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11
12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF CALIFORNIA

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

16 Plaintiffs,

17 v.

18 UNITED STATES ARMY CORPS OF
19 ENGINEERS,

20 Defendant.

21

UNITED STATES OF AMERICA,

22 Counterclaim- Plaintiff,

23 v.

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

27 Counterclaim- Defendants.
28

No. 2:13-CV-02095-KJM-DAD

**UNITED STATES' OPPOSITION TO
DUARTE'S MOTION FOR LEAVE
TO FILE SECOND AMENDED
COMPLAINT**

Date: August 7, 2015

Time: 10:00 a.m.

Location: Courtroom 3, 15th Floor

1 Defendant U.S. Army Corps of Engineers and Counterclaim-Plaintiff United States of
2 America oppose the motion filed by Plaintiffs-Counterclaim Defendants Duarte Nursery, Inc.
3 and John Duarte (“Duarte,” “Duarte parties,” or “plaintiffs”) for leave to amend their existing
4 complaint.¹ Duarte seeks to resurrect the First Amendment retaliation claim that this Court, in
5 an Order dated March 24, 2015 (ECF No. 63), dismissed for failure to state a claim. But
6 Duarte’s proposed amendment does not cure the existing complaint’s deficiencies. Therefore,
7 leave should be denied -- as explained below.

8 **STATUTORY AND REGULATORY BACKGROUND**

9 The underlying dispute here involves the Clean Water Act (“CWA” or “Act”), the
10 objective of which is “to restore and maintain the chemical, physical, and biological integrity of
11 the Nation’s waters.” 33 U.S.C. § 1251(a). The United States alleges that Duarte violated CWA
12 section 301(a), which prohibits the “discharge of any pollutant,” which, in turn, means “any
13 addition of any pollutant to navigable waters from any point source,” except in compliance with
14 the Act. 33 U.S.C. §§ 1311(a), 1362(12). “Navigable waters” -- or “waters of the United States”
15 -- include streams and wetlands that have a significant nexus with traditional navigable waters.
16 See 33 U.S.C. § 1362(7); *Rapanos v. United States*, 547 U.S. 715, 780-81 (2006) (Kennedy, J.,
17 concurring in judgment); *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011). The
18 pollutants at issue here are dredged or fill material, and CWA section 404, 33 U.S.C. § 1344,
19 authorizes the U.S. Army Corps of Engineers (“Corps”) to issue a permit “for the discharge of
20 dredged or fill material into the navigable waters at specified disposal sites.” *Id.* § 1344(a).

21 The Corps and the U.S. Environmental Protection Agency (“EPA”) share responsibility
22 for implementing and enforcing these provisions of the CWA. See, e.g., 33 U.S.C. § 1344(b) and
23 (c). When the Corps alleges that any person is in violation of sections 301(a) and 404 of the Act,
24 the Corps may issue a notification to the parties responsible for a potential violation. 33 C.F.R.
25 § 326.3(c). The notification takes the form of a “cease-and-desist order” for on-going projects
26 and a general notification for completed projects. 33 C.F.R. § 326.3(c)(1), (2). The Corps may
27

28 ¹ “Plaintiffs’ Notice of Motion and Motion to File Second Amended Complaint” (ECF No. 80).

1 also refer the matter to EPA. *See* Memorandum of Agreement between the Department of the
2 Army and EPA Concerning Federal Enforcement for the Section 404 Program of the Clean
3 Water Act (Jan. 19, 1989) (“Agencies’ Enforcement Memo”), available at
4 <http://www.usace.army.mil/Portals/2/docs/civilworks/mous/enfmoa.pdf>.

5 Alternatively, or in addition, either agency may request that the U.S. Department of
6 Justice commence a judicial enforcement action. *See* 33 U.S.C. §§ 1319(b) and (d), 1344(s); 33
7 C.F.R. § 326.5(a); Agencies’ Enforcement Memo.

