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**IN THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO**

CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE; CALIFORNIA
WATER IMPACT NETWORK;
AQUALLIANCE.

Petitioners.

V.

CALIFORNIA STATE WATER
RESOURCES CONTROL BOARD, and
EILEEN SOBECK, in her official capacity as
State Water Resources Control Board
Executive Director,

Respondents.

UNITED STATES BUREAU OF
RECLAMATION

Real Parties in Interest

Case No.

**VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
BREACH OF CONTRACT AND
ATTORNEY'S FEES**

(Water Code; Fish and Game Code; Code of Civil Procedure; Public Trust Doctrine)

1 Petitioners California Sportfishing Protection Alliance, California Water Impact Network,
2 and AquAlliance (collectively “Petitioners”) hereby allege as follows:

3 **INTRODUCTION**

4 1. Petitioners and Plaintiffs California Sportfishing Protection Alliance, California
5 Water Impact Network and AquAlliance (collectively, “Petitioners”) seek a writ of mandate
6 setting aside the approval on June 10, 2021 by Respondents and Defendants California State
7 Water Resources Control Board (“SWRCB”), and its Executive Director Eileen Sobeck
8 (“Approval”) of the Real Party in Interest United States Bureau of Reclamation’s Sacramento
9 River Temperature Management Plan for Water Year 2021 (“TMP”). The SWRCB’s Approval of
10 the 2021 TMP is an abuse of discretion because it needlessly deprives imperiled salmonid
11 fisheries of adequate flows of cold water in the Sacramento River needed to prevent their
12 extinction, in violation of law. The Petitioners timely filed their petitions for reconsideration of
13 the Approval, but the SWRCB has failed to take timely action on them.

14 2. Petitioners seek urgent relief from this Court to prevent the demise of threatened,
15 endangered, and critically imperiled aquatic species in the Sacramento River, and in the San
16 Joaquin River/San Francisco Bay-Delta, including but not limited to winter-run Chinook salmon,
17 fall-run Chinook salmon, and spring-run Chinook salmon, which face imminent jeopardy of
18 extinction as a direct result of the SWRCB Approval challenged herein. Mandamus relief is
19 necessary because the SWRCB Approval fails to comply with: prior SWRCB Order 90-5;
20 procedural and substantive mandates imposed by the Water Code; the common law and statutory
21 Public Trust Doctrine; the California Endangered Species Act; prior SWRCB Order 90-5; and
22 procedural mandates imposed by the Code of Civil Procedure (“CCP”). Relief for breach of
23 contract is warranted because the SWRCB failed to perform its contract duties under its Settlement
24 Agreement with Petitioners to rectify its decades-long and ongoing pattern and practice of failing
25 to manage the temperature of the Sacramento River to protect its fisheries as required by law.

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PARTIES

3 3. Petitioner CALIFORNIA SPORTFISHING PROTECTION ALLIANCE
4 (“CSPA”) is a California non-profit public benefit organization dedicated to the protection,
5 preservation, and enhancement of fisheries and associated aquatic and riparian ecosystems,
6 including in the Sacramento and San Joaquin Rivers and their watersheds and the San Francisco
7 Bay-Delta. CSPA actively opposed the SWRCB’s Approval of the draft and final TMPs through
8 oral and written comments to the SWRCB. CSPA’s members reside within the Central Valley
9 watershed and in the Bay-Delta where they view, enjoy, and routinely use the Delta ecosystem for
10 boating, fishing, and wildlife viewing. CSPA’s members use and derive significant and ongoing
11 enjoyment from the public trust fishing, recreational, aesthetic and conservation benefits of the
12 Central Valley watershed, Sacramento River, and the San Francisco Bay-Delta ecosystem, all of
13 which will suffer irreparable harm due to SWRCB’s illegal Approval of the TMP.

14 4. Petitioner CALIFORNIA WATER IMPACT NETWORK (“C-WIN”) is a
15 California non-profit public benefit organization for the protection and restoration of fish and
16 wildlife resources, scenery, water quality, recreational opportunities, agricultural uses, and other
17 natural environmental resources and uses of the rivers and streams of California. C-WIN and its
18 members have actively opposed the draft and final TMPs, through written testimony. C-WIN has
19 members who reside in, use, and enjoy the Central Valley watershed, Sacramento River, and the
20 San Francisco Bay-Delta ecosystem for nature study, recreation, and aesthetic enjoyment, which
21 uses will be irreparably harmed by the TMP.

