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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DUARTE NURSERY, INC., a California Corporation; and JOHN DUARTE, an individual,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant.

UNITED STATES OF AMERICA
Counterclaim- Plaintiff,

v.

DUARTE NURSERY, INC., a California Corporation; and JOHN DUARTE, an individual,

Counterclaim- Defendants.

No. 2:13−CV−02095−KJM−AC (TEMP)

DUARTE'S TRIAL BRIEF [L.R. 285(a)]

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Timeline of Key Events

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January 2012

Matthew Kelley sees wheat growing on LaPant property, but does not think it worth his time.

June 27, 2012

Remaining 450 acres are assigned to wheat crop base.

October 15, 2012

Wade Nutter photographs Caleb Unruh's tractor on Duarte property.

November 2012

Mr. Kelley drives by Duarte property and sees what he believes is a violation of the Clean Water Act.

December 11, 2012

Mr. Kelley calls John Duarte and accuses him of deep ripping.

January/February 2013

Mr. Kelley purges file.

February 19, 2013

Mr. Kelley files his investigation report stating that Duarte had tilled the site causing significant wetland damage.

February 23, 2013

The Corps sends Duarte a cease-and-desist letter.

April 2013

James Robb responds to Duarte alleging that the property was deep-ripped and prepares the matter for the EPA.

May 2014

The Corps files counterclaim.

March and April 2015

Government sends large team of experts to the property to inspect and dig pits and trenches.

Duarte

Late 2011

Brad Munson approaches Jim Duarte about buying 2,000 acres in Tehama County owned by Jack LaPant.

April 2012

Duarte closes on the purchase of the property for $5.6 million.

May 2012

Goose Pond agrees to buy 1500 acres from Duarte for $9.25 million.

Mr. Munson wants to plant orchards, but Duarte instructs Mr. Munson not to deep rip or plant orchards.

June 27, 2012

Remaining 450 acres are assigned to wheat crop base.

Summer 2012

Mr. Munson requests to grow wheat.

Fall 2012

Duarte instructs Mr. Munson to avoid wetlands.

October 2012

Caleb Unruh attempts to start tillage for wheat and Wade Nutter photographs Mr. Unruh's tractor.

November 2012

Sale of property to Goose Pond closes.

Mr. Unruh proceeds tilling after rainfall and is finished by early December.

December 11, 2012

Duarte denies deep ripping and invites Mr. Kelley to view the property.

December 19, 2012

Mr. Unruh plants wheat seed on the property.

February 2013

Duarte ceases all work on property, complying with cease-and-desist letter.

March 7, 2013

Mr. Unruh takes clear water samples from Coyote Creek and sees wheat growth on the property.

March 21, 2013

Duarte responds to the cease-and-desist letter requesting more information.

October 10, 2013

Duarte files suit against the Corps.

I. SHORT STATEMENT OF THE FACTS

A. How We Got Here

Duarte Nursery is a family business, built by James ("Jim") Duarte and his wife, Anita, on the family farm where Jim grew up in Hughson, California. Jim and his sons, John and Jeff, built the first greenhouses by hand with 2" x 4"s and plastic sheeting. Jim is the Chairman of the Board, John is the president, and Jeff is the vice-president. Jim and Anita, John, and Jim own the company. As a result of their hard work, Duarte Nursery became an important producer of grape rootstock in the United States, soon expanding into production of fruit and nut trees.

In 2012, the Duarte Nursery allowed a farm field it owns in rural Tehama County to be shallowly tilled and planted to wheat by a business associate. What John Duarte and his family now face is a claim by the Corps that the tilling damaged seasonal depressional wetlands in the field, and a demand for a $2.8 million civil penalty, the purchase of tens of millions of dollars of private off-site mitigation credits, and other relief. How did we get here?

When the Corps' lawyers and experts first got this case, Corps staff had led them to believe that the Duarte property would resemble the deep-ripped moonscape left at Borden Ranch (leading to *Borden Ranch P'ship v. United States*, 261 F.3d 810 (9th Cir. 2001)), after industrial-sized equipment dragged steel shanks five to seven feet deep through the soil to break up the restrictive subsoil layer necessary for vernal pool wetlands to form and persist on the surface:

Exhibit D: Deep Ripping at Borden Ranch

Exhibit BJ: A Real Deep Ripper

What they actually saw on Duarte's property was farm and pastureland tilled a few inches deep to plant winter wheat, with the wetlands in full bloom even in a historic drought:

Exhibit 89: Shallow Tillage at Duarte Property, with Wetlands in Full Bloom

Rather than admitting the mistake, the Corps richly paid its team of mostly out-of-state experts to support the claim that this case is just like *Borden Ranch*. Predicated on that claim, the Corps now asks this Court to impose ruinous penalties and injunctive relief on Duarte, which could ruin the company and Mr. Duarte's family, and put hundreds of people who had nothing to do with this shallow tillage out of work.

