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March 19, 1996

Mr. John Caffrey
Chairman
State Water Resources Control Board
P. O. Box 100
Sacramento, CA 95814-6415

Re: Summer Peck Ranch Injunction:
Application For Drain Discharge Permit

Dear Mr. Caffrey:

As you know, we represent the plaintiffs in the Summer Peck Ranch case in connection with implementation of the U.S. District Court's injunction mandating that the federal government take actions to prepare, file, and pursue an application for a discharge permit for the San Luis Drain to the Sacramento-San Joaquin Delta and the Board's upcoming proceedings relating to that expected application.

My firm's letter, dated January 26, 1996, to the federal government, a copy of which was sent to you, sets forth our clients' grave concerns about the government's failure to perform the mandatory injunction to date.

The purpose of this letter is to outline in brief some of the procedural issues the Board can be expected to face in the coming weeks and months relating to this matter.

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First, please permit me to remind the Board and its staff that our clients initially attempted to join the Board as a party in the Peck litigation. Upon receiving the Court's view that, as of April 1993, the Board's joinder was not yet ripe, our clients voluntarily dismissed their claims against the Board without prejudice. At that time, however, the Court said: "If they do something that tangibly affects you and that imposes hardship, there is nothing that prevents you from amending this complaint to rejoin the State as a party."

It may also be significant to note that the testimony of one Board staff member was submitted by the U.S. at the Peck trial in an attempt to establish that its drainage obligation was excused. In our view, a careful analysis of the implications of this testimony for the upcoming proceeding is warranted.

The Board has previously received copies of the Court's findings of fact, conclusions of law, and partial judgment thereon. We think that the Board must take careful account of certain key rulings therein.

The Court ruled that the government is refusing to follow the Congressional mandate to build and operate the Drain in furtherance of a policy decision. FOF 37; COL 19; Judgment ¶14. In other words, the applicant who will come before the Board can not, as usual, be expected to file the best possible application, but instead can be expected to file an inadequate application in an effort to prompt a denial in furtherance of its anti-drainage policy.

The Court found that the Board will act on a fully developed administrative record which would include at least 17 specified items. FOF 31. We think all interested parties should focus now on appropriate methodologies for collecting and presenting in the application those and other appropriate items.

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The Court made extensive findings about the probable selenium concentration of water from the San Luis Unit as a whole to be discharged in the Delta by the completed and fully operating Drain. FOF 41-55. The Court found that there was no scientific basis for the government's original prediction of 300 ppb, nor for its revised prediction at trial's end of 150 ppb. FOF 53, 54. The best evidence on this question -- the government's own formal studies -- suggests that the true concentration may be only about 6 ppb. FOF 44,45. This key threshold issue is one on which our clients intend to focus in the upcoming proceeding.

The Court found that the Board, not its staff, will decide the permit issues. FOF 31. We think this is important, particularly in light of your staff's court testimony which provided some support for the government's policy position.

As you know, the California Legislature mandated in 1982 that the Board "shall permit the discharge" of drainage water from the Drain to the Delta if it finds that certain specified requirements are satisfied. Water Code § 13953.2. The Court made various rulings relating to this key statutory mandate. FOF 29, 68; COL. 4, 22; Judgment ¶4. It also ruled that California's water quality laws do not excuse the government's drainage duties. COL. 3,4; Judgment ¶¶3(a), 3(b). It is our view that Water Code Section 13953.2 must be the Board's main focus in the upcoming proceedings. Our clients firmly believe that the Drain can and, if the federal government does its duty, will satisfy all requirements of that statute. The construction and operation of the Drain will, at long last, solve the ever-worsening waterlogging and salinization problem in the Valley, without harming beneficial uses in the Delta.

