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**From:** A.J. Ferate  
**Sent:** Mon 8/7/2017 7:42:20 PM  
**Subject:** Duarte motion to dismiss  
[pdf.pdf](#)

Mr. Traylor:

Thanks for briefly taking my call this afternoon. I understand that Mr. Pollins is out of the office through next week, so I have left a message for Mr. Tice to return.

Attached is the motion to dismiss we discussed. Put plainly, under the Clean Water Act, CoA/DOJ have no subject matter jurisdiction in the Duarte case unless EPA is a party to the matter. As you have mentioned, EPA is not a party in this case. (CoA only has enforcement authority where a 404 permit has been issued; EPA has authority where the questions is should the party be required to have a 404 permit.)

This case goes to trial next week. Your review and thoughts on this matter prior to the case going to hearing would be helpful.

Again, thank you very much for your time, A.J. Ferate

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9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA

11 DUARTE NURSERY, INC., a California  
12 Corporation; and JOHN DUARTE, an individual,,

13 Plaintiffs,

14 v.

15 UNITED STATES ARMY CORPS OF  
16 ENGINEERS,

17 Defendant.

18 UNITED STATES OF AMERICA,

19 Counterclaim-Plaintiff,

20 v.

21 DUARTE NURSERY, INC., a California  
22 Corporation; and JOHN DUARTE, an individual,

23 Counterclaim Defendants.  
24  
25  
26  
27  
28

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

MOTION TO DISMISS COUNTERCLAIM  
FOR LACK OF SUBJECT-MATTER  
JURISDICTION

NOTICE OF MOTION

ALTERNATIVE APPLICATION FOR  
HEARING ON SHORTENED TIME OR  
FOR CONTINUANCE OF TRIAL

MEMORANDUM IN SUPPORT

Date: August 25, 2017

Time: 10:00am

Courtroom: 3

Hon. Kimberly J. Mueller

Accompanying documents:

Declaration of Peter Prows

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**NOTICE OF MOTION AND MOTION**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on August 25, 2017, at 10:00am, in Court 3, 15th floor, of the Robert T. Matsui United States Courthouse, 501 I Street, Sacramento, CA, or soon thereafter as the matter may be heard, counterclaim-defendants Duarte Nursery, Inc. and John Duarte (jointly “Duarte”) shall move and hereby move for an order dismissing the counterclaim in its entirety.

This motion is brought in accordance with Rule 12(h)(3) and Rule 12(b)(1) of the Federal Rules of Civil Procedure (“FRCP”), on the ground that the Court lacks subject-matter jurisdiction over the counterclaim.

Counsel certifies that meet-and-confer efforts have been exhausted. On July 18, 2017, counsel for Duarte emailed counsel for the United States, explained the issue, and proposed the following:

Before we bring a Rule 12(b)(1) motion to dismiss (which can be brought at any time), we’d like to invite you to provide us, by the end of this week, with the authorities, if any, you think show why this action is properly brought under Section 309(b), or else a proposed dismissal of the counterclaim with prejudice. We’d also ask for your agreement that such a motion to dismiss, if a motion is necessary, should be briefed and heard before the presentation of evidence at trial, as well as a proposed briefing schedule.

Counsel for the United States responded on July 21 as follows:

As set forth in our counterclaim, it is the United States’ position that the district court has subject matter jurisdiction. We do not consent to dismissal of the case. In addition, you have repeatedly informed the court over the past two years that you do not contest jurisdiction. We do not agree to delay the trial, or shorten time for any motion, in order for you to raise the late-breaking assertion that the court lacks jurisdiction.

This motion is based on this Notice of Motion and Motion, the following Memorandum, the accompanying Declaration of Peter Prows, the pleadings and other documents filed in this matter, and on any additional argument and evidence that may be presented at the hearing on this motion.

1                   **ALTERNATIVE APPLICATION FOR HEARING ON SHORTENED TIME**  
2                   **OR FOR CONTINUANCE OF TRIAL**

3                   FRCP Rule 12(i) provides as follows:

4                   **Hearing Before Trial.** If a party so moves, any defense listed in Rule  
5                   12(b)(1)–(7)—whether made in a pleading or by motion—and a  
6                   motion under Rule 12(c) must be heard and decided before trial unless  
7                   the court orders a deferral until trial.