8 **FACTUAL AND PROCEDURAL BACKGROUND**

9 As set forth in the Corps’ inspection report (which is Exhibit C to Duarte’s motion for
10 leave, ECF No. 80-5), since 2012 Duarte has owned property in Tehama County, California, just
11 south of the city of Red Bluff. Duarte’s Mot., Ex. C at 1-2. On the property are Coyote Creek
12 and other aquatic features hydrologically and ecologically connected with the traditionally
13 navigable Sacramento River. *Id.* at 2. As explained in the Corps’ report, these streams and
14 wetlands have functions that include “help[ing] to moderate flood flows due to storm events,
15 provid[ing] filtration of sediments and pollutants prior to entering Coyote Creek, and [providing]
16 designated critical habitat and . . . support[ing] the Federally-listed vernal pool fairy shrimp
17 (*Branchinecta lynchi*) and the vernal pool tadpole shrimp (*Lepidurus packardi*).” *Id.* at 2. These
18 features have long since existed on the property; in 1994, the Corps verified a delineation of
19 waters of the United States. *Id.* at 1. And Duarte retained a consultant and obtained a
20 delineation in 2012. *Id.* at 4.

21 On November 28, 2012, Matthew Kelley of the Corps happened to drive by the property
22 on his way back to the office from an assignment in Tehama County. *Id.* at 1. From the road, he
23 “observed a rubber tracked agricultural tractor with a seven shank ripper attached to the
24 tractor[’s] three point hitch.” *Id.* Moreover, as the inspection report notes, “[t]he ripping
25 appeared to have gone through and impacted seasonal wetlands and drainages on the site that are
26 tributary abutting, and adjacent to Coyote Creek.” *Id.* Mr. Kelley returned to the road bordering
27 the property on December 6, 2012, observing more ripping and taking photographs. *Id.* at 2.
28

1 On December 11, 2012, Mr. Kelley contacted Mr. Duarte about the ripping activities he
2 had observed. *Id.* at 3. During their telephonic conversation, Mr. Duarte acknowledged streams
3 and wetlands on the property but claimed that “they were staying away from them.” *Id.* at 3.
4 Mr. Kelley shared his contrary observation that aquatic features were not being avoided and
5 advised Duarte, in light of the Act’s protection of the streams and wetlands, to stop “any
6 additional fills in waters of the United States, including wetlands.” *Id.*

7 A written cease-and-desist order (“CDO”) followed on February 25, 2013. As
8 summarized by this Court, the CDO alleges that the Duarte parties “discharged dredged or fill
9 material into seasonal wetlands, vernal pools, vernal swales, and intermittent and ephemeral
10 drainages, which are waters of the United States, without a . . . permit,” and further stated that
11 “[s]ince a DA [Department of Army] permit has not been issued authorizing this discharge, the
12 work is in violation of the Clean Water Act.” Order of Mar. 24, 2015, at 3:6-10 (quoting ¶ 50 of
13 the existing complaint).

14 On October 10, 2013, Duarte commenced the above-entitled action, alleging a series of
15 claims (claims one, two, and five) that argue that the Corps issued the CDO without due process
16 of law. *See* Order of Mar. 24, 2015, at 3:22 through 4:2 (summarizing Duarte’s due process
17 claims). The same day, Duarte’s attorney issued a press release. *See* Duarte’s Motion for Leave,
18 Ex. B at 1-6 (ECF No. 80-4). Given the pending litigation, the Corps did not comment. *Id.*

19 On April 23, 2014, the Court denied a motion filed by the U.S. Department of Justice, on
20 behalf of the Corps, to dismiss the due process claims. Order of Apr. 23, 2014 (ECF No. 27).

21 On May 7, 2014, the U.S. Department of Justice, on behalf of the Corps, filed an answer
22 to the due process claims and, in addition, a counterclaim for injunctive relief and civil penalties
23 under the CWA. As the Court has correctly noted, “the government’s counterclaim . . . seeks
24 enforcement against the same activity alleged in the previously issued CDO[.]” Order of Mar.
25 24, 2015, at 8:22-23. The United States followed Fed. R. Civ. P. 13(a), which provides: “A
26 pleading must state as a counterclaim any claim that . . . the pleader has against an opposing
27 party if the claim . . . arises out of the transaction or occurrence that is the subject [] of the
28 opposing party’s claim[.]”

1 On August 20, 2014, Duarte filed its existing complaint. In addition to its due process
2 claims, Duarte then raised an allegation – in claim six – that Duarte’s decision to sue the Corps
3 and make statements to the media were “substantial” or “motivating factors” behind the United
4 States’ decision to file the counterclaim. Existing Compl. ¶ 84. Duarte characterized that claim
5 as “Retaliatory Prosecution” in violation of the First Amendment. Existing Compl. at 19. The
6 relief Duarte sought was non-monetary; i.e., “[a] prohibitory judgment preventing the Corps
7 from prosecuting the Counterclaim and taking other enforcement action[] . . . until the Corps can
8 establish that it would make the same enforcement decisions absent [Duarte’s] First Amendment
9 protected activity.” Existing Compl. at 20.