22 5. Petitioner AQUALLIANCE (“AquAlliance”) is a California public benefit
23 corporation organized to protect Northern California’s waters and thereby sustain family farms,
24 recreational opportunities, vernal pools, creeks, rivers, and the San Francisco Bay-Delta estuary.
25 AquAlliance has members who regularly use the waters of the Delta and its tributaries including
26 the Sacramento River for recreation, including kayaking, paddling, fishing, and wildlife viewing.
27 AquAlliance members also routinely participate in conservation activities in and around the Bay-
28 Delta estuary and its tributary vernal pools, creeks, and rivers. AquAlliance and its members have

2 been involved in the administrative proceedings that have been provided to date for the TMP,
3 including attending meetings and providing written comments objecting to the SWRCB's
4 Approval.

5 6. Respondent CALIFORNIA STATE WATER RESOURCES CONTROL BOARD
6 (“SWRCB” or “Board”) is the state agency charged with regulating water quality and supply
7 within California. Respondent EILEEN SOBECK is the Executive Director of the Board who
8 signed the five-page letter Approval of the TMP. When requested, the Board has authority to
9 review and approve or disapprove, in whole or in part, these decisions of the Executive Director,
10 but failed to do so here despite Petitioners’ requests that it do so.

11 7. Real Party in Interest UNITED STATES BUREAU OF RECLAMATION
12 (“Reclamation”) is a subdivision of the Department of the Interior, an agency of the United States
13 of America, that operates the federal Central Valley Project, and requested approval of the TMP
14 ostensibly to comply with SWRCB Order 90-5. Reclamation is named in an abundance of
15 caution, as the TMP applicant for which the Approval was made, but Petitioners seek no relief as
16 against Reclamation, whose participation is therefore neither necessary nor indispensable.
17 Moreover, Water Code section 1126, subdivision (e) provides that: “In any court case reviewing a
18 decision or order by the board relating to . . . a permit or license to appropriate water held by the
19 United States through the Bureau of Reclamation . . . , the election by the United States, or any
20 agency thereof, not to be a party shall not, in and of itself, be the basis for dismissal pursuant to
21 Section 389 of the Code of Civil Procedure or any other provision of law.”

LEGAL FRAMEWORK

JUDICIAL REVIEW OF SWRCB DECISIONS

24 8. Water Code section 1126(a) provides that “[a]ny party aggrieved by any decision or
25 order may, not later than 30 days from the date of final action by the board, file a petition for a
26 writ of mandate for review of the decision or order. Except in cases where the decision or order is
27 issued under authority delegated to an officer or employee of the board, reconsideration before the

board is not an administrative remedy that is required to be exhausted before filing a petition for writ of mandate.”

9. "Exhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts. One exception to this general rule is where irreparable injury will result if an administrative hearing is permitted to proceed and its orders made effective without prior judicial interference. (*Abelleira v. District Court of Appeal*, [(1941)] 17 Cal.2d 280, 293, 296; *Greenblatt v. Munro*, [(1958)] 161 Cal.App.2d 596, 605-606.)" *Hesperia Land Development Co. v. Superior Court in and for Los Angeles County* (1960) 184 Cal.App.2d 865, 876.

10. Water Code section 1126, subdivision (c) further provides: "Section 1094.5 of the Code of Civil Procedure shall govern judicial proceedings under this section."

11. Code of Civil Procedure section 1094.5, subdivision (b), in turn, provides that “[t]he inquiry in such a case shall extend to . . . whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.”

12. For the reasons set forth below, the SWRCB's Approval constituted an abuse of discretion because the SWRCB failed to: proceed in the manner required by law, support the Approval with adequate findings, and support its findings with substantial evidence.

SACRAMENTO RIVER TEMPERATURE MANAGEMENT

13. The Central Valley Basin Plan, adopted by the Central Valley Regional Water Quality Control Board, includes temperature criteria to protect salmon spawning habitat. The Plan states that “[t]emperature changes due to controllable factors shall” not be elevated above 56°F in the reach of the Sacramento River from Keswick Dam to Hamilton City, nor above 68°F in the reach from Hamilton City to the I Street Bridge, during periods when such temperature increases will be detrimental to the fishery. Central Valley Basin Plan at III-8.000.