For the Government, this case started in November 2012. One cloudy day, Matthew Kelley, a Corps staffer, happened to drive along Paskenta Road near Coyote Creek in Tehama County and look east. Mr. Kelley was familiar with the area, having seen wheat growing there earlier that year. He later claimed to have thought that earlier wheat crop to be a violation of the Clean Water Act, but he had never issued a permit for wheat before and did not think the matter worth his time. (The Government has since sued Mr. Jack LaPant, in a case related to this one, over that wheat planting.)

On this day, in the area north of Coyote Creek (not the Duarte Property that is the subject of this suit) he saw industrial-sized trenchers, levelers, and bulldozers:

Exhibits IN & IO: Matt Kelley Photos Of Non-Duarte Property

Mr. Kelley went back a few days later to take more pictures of the work underway on the parcel north of the Duarte property. That day, on the Duarte property south of Coyote Creek, he also saw a single small tractor set up to till no more than 12 inches deep:

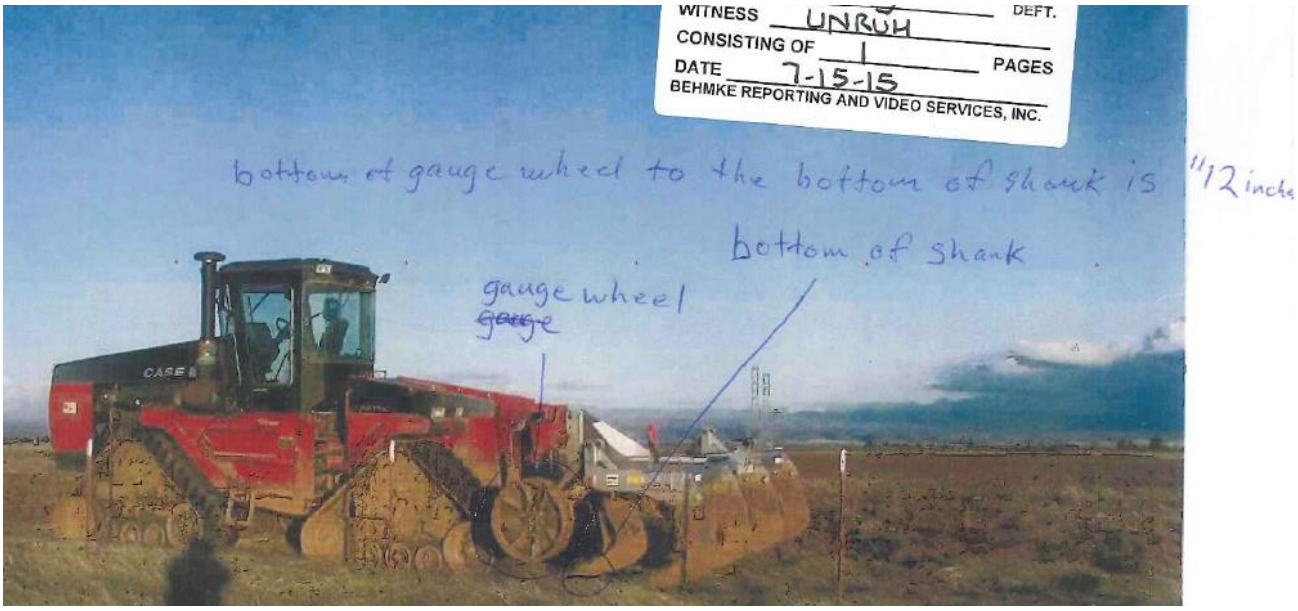

Exhibit JM: Matt Kelley Photo Of Tractor On Duarte Property, Marked Up By Caleb Unruh

Mr. Kelley did not set foot on the property at the time, and spent a total of only a few minutes taking photos of it from the road.