10 **THE COURT’S ORDER OF MARCH 24, 2015**

11 On March 24, 2015, the Court granted the United States’ Rule 12(b)(6) motion to dismiss
12 Duarte’s First Amendment retaliation claim.²

13 The Court explained, as an initial matter, that “[a] First Amendment retaliation claim
14 requires that plaintiff ultimately show three elements: ‘(1) that the plaintiff was engaged in
15 constitutionally protected activity; (2) that the defendant’s actions caused the plaintiff to suffer
16 an injury that would chill a person of ordinary firmness from continuing to engage in that
17 activity; and (3) that the defendant’s adverse action was substantially motivated as a response to
18 the plaintiff’s exercise of constitutionally protected conduct.’” Order of Mar. 24, 2015, at 7:26
19 through 8:4 (quoting *Schneider v. Cnty. of Sacramento*, Civ. No. S-12-2457, 2014 WL 418764,
20 at *8 (E.D. Cal. Aug. 21, 2014)). The Court further explained that Duarte “must show the
21 government acted with retaliatory intent ‘with the purpose of deterring the exercise of First
22 Amendment freedoms’ and not ‘as a legitimate response to litigation.’” *Id.* at 8:10-13 (quoting
23 *Greenwich Citizens Comm., Inc. v. Counties of Warren & Washington Indus. Dev. Agency*, 77
24 F.3d 26, 30-31 (2d Cir. 1996)).

25 Moreover, the Court found Duarte’s pleading deficient with respect to the second and
26 third elements of a First Amendment retaliation claim. The existing complaint, the Court
27

28 ² The Court did not reach the United States’ Rule 12(b)(1) arguments regarding that claim.

1 concluded, “includes no facts supporting an inference the government’s counterclaim was
2 motivated by [Duarte’s] speech.” Order of Mar. 24, 2014, at 8:20-21. Further, the Court
3 determined that it would be unreasonable to “infer any retaliatory motive when the CDO . . .
4 [was] issued before [Duarte] ever spoke on the issue or filed their original complaint.” *Id.* at 8:8-
5 9. In addition, the Court held that even if the existing complaint had alleged a link between First
6 Amendment activity and the counterclaim, “plaintiffs have not pleaded any injury caused by the
7 alleged retaliatory conduct.” *Id.* at 8:24-25.

8 The Court directed Duarte “to file any second amended complaint consistent with this
9 order within 21 days.” *Id.* at 9:7-8. That deadline expired on April 14, 2015. Nearly three
10 months later, Duarte filed the present motion.

11 STANDARD OF REVIEW

12 As the Court’s Scheduling Order provides: “No further joinder of parties or amendments
13 to pleadings is permitted without leave of court, good cause having been shown.” Amended
14 Status (Pretrial Scheduling) Order of May 14, 2015, at 2:6-8 (citing Fed. R. Civ. P. 16(b);
15 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992)). “[T]he focus of the [good
16 cause] inquiry is upon the moving party’s reasons for seeking modification.” *Johnson*, 975 F.2d
17 at 609. Similarly, as Duarte acknowledges, “[l]eave need not be granted where the amendment
18 of the complaint . . . constitutes an exercise in futility.” Duarte’s Mot. at 2:25-28 (quoting *Ascon*
19 *Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989)).

20 ARGUMENT

21 Duarte seeks to amend based on its contention that “[t]he proposed Second Amended
22 Complaint alleges the necessary additional facts to state a claim . . . for First Amendment
23 retaliation[.]” Duarte’s Mot. at 2:1-2. Duarte is wrong. Neither the proposed Second Amended
24 Complaint nor any reasonable inference drawn from the exhibits to Duarte’s motion (and
25 informing the allegations Duarte seeks to make) cures the deficiencies found by this Court.

