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22 UNITED STATES DISTRICT COURT
23 EASTERN DISTRICT OF CALIFORNIA

24 UNITED STATES OF AMERICA,
25 Counterclaim-Plaintiff,
26 v.
27 DUARTE NURSERY, INC.; JOHN DUARTE
28 Counterclaim-Defendants.

No. 2:16-CV-01498-KJM-DB

CONSENT DECREE

1 WHEREAS, Counterclaim-Plaintiff United States of America has filed a Counterclaim in
2 this action alleging that Counterclaim-Defendants John Duarte and Duarte Nursery, Inc.,
3 (collectively, "Defendants") violated and remain in violation of the Clean Water Act ("CWA")
4 section 301(a), 33 U.S.C. § 1311(a);

5 WHEREAS, the Counterclaim alleges that Defendants' CWA violations resulted from
6 activities on real property near Paskenta Road and Coyote Creek in Tehama County, California
7 ("the Site") in 2012;

8 WHEREAS, the Counterclaim alleges that Defendants' activities resulted in the
9 unauthorized discharge of dredged or fill material into waters of the United States that are
10 hydrologically and ecologically connected to Coyote Creek and the Sacramento River;

11 WHEREAS, the Counterclaim requests that the Court award injunctive relief and civil
12 penalties;

13 WHEREAS, Defendants do not admit the facts as alleged in the Counterclaim and do not
14 admit any liability to the United States arising out of the transactions or occurrences alleged in
15 the Counterclaim;

16 WHEREAS, the United States does not admit any liability to Defendants arising out of
17 the transactions or occurrences alleged in all claims asserted by Defendants against the United
18 States or the United States Army Corps of Engineers in this case; and

19 WHEREAS, the Parties recognize that this Consent Decree has been negotiated by the
20 Parties in good faith and will avoid further litigation among the Parties, and the Court by
21 entering this Consent Decree finds that this Consent Decree is fair, reasonable, and in the public
22 interest;

23 THEREFORE, before the taking of any testimony, and without further adjudication or
24 admission of any issue of fact or law except as provided in Section I of this Consent Decree, and
25 with the consent of the Parties by their authorized representatives, it is hereby ORDERED,
26 ADJUDGED and DECREED as follows:

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1 **I. JURISDICTION, VENUE, AND SUFFICIENCY OF COMPLAINT**

2 1. This Court has jurisdiction over the subject matter of the Counterclaim pursuant to
3 at least 28 U.S.C. §§ 1331 and 1345. Defendants withdraw their motion to dismiss for lack of
4 subject matter jurisdiction.

5 2. Venue is proper in the Eastern District of California pursuant to 28 U.S.C.
6 §§ 1391(b) and (c).

7 3. For purposes of this Consent Decree, including any action to enforce this Consent
8 Decree, Defendants consent to personal jurisdiction and venue; and

9 4. For purposes of this Consent Decree, including any action to enforce this Consent
10 Decree, the Parties agree, and the Court finds, that the Counterclaim states claims upon which
11 relief can be granted pursuant to CWA sections 301(a) and 309(d), 33 U.S.C. §§ 1311(a) and
12 1319(d).

13 **II. APPLICABILITY**

14 5. This Consent Decree applies to and is binding upon the United States, and upon
15 Defendants and any successors, assigns, or other persons otherwise bound by law whether or not
16 such person has notice of this Consent Decree.

17 6. No transfer of ownership or control of the Site, of any portion of the Site, or of
18 any less-than-fee-simple interest in the Site or a portion thereof (such as an easement or lease)
19 shall relieve Defendants of any of their obligations in this Consent Decree. As a condition of any
20 such transfer, Defendants shall reserve all rights necessary to comply with this Consent Decree.
21 At the time of such transfer, Defendants shall provide a copy of this Consent Decree to the
22 transferee, shall obtain the transferee's acknowledgement thereof, and shall provide written
23 notice of the transfer and a copy of such acknowledgment to the United States and to the Corps
24 at the addresses specified in Section XI of this Consent Decree. Any attempted or actual transfer
25 of any interest in the Site without complying with this Paragraph constitutes a violation of this
26 Consent Decree.

27 7. Defendants shall provide a copy of this Consent Decree to all officers and agents
28 whose duties might reasonably include compliance with any provision of this Consent Decree,

1 including any contractor or consultant retained to perform remedial work or monitoring and
2 maintenance required under this Consent Decree. To the extent that Defendants retain any
3 contractor or consultant to perform remedial work, monitoring and maintenance, or any other
4 obligation required under this Consent Decree, Defendants shall condition any such contract
5 upon performance that conforms to the terms of this Consent Decree.

6 8. In any action to enforce this Consent Decree, Defendants shall not raise as a
7 defense the failure by any of its officers, directors, employees, agents, contractors, or consultants
8 to take any actions necessary to comply with this Consent Decree.

9 **III. DEFINITIONS**

10 9. Terms used in this Consent Decree that are defined in the CWA or in regulations
11 promulgated pursuant to the CWA shall have the meanings assigned to them in the CWA or such
12 regulations, unless otherwise provided in this Consent Decree.

13 10. Whenever the terms set forth below are used in this Consent Decree, the
14 following definitions shall apply:

15 “Balance of the Site” shall mean all areas of the Site except for the areas identified as
16 “waters of the United States” on the United States’ expert team delineation, marked Trial
17 Exhibits 59 and 60 and attached hereto as Appendix 1, and the Conservation Reserve.

18 “Counterclaim” shall mean the affirmative claim filed by the United States in this action
19 on May 7, 2014, and attached hereto as Appendix 2;

20 “Conservation Reserve” shall mean the entirety of the following areas within the Site:
21 (1) as much of the main stem of Coyote Creek that Defendants own or control, including all
22 areas at or below its Ordinary High Water Mark (“OHWM”) as identified by the United States’
23 expert team delineation identified on Trial Exhibits 59 and 60, as well as a setback of 75 feet
24 beyond the OHWM; and (2) as much of Stream 2 that Defendants own or control, including all
25 areas at or below its OHWM as identified in the United States’ expert team delineation identified
26 on Trial Exhibits 59 and 60, as well as a setback of 75 feet beyond the OHWM.

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1 "Corps" shall mean the United States Army Corps of Engineers and any of its successor
2 departments or agencies. Unless the context shows otherwise, all references to the United States
3 herein shall include the Corps.

4 "Day," whether capitalized or not, shall mean a calendar day unless expressly stated to be a
5 business day. In computing any period of time under this Consent Decree, where the last day would
6 fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the
7 next business day.

8 "Defendants" shall mean John Duarte and Duarte Nursery, Inc.

9 "Effective Date" shall mean the date on which this Consent Decree is entered by the
10 Court.

11 "Parties" shall mean the United States, the Corps, and Defendants.

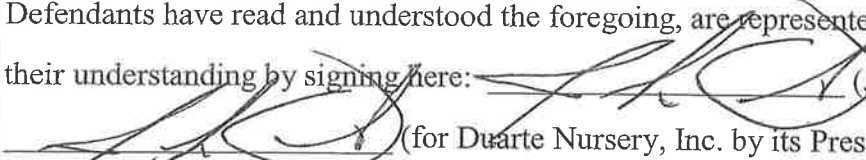

12 "Site" shall mean the real property at issue in this case that is currently owned or
13 controlled by Duarte Nursery, Inc., bounded on the north by the main stem of Coyote Creek,
14 situated along Paskenta Road, comprising approximately 450 acres, located in rural Tehama
15 County, California, and having Assessor's Parcel Numbers 037-070-351 and 037-070-371.

16 **IV. SCOPE, EFFECT, AND RESERVATION OF RIGHTS**

17 11. This Consent Decree resolves (a) the civil claims of the United States for the
18 violations of the CWA alleged in the Counterclaim, subject to Defendants' compliance with this
19 Consent Decree; and (b) all claims that Defendants brought, or could have brought, against the
20 United States related to the Counterclaim (including, but not limited to, the claims set forth in
21 Duarte's Complaint, First Supplemental Complaint, and Second Amended Complaint). All
22 Parties waive any and all rights of appeal.

23 12. Defendants' release shall extend to all claims whether or not claimed or suspected
24 and constitute a waiver of each and all the provisions of the California Civil Code, Section 1542
25 (to the extent it would be applicable), which reads as follows:

26 A general release does not extend to claims which the creditor does not know or
27 suspect to exist in his or her favor at the time of executing the release, which if
28 known by him or her must have materially affected his or her settlement with the
debtor.

1 Defendants have read and understood the foregoing, are represented by counsel, and indicate
2 their understanding by signing here:  (John Duarte individually);
3  (for Duarte Nursery, Inc. by its President).

4 13. It is the express purpose of the Parties in entering this Consent Decree to further
5 the objectives set forth in CWA section 101, 33 U.S.C. § 1251.

6 14. Defendants' obligations under this Consent Decree are joint and several.

7 15. The Parties acknowledge that, as of the Effective Date of this Consent Decree,
8 Nationwide Permit 32, 77 Fed. Reg. 10,184 (Feb. 21, 2012), provides CWA section 404
9 authorization for the discharge of dredged or fill material insofar as such discharge is necessary
10 to fulfill the remedial requirements set forth in Paragraph 24 of this Consent Decree, with such
11 authorization being subject to the conditions provided in Nationwide Permit 32 and this Consent
12 Decree.

13 16. This Consent Decree is not and shall not be interpreted to be a permit, or
14 modification of any permit, under any federal, state, or local laws or regulations. Defendants are
15 responsible for compliance with all applicable federal, state, and local laws, regulations, and
16 permits; and Defendants' compliance with this Consent Decree shall be no defense to any action
17 commenced pursuant to any such laws, regulations, or permits, except as set forth in this Consent
18 Decree. The United States does not warrant that Defendants' compliance with any aspect of this
19 Consent Decree will result in compliance with any provisions of federal, state, or local laws,
20 regulations, or permits. Further, in any future Clean Water Act permit application, Defendants
21 may not rely upon (a) any provision of this Consent Decree, including on-Site remediation work
22 or preservation, as part of any avoidance and minimization measures demonstration; or (b) any
23 provision of this Consent Decree, including off-Site compensatory mitigation, as part of any
24 compensatory mitigation proposal.

25 17. Except as provided in Paragraph 15, nothing in this Consent Decree shall limit the
26 ability of the Corps to issue, modify, suspend, revoke, or deny any individual permit or any
27 nationwide or regional general permit, nor shall this Consent Decree limit the United States
28

1 Environmental Protection Agency's ability to exercise its authority pursuant to CWA section
2 404(c), 33 U.S.C. § 1344(c).

3 18. This Consent Decree in no way affects the rights of the United States as against
4 any person not a party to this Consent Decree.

5 19. The United States reserves all legal and equitable remedies available to enforce
6 this Consent Decree and applicable law, except as expressly stated in Paragraph 11 of this
7 Consent Decree. This Consent Decree shall not be construed to limit the rights of the United
8 States to obtain remedies under the CWA or its implementing regulations, or under other federal
9 laws, regulations, or permit conditions, except as expressly specified in Paragraph 11 of this
10 Consent Decree.

11 **V. REMEDIAL PROVISIONS**

12 **A. CIVIL PENALTY**

13 20. Within one-hundred eighty (180) Days of the Effective Date of this Consent
14 Decree, Defendants shall pay a civil penalty to the United States in the amount of three-hundred
15 thirty thousand dollars (\$330,000).