Back at the office, Mr. Kelley did some research and learned that Duarte Nursery owned the property south of Coyote Creek and east of Paskenta Road. After waiting until the tillage on Duarte's property was complete, Mr. Kelley called John Duarte on December 11, 2012, and accused him of deep ripping that property. John, thinking Mr. Kelley was confused with what was happening at the property north of Coyote Creek, denied deep ripping and invited Mr. Kelley to meet at the property to answer any further questions.[1] Mr. Kelley did not accept that invitation.

Instead, Mr. Kelley worked to refer this matter up the bureaucratic chain for enforcement. On February 19, 2013, he had prepared his investigation report (Exhibit DH), which became the key document that ultimately resulted in the present prosecution. That investigation report falsely stated that Duarte had tilled the site "to approximately 3 feet deep", causing significant wetland destruction. Neither of these allegations was true.

[1] Mr. Kelley in his deposition denied remembering that this invitation was extended. But Mr. Kelley went on to admit to "purging" his file of "important" notes and information at a time when he was also threatening Duarte with civil or criminal liability. An adverse evidentiary inference for spoliation is appropriate.

On February 23, the Corps sent Duarte a cease-and-desist letter (drafted by Mr. Kelley) (Exhibit DJ). This order withheld any information that would have disclosed what the Corps thought Duarte had done to violate the Act. So, in March, Duarte responded with a letter from counsel denying any violations, claiming the application of the Act's protections for normal farming practices, requesting additional information, and assuring the Corps that once the information was provided, Duarte would respond to questions posed by the Corps about the work on the Property. (Exhibit DL). Mr. Kelley dismissed this letter to his fellow Corps staff as a "ranting fishing expedition" (Exhibit DM), and then purged his own file of documents to prevent their release under the Freedom of Information Act, and discouraged his superiors from providing the information Duarte requested. In April, the Corps responded with a letter, drafted by Mr. Kelley's superior, James Robb, in the brand-new enforcement unit at the Corps Sacramento District Office. That letter withheld all the pertinent information Duarte had requested other than the remarkable allegation that "while the property was under Mr. Duarte's control it was deep-ripped." (Exhibit DN.)

Over the next few months, Mr. Robb prepared to refer this matter to EPA for further enforcement, based almost entirely on Mr. Kelley's incorrect investigation report. Mr. Robb and his superiors at the Corps abandoned that referral because, on October 10, 2013, Duarte Nursery filed this suit. Corps staff then decided to not refer this matter to EPA, but rather to refer it directly to the Department of Justice. That referral, again, was based almost exclusively on Mr. Kelley's investigation report, with its false statements that the land had been plowed three feet deep and that several acres of vernal pools had been permanently destroyed.

In May 2014, this counterclaim on behalf of the Corps was filed against both Duarte Nursery and John Duarte personally. DoJ only brought this case because Duarte Nursery sued the Corps.

In March and April 2015, the Corps sent a large team of mostly out-of-state experts to the property for a site inspection. When they got there, they quickly observed the obvious: the property was tilled less than a foot deep, and not deep ripped to a depth of three feet as alleged by Mr. Kelley. Nevertheless the Corps persisted, spending 10 days inspecting the property and digging dozens of four-foot-deep pits and trenches in vernal pools with a track hoe.

The Corps gave itself a Clean Water Act permit for this work, in consultation with the U.S. Fish and Wildlife Service, on the basis of representations by the Department of Justice and its experts in this case that digging deep pits and trenches on the property would not harm listed species such as fairy shrimp. (Exhibits EL-ER, EU.)

Exhibit HU: No Harm To Fairy Shrimp Here

The Corps' experts must have quickly confirmed that Duarte's shallow tillage did not cause any harm to waters or wetlands on the property. Perhaps most importantly, that tillage could not have destroyed or punctured the critical restrictive layer of subsoil—called a hardpan or duripan—that prevents water from percolating downwards and thus allows water to collect and wetlands to form in depressions on the surface. The restrictive layer on nearly all of Duarte's property is much deeper than a foot below the surface. That deep layer obviously went untouched by the shallow tillage. In a small area at the south end of the property, where the duripan lies closer to the surface, the tillage may have scraped the upper surface of the duripan in a few places. As that layer is several feet thick, though, any such scraping of its upper surface did not and could not destroy or puncture it, much less render it any less impermeable or restrictive. Indeed, water pooled in the experts' pits, demonstrating that the restrictive layer remains intact:

