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**IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA**

TRI-DAM,

Plaintiff,

v.

RICHARD SCHEDIWY AND LAURA  
STRAUSS,

Defendants.

1:11-cv-01141-AWI-MJS

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

(Docs. 64, 72)

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**I. INTRODUCTION**

Plaintiff, Tri-Dam, and Defendants Richard Schediwy and Laura Strauss filed competing motions for summary pursuant to Federal Rule of Civil Procedure 56. Plaintiff filed its motion on October 18, 2013, the dispositive motions deadline. Defendants filed their opposition and motion on November 8, 2013, three weeks after the dispositive motions deadline. For the following reasons Plaintiff's motion for summary judgment shall be granted and Defendants' motion for summary judgment shall be denied.

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1 **II. FACTS AND PROCEDURAL BACKGROUND**

2 Tri-Dam, a joint venture between the South San Joaquin Irrigation District and Oakdale  
3 Irrigation District, owns and operates the Tulloch Hydroelectric Project No. 2067 located near  
4 the city of Copperopolis, California, pursuant to a license issued by the Federal Energy  
5 Regulatory Commission (“FERC”). First Amended Complaint (“FAC”) at ¶¶ 3-4. The Tulloch  
6 Project boundary extends approximately 1,619 acres and includes all the land within the 515-foot  
7 elevation contour surrounding the Tulloch Reservoir. FAC at ¶ 5. FERC first granted Tri-Dam a  
8 license to operate the Tri-Dam Project on January 1, 1955, for a term ending December 31, 2004.  
9 FAC at ¶ 8. Article 39 of the license granted Tri-Dam the authority to grant permission for use of  
10 lands within the Tulloch Project boundary without prior approval of FERC. FAC at ¶ 8; Tulloch  
11 Reservoir Shoreline Management Plan, December 2002, (“SMP”) at p. 1-1.

12 FERC requires that each licensee (Tri-Dam) obtain control of all lands needed for  
13 operation and maintenance of the project. Declaration of Dan Pope, Exhibit B (“FERC License”)  
14 at p. 35, 114 FERC ¶ 62, 162 (2006). Sixty-one percent of the land within the FERC Project  
15 Boundary is privately owned, twenty-six percent of the land is owned by the Oakdale and South  
16 San Joaquin Irrigation Districts and twelve percent is owned by either the state or federal  
17 governments. SMP at p. 6. Tri-Dam obtained a flowage easement for all of the land within the  
18 FERC Project boundary in 1956. The easement to Oakdale and South San Joaquin Irrigation  
19 Districts, granted the following uses and purposes:

- 20 (a) The right to permanently overflow, flood and cover [the FERC Project Boundary]  
21 land with flood, slack, or back water created by the erection and operation of the  
22 Tulloch Dam across the Stanislaus River;  
23 (b) The right to enter upon said land from time to time to clear, destroy, or dispose of any  
24 timber or other natural growth, any obstructions, accumulations, trash, filth and any  
25 other thing which would in any way interfere with the use of said reservoir, or the  
waters therein, or tend to render unsafe or unsanitary either the reservoir created by  
said dam or the margin thereof;  
(c) The right to ingress to and egress from said lands for the purposes aforesaid.

26 Request for Judicial Notice (“RJN”), Exhibit A, Conveyance of Easement, Doc. 65-1 at p. 4;  
27 Separate Statement of Undisputed Material Fact (“SSF”) at ¶ 7; SMP at p. 6. This easement  
28 applied to all property within the 515-foot elevation contour. *Id.*

1 In 2002, Tri-Dam developed Tulloch Reservoir’s most current Shoreline Management  
2 Plan (“SMP”)<sup>1</sup> in anticipation of obtaining a new license for the Tulloch Project. Observing the  
3 FERC license required Tri-Dam to obtain FERC approval for (1) actions that would in any way  
4 reduce the storage capacity of Tulloch Reservoir and (2) use of lands within the FERC Project  
5 Boundary, the SMP recognized there was considerable public interest for development of the  
6 Tulloch Reservoir shoreline and that some of this development could conceivably have only  
7 minor impacts on reservoir storage or project operations. Accordingly, the SMP expressed Tri-  
8 Dam’s need to approach FERC for general approval of minor development activities to facilitate  
9 such activities within the Project Boundary and avoid the need to obtain FERC approval for  
10 every individual development activity.

11 The SMP described the minor development activities for which Tri-Dam had requested  
12 FERC’s approval. One such minor development activity is the erection of a retaining wall. The  
13 SMP also outlined an “encroachment” permitting scheme through which parties could apply for  
14 – and Tri-Dam would issue – permits authorizing a particular use or facility within the FERC  
15 Project Boundary. According to the SMP, all proposed development activities are subject to  
16 requirements of applying for and obtaining a Tri-Dam encroachment permit.

17 On December 23, 2002, Tri-Dam filed an application with FERC for a new license,  
18 pursuant to sections 4(e) and 15 of the Federal Power Act (FPA, 16 U.S.C §§ 791 et seq.), to  
19 continue operation and maintenance of the Tulloch Project; the SMP was included as an exhibit  
20 to the new license application. On February 16, 2006, FERC issued a new license to Tri-Dam  
21 for a period of 39 years, 11 months subject to the terms and conditions of the FPA, which was  
22 incorporated into the license by reference. (Between 2004 and 2006, Tri-Dam operated the  
23 Tulloch Project under an annual license pending the disposition of its new license application.)  
24 Article 411 of this license approves the SMP. Article 413 gives Tri-Dam the authority to grant  
25 permission for certain uses and occupancies of project lands and waters, including non-  
26 commercial piers, landings and boat docks, without prior FERC approval, and continuing

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27 <sup>1</sup> The SMP was submitted by Tri-Dam with its license application in 2002 and remained in effect until FERC  
28 approved the revised Reservoir Management Plan as directed by the 2006 FERC license. FAC ¶ 11. Thus, the SMP  
was in effect at all times relevant to this action.