14. In 1990, the Board adopted Water Rights Order 90-5, "to consider enforcing certain water quality objectives in the upper Sacramento River, which are contained in the [Central Valley

1 Basin Plan]," and to enforce "the Public Trust Doctrine." Order 90-5 notes that: "[t]he United
2 States Bureau of Reclamation (Bureau) operates the Shasta Unit of the Central Valley Project.
3 Shasta Dam impounds Shasta Lake, with a storage capacity of 4.5 million acre-feet. . . . The
4 operation of Shasta Dam affects downstream water quality . . . [and] some years, during late
5 summer and early fall, releases from Shasta Lake, where the water has been heated by the sun
6 during storage, have caused river water temperatures to exceed the levels necessary to protect the
7 fishery"

9 15. Order 90-5 explains at pages 18-20:

10 "The 56° temperature objective in the Basin Plan establishes the temperature that will
11 protect the fishery from adverse thermal effects during salmonid spawning and egg
12 incubation. The releases from Shasta Dam and its related facilities are the primary
13 controllable influence on the temperature of water in the affected reach. Climatic influence
14 varies by season. The release of low temperature water into the upper Sacramento River
15 helps provide conditions which replace those conditions which were available to the
16 fishery upstream of Shasta Dam before the dam was constructed. This helps mitigate, in
17 part, for the loss of the upstream spawning and rearing habitat. The Basin Plan
18 temperature objective applies from Keswick Dam to Hamilton City, but only to the extent
19 that temperatures are controllable and higher temperatures would be detrimental to the
20 fishery. Depending upon the amount of water in storage at Shasta, ambient air
21 temperatures, tributary inflow, and possibly other factors, the Bureau's existing facilities
22 often cannot control temperatures in the entire reach at 56° or less. For example, the
23 Bureau must plan its releases so that it does not run out of cool water late in the season. It
24 must also plan its releases so that it will meet other applicable permit or license terms and
25 conditions. Moreover, during some times of the year spawning salmonid adults or eggs do
26 not occupy the entire affected reach. Because of these and other factors, it is necessary that
27 the length of the reach to be protected be flexible. At the same time, we recognize that any
28 shortening of the protected reach during the period when spawning salmon and eggs are

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2 present may limit the production of salmon. To maximize salmon production with a
3 limited supply of water will require careful planning.”

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5 “The term we adopt in this Order will require the Bureau to maintain the temperature in the
6 reach of the Sacramento River between Keswick Dam and the Red Bluff Diversion Dam at
7 56° F when (1) higher temperatures will be detrimental to the fishery, and (2) maintenance
8 of 56° F in that reach is within the Bureau’s reasonable control. Whether a particular factor
9 is within the Bureau’s reasonable control depends on the specific facts and is a matter for
10 the Chief of the Division of Water Rights or the Board to decide, when the Bureau
11 proposes changes in the location where it will meet the temperature requirement. Parties
12 who believe that it is within the Bureau’s reasonable control to meet the temperature
13 requirement at a location different from the location the Bureau proposes, may so advise
14 the Chief of the Division of Water Rights.”

15 16. Order 90-5 thus relaxes the Central Valley Basin Plan temperature requirements by
16 moving the 56°F compliance point 44 miles upstream from Hamilton City (River Mile 199) to Red
17 Bluff (River Mile 243), eliminating 44 miles of Sacramento River spawning habitat.

18 17. Order 90-5 further provides that the Bureau “shall immediately report any change
19 in the location where it will meet the temperature requirement to the Chief of the Division of
20 Water Rights, and shall file an operation plan showing Permittee’s [i.e., the Bureau of
21 Reclamation’s] strategy to meet the temperature requirement at the new location. Permittee may
22 then meet the temperature requirement at the new location until it is within Permittee’s reasonable
23 control to meet it at the Red Bluff Diversion Dam, unless within 10 days after submission of the
24 report the Chief of the Division of Water Rights objects to the change.”

25 18. Consistent with the Central Valley Basin Plan, Order 90-5 notes that the regulatory
26 attainment of these temperature objectives is limited to “controllable factors” by Reclamation.
27 Later, the Board’s Order 92-2 clarified that the timing and quantity of water delivery from Shasta
28 Reservoir by Reclamation are controllable factors subject to the regulatory control of the Board.

