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Save the El Dorado Canal

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF EL DORADO

SAVE THE EL DORADO CANAL, )  
)

Petitioner )

v. )

EL DORADO IRRIGATION DISTRICT; )  
EL DORADO IRRIGATION DISTRICT )  
BOARD OF DIRECTORS; )  
and DOES 1 to 20, )

Respondents )  
\_\_\_\_\_ )

No. PC20190260

**PETITIONER'S REPLY BRIEF**

Hearing Date: March 13, 2020

Time: 2:30 p.m.

Dept.: 9

Judge: Hon. Dylan Sullivan

Petition Filed: May 21, 2019

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**I. INTRODUCTION**

Respondent El Dorado Irrigation District’s Opposition Brief (“ROB”) includes the same errors as the District’s environmental review for the Upper Main Ditch Piping Project (“Project”). The Environmental Impact Report (“EIR”) for the Project did not acknowledge the fact that the majority of the Upper Main Ditch would be abandoned and would not be maintained for conveyance of storm water in the future. The EIR did not adequately analyze for the drainage and flooding impacts that will result from the Blair Road Alternative, and the District repeatedly assured the public and the decision makers that there would be *no* drainage impacts at all.

This failure to disclose a crucial aspect of the Project resulted in a failure to fulfill the informational requirements of CEQA.<sup>1</sup> (*Sierra Club v. Fresno County* (2018) 6 Cal.5th 502, 510 [An EIR missing sufficient analysis to support its conclusions fails to meet CEQA’s function of facilitating “informed agency decisionmaking and informed public participation.”])

This failure to disclose and analyze Project impacts is not difficult to ascertain from the record. Thus, the Opposition Brief includes several arguments designed to paint Petitioner Save the El Dorado Canal (“Petitioner”) as confused or without legal remedy. In fact, in a letter to the District on July 23, 2018, Petitioner’s counsel summarized and discussed many of the issues raised by members of the public, including all of the issues raised in the Petition and the Opening Brief. (AR 2034-2042.) These issues were preserved for review, and there is nothing confusing about the fact that the EIR fails to disclose the drainage and flooding impacts of the Project.

The EIR was focused on the “proposed project” which included the entire pipeline within the existing ditch, and so failed to adequately analyze impacts to biological resources, aesthetics, recreation and increased wildfire risk associated with the Blair Road Alternative. As set forth in detail below and in the Opening Brief (“OB”), the EIR did not disclose crucial elements of the Project, and also did not adequately evaluate all of the Project’s impacts.

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<sup>1</sup> Pub. Resources Code §§ 21000 et seq. and the CEQA Guidelines, California Code of Regulations, Title 14, section 15000 et seq.

1 **II. CLARIFICATION OF FACTS**

2 The District’s conclusion that the Project will not impact drainage in the Project area  
3 requires one to overlook the fact that the abandoned portions of the Upper Main Ditch (“UMD”)  
4 will be filled in, either by landowners intending to fill in the abandoned segments, or by the  
5 passage of time and the ongoing buildup of debris. The District’s conclusions rely entirely upon  
6 the assumption that landowners will voluntarily clean debris out of the ditch and maintain the  
7 existing capacity of the UMD to convey stormwater flows.

8 The unavoidable fact in this case is that the EIR for the Project analyzed the drainage  
9 impacts of the original “proposed project”: a project where the entire pipeline would be  
10 contained within the existing UMD, and a remnant channel engineered and constructed so that  
11 the UMD could continue to collect and convey storm flows. The Blair Road Alternative does *not*  
12 include a “remnant channel” in a 9,300-foot segment of the UMD. The EIR did not analyze for  
13 this outcome. The abandoned 9,300-foot segment will not be engineered or maintained.

14 Throughout its Opposition Brief, the District continues to spin the various project  
15 descriptions, cherry picking quoted material from the original project proposal, the proposed  
16 project in the DEIR (see ROB, pp. p. 25:1-14, and 26), and the description of the Blair Road  
17 Alternative (the Project as approved). (ROB, p. 25:14-28.)

18 Understanding the similarities and the differences between these descriptions is essential to  
19 understanding the arguments raised by both parties. The following provides factual clarification  
20 for: (1) the “proposed project” as originally described in the Initial Study; (2) and the Blair Road  
21 Alternative as described in the Initial Study; (3) the “proposed project” as described in the DEIR;  
22 and (4) the Blair Road Alternative as described in the DEIR.

23 The “proposed project” throughout the analysis was the installation of the entire pipeline  
24 within the Upper Main Ditch. This alignment within the ditch is referred to herein as “Proposed  
25 Project.”

26 **A. The original project described in the Initial Study**

27 Any version of the UMD project was intended to replace a 3-mile section of water supply  
28 ditch. (See Initial Study [“IS”]), p. 1, AR 62.) The IS included descriptions of the three

1 alternatives, including the Proposed Project, which would involve a pipeline within the UMD,  
2 with fill material placed over the pipeline. (IS, p. 4, AR 68.) Figure 2 depicts the Proposed  
3 Project with the pipeline following the existing UMD alignment. (IS, Fig. 2, AR 69.)