Exhibits FC, FD, FH: Water Pooling Above Restrictive Layer In DoJ Experts' Pits

But the Corps' experts were being paid well to write a report, and so a report they wrote. It ended up long on background and short on analysis. While the experts dug a lot of pits and trenches, they ran no real tests and gathered very little data. Their actual analysis of impacts was reduced largely to eyeballing the wetlands and speculating about impacts. What the report lacked in real science it made up for in hyperbole. It analogized the tops of plow furrows to "small mountain ranges", and the tillage to a "tornado" that "completely uproots and rearranges" "a town". The capper was the opinion that the effect of Duarte's tillage "was functionally the same" as the deep ripping done at "Borden Ranch". With that, the Corps asserted—and now must prove—the following:

Borden Ranch deep ripping *Duarte shallow tillage*

B. The Real Story

Duarte is a multi-generational family-run business, primarily providing trees and vines to customers in California. Depending on the time of year, it employs between 500 and 1000 hard-working people. Its workforce includes a mix of highly skilled scientists, devoted to finding innovative ways to grow more food with less water and fertilizer inputs in more places, and unskilled workers who fulfill customer orders and perform other tasks. Duarte treats its employees and customers well, and has become an important part of the Modesto economy and community.

Much of Duarte's understanding of the Clean Water Act comes from the *Borden Ranch* case. Duarte was invested in a nearby portion of Borden Ranch that was not the subject of that enforcement action. Duarte's understanding was that shallow tillage in wetlands to plant crops was legal, whereas deep ripping wetlands was not. Duarte's understanding came from statements by EPA at the time. It was more powerfully driven home by Duarte's witnessing of EPA pursuing a high-profile enforcement action right next door to their portion of Borden Ranch for deep ripping in vernal pools, while EPA left alone the shallow tillage to plant crops it knew was taking place on Duarte's piece of Borden Ranch.

Compliance with the law is important for Duarte. Duarte has had thousands of acres in California deep ripped for orchard or vineyard development. As part of that process, Duarte hires expert consultants to map waters and wetlands and avoid them completely. Duarte's understanding of the Clean Water Act has never before been challenged by the Government, and Duarte has never before been found to have violated the Clean Water Act.

This case began as a real estate deal for Duarte. In late 2011, Brad Munson, an old acquaintance of Jim Duarte (John Duarte's father), approached Jim with a good deal on about 2000 acres in Tehama County, owned by Jack LaPant. That property straddled Coyote Creek, just east of Paskenta Road: 1500 acres were north of the creek, and 450 were south of it. In April 2012, Duarte closed on the purchase for $5.6 million.

A significant portion of the property had been planted to wheat by Mr. LaPant. The U.S. Farm Services Agency had long ago allocated a significant "wheat base" to the property, under the Food Security Act. The property also appeared to have potential for future orchard development.

During due diligence, Duarte learned that Mr. LaPant had procured a draft delineation of waters and wetlands on the property from NorthStar. That delineation noted that the property was underlain by a restrictive layer, starting in one area at 13 inches below the surface to in most areas more than 80 inches below the surface. (Exhibit 89.) Developing the property into orchards would require a large investment, including in deep ripping many feet deep through the entire restrictive layer on the property. Duarte had no plans or budget to develop any part of the property into orchards at the time or at any time since.

Duarte was interested in the possibility, at a conceptual level, of developing the property into an orchard at some point in the distant future. Duarte had neither the business plan nor the finances to plant an orchard on the subject property. But it had a more immediate interest: in May, an entity called Goose Pond entered into an agreement to buy the 1500 acres north of Coyote Creek from Duarte for $9.25 million. (The price was later reduced, during escrow, to $8.7 million.) Goose Pond was also interested in purchasing trees from Duarte to plant on that portion of the property.

At around the same time, Mr. Munson wanted to be aggressive about developing the remainder of the property into orchards. Mr. Munson already stood to make more than $100,000—essentially a finder's fee—on the purchase and sale of the property, and thought he might make more should orchard development proceed. NorthStar got wind of Mr. Munson's plan and wrote Duarte a letter warning Duarte against proceeding with that plan without going through the proper processes. (Exhibit 12.) Duarte had no intention of doing anything that might derail the sale to Goose Pond, and so Duarte Nursery instructed Mr. Munson to stand down from any plans to deep rip the property and plant orchards.