1 responsibility to supervise and control the uses and occupancies for which it grants permission.  
2 If a permitted use or occupancy violates any condition imposed by the license or by Tri-Dam,  
3 article 413 further gives Tri-Dam authority to take any lawful action necessary to correct the  
4 violation, including canceling the permission to use and occupy the project lands and waters and  
5 requiring the removal of any non-complying structures and facilities.

6 Defendants Richard Schediwy and Laura Strauss own real property in Copper Cove  
7 Estates, located at 4378 Council Trail, Copperopolis, in Calaveras County, California (“Subject  
8 Property”). Joint Statement of Undisputed Facts (“JSF”) at ¶ 1. Defendants applied with Tri-Dam  
9 for a permit to build a “concrete block stemwall / sloped back retaining wall at the 515’ contour  
10 elevation” in the Tulloch Reservoir. JSF at ¶ 2. On February 28, 2004, Tri-Dam granted  
11 Defendants’ application. JSF at ¶ 2; Declaration of Richard Schediwy, Doc. 72-3, (“Schediwy  
12 Dec.”) at ¶ 2. Defendants’ contractor installed the entire retaining wall on the Subject Property  
13 below the 515-foot elevation contour. JSF at ¶ 3. Although there is some disagreement about the  
14 exact contour elevation of the retaining wall, it is agreed the wall was constructed between the  
15 504 and 506-foot contour lines. Schediwy Dec. at ¶ 2; Schediwy Dec., Exhibit A.

16 On May 6, 2004, Susan Larson, Tulloch Coordinator, wrote Defendants on behalf of Tri-  
17 Dam to demand the removal of the wall constructed in violation of the permit requirements and  
18 the submission of a compliance proposal by Defendants by May 14, 2004. Doc.72-3, Exhibit A.  
19 Defendants made contact with Kathleen Norton, U.S. Army Corps Engineer, for direction  
20 regarding the removal of the retaining wall and informed Ms. Larson of their contact. Schediwy  
21 Dec. at ¶ 4. Defendants did not submit a compliance proposal as required by Tri-Dam. Schediwy  
22 Dec. at ¶¶ 4-5. On July 13, 2004, Ms. Larson wrote a letter to Defendants informing them their  
23 use of the retaining wall as a boat dock was in violation of permit conditions and again urging  
24 Defendants to submit a proposal that would bring their property into compliance. Schediwy Dec.,  
25 Exhibit C. On July 22, 2004, Defendants informed Ms. Larson that they received instruction  
26 from Ms. Norton to wait until winter when the water level drops below the five-hundred foot  
27 mark, remove the existing wall, gently back-fill to restore the original contour, and embark on  
28 new excavation to accommodate the new retaining wall. Doc. 72-3, Exhibit J. On September 16,

1 2004, Ms. Larson provided Defendants with a copy of the 2002 SMP detailing the application  
2 process for approval of a retaining wall. Schediwy Dec. at ¶ 11.

3 Defendants were unable to engage the services of the contractor who they had hired to  
4 build the wall. Defendants unsuccessfully attempted to retain six other contractors who could or  
5 would not accept the job. Schediwy Dec. at ¶ 22. Defendants were unable to secure permission  
6 from their neighbors to haul the debris, which would be generated by destruction of the wall,  
7 across their properties. Schediwy Dec. at ¶ 21. Defendants did not submit to Tri-Dam an  
8 application for a permit to build a new wall nor did they remove the improperly placed wall.

9 On December 31, 2004 Tri-Dam’s license to operate the Tulloch Project expired. Tri-  
10 Dam for two years thereafter operated under an annual license until a new license was granted on  
11 February 16, 2006. FERC License at p. 2.

12 In June 2005, Mr. Schediwy initiated arbitration against his former contractor for breach  
13 of contract due to the building of the wall that was not in compliance with the Tri-Dam permit.  
14 On December 12, 2005, Arbitrator Daniel Yamshon issued an award of \$43,036.55 to  
15 compensate Mr. Schediwy for: the payments made to the contractor for the building of the wall,  
16 expenses incurred by Mr. Schediwy based on the negligent building of the wall, the cost of  
17 demolition and debris removal. Declaration of Thomas Marrs, (“Marrs Dec.”) Exhibit F. On  
18 March 7, 2006, the arbitration order was confirmed by the Honorable Calaveras County Superior  
19 Court Judge William Kelsay. Marrs Dec., Exhibit F.

20 On July 8, 2011, Plaintiff filed suit in this court seeking an order permanently enjoining  
21 Defendants from maintaining a retaining wall that they had unlawfully constructed on the  
22 Subject Property at the 504-foot to 505-foot contour elevation. The retaining wall is still in place.

### 23 **III. LEGAL STANDARD**

24 “A party may move for summary judgment, identifying each claim or defense – or the  
25 part of each claim or defense – on which summary judgment is sought. The court shall grant  
26 summary judgment if the movant shows that there is no genuine dispute as to any material fact  
27 and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving  
28 party bears the initial burden of “informing the district court of the basis for its motion, and

1 identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and  
2 admissions on file, together with the affidavits, if any,’ which it believes demonstrate the  
3 absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986);  
4 *see* Fed. R. Civ. P. 56(c)(1)(A). “Where the non-moving party bears the burden of proof at trial,  
5 the moving party need only prove that there is an absence of evidence to support the non-moving  
6 party’s case.” *In re Oracle Corp. Securities Litigation*, 627 F.3d 376, 387 (9th Cir. 2010) (citing  
7 *Celotex, supra*, 477 U.S. at p. 325). If the moving party meets its initial burden, the burden shifts  
8 to the non-moving party to present evidence establishing the existence of a genuine dispute as to  
9 any material fact. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574,  
10 585-86 (1986). To overcome summary judgment, the opposing party must demonstrate a factual  
11 dispute that is both material, i.e. it affects the outcome of the claim under the governing law, *see*  
12 *Anderson*, 477 U.S. at 248; *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626,  
13 630 (9th Cir.1987), and genuine, i.e., the evidence is such that a reasonable jury could return a  
14 verdict for the nonmoving party. *See Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th  
15 Cir.1987). In order to demonstrate a genuine issue, the opposing party “must do more than  
16 simply show that there is some metaphysical doubt as to the material facts.... Where the record  
17 taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no  
18 ‘genuine issue for trial.’” *Matsushita, supra*, 475 U.S. at p. 587 (citation omitted).