THE PUBLIC TRUST DOCTRINE

19. The Board's Order 90-5 was expressly adopted pursuant to the Board's Public Trust Doctrine duties and authorities. *Id.* at 2 ("This proceeding is also an action to enforce the requirements of . . . the Public Trust Doctrine.").

20. The SWRCB must evaluate any allocation or diversion of a public trust resource in light of the impacts upon public trust interests and “avoid or minimize any harm to those interests.” *National Audubon Society v. Superior Court* (“National Audubon”) (1983) 33 Cal.3d 419, 426.

21. The Public Trust Doctrine mandates that “before state courts and agencies approve” actions that may harm public trust resources, they consider the potential impact “upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.” *National Audubon*, 33 Cal.3d at 426. “[T]he pivotal fact is not whether water is diverted or extracted or the fact that it is water itself adversely impacting water within the public trust. Rather, the determinative fact is the *impact of the activity on the public trust resource.*” *Environmental Law Foundation v. State Water Resources Control Board* (2018) 26 Cal.App.5th 844, 859 (emphasis added).

22. The Board failed to consider the Public Trust when it approved the TMP. But in approving the TMP, the Board had an “affirmative dut[y] to take the trust into account and protect public trust uses whenever feasible.” *San Francisco Baykeeper, Inc. v. State Lands Com.* (“*Baykeeper II*”) (2018) 29 Cal.App.5th 562, 571. Moreover, the Board’s compliance with the Public Trust Doctrine cannot be “taken in some fragmentary and publicly invisible way.” *San Francisco Baykeeper v. State Lands Commission* (“*Baykeeper I*”) (2015) 242 Cal.App.4th 202, 234. “The obligations a government may have as . . . trustee are more complex and demanding than its general obligation to act for the public benefit” *Zack’s Inc. v. City of Sausalito* (2018) 165 Cal.App.4th 1163, 1176.

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2 23. “[A]n appropriative water rights system administered without consideration of the
3 public trust may cause unnecessary and unjustified harm to trust interests.” *National Audubon*, 33
4 Cal.3d at 446-447.

5 24. A necessary first step in any Public Trust Doctrine analysis must be to identify the
6 public trust resources that would be affected:

7 The trustee must disclose to the beneficiaries all matters pertaining to the health
8 of the trust. This disclosure, called an ‘accounting,’ provides the process by
9 which beneficiaries may ensure proper management of their assets. In the
10 financial context, the scope of an accounting includes all information ‘in which
the beneficiary has a legitimate concern.’ This requires, at the very least, a clear
and concise statement of the nature and value of the trust *res* . . .

11 *Nature’s Trust: Environmental Law for a New Ecological Age* (2013) Mary C. Wood, at 203.

12 25. Fishing, ecological study, aesthetic enjoyment, recreation, navigation, and
13 waterborne commerce, each constitute established Public Trust uses. *Marks v. Whitney* (1971) 6
14 Cal.3d 251, 259-260. It has been settled law in California for over 50 years that, although
15 “[p]ublic trust easements are traditionally defined in terms of navigation, commerce and
16 fisheries[,] . . . [t]hey have been held to include the right to fish, hunt, bathe, swim, to use for
17 boating and general recreation purposes the navigable waters of the state, and . . . one of the most
18 important public uses of the tidelands – a use encompassed within the tidelands trust – is the
19 preservation of those lands in their natural state, so that they may serve as ecological units for
20 scientific study, as open space, and as environments which provide food and habitat for birds and
21 marine life, and which favorably affect the scenery and climate of the area.” *Id.*

22 26. Water diversions for agriculture, commerce, industrial, and municipal consumptive
23 uses do not constitute established Public Trust uses.

24 27. Fish and Game Code section 5937 states that “[t]he owner of any dam shall allow
25 sufficient water at all times to pass . . . around, or through the dam to keep in good condition any
26 fish . . . below the dam,” and the courts have interpreted section 5937 to be “a legislative
27 expression of the public trust protecting fish as trust resources when found below dams.”