The sale to Goose Pond remained on track through that summer, and closed in early November. But Mr. Munson remained in turning additional financial gain from the property. He arranged for the U.S. Farm Services Agency to allocate a wheat base specifically to the 450 acres south of Coyote Creek. (The Farm Services Agency did not inform Mr. Munson or Duarte Nursery that it would need a permit from the Corps to till and plant wheat.) He approached Duarte Nursery about planting a wheat crop. Understanding from *Borden Ranch* that shallow tillage to plant crops would not violate the Clean Water Act, Duarte Nursery agreed to let Mr. Munson arrange for a

wheat crop on those 450 acres, on two conditions: the tillage must be no deeper than 12 inches (above even the shallowest restrictive layer identified by NorthStar), and the tillage should avoid the waters and wetlands mapped by NorthStar.

Mr. Munson heeded the first condition well, but, as Duarte would learn some time later, he did not perfectly follow the second. Mr. Munson hired Caleb Unruh for the job. Mr. Unruh had harvested the wheat planted by Mr. LaPant, and was recommended to Mr. Munson by the local grain mill. Mr. Munson instructed Mr. Unruh to plant wheat and wheat only and to till no deeper than 12 inches, but Mr. Munson did not provide Mr. Unruh with NorthStar's map. Mr. Munson left all the remaining details and arrangements to Mr. Unruh.

Mr. Unruh tried to start the tillage in October 2012, but the sun-baked soil crust made tillage difficult, and so Mr. Unruh decided to wait to really begin until an inch or so of rain fell to soften things up. Unbeknownst to Mr. Unruh, one of the Corps' experts in this case, Wade Nutter, while on assignment for DoJ, stopped to photograph Mr. Unruh's tractor parked on the property, waiting for rain:

Exhibit CW: Parked tractor on Duarte property, October 2012

Neither Dr. Nutter nor DoJ warned Mr. Unruh or Duarte Nursery against proceeding with the tillage, apparently preferring instead to lie in wait until this suit.

In late November, after a bit of rain, Mr. Unruh proceeded with the tillage. He set the gauge wheel on the tractor to limit the tillage to no more than 12 inches deep—shallower than the shallowest restrictive layer identified by NorthStar. The tractor did not till through any streams or standing or flowing water. The tractor did not hit anything hard under the surface of the soil.[2] The tillage was complete by early December.

After the tillage was complete, Matthew Kelley placed his December 11 call to Mr. Duarte, accusing him of deep ripping but not taking him up on his offer to meet at the property.

Mr. Unruh then contracted to have wheat seed flown onto the property, which was done on December 19. He considered harrowing or discing the seed into the soil, but by then additional rain had fallen making the soil too wet to work further.

Mr. Unruh went back to the property a few times afterwards, in 2013. He saw that healthy stands of wheat had grown. He also took some water samples from Coyote Creek and sent them to a lab for analysis. The water in Coyote Creek was clear, both entering and leaving the property. (Exhibits JD & JF.)

As it turns out, the tillage on Duarte's property caused no harm to any vernal pools. This certainly is not another *Borden Ranch*, where the wetlands were "completely obliterated". The property had been tilled for grain and crop plantings many times before, and Duarte's tillage was no different. The tillage caused no siltation in Coyote Creek. No listed species were harmed. All the waters and wetlands that were on Duarte's property before the tillage were still there afterwards. The vegetation in the tilled wetlands on Duarte's property is essentially indistinguishable from the vegetation in the untilled wetlands. All the wetlands today are filled with righteous wetland vegetation and continue to function fully as wetlands. There was no harm.

This past winter and spring, Duarte had cattle graze the property. (Duarte told the Corps in advance of this grazing, and the Corps did not object.) The furrows and ridges of which the Corps complains have been largely obliterated. Duarte intends to have cattle graze the property again this

[2] Restrictive layers like hardpan or duripan are extremely hard. The tractor was equipped with a sheer bolt machined to break, causing the shanks to spring up, should a shank hit something hard under the soil, so as to prevent damage to the expensive shanks. No sheer bolts broke during the tillage.

coming winter and spring, which should take care of any remaining furrows and ridges and in that respect return the property to its pre-tilled, grazed, condition.

Imposing a significant penalty on the Duartes will cause massive harm to Duarte Nursery, its employees, and members of the Duarte family other than John. The company has no ability to pay any significant penalty. Any significant penalty would certainly cause jobs to be lost and much financial pain inflicted on people who had nothing to do with the tillage at issue, as well as much harm to the business as a going concern. It would also devastate John Duarte's family, including his wife and kids (who also had nothing to do with the tillage).