4 With respect to altering drainage conditions, the IS stated that the Proposed Project impacts  
5 would be less than significant because the ditch would be filled in, and “by filling in the ditch  
6 with an out sloped grade, the drainage flow path would be returned to historic, pre-ditch  
7 conditions.” (IS, p. 46, AR 110.) The IS went on to say that the UMD currently intercepts  
8 stormwater, but with the pipeline installed in the ditch, the storm water would “sheet flow” back  
9 to “historic drainage patterns.” (*Id.*) These “historic drainage patterns” are presumably those  
10 patterns that existed in the early 1800s, before the UMD was constructed.

#### 11 **B. Description of the Blair Road Alternative in the Initial Study**

12 The IS described the Blair Road Alternative as including a pipeline within the UMD for  
13 approximately 6,100 feet, while “approximately 9,300 feet of the existing ditch [UMD] would be  
14 abandoned.” (*Id.*) The remainder of the pipeline would be undergrounded following the roadway  
15 right of way, and then “rejoin the existing ditch alignment at the Blair Road crossing of the  
16 Upper Main Ditch and continue to the WTP.” (*Id.*) Figure 4 in the IS shows the Blair Road  
17 alignment. (IS, Fig. 4, AR 71.)

18 The IS did not address the impact of the Blair Road Alternative to drainage and potential  
19 flooding. (See IS, p. 46, AR 110.)

#### 20 **C. The Proposed Project in the Draft EIR**

21 The Proposed Project includes installation of a 42-inch buried pipeline in the existing  
22 UMD. (DEIR, p. 2.9, AR 187.) In a change from the description in the IS, the DEIR states that  
23 the UMD would be backfilled, and “[a] reshaped ditch would be left in the compacted surface to  
24 allow for passage of stormwater flows up to the current 10-year storm event capacity.” (DEIR, p.  
25 2.13, AR 194.)

26 In discussing the Project Description, the District refers to the 2014 Basis of Design Report  
27 by Domenichelli & Associates (ROB, p. 26:10-15), and asserts that the UMD will continue to  
28 “passively receive” and convey runoff. Yet, the 2014 Basis of Design Report (“2014 Report”)

1 states that the Proposed Project would result in the drainage returning to “historic conditions,”  
2 like the description in the IS. (2014 Report, p. 18, AR 739.)

3 Further adding to the confusion, the District quotes from the FEIR response to comments  
4 (ROB, p. 26:11-23), where the District cites the only paragraph in the DEIR Project Description  
5 that addressed stormwater, claiming that the ditch will continue to have capacity to handle 10-  
6 year storm flows. (ROB, p. 26:14-18.) That description was for the Proposed Project, not the  
7 Blair Road Alternative.

#### 8 **D. The Blair Road Alternative in the Draft EIR**

9 As noted above, the District refers to the 2014 Report by Domenichelli & Associates, and  
10 that Report is listed as a source for the EIR and included in Appendix B. (See Appendix B to  
11 DEIR, p. 1, AR 713.) The 2014 Report notes that under the Blair Road Alternative, 9,300 feet of  
12 ditch will be abandoned. It goes on to state that the “section of abandoned ditch will be filled  
13 with compacted engineered fill to return the drainage pattern to pre-ditch conditions.” (2014  
14 Report, p. 20, AR 741.) That is not what is included in the EIR, nor in the Project approval. The  
15 abandoned ditch will not be filled, in fact, it is stated over and over in the EIR (and by the  
16 District in its brief) that the abandoned ditch will remain open (to be cleared and maintained by  
17 private landowners) and continue to collect and convey stormwater.

18 Oddly, the District quotes in its brief the description of the Proposed Project rather than the  
19 Blair Road Alternative. (ROB, p. 25:5-14.) The brief goes on to quote a portion of the Project  
20 Description for the Blair Road Alternative, where it is concluded that the “unused portions of the  
21 ditch would revert to the underlying property owners. The District would take appropriate future  
22 maintenance actions within its pipeline easement rights to maintain the ditch as necessary to  
23 protect and maintain District facilities.” (ROB, p. 25:15-24.) This contradictory conclusion  
24 seems to say that the abandoned section of the ditch will be the responsibility of the underlying  
25 property owners, while the District will maintain its facilities for its own protection.

26 In the FEIR response to comments discussed above, the District tried to draw the Blair  
27 Road Alternative into the response by claiming that the abandoned section of the UMD would be  
28 “unaffected.” (ROB, p. 26:19-23.) The District maintains the existing ditch, keeping it clear of

1 debris on a regular basis so that it can be operated as a water conveyance. Abandoning that ditch  
2 *will* have a physical impact. The statement that it will be “unaffected” has no basis in fact.

3 The EIR was not drafted to fully describe and consider the Blair Road Alternative. There is  
4 much in the District’s brief that glosses over this fact. The District argues that many assumptions  
5 were made regarding the Blair Road Alternative, and the assumptions are “reasonable.”

6 The District claims that it was reasonable to assume that private landowners will maintain  
7 the abandoned ditch “as an incident of ownership.” That this private action will assure that the  
8 ditch retains the current capacity to convey stormwater. (ROB, p. 42:21-28.) This seems  
9 particularly suspect in light of the 2014 Report stating that the Blair Road Alternative would  
10 include *filling in* the abandoned ditch with engineered fill. (2014 Report, p. 20, AR 741.)