26 I. DUARTE FAILS TO ALLEGE RETALIATORY MOTIVE

27 As a matter of law, the proposed Second Amended Complaint fails to “plead[] a link
28 between [Duarte’s] speech and the government’s counterclaim.” Order of Mar. 24, 2015, at

1 8:22. Duarte concedes that “the proposed Second Amended Complaint does not allege a new
2 theory.” Duarte’s Mot. at 5:9-10. But that is precisely the problem; the Court has already
3 rejected the original theory. The Court held: “The counterclaim for enforcement of the
4 previously issued CDO . . . is a mere extension of actions the government took well before the
5 [First Amendment] activity plaintiffs allege was a substantial factor motivating the filing of the
6 counterclaim.” Order of Mar. 24, 2015, at 8:14-17. Nothing in the proposed Second Amended
7 Complaint alters the factual premise of that holding. It remains undisputed that the CDO was
8 issued “before plaintiffs ever spoke on the issue or filed their original complaint.” *Id.* at 8:8-9.
9 *See* Proposed Second Am. Compl. ¶ 51 (CDO issued on February 25, 2013); *id.* at ¶ 81 (original
10 complaint filed on October 10, 2013); *id.* at ¶ 81 (after the complaint’s filing, “Plaintiffs engaged
11 in a variety of First Amendment protected activities”).

12 Duarte argues that the Court’s Order left open the possibility that the Corps could
13 develop a retaliatory motive sometime after the issuance of the CDO. *See, e.g.*, Duarte’s Mot. at
14 5:24-26 (asserting that the Order “identifies the necessary additional facts that Duarte must
15 allege in order to state a claim for First Amendment retaliation: retaliatory motive on the part of
16 the Army Corps, without which the United States would not have filed the Counterclaim”).
17 Duarte previously (and unsuccessfully) made that argument, and it ignores the plain terms of the
18 Court’s Order. The Court found the CDO and the counterclaim to be part and parcel of
19 enforcement, with the CDO constituting a preliminary step in the process. That means that if the
20 Corps did not act with a retaliatory motive at the time of the CDO -- and there is no allegation
21 that the Corps did -- then the Corps necessarily did not act with a retaliatory motive later in the
22 enforcement process, including after Duarte’s alleged First Amendment activity.

23 But even if the Court’s Order left room for debate on this point, the five exhibits Duarte
24 relies upon -- i.e., Exhibits B through F (ECF Nos. 80-4 through 80-8) -- do not support a
25 reasonable inference that the Corps became motivated by retaliation during the enforcement
26 process. *Cf. Schneider*, 2014 WL 4187364, at *8 (in resolving a motion to dismiss, “the court
27 must draw *reasonable* inferences and read the complaint in the light most favorable to
28 plaintiffs.”) (emphasis added).

1 *First*, Exhibit B to Duarte’s motion is a press release by Duarte’s lawyer, issued on the
2 same day that its original complaint was filed, and forwarded via email to the Corps by a local
3 newspaper, the Red Bluff Daily News. As the email shows, the Corps had no comment
4 “regarding the pending litigation.” Duarte’s Mot., Ex. B at 1. There is no evidence of a
5 retaliatory motive.

6 *Second*, Exhibit C to Duarte’s motion is the Corps’ inspection report, excerpts of which
7 have been discussed *supra* p. 2. In that report, completed on February 19, 2013 and
8 electronically signed on October 10, 2013, Matthew Kelley of the Corps described, in detail, his
9 observations and key facts supporting the allegation that Duarte violated the CWA, including:
10 (a) streams and wetlands exist on Duarte’s property; (b) they constitute “waters of the United
11 States” protected by the CWA; (c) Duarte knew of the existence of streams and wetlands when
12 he ripped his property; (d) Duarte’s contractor nevertheless ripped right through streams and
13 wetlands; and (e) Duarte added dredged or fill material to streams and wetlands from a point
14 source without a CWA section 404 permit. Evident on its face, nothing in that inspection report
15 indicates that the Corps was doing anything other than enforcing the CWA.