16 21. Payment to the United States shall be made in accordance with written
17 instructions to be provided to Defendants by the United States Department of Justice following
18 entry of this Consent Decree. Upon payment, Defendants shall provide written notice to the
19 United States at the addresses specified in Section XI of this Consent Decree.

20 **B. INJUNCTIVE RELIEF**

21 22. Except as necessary to fulfill the requirements of Paragraph 24 below, Defendants
22 and their agents, successors, and assigns and all persons having actual or constructive notice of
23 this decree are enjoined from disturbing approximately 44 acres of waters of the United States on
24 the Site as identified in the United States' expert team delineation in Trial Exhibits 59 and 60
25 (Appendix 1 hereto), plus a 35-foot setback, by any dredging, filling, land clearing, tillage,
26 agricultural activities, construction work, or any pollutant discharge or earthmoving activities for
27 a period of ten (10) years beginning the Effective Date of this Consent Decree. Nevertheless,
28 Defendants and their agents, successors, and assigns may use the foregoing 44 acres for

1 moderate non-irrigated cattle grazing and weed, pest, or invasive species control. The
2 obligations of this paragraph shall run with the land and bind Defendants' successors and
3 assigns, and shall be enforceable by the United States or the Corps (by any appropriate legal
4 proceeding, including but not limited to enforcement of this Consent Decree). The Balance of
5 the Site is not affected by this Paragraph.

6 *Provided*, that at any time after two (2) years from the Effective Date of this Consent
7 Decree, Defendants may seek from the Corps a revised jurisdictional determination for the Site.
8 In making such determination, the Corps shall apply the then-applicable definition of "waters of
9 the United States" and shall otherwise act in accordance with then-governing law. Defendants
10 may thereafter conduct activities otherwise consistent with then-governing law in areas
11 determined by such revised determination (as may be modified on judicial review thereof) not to
12 be "waters of the United States." This proviso does not apply to the Conservation Reserve.

13 23. Except as necessary to fulfill the requirements of Paragraph 24 below, Defendants
14 and their agents, successors, and assigns and all persons having actual or constructive notice of
15 this decree are permanently enjoined from disturbing the Conservation Reserve by any dredging,
16 filling, land clearing, tillage, agricultural activities, construction work, or any pollutant discharge
17 or earthmoving activities. Nevertheless, Defendants and their agents, successors, and assigns
18 may use the Conservation Reserve for moderate non-irrigated cattle grazing and weed, pest, or
19 invasive species control. The obligations of this paragraph shall run with the land and bind
20 Defendants' successors and assigns, and shall be enforceable by the United States or the Corps
21 (by any appropriate legal proceeding, including but not limited to enforcement of this Consent
22 Decree). The Balance of the Site is not affected by this Paragraph.

23 24. Defendants shall, within thirty (30) Days of the Effective Date of this Consent
24 Decree, submit to the Corps a plan to (a) smooth all disturbed soil surfaces and reasonably match
25 the pre-November 2012 grade and hydrology within impacted waters of the United States on the
26 Site, approximately 22 acres as identified in Trial Exhibit 61 and attached hereto as Appendix 3;
27 (b) stabilize bare mineral soils by planting a native grass and seed mix or taking other
28 appropriate erosion and sediment control measures; and (c) complete the foregoing steps

1 promptly but under a seasonally appropriate schedule such as completing all smoothing near the
2 end of the first available dry season and installing any plants near the beginning of the wet
3 season that follows. Defendants shall obtain approval of a detailed remediation plan covering
4 the aforementioned work by the Corps prior to implementation, which approval shall not be
5 unreasonably withheld. Defendants shall implement the plan as approved by the Corps.

6 25. Within fourteen (14) Days of completion of remedial work required in Paragraph
7 24 above, Defendants shall provide written notice to the United States, including the Corps,
8 under Section XI of this Consent Decree.

9 26. Within 30 days of the Effective Date, Defendants shall record a certified copy of
10 this Consent Decree with the Tehama County, California, recorder's office. Within 30 Days of
11 such recording, Defendants shall provide written notice of such completion, along with a copy of
12 the recorded instrument, to the United States and the Corps at the addresses specified in Section
13 XI of this Consent Decree.

14 27. No later than one (1) year from the Effective Date of this Consent Decree,
15 Defendants shall effect off-site compensatory mitigation by expending seven-hundred seventy
16 thousand dollars (\$770,000) in some combination of the following: (1) purchasing vernal pool
17 establishment credits from one or more Corps-approved mitigation banks that serve the Coyote
18 Creek or Oat Creek watersheds; (2) purchasing credits from the National Fish and Wildlife
19 Foundation's In Lieu Fee Program for the Northeastern Sacramento Valley Vernal Pool Service
20 Area; or (3) effecting such mitigation in another manner approved by the Corps. Within fourteen
21 (14) Days of completion of the requirements of this Paragraph, Defendants shall provide written
22 notice to the United States and the Corps under Section XI of this Consent Decree.

23 **VI. SUBMISSIONS**

24 28. Each submission by Defendants under this Consent Decree shall be signed by an
25 official of the submitting party and include a certification to the effect of the following:

26 I certify under penalty of law that this document and all attachments were
27 prepared under my direction or supervision in accordance with a system designed
28 to assure that qualified personnel properly gather and evaluate the information
submitted. Based on my inquiry of the person or persons who manage the system,
or those persons directly responsible for gathering the information, the
information submitted is, to the best of my knowledge and belief, true, accurate,

1 and complete. I have no personal knowledge that the information submitted is
2 other than true, accurate, and complete. I am aware that there are significant
3 penalties for submitting false information, including the possibility of fine and
4 imprisonment for knowing violations.

5 29. The reporting requirements of this Consent Decree do not relieve Defendants of
6 any reporting obligations otherwise required by federal, state, or local law, regulation, permit, or
7 other requirement.

8 30. Any information provided pursuant to this Consent Decree may be used by the
9 United States in any proceeding to enforce the provisions of this Consent Decree and as
10 otherwise permitted by law.

11 **VII. RETENTION OF RECORDS AND ACCESS**

12 31. Until three (3) years after the termination of this Consent Decree pursuant to
13 Section XV, Defendants shall retain, and shall instruct their contractors, consultants, and other
14 agents to preserve, all non-identical copies of all documents, records, or other information
15 (including electronically stored information) in their or their contractors' or other agents'
16 possession or control, or that come into their contractors' or other agents' possession or control,
17 that relate in any manner to Defendants' performance of its obligations under this Consent
18 Decree. At any time during this information-retention period, upon request by the United States,
19 Defendants shall provide copies of any documents, records, or other information required to be
20 maintained under this Paragraph. If Defendants assert that any information is protected from
21 disclosure under any privilege or protection recognized by federal law, and the United States
22 disputes such assertion, the dispute may be resolved in accordance with Section VIII of this
23 Consent Decree.

24 32. The United States and the Corps shall have the right to access all or part of the
25 Site at all reasonable times, with reasonable advance notice, in order to

- 26 a. monitor the progress of activities required under this Consent Decree;
- 27 b. verify any data or information submitted to the United States or the Corps
28 in accordance with the terms of this Consent Decree;
- c. obtain samples;

- 1 d. obtain documentary evidence, including photographs and similar data; and
- 2 e. assess Defendants' compliance with this Consent Decree.

3 Nothing in this Consent Decree is intended to alter the otherwise governing law of premises
4 liability.

5 33. This Consent Decree in no way limits or affects the United States' otherwise
6 existing rights of entry and inspection or right to obtain information, nor does it limit or affect
7 any duty or obligation of Defendants to maintain documents, records, or other information.

8 **VIII. DISPUTE RESOLUTION**

9 34. Unless otherwise expressly provided for in this Consent Decree, the Parties shall
10 attempt to resolve any and all disputes arising under or with respect to this Consent Decree
11 through the dispute resolution procedures of this Section ("Dispute Resolution").

12 35. A dispute shall be considered to have arisen when a written Notice of Dispute is
13 transmitted to the opposing party at the addresses specified in Section XI. Such Notice of
14 Dispute shall state clearly the matter in dispute.

15 36. If after 30 Days of transmittal of the Notice of Dispute, the complainant concludes
16 that the Parties have reached an impasse, then the complainant may seek resolution of the dispute
17 by the Court. The Parties may continue to attempt to resolve the Notice of Dispute while the
18 matter is pending before the Court.

19 37. The invocation of Dispute Resolution procedures under this Section shall not, by
20 itself, extend, postpone, or affect in any way any obligation of Defendants under this Consent
21 Decree. Stipulated penalties and interest, if applicable to the disputed matter, shall continue to
22 accrue from the first Day of violation, but payment shall be stayed pending resolution of the
23 dispute as provided in Section X. If Defendants do not prevail on any disputed issue, stipulated
24 penalties, and interest, if applicable, are to be assessed and paid as provided in Section X. If
25 determined by the Court that Defendants did not violate the Consent Decree, no stipulated
26 penalty or interest shall be assessed against Defendants.

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1 **IX. FORCE MAJEURE**

2 38. "Force majeure," for purposes of this Consent Decree, is defined as any event
3 arising from causes beyond the control of Defendants, of any person controlled by Defendants,
4 or of Defendants' contractors or consultants that delays or prevents the performance of any
5 obligation under this Consent Decree despite Defendants' best efforts to fulfill the obligation.

6 39. If any event occurs or has occurred that may delay the performance of any
7 obligation under this Consent Decree, whether or not caused by a force majeure event,
8 Defendants shall provide notice to the United States, at the addresses specified in Section XI,
9 within a reasonable time after Defendants first knew or should have known that the event might
10 cause a delay. Defendants shall also provide an explanation and description of the reasons for
11 the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or
12 minimize the delay; a schedule for implementation of any measures to be taken to prevent or
13 mitigate the delay or the effect of the delay; Defendants' rationale for attributing such delay to a
14 force majeure event if it intends to assert such a defense; and a statement as to whether, in the
15 opinion of Defendants, such event may cause or contribute to an endangerment to public health,
16 welfare, or the environment. Defendants shall include with any written notice required by this
17 Section all available documentation.

18 40. If the United States agrees in writing that the delay or anticipated delay is
19 attributable to a force majeure event, the time for performance of the obligations under this
20 Consent Decree that are affected by the force majeure event may be extended for such time as is
21 necessary to complete those obligations.

22 41. If the United States does not agree that the delay or anticipated delay has been or
23 will be caused by a force majeure event, or does not agree to the extension of time sought by
24 Defendants, then Defendants may invoke Dispute Resolution under Section VIII of this Consent
25 Decree.

26 42. If Defendants invoke Dispute Resolution under Section VIII of this Consent
27 Decree, Defendants shall have the burden of demonstrating that the delay or anticipated delay
28 has been or will be caused by a force majeure event; the number of Days of delay or anticipated

1 delay that was or will be caused by such force majeure event; that the duration of the delay or the
2 extension sought was or will be warranted under the circumstances; that Defendants could not
3 have foreseen and prevented such delay; that Defendants exercised best efforts to prevent, avoid,
4 minimize, and mitigate the delay and its effects; and that Defendants complied with the
5 requirements of this Section.