11 The “substantial evidence” the District points to in support of the notion that the  
12 landowners will act against their own interests and expend time and money maintaining the  
13 ditch, is threefold. First is the fact that fill activity is regulated by the County. (ROB, p. 42:26-  
14 27.) There is nothing in the record showing that the County regulates the piling of leaves or  
15 brush or other debris into an abandoned ditch. The second piece of evidence is that private  
16 landowners have an “incentive to avoid harm to their property or that of third parties.” (ROB, p.  
17 42:27-28.) The harm that will result from flooding will not be the landowners’ responsibility, it  
18 will be the District’s, and the District has explicitly acknowledged this liability. (District Board  
19 June 26, 2017, Action Item 7, pp. 1-10, AR 3620-3630, specifically 3624-3625 [“In light of the  
20 long term liability facing the District...”].) The District says that it will slope the remnant  
21 channels in the District-owned sections of the UMD so that storm flows will be directed into the  
22 abandoned ditch. (DEIR, p. 2.32, AR 221.) In other words, the District will continue to use the  
23 abandoned ditch (without any easement or permission) for drainage of its own facilities.

24 The final piece of evidence presented by the District is that the District will not have any  
25 “authority” to maintain portions of the ditch for which it loses its easement rights by virtue of  
26 non-use. (ROB, pp. 42:28 and 43:1-2.) The tension between the claim that the District has no  
27 authority to maintain the ditch, but has the right to continue to use it for drainage by conveying  
28 storm flows into it, is impossible to reconcile.



1 **III. DISCUSSION**

2 **A. Petitioner’s arguments are supported by citations to the record and authorities**

3 The District’s arguments begin with a series of grasping claims around the notion that  
4 Petitioner did not cite evidence, and that if it did, the evidence was not cited in the correct  
5 format, which is “inherently prejudicial to EID.” (ROB, p. 17, fn. 7.) The appendix to the  
6 Opening Brief contains more than 1,500 pages, and the Opening Brief is riddled with references  
7 to the Record. Petitioner has provided the court with citations to the evidence the District relied  
8 upon, and has discussed at length how that evidence was used by the District.

9 The District cites to a favorite case in opposing briefs in the CEQA context: *Citizens for*  
10 *Positive Growth & Preservation v. City of Sacramento* (2019) 43 Cal.App.5th 609, 629-631  
11 (“*Citizens*”). This case cites *South County Citizens for Smart Growth v. Nevada County* (2013)  
12 221 Cal.App.4th 316, describing the issue before the court in both cases: where petitioner bears  
13 the burden of proving a double negative, that the agency’s decision not to recirculate an EIR is  
14 not supported by substantial evidence. (*Citizens, supra*, 43 Cal.App.5th at 632.) The burden on  
15 the petitioner is to cite the evidence the agency relied upon and explain why it does not support  
16 the agency’s conclusion. (*Id.*)

17 These cases are helpful to a respondent when a petitioner cites only evidence that does not  
18 support the agency’s decision, and fails to discuss the evidence the agency relied upon. In those  
19 cases, the courts have been clear that it is not the court’s job to search through the record trying  
20 to find the evidence the agency relied upon. (*See, Citizens, supra*, 43 Cal.App.5th at 626, fn. 8.)

21 While these cases are helpful to respondents in some situations, the Petitioner’s Opening  
22 Brief in this case cited to an appendix of record documents containing more than 1,500 pages of  
23 information. The studies the District relied upon are cited and discussed by Petitioner at length.  
24 Maybe out of habit, or in the hopes that these cases would not be deeply analyzed, the District  
25 cites these favorite cases and attempts to argue that the Petitioner did not cite the evidence the  
26 District relied upon, despite the fact that Petitioner did cite the evidence and discuss it at length.

27 The argument regarding citation format notes that the Local Rule calls for the title of the  
28 document and the document page number in references to the record. While Local Rule 7.12.13

1 states that reference to document title and page are required, that language was interpreted by  
2 Petitioner’s counsel not to require a double-citation. (See Declaration of Marsha A. Burch in  
3 Support of Petitioner’s Reply Brief, served and filed herewith.) Further, the stipulation between  
4 the parties allowed Petitioner 40 pages for its Opening Brief, and the brief actually contained  
5 less than 38 pages of argument. There is no “inherent prejudice” where the Opening Brief  
6 contained fewer pages than was allowed.

7 In a confusing paragraph, the District argues that Petitioner’s argument that the Project  
8 Description was inadequate should be dismissed by the Court because the Opening Brief failed  
9 to support the argument with legal authority and failed to discuss the evidence in the record  
10 favorable to the EID determination. (ROB, p. 17:9-12). The paragraph goes on to say that  
11 Petitioner “mischaracterizes the analytical approach for estimating water loss in the ditch...”  
12 (ROB, p. 17:12-18.) The District, all in one paragraph, claims that Petitioner did not discuss the  
13 facts favorable to the District, *and* that Petitioner set out the facts favorable to the District but  
14 “mischaracterized the analytical approach” contained in the documents the District relied on.  
15 (*Id.*) Petitioner did exactly what a petitioner is required to do: set out the facts (in this case  
16 studies and expert reports) relied on by the District, and discussed why these documents do not  
17 support the District’s conclusions. A petitioner need only discuss the facts the agency relied on,  
18 it does not need to *agree* with the agency’s conclusions. There would be no CEQA challenge if  
19 the only way to challenge a conclusion would be to agree with it.