16 *Third*, Exhibit D to Duarte’s motion is the Corps’ draft referral letter to EPA dated
17 October 11, 2013 recommending, *inter alia*: (a) “[p]enalties sufficient to provide a deterrent and
18 negate any financial or temporal gains . . . realized as a result of the alleged violation[;]” and (b)
19 “[r]estoration of waters wherever possible and compensatory mitigation consistent with [the
20 Corps’] standards for waters where restoration is not possible.” Duarte’s Mot., Ex. D at 6. In
21 fact, the Corps never actually transmitted that draft letter or recommendation to EPA. Instead,
22 after learning of Duarte’s lawsuit, the Corps directly referred the matter of Duarte’s alleged
23 violations of the CWA to the U.S. Department of Justice (the Corps’ lawyer in Duarte’s lawsuit)
24 rather than refer it to EPA to decide whether to request enforcement assistance from the U.S.
25 Department of Justice. See Declaration of James Robb ¶¶ 7-13 (July 24, 2015) (Ex. A); see also
26 *supra* p. 2. In any event, the only reasonable inference to be drawn from Exhibit D is that the
27 Corps acted responsibly, not with a retaliatory motive.
28

1 *Fourth*, Exhibit E to Duarte’s motion is a portion of Mr. Kelley’s deposition, in which he
2 testified that: (a) his office is located in Redding whereas the Sacramento District of the Corps is
3 based in Sacramento; (b) it was more efficient for Mr. Kelley to sign his inspection report
4 electronically, as opposed to in hard copy, to avoid (in his words) “ship[ping] it back and forth”
5 between Redding and Sacramento; (c) Mr. Kelley does not remember when he had been
6 requested to sign the inspection report; and (d) Mr. Kelley does not remember if he knew that
7 Duarte had commenced this action at the time he electronically signed the inspection report.
8 None of these facts supports an inference of a retaliatory motive on the part of the Corps.
9 Rather, the only reasonable inference is that the Corps wanted to transmit a signed inspection
10 report to EPA in conjunction with the referral discussed above (i.e., Exhibit D to Duarte’s
11 motion). In fact, that is precisely what happened. Robb Decl. ¶ 10.

12 *Fifth*, and last, Exhibit F to Duarte’s motion is an email by Caleb Unruh, Duarte’s
13 contractor who ripped the property. The context of the email regards the rescheduling of a
14 deposition due to Mr. Unruh’s recovery from surgery. Duarte’s Mot., Ex. F, at 2. In that email,
15 Mr. Unruh accused the United States of retaliation, citing counsel’s attempt to explain, in lay
16 terms, the procedural posture of the case, i.e., that Duarte filed its lawsuit before the United
17 States filed its counterclaim. *Compare* Fed. R. Civ. P. 13(a) (“A pleading must state as a
18 counterclaim any claim that . . . the pleader has against an opposing party if the claim . . . arises
19 out of the transaction or occurrence that is the subject [] of the opposing party’s claim[.]”) *with*
20 Duarte’s Mot., Ex. F, at 2 (“I asked him what was going on to which he replied ‘You know that
21 they sued us.’ I said yes I knew that. He said ‘Well, so we are suing them.’ We then spoke
22 informally for a half hour about said matter. I am a Christian. I do not believe in retaliation.
23 This does not make me feel very good.”). This accusation of retaliation was clearly unfounded
24 and is not evidence of a retaliatory motive.³

25 In sum, nothing Duarte argues or proposes to plead comes remotely close to “show[ing]
26 [that] the government acted with retaliatory intent ‘with the purpose of deterring the exercise of
27 _____

28 ³ For completeness, the United States attaches its response to Mr. Unruh’s email (Ex. B).

1 First Amendment freedoms’ and not ‘as a legitimate response to litigation.’” Order of Mar. 24,
2 2015, at 8:10-13 (quoting *Greenwich Citizens*, 77 F.3d at 30-31). For want of legally cognizable
3 or factually supported allegations of a retaliatory motive, leave to amend should be denied.

4 **II. DUARTE FAILS TO ALLEGE INJURY**

5 Leave to amend should be denied for an additional -- or freestanding -- reason: Duarte
6 has failed to “plead[] any injury caused by the alleged retaliatory conduct.” Order of Mar. 24,
7 2015, at 8:24-25. As this Court held, injury is an essential element of any First Amendment
8 retaliation claim. *Id.* at 7:26 through 8:3. But Duarte’s proposed Second Amended Complaint
9 provides only a cursory, conclusory accusation of injury. It alleges: “Plaintiffs have been
10 injured by the Corps’ retaliatory prosecution of the Counterclaim in violation of Plaintiffs’ First
11 Amendment rights. If an injunction does not issue enjoining Defendants from prosecuting the
12 Counterclaim, Plaintiffs will be irreparably harmed.” Proposed Second Am. Compl. ¶ 90. This
13 allegation falls far short of the mark. As the Supreme Court has emphasized time and again, “[a]
14 complaint must include something more than ‘an unadorned, the-defendant-unlawfully-harmed-
15 me accusation’ or ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of
16 action.” Order of Mar. 24, 2015, at 5:27 through 6:2 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662,
17 678 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