8                   Here Duarte is asserting a defense listed in Rule 12(b)(1), lack of subject-matter jurisdiction. Rule  
9                   12(i) therefore requires this motion to be heard and decided before trial. Trial is scheduled for  
10                  August 15, 2017, which does not allow for a full briefing schedule on this motion. The briefing  
11                  schedule should accordingly be shortened, or the trial be continued, so that this motion can be heard  
12                  and decided first.

13   **MEMORANDUM IN SUPPORT**

14                  Duarte submits the following memorandum in support of this motion.

15   **I. INTRODUCTION**

16                  The Clean Water Act gives specified authority to bring civil enforcement actions to the  
17                  Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (the “Corps”).  
18                  (Clean Water Act, § 309(b), 33 U.S.C. § 1319(b) (EPA’s authority); § 404(s)(3), 33 U.S.C.  
19                  § 1344(s)(3) (Corps’s authority).) These two sections give both agencies authority to bring civil  
20                  enforcement actions to prosecution discharges in violation of a permit. But only EPA has authority  
21                  to bring civil enforcement actions to prosecute discharges *without a permit*.

22                  Here, Duarte sued the Corps, and the Corps (styling itself as the United States of America)  
23                  filed a counterclaim. That counterclaim does not allege any violations of a permit; it alleges only  
24                  discharges without a permit. But the Corps does not have authority to prosecute discharges without  
25                  a permit. Although EPA does have that authority, the counterclaim does not allege that EPA is  
26                  bringing the claim, and the Corps admitted in deposition that this matter was never even referred to  
27                  EPA for prosecution.

28                  A federal district court has jurisdiction only to the extent a statute confers jurisdiction. As  
the Supreme Court has made clear, Congress intended to limit jurisdiction to enforce the Clean  
Water Act to the express enforcement provisions of the Act. Because Congress did not authorize the

1 Corps to prosecute discharges without a permit, this Court does not have jurisdiction to hear the  
2 Corps's counterclaim.

3 The words of the statute are clear and unambiguous. EPA is given authority to prosecute  
4 discharges without a permit; the Corps is not. Because the statute is clear, deference to EPA or the  
5 Corps is not appropriate.

6 Duarte has, however, found three out-of-circuit district court decisions, issued between 1989  
7 and 1998, that allowed the Corps to prosecute discharges without a permit notwithstanding the clear  
8 language of the statute. These cases are wrongly decided. The first acknowledges that the statute  
9 does not provide the Corps with authority, and then holds that EPA can delegate its authority to the  
10 Corps. But that case did not cite or apply the Supreme Court decisions holding that jurisdiction  
11 under the Clean Water Act is limited to the express provisions of the statute. Nor did it consider the  
12 federal delegation statute, which authorizes an agency head to delegate authority to his or her  
13 "subordinates" only—not to another agency. The other two decisions rely on the first, and on a  
14 generalized sense of the role of the Corps under the Clean Water Act—which cannot override the  
15 clear and explicit provisions of the statute. None of these cases cites or applies the relevant Supreme  
16 Court decisions. For these reasons, the three cases are neither binding nor persuasive authority.

17 The Clean Water Act is clear. Congress did not authorize the Corps to bring the type of  
18 counterclaim it has brought here. This Court therefore lacks jurisdiction over the counterclaim. The  
19 counterclaim should be dismissed without leave to amend.

## 20 II. RELEVANT BACKGROUND

21 In October 2013, Duarte filed suit against the Corps. (ECF Doc. 1.) Duarte did not file suit  
22 against EPA or the United States of America. (*Id.*) In May 2014, the Corps responded with a  
23 document, entitled "Answer and Counterclaim", asserting that it is both an answer filed by the Corps  
24 and a counterclaim filed by the United States of America (the "United States") "acting through the  
25 Corps". (ECF Doc. 28 at 2.) There is no allegation that the United States is acting through EPA, or  
26 that EPA is otherwise bringing the suit.