20 In another confounding argument, the District claims that the Opening Brief arguments  
21 regarding the Project Description should be disregarded by the Court because the Opening Brief  
22 refers to the Project Description in the Initial Study, and because Petitioner offers “no evidence”  
23 to support the argument that the Project Description in the Draft EIR contains a false statement.  
24 (ROB, p. 18:1-6.)

25 With respect to the first claim, there is no authority to support the District’s position that  
26 the Project Description in the Initial Study need not be consistent with the Project Description in  
27 the EIR. The Project description must be stable. (*San Joaquin Raptor Rescue Center v. County*  
28 *of Merced* (2007) 149 Cal.App.4th 645, 655.) With respect to the second claim, the District

1 misstates Petitioner’s argument. In the Opening Brief, Petitioner argues that the Project  
2 Description makes the explicit statement that in the areas where the pipeline alignment is *not*  
3 within the existing ditch, the ditch would be reshaped to provide “a similar level of stormwater  
4 capacity for flows up to the 10-year event.” It goes on to say that “[f]lows in excess of the 10-  
5 year event would pass over the alignment and follow the natural drainage courses as they do  
6 under existing conditions.” (DEIR, p. 2.18, AR 202; and see OB, p. 23:6-14.) This is a crucial  
7 point in Petitioner’s argument, and it has been mischaracterized by the District. It was also the  
8 essential failure in the EIR. The section of the ditch that will not include the pipeline will be  
9 abandoned, and may be filled in, either intentionally or over time from lack of maintenance.  
10 (OB, pp. 39:21-28 and 40:1-13.) The statement that that section of the ditch will continue to  
11 have the same capacity as existing conditions is false.

12 It is entirely unclear how the District believes there is insufficient evidence cited to  
13 support this claim. The discussion of the background facts in the Opening Brief cites to dozens  
14 of places in the record where the abandonment of the ditch section was acknowledged,  
15 discussed, and objected to.

16 The final argument contained in this paragraph urges the Court to disregard Petitioner’s  
17 argument for two reasons: (1) because the Opening Brief only “vaguely” refers to the District’s  
18 arguments; and (2) does not cite to “the EIR or other allegedly insufficient evidence.” (ROB, p.  
19 18:6-12.) The first argument is so unclear it is difficult to respond. The Opening Brief included  
20 discussion of the fact that during the environmental review process, the District acknowledged  
21 that most of the Upper Main Ditch would be abandoned, but argued that the Project Description  
22 did not state this essential fact about the Project, and so was insufficient. (See comment letter  
23 from Petitioner’s counsel dated July 23, 2018, AR 2034-2042.) The second argument asserts  
24 that Petitioner is required to “find” evidence in the record to *refute* the District’s conclusion and  
25 “reasonable fact-based assumptions about future actions by landowners along the Ditch.” (*Id.*)  
26 As an initial matter, it is not up to a petitioner to find evidence to refute a conclusion, the  
27 obligation is to discuss the evidence relied on by the agency and describe how the evidence  
28 does not support the conclusion. In this case, Petitioner did just that. The Opening Brief is rife

1 with references to the record showing that landowners *will intentionally fill in the abandoned*  
2 *sections of ditch*. (OB, pp. 39:21-28 and 40:1-13.) The abandoned section of ditch *will fall into*  
3 *disrepair*. (*Id.*) The District has abandoned sections of the same ditch system in the same  
4 neighborhood in the past. Evidence resulting from that previous abandonment shows without a  
5 doubt that abandoned ditch segments will *not* function as they have in the past for stormwater  
6 conveyance. (*Id.*, and see District Board June 26, 2017, Action Item 7, pp. 1-10, AR 3620-3630,  
7 specifically 3624-3625.) The District’s argument makes no sense in the face of this huge  
8 amount of evidence cited by Petitioner, and acknowledged by the District’s staff and the Board.

9       Next up is an argument that the Court should ignore Petitioner’s claims that the EIR failed  
10 to adequately analyze impacts to aesthetics and recreation because the Petitioner “failed to lay  
11 out the evidence favorable to EID and show why it is lacking.” The evidence relied upon in the  
12 DEIR is summarized in the Master Responses contained in the FEIR, and Petitioner discussed  
13 that evidence at length in the Opening Brief. (See OB, pp. 26-27.) The Background Facts  
14 section of the Opening Brief cites to hundreds of pages of the Record, and describes the facts  
15 and assumptions relied on by the District in its analysis. Petitioner does not agree that  
16 substantial evidence supports the District’s conclusions, but did cite to the portions of the record  
17 where the District discussed the relied-upon evidence.

18       Finally, the District argues that the Opening Brief does not cite to enough evidence  
19 regarding the argument that drainage impacts are foreseeable and should be analyzed. (ROB, p.  
20 19:6-14.) The Master Responses discussed in the Opening Brief are contained in the FEIR and  
21 discuss all of the evidence in the DEIR. An Opening Brief is not required to cite only to the  
22 DEIR, it is required to discuss the evidence the lead agency relied on. The Opening Brief  
23 discusses, at great length, the evidence the District relied on to support its conclusion that the  
24 Project would not have any significant impacts to drainage and flooding. (OB, pp. 35-42.)