6 **X. STIPULATED PENALTIES**

7 43. Defendants shall be liable for stipulated penalties to the United States for
8 violations of this Consent Decree in accordance with this Section, unless excused under Section
9 IX (Force Majeure). A violation includes failing to perform any obligation required by this
10 Consent Decree, including but not limited to any remedial work plan or schedule approved under
11 this Consent Decree, within the specified time schedules established by or approved under this
12 Consent Decree. *Provided*, however, that an insubstantial violation that is cured within seven (7)
13 days of Defendants' receiving written notice from the United States or the Corps shall not incur
14 penalties greater than ten thousand dollars (\$10,000).

15 44. Stipulated penalties shall accrue for violating this Consent Decree in the amount
16 of two thousand five hundred dollars (\$2,500) per Day.

17 45. Stipulated penalties under this Section shall begin to accrue on the Day that a
18 violation occurs and shall continue to accrue until the violation ceases.

19 46. Except as provided in this Section, Defendants shall pay any stipulated penalty
20 within thirty (30) Days of receiving the United States' written demand. Defendants shall make
21 any such payment in accordance with written instructions to be provided by the United States.
22 Upon any such payment, Defendants shall provide written notice to the United States at the
23 addresses specified in Section XI of this Consent Decree.

24 47. The United States may, in the unreviewable exercise of its discretion, reduce or
25 waive stipulated penalties otherwise due it under this Consent Decree.

26 48. Any disputes concerning the amount of stipulated penalties or the underlying
27 violation that gives rise to the assessment of stipulated penalties are subject to the Dispute
28

1 Resolution provisions of Section VIII. Stipulated penalties and any applicable interest shall
2 continue to accrue as provided in this Consent Decree, but need not be paid until the following:

3 a. If the dispute is resolved by agreement between the Parties, Defendants
4 shall pay the amount due under such agreement, together with any applicable interest, to the
5 United States within thirty (30) Days of the effective date of the agreement.

6 b. If the dispute is taken to the Court, Defendants shall pay all accrued
7 penalties determined by the Court to be owing, together with any applicable interest, to the
8 United States within thirty (30) Days of receiving the Court's decision, except as provided in
9 subparagraph c, below.

10 c. If any party appeals the Court's decision, Defendants shall pay all accrued
11 penalties determined to be owing, together with any applicable interest, to the United States
12 within fifteen (15) Days of receiving the final appellate decision.

13 49. If Defendants fail to pay stipulated penalties according to the terms of this
14 Consent Decree, Defendants shall be liable for interest on such penalties, as provided for in
15 28 U.S.C. § 1961, accruing as of the date payment became due. Nothing in this Paragraph shall
16 be construed to limit the United States from seeking any remedy otherwise provided by law for
17 Defendants' failure to pay any stipulated penalties.

18 50. The payment of stipulated penalties and interest, if any, shall not alter in any way
19 Defendants' obligation to complete the performance of the requirements of this Consent Decree.

20 51. Stipulated penalties are not the United States' exclusive remedy for violations of
21 this Consent Decree. Subject to the provisions of Section IV, the United States expressly
22 reserves the right to seek any other relief it deems appropriate for Defendants' violation of this
23 Consent Decree or applicable law, including but not limited to an action against Defendants for
24 statutory penalties, additional injunctive relief, mitigation or offset measures, and/or contempt.
25 However, the amount of any statutory penalty assessed for a violation of this Consent Decree
26 shall be reduced by an amount equal to the amount of any stipulated penalty assessed and paid
27 pursuant to this Consent Decree.

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1 **XI. NOTICES AND COMMUNICATIONS**

2 52. All notices and communications required under this Consent Decree shall be
3 made to the Parties through each of the following persons and addresses:

4 a. TO THE UNITED STATES:

5 i. TO THE DEPARTMENT OF JUSTICE:

6 LETITIA A. GRISHAW
7 Chief, Environmental Defense Section
8 ANDREW J. DOYLE
9 SAMARA M. SPENCE
10 United States Department of Justice
11 Environment and Natural Resources Division
12 P.O. Box 7611
13 Washington, DC 20044
14 andrew.doyle@usdoj.gov
15 samara.spence@usdoj.gov
16 DJ # 90-5-1-4-19984

12 AND

13 PHILLIP A. TALBERT
14 United States Attorney
15 GREGORY T. BRODERICK
16 Assistant United States Attorney
17 501 I Street, Suite 10-100
18 Sacramento, CA 95814
19 gregory.broderick@usdoj.gov

17 ii. TO THE CORPS:

18 A.L. FAUSTINO
19 District Counsel
20 U.S. Army Corps of Engineers
21 Sacramento District
22 1325 J Street, Room 1440
23 Sacramento, CA 95814
24 Al.Faustino@usace.army.mil

23 b. TO DEFENDANTS:

24 GERALD E. BRUNN
25 Law Offices of Brunn & Flynn
26 928 12th Street, Suite 200
27 Modesto, CA 95354
28 (209) 521-2133 (p)
(209) 521-7584 (f)
gbrunn@brunn-flynn.com

1 53. Any party may, by written notice to the Parties, change its designated notice
2 recipient or notice address provided above.

3 54. Notices submitted pursuant to this Section shall be deemed submitted upon
4 mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties
5 in writing.

6 **XII. COSTS OF SUIT**

7 55. The Parties shall bear their own costs and attorneys' fees in this action to date.
8 The Parties shall bear their own costs of this action, including attorneys' fees, except that the
9 United States shall be entitled to collect the costs (including reasonable attorneys' fees) incurred
10 in any action necessary to collect any portion of the civil penalty or any stipulated penalties due
11 but not paid by Defendants.

12 **XIII. PUBLIC PARTICIPATION**

13 56. This Consent Decree shall be lodged with the Court for a period of not less than
14 thirty (30) Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United
15 States reserves the right to withdraw or withhold its consent if the comments regarding the
16 Consent Decree disclose facts or considerations indicating that the Consent Decree is
17 inappropriate, improper, or inadequate. Defendants consent to entry of this Consent Decree
18 without further notice and agree not to withdraw from or oppose entry of this Consent Decree by
19 the Court or to challenge any provision of the Decree, unless the United States has notified
20 Defendants in writing that it no longer supports entry of the Decree. Defendants shall be free to
21 exercise their rights protected by the First Amendment to the United States Constitution.

22 **XIV. MODIFICATION**

23 57. The terms of this Consent Decree may be modified only by a subsequent written
24 agreement signed by all the Parties. Where the modification constitutes a material change to any
25 term of this Consent Decree, it shall be effective only upon the Court's approval.

26 **XV. TERMINATION**

27 58. This Consent Decree expires ten (10) years following the Effective Date, unless at
28 that time Defendants are out of compliance with any provision, in which case the Consent

1 Decree does not expire until Defendants achieve compliance.

2 59. Termination of this Consent Decree does not extinguish the requirements of
3 Paragraph 23 above.

4 **XVI. SIGNATURES/SERVICE**

5 60. Each undersigned representative of Defendants and the United States Department
6 of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this
7 Consent Decree and to execute and legally bind the party he represents to this document.

8 61. This Consent Decree may be signed in counterparts, such counterpart signature
9 pages shall be given full force and effect, and its validity shall not be challenged on that basis.
10 Defendants agree to accept service of process by mail with respect to all matters arising under or
11 relating to this Consent Decree and to waive the formal service requirements set forth in the
12 Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not
13 limited to, service of a summons.

14 **XVII. INTEGRATION**

15 62. This Consent Decree constitutes the final, complete, and exclusive agreement and
16 understanding among the Parties with respect to the settlement embodied in the Consent Decree
17 and supersedes any prior agreements and understandings, whether oral or written, concerning the
18 settlement embodied herein. Other than Appendices hereto, and modifications made effective in
19 accordance with Section XIV of this Consent Decree, the Parties acknowledge that there are no
20 representations, agreements, or understandings relating to the settlement other than those
21 expressly contained in this Consent Decree.

22 **XVIII. FINAL JUDGMENT AND RETENTION OF JURISDICTION**

23 63. Upon its approval and entry by the Court, this Consent Decree shall constitute a
24 final judgment of the Court as to the United States and Defendants. The Parties waive any rights
25 to appeal such final judgment.

26 64. This Court retains jurisdiction over this action for the purpose of resolving
27 disputes arising under this Consent Decree, or entering orders modifying this Consent Decree, or
28 effectuating or enforcing compliance with the terms of this Consent Decree.

1 **XIX. APPENDICES**

2 65. Appendices 1 through 3 are attached to and part of this Consent Decree.

3

4 IT IS SO ORDERED.

5

6 Dated, entered, and made effective this _____ day of _____, 2017.

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UNITED STATES DISTRICT JUDGE

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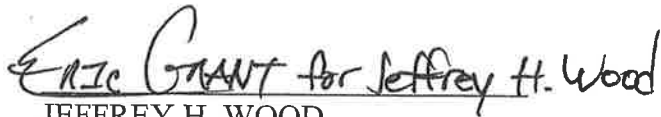
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Respectfully submitted,

Dated: August 15, 2017

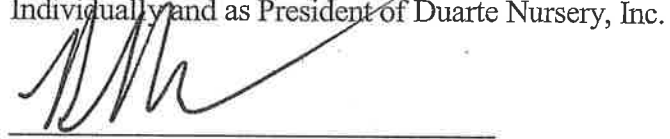


JEFFREY H. WOOD
Acting Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division
Attorney for the United States

Dated: August 15, 2017



JOHN DUARTE
Individually and as President of Duarte Nursery, Inc.



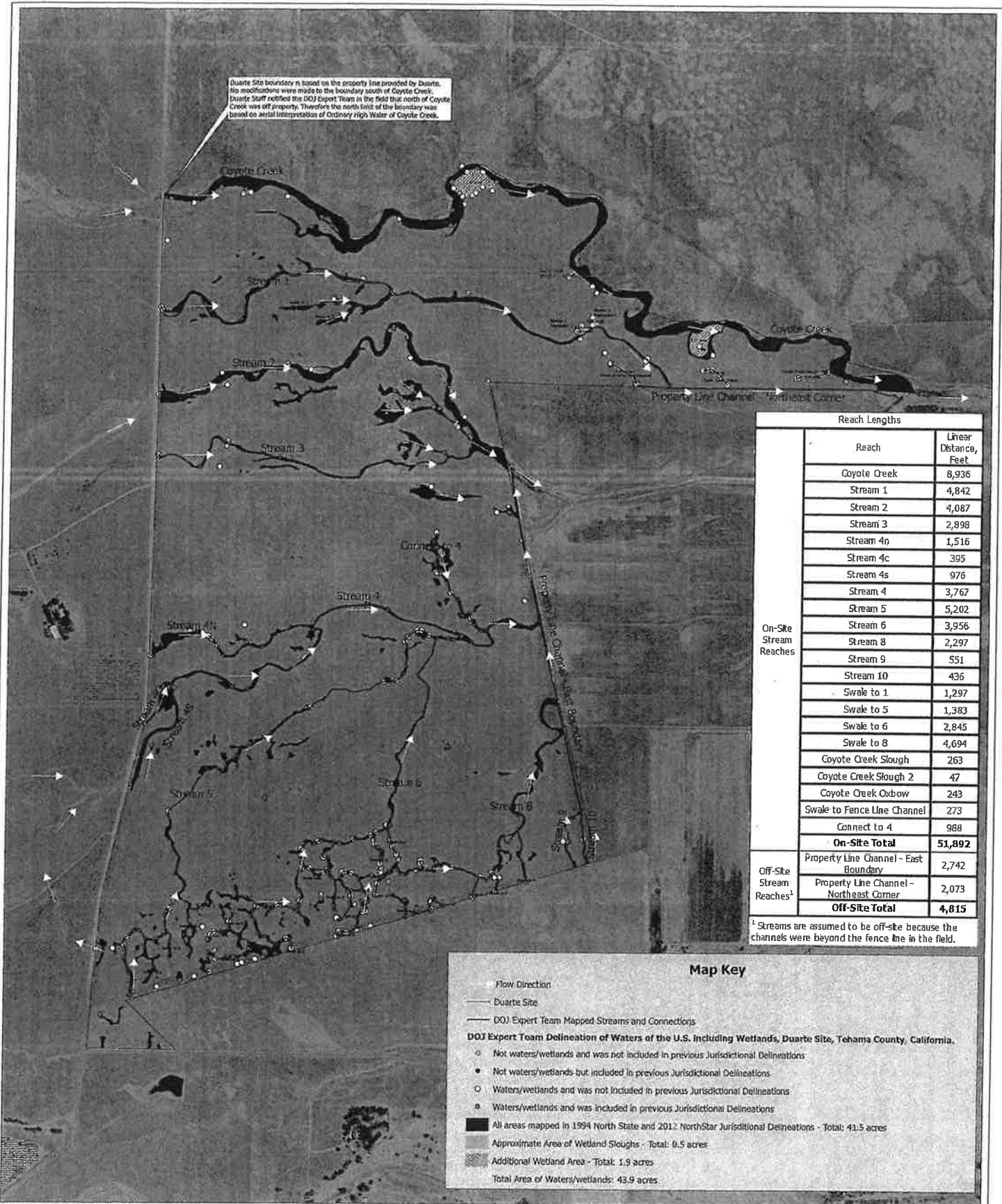
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PACIFIC LEGAL FOUNDATION
Attorney for Duarte Nursery, Inc. and John Duarte