27 The counterclaim alleges that Duarte discharged pollutants without a permit in violation of  
28 the Clean Water Act. (*Id.* at 16, ¶ 1 ("without authorization by the Corps") and at 28, ¶ 101 (alleging

1 Duarte did not “apply for, secure, and comply with a CWA section 404 permit to discharge  
2 pollutants at the Site”).) The counterclaim alleges that “[t]his Court has jurisdiction over the subject  
3 matter of this action pursuant to 33 U.S.C. § 1319(b) [authorizing EPA to prosecute violations of the  
4 Clean Water Act] and 28 U.S.C. §§ 1331 [general federal question jurisdiction] and 1345  
5 [jurisdiction over “suits or proceedings commenced by the United States, or by any agency or officer  
6 thereof expressly authorized to sue by Act of Congress”].”

7 The Corps decided not to refer the matter to EPA. As James Robb, a Corps enforcement  
8 employee, testified at his deposition, this case was not sent to EPA because the Corps “had been  
9 sued”:

10 Q I think I asked before and you said no. Was the referral actually  
sent to EPA?

11 A No, it was not.

12 Q Why not?

13 A As I indicated before, we had been sued and we needed to talk  
about what the next steps would be.

14 Q When was the decision made not to send the referral to EPA?

15 A Sometime in the next couple of weeks.

(ECF 113 at 150:8-16 (page numbers of transcript).)

### 16 III. THIS COURT LACKS SUBJECT-MATTER JURISDICTION

#### 17 A. Courts Have Jurisdiction Only Insofar As A Statute Confers Jurisdiction

18 “Courts created by statute can have no jurisdiction but such as the statute confers.”

19 (*Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818 (1988). “[T]he district courts  
20 may not exercise jurisdiction absent a statutory basis”. (*Exxon Mobil Corp. v. Allapattah Servs.*,  
21 545 U.S. 546, 552 (2005).) District courts have limited jurisdiction:

22 The district courts of the United States, as we have said many times,  
23 are courts of limited jurisdiction. They possess only that power  
authorized by Constitution and statute...

24 (*Id.*, quoting *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994), quotation  
25 marks omitted.) “Only Congress may determine a lower federal court's subject-matter jurisdiction.”  
26 (*Kontrick v. Ryan*, 540 U.S. 443, 452 (2004), citing U.S. Const., Art. III, § 1.)

27 “[S]tatutes extending federal jurisdiction...are narrowly construed so as not to reach beyond  
28

1 the limits intended by Congress.” (*Phillips v. Osborne*, 403 F.2d 826, 828 (9th Cir. 1968), citing  
2 *Healy v. Ratta*, 292 U.S. 263, 270 (1934).)

3 “If the court determines at any time that it lacks subject-matter jurisdiction, the court must  
4 dismiss the action.” (FRCP Rule 12(h)(3).) A party “may raise a court's lack of subject-matter  
5 jurisdiction at any time”. (*Kontrick v. Ryan* 540 U.S. 443, 455 (2004), citing *Mansfield, C. & L.M.R.*  
6 *Co. v. Swan*, 111 U.S. 379, 382 (1884)).

7 **B. This Court Does Not Have Jurisdiction To Hear The Counterclaim**

8 The counterclaim asserts that this Court has jurisdiction under section 1319(b) of title 33 of  
9 the U.S. Code. (See section II above.) Section 1319 gives the “Administrator” authority to file suit:

10 The Administrator is authorized to commence a civil action for  
11 appropriate relief...for any violation for which he is authorized to  
issue a compliance order under subsection (a) of this section.

12 (33 U.S.C. § 1319(b)). The “Administrator” is the Administrator of EPA. (33 U.S.C. § 1251(d).)  
13 Because the Corps is not the Administrator, § 1319(b) does not authorize the Corps to file suit. Nor  
14 does § 1319(b) authorize the United States, acting on behalf of the Corps, to file suit. The  
15 counterclaim is therefore not authorized by § 1319(b).