28 *California Trout v. State Water Res. Control Bd.* (“*California Trout*”) (1989) 207 Cal.App.3d 585,

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2 626. “The Legislature, not the Water Board, is the superior voice in the articulation of public
3 policy concerning the reasonableness of water allocation;” where the Legislature has adopted a
4 specific rule governing the public trust in Fish and Game Code 5937, “the Water Board has no
5 authority to disregard it.” *Id.* at 631. Here, “the Legislature has already balanced the competing
6 claims for water . . . and determined to give priority to the preservation of their fisheries.” *NRDC*
7 v. *Patterson*, 333 F.Supp.2d 906, 918 (E.D. Cal. 2004); *Marks v. Whitney, supra*, 6 Cal.3d at 259-
8 260.

9 WASTE AND UNREASONABLE USE

10 28. The Board’s Order 90-5 was expressly adopted to prevent waste and unreasonable
11 use. *Id.* at 2 (“This proceeding is also an action to enforce the requirements of Cal. Const. Art. X,
12 Section 2, Water Code Section 275. . . .”)

13 29. Article X, section 2 mandates that *all* uses of California’s water resources—
14 regardless of the particular rights under which water uses occur—must be reasonable and for a
15 beneficial purpose:

16 [B]ecause of the conditions prevailing in this State the general welfare requires that the
17 water resources of the State be put to beneficial use to the fullest extent of which they are
18 capable, and that the waste or unreasonable use or unreasonable method of use of water be
19 prevented, and that the conservation of such waters is to be exercised with a view to the
20 reasonable and beneficial use thereof in the interest of the people and for the public
21 welfare. The right to water . . . is and shall be limited to such water as shall be reasonably
22 required for the beneficial use to be served, and such right does not and shall not extend to
23 the waste or unreasonable use or unreasonable method of use or unreasonable method of
24 diversion of water.

25 30. Water Code section 275 states that “The department and board shall take all
26 appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent
27 waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of
28 water in this state.”

29 31. The law is settled that article X, section 2 is a “universal limitation” on all water
30 use. *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 105, citing
Cal. Const., art. X, § 2). “All uses of water . . . are subject to the constitutional standard of

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2 reasonable use.” *Environmental Law Foundation v. State Water Resources Control Board* (2018)
3 26 Cal.App.5th 844, 861 (emphasis added), citing National Audubon, *supra*, 33 Cal. 3d at 443; see
4 also *Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1482 (holding
5 article X, section 2 applies to all water users). Article X, section 2 is “plain and unambiguous”
6 (*Gin S. Chow* (1933) 217 Cal. 673, 700), and “admit[s] of no exception” (*Peabody v. City of*
7 *Vallejo* (1935) 2 Cal.2d 351, 367).

8 32. SWRCB Order 90-5 explains that:

9 “The general welfare of this state requires that water resources be put to beneficial use to
10 the fullest extent of which they are capable, and that the waste or unreasonable use or
11 unreasonable method of use of water be prevented. Cal. Const. Art. X, Section 2. The
12 Bureau [of Reclamation]’s permits are conditioned as a matter of law upon compliance
13 with this section. *United States v. State Water Resources Control Board* (1986) 182
14 Cal.App.3d 82 Thus, the Bureau must do whatever is reasonable to maximize the
15 uses of the water available to it.”

FACTUAL AND PROCEDURAL BACKGROUND

16 33. The SWRCB has for decades engaged in a pattern and practice of approving
17 Sacramento River Temperature Management Plans in violation of Order 90-5 and the Public Trust
18 Doctrine. To rectify this recurring violation of law, on July 17, 2020, Petitioners entered into a
19 Settlement Agreement to resolve pending claims that SWRCB maintained a “pattern and practice”
20 of, among other things, approving Sacramento River Temperature Management Plans in violation
21 of 90-5 and the Public Trust Doctrine. The “pattern and practice” claims sought declaratory and
22 injunctive relief regarding an over-arching course of conduct and unwritten policies of SWRCB,
23 but did not directly challenged the validity of any single Board approval. See, e.g., *EBMUD v.*
24 *California Dept. of Forestry* (1996) 43 Cal.App.4th 1113, 1119 ([“an action challenging an
25 administrative agency policy of ignoring or violating applicable laws and regulations, but not
26 challenging any specific agency decision, [is] an actual, justiciable controversy for which
27 declaratory relief [is] available.”]); *Californians for Native Salmon & Steelhead Assn. v.*
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2 *Department. of Forestry* (1990) 221 Cal.App.3d 1419, 1428 (pattern and practice claim “allege[s] 3 policies impermissibly made in violation of statutory mandates by an administrative agency and 4 concomitant conduct consistent with the policies, but in violation of law”).

