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State Lands Commission

10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

14 **PEOPLE OF THE STATE OF CALIFORNIA,**
 15 **EX. REL. THE REGIONAL WATER**
 16 **QUALITY CONTROL BOARD, SAN**
DIEGO REGION,

17 Plaintiff,

18 v.

19 **INTERNATIONAL BOUNDARY AND**
 20 **WATER COMMISSION, UNITED STATES**
 21 **SECTION; JOSE NUÑEZ, in his capacity**
 22 **as Acting Commissioner of the**
INTERNATIONAL BOUNDARY AND
 23 **WATER COMMISSION, UNITED STATES**
SECTION,

24 Defendants.

Case No. 18-CV-2050-JM (JMA)

COMPLAINT IN INTERVENTION

Dept: Courtroom 5D
 Judge: The Hon. Jeffrey T. Miller
 Trial Date: Not Set
 Action Filed: 9/4/2018

1 By leave of court, the State Lands Commission (“Commission”) hereby
2 intervenes in this action and unites with Plaintiff the California Regional Water
3 Quality Control Board, San Diego Region (“San Diego Water Board”) in alleging
4 as follows:

5 **NATURE OF UNDERLYING ACTIONS**

6 1. The San Diego Water Board commenced this action by filing a
7 Complaint for Declaratory and Injunctive Relief (Clean Water Act, 33 U.S.C.
8 § 1251 *et seq.*) (“Complaint”) on September 4, 2018 against Defendants the
9 International Boundary and Water Commission, United States Section, and Jose
10 Nuñez, in his capacity as Acting Commissioner of the International Boundary and
11 Water Commission, United States Section (together referred to herein as
12 “USIBWC”).

13 2. The Complaint alleges: “Based on USIBWC’s spill reports and daily
14 logs, between April 19, 2015 and October 19, 2017, USIBWC reported that its
15 canyon collectors at Stewart’s Drain, Canyon del Sol, and Goat Canyon failed to
16 divert more than 11 million gallons of waste to the [South Bay International
17 Wastewater Treatment] Plant. . . . USIBWC reported that there were eleven
18 separate Type A discharges events from its canyon collectors. Moreover, on
19 February 27, 2018, USIBWC reported that the Goat Canyon pump station
20 malfunctioned and released over fifty thousand gallons of waste.” San Diego Water
21 Board Complaint at para. 41. The Complaint further alleges “that the pollution from
22 these discharges flowed onto state land, the Tijuana River, Tijuana River Estuary,
23 and/or the Pacific Ocean. San Diego Water Board Complaint at para. 43.

24 3. The Complaint alleges that the discharge events were due to USIBWC’s
25 failure to properly maintain and operate its canyon collectors. “Specifically, these
26 discharges occurred during dry weather because USIBWC failed to remove trash
27 and other debris that interfered with the diversion of wastewater through the inlet,
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1 and/or USIBWC’s failure to properly maintain the berms of the canyon collector
2 detention basins.” San Diego Water Board Complaint at para. 44.

3 4. The Complaint alleges that the spill resulting from the Goat Canyon
4 pump station resulted from the malfunction of equipment under USIBWC’s control.
5 San Diego Water Board Complaint at para. 46.

6 5. The Complaint seeks declaratory and injunctive relief.

7 **JURISDICTION AND VENUE**

8 6. This Court has jurisdiction over the subject matter of this action pursuant
9 to the Clean Water Act’s citizen suit provision, 33 U.S.C. § 1365(a), and pursuant
10 to 28 U.S.C. sections 1391 and 1395.

11 7. Venue is proper in this judicial district pursuant to Clean Water Act
12 section 505(c)(1), 33 U.S.C. § 1365(c)(1), and pursuant to 28 U.S.C. section 1391.

