

1 JEFFREY H. WOOD  
Acting Assistant Attorney General  
2 ERIC GRANT (Cal. Bar No. 151064)  
Deputy Assistant Attorney General  
3 ANDREW J. DOYLE (FL Bar No. 84948)  
SAMARA M. SPENCE (TN Bar No. 031484)  
4 United States Department of Justice  
Environment and Natural Resources Division  
5 P.O. Box 7415  
Washington, DC 20044  
6 (202) 514-0943

7 PHILLIP A. TALBERT  
United States Attorney  
8 GREGORY T. BRODERICK  
Assistant United States Attorney  
9 501 I Street, Suite 10-100  
10 Sacramento, CA 95814  
Telephone: (916) 554-2700

11 *Attorneys for the United States*

12 DAVID IVESTER (Bar No. 76863)  
13 PETER PROWS (Bar No. 257819)  
Briscoe Ivester & Bazel LLP  
14 155 Sansome Street, Seventh Floor  
San Francisco, CA 94104  
15 (415) 402-2700 (p)  
divester@briscoelaw.net  
16 pprows@briscoelaw.net

17 M. REED HOPPER (Bar No. 131291)  
18 ANTHONY L. FRANÇOIS (Bar No. 184100)  
Pacific Legal Foundation  
19 930 G Street  
Sacramento, CA 95814  
20 (916) 419-7111

21 *Attorneys for Duarte Nursery Inc. and John Duarte*

22 UNITED STATES DISTRICT COURT  
23 EASTERN DISTRICT OF CALIFORNIA

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

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

**CONSENT DECREE**

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

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

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

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

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

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

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

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

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

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

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

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

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

13 **II. APPLICABILITY**

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

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

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

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

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

9 **III. DEFINITIONS**

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

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

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

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

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

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

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

8 “Defendants” shall mean John Duarte and Duarte Nursery, Inc.

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

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

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

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

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

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

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

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

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

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

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

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

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28 <sup>1</sup> Proposed Consent Decree filed by the parties contains signatures.

1           17. Except as provided in Paragraph 15, nothing in this Consent Decree shall limit the  
2 ability of the Corps to issue, modify, suspend, revoke, or deny any individual permit or any  
3 nationwide or regional general permit, nor shall this Consent Decree limit the United States  
4 Environmental Protection Agency's ability to exercise its authority pursuant to CWA section  
5 404(c), 33 U.S.C. § 1344(c).

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

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

14 **V. REMEDIAL PROVISIONS**

15 **A. CIVIL PENALTY**

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

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

23 **B. INJUNCTIVE RELIEF**

24           22. Except as necessary to fulfill the requirements of Paragraph 24 below, Defendants  
25 and their agents, successors, and assigns and all persons having actual or constructive notice of  
26 this decree are enjoined from disturbing approximately 44 acres of waters of the United States on  
27 the Site as identified in the United States' expert team delineation in Trial Exhibits 59 and 60  
28 (Appendix 1 hereto), plus a 35-foot setback, by any dredging, filling, land clearing, tillage,

1 agricultural activities, construction work, or any pollutant discharge or earthmoving activities for  
2 a period of ten (10) years beginning the Effective Date of this Consent Decree. Nevertheless,  
3 Defendants and their agents, successors, and assigns may use the foregoing 44 acres for  
4 moderate non-irrigated cattle grazing and weed, pest, or invasive species control. The  
5 obligations of this paragraph shall run with the land and bind Defendants' successors and  
6 assigns, and shall be enforceable by the United States or the Corps (by any appropriate legal  
7 proceeding, including but not limited to enforcement of this Consent Decree). The Balance of  
8 the Site is not affected by this Paragraph.

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

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

26 24. Defendants shall, within thirty (30) Days of the Effective Date of this Consent  
27 Decree, submit to the Corps a plan to (a) smooth all disturbed soil surfaces and reasonably match  
28 the pre-November 2012 grade and hydrology within impacted waters of the United States on the



1 Site, approximately 22 acres as identified in Trial Exhibit 61 and attached hereto as Appendix 3;  
2 (b) stabilize bare mineral soils by planting a native grass and seed mix or taking other  
3 appropriate erosion and sediment control measures; and (c) complete the foregoing steps  
4 promptly but under a seasonally appropriate schedule such as completing all smoothing near the  
5 end of the first available dry season and installing any plants near the beginning of the wet  
6 season that follows. Defendants shall obtain approval of a detailed remediation plan covering  
7 the aforementioned work by the Corps prior to implementation, which approval shall not be  
8 unreasonably withheld. Defendants shall implement the plan as approved by the Corps.

9       25. Within fourteen (14) Days of completion of remedial work required in Paragraph  
10 24 above, Defendants shall provide written notice to the United States, including the Corps,  
11 under Section XI of this Consent Decree.

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

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

26 **VI. SUBMISSIONS**

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

1 I certify under penalty of law that this document and all attachments were  
2 prepared under my direction or supervision in accordance with a system designed  
3 to assure that qualified personnel properly gather and evaluate the information  
4 submitted. Based on my inquiry of the person or persons who manage the system,  
5 or those persons directly responsible for gathering the information, the  
6 information submitted is, to the best of my knowledge and belief, true, accurate,  
7 and complete. I have no personal knowledge that the information submitted is  
8 other than true, accurate, and complete. I am aware that there are significant  
9 penalties for submitting false information, including the possibility of fine and  
10 imprisonment for knowing violations.