19 A court ruling on a motion for summary judgment must construe all facts and inferences  
20 in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477  
21 U.S. 242, 255 (1986). Nevertheless, inferences are not drawn out of the air, and it is the opposing  
22 party's obligation to produce a factual predicate from which the inference may be drawn. *See*  
23 *Richards v. Nielsen Freight Lines*, 602 F.Supp. 1224, 1244–45 (E.D.Cal.1985), *aff'd*, 810 F.2d  
24 898, 902 (9th Cir.1987).

#### 25 IV. DISCUSSION

26 Plaintiff presents three arguments that it asserts entitle it to the requested injunctive relief:  
27 First, Defendants’ recovery of damages against their contractor based on their claim that they  
28 were required to remove the retaining wall requires judicial estoppel of Defendants’ position that

1 the wall need not be removed. Second, FERC has granted Tri-Dam the authority to approve or  
2 deny all minor encroachments on the Tulloch Reservoir and requires Tri-Dam to seek removal of  
3 all unpermitted or non-compliant developments. Third, Tri-Dam's broad easement over the  
4 Subject Property allows it to remove anything which in any way interferes with the use of the  
5 Tulloch Reservoir.

#### 6 **A. Judicial Estoppel**

7 Plaintiff asserts that "Defendants are judicially estopped from opposing Tri-Dam's  
8 request that they remove their unauthorized retaining wall because Schediwy benefitted from  
9 taking the opposite position in an earlier judicial proceeding." Plaintiffs Motion for Summary  
10 Judgment ("PMSJ") at p. 10. The doctrine of judicial estoppel, sometimes called the doctrine of  
11 preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one  
12 position, and then seeking a second advantage by taking an incompatible position. *Blix St.*  
13 *Records, Inc. v. Cassidy*, 191 Cal.App.4th 39, 47 (2010). The application of judicial estoppel is  
14 not limited to bar the assertion of inconsistent positions in the same litigation, but is also  
15 appropriate to bar litigants from making incompatible statements in two different cases. *Rissetto*  
16 *v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 605 (9th Cir. 1996) ("We now make it  
17 explicit that the doctrine of judicial estoppel is not confined to inconsistent positions taken in the  
18 same litigation"); *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d  
19 1540, 1548 (7th Cir.1990) (estoppel is even more appropriate where the incompatible statements  
20 are made in two different cases, since "[i]nconsistent positions in different suits are much harder  
21 to justify" than inconsistent pleadings within one suit).

22 The doctrine's dual goals are to maintain the integrity of the judicial system and to protect  
23 parties from opponents' unfair strategies. *See Aguilar v. Lerner*, 32 Cal.4th 974, 986 (2004); *New*  
24 *Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Judicial estoppel is an equitable doctrine  
25 invoked by courts in their discretion. *Id.*; *see also Yanez v. United States*, 989 F.2d 323, 326 (9th  
26 Cir.1993). Because of its harsh consequences, the doctrine should be applied with caution and  
27 limited to egregious circumstances. *Gottlieb v. Kest*, 141 Cal.App.4th 110, 132 (2006); *MW*

1 *Erectors, Inc. v. Niederhauser Ornametal and Metal Words Co., Inc.*, 36 Cal.4th 412, 422  
2 (2005).

3 The doctrine should apply when: (1) the same party has taken two positions; (2) the  
4 positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was  
5 successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as  
6 true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a  
7 result of ignorance, fraud, or mistake. *Jackson v. County of Los Angeles*, 60 Cal.App.4th 171,  
8 183 (1997); *Miller v. Bank of America N.A.*, 213 Cal.App.4th 1, 9 (2013) (citations omitted).

9 *1. The Same Party Has Taken Two Positions.*

10 In the arbitration proceeding between Mr. Schediwy and his former contractor it was  
11 determined, based on Mr. Schediwy’s testimony and the testimony of Susan Larson, that the  
12 retaining wall “needs to be demolished and removed.” Marrs Dec., Exhibit F at p. 10. From the  
13 face of the arbitration award it is unclear whether or not Mr. Schediwy explicitly indicated that  
14 the wall would have to be removed but he certainly benefited from that finding as it appears to  
15 have been the primary contributing factor in Mr. Schediwy’s recovery. *Id.* In fact, Mr. Schediwy  
16 was awarded \$28,125.00 to compensate him for the necessary demolition and debris removal. *Id.*  
17 at p. 11.

18 In the case presently before this Court Defendants deny that they have ever refused to  
19 remove the retaining wall. Amended Answer (“AA”) at ¶ 13. However, Defendants oppose the  
20 complete removal of the retaining wall, including the footings. *Id.* Defendants instead support  
21 what they have called an “alternative mitigation plan,” which proposes using the footings that are  
22 presently used to support the retaining wall to eventually support a dock once the present  
23 retaining wall is demolished and a new wall is built in conformity with the terms of the SMP and  
24 any permit issued by Tri-Dam.

25 Defendants first advanced the position that the wall was required to be removed.  
26 Defendants now oppose the complete removal of the wall. Although Defendants attempt to  
27 minimize the difference between these positions, they are, in fact, two different positions.

28 *2. The Positions Were Taken In Judicial or Quasi-Judicial Proceedings*



1 The Ninth Circuit has held that prior statements made in administrative hearings or in  
2 arbitration proceedings are appropriate subjects of judicial estoppel. *Rissetto* 94 F.3d at p. 604;  
3 *PowerAgent Inc. v. Electronic Data Systems Corp.*, 358 F.3d 1187, 1192-1193 (9th Cir. 2004);  
4 *Admiral Insurance Co. v. Rushmore*, 70 F.3d 1277, 1995 WL 693335 (9th Cir. 1995)  
5 (unpublished); *see also, In re Siller*, 427 B.R. 872, 886 (E.D. Cal. 2010); *Speroni S.p.A. v.*  
6 *Perceptron Inc.*, 12 Fed. Appx. 355, 358 (6th Cir. 2001) (unpublished). The rationale for  
7 application of judicial estoppel to these situations is that the “truth is no less important to [an  
8 entity] acting in a quasi-judicial capacity than it is to a court of law.” *Rissetto*, 358 F.3d at p. 604.  
9 The same rationale applies here.