16 There is no doubt that Congress intended § 1319(b) to refer to EPA and *not* to the Corps.  
17 The Clean Water Act provides specific authority to the Corps to file suit in section 1344(s)(3), which  
18 starts with language almost identical to § 1319(b):

19 The Secretary is authorized to commence a civil action for appropriate  
20 relief... for any violation for which he is authorized to issue a  
compliance order under paragraph (1) of this subsection.

21 But paragraph 1 (§ 1344(s)(1)) authorizes the Corps to issue compliance orders *only* for violation of  
22 a permit (“any person is in violation of any condition or limitation set forth in a permit issued by the  
23 Secretary”), not for discharges without a permit. Congress clearly intended to limit the authority of  
24 the Corps to violations of a Corps permit, because it imposed the same limit in another paragraph.  
25 The penalty provision, paragraph §1344(s)(4), limits the imposition of penalties to a person who  
26 “violates any condition or limitation in a permit issued by the Secretary under this section”, or who  
27 violates a permit-compliance order issued by the Corps—but not a person who has discharged  
28 without a permit.

1 EPA's authority, in comparison, is much broader. It can issue a compliance order for any  
2 violation of the Clean Water Act. (33 U.S.C. § 1319(a).) The Corps, therefore, plainly does not  
3 have authority to file suit for discharges *without* a permit, only for discharges in violation of Corps  
4 permits. The counterclaim effectively admits this point by not asserting jurisdiction under § 1344.

5 Because § 1319(b) authorizes only EPA to file enforcement actions against discharges  
6 without a permit, and because the Corps is not EPA, this Court does not have subject-matter  
7 jurisdiction under § 1319(b).

8 The counterclaim also asserts jurisdiction under sections 1331 and 1345 of title 28 of the  
9 U.S. Code. But § 1331 does not provide jurisdiction:

10 The Supreme Court in *Middlesex County Sewerage Authority v.*  
11 *National Sea Clammers Ass'n*, 453 U.S. 1, 21, 69 L. Ed. 2d 435, 101  
12 S. Ct. 2615 (1981), concluded that Congress intended to limit access to  
13 federal court to enforce the CWA to the express enforcement  
14 provisions of the Act.... This precludes suits brought under 28 U.S.C.  
15 § 1331....

16 (*Las Vegas v. Clark County*, 755 F.2d 697, 703 (9th Cir. 1984).) This rationale would also prohibit  
17 jurisdiction under other statutes providing a general authorization of jurisdiction, including § 1345.  
18 In any case, § 1345 is not applicable by its own terms, because it provides jurisdiction only when an  
19 “agency or officer [of the United States is] expressly authorized to sue by Act of Congress.” Here  
20 there is no express authorization for the Corps to sue for the alleged unpermitted discharges.

21 In the *Gwaltney* case, the Supreme Court considered “whether § 505(a) of the Clean Water  
22 Act...confers federal jurisdiction over citizen suits for wholly past violations”. (*Gwaltney of*  
23 *Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 52 (1987).) Section 505 authorizes “any  
24 citizen” to bring a civil enforcement action against any person “who is alleged to be in violation” of  
25 the Act. (§ 505(a)(1), 33 U.S.C. § 1365(a)(1).) The Supreme Court concluded that “[t]he most  
26 natural reading of ‘to be in violation’ is a requirement that citizen-plaintiffs allege a state of either  
27 continuous or intermittent violation”, and held that “citizens, unlike the Administrator, may seek  
28 civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation”. (*Gwaltney*  
at 57, 59.) The Court vacated lower court rulings denying a Rule 12(b)(1) motion.

The Court's jurisdiction to hear enforcement claims brought under the Clean Water Act is,

1 therefore, limited to the express enforcement provisions of that act. Those express provisions give  
2 EPA—but not the Corps—authority to prosecute discharges without a permit. Here, the United  
3 States on behalf of the Corps alleges that Duarte discharged without a permit. Because Congress has  
4 not authorized the Corps to file this suit, this Court lacks jurisdiction to hear it.