18 Thus, filing the proposed Second Amended Complaint would be an exercise in futility
19 because: (a) Duarte’s unadorned accusation of injury does not cure the deficiency identified by
20 this Court in its Order of March 25, 2015; and (b) binding precedent does not permit a party to
21 plead an essential element of a claim in such a conclusory manner.

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CONCLUSION

Duarte's Motion to File Second Amended Complaint (ECF No. 80) should be denied.

Respectfully submitted,

Dated: July 24, 2015

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CERTIFICATE OF SERVICE

I hereby certified that on this 24th day of July, 2015, I electronically filed the foregoing opposition and exhibits A and B referenced therein. All counsel of record will be served through the Court's e-filing system.

/s Andrew J. Doyle
Attorney for the United States

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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-DAD

**DECLARATION OF JAMES
ROBB OF U.S. ARMY CORPS OF
ENGINEERS**

1 I, James Robb, declare as follows:

2 1. Since 2009, I have been employed by the U.S. Army Corps of Engineers.

3 2. I am a Senior Project Manager and have over 20 years of experience in aquatic
4 resource regulation.

5 3. On or about March 10, 2013, when the Sacramento District of the U.S. Army
6 Corps of Engineers established the Enforcement Unit, I began investigating Duarte Nursery, Inc.
7 and John Duarte's ("Duarte") alleged Clean Water Act violations.

8 4. As an initial matter, I examined the records for this matter to make sure that they
9 were complete and organized.

10 5. I also drafted a timeline of events, dated July 3, 2013, relevant to the
11 investigation. The bates-stamp on the first page of the timeline is USACE0003020.

12 6. As noted on the timeline, the records include February 19, 2013 investigation
13 report by Matthew P. Kelley, the Chief of the Sacramento District's Redding Regulatory Office.

14 7. In early October 2013, the Sacramento District prepared to refer the matter of
15 Duarte's alleged Clean Water Act violations to Region 9 of the U.S. Environmental Protection
16 Agency ("EPA") in accordance with the Memorandum of Agreement Between the Department
17 of the Army and the Environmental Protection Agency Concerning Federal Enforcement for the
18 Section 404 Program of the Clean Water Act (Jan. 19, 1989).

19 8. As part of that preparation, I drafted a cover letter and referral memorandum.

20 9. On October 9, 2013, I requested, via email, that the draft be prepared for signature
21 by the Sacramento District's Deputy Regulatory Division Chief. That email has a bates-stamp of
22 USACE0006550 and is attached hereto. The bates-stamp of the first page of the draft cover
23 letter and referral memorandum is USACE0001720. It is dated October 11, 2013, because that is
24 when I expected it to be sent, following the Deputy Chief's signature, to EPA.

25 10. When gathering records to enclosure with the referral package to EPA, I noticed
26 that Matthew Kelley's investigation report of February 19, 2013 had not been signed by him. In
27 an email dated October 10, 2013, 7:58 a.m. Pacific time, I asked Matthew Kelley to sign the
28 investigation report. That email, consolidated with subsequent replies, has a bates-stamp of

1 USACE0006599 and is attached hereto. In the same email, I noted my intention was to send the
2 referral letter out by that Friday, October 11, 2013. Within an hour (8:50 a.m.), Mr. Kelley
3 responded via email by asking if I wanted a wet signature or electronic signature. I responded
4 that an electronic signature was fine. As shown on the inspection report, the first page of which
5 has a bates-stamp of USACE0000563 and the last page of which has a bates-stamp of
6 USACE0000567, Mr. Kelley signed the report document later that day (i.e., October 10, 2015).

7 11. I first heard that Duarte had filed a lawsuit against the Corps at 10:58 a.m. Pacific
8 time on October 10, 2013, when Paul Maniccia, the Enforcement Unit Chief, forwarded an email
9 from the Red Bluff Daily News with the subject "Embargoed: Tomorrow, lawsuit over feds'
10 shut-down of Tehama wheat farm." The first page of that email has bates-stamp of
11 USACE0001310.