10 The arbitration proceeding in question had many of the formal hallmarks of a judicial  
11 proceeding such as: the ability to call witnesses, the swearing of an oath of truthfulness by the  
12 parties, and a neutral party presiding over the hearing. *Marrs Dec.*, Exhibit F at p. 4.<sup>2</sup>

13 The action before this Court is clearly a judicial proceeding.<sup>3</sup>

14 Accordingly, neither the arbitration proceeding nor the action before this court fall  
15 outside the appropriate scope of judicial estoppel.

### 16 3. The Party Was Successful In Asserting The First Position

17 A party is successful in asserting a position for purposes of judicial estoppel when a  
18 position is successful in persuading a fact finder to accept the party’s position. *New Hampshire v.*  
19 *Maine*, 532 U.S. at p. 750. “Absent success in a prior proceeding, a party’s later inconsistent  
20 position introduces no ‘risk of inconsistent court determinations’ [citation] and thus poses little  
21 threat to judicial integrity.” *Id.* at p. 751 (citations omitted).

22 The arbitrator in the action between Mr. Schediwy and his former contractor awarded Mr.  
23 Schediwy \$28,125.00 for removal of the uncompleted sea wall based on his claim for the same.

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25 <sup>2</sup> The statements made by Mr. Schediwy’s counsel to his former contractor in the letter attached as Exhibit R to Mr.  
26 Marrs’ Declaration were not statements taken in judicial proceedings and are accordingly not considered for  
27 purposes of judicial estoppel analysis (except to the extent that they are concurrent with what was presented in the  
arbitration hearing).

28 <sup>3</sup> This Court does not find merit to Defendants contention that the statements made in their amended answer are not  
valid evidence. *See Am. Title Ins. Co. v. Lovelace Corp.*, 861 F.2d 224, 226 (9<sup>th</sup> Cir. 1988); *Tamsco Properties, LLC*  
*v. Langemeier*, 2013 WL 246782 at \*1 (E.D. Cal. 2013) (slip copy) (“Factual assertions in pleadings, unless  
amended, are considered judicial admissions conclusively binding on the party who made them.”)

1 Marris Dec., Exhibit F. at pp. 4, 10-11. Accordingly, Mr. Schediwy was successful in asserting  
2 his first position.

3 4. The Two Positions Are Not Totally Inconsistent

4 The Ninth Circuit has adopted a liberal approach in interpreting this element of judicial  
5 estoppel, reflecting its preference that claims be litigated on their merits. *See Admiral Ins. Co. v.*  
6 *Rushmore*, 70 F.3d 1227, 1995 WL 693335 at \*3 (9th Cir. 1995) (unpublished) (Noting that “in  
7 most cases, [the Ninth Circuit] has declined to preclude the litigants’ allegedly inconsistent  
8 claims.”). The Supreme Court has indicated that this element is significant when “judicial  
9 acceptance of an inconsistent position in a later proceeding would create the perception that  
10 either the first or second court was misled.” *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 170  
11 (2010).

12 Although this Court does not have a transcript of the arbitration hearing, from the limited  
13 record it appears that Mr. Schediwy sought to recover the cost of removing the improperly  
14 placed uncompleted retaining wall based on representations from Tri-Dam that the wall would  
15 have to be removed. Marris Dec., Exhibit F at p. 4. It appears that in the arbitration hearing that  
16 the arbitrator and Mr. Schediwy relied upon Ms. Larson’s testimony that the wall would have to  
17 be removed. In the case before this Court, Defendants admit that the retaining wall was  
18 improperly placed and that it should be removed from its present location. Defendants dispute  
19 Tri-Dam’s demand that they remove the footings that presently support their retaining wall and  
20 backfill the area to its pre-excavation condition only to excavate again to build a retaining wall in  
21 compliance with a Tri-Dam permit. The arbitration award is consistent with this stance as it  
22 provides damages for “demolition and debris removal” not for filling of the land to return it to its  
23 pre-excavation state. Accordingly, this Court does not believe the positions taken by Defendants  
24 to be totally inconsistent.

25 5. The First Position Was Not Taken As A Result Of Ignorance, Fraud, or Mistake

26 Although Defendants’ position was taken in reliance on Tri-Dam’s insistence that the  
27 retaining wall be removed, it cannot be said to have been a result of ignorance, fraud, or mistake  
28 that Defendants advanced that position at the arbitration hearing.

1 6. Conclusion

2 The doctrine of judicial estoppel is invoked by courts in their discretion. The position that  
3 judicial estoppel should be reserved for the most egregious attempts at attaining unfair advantage  
4 and misleading the court is in line with the Ninth Circuit’s preference for adjudication on the  
5 merits. Here, Defendants asserted two distinct but not totally incompatible positions. As a result,  
6 this Court, in its discretion, will not judicially estop Defendants from arguing that the footings of  
7 their retaining wall should be permitted to remain intact if they seek and obtain from Tri-Dam a  
8 permit to build a retaining wall and dock that could make use of the footings as presently located.

9 **B. FERC’s Enforcement Authority Delegated to Tri-Dam**

10 Plaintiff argues that by granting the Tri-Dam license and approving the SMP, “FERC has  
11 exercised its plenary regulatory authority to prohibit any and all developments with the project  
12 boundary ... not approved by Tri-Dam.” MSJ at p. 15. Plaintiff asserts that FERC regulatory  
13 authority over the project boundary alone grants Tri-Dam the right to enforce the terms of the  
14 SMP against private property owners within the project boundary.<sup>4</sup> Plaintiff mistakes its duty to  
15 comply with and enforce the FERC license with a grant of the property rights necessary to  
16 enforce the license against property owners within the project boundary.