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

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

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

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

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

a. monitor the progress of activities required under this Consent Decree;

- 1           b.       verify any data or information submitted to the United States or the Corps
- 2 in accordance with the terms of this Consent Decree;
- 3           c.       obtain samples;
- 4           d.       obtain documentary evidence, including photographs and similar data; and
- 5           e.       assess Defendants' compliance with this Consent Decree.

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

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

11 **VIII. DISPUTE RESOLUTION**

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

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

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

22           37.       The invocation of Dispute Resolution procedures under this Section shall not, by  
23 itself, extend, postpone, or affect in any way any obligation of Defendants under this Consent  
24 Decree. Stipulated penalties and interest, if applicable to the disputed matter, shall continue to  
25 accrue from the first Day of violation, but payment shall be stayed pending resolution of the  
26 dispute as provided in Section X. If Defendants do not prevail on any disputed issue, stipulated  
27 penalties, and interest, if applicable, are to be assessed and paid as provided in Section X. If  
28

1 determined by the Court that Defendants did not violate the Consent Decree, no stipulated  
2 penalty or interest shall be assessed against Defendants.

3 **IX. FORCE MAJEURE**

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

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

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

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

1           42. If Defendants invoke Dispute Resolution under Section VIII of this Consent  
2 Decree, Defendants shall have the burden of demonstrating that the delay or anticipated delay  
3 has been or will be caused by a force majeure event; the number of Days of delay or anticipated  
4 delay that was or will be caused by such force majeure event; that the duration of the delay or the  
5 extension sought was or will be warranted under the circumstances; that Defendants could not  
6 have foreseen and prevented such delay; that Defendants exercised best efforts to prevent, avoid,  
7 minimize, and mitigate the delay and its effects; and that Defendants complied with the  
8 requirements of this Section.

9 **X. STIPULATED PENALTIES**

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

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

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

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

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

1           48. Any disputes concerning the amount of stipulated penalties or the underlying  
2 violation that gives rise to the assessment of stipulated penalties are subject to the Dispute  
3 Resolution provisions of Section VIII. Stipulated penalties and any applicable interest shall  
4 continue to accrue as provided in this Consent Decree, but need not be paid until the following:

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

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

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

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

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

22           51. Stipulated penalties are not the United States' exclusive remedy for violations of  
23 this Consent Decree. Subject to the provisions of Section IV, the United States expressly  
24 reserves the right to seek any other relief it deems appropriate for Defendants' violation of this  
25 Consent Decree or applicable law, including but not limited to an action against Defendants for  
26 statutory penalties, additional injunctive relief, mitigation or offset measures, and/or contempt.  
27 However, the amount of any statutory penalty assessed for a violation of this Consent Decree  
28

1 shall be reduced by an amount equal to the amount of any stipulated penalty assessed and paid  
2 pursuant to this Consent Decree.

3 **XI. NOTICES AND COMMUNICATIONS**

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

6 a. TO THE UNITED STATES:

7 i. TO THE DEPARTMENT OF JUSTICE:

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

14 AND

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

19 ii. TO THE CORPS:

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

24 b. TO DEFENDANTS:

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

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

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

6 **XII. COSTS OF SUIT**

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

12 **XIII. PUBLIC PARTICIPATION**

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

22 **XIV. MODIFICATION**

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

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28 ////



1 **XV. TERMINATION**

2 58. This Consent Decree expires ten (10) years following the Effective Date, unless at  
3 that time Defendants are out of compliance with any provision, in which case the Consent  
4 Decree does not expire until Defendants achieve compliance.

5 59. Termination of this Consent Decree does not extinguish the requirements of  
6 Paragraph 23 above.

7 **XVI. SIGNATURES/SERVICE**

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

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

17 **XVII. INTEGRATION**

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

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

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

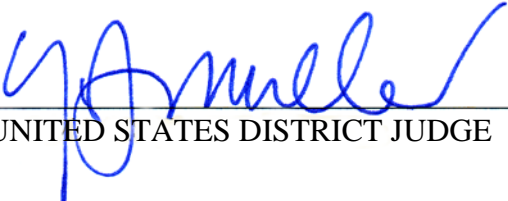
1           64.     This Court retains jurisdiction over this action for the purpose of resolving  
2 disputes arising under this Consent Decree, or entering orders modifying this Consent Decree, or  
3 effectuating or enforcing compliance with the terms of this Consent Decree.

4 **XIX. APPENDICES**

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

6  
7 IT IS SO ORDERED.

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9 Dated, entered, and made effective this 7th day of December, 2017.

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15 UNITED STATES DISTRICT JUDGE  
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Respectfully submitted,

Dated: \_\_\_\_\_, 2017

<sup>2</sup>

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

Dated: \_\_\_\_\_, 2017

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

\_\_\_\_\_  
PETER PROWS  
BRISCOE IVESTER & BAZEL LLP  
*Attorney for Duarte Nursery, Inc. and John Duarte*

\_\_\_\_\_  
ANTHONY L. FRANÇOIS  
PACIFIC LEGAL FOUNDATION  
*Attorney for Duarte Nursery, Inc. and John Duarte*

\_\_\_\_\_  
<sup>2</sup> Proposed Consent Decree filed by parties contains signatures of all parties and counsel.