Duarte gained no economic benefit from the tillage. The arrangement with Mr. Munson provided for him to reap any financial benefit from the crop. Duarte was prohibited by the Corps from harvesting the wheat that did grow. Because the restrictive layer on the property is still fully intact, the property has not been improved in any way that would now make it suitable for growing more valuable orchard or permanent crops. All Duarte has to show for this case is a still-empty field in Tehama County, a wheat crop that moldered into the ground, and millions of dollars in fees to lawyers and experts retained to defend against the Corps' efforts to extract ruinous penalties for merely shallowly tilling a previously tilled field to plant wheat.

II. ADMISSIONS AND STIPULATIONS NOT RECITED IN PRETRIAL ORDER

No pretrial order has yet issued.

III. SUMMARY OF POINTS OF LAW

A. The Counterclaim Should Be Dismissed Before Trial For Lack Of Subject-Matter Jurisdiction

Duarte has moved to dismiss the counterclaim for lack of subject-matter jurisdiction. (ECF 304.) The counterclaim (ECF 28) is brought in the name of the Corps and alleges discharges without a permit, in violation of the Clean Water Act. The counterclaim invokes Section 309(b) of the Act, 33 U.S.C. § 1319(b), as the basis for subject-matter jurisdiction. But Section 309(b) provides an authorization to the Administrator of EPA only to bring suit for discharges without a permit. The Corps' authorization to sue, Section 404(s)(3) (33 U.S.C. § 1344(s)(3)), limits the Corps' authority

to discharges in violation of a permit. Because the Corps lacks authority to bring this suit, it should be dismissed.

The Federal Rules require this motion to should be heard and decided before trial. (*See* FRCP Rule 12(i).)

B. No On-Site Injunctive Relief Is Legally Authorized or Would Be Appropriate

The Corps' proposed judgment, in paragraph 3, asks for on-site injunctive relief (dubbed "ecosystem restoration work"). The Corps invokes Section 309(b), 33 U.S.C. § 1319(b), as the basis for an award of injunctive relief. That section authorizes the "Administrator" of EPA to bring a civil action for "appropriate relief, including a permanent or temporary injunction". That section does not authorize the *Corps* to bring a civil action for an injunction involving unpermitted work. No authority exists to award the Corps injunctive relief in civil actions such as this one.

Even if an injunction were legally authorized in this case, an injunction is not mandatory. An injunction in Clean Water Act cases, like in every other case, remains an "extraordinary remedy"; "[i]t is not a remedy which issues as of course" or to "restrain an act the injurious consequences of which are merely trifling." (*Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982), internal citations and quotation marks omitted.) An injunction remains a matter of discretion, even where a violation of the Act is established, and should issue only where "essential" to protect "injuries otherwise irremediable". (*Id.* at 312.)

Because Duarte's shallow tillage caused no real environmental harm, there is no basis for injunctive relief.

Injunctive relief would also be improper for an additional reason. Where the Corps is aware beforehand of a project that is later alleged to violate the Act, and the Corps nevertheless does nothing to stop that project from proceeding, then the Corps' inaction should be given "considerable weight" in fashioning appropriate relief; ordering complete restoration in such circumstances "is a draconian exercise of judicial discretion". (*United States v. Huebner*, 752 F.2d 1235, 1245 (7th Cir. 1985).) Here, the Corps and other federal agencies, such as the Farm Services Agency and the Department of Justice, were well aware of Duarte's tillage beforehand. They had at least three opportunities to stop it: once when Mr. Kelley saw wheat growing on Mr. LaPant's property in

January 2012, again when Mr. Munson told the Farm Services Agency about the planned wheat crop in summer 2012, and once more when Dr. Nutter saw the tractor parked on Duarte's property in October 2012. But the Government did nothing to stop it, apparently preferring instead to lie in wait until this suit. Complete restoration would be inappropriate.

Even if injunctive relief to require on-site restoration were potentially appropriate, the Court should consider whether it would be necessary. The condition of the property before Duarte's tillage was of a previously tilled field that had been grazed in more recent years. Following Duarte's tillage, Duarte has had the property grazed, and Duarte intends to continue having the property grazed for at least another year. This grazing will effectively restore the property to its pre-tilled condition as grazed land. No additional injunction ordering on-site restoration would be appropriate or necessary here. The grazing has and will continue to restore the Property to the status quo ante.