17 Under the Federal Power Act, FERC has the power to issue licenses to private parties to  
18 construct and operate dams and similar projects. *See* 16 U.S.C.A. § 797(e) (West 2000 & West  
19 Supp.2009). Furthermore, FERC may delegate its responsibility to ensure that the uses of the  
20 project lands are consistent with the public interest to the licensees. *See Union Electric Co., d/b/a*

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22 <sup>4</sup> Plaintiff cites *DiLaura v. Power Authority of N.Y.*, 786 F.Supp. 241 (W.D. N.Y. 1991) in support of its position  
23 that FERC has full regulatory authority, however, the *DiLaura* Court refers to FERC’s power to enforce conditions  
of the FPA against a licensee in operation of the project.

24 The 8th Circuit’s opinion in *Coalition for Fair and Equitable Regulation of Docks on Ozarks v. FERC*, 297 F.3d 771  
25 (8th Cir. 2002), specified that FERC requires licensees to develop project resources and permits them to recruit  
public and private interests to help do so; FERC does not grant licensees the necessary property rights to regulate  
private property within the project boundary.

26 In *VA Timberline, LLC v. Appalachian Power Co.*, 2008 WL 269544 at \*2-4 (W.D. Va. 2008) the court recognized  
27 the licensee’s right to grant permits based on the facts that (1) Timberline sought to build its dock within the project  
boundary and (2) the licensee had obtained property rights by way of an easement over the area that specifically  
28 provided for “remov[al] of ... any and all structures, improvements ... and objects” in the project area. The court  
explained that licensee’s ability to remove the dock rested on their easement over the property. *Id.* at. \*4-5.

1 *AmerenUE*, 90 FERC ¶ 61,249, at \*61833 (2000). Here, FERC delegated the regulation of the  
2 project lands at issue to Tri-Dam in 1956 and further delegated its responsibilities to Tri-Dam  
3 when FERC adopted the SMP. This Court has previously held that “Articles 411 and 413 of Tri-  
4 Dam’s FERC license essentially permit Tri-Dam to regulate certain uses and occupancies of land  
5 in the FERC Project Boundary without prior FERC approval, in accordance with the SMP.  
6 However, the license merely gives Tri-Dam authority to do so; it does not give Tri-Dam the right  
7 to do so.” *Tri-Dam v. Yick*, 2013 WL 752197 at \*4 (E.D. Cal. 2013) (unpublished). To clarify  
8 this Court’s holding, Articles 411 and 413 of the FERC license authorize Tri-Dam to issue  
9 permits for minor encroachments (i.e. Tri-Dam’s issuance of permits to private landowners does  
10 not violate Tri-Dam’s licensure agreement). Article 413 also imposes upon Tri-Dam a duty to  
11 ensure that lands within the project boundary are not put to a use that violates the FERC license.<sup>5</sup>  
12 Articles 411 and 413 do not grant Tri-Dam a property right over lands within the project  
13 boundary.

14         The inclusion of lands within a project boundary serves the function of indicating that the  
15 lands are used in some manner for project purposes. However, the mere inclusion of lands within  
16 a project boundary will not restrict landowner uses, since such inclusion does not itself create or  
17 alter property rights. *See, e.g., PacifiCorp, order on rehearing*, 80 FERC ¶ 61,334, at 62,113  
18 (1997). A licensee is required to acquire and retain all interests in non-federal lands necessary or  
19 appropriate to carry out project purposes. *See id.*; Article 5 of FERC License; *VA Timberline,*  
20 *L.L.C. v. Appalachian Power Co.*, 343 F. App’x 915, 917 (4th Cir. 2009) (unpublished); 18  
21 C.F.R. § 4.32. “These interests can be obtained through easement, fee title, leases, and other  
22 types of conveyances. The instruments of conveyance define the extent of the licensee’s right.”  
23 *Union Elec. Co.*, 137 FERC ¶ 61114 at \*8 (2011). Further supporting the conclusion that a  
24 FERC license conveys no interest in property, Title 16 of the United States Code Section 814  
25 provides that a licensee may, in the appropriate situation, exercise the right of eminent domain to  
26 secure a right to property necessary to operation of a dam, reservoir or the works appurtenant or

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27  
28 <sup>5</sup> 16 U.S.C. § 825p creates jurisdiction in the federal courts to enforce FERC licenses against a FERC licensee. *U.S. v. Southern California Edison Co.*, 300 F.Supp.2d 964, 985 (E.D. Cal 2004).

1 accessory thereto. 16 U.S.C. § 814. There would be no need for the use of eminent domain if the  
2 FERC license granted the necessary property interest to a licensee to operate the project.

3 “[A] SMP is only applicable to lands owned or controlled by a licensee, and has no effect  
4 on shoreline areas in which a licensee has no interest.” *Union Electric Co.*, 137 FERC ¶ 61114 at  
5 \*4. “[A]n entity with unencumbered fee title to lands within the project boundary is free to use  
6 them as that entity sees fit.” *Union Elec. Co.*, 140 FERC ¶ 61210 (2012); *see also Metro*  
7 *Hydroelectric Co., LLC v. Metro Parks*, 541 F.3d 605, 612-613 (6<sup>th</sup> Cir 2008) (holding that  
8 FERC does not convey a property interest to enter land to conduct an activity required by FERC  
9 to obtain or maintain a FERC license or permit.)

10 Therefore, Tri-Dam’s right to enforce the SMP is restricted by the scope of Tri-Dam’s  
11 property interest, in this case an easement, in the Subject Property.

### 12 **C. Tri-Dam Easement**

13 In 1956, the Oakdale Irrigation District and South San Joaquin Irrigation District  
14 obtained an easement that extends, at its upper bound, to the 515-foot contour elevation of the  
15 Tulloch Reservoir. RJN, Exhibit A, Doc. 65-1. Defendants were on record notice of the easement  
16 as evidenced by the title report submitted by Plaintiff<sup>6</sup> and Defendants’ Guarantee of Title. Marrs  
17 Dec., Exhibit S; Schediwy Dec., Exhibit Z. It is undisputed for purposes of this motion that the  
18 retaining wall was built below both the 515-foot contour line (where the easement begins) and  
19 the 510-foot contour line (the high water line and height at which the Schediwy permit required  
20 the retaining wall built). JSF at ¶ 3; Schediwy Dec. at ¶ 2; Schediwy Dec., Exhibit A; Pope Dec.  
21 at ¶10.