Appendix 1

Duarte Site boundary is based on the property line provided by Duarte. No modifications were made to the boundary south of Coyote Creek. Duarte Staff notified the DOJ Expert Team in the field that north of Coyote Creek was off property. Therefore the north limit of the boundary was based on aerial interpretation of Ordinary High Water of Coyote Creek.



¹ Streams are assumed to be off-site because the channels were beyond the fence line in the field.

Data Source: USDA 2014 Aerial.

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0 500 1,000 2,000 Feet



Figure V-33a. Duarte Site: DOJ Expert Team Delineation of Waters of the U.S., including Wetlands, Duarte Site, Tehama County, California.

GOVERNMENT EXHIBIT 059 2:13-CV-02095-KJM-DB

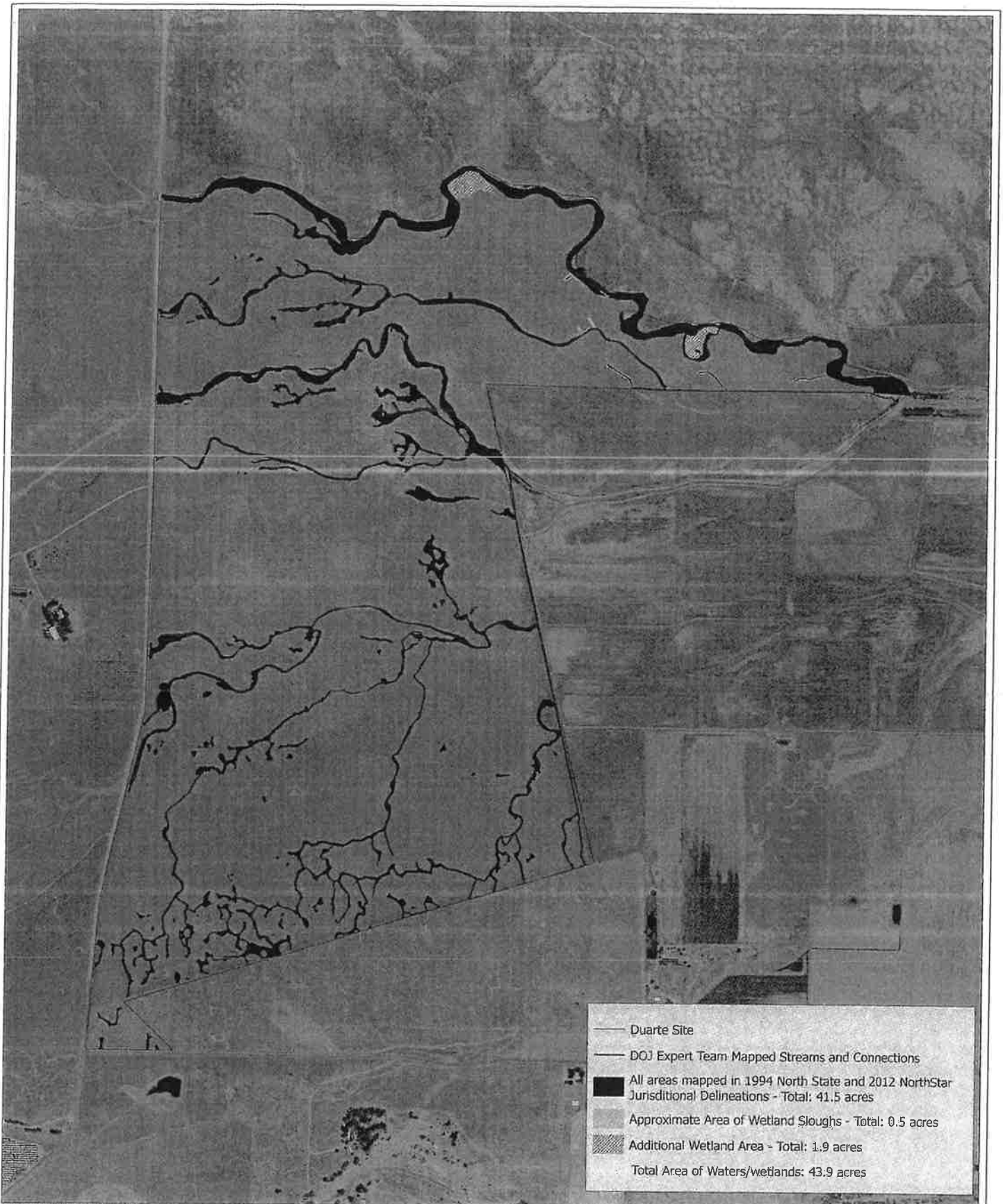


Figure V-33b. Duarte Site: DOJ Expert Team Delineation of Waters of the U.S., including Wetlands, Duarte Site, Tehama County, California.

GOVERNMENT
 EXHIBIT
 060
 2:13-CV-02085-KJM-DB

Appendix 2

1 ROBERT G. DREHER
2 Acting Assistant Attorney General

3 Andrew J. Doyle (FL Bar No. 84948)
4 John Thomas H. Do (CA Bar No. 285075)
5 Trial Attorneys
6 United States Department of Justice
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8 P.O. Box 7611
9 Washington, DC 20044

10 Attorneys for the Defendant and Counterclaim-Plaintiff

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12
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14 UNITED STATES DISTRICT COURT
15 EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF
ENGINEERS,

Defendant.

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UNITED STATES OF AMERICA,

Counterclaim-
Plaintiff,

v.

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

Counterclaim-
Defendants.

No. CIV. S-13-2095 LKK/DAD

ANSWER AND COUNTERCLAIM

1 In the first part of this pleading, *infra* pp. 2-16
2 ("Answer"), the United States Army Corps of Engineers ("Corps")
3 responds to the Complaint for Declaratory and Injunctive Relief
4 ("Duarte's Complaint," ECF No. 1) filed by Duarte Nursery, Inc.
5 and John Duarte (collectively "Duarte").

6 In the second part of this pleading, *infra* pp. 16-29
7 ("Counterclaim"), the United States of America ("United States"),
8 by the authority of the Attorney General and at the request of
9 Secretary of the United States Department of the Army, acting
10 through the Corps, asserts a claim for injunctive relief and
11 civil penalties against Duarte under the Clean Water Act.

12 **ANSWER**

13 The Corps asserts defenses to Duarte's Complaint and answers
14 each numbered paragraph as follows:

15 **JURISDICTION**

16 1. Paragraph 1 constitutes Duarte's legal conclusion to
17 which no response is required. To the extent that a response is
18 required, the Corps denies that Duarte has properly invoked the
19 limited subject matter jurisdiction of this Court.

20 **INTRODUCTION**

21 2. With respect to the first sentence of paragraph 2, the
22 Corps admits that Duarte Nursery, Inc. owns real property on
23 Paskenta Road in rural Tehama County, a few miles south of the
24 city of Red Bluff. The Corps is without knowledge or information
25 sufficient to form a belief as to the truth of the remaining
26 allegations in the first sentence of paragraph 2 and therefore
27 denies the same. The Corps is without knowledge or information
28 sufficient to form a belief as to the truth of the allegations in

1 the second sentence of paragraph 2 and therefore denies the same.
2 The third sentence of paragraph 2 constitutes Duarte's legal
3 conclusion to which no response is required. To the extent that
4 a response is required, the Corps denies the third sentence of
5 paragraph 2.

6 3. With respect to the first sentence of paragraph 3, the
7 Corps admits that Exhibit A to Duarte's Complaint is a true and
8 correct copy of a letter that the Corps issued to Duarte on or
9 about February 25, 2013. The remaining allegations in the first
10 sentence of paragraph 3 contain Duarte's characterization of
11 Exhibit A, which speaks for itself, and the Corps denies any
12 allegations contrary to the plain meaning of Exhibit A. The
13 Corps denies the allegations in the second and third sentences of
14 paragraph 3.

15 4. Paragraph 4 is not directed to the Corps and relates
16 entirely to the defendants or claims that were dismissed by this
17 Court's Order of April 23, 2014 (ECF No. 27) and thus requires no
18 response.

19 5. The Corps denies the allegations in the first sentence
20 of paragraph 5 to the extent they are directed to the Corps.
21 With respect to the second, third, fourth, and fifth sentences of
22 paragraph 5, they constitute Duarte's characterization of
23 Duarte's Complaint to which no response is required. To the
24 extent that a response is required, the Corps denies the
25 allegations in these sentences to the extent they are directed to
26 the Corps. The balance of paragraph 5 is not directed to the
27 Corps and relates entirely to the defendants or claims that were
28 dismissed by this Court's Order of April 23, 2014 (ECF No. 27)

1 and thus requires no response.

2 **VENUE**

3 6. Paragraph 6 constitutes Duarte's legal conclusion to
4 which no response is required. To the extent that a response is
5 required, the Corps admits that venue is proper in the United
6 States District Court for the Eastern District of California
7 assuming, for the sake of argument, that Duarte has properly
8 invoked the limited subject matter jurisdiction of this Court.

9 **PARTIES**

10 **Plaintiffs**

11 7. The Corps admits that Duarte Nursery, Inc. owns the
12 property that is the subject of Duarte's Complaint. The Corps is
13 without knowledge or information sufficient to form a belief as
14 to the truth of the remaining allegations in paragraph 7 and
15 therefore denies the same.

16 8. The Corps admits that John Duarte is the President of
17 Duarte Nursery, Inc. The Corps is without knowledge or
18 information sufficient to form a belief as to the truth of the
19 remaining allegations in paragraph 8 and therefore denies the
20 same.