12 12. Shortly thereafter, the Sacramento District conferred with EPA, and the U.S.
13 Army Corps of Engineers referred the matter of Duarte's alleged violations of the Clean Water
14 Act to the U.S. Department of Justice in conjunction with its representation of the U.S. Army
15 Corps of Engineers in Duarte's lawsuit.

16 13. The draft cover letter and referral memorandum was never sent to EPA.

17 I declare under penalty of perjury that the foregoing is true and correct.

18 Executed on July 24, 2015.

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James Robb

From: Case 2:13-cv-02095-KJM-DAD Document 82-1 Filed 07/24/15 Page 4 of 5
Robb, James T SPK
To: Jenkins, Chandra SPK
Sent: 10/9/2013 4:28:42 PM
Subject: printable, Ohm Road referral (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Channa would you prep this for Mike Nepstad's signature? Per our last discussion, you don't do QC on the attachments right?

R:\ORM\1994\199400697\Ohm Road Violations Master File\USACE referral cover letter.docx

Jamie

James T. Robb
Senior Regulatory Project Manager
Sacramento District, US Army Corps of Engineers
1325 J Street, Room 1350
Sacramento, CA 95814
James.T.Robb@usace.army.mil
o: 916-557-7610
m: 916-397-9421

Classification: UNCLASSIFIED
Caveats: NONE

Case 2:13-cv-02095-KJM-DAD Document 82-1 Filed 07/24/15 Page 5 of 5
From: Robb, James T SPK
To: Kelley, Matthew P SPK
CC: Maniccia, Paul M SPK
Sent: 10/10/2013 11:50:51 AM
Subject: RE: Need signed initial investigation reports for Duarte & LaPant/Farmland (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Their MFRs so I think an electronic signature should be fine. Thanks.

-----Original Message-----

From: Kelley, Matthew P SPK
Sent: Thursday, October 10, 2013 8:50 AM
To: Robb, James T SPK
Subject: RE: Need signed initial investigation reports for Duarte & LaPant/Farmland (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Do you want me to print and wet sign or do you want me to electronically sign?

-----Original Message-----

From: Robb, James T SPK
Sent: Thursday, October 10, 2013 7:58 AM
To: Kelley, Matthew P SPK
Cc: Maniccia, Paul M SPK
Subject: Need signed initial investigation reports for Duarte & LaPant/Farmland (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Would you please sign these today. I'm trying to get the referral letter out by Friday. Thanks. You'll find them at the following locations.

R:\ORM\1994\199400697\Ohm Road Violations Master File\2012_12_19 USACE Initial Investigation Report SPK-2012-01296 UNSIGNED.pdf
R:\ORM\1994\199400697\Ohm Road Violations Master File\2013_02_19 USACE Initial Investigation Report (SPK-2013-00015) UNSIGNED.pdf

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Caveats: NONE

Do, John Thomas (ENRD)

From: Do, John Thomas (ENRD)
Sent: Thursday, May 28, 2015 6:44 PM
To: Caleb Unruh
Cc: Broderick, Gregory (USACAE); Doyle, Andrew (ENRD); pprows@briscoelaw.net
Subject: RE: Duarte Matter
Attachments: ENV_DEFENSE-#725081-v1-Duarte_Deposition_Letter_Unruh_05_28_15.pdf

Please see the attached letter. The body of the letter is also included in this email below:

Mr. Unruh,

Given the news that you are in recovery following surgery and on medication, we agree to reschedule the deposition. Although the subpoena remains in effect, you need not appear on June 1st as it states. We will write you next week to re-schedule.

You may not be in a position right now to fully consider this information, but please know that your perception of retaliation is incorrect. The activities of Duarte Nursery and John Duarte at the site were of concern to the Corps of Engineers nearly a year before Duarte filed its lawsuit. In December 2012, the Corps spoke with Mr. Duarte. Duarte did not file this lawsuit until October 2013. The United States Department of Justice (where we work) filed a claim on behalf of the Corps in May 2014. We learned of your involvement in January 2015, when Duarte disclosed your name to us and described you as the “farming contractor for the Property” and also informed us that you “may testify on the farming of the Property.”