22 The extent of an easement “is determined by the terms of the grant, or the nature of the  
23 enjoyment by which it was acquired.” Cal. Civ. Code, §806. With an express easement, as in this  
24 case, the only interests that are transferred from the grantor to the grantee are the interests  
25 expressed in the grant and those necessarily incident to the interests. *Pasadena v. California-*

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26  
27 <sup>6</sup> Defendants complain that the Title Report is dated March 19, 2013, after the close of discovery. Defendants  
28 contend that the report is therefore unauthenticated and inadmissible. There is “evidence sufficient to support a  
finding that the item is what the proponent claim it is.” Fed. R. Evid. 901. Additionally, Defendants’ Guarantee of  
Title is evidence of recordation of the easement attached to Defendants’ property.

1 *Michigan Land & Water Co.*, 17 Cal.2d 576, 579 (1941). An easement, “unless it is ambiguous,  
2 must be construed by a consideration of its own terms. The meaning and intent thereof is a  
3 question of law ....” *Gray v. McCormick*, 167 Cal. App. 4th 1019, 1024 (2008) (citation  
4 omitted). The owner of the servient estate may make “use of the area the easement covers so  
5 long as the use does not ‘interfere unreasonably’ with the easement’s purpose.” *Scrubby v. Vintage*  
6 *Grapevine, Inc.*, 37 Cal.App.4th 697, 702-703 (1995) (citing *Camp Meeker Water System, Inc. v.*  
7 *Public Utilities Com.* (1990) 51 Cal.3d 845, 867). Certain uses of lands that are restricted by  
8 easements are deemed to be an unreasonable interference with the land, as a matter of law. See,  
9 e.g., *Pacific Gas & Electric Co. v. Hacienda Mobile Home Park*, 45 Cal. App. 3d 519, 528 (1st  
10 Dist. 1975). Owner of a servient tenement “may not use their property in a way that obstructs the  
11 normal use of the easement.” *Spencer & Morin Properties, Inc. v. Johnson*, \_\_\_ Cal.Supp. \_\_\_,  
12 2012 WL 6686093 at \*2 (2012) (unpublished) (citing *Blackmore v. Pawell*, 150 Cal.App.4th  
13 1593, 1599 (2007)).

14 The easement language, as stated above, grants Plaintiff “[t]he right to overflow the ...  
15 land, ... enter upon said land ... to clear, destroy, or dispose ... any *obstructions* ... and *any*  
16 *other thing* which would *in any way* interfere with the use of said reservoir, or the waters therein,  
17 or tend to render unsafe or unsanitary either the reservoir created by said dam or the margin  
18 thereof.” RJN, Exhibit A, Doc. 65-1; SSF at ¶ 7 (emphasis added). This language is onerous but  
19 unambiguous. Tri-Dam has the right to destroy, clear or dispose of anything that in any way  
20 interferes with Tri-Dam’s use of the reservoir or with the waters.

21 In *VA Timberline, LLC v. Appalachian Power Co.*, the licensee operating the  
22 hydroelectric development obtained an easement that permitted it to “cut, burn, and/or remove  
23 ... any and all buildings, structures, improvements ... and other objects ... located on the  
24 premises below the contour the elevation of which is 620 feet.” The licensee quitclaimed all  
25 interest in its easement permitting it to remove structures within the project boundary to a  
26 developer “subject to the terms and conditions of its FERC license.” *VA Timberline, LLC v.*  
27 *Appalachian Power Co.* (“*Timberline*”), 2008 WL 269544 at \*4, *aff’d* 343 Fed.Appx. 915 (4th  
28 Cir. 2009). The developer then sought to construct a dock that would violate the terms of the

1 SMP. The licensee denied the developer permission to construct the dock. Fourth Circuit  
2 affirmed the District Court’s holding that, based on the property rights maintained under the  
3 easement, rather than the terms of the SMP, the licensee could remove the dock in question. *Id* at  
4 \*4-5 and p. 918. The easement in the case at bar predates the SMP and is not contemporaneous  
5 with its terms. Accordingly, it is possible here that a violation of the SMP may not necessarily  
6 violate Tri-Dam’s easement. In order to be subject to removal the retaining wall must violate Tri-  
7 Dam’s easement.

8 As discussed, the easement provides that Tri-Dam may remove anything which would in  
9 any way interfere with the use of the reservoir or the waters therein, or that tends to render  
10 unsafe or unsanitary the reservoir or the margin thereof. Accordingly, in order for Tri-Dam to  
11 prove a violation of its easement it must adduce some evidence that the encroachment  
12 complained of actually interferes with one of the aforementioned items. Article 413 of the FERC  
13 license requires as a condition of licensure that Tri-Dam comply with the SMP. FERC License at  
14 p. 28. Tri-Dam claims that any violation of the SMP would interfere with Tri-Dam’s continued  
15 use of the reservoir since it could result in revocation of its FERC license.

16 Section 4.4(2) of the SMP states that “[t]he construction of any facility must be  
17 completed as described in the approved permit and within twelve months from the date of permit  
18 approval by Tri-Dam . . .” SMP at p. 10. Defendants do not dispute that the construction of their  
19 wall was not as described in the approved permit and within twelve months of the date of  
20 approval. JSF at ¶ 3. Defendants therefore are in violation of the SMP.<sup>7</sup> Despite the fact that the  
21 parties agree that there is evidence of violation of the SMP, Tri-Dam has failed to establish that  
22 the violation of the SMP would in fact violate the easement. Tri-Dam has submitted no evidence  
23 to suggest that FERC would revoke its license based on potential encroachments that do not  
24  
25

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26 <sup>7</sup> A violation of the SMP has been established. Accordingly, the Court does not need to revisit Plaintiff’s prior  
27 contention that SMP Section 6.3(1) was violated merely by constructing a facility below the 510-foot contour line.  
28 *See* Doc 32 at pp. 14-15. Mr. Pope’s declaration in support of Plaintiff’s motion for summary judgment at ¶ 10  
(stating that some structures are built below the 510-foot contour line) and the Court’s reading of Section 6.3 (as  
requiring that a facility must not extent more than 40 feet from the shoreline) confirm this Court’s prior conclusion  
that the SMP is not violated merely because the structure was built below the 510-foot contour line. Doc. 32 at p. 15.