21 **Defendants**

22 9. The Corps admits the allegations in the first sentence
23 of paragraph 9. The remaining allegations in paragraph 9
24 constitute Duarte's legal conclusion, which require no response,
25 and characterize 33 U.S.C. § 1344(a) and 33 C.F.R. § 326.3, which
26 speak for themselves as to their content and meaning.

27 10-16. Paragraphs 10 through 16 are not directed to the
28 Corps and relate entirely to the defendants or claims that were

1 dismissed by this Court's Order of April 23, 2014 (ECF No. 27)
2 and thus require no response.

3 **LEGAL BACKGROUND**

4 17-35. Paragraphs 17 through 35 constitute Duarte's
5 characterization of the Clean Water Act and associated
6 regulations, case law, and guidance documents which speak for
7 themselves as to their content and meaning. Paragraphs 17
8 through 35 also contain Duarte's legal conclusions to which no
9 response is required.

10 36-38. Paragraphs 36 through 38 are not directed to the
11 Corps and relate entirely to the defendants or claims that were
12 dismissed by this Court's Order of April 23, 2014 (ECF No. 27)
13 and thus require no response.

14 39-43. Paragraphs 39 through 43 constitute Duarte's
15 characterization of the United States Constitution, case law, and
16 a treatise which speak for themselves as to their content and
17 meaning. Paragraphs 39 through 43 also contain Duarte's legal
18 conclusions to which no response is required.

19 **FACTUAL ALLEGATIONS**

20 44. The Corps admits the allegation in the first sentence
21 of paragraph 44 that Duarte Nursery, Inc. owns property located
22 on Paskenta Road in rural Tehama County, south of the city of Red
23 Bluff and roughly three miles west of Interstate 5. (Duarte uses
24 the shorthand "Property," so this Answer does as well.) The
25 Corps admits the allegation in the first sentence of paragraph 44
26 that the Property includes Tehama County Assessor's Parcel
27 Numbers ("APN") 037-070-35-1 and 037-070-37-1, but the Corps
28 denies that the Property is limited to these two parcels. The

1 Corps is without knowledge or information sufficient to form a
2 belief as to the truth of the remaining allegations in the first
3 sentence of paragraph 44 and the allegations in the second
4 sentence of paragraph 44 and therefore denies the same.

5 45. The Corps is without knowledge or information
6 sufficient to form a belief as to the truth of the allegations in
7 paragraph 45 and therefore denies the same.

8 46. The Corps admits the allegations in paragraph 46 that
9 an environmental consultant was retained in approximately 2012
10 regarding the Property. The Corps is without knowledge or
11 information sufficient to form a belief as to the truth of the
12 remaining allegations in paragraph 46 and therefore denies the
13 same.

14 47. The Corps admits the allegation in paragraph 47 that in
15 November 2012 the Property contained wetlands. The Corps denies
16 the allegations in paragraph 47 that wetlands were avoided, and
17 that no deep ripping has taken place on the Property while it has
18 been owned by Duarte Nursery, Inc. or under the control of John
19 Duarte. The Corps is without knowledge or information sufficient
20 to form a belief as to the truth of the remaining allegations in
21 paragraph 47 and therefore denies the same.

22 48. The Corps denies the allegations in paragraph 48.

23 49. The Corps denies the allegations in paragraph 49.

24 50. The Corps admits the allegation in paragraph 50 that on
25 or about February 25, 2013, the Corps issued a true and correct
26 copy of Exhibit A to Duarte's Complaint to Duarte. The remaining
27 allegations in paragraph 50 purport to quote Exhibit A, which
28 speaks for itself, and the Corps denies any allegations contrary

1 to the plain meaning of Exhibit A.

2 51. Paragraph 51 constitutes Duarte's characterization of
3 Exhibit A to Duarte's Complaint, which speaks for itself, and the
4 Corps denies any allegations contrary to the plain meaning of
5 Exhibit A.

6 52. The Corps admits that allegation in paragraph 52 that
7 on or about March 21, 2013, the Corps received a written
8 communication from Duarte. The remaining allegations in
9 paragraph 52 constitute Duarte's characterization of such
10 communication, which speaks for itself, and the Corps denies any
11 allegations contrary to the plain meaning of such communication.

12 53. The Corps admits the allegation in paragraph 53 that on
13 or about April 18, 2013, the Corps communicated in writing to
14 Duarte. The remaining allegations in paragraph 53, including all
15 of its subparts, constitute Duarte's characterization of such
16 communication, which speaks for itself, and the Corps denies any
17 allegations contrary to the plain meaning of such communication.

18 54. The Corps denies the allegations in paragraph 54.

19 55-60. Paragraphs 55 through 60 are not directed to the
20 Corps and relate entirely to the defendants or claims that were
21 dismissed by this Court's Order of April 23, 2014 (ECF No. 27)
22 and thus require no response.

23 61. To the extent that the allegations in paragraph 61 are
24 directed to the Corps, the Corps denies these allegations. To
25 the extent that the allegations in paragraph 61 are not directed
26 to the Corps and relate entirely to the defendants or claims that
27 were dismissed by this Court's Order of April 23, 2014 (ECF No.
28 27), these allegations require no response.

1 62. To the extent that the allegations in paragraph 61 are
2 directed to the Corps, the Corps denies these allegations. To
3 the extent that the allegations in paragraph 61 are not directed
4 to the Corps and relate entirely to the defendants or claims that
5 were dismissed by this Court's Order of April 23, 2014 (ECF No.
6 27), these allegations require no response.

7 63. The Corps is without sufficient knowledge or
8 information sufficient to form a belief as to the truth of the
9 allegations in paragraph 63 that Duarte left wheat crop
10 unattended, resulting in its total loss, at a cost to Duarte
11 Nursery, Inc. of at least \$50,000 in planting costs, and
12 therefore denies these allegations. To the extent that the
13 remaining allegations in paragraph 63 are directed to the Corps,
14 the Corps denies these allegations. To the extent that the
15 remaining allegations in paragraph 63 are not directed to the
16 Corps and relate entirely to the defendants or claims that were
17 dismissed by this Court's Order of April 23, 2014 (ECF No. 27),
18 these allegations require no response.

19 64. The Corps is without sufficient knowledge or
20 information sufficient to form a belief as to the truth of the
21 allegations in paragraph 64 that Duarte did not make necessary
22 preparations for farming the Property in the Fall of 2013, and
23 therefore denies these allegations. To the extent that the
24 remaining allegations in paragraph 64 are directed to the Corps,
25 the Corps denies these allegations. To the extent that the
26 remaining allegations in paragraph 64 are not directed to the
27 Corps and relate entirely to the defendants or claims that were
28 dismissed by this Court's Order of April 23, 2014 (ECF No. 27),

1 these allegations require no response.

2 65. With respect to the allegations in the first sentence
3 of paragraph 65, to the extent that these allegations are
4 directed to the Corps, the Corps is without knowledge or
5 information sufficient to form a belief as to the truth of these
6 allegations and therefore denies the same. To the extent that
7 the allegations in the first sentence of paragraph 65 are not
8 directed to the Corps and relate entirely to the defendants or
9 claims that were dismissed by this Court's Order of April 23,
10 2014 (ECF No. 27), these allegations require no response. With
11 respect to the allegations in the second sentence of paragraph 65
12 (and Duarte's citation to and quotation from case law), they
13 constitute Duarte's legal conclusion to which no response is
14 required. To the extent that a response is required, the Corps
15 denies any allegation in the second sentence of paragraph 65 that
16 is directed to the Corps.

17 66. Paragraph 66 constitutes Duarte's legal conclusion,
18 which requires no response, and characterizes 33 C.F.R.
19 § 326.3(c)(3) and 326.5(a), which speak for themselves as to
20 their content and meaning. To the extent that a response is
21 required, the Corps denies that actions referenced in 33 C.F.R.
22 § 326.3(c)(3) and 326.5(a) are dependent upon whether the Corps
23 had previously issued to Duarte a true and correct copy of
24 Exhibit A to Duarte's Complaint.

25 67. Paragraph 67 is not directed to the Corps and relates
26 entirely to the defendants or claims that were dismissed by this
27 Court's Order of April 23, 2014 (ECF No. 27) and thus requires no
28 response.

1 68. The Corps admits the allegation in the first sentence
2 of paragraph 68 that the Corps disseminated to other state and
3 federal agencies a true and correct copy of Exhibit A to Duarte's
4 Complaint. With respect to the allegation in the first sentence
5 of paragraph 68 that Exhibit A "labeled" Duarte as "violators,"
6 this allegation constitutes Duarte's characterization of Exhibit
7 A, which speaks for itself, and the Corps denies any allegation
8 contrary to the plain meaning of Exhibit A. To the extent that
9 the remaining allegations in the first sentence of paragraph 68
10 are directed to the Corps, the Corps denies these allegations.
11 To the extent that the allegations in paragraph 68 are not
12 directed to the Corps and relate entirely to the defendants or
13 claims that were dismissed by this Court's Order of April 23,
14 2014 (ECF No. 27), these allegations require no response. With
15 respect to the allegations in the second sentence of paragraph
16 68, the Corps denies these allegations to the extent that they
17 are directed to the Corps. To the extent that the allegations in
18 the second sentence of paragraph 68 are not directed to the Corps
19 and relate entirely to the defendants or claims that were
20 dismissed by this Court's Order of April 23, 2014 (ECF No. 27),
21 these allegations require no response.

22 69. The Corps incorporates by reference its responses to
23 paragraphs 1 through 68 of Duarte's Complaint.

24 70. Paragraph 70 constitutes Duarte's legal conclusion to
25 which no response is required. To the extent a response is
26 required, the Corps denies paragraph 70 to the extent that it is
27 directed to the Corps. To the extent that paragraph 70 is not
28 directed to the Corps and relates entirely to the defendants or

1 claims that were dismissed by this Court's Order of April 23,
2 2014 (ECF No. 27), paragraph 70 requires no response.

3 71. Paragraph 71 constitutes Duarte's legal conclusion to
4 which no response is required. To the extent a response is
5 required, the Corps denies paragraph 71 to the extent that it is
6 directed to the Corps. To the extent that paragraph 71 is not
7 directed to the Corps and relates entirely to the defendants or
8 claims that were dismissed by this Court's Order of April 23,
9 2014 (ECF No. 27), paragraph 71 requires no response.

10 72. Paragraph 72 constitutes Duarte's legal conclusion to
11 which no response is required. To the extent a response is
12 required, the Corps denies paragraph 72 to the extent that it is
13 directed to the Corps. To the extent that paragraph 72 is not
14 directed to the Corps and relates entirely to the defendants or
15 claims that were dismissed by this Court's Order of April 23,
16 2014 (ECF No. 27), paragraph 72 requires no response.

17 73. Paragraph 73 constitutes Duarte's legal conclusion to
18 which no response is required. To the extent a response is
19 required; the Corps denies paragraph 73 to the extent that it is
20 directed to the Corps. To the extent that paragraph 73 is not
21 directed to the Corps and relates entirely to the defendants or
22 claims that were dismissed by this Court's Order of April 23,
23 2014 (ECF No. 27), paragraph 73 requires no response.

24 74. The Corps incorporates by reference its responses to
25 paragraphs 1 through 73 of Duarte's Complaint.