5 34. In that Settlement Agreement, SWRCB agreed to take affirmative measures to 6 break its longstanding patterns and practices:

7 In order to improve Sacramento River temperature management, the State Water Board 8 shall coordinate with the U.S. Bureau of Reclamation (“Reclamation”) and other 9 stakeholders in a public process to develop a protocol for temperature monitoring, 10 modeling, planning, and reporting pursuant to State Water Board Order WR 90-5. 11 Although the Board cannot pre-judge the outcome of the process, and the Board’s position 12 may change based on information presented during the process, the State Water Board 13 shall request, within 30 days of execution of this Agreement, that Reclamation develop a 14 protocol that includes the following elements:

- 15 • An initial report at the beginning of the water year to facilitate planning for possible dry 16 year conditions, including an assessment of storage conditions in Shasta and Trinity 17 reservoirs, an assessment of operational alternatives (including any prospective water 18 transfers) to manage storage through the fall and early winter to provide for cold water 19 pool protection during the following summer and fall, and measures to avoid significant 20 flow fluctuations and other possible impacts to fall-run Chinook salmon;
- 21 • Development of a Sacramento River temperature management plan (TMP) each year to 22 reasonably protect winter-run Chinook salmon, spring-run Chinook salmon, fall run 23 Chinook salmon, and other native species; Development of an initial TMP early in the 24 season, before initial water supply allocations in February, subject to adaptive management 25 as hydrology and other conditions change;
- 26 • Evaluation of a range of operational scenarios with different assumptions regarding water 27 supply deliveries under Reclamation’s water right permits to Central Valley Project (CVP) 28 contractors, including but not limited to an operational scenario that assumes lower releases from Shasta Reservoir during the spring and summer, and, in addition, to the extent necessary and consistent with contractual priorities, a change in the timing or quantity of CVP deliveries to settlement or exchange contractors, in order to conserve cold water resources in Shasta Reservoir and control temperature in the Sacramento River throughout the temperature control season without redistributing water supply impacts to Folsom or Oroville reservoirs or causing water quality or flow violations in the Sacramento-San Joaquin Delta Estuary;
- 29 • Development of improved modeling tools that allow for evaluation of different 30 operational scenarios as described above, including, at minimum, an evaluation of the 31 feasibility of meeting temperature compliance under Order WR 90-5 at temperature control 32 points Red Bluff Diversion Dam, Bend Bridge, Jelly’s Ferry, Ball’s Ferry, Clear Creek, 33 and Keswick Dam;

- Improved transparency concerning the temperature management planning process, including disclosure of all modeling assumptions that inform the development of the TMP and analysis and disclosure of the relationship between temperature compliance points and different operational scenarios, including water deliveries; and
 - Improved coordination and communication between Reclamation, the State Water Board, and the public, including provisions for convening at least one meeting each year to hear public input on Reclamation’s draft TMP before it is formally submitted to the State Water Board, posting the draft TMP and any subsequent modifications, and posting any SRTTG meeting notes and materials. The State Water Board will ensure that the foregoing documents are either posted as soon as practicable or otherwise provide the information to interested parties.

(2) Modeling

The State Water Board will employ staff, with modeling and other relevant expertise, to evaluate the U.S. Bureau of Reclamation's compliance with Order WR 90-5 temperature management requirements, including whether different water supply delivery alternatives may achieve temperature compliance at temperature control points Red Bluff Diversion Dam, Bend Bridge, Jelly's Ferry, Ball's Ferry, Clear Creek, and Keswick Dam. During years when temperature management may be a concern, the State Water Board will work with Reclamation, the fisheries agencies, and others as appropriate to evaluate, with hydrologic and temperature modeling and other available tools, a range of possible operational assumptions for temperature management, including options for conserving cold water through reduced water supply deliveries to Reclamation contractors (including exchange and settlement contractors contractors) under Reclamation's water rights permits.

35. On or about August 31, 2020, SWRCB Executive Director and Respondent herein Eileen Sobeck sent a letter to Reclamation identifying each of the issues set forth in the Settlement Agreement that would be needed to be addressed through implementation of adequate Sacramento River temperature management, and a workable temperature management plan. As discussed, below, the Approval and approval process failed to meet these standards.