25 **B. The Project Description is inadequate**

26       The District claims that the CEQA Guidelines allow for a Project Description to omit  
27 “extensive detail beyond that needed for evaluation and review of the environmental impact.”  
28 (ROB, p. 20:1-3, citing Guidelines § 15124.) Essentially, the District argues that in order to

1 prevail, the Petitioner must show that there would have been “different information” if the  
2 Project Description had not omitted the fact that much of the only stormwater conveyance  
3 system for the 314-acre watershed was being abandoned, and (based on results of past  
4 abandonments) would likely be filled in and no longer able to convey any water. (ROB, p. 20:3-  
5 6.) Had the public and the decision makers had been made aware of the facts about the Project,  
6 then “different information” would have been developed. Simply put, the EIR did not  
7 adequately describe or analyze the Blair Road Alternative.

8 The Record in this case contains much evidence showing that the abandoned sections of  
9 the ditch *will* fill in, either by intention of the landowner, or through lack of maintenance. The  
10 District claims that it has no authority and no obligation to even consider the stormwater  
11 drainage problems created by the Project (ROB, pp. 42-43). Petitioner and the County raised the  
12 question of how the District can intentionally destroy the only existing stormwater drainage  
13 system for the watershed and simply wash its hands of any responsibility to the community or  
14 the County. (Comment letters from County of El Dorado and Petitioner’s counsel, respectively,  
15 AR 1952-1953 and 2034-2042.) The impacts are foreseeable.

16 **1. The Project Objective regarding reduction of water loss is not supported by**  
17 **substantial evidence**

18 The District claims that there is no citation to any authority requiring the “objectives”  
19 section of the Project Description to be supported by evidence. The Opening Brief cites to  
20 CEQA’s requirements and cases interpreting the requirements of CEQA for a clear, accurate,  
21 stable project description. Project objectives are part of the Project Description. “Among other  
22 things, a project description must include a clear statement of ‘the objectives sought by the  
23 proposed project,’ which will help the Lead Agency ‘develop a reasonable range of alternatives  
24 to evaluate in the EIR and will aid the decision makers in preparing findings or a statement of  
25 overriding considerations, if necessary.’” (*San Joaquin Raptor Rescue Center v. County of*  
26 *Merced* (2007) 149 Cal.App.4th 645, 654, citing Guidelines § 15124(b).)

27 The pages of the Project Description discussing the objectives *are* cited in the Opening  
28 Brief. (See OB, p. 9:19-22.) Further, the Petition asserts that the Project Description is

1 inadequate (Petition, ¶¶ 52-55), and the objective of reducing water loss is part of the Project  
2 Description. (DEIR, p. 2.6, AR 184.) Therefore, Petitioner may pursue this claim.

3 The District goes on to argue that comments regarding the lack of need for the Project  
4 were required to state that this was a flaw in the “Project Description.” (ROB, p. 21:1-5.) The  
5 many comments raising concerns about the lack of substantial evidence supporting the  
6 conclusion that the Project was *necessary* to achieve the objective of reducing water loss were  
7 clear, and it was not necessary for the commenters to use a term of art from the statutes for the  
8 District to address this issue. Further, it was described as a flaw in the Project Description in  
9 comments. (Comment Letter from Petitioners’ counsel, AR 2034-2042.) It is interesting that the  
10 District urges the Court to disregard early comments on the Project objectives, and claims that  
11 the agency did not have the “opportunity to address this specific objection” (ROB, p. 21:5-8), in  
12 light of the fact that the District *did* respond to these comments regarding the flaw by hiring a  
13 consultant to prepare a whole new “study.” (FEIR, p. 2.24, AR 1934.) The claim now that the  
14 District did not have an opportunity to address this issue is belied by the fact that the comments  
15 submitted were clearly directed at the flawed Project Description, and the District took the  
16 opportunity to address the comments by commissioning a new study.

17 The District goes on to defend the “Tully And Young Main Ditch Water Loss Technical  
18 Memorandum (February 2017),” Appendix B.5 to DEIR, (“Tully and Young Memorandum”),  
19 claiming that it supports the District’s conclusions. (ROB, p. 21:19-28.) The District argues, as  
20 it did during the CEQA review, that the information relied on represented the “best available  
21 information prepared by independent qualified consultants.” (ROB, p. 22:2-3.)

22 The District’s own documentation revealed that the data used to prepare the 2017 Tully  
23 and Young Memo was unreliable. (See OB, pp. 18:23-28, 19, and 20:1-18.)<sup>2</sup>

24  
25  
26  
27 <sup>2</sup> The statement in the Opening Brief regarding the “Summer 2015 spreadsheet” was mistakenly referred  
28 to the wrong page of the AR. The correct citation is to a letter from Raymond Curtis, AR pp. 2321-2324,  
at p. 2323.