13 **PLAINTIFF IN INTERVENTION**

14 8. The State Lands Commission is an agency of the State of California. Cal.
15 Pub. Res. Code § 6101. When California was admitted to the Union in 1850 it
16 acquired ownership of submerged lands, tidelands, and the beds of inland navigable
17 waters within its borders. The State holds these sovereign lands in trust for the
18 benefit of the people. Under the Public Trust Doctrine, these sovereign lands may
19 only be used for public purposes such as navigation, fishing, waterborne commerce,
20 recreation, ecological preservation, and scientific study. The California Public
21 Resources Code vests the State Lands Commission with exclusive jurisdiction over
22 all ungranted tidelands and submerged lands owned by the State, and of the beds of
23 navigable rivers, streams, bays, estuaries, and inlets, including tidelands and
24 submerged lands or any interest therein. All jurisdiction and authority remaining in
25 the State as to tidelands and submerged lands as to which grants have been or may
26 be made is vested in the State Lands Commission. Cal. Pub. Res. Code § 6301.

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BASIS FOR INTERVENTION

9. The State Lands Commission has an interest in this matter, which justifies intervention pursuant to Federal Rule of Civil Procedure 24(a)(1), (a)(2), or (b)(1).

10. The State Lands Commission is a citizen for the purposes of 33 U.S.C. section 1365(g). The Complaint and the actions of the San Diego Water Board constitute a state commencing and diligently prosecuting civil actions in a United States court to require compliance with a standard, limitation, or order pursuant to 33 U.S.C. section 1365(b)(1)(B).

11. The State Lands Commission has exclusive jurisdiction over ungranted tidelands and submerged lands located in and near the Tijuana River Watershed, the Tijuana Estuary, and the Pacific Ocean. All jurisdiction and authority remaining in the State as to tidelands and submerged lands as to which grants have been made is vested in the State Lands Commission. Cal. Pub. Res. Code § 6301. The State Lands Commission confirmed the State’s title to certain tidelands within the Tijuana River Estuary through the Tijuana River Estuary Tidelands Agreement – SLL No. 71, dated December 24, 1980, and recorded in the Official Records of San Diego County as document number 1980-0432991. The State Lands Commission leases sovereign land in the Tijuana River Estuary to the California Department of Parks and Recreation for the Border Field State Park and to the United States Fish and Wildlife Service for the Tijuana River National Estuarine Research Reserve.

12. The State Lands Commission has a direct and immediate interest in the outcome of this action, which cannot be adequately represented by the current parties. Ungranted sovereign lands in and near the Tijuana River Watershed, the Tijuana Estuary, and the Pacific Ocean, over which the State Lands Commission has jurisdiction and which the State holds in trust for the People of the State of California, have been damaged from the past and current spills and discharges alleged in the Complaint and may be so damaged in the future. These spills and

1 discharges also impair the public uses to which these ungranted sovereign lands are
2 devoted under the Public Trust Doctrine. The State Lands Commission, as the
3 exclusive administer of the State’s responsibilities over these ungranted lands, has a
4 direct interest in how these violations are resolved.

5 13. The State Lands Commission is not introducing new causes of action, nor
6 is it taking any position in this case which will delay litigation, change the position
7 of the parties, or enlarge the issues pled.

8 14. The State Lands Commission has standing to maintain this action under
9 the Constitution of the United States due to the direct injury to the sovereign lands
10 the Commission administers.

11 **GENERAL ALLEGATIONS**

12 15. USIBWC has constructed a network of facilities (“Facilities”) to capture
13 and treat waste flows entering the United States from Mexico through the Tijuana
14 River watershed. The Facilities include:

15 a. the South Bay International Wastewater Treatment Plan (“Plant”), a
16 secondary treatment plan which receives wastewater from the Tijuana River
17 watershed, treats the wastewater, and discharges the treated wastewater into the
18 Pacific Ocean through the South Bay Ocean Outfall;

19 b. a system of five concrete channels and detention basins located in
20 canyons within San Diego County (“canyon collectors”), just north of the United
21 States-Mexico boarder and west of the main channel of the Tijuana River.

22 USIBWC designed the canyon collectors to capture dry-weather, transboundary
23 flows from Mexico and convey that wastewater into the Plant; and

24 c. two pump stations to facilitate the diversion of wastewater from the
25 canyon collectors to the Plant for treatment.