1 interfere with the actual operation of the project. The argument that any violation of the SMP is a  
2 violation of the easement is therefore rejected.

3 Tri-Dam has submitted undisputed evidence that indicates that the retaining wall was  
4 built at or below the 506-foot contour line. Accordingly, the wall intrudes several feet below  
5 510-foot contour level; the normal high water level of the Tulloch Reservoir. In doing so, the  
6 Schediwy structure, in some way, interferes with the waters within the reservoir by displacing  
7 the normal flow of the waters.

8 Since the retaining wall is an obstruction or thing that in some way interferes with the  
9 waters of the reservoir by existing below the high water mark and displacing the waters it may be  
10 destroyed or disposed of as permitted the Tri-Dam easement.

#### 11 **D. Defendants' Motion For Summary Judgment**

##### 12 1. Timeliness

13 Defendants' counsel, Ms. Clack, has missed deadlines three times before. After the denial  
14 of Defendants' motion to dismiss the First Amended Complaint on December 11, 2012,  
15 Defendant was required to file an answer within fourteen (14) days. Defendant failed to do so.

16 On March 30, 2012, Ms. Clack missed the deadline for initial disclosures. Ms. Clack  
17 eventually filed late initial disclosures.

18 On April 30, 2013, Judge Snyder issued an order denying Plaintiff's request for sanctions  
19 based on Ms. Clack having missed an expert disclosure deadline. The Court again made clear to  
20 Defendants that no further delays would be tolerated. The Court reintegrated "Deadlines are  
21 serious. There must be no more delayed responses or missed deadlines in this case." Despite this  
22 admonition Defendants again missed a deadline.

23 The parties proposed on May 14, 2013, a scheduling order with a dispositive motion  
24 deadline of October 18, 2013. Judge Snyder adopted the proposed scheduling order in whole.  
25 Defendants moved for Summary Judgment on November 8, 2013. Defendants were three weeks  
26 late in filing their motion.

27 Rule 16 of the Federal Rules of Civil Procedure Section (f)(1)(C) provides that the Court  
28 may issue any just order, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its



1 attorney fails to obey a scheduling or other pretrial order. Fed. R. Civ. P. 16(f)(1)(C). Rule  
2 37(b)(2)(A)(iii), (vi), and (vii) provide that the court may issue an order striking pleadings in  
3 whole or in part, rendering default judgment against the disobedient party, or treating as  
4 contempt of the court the failure to obey any order. Fed. R. Civ. P. 37(b)(2)(A)(iii),(vi)-(vii).

## 5 2. Effect of Granting Plaintiff's Motion for Summary Judgment

6 This Court has made the determination to grant summary judgment in favor of Plaintiff  
7 due to the violation of express terms of the easement. Since Defendants' motion is based in part  
8 on an argument that the easement was not violated it cannot be granted.

9 Based on Defendants' prior and present unexcused and unjustified violations of deadlines  
10 and scheduling orders and based on the inconsistency of their argument with the with the Court's  
11 findings in the preceding portion of this order, this Court strikes Defendants motion for summary  
12 judgment.<sup>8</sup>

## 13 **E. Permanent Injunction**

14 A claim for permanent injunction requires a plaintiff to show "(1) that it has suffered an  
15 irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate  
16 to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff  
17 and defendant, a remedy in equity is warranted; and (4) that the public interest would not be  
18 disserved by a permanent injunction." *Northern Cheyenne Tribe v. Norton*, 503 F.3d 836, 843  
19 (9th Cir. 2007) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

### 20 1. Irreparable Injury

21 Loss of an interest in real property constitutes an irreparable injury. *Park Village Apt.*  
22 *Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1159 (9th Cir. 2011); *Sundance Land*  
23 *Corp. v. Community First Fed'd Sav. & Lan Ass'n*, 840 F.2d 653, 661 (9th Cir. 1988). Here, a  
24 failure to enjoin Defendant's nonconforming use of the servient tenement would deprive Plaintiff  
25 of its property rights under its easement.

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26  
27  
28 <sup>8</sup> Defendants' argument regarding the proposed injunction, specifically the potential harm to the lake bed, is considered and addressed in the following section.

1 Substantial harm to or loss of business constitutes an irreparable injury. *Doran v. Salem*  
2 *Inn, Inc.*, 422 U.S. 922, 932 (1975). As this Court held on the same facts in *Tri-Dam v.*  
3 *Schediwy*, 2011 WL 6692587 at \*10 (E.D. Cal. 2011) (unpublished), and discussed above, Tri-  
4 Dam has adduced evidence showing irreparable injury in the form of a violation of Section  
5 4.4(2) of the SMP in addition to the permit violation. As discussed above, Tri-Dam’s failure or  
6 inability to correct SMP violations places its license to operate the dam in jeopardy.<sup>9</sup>

7 2. No Remedy at Law

8 Monetary damages would not suffice to remedy Defendants’ violation of the SMP or the  
9 interference with the waters of the Tulloch Reservoir. Accordingly, Plaintiff has no remedy at  
10 law.