1           **2.       The Project Description omits crucial information regarding**  
2                   **hydrology and drainage**

3           The District accuses Petitioner of confusing the facts by discussing the 2005 Feasibility  
4 Report and arguing that the Report set forth the approaches that could be taken by the District in  
5 addressing the Main Ditch, and the Project implements one of the approaches described in that  
6 document. (ROB, p. 24:9-23.) The District bemoans the confusion and claims that the 2005  
7 report is a dozen years old and was not really addressing the Upper Main Ditch, but was  
8 focused on the Middle Main Ditch. (*Id.*) In fact, the 2005 Feasibility Report was swept under  
9 the rug by the District during review of the Project because the significant impacts that will  
10 result are clearly identified in the 2005 Feasibility Report. Petitioner is not “sowing confusion,”  
11 but shedding light on the facts the District was aware of that it chose not to disclose to the  
12 public in the EIR.

13           After claiming that the Opening Brief is just too confusing to respond to, the District goes  
14 on to argue that the EIR describes all of the Project’s impacts to drainage. The first section of  
15 the Draft EIR quoted describes the proposed project (not the Project as approved – the Blair  
16 Road Alternative). (ROB, p. 25:1-14.) The proposed project would *not* have involved  
17 abandonment of a large part of the ditch, and so is not particularly relevant.

18           The second section of quoted material describes the Project as approved. (ROB, p. 25:15-  
19 24.) The essential pieces of the Blair Road description are two statements as follows: “The ditch  
20 would continue to have the capacity to passively receive and convey stormwater flows during  
21 storm events[.]” and “[t]he District would take appropriate future maintenance actions within its  
22 pipeline easement rights to maintain the ditch as necessary to protect and maintain District  
23 facilities.” (DEIR, p. 2.38, AR 231.) The fact is that under the Blair Road Alternative (the  
24 Project as approved), only about 30% of the ditch (housing the new pipeline) will continue to  
25 have “capacity to receive and convey stormwater,” and that section of the ditch would be the  
26 only portion that would be subject to “appropriate future maintenance actions.” The Project  
27 Description is not just misleading it is blatantly false.

1           The District goes on to argue that the changes in the Project description between the Initial  
2 Study and the Draft EIR are actually a good sign that the District listened to comments and  
3 responded by altering the Project. (ROB, p. 26-27.) As set forth in detail in Section II, above,  
4 between the Initial Study and the DEIR, the project design was changed. The original project  
5 proposed to replace the entire Upper Main Ditch with a pipeline and fill the ditch to allow  
6 stormwater to “sheet” over the ditch. The District takes credit now for making a “good” revision  
7 to the originally proposed project, citing the change in design from filling in the ditch (and  
8 allowing water to sheet flow across it) to the “remnant channel” design that would allow a 10-  
9 year storm flow to continuing flowing “following pre-Project drainage patterns.” (ROB, p.  
10 26:15-18; DEIR, p. 2.38, AR 231.) The devil is in the detail here, the thing the District  
11 continues to gloss over is that the abandonment of 60% of the ditch under the Blair Road  
12 Alternative does *not* include a “remnant channel” in the abandoned segment. It includes *no*  
13 *channel*. Thus, the FEIR erroneously concludes that “the Blair Road Alternative and Combined  
14 Alternative would not change the capacity to convey stormwater, because under those  
15 alternatives the existing ditch would be *unaffected* except in areas where the new pipeline  
16 would enter the ditch. . . .” (ROB, p. 26:15-18; FEIR, pp. 2.20-2.21, AR 1930-1931, emphasis  
17 added.) The abandoned section of the UMD will not be “unaffected,” it will be abandoned.

18           The District argues that the Project Description is “clear and consistent,” but what is clear  
19 and consistent is the District’s refusal to disclose that the abandoned portions of the ditch will  
20 not be maintained, and will eventually be filled by the landowners, or by the passage of time  
21 with debris piling up.

22           The entire discussion of this issue in the Opposition Brief sidesteps the fact that  
23 throughout the EIR the District repeatedly told the public and the decision makers that nothing  
24 would change with respect to drainage; that the ditch (even the abandoned sections) would be  
25 “unaffected.” It simply is not true. This false picture painted during the environmental review  
26 process prevented informed decision making and public participation.



1 **C. The EIR’s impact analysis is inadequate**

2 **1. The EIR fails to adequately analyze and mitigate the Project’s impacts to**  
3 **aesthetics and recreation**

4 The District complains that Petitioner should not combine the arguments regarding  
5 impacts to aesthetics and recreation. (ROB, p. 27:15-18.) Also, the District continues to argue  
6 that the Petitioner must cite to the DEIR. There is no authority supporting this argument. The  
7 Petitioner must cite evidence relied on by the lead agency, and in this case, the District  
8 dismissed the aesthetic, recreational, and community values. This dismissal was based upon the  
9 clinical approach that concluded that the trail along the ditch is not valuable in terms of views,  
10 and is not a formally recognized recreational trail. (OB, p. 26:1-6.) This dismissal of the trail’s  
11 value also involved the District claiming that the ditch and trail do not meet the criteria for  
12 listing under the California Register of Historic Places. (ROB, p. 30:16-24.) The District goes  
13 on to argue that the Project will not impact cultural or archeological resources. (ROB, pp.  
14 30:24-28 and 31:1-4.) The Draft EIR concluded that the ditch is not “directly associated with  
15 significant historical events, individuals of historical importance, or the development of local  
16 water conveyance systems.” (DEIR, p. 3.5.14, AR 389.) Because that was the end of the  
17 inquiry, Petitioner and others submitted comments providing information about the historic  
18 events and individuals. (OB, pp. 26 and 27:1-3.) The State Historic Preservation Officer  
19 (“SHPO”) concurred with the District’s findings that no “historic properties” would be affected  
20 by the Project, but the community feels very strongly that this conclusion is incorrect. While  
21 there is evidence that the SHPO made such a conclusion, it is not simply that the Petitioner  
22 disagrees. The District did not evaluate, but dismissed, the wealth of information from locals  
23 who believe that the ditch and its trail are an important piece of local history.