26 16. In order to lawfully operate these facilities, USIBWC applied for and
27 received an NPDES permit from the San Diego Water Board in 2014 to allow the
28 discharge of treated waste into the Pacific Ocean.

1 17. On information and belief, the San Diego Water Board issued Order No.
2 96-50 regulating waste discharge from the Facilities.

3 18. On information and belief, the San Diego Water Board issued NPDES
4 Permit No. CA0108928 (“NPDES Permit”) to USIBWC (Order No. R9-2014-0009,
5 as amended by Order No. R9-2014-0094), which updated prior waste discharge
6 requirements for the Facilities and incorporated discharge restrictions set forth in
7 chapter 4 of the San Diego Basin Plan. A copy of the NPDES Permit is attached to
8 the San Diego Water Board Complaint as Exhibit 2. The NPDES Permit imposes
9 numerous requirements on USIBWC related to the operation of the Facilities.

10 19. Based on USIBWC’s spill reports and daily inspection logs, between
11 April 19, 2015 and October 19, 2017, USIBWC reported that its canyon collectors
12 at Stewart’s Drain, Canyon del Sol, and Goat Canyon failed to divert more than 11
13 million gallons of waste to the Plant in violation of the NPDES Permit. Indeed, as
14 illustrated in Table A below taken from the Complaint, USIBWC reported eleven
15 separate Type A discharges events from its canyon collectors. Moreover, on
16 February 27, 2018, USIBWC reported that the Goat Canyon pump station
17 malfunctioned and released over fifty thousand gallons of waste.

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19 **TABLE A**

Spill Date	Volume (gallons)	Discharge Type	Amount Recovered	Canyon Collector	Inlet Obstruction	Discharge Monitoring
4/19/15	2,000	Type A	N/A	Canyon del Sol	N/A	Incomplete
1/28/16	2,238	Type A	0	Stewart’s Drain	No	Incomplete
9/5/16	390	Type A	0	Canyon del Sol	Yes	Incomplete
3/1/17	145,000	Type A	0	Goat Canyon	Yes	Incomplete
4/24/17	12,850	Type A	0	Stewart’s Drain	Yes	Incomplete

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1	4/30/17	645,000	Type A ¹	0	Goat Canyon	N/A	None
2	5/21/17	1,560	Type A	0	Stewart's Drain	Yes	None
3	5/24/17	3,800	Type A	0	Stewart's Drain	Yes	None
4	6/27/17	5,500,000	Type A	0	Canyon del Sol	Yes	Incomplete
5	10/6/17	4,152,000	Type A	0	Canyon del Sol	Yes	Incomplete
6	10/19/17	1,207,000	Type A	0	Canyon del Sol	Yes	Incomplete
7	2/27/18	54,000	Facility Spill	0	Goat Canyon	Yes	N/A

9 20. The discharges identified in Table A did not occur at the South Bay
10 Ocean Outfall as required by USIBWC's NPDES permit.

11 21. Instead, on information and belief, the State Lands Commission alleges
12 that pollution from the discharges identified in Table A flowed into the Tijuana
13 River, Tijuana River Estuary, and/or the Pacific Ocean, including onto sovereign
14 lands held by the State in trust for the people of the State of California.

15 22. On information and belief, the discharges identified in Table A were due
16 to USIBWC's failure to properly maintain and operate its canyon collectors.

17 23. On information and belief, the spill resulting from the Goat Canyon
18 pump station identified in Table A resulted from the malfunction of equipment
19 under USIBWC's control.

20 24. Testing of water samples from discharge events revealed multiple
21 exceedances of water quality standards for fecal coliform and enterococcus
22 bacteria. The waste discharged from these spill events also contained contaminants
23 including mercury, chloroform, dichlorobenzene, copper, nickel, zinc, oil,
24 ammonia, grease, and suspended solids.

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28 ¹ USIBWC initially, and incorrectly, labeled the April 30, 2017 discharge as
a Type B event.