11 3. Balance of Hardships

12 Plaintiff has a strong interest in obtaining an injunction ensuring compliance with its  
13 FERC license. If Plaintiff fails to gain compliance its FERC license could be subject to  
14 forfeiture. Defendants do not dispute that their wall was constructed in violation of the permit  
15 and below the 510-foot contour elevation. Rather, Defendants allege that “Section 4.6 [of the  
16 SMP] provides for ‘modification’ as an option to Tri-Dam for non-complying structures.”  
17 Opposition to Motion for Summary Judgment (“Opposition”) at p. 26. Defendants omit from  
18 their motion the fact that the SMP provides that any one or more of the following could be  
19 imposed as consequences for failure to comply with SMP regulations: “unwanted construction  
20 delays, suspension or cancellation of approved applications, increase in fees, modification or  
21 removal of non-complying structures and restoration of disturbed areas at the owner’s expense,  
22 loss of any consideration for future reservoir use applications until the violation is successfully  
23 resolved.” SMP at p. 11. Although Defendants claim that they did not actually obtain a copy of  
24 the SMP until they sought to submit a new permit application, it was accessible to them at any  
25 time. Accordingly, Defendants’ argument that they were without constructive knowledge is  
26 unavailing.

27  
28 <sup>9</sup> This Court does not need to determine whether the wall threatens public safety and impedes navigation for purposes of establishing an irreparable injury.

1 As Plaintiff notes, if this Court refuses to grant injunctive relief Plaintiff will have no  
2 ability to enforce the SMP or uniformly regulate development on the Tulloch Reservoir. MSJ at  
3 p. 26. Such a position would render Plaintiff unable to prevent obstructions that could decrease  
4 the holding capacity of the reservoir and impair its ability to provide electricity, water, and  
5 recreation to the area, as required by its license and the SMP.

6 Defendants do not seek to oppose destruction of their wall. Instead they seek to use the  
7 footings of the existing structure as supports for a new dock; a measure that they claim will  
8 prevent shoreline erosion. Although Defendants have no legal claim of entitlement to a  
9 modification of their permit prior to their destruction of the improperly built retaining wall, this  
10 Court recognizes Defendants' concerns of inefficiency at removal of the retaining wall and  
11 filling of the shoreline only to excavate the recently filled land pursuant to a new permit. Further,  
12 the court recognizes that any unnecessary excavation in the lake bed that would cause damage to  
13 the reservoir is a harm that both parties would seek to avoid.

14 To the extent possible, if the project could be accomplished as Defendants suggest and  
15 comply with Plaintiff's permit procedure this Court believes that equity would be served by such  
16 a resolution.

17 Generally, when a court makes a determination upon balancing the equities it considers  
18 the cost of compliance for a defendant. Here, the monetary cost of compliance for Defendants,  
19 although relatively high, was awarded to Defendants in 2005.

20 Based on the foregoing, this Court concludes that the balance of hardships favors the  
21 Plaintiff.

#### 22 4. Public Interest Not Disserved

23 The public has an interest in navigability and safety of the reservoir. In order for Plaintiff  
24 to ensure that the reservoir is maintained in conformity with SMP requirements it must be able to  
25 ensure that any interference with the waters of the Tulloch Reservoir be prevented. The public  
26 would not be disserved by enforcement of the Tri-Dam easement.

27 Further, the public has an interest in continued operation of the Tulloch Project. Tri-Dam  
28 could be hindered in that operational goal if no injunction were granted.

1 Accordingly, public policy would not be disserved by granting of this injunction.

2 5. Scope of Injunction

3 “The essence of equity jurisdiction has been the power of the [court] to do equity and to  
4 mold each decree to the necessities of the particular case. Flexibility rather than rigidity has  
5 distinguished it.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citing *Hecht Co. v.*  
6 *Bowles*, 321 U.S. 321, 329 (1944)). District Courts are granted wide latitude in shaping equitable  
7 relief. *Geertson Seed Farms v. Johanns*, 570 F.3d 1130, 1136 (9th Cir. 2009); *Apple Inc. v.*  
8 *Psystar Corp.*, 673 F.Supp.2d 943, 951 (N.D. Cal. 2009).

9 Here, Plaintiff has a procedure for the public to obtain encroachment permits for  
10 properties that fall within the 515-foot contour line. Defendants followed this procedure then,  
11 due primarily to the fault of Defendants’ contractor, the structure was built incorrectly. The  
12 permit procedure provides, as Defendants point out, that a failure to comply with permit  
13 procedures could appropriately result in modification of the non-complying structure at the  
14 property owner’s expense. Equity would support such an outcome to the extent that it is  
15 consistent with Tri-Dam’s established permitting procedures. In the event that Defendants are  
16 unable to submit a SMP compliant permit application the foregoing factors support a remedy in  
17 equity requiring Defendants to completely remove the retaining wall and backfill the excavation  
18 area to its pre-excavation condition.

19 **V. ORDER**

20 Having concluded that a permanent injunction would be consistent with traditional  
21 principles of equity, and having considered the four *eBay* factors to reach that determination, the  
22 Court hereby finds that the following injunction is both equitable and reasonable to prevent or  
23 restrain further violation of Plaintiff’s easement.

24 IT IS HEREBY ORDERED that Tri-Dam’s motion for summary judgment is GRANTED as  
25 follows:

- 26 1. Defendants are REQUIRED to submit to Tri-Dam and the Army Corps of Engineers  
27 within 30 days a detailed plan regarding bringing their property into compliance by  
28

1 destroying their retaining wall, including the footings, and filling the property to its pre-  
2 excavation condition.

- 3 2. Defendants MAY submit to Tri-Dam and the Army Corps of Engineers within 30 days a  
4 detailed plan regarding bringing their property into compliance by destroying their  
5 retaining wall down to the footings. This proposal must contain a plan for constructing a  
6 retaining wall that meets with Tri-Dam's requirements and makes use of the presently  
7 placed footings. Tri-Dam is encouraged but not required to consider granting a permit to  
8 Defendants as they have proposed.
- 9 3. In either case, Tri-Dam is to issue a decision to Defendants regarding the permit  
10 applications submitted in compliance with this order.
- 11 4. Within 60 days of the entry of Tri-Dam's decision on the permit application(s), or as soon  
12 thereafter as approved by the Army Corps of Engineers, Defendants MUST begin  
13 demolition of their retaining wall. Defendants are to complete their demolition and  
14 removal of the debris without unreasonable delay and in no event beyond the one-year  
15 timeframe provided by Section 4.4(2) of the SMP.

16 IT IS SO ORDERED.

17 Dated: March 5, 2014

18   
19 SENIOR DISTRICT JUDGE