C. No Off-Site Injunctive Relief Is Legally Authorized or Would Be Appropriate

The Corps' proposed judgment, in paragraph 5, asks for Duarte to purchase between 66 and 132 acres of "vernal pool establishment credits", including from private third parties, for off-site projects. Those credits cost upwards of $250,000[3] each; in total, the Corps here is asking the Court to order Duarte to spend $15-$30 million to purchase these off-site credits. Again, no authority exists to award the Corps injunctive relief under Section 309(b) in civil actions such as this one, involving unpermitted work.

Even if injunctive relief were possible, the Corps has the burden to show that such relief were necessary to remedy otherwise irremediable harm. (*See Weinberger*, *supra*.) There was no significant or lasting harm done here, so injunctive relief is not necessary. Even if harm were done, Duarte's recent grazing, and plans to continue grazing, of the property are sufficient. No additional off-site injunctive relief would be appropriate. (*See United States v. Smith*, 2014 U.S.Dist.LEXIS 100889 *34 (S.D. Ala. 2014) (denying Government's request for off-site mitigation where other relief adequately addressed violations of the Act).)

[3] http://www.easillc.com/mitigation-credit-price-report-mcpr/

D. No Injunction Requiring Compliance With The Law Would Be Appropriate

The Corps' proposed judgment, in paragraph 4, asks for an injunction prohibiting Duarte from discharging pollutants to navigable waters on the property without a permit. But the law already prohibits Duarte from discharging pollutants to navigable waters on the property without a permit. (33 U.S.C. § 1311(a).) An injunction requiring compliance with laws Duarte is already obliged to comply with would be superfluous and redundant, rather than "essential". (*See Weinberger*, *supra*.) This type of injunction should be denied.

E. A Nominal Penalty At Most Would Be Appropriate

The Corps also invokes Section 309(d), 33 U.S.C. § 1319(d), as the basis for civil penalties. That section provides that those who violate the Act "shall be subject to a civil penalty". The Solicitor General has taken the position that penalties need not be assessed for every Clean Water Act violation. (Oral Argument Tr., *Tull v. United States*, No. 85-1259, 1987 U.S. Trans. LEXIS 141 *21-22.) The Ninth Circuit, however, has held that "civil penalties are mandatory" under Section 309(d). (*Leslie Salt Co. v. United States*, 55 F.3d 1388, 1397 (9th Cir. 1995).) The Ninth Circuit emphasized, however, that "a civil penalty of only a nominal amount" could well be appropriate. (*Id.*) "[A] large penalty is not necessary to deter other nonindustrial rural landowners" from violating Clean Water Act; "[s]urely years of protracted litigation and hundreds of thousands of dollars in attorney's fees are amply sufficient to deter the farmer". (*Quad Cities Waterkeeper Inc. v. Ballegeer*, No. 4:12-cv-4075-SLD-JEH, 2017 U.S.Dist.LEXIS 45829 at *22 (C.D.Ill. Mar. 28, 2017).)

Section 309(d) requires consideration of six broad factors: "[i] the seriousness of the violation or violations, [ii] the economic benefit (if any) resulting from the violation, [iii] any history of such violations, [iv] any good-faith efforts to comply with the applicable requirements, [v] the economic impact of the penalty on the violator, and [vi] such other matters as justice may require." (33 U.S.C. § 1319(d).) Although various district courts have devised various formulae for evaluating these factors, none of those are called for by the text of the statute or Ninth Circuit authority. The Ninth Circuit emphasizes district courts' "broad discretion to set a penalty commensurate with the defendant's culpability." (*Leslie Salt Co.* at 1397.)

The Excessive Fines Clause of the Eighth Amendment also prohibits a penalty that "is grossly disproportional to the gravity of a defendant's offense". (*United States v. Bajakajian*, 524 U.S. 321, 334 (1998).) A $2.8 million dollar civil penalty, and tens of millions of dollars in off-site mitigation credits, are grossly disproportional to Duarte's shallow tillage and its insignificant impact.

Further, to the extent that the government seeks off-site mitigation credits on the ground that these would have been required for issuance of a permit for the Duarte's shallow tillage, the unconstitutional-conditions doctrine would have prevented the imposition of these mitigation credits in the permitting context, since they are not roughly proportional to Duarte's shallow tillage and its insignificant impacts. (*See Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (permit conditions must be roughly proportional to project's impacts, or else conditions are an unconstitutional taking).) Because non-proportional offsite mitigation credits could not have been imposed through a permitting process, they also may not be imposed on Duarte through an enforcement action. (*See Horne v. U.S.D.A.*, 133 S.Ct. 2053, 2063 (2013) (enforcement actions subject to same constitutional takings limitations as permitting).)