1 44. The discharges described in Table A above, which Table is taken from
2 the Complaint, did not result in discharges from the South Bay Ocean Outfall.
3 Instead, on information and belief, the discharges were discharges to lands,
4 including sovereign lands owned by the State, and waters of the United States.

5 45. USIBWC's improper discharges of waste through its canyon collectors
6 and the Goat Canyon pump station date back to 2015 and continued through 2018.
7 On information and belief, throughout this time, USIBWC failed to properly
8 operate and maintain these facilities and failed to ensure similar discharges would
9 be prevented in the future. Accordingly, there is a reasonable likelihood that these
10 discharges will continue unless enjoined by this Court.

11 46. USIBWC violated the monitoring and reporting obligations set forth in
12 Section VI. B and Attachment E of the NPDES Permit.

13 47. USIBWC violated Section VI.C.2 of the NPDES Permit because it failed
14 to implement the Prevention/Response Plan to recover waste discharged from its
15 canyon collectors during dry weather spill events and from its pump stations.

16 48. On information and belief, the discharge events from the canyon
17 collectors and Goat Canyon pump station contributed to violations of the NPDES
18 Permit receiving water limitations established in Section V and Attachment E of the
19 permit.

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PRAYER FOR RELIEF

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2 WHEREFORE, the State Lands Commission requests this Court to enter a
3 judgment:

4 1. Declaring that USIBWC’s eleven discharges of waste from its canyon
5 collectors constitute violations of Clean Water Act sections 301 and/or 402.

6 2. Declaring that USIBWC’s discharge of waste from its Goat Canyon pump
7 station constitutes a violation of Clean Water Act sections 301 and/or 402.

8 3. Declaring that USIBWC violated the terms of its NPDES Permit by:

9 a. Causing or threatening to cause a condition of pollution,
10 contamination, or nuisance through its discharges of waste into waters of the United
11 States;

12 b. Failing to collect samples and monitor for all required parameters for
13 all eleven Type A discharges from its canyon collectors identified in Table A.

14 c. Failing to implement its Prevention/Response Plan to prevent and
15 recover waste from any of the discharge events that occurred at the canyon collectors
16 or the Goat Canyon pump station.

17 d. Exceeding receiving water limitations imposed by the NPDES Permit
18 for enterococcus and fecal coliform bacteria.

19 4. Declaring that each of the NPDES Permit violations, cited above, are
20 ongoing.

21 5. Ordering USIBWC to take all actions necessary to comply with the Clean
22 Water Act and the NPDES Permit, including properly operating and maintaining its
23 Facilities to avoid any flows past its existing canyon collectors, properly maintaining
24 its Facilities to avoid any future pump station or other Facility failures, properly
25 implementing the monitoring program in the NPDES Permit and creating and
26 implementing a response plan as stated in the NPDES Permit.

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1 6. Awarding the State Lands Commission its costs of litigation, including
2 reasonable attorneys' fees, incurred in prosecuting this action, pursuant to 28 U.S.C.
3 § 2412, Clean Water Act section 505(d), 33 U.S.C. § 1365(d), and all applicable law.

4 7. All other relief deemed appropriate by this Court.

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6 Dated: December 13, 2018

Respectfully Submitted,

7 XAVIER BECERRA
8 Attorney General of California
9 DEBORAH M. SMITH
Supervising Deputy Attorney General

10
11 s/HAYLEY PETERSON
12 HAYLEY PETERSON
13 Deputy Attorney General
Attorneys for Intervenor
State Lands Commission

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CERTIFICATE OF SERVICE

Case Name: **People v. International
Boundard Water Comm.**

No. **18CV2050 JM LL**

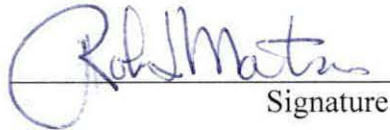
I hereby certify that on **December 13, 2018**, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

COMPLAINT IN INTERVENTION

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **December 13, 2018**, at San Diego, California.

Roberta L. Matson
Declarant



Signature