26 75. Paragraph 75 constitutes Duarte's legal conclusion to
27 which no response is required. To the extent a response is
28 required, the Corps denies paragraph 75 to the extent that it is

1 directed to the Corps. To the extent that paragraph 75 is not
2 directed to the Corps and relates entirely to the defendants or
3 claims that were dismissed by this Court's Order of April 23,
4 2014 (ECF No. 27), paragraph 75 requires no response.

5 76. Paragraph 76 constitutes Duarte's legal conclusion to
6 which no response is required. To the extent a response is
7 required, the Corps denies paragraph 76 to the extent that it is
8 directed to the Corps. To the extent that paragraph 76 is not
9 directed to the Corps and relates entirely to the defendants or
10 claims that were dismissed by this Court's Order of April 23,
11 2014 (ECF No. 27), paragraph 76 requires no response.

12 77. Paragraph 77 constitutes Duarte's legal conclusion to
13 which no response is required. To the extent a response is
14 required, the Corps denies paragraph 77 to the extent that it is
15 directed to the Corps. To the extent that paragraph 77 is not
16 directed to the Corps and relates entirely to the defendants or
17 claims that were dismissed by this Court's Order of April 23,
18 2014 (ECF No. 27), paragraph 77 requires no response.

19 78. Paragraph 78 constitutes Duarte's legal conclusion to
20 which no response is required. To the extent a response is
21 required, the Corps denies paragraph 78 to the extent that it is
22 directed to the Corps. To the extent that paragraph 78 is not
23 directed to the Corps and relates entirely to the defendants or
24 claims that were dismissed by this Court's Order of April 23,
25 2014 (ECF No. 27), paragraph 78 requires no response.

26 **FIRST CAUSE OF ACTION**

27 79. The Corps incorporates by reference its responses to
28 paragraphs 1 through 78 of Duarte's Complaint.

1 80-82. Paragraphs 80 through 82 constitute Duarte's legal
2 conclusions to which no response is required. To the extent a
3 response is required, the Corps denies paragraphs 80 through 82.

4 **SECOND CAUSE OF ACTION**

5 83. The Corps incorporates by reference its responses to
6 paragraphs 1 through 82 of Duarte's Complaint.

7 84-86. Paragraphs 84 through 86 constitute Duarte's legal
8 conclusions to which no response is required. To the extent a
9 response is required, the Corps denies paragraphs 84 through 86.

10 **THIRD CAUSE OF ACTION**

11 87. The Corps incorporates by reference its responses to
12 paragraphs 1 through 86 of Duarte's Complaint.

13 88-90. Paragraphs 88 through 90 are not directed to the
14 Corps and relate entirely to Duarte's Third Cause of Action that
15 was dismissed by this Court's Order of April 23, 2014 (ECF No.
16 27) and thus require no response.

17 **FOURTH CAUSE OF ACTION**

18 91. The Corps incorporates by reference its responses to
19 paragraphs 1 through 90 of Duarte's Complaint.

20 92-94. Paragraphs 92 through 94 are not directed to the
21 Corps and relate entirely to Duarte's Fourth Cause of Action that
22 was dismissed by this Court's Order of April 23, 2014 (ECF No.
23 27) and thus require no response.

24 **FIFTH CAUSE OF ACTION**

25 95. The Corps incorporates by reference its responses to
26 paragraphs 1 through 94 of Duarte's Complaint.

27 96. Paragraph 96 constitutes Duarte's legal conclusion to
28 which no response is required. To the extent a response is

1 required, the Corps denies paragraph 96.

2 97. The first sentence of paragraph 97 constitutes Duarte's
3 legal conclusion, which requires no response, and characterizes
4 33 C.F.R. § 326.3(a)-(b), which speak for themselves as to their
5 content and meaning. The second sentence of paragraph 97
6 constitutes Duarte's legal conclusion, which requires no
7 response, and characterizes 33 C.F.R. pt. 326, which speaks for
8 itself as to its content and meaning. To the extent a response
9 is required, the Corps denies paragraph 97.

10 98. The first sentence of paragraph 98 constitutes Duarte's
11 legal conclusion, which requires no response, and characterizes
12 33 C.F.R. § 326.3(b), which speaks for itself as to its content
13 and meaning. The second sentence of paragraph 98 constitutes
14 Duarte's legal conclusion, which requires no response, and
15 characterizes 33 C.F.R. pt. 326, which speaks for itself as to
16 its content and meaning. To the extent a response is required,
17 the Corps denies paragraph 98.

18 99. Paragraph 99 constitutes Duarte's legal conclusion,
19 which requires no response, and characterizes 33 C.F.R. pt. 326,
20 which speaks for itself as to its content and meaning. To the
21 extent a response is required, the Corps denies paragraph 99.

22 **PRAYER FOR RELIEF**

23 The remaining paragraphs of Duarte's Complaint state
24 Duarte's prayer for relief, to which no response is required. To
25 the extent a response is required, the Corps denies that Duarte
26 is entitled to the relief it requests or to any relief
27 whatsoever.

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ALL CLAIMS

The Corps denies any allegation in Duarte's Complaint, whether express or implied, that are not specifically admitted, denied, or qualified. To the extent that any allegation in Duarte's Complaint remains unanswered, the Corps denies any such allegation.

DEFENSES

Without limiting or waiving any defenses available to it, the Corps at this time asserts the following defenses, including but not limited to affirmative defenses, against Duarte:

1. Duarte has failed to properly invoke the limited subject matter jurisdiction of this Court.

2. Duarte has failed to challenge reviewable "final" agency action within the meaning of the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 702-06.

3. Duarte's claims are barred in whole or in part by sovereign immunity.

4. Duarte lacks standing to bring the claims alleged against the Corps.

5. Duarte's claims are not ripe.

6. Duarte's claims are or may during this action become moot.

7. Duarte has failed to state a claim upon which relief can be granted.

8. Duarte should recover nothing, or less than its demand, for equitable reasons, including but not limited to: its own conduct; the violations of the Clean Water Act that it is

1 responsible for; and application of the doctrines of unclean
2 hands, estoppel, waiver, release, or laches.

3 **CONCLUSION OF ANSWER**

4 WHEREFORE, the Corps respectfully requests that the Court
5 deny all relief sought by Duarte; enter judgment in favor of the
6 Corps; and award the Corps any appropriate relief.

7 **COUNTERCLAIM**

8 The United States alleges as follows:

9 **NATURE OF THE ACTION**

10 1. This Counterclaim is a civil enforcement action
11 commenced under sections 309 and 404 of the Clean Water Act
12 ("CWA"), 33 U.S.C. §§ 1319 and 1344, and under 28 U.S.C. §§ 516
13 and 519 to obtain injunctive relief and civil penalties against
14 Duarte Nursery, Inc. and John Duarte (collectively "Duarte") for
15 the discharge of pollutants into waters of the United States in
16 Tehama County, California without authorization by the Corps, in
17 violation of CWA section 301(a), 33 U.S.C. § 1311(a).

18 2. The United States seeks: (a) injunctive relief
19 prohibiting Duarte from further unauthorized discharges of
20 pollutants; (b) injunctive relief compelling Duarte to restore
21 and mitigate the impacts of the unauthorized discharges of
22 pollutants alleged in this Counterclaim; (c) civil penalties in
23 favor of the United States and against Duarte; and (d) such other
24 relief as the Court may deem appropriate.

25 **JURISDICTION AND VENUE**

26 3. This Court has jurisdiction over the subject matter of
27 this action pursuant to 33 U.S.C. § 1319(b) and 28 U.S.C. §§ 1331
28 and 1345.

1 4. Venue is proper in the United States District Court for
2 the Eastern District of California pursuant to 33 U.S.C.
3 §§ 1319(b) and 28 U.S.C. § 1391(b) and (c) because Duarte
4 conducts business in this District; the waters of the United
5 States into which pollutants were discharged without
6 authorization are located in this District; and the cause of
7 action alleged in this Counterclaim arose in this District.

8 5. The United States has provided notice of the
9 commencement of this action to the State of California pursuant
10 to 33 U.S.C. § 1319(b).

11 **PARTIES**

12 6. The counterclaim-plaintiff in this action is the United
13 States of America, and authority to bring this action is vested
14 in the United States Department of Justice pursuant to Section
15 506 of the CWA, 33 U.S.C. § 1366, and 28 U.S.C. §§ 516 and 519.

16 7. The counterclaim-defendants in this action are Duarte
17 Nursery, Inc. and John Duarte.

18 8. Duarte Nursery, Inc. is a corporation formed under the
19 laws of California with a business address of 1555 Baldwin Road,
20 Hughson, California 95326.

21 9. John Duarte is an individual residing at 1555 Baldwin
22 Road, Hughson, California 95326.

23 **STATUTORY AND REGULATORY BACKGROUND**

24 10. Section 101(a) of the CWA, 33 U.S.C. § 1251(a),
25 provides that "[t]he objective of this chapter is to restore and
26 maintain the chemical, physical, and biological integrity of the
27 Nation's waters."
28

1 11. Section 301(a) of the CWA, 33 U.S.C. § 1311(a),
2 prohibits the "discharge of any pollutant by any person" except,
3 *inter alia*, as authorized by a permit issued pursuant to section
4 404 of the CWA, 33 U.S.C. § 1344.

5 12. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines
6 "person" to include, *inter alia*, an "individual" and a
7 "corporation."

8 13. Section 502(12) of the CWA, 33 U.S.C. § 1362(12),
9 defines "discharge of a pollutant" as "any addition of any
10 pollutant to navigable waters from any point source."

11 14. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines
12 "pollutant" to include, *inter alia*, "dredged spoil," "biological
13 materials," "rock," "sand," and "cellar dirt."

14 15. Section 502(14) of the CWA, 33 U.S.C. § 1362(14),
15 defines "point source" to include "any discernible, confined and
16 discrete conveyance . . . from which pollutants are or may be
17 discharged."

18 16. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines
19 "navigable waters" as "the waters of the United States, including
20 the territorial seas."

21 17. 33 C.F.R. § 328.3(a)(1), (5) and (7) define "waters of
22 the United States" to include, *inter alia*: all waters that are
23 currently used, were used in the past, or may be susceptible for
24 use in interstate or foreign commerce ("traditional navigable
25 waters"); tributaries of traditional navigable waters; and
26 wetlands adjacent traditional navigable waters or their
27 tributaries.

28

1 18. 33 C.F.R. § 328.3(b) defines "wetlands" as "those areas
2 that are inundated or saturated by surface or ground water at a
3 frequency and duration sufficient to support, and that under
4 normal circumstances do support, a prevalence of vegetation
5 typically adapted for life in saturated soil conditions."

6 19. 33 C.F.R. § 328.3(c) defines "adjacent" as "bordering,
7 contiguous, or neighboring." It further provide: "Wetlands
8 separated from other waters of the United States by man-made
9 dikes or barriers, natural river berms, beach dunes and the like
10 are 'adjacent wetlands.'"

11 20. 33 U.S.C. § 1319(b) authorizes the commencement of a
12 civil action for appropriate relief, including a permanent
13 injunction, against any person who violates 33 U.S.C. § 1311(a).

14 21. 33 U.S.C. § 1319(d) provides that any person who
15 violates 33 U.S.C. § 1311(a) shall be subject to a civil penalty
16 not to exceed \$25,000 per day for each violation.

17 22. Effective after January 12, 2009, 40 C.F.R. § 19.4
18 adjusts the \$25,000 amount provided in 33 U.S.C. § 1319(d) to
19 \$37,500.