24 **2. The EIR fails to adequately analyze potential impacts to biological resources**

25 **a. The EIR fails to adequately analyze impacts to riparian habitat**

26 The District cannot explain why it states in the Project Description that if the Blair Road  
27 alternative is chosen, the district will obtain a Streambed Alteration Agreement from the  
28 California Department of Fish and Wildlife (“CDFW”). Because it cannot be explained, the

1 District argues that Petitioner is confused (again) and that the argument in the Opening Brief  
2 arises out of a “misunderstanding” of the EIR. (ROB, p. 34:1-6.)

3 There is no misunderstanding. The District relies on a wetland delineation that CDFW told  
4 the District was not appropriate for this use because of its methodology (OB, p. 28:10-28), and  
5 also relies on a mitigation measure that says a Streambed Alternation Agreement *will* be  
6 obtained. (*Id.*) It is not the Petitioner raising a confused argument. In its efforts to wiggle out of  
7 the direct commitments made in the EIR, the District has confused the issue.

8 In response to the many comments submitted regarding the impacts to riparian habitat, all  
9 were referred to Master Response 4, which states that the impact will be insignificant because it  
10 will be “regulated through the 1602 process.” (OB, p. 30:1-8, citing DEIR, p. 2.10, AR 1920.)  
11 The District argues in the face of this clear language that the “Project’s potential impacts from  
12 loss of riparian and water resources would not be considered significant impacts, and therefore,  
13 would not fall under the regulation of CDFW.” (ROB, p. 34:1-3.) Comparing what was said in  
14 Master Response 4 and what the District says today in its Opposition Brief, it is impossible to  
15 reconcile. The Master Response said there would not be any significant impacts because of  
16 compliance with CDFW 1602 regulations, and today, the District says that there will be no  
17 significant impacts and so the Project is *not subject* to CDFW 1602 regulations. The Opposition  
18 Brief contains a post hoc attempt to avoid the commitments made in the EIR and is not  
19 supported by the Record.

20 The District’s final argument regarding its utter disregard of CDFW’s comments is to say  
21 that the agency did not object to such treatment. (ROB, p. 34:10-12.) It is not surprising that a  
22 State resource agency, working as best as it can on a challenging budget, did not take the time  
23 to object to the District’s disregard. It is also understandable in light of the fact that the Master  
24 Response in the Final EIR states that the Project *will* be regulated through the 1602 process  
25 (DEIR, p. 2.10, AR 1920). The CDFW may have taken that to mean that the District intended to  
26 comply with the regulations.

1                   **b.       The EIR fails to adequately analyze potential impacts to trees**

2           The District argues around the actual issue in its brief, going into great detail about the  
3 portions of the EIR where tree impacts associated with the Proposed Project were discussed.  
4 With respect to the Blair Road Alternative, the DEIR simply concluded that the Project would  
5 not impact riparian areas because it would be located largely within the roadway. (DEIR, p.  
6 3.4.34, AR 355.)

7           The discussion set forth in the Opening Brief describes the shortcomings of the response  
8 to comments on this issue (OB, pp. 31-32), and the District’s Opposition Brief does nothing to  
9 explain how the lack of adequate response should be excused.

10                   **c.       The EIR fails to adequately analyze potential impacts to fire hazards**

11           The District argues that its conclusion in the EIR is correct: that the ditch is not a  
12 “substantial water source” and that it lacks infrastructure, permanent supply, and water rights  
13 that would make it a valuable firefighting resource. (ROB, p. 38:25-28.) In the Opposition  
14 Brief, the District clings to the claim that the irrigation ditch was not used during the King Fire  
15 in 2014, and that this proves that the ditch is not a valuable source of water during a wildfire.

16           The District does not address the comments submitted from residents who tell stories of  
17 the role of another segment of the ditch (approximately a mile away) in saving their property  
18 during the King Fire (OB, p. 33:1-19), other than to say the “dire predictions” by mere lay  
19 persons do not constitute substantial evidence. (ROB, p. 16:9-14.) The case relied upon here by  
20 the District determined that under CEQA, “the question is whether a project will affect the  
21 environment of persons in general, not whether a project will affect particular persons.  
22 [Citations.] Thus, “the mere possibility of adverse impact on a few people, as opposed to the  
23 environment in general,” is not sufficient to constitute substantial evidence of an adverse effect.  
24 (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157  
25 Cal.App.4th 885, 900–901.) The *Porterville* case dealt with impacts to the views of a small  
26 number of citizens. (*Id.*)

27           In this case, a valuable fire fighting resource being removed from the area will place  
28 thousands of homes, residents, and property in greater danger of being lost in wildfires. These

1 are not “dire predictions” by a handful of residents. Further, the direct observation of a  
2 layperson *is* substantial evidence. (*Pocket Protectors v. City of Sacramento* (2004) 124  
3 Cal.App.4th 903, 927-928.)