Weighing the six factors here ought to lead the Court, in its discretion, to impose at most only a nominal penalty.

1. The Alleged Violation Was Most Unserious

The tillage did not cause any significant harm to waters or wetlands. The furrows and ridges the Corps complains about have been almost completely obliterated after just one season of grazing. Further, this was not an intentional violation of the Act, nor did any published regulation, guidance, or other Corps document provide notice that the actions taken would violate the Act. This factor weighs in favor of a nominal penalty.

2. There Was No Economic Benefit

Duarte gained no economic benefit from the tillage. It was never expecting any financial benefit from the wheat crop, and got nothing from it. The tillage did nothing to increase the value of the property, which would still need to be deep ripped several feet deep to make it suitable for permanent crops. This factor also weighs in favor of a nominal penalty.

3. There Is No History Of Clean Water Act Violations

The Corps has stipulated the Duarte has not been accused of violating the Clean Water Act before. (ECF 278, Duarte's core undisputed fact no. 22, p. 26.) This factor also weighs in favor of a nominal penalty.

4. Duarte Tried In Good Faith To Comply

Duarte had a clear understanding of what it thought the law was, based largely on witnessing the *Borden Ranch* case play out next door, and took steps above and beyond what it thought were necessary to comply. Duarte thought that shallow tillage for crops was perfectly legal, as EPA had said during *Borden Ranch*. Duarte instructed Mr. Munson, who instructed Mr. Unruh, to till no deeper than 12"—which is shallower than the shallowest restrictive layer identified by NorthStar. In an abundance of caution, Duarte also instructed Mr. Munson to have the tillage avoid the waters and wetlands delineated by NorthStar, and many of those waters and wetlands were in fact avoided. Duarte's serious efforts to comply, founded on its good faith belief of what the law required, further weighs in favor of a nominal penalty.

Further, Duarte made good faith efforts to address Mr. Kelley's phone call and the Corps' cease and desist order. Duarte offered to meet Kelley at the property to clarify what was actually underway there, stopped all work on the Property when ordered to by the Corps, provided a prompt response to the Corps' order (for which cooperation the Corps expressed its thanks), and offered to respond to several questions posed by the Corps once the Corps explained, in terms other than bureaucratic boilerplate, what it contended that Duarte had done to violate the Act. It was the Corps staff who refused to explain what it alleged against Duarte, and took active steps to permanently hide information from Duarte by destroying it.

Duarte's good faith compliance with the cease and desist order is also an important factor in whether the Corps is entitled to any penalty based on the mere passage of time, such as a daily penalty. The Corps ordered Duarte to stop all work on February 23, 2013 (which Duarte did), and then never withdrew that order, moved for a preliminary injunction, or prescribed potential remedial measures until it filed its proposed judgment in this case. The Corps cannot be heard to complain

that it is entitled to recovery based on alleged temporal harms to the environment caused by the mere passage of time, when it froze the scene more than four years ago.

5. A Significant Penalty Would Be Ruinous To Duarte And Others

Duarte does not have the ability to pay any significant penalty. Duarte has already paid millions in attorney and expert fees in this case. Any requirement to pay a significant penalty beyond what has already been paid would hurt not just Duarte Nursery and the entire Duarte family, but also hundreds of nursery employees and their families who had nothing to do with the inconsequential shallow tillage at issue. This factor also weighs in favor of a nominal penalty.

6. A Nominal Penalty Would Be In The Interest Of Justice

This case is only here because Corps staff mischaracterized what Duarte did as deep ripping to the Department of Justice and then, once the Corps realized its mistake, decided to double down rather than dropping this matter. And the Corps only decided to sue Duarte as a response to the Corps being sued in the first place.

The Corps is now pursuing the novel theory of liability that shallow tillage is the same thing as deep ripping. This is a dramatic change in position for the Corps. For decades, the Corps and EPA have maintained that shallow tillage of the sort done by Duarte, which does not destroy any wetlands, is legal. (Exhibits Y, AF, KC, KX.[4]) The Corps has never even processed a permit for the type of tillage Duarte did. If the Corps' novel new theory holds up, other farmers in the future may well be on notice. But Duarte was not. The novelty of this case, combined with the agencies' prior assurances that shallow tillage is legal, weighs in favor of a nominal penalty.

DATED: July 31, 2017

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[4] Duarte intends to request judicial notice of these documents at the appropriate time.