5 The counterclaim should be dismissed.

6 **C. Courts Must Give Effect To The Unambiguously Expressed Intent Of Congress**

7 When the language of a statute is unambiguous, a court must apply the statute as it was  
8 written:

9 If the statute is clear and unambiguous that is the end of the matter, for  
10 the court, as well as the agency, must give effect to the unambiguously  
11 expressed intent of Congress. ...In ascertaining the plain meaning of  
the statute, the court must look to the particular statutory language at  
issue, as well as the language and design of the statute as a whole.

12 (*Sullivan v. Strop*, 496 U.S. 478, 482 (1990) quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281,  
13 291-292 (1988), quotation marks omitted). “Statutory construction must begin with the language  
14 employed by Congress and the assumption that the ordinary meaning of that language accurately  
15 expresses the legislative purpose”. (*Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S.  
16 401, 407 (2011), quoting *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). A court must  
17 presume that Congress meant what it said:

18 “We have stated time and again that courts must presume that a  
19 legislature says in a statute what it means and means in a statute what  
it says there. When the words of a statute are unambiguous, then, this  
20 first canon is also the last: ‘judicial inquiry is complete.’” *Connecticut*  
*Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (quoting *Rubin*  
*v. United States*, 449 U.S. 424, 430 (1981)) (internal citations  
21 omitted). We will not alter the text in order to satisfy the policy  
22 preferences of [an agency].

23 (*Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-462 (2002), parallel citations omitted.)

24 Here, the language of § 1319(b) unambiguously gives general Clean Water Act enforcement  
25 authority only to EPA, and the language of § 1344(s) unambiguously limits the Corps’s authority to  
26 permit violations. Congress clearly intended this restriction on the authority of the Corps. That,  
27 then, is “the end of the matter”.  
28

1 **D. Cases To The Contrary Are Not Consistent With The Statute Or Supreme Court**  
 2 **Precedent**

3 Duarte has identified three cases in which a district court considered the argument made here  
 4 and rejected it. None of these cases, however, offered persuasive reasons, and none applied the  
 5 relevant Supreme Court on Clean Water Act jurisdiction and statutory interpretation.

6 **1. Kelcourse**

7 In 1989, the District of Massachusetts acknowledged that “nowhere in the statute is it explicit  
 8 that the Secretary [i.e. the Corps] can bring an action under 33 U.S.C. sec. 1344 for a permitless  
 9 discharge”. (*United States v. Kelcourse*, 721 F.Supp. 1472, 1473 (D.Mass. 1989).) Nevertheless,  
 10 the court concluded that the Corps could bring suit because EPA had delegated its authority to the  
 11 Corps in a “memorandum of agreement”. (*Id.* at 1478.) The court reasoned that that “[b]y  
 12 delegating such enforcement authority, EPA, of course, did not expand the Corps' power”, that “the  
 13 power delegated to the Corps by EPA derives directly from EPA's authority under 33 U.S.C. sec.  
 14 1311 and 33 U.S.C. sec. 1319”, and that “[s]uch delegation is not statutory and may be revoked by  
 15 the EPA at any time.” (*Id.*)

16 *Kelcourse* did not consider whether Congress had authorized EPA to delegate authority to the  
 17 Corps. Congress did not. “An agency literally has no power to act...unless and until Congress  
 18 confers power upon it.” (*Louisiana Public Service Com'n v. F.C.C.*, 476 U.S. 355, 374 (1986).) An  
 19 agency cannot expand its power to override a Congressional limit on that power:

20 we simply cannot accept an argument that [an agency] may  
 21 nevertheless take action which it thinks will best effectuate a federal  
 22 policy. An agency may not confer power upon itself. To permit an  
 23 agency to expand its power in the face of a congressional limitation on  
 24 its jurisdiction would be to grant to the agency power to override  
 25 Congress.

26 (*Id.* at 374-375.) In *Kelcourse*, the court should have recognized that EPA could not act to expand  
 27 the power of the Corps when that expansion would override the Congressional restrictions imposed  
 28 by 33 U.S.C. § 1344. EPA, therefore, is not authorized to delegate authority to the Corps.