20 23. Each day that dredged or fill material remains in the
21 place where it was discharged without authorization constitutes a
22 separate violation of 33 U.S.C. § 1311(a).

23 **GENERALLY APPLICABLE ALLEGATIONS**

24 **The Site**

25 24. Duarte Nursery, Inc. owns real property on Paskenta
26 Road in Tehama County, California, just south of the city of Red
27 Bluff and roughly three miles due west of Interstate 5 ("the
28 Site").

1 25. The Site is located on or near Sections 24 and 25,
2 Township 26 North, Range 4 West, and unsectioned portions of the
3 La Barranca Colorada Mexican Land Grant within Township 26 North,
4 Range 3 West, Mount Diablo Base & Meridian, Latitude 40.08274°,
5 Longitude -122.268048 °.

6 26. The Site includes but is not limited to the following
7 parcels, as identified by their Tehama County Assessor's Parcel
8 Numbers ("APN"): 037-070-35-1 and 037-070-37-1.

9 27. The Site is approximately 500 acres in size.

10 28. Duarte Nursery Inc. has owned or controlled the Site
11 since at least April 2012.

12 29. John Duarte has been the President and co-owner of
13 Duarte Nursery, Inc. since at least April 2012.

14 **Coyote Creek and Downstream Waters**

15 30. The northern portion of the Site contains or is
16 bordered by an aquatic feature, "Coyote Creek."

17 31. Coyote Creek carries water.

18 32. Coyote Creek has a bed and bank.

19 33. Coyote Creek is a stream.

20 34. Coyote Creek originates generally west of the Site.

21 35. The direction of the flow of water in Coyote Creek is
22 generally from west to east.

23 36. Coyote Creek exceeds 10 miles in length.

24 37. Coyote Creek's watershed, or the area from which it
25 receives water, exceeds 16,000 acres.

26 38. Approximately eight miles downstream (east) of the
27 Site, Coyote Creek joins another aquatic feature, "Oat Creek."

28 39. Oat Creek carries water.

1 40. Oat Creek has a bed and bank.

2 41. Oat Creek is a stream.

3 42. The direction of the flow of water in Oat Creek is
4 generally from west to east.

5 43. Oat Creek exceeds 20 miles in length.

6 44. Oat Creek's watershed, inclusive of Coyote Creek's
7 watershed, exceeds 44,000 acres.

8 45. Less than a mile downstream of Coyote Creek's
9 confluence with Oat Creek, Oat Creek joins the Sacramento River.

10 46. Coyote Creek and Oat Creek contribute flow to the
11 Sacramento River.

12 47. The Sacramento River is the longest river in
13 California.

14 48. From approximately two miles northwest of the city of
15 Redding, California the Sacramento River flows in a southerly
16 direction for over 300 miles before it reaches San Francisco Bay
17 and the Pacific Ocean.

18 49. The Sacramento River's watershed is approximately
19 27,500 square miles.

20 50. The Sacramento River contributes flow to the Pacific
21 Ocean.

22 51. The Sacramento River is currently used for interstate
23 commerce.

24 52. The Sacramento River was used in the past for
25 interstate commerce.

26 53. The Sacramento River is susceptible for use in
27 interstate commerce.

28 54. The Sacramento River is navigable-in-fact.

1 55. Coyote Creek, Oat Creek, and the Sacramento River are
2 critical habitat for, *inter alia*; two threatened species:
3 Central Valley Spring Run Chinook Salmon (*Oncorhynchus*
4 *tshawytscha*) and Central Valley Steelhead (*Oncorhynchus mykiss*).
5 50 C.F.R. § 223.102(c)(4) and (17); *id.* § 226.211(k) and (l).
6 The Endangered Species Act ("ESA") defines "critical habitat" for
7 a threatened or endangered species, in pertinent part, as "the
8 specific areas within the geographical area occupied by the
9 species, at the time it is listed in accordance with the
10 provisions of section 1533 of this title, on which are found
11 those physical or biological features (I) essential to the
12 conservation of the species and (II) which may require special
13 management considerations or protections"; and "specific areas
14 outside the geographical area occupied by the species at the time
15 it is listed in accordance with the provisions of section 1533 of
16 this title, upon a determination by the Secretary that such areas
17 are essential for the conservation of the species." 16 U.S.C.
18 § 1532(5)(A)(i), (ii). The ESA defines "endangered species" in
19 pertinent part as "any species which is in danger of extinction
20 throughout all or a significant portion of its range." *Id.*
21 § 1532(6). The ESA defines "threatened species" as "any species
22 which is likely to become an endangered species within the
23 foreseeable future throughout all or a significant portion of its
24 range." *Id.* § 1532(20). The ESA defines "species" to include
25 "subspecies" and certain "distinct population segment[s]." *Id.* §
26 1532(16).

27 56. Central Valley Spring Run Chinook Salmon and Central
28 Valley Steelhead are anadromous fish, which means that they are

1 hatched in freshwater, spend most of their life in oceanic
2 waters, and return to freshwater to spawn.

3 57. Critical habitat for Central Valley Spring Run Chinook
4 Salmon extends upstream from the confluence of Oat Creek with the
5 Sacramento River to the following location in Coyote Creek:
6 Latitude 40.0929°, Longitude -122.1621°. 50 C.F.R.

7 § 226.211(k)(1)(ii).

8 58. Critical habitat for Central Valley Steelhead extends
9 upstream from the confluence of Oat Creek with the Sacramento
10 River to the following location in Oat Creek: Latitude 40.0769°,
11 Longitude -122.2168°. 50 C.F.R. § 226.211(l)(1)(ii).

12 59. The Site is upstream of critical habitat for Central
13 Valley Spring Run Chinook Salmon and Central Valley Steelhead.

14 60. Exhibit 1 to this Counterclaim is a map that fairly and
15 accurately depicts the flow path from Coyote Creek at the Site to
16 the Sacramento River.

17 **Streams at the Site**

18 61. In addition to being bordered by Coyote Creek, the Site
19 contains -- or contained prior to the discharges of pollutants
20 alleged in this Counterclaim -- at least two additional streams.

21 62. These streams carried water.

22 63. These streams had a bed and bank.

23 64. The direction of the flow of water in these streams was
24 generally from west to east.

25 65. These streams joined Coyote Creek east of the Site.

26 66. At least one of these streams may have contained
27 wetlands.

28

1 67. These streams contributed flow to Coyote Creek and may
2 be regarded as branches of Coyote Creek.

3 68. The discharges of pollutants alleged in this
4 Counterclaim had the effect of replacing portions of streams with
5 dry land or changing the bottom elevation of portions of streams.

6 69. The discharges of pollutants alleged in this
7 Counterclaim destroyed portions of streams at the Site.

8 **Wetlands at the Site**

9 70. In addition to streams, the Site contains -- or
10 contained prior to the discharges of pollutants alleged in this
11 Counterclaim -- other aquatic features.

12 71. These aquatic features were inundated or saturated by
13 surface or ground water at a frequency and duration sufficient to
14 support, and under normal circumstances did support, a prevalence
15 of vegetation typically adapted for life in saturated soil
16 conditions.

17 72. These aquatic features were "wetlands" within the
18 meaning of 33 C.F.R. § 328.3(a)(7), (b).

19 73. Wetlands at the Site provided suitable habitat for,
20 *inter alia*, vernal pool fairy shrimp (*Branchinecta lynchi*), a
21 threatened species, and vernal pool tadpole shrimp (*Lepidurus*
22 *packardi*), an endangered species. 50 C.F.R. § 17.11(h);
23 *Endangered and Threatened Wildlife and Plants; Determination of*
24 *Endangered Status for the Conservancy Fairy Shrimp, Longhorn*
25 *Fairy Shrimp, and Vernal Pool Tadpole Shrimp; and Threatened*
26 *Status for the Vernal Pool Fairy Shrimp*, 59 Fed. Reg. 48,136
27 (Sept. 19, 1994).

28

1 74. Since at least 2006, wetlands at the Site have been
2 designated critical habitat for vernal pool fairy shrimp. 50
3 C.F.R. § 17.95(h)(13); *Endangered and Threatened Wildlife and*
4 *Plants; Designation of Critical Habitat for Four Vernal Pool*
5 *Crustaceans and Eleven Vernal Pool Plants*, 71 Fed. Reg. 7,118,
6 7,141-42 (Feb. 10, 2006).

7 75. Exhibit 2 to this Counterclaim is a true and correct
8 copy of a map, codified at 50 C.F.R. § 17.95(h)(13), depicting
9 areas of critical habitat for vernal pool fairy shrimp.

10 76. The Site falls within the area marked as "Unit 6" on
11 Exhibit 2.

12 77. Wetlands at the Site bordered, were contiguous to, or
13 neighbored Coyote Creek or another stream at the Site.

14 78. The discharges of pollutants alleged in this
15 Counterclaim had the effect of replacing wetlands with dry land
16 or changing the bottom elevation of wetlands.

17 79. The discharges of pollutants alleged in this
18 Counterclaim destroyed wetlands at the Site.

19 **ADDITIONAL GENERALLY APPLICABLE ALLEGATIONS**

20 80. The Sacramento River is a traditional navigable water
21 under 33 C.F.R. § 328.3(a)(1).

22 81. Coyote Creek and Oat Creek are "tributaries" of the
23 Sacramento River within the meaning of 33 C.F.R. § 328.3(a)(5).

24 82. Streams at the Site are or were, prior to their
25 destruction, "tributaries" of Coyote Creek, Oat Creek, and the
26 Sacramento River within the meaning of 33 C.F.R. § 328.3(a)(5).

27 83. Wetlands at the Site are or were, prior to their
28 destruction, "adjacent" to one or more tributaries within the

1 meaning of 33 C.F.R. § 328.3(a)(7), (c), and 40 C.F.R. §
2 230.3(s)(7).

3 84. Coyote Creek, either alone or in combination with
4 similarly situated lands in the region, significantly affects the
5 chemical, physical, or biological integrity of the Sacramento
6 River.

7 85. Oat Creek, either alone or in combination with
8 similarly situated lands in the region, significantly affects the
9 chemical, physical, or biological integrity of the Sacramento
10 River.

11 86. Streams at the Site, either alone or in combination
12 with similarly situated lands in the region, significantly affect
13 or affected the chemical, physical, or biological integrity of
14 the Sacramento River.

15 87. Wetlands at the Site, either alone or in combination
16 with similarly situated lands in the region, significantly affect
17 or affected the chemical, physical, or biological integrity of
18 the Sacramento River.

19 88. At all times relevant to this Counterclaim, the
20 Sacramento River, Oat Creek, Coyote Creek, streams at the Site,
21 and wetlands at the Site constituted "waters of the United
22 States" and "navigable waters" within the meaning of 33 U.S.C.
23 § 1362(7).

24 89. Duarte Nursery, Inc. is a "person" under 33 U.S.C.
25 § 1362(5).

26 90. John Duarte is a "person" under 33 U.S.C. § 1362(5).
27
28

COUNT

1
2 91. The United States repeats the allegations set forth in
3 Paragraphs 1 through 90 of this Counterclaim.

4 92. As a result of earthmoving activities undertaken at the
5 Site, Duarte added pollutants to waters of the United States from
6 point sources without authorization.

7 93. Beginning in approximately November 2012, Duarte
8 prepared much of the Site for planting.