The Court's rulings cover various key issues in addition to selenium concentration, including treatment of the

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drain water before discharge, if necessary, dilution thereof after discharge, if necessary, and the effect thereof, if any, on wildlife in the Delta. In particular, the Court addressed the dilution ratio issue, and ruled that the evidence did not establish what ratio, if any, would apply. FOF 78-82. Your February 8, 1996 letter to the U.S. inviting it and other interested parties to a workshop in early April to give guidance on preparation of an application was constructive and welcomed by our clients. We note, however, the statement that the Board "will reconsider the matter of initial dilution." Subsequent discussions with staff members have disclosed that the staff will make no recommendations at that time on that issue, and that the Board will then make no decisions. We think it very important that the Board make no decisions about dilution ratios or anything else which may have the effect of requiring denial of the permit, or the imposition of restrictive conditions thereon, prior to receipt and careful review of a complete application.

The U.S., certain Board staffers, and others -- but not our clients -- have been participating for some time in the San Joaquin Valley Drainage Program and Drainage Implementation Program which have focussed exclusively on possible "in-valley solutions" to the drainage problem. The Court made extensive findings thereon, and ruled that the government had failed to take necessary steps and had not effectively addressed the problem. FOF 34-40. Furthermore, in addition to the central ruling that Unit lands must be drained, the Court ruled that the government is authorized, although not directed, to drain non-Unit lands, as well, through the Drain to the Delta. COL. 14; Judgment ¶7. It is our view that the SJV Drainage Program and Drainage Implementation Program, and any participation therein by the Board's staff, must now focus on draining Unit lands (and perhaps non-Unit lands too) by means thereof. Our clients would appreciate the opportunity to participate in such an endeavor.

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Please also permit me to remind the Board and its staff that Rule 65(d) of the Federal Rules of Civil Procedure provides that every injunction is binding, not only upon the actual parties to the action, but also "upon those persons in active concert or participation with them" who receive actual notice of the injunction.

Before and at the workshop we would like to engage the Board and its staff in another threshold procedural issue of particular concern. Any adjudication, including one before a quasi-adjudicatory agency, must be a true contest of adversaries who aggressively and fully present the merits of their respective cases. Only then can an independent and impartial adjudicator render a proper decision. See generally Witkin, "Friendly Suit," California Procedure, 3rd Ed., Actions §47; Wright, Miller & Cooper, "Adversary, Feigned, and Collusive Cases," Federal Practice and Procedure: Jurisdiction 2d Ed., §3530.

In view of certain facts unique to the upcoming proceeding -- especially the disturbing notion that the applicant may attempt to "throw" the match -- the Board, we believe, should institute appropriate protective mechanisms up front to insure that a bona fide application is filed and reviewed.

We look forward to discussing various possible mechanisms with the Board and its staff, including the intervention of real parties in interest, participation by amici curiae, or the appointment of a special master. At the very least, as you are well aware, the Board is required to implement a public information program, consult with and carefully evaluate the recommendations of concerned local agencies, and adopt state policy after public hearings. Water Code §§ 13144, 13147, 13167. In the context of quasi-adjudicatory proceedings, such as we have here, an interested person may request a prehearing conference or participate in the hearing itself. 23 CCR §§ 648.3, 648.8. In

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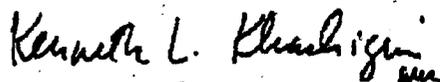
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this connection, our clients request that they and their representatives be allowed to participate in all appropriate ways in the Board's upcoming review relating to the government's anticipated application.

To conclude, there is a particularly serious water quality problem before the Board. I do not refer to the aberrant past discharges by the government of drainage water from a few selenium "hot spots" to Kesterson Reservoir. And I do not even refer to the future discharges to the Delta of drainage water from the Unit, or possibly beyond. The real water quality problem facing the Board, I respectfully submit, is the current waterlogging and salinization of our clients' lands and those of thousands of other farmers in the San Joaquin Valley. Our clients' damages alone amount to \$500 million. We want to help you solve this very serious problem.

We look forward to participating in the upcoming workshop and will be prepared to review these issues with you and your fellow Board members.

Cordially,



Kenneth L. Khachigian

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cc: Board Members
Mr. Walt Pettit
William Attwater, Esq.
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