36. On March 12, 2021, and March 14, 2021, Petitioners submitted written comments urging SWRCB to immediately enforce Order 90-5 “to avoid a repeat this year of the disastrous conditions that occurred in 2014 and 2015, when the U.S. Bureau of Reclamation (‘Reclamation’) lost temperature control below Shasta Dam, devastating endangered salmon populations and commercially valuable salmon runs.” Petitioners noted that “The current operations plans prepared by DWR and Reclamation, based on the 90 percent exceedance forecast, will fail to

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2 provide reasonable protection for fish and wildlife, and will leave California badly unprepared if
3 2022 is also dry. First, the proposed operations of the State Water Project (“SWP”) and federal
4 Central Valley Project (“CVP”) would drain upstream reservoirs to storage levels similar to those
5 in 2014 and 2015, when Reclamation lost control of water temperatures and killed 77 percent and
6 85 percent, respectively, of the endangered winter run Chinook salmon below Shasta Dam and
7 caused similarly devastating impacts to fall run Chinook salmon in the Sacramento River.”

8 37. Petitioners observed that “[i]t is necessary and appropriate for the Board to
9 immediately require Reclamation and DWR to submit by March 31 alternative operations plans
10 that improve upstream storage and fully meet the relevant water quality objectives by evaluating
11 actions, including the use of hydropower bypasses at Shasta Dam and other upstream reservoirs
12 and reducing water supply allocations to the Sacramento River Settlement Contractors and other
13 water contractors as needed to comply with the Plan and Water Rights Order 90-5. The Board
14 should evaluate these proposed operations through a public and transparent process before early
15 April, in order to ensure that the Board can take action to protect the Public Trust. Any further
16 delay runs the risk of foreclosing options this year, as DWR and Reclamation will begin making
17 irrigation water deliveries in earnest in April and will reduce reservoir storage and make other
18 operational modifications accordingly.”

19 38. “First, Reclamation does not intend to submit a temperature management plan to
20 the Board until May, pursuant to Order 90-5. However, waiting until May is too late, as the Board
21 and other agencies have repeatedly recognized. For instance, last year the Board explained to
22 Reclamation that, “Although Reclamation proposes to submit a draft plan in April and a final plan
23 in May, depending on the circumstances in any given year, submittal of a draft plan in April may
24 not satisfy Reclamation’s obligations under Order WR 90-05. Particularly when the hydrology is
25 dry, planning starting earlier in the water year will be required.” Similarly, the National Marine
26 Fisheries Service (“NMFS”) explained in February 2018 that it is critical to “use a conservative
27 forecast as early as possible to protect the cold water pool in Shasta Reservoir so that suitable
28 spawning and egg/alevin incubation habitat can be maintained in the Sacramento River during the

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2 summer and fall.” It is crucial to plan for temperature management before May because the
3 volume of water releases from Shasta Reservoir in April and May – largely for deliveries to the
4 Sacramento River Settlement Contractors – can significantly deplete the coldwater pool and the
5 ability to maintain adequate water temperatures, as NMFS has previously found. This year, the
6 Glenn Colusa Irrigation District (the largest Sacramento River Settlement Contractor) plans to
7 ramp up diversions in mid- to late-April 2021. Water deliveries to Settlement and Exchange
8 Contractors are within Reclamation’s control under Order 90-5, and as the Board insisted in its
9 April 3, 2020 letter, Reclamation must evaluate different water supply assumptions to these
10 contractors in order to improve water temperature and carryover storage.”

11 39. The SWRCB failed to heed any of these urgent concerns.

12 40. On April 15, 2021, Petitioners CSPA and C-WIN submitted written comments, in
13 advance of the SWRCB’s Sacramento River temperature workshop, emphasizing that “[t]he
14 Sacramento River Settlement Contractors and any other water rights holders do not have the right
15 to have Reclamation deliver water to them when that water needs to be held in storage to maintain
16 temperature control in Shasta Reservoir.”

17 41. On April 21, 2021, the SWRCB held an all-day workshop for discussion of
18 Sacramento River temperature management.

19 42. On May 5, 2021, the Bureau submitted to SWRCB a Draft Temperature
20 Management Plan for 2021.

21 43. On May 10, 2021, Governor Newsom issued a Proclamation of a State of
22 Emergency (“the Proclamation”).

23 44. The Government Code permits the Governor to suspend “any regulatory statute