4 The District also did not respond to the Opening Brief’s description of comments  
5 submitted by a local Deputy Chief firefighter and Registered Professional Forester, describing  
6 how the ditch acted as a fire break during the King Fire in an area approximately a mile from  
7 the Project area, and supported pumping operations that saved several homes along Randolph  
8 Canyon Road. (OB, p. 34:4-19.) This comment was not submitted by a “non-expert.”  
9 Substantial evidence does not support the District’s conclusion.

### 10 **3. The EIR fails to adequately describe the environmental setting**

11 In the face of the evidence showing that 9,300 feet of the ditch will be abandoned, with all  
12 of that abandoned section reverting the landowners, the District concludes its argument  
13 regarding the environmental setting by stating that “the EIR contained detailed information  
14 about the existing drainage and hydrology as it relates to the Ditch, and *the EIR made it clear*  
15 *that the Project must be designed in a manner that accommodates runoff and stormwater*  
16 *along the Ditch corridor.* (DEIR, pp. 3.9.7, AR 460; Domenichelli 2016, pp. 9-13, AR 1188-  
17 1192.)” (ROB, p. 40:21-24, emphasis added.) It is almost as though the District believes that  
18 stating that the EIR intended for the District to design the Project so that future stormwater will  
19 be “accommodated” by the Project, that it would actually be so. The Project results in  
20 abandonment of most of the Upper Main Ditch. The record reveals that after abandonment of  
21 the Middle Main Ditch, landowners filled in the ditch segments, or they were clogged with  
22 debris. (OB, pp. 39:21-28 and 40:1-13.) There is no mention in the EIR of any effort to educate  
23 landowners about what will happen in terms of flooding, and the blind “belief” that landowners  
24 will somehow know what is good and right, is the “substantial evidence” the District points to.

### 25 **4. The EIR fails to adequately analyze impacts to hydrology**

26 The District refers to the flooding impacts that will occur when the abandoned ditch is  
27 filled in by landowners or clogged with debris as “potential indirect impacts.” (ROB, p. 41:1-5.)  
28 The District says that Petitioner “disagrees with EID’s conclusion that the ditch will continue to

1 have the capacity to receive and convey runoff and stormwater under Project operations, similar  
2 to baseline conditions.” (ROB, p. 41:6-10.) This is an astute assessment of Petitioner’s position.

3 The District states: “Regarding the Blair Road Alternative, the EIR explains that  
4 construction would include a graded slope to facilitate normal gravity flow of stormwater.  
5 (*Ibid.*) This would allow the Ditch to continue to passively receive and convey stormwater,  
6 with little change from current conditions. (*Ibid.*)” (ROB, p. 41:21-24.) What this quoted  
7 section of the Draft EIR actually means is that the transition between the portions of the ditch  
8 with the pipeline installed within it would include a transition *into the abandoned segment* of  
9 the ditch. (DEIR, p. 2.38, AR 231.) In other words, despite the fact that over time the  
10 abandoned ditch will be blocked and unable to convey stormwater, all will be well because the  
11 District will be intentionally shunting storm flows into the abandoned ditch from the portion of  
12 the ditch it continues to operate for the pipeline. This makes no sense.


13 The Districts arguments boil down to one thing: a claim that blockage of the abandoned  
14 section of the ditch is not “foreseeable.” (ROB, pp. 42-43.) As set forth in detail above, there is  
15 no support for the District’s assumptions, and the blockage of the abandoned ditch is inevitable.

#### 16 IV. CONCLUSION

17 As demonstrated above, the EIR is fundamentally inadequate in numerous respects. It fails  
18 to properly analyze, or mitigate, the Project’s severe impacts to drainage, aesthetics and  
19 recreation, biological resources, and wildfire risks. The District must revise and recirculate the  
20 EIR to include proper analysis and mitigation of all of the Project’s significant impacts. As it  
21 stands, the document fails as an information document and violates CEQA.

22 DATED: February 24, 2020

23 LAW OFFICES OF MARSHA A. BURCH

24  
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26 By  \_\_\_\_\_  
27 Marsha A. Burch  
28 Attorney for Petitioner  
Save the El Dorado Canal

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**PROOF OF SERVICE**

I am employed in the County of Nevada; my business address is 131 South Auburn Street, Grass Valley, California; I am over the age of 18 years and not a party to the foregoing action. On February 24, 2020, I served a true and correct copy of the following documents:

**1. PETITIONER'S REPLY BRIEF**

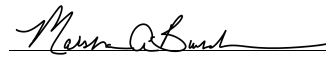
I served the documents on the following persons at the following email address pursuant to stipulation for electronic service:

Kelley Taber  
Michelle E. Chester  
Somach Simmons & Dunn  
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Sacramento, CA 95814  
[ktaber@somachlaw.com](mailto:ktaber@somachlaw.com)  
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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 24, 2020, at Grass Valley, California.

  
\_\_\_\_\_  
Marsha A. Burch