The court should also have considered whether Congress has allowed one agency to delegate  
 its authority to another agency. The federal delegation statute allows an agency head to delegate  
 authority only to his or her subordinates: “the head of an agency may delegate *to subordinate*

1 *officials* the authority vested in him....” (5 U.S.C. § 302, emphasis added.) The Corps is not a  
2 subordinate official of EPA. For this reason as well, EPA is not authorized to delegate authority to  
3 the Corps.

4 Moreover, as a matter of fact, it appears that EPA never did delegate authority to the Corps.  
5 An EPA guidance document on delegation dated 1994 discusses to whom the EPA Administrator  
6 has delegated authority, and there is no mention of the Corps. (Prows Decl., ex. 1.)

7 In any case, the delegation analysis in *Kelcourse* ignores the language of the statute, which  
8 limits the authority of the Corps to enforcement of permit violations, and does not give the Corps  
9 general enforcement authority. If Congress specifically limited the authority of the Corps, the statute  
10 should not be interpreted to void that limit.

11 *Kelcourse* was, therefore, wrongly decided.

12 **2. Reichelt**

13 In 1996, the Northern District of Indiana relied on and followed *Kelcourse*. (*Reichelt v.*  
14 *United States Army Corps of Eng'rs*, 969 F.Supp. 519, 523 (N.D.Ind. 1996).) The court did not  
15 consider the language of the statute, the Supreme Court decisions on Clean Water Act jurisdiction  
16 and instructions to interpret statutes as they are written, or any delegation issue. *Reichelt* is therefore  
17 not persuasive, and was also wrongly decided.

18 **3. Hallmark**

19 In 1998, the Northern District of Illinois reasoned that “[i]f section 404(s)(1) allows the  
20 Corps to issue a compliance order for permitless discharges, then section 404(s)(3) grants the Corps  
21 authority to bring civil actions for permitless discharges.” (*United States v. Hallmark Constr. Co.*,  
22 14 F.Supp.2d 1065, 1068 (N.D.Ill. 1998).) But § 404(s)(1) unambiguously *does not* authorize the  
23 Corps to issue a compliance order for permitless discharges. That section reads, in full:

24 Whenever on the basis of any information available to him the  
25 Secretary finds that any person is *in violation of any condition or*  
26 *limitation set forth in a permit issued by the Secretary under this*  
27 *section*, the Secretary shall issue an order requiring such person to  
28 comply with such condition or limitation, or the Secretary shall bring a  
civil action in accordance with paragraph (3) of this subsection.

(33 U.S.C. § 1344(s)(1), emphasis added.) This section unambiguously authorizes a compliance

1 order only when there is a violation of a Corps permit. The section says nothing about permitless  
2 discharges.

3 Nevertheless, the court reasoned that “[i]f the Corps has permit control over wetland areas to  
4 ensure their protection, it most certainly has the power to stop unlawful permitless activity that  
5 endangers navigable waters.” (*Hallmark* at 1068.) But this reasoning is untethered from the  
6 language of the statute, which leaves enforcement authority over alleged unpermitted discharges to  
7 EPA and restricts the Corps’s authority to permit violations. This reasoning directly contradicts the  
8 holdings of the Supreme Court on Clean Water Act jurisdiction and statutory interpretation.

9 The statute is clear. Congress *did not* give the Corps general enforcement authority.  
10 Congress gave the Corps authority *only* to enforce permit violations. The statutory language is not  
11 ambiguous, and it makes perfect sense. Congress intended to give EPA, and EPA alone, general  
12 enforcement authority. Congress intended to limit the authority of the Corps. When Congress  
13 makes its intent clear, and the words of the statute are unambiguous, a court must not substitute its  
14 own policy preferences, or those of the agency, for the specific statutory provisions.

15 *Hallmark* was also wrongly decided. None of the three reported cases holding that the Corps  
16 can file suit for a discharge without a permit complied with Supreme Court decisions holding Clean  
17 Water Act enforcement jurisdiction is limited to the express provisions of the statute, or those  
18 decisions holding that when a statute is clear, a court must implement it.

19 **IV. CONCLUSION**

20 The counterclaim should be dismissed for lack of subject-matter jurisdiction.

21 DATED: July 23, 2017.

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