9 94. During such preparation, Duarte used mechanized
10 equipment to drag long metal shanks through the ground ("deep
11 ripping").

12 95. Deep ripping or other earthmoving activities occurred
13 throughout much of the Site.

14 96. Deep ripping or other earthmoving activities resulted
15 in the placement of dredged spoil, biological materials, rock,
16 sand, cellar dirt, or other earthen material constituting
17 "pollutants" within the meaning of 33 U.S.C. § 1362(6) into
18 streams or wetlands at the Site.

19 97. Equipment used during deep ripping or other earthmoving
20 activities constituted a "point source" within the meaning of 33
21 U.S.C. § 1362(14).

22 98. Equipment operated in at least 15 acres of streams or
23 wetlands.

24 99. The deep ripping or other earthmoving activities
25 resulted in the "discharge of any pollutant" within the meaning
26 of 33 U.S.C. § 1311(a).

27 100. The deep ripping or other earthmoving activities were
28 carried out by Duarte Nursery, Inc., John Duarte, or one or more

1 persons acting on behalf of or with the consent or knowledge of
2 Duarte.

3 101. At no time did Duarte or any person on Duarte's behalf
4 apply for, secure, and comply with a CWA section 404 permit to
5 discharge pollutants at the Site.

6 102. Duarte violated 33 U.S.C. § 1311(a).

7 103. Duarte has allowed pollutants to remain in waters of
8 the United States.

9 104. Duarte remains in violation of 33 U.S.C. § 1311(a).

10 105. Duarte Nursery, Inc. and John Duarte are jointly and
11 severally responsible for the CWA violations alleged herein.

12 REQUEST FOR RELIEF

13 WHEREFORE, the United States respectfully requests that this
14 Court order the following relief:

15 Enjoin Duarte from further discharges of pollutants except
16 as in compliance with the CWA;

17 Compel Duarte to restore impacted waters of the United
18 States;

19 Require Duarte to mitigate for impacted waters of the United
20 States;

21 Assess and direct Duarte to pay civil penalties;

22 Award the United States the costs and disbursements of this
23 action; and

24 Grant the United States such other relief as the Court finds
25 appropriate.

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Respectfully submitted,

ROBERT G. DREHER
Acting Assistant Attorney General

Dated: May 7, 2014

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Of Counsel:

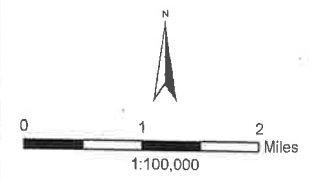
Joshua Holmes
Assistant District Counsel
U.S. Army Corps of Engineers
Sacramento District
1325 J Street
Sacramento, CA 95814

Attorneys for the Defendant and
Counterclaim-Plaintiff



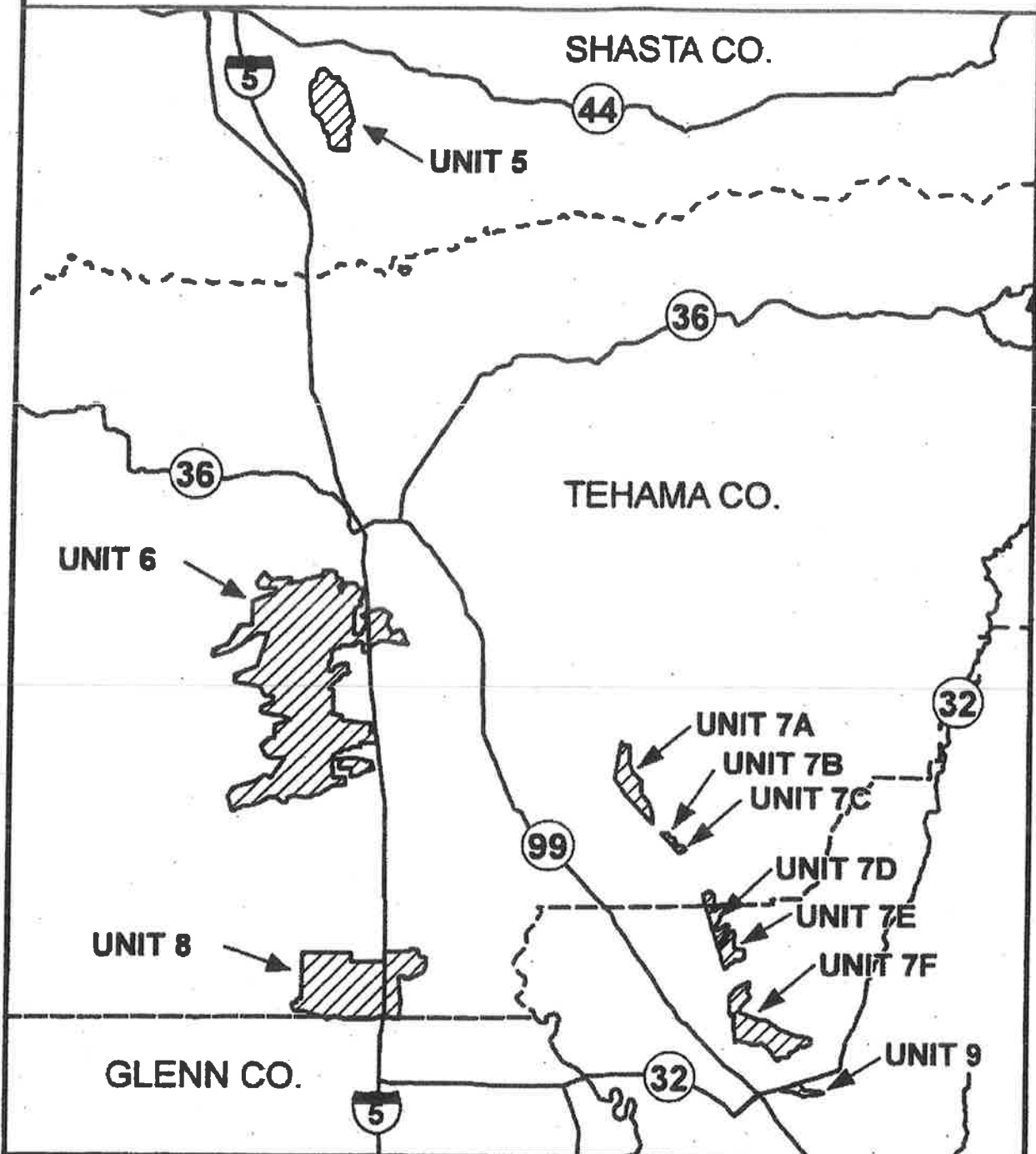
Legend
 — Stream Flowline
 [Dashed Box] Duarte Site


Data Source:
 USGS National Hydrography Dataset (Stream Flowline) & USDA 2012 National Agriculture Imagery Program (2012 NAIP)
 Coordinate System: GCS_WGS_1984

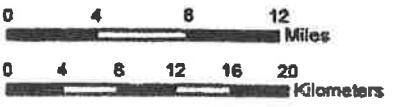


Flow of Coyote Creek from Site to Oat Creek to Sacramento River

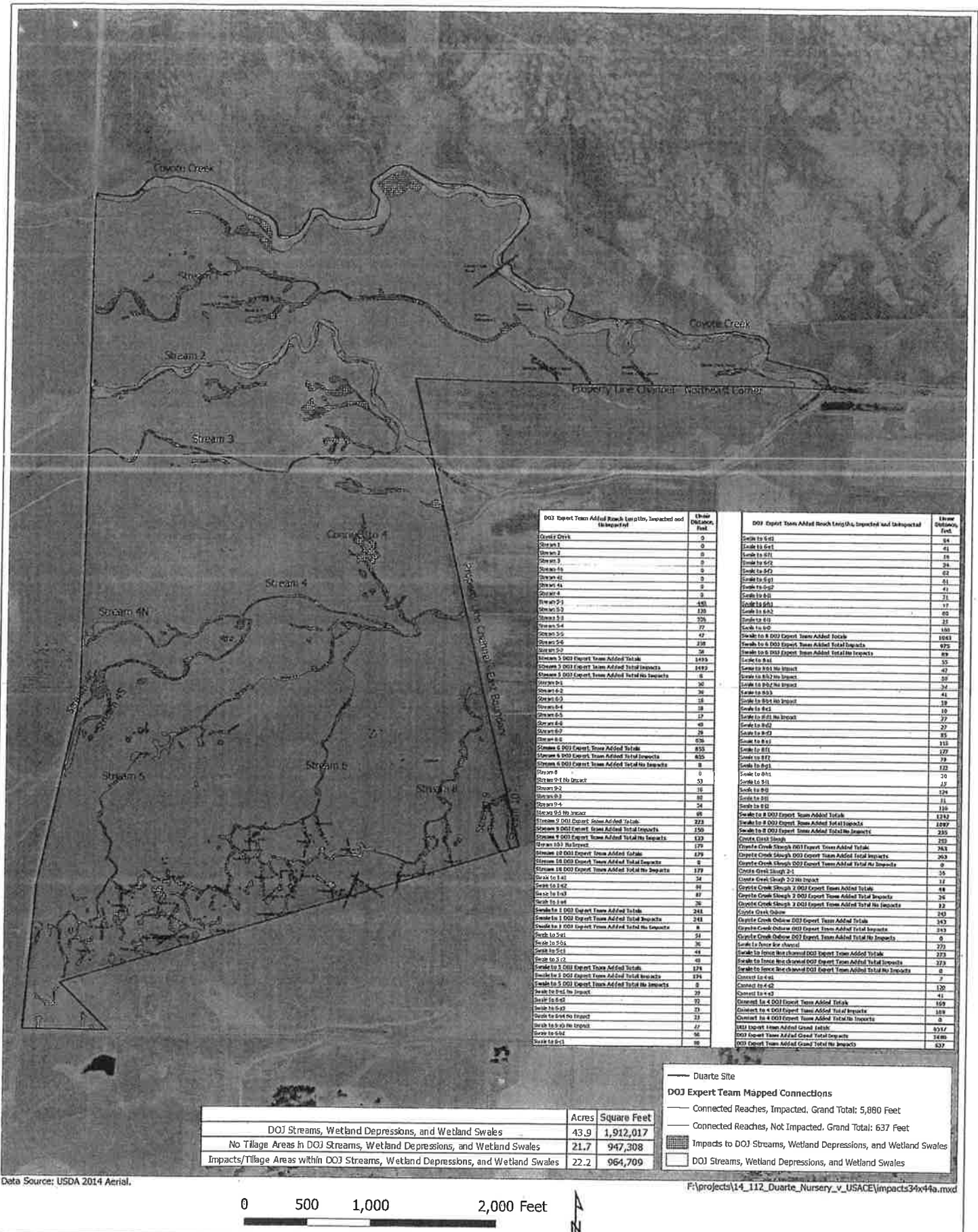




— Highways
 - - - County Boundary
 Final Critical Habitat Unit



Appendix 3



Data Source: USDA 2014 Aerial.

F:\projects\14_112_Duarte_Nursery_v_USACE\impacts34x44a.mxd

0 500 1,000 2,000 Feet

Figure V-47. Duarte Site: DOJ Expert Team Estimated Impacts to Streams, Wetland Depressions and Wetland Swales, Duarte Site, Tehama County, California.

GOVERNMENT
EXHIBIT
051
2-13-CV-02095-KJM-DB