Please also know that in order for us to fully learn, from you, what information you have about this matter, the law requires personal service of a subpoena unless you waive such service. You did call Mr. Broderick, but he was not available during the 15-minute window of time in which you stated that he may return your call.

Please recover well.

John Thomas Do
Attorney | U.S. Department of Justice | Environment & Natural Resources Division
P.O. Box 7611 Washington DC 20044 | 202-514-2593 | john.do@usdoj.gov

From: Caleb Unruh [<mailto:unruhventure@gmail.com>]
Sent: Thursday, May 28, 2015 11:07 AM
To: Do, John Thomas (ENRD); Broderick, Gregory (USACAE); pprows@briscoelaw.net
Subject: Duarte Matter

To all involved with this matter;

I write this as I can, going from place to place. I am a farmer by trade. A farmer's work is very seasonal. Spring time is a very busy time for a farmer. If the ground is not worked and the seeds are not planted in a

"And on the 8th day, God looked down on his planned paradise and said, "I need a caretaker." So God made a farmer. God said, "I need somebody willing to get up before dawn, milk cows, work all day in the fields, milk cows again, eat supper and then go to town and stay past midnight at a meeting of the school board." So God made a farmer. "I need somebody with arms strong enough to rustle a calf and yet gentle enough to deliver his own grandchild. Somebody to call hogs, tame cantankerous machinery, come home hungry, have to wait lunch until his wife's done feeding visiting ladies and tell the ladies to be sure and come back real soon -- and mean it." So God made a farmer. God said, "I need somebody willing to sit up all night with a newborn colt. And watch it die. Then dry his eyes and say, 'Maybe next year.' I need somebody who can shape an ax handle from a persimmon sprout, shoe a horse with a hunk of car tire, who can make harness out of haywire, feed sacks and shoe scraps. And who, planting time and harvest season, will finish his forty-hour week by Tuesday noon, then, pain'n from 'tractor back,' put in another seventy-two hours." So God made a farmer. God had to have somebody willing to ride the ruts at double speed to get the hay in ahead of the rain clouds and yet stop mid-field and race to help when he sees the first smoke from a neighbor's place. So God made a farmer. God said, "I need somebody strong enough to clear trees and heave bails, yet gentle enough to tame lambs and wean pigs and tend the pink-combed pullets, who will stop his mower for an hour to splint the broken leg of a meadow lark. It had to be somebody who'd plow deep and straight and not cut corners. Somebody to seed, weed, feed, breed and rake and disc and plow and plant and tie the fleece and strain the milk and replenish the self-feeder and finish a hard week's work with a five-mile drive to church. "Somebody who'd bale a family together with the soft strong bonds of sharing, who would laugh and then sigh, and then reply, with smiling eyes, when his son says he wants to spend his life 'doing what dad does." So God made a farmer.

I received a subpoena about a month ago requesting information on what only has been referred to me as the "Duarte matter." I called and spoke with John Thomas Do. I asked him what was going on to which he replied "You know that they sued us." I said yes I knew that. He said "Well, so we are suing them." We then spoke informally for a half hour about said matter. I am a Christian. I do not believe in retaliation. This does not make me feel very good. An eye for an eye and a tooth for a tooth is Old Testament. Soon after this subpoena, my father in-law found a man waiting at my house for me after dark around 9-9:15pm. This subpoena was the beginning of a parade of voicemails and emails. Due to my season I was not able to immediately return these, which appears to have upset some involved with this matter. I received a second subpoena about two weeks ago requesting me to testify at a deposition. With this subpoena was a letter stating that the DOJ had not received a response from me. This is not true. I called and left a voicemail with Greg on the 12th of May to which no response was made. Then this guy that came after dark came again around the same time of night looking for me. This upset me as it was causing my wife to feel unsafe due to the time of day this man came around. Do you know what enters the vineyard after dark? The foxes..... I feel stalked and harassed after all of this. Then last Thursday night late, I went into emergency surgery to remove a highly infectious appendix. I am asking that my deposition be postponed to allow for my recovery, as I don't feel I can leave a clear testimony with the powerful narcotics and antibiotics that have been prescribed. I also ask that my deposition be taken in the city of Willows CA 95988. I ask that no contact be made at my home. I ask that all informal communications cease. No more phone calls please. I ask that any communications be in writing and a copy sent to all involved with this matter.

Thank you in advance for your patience.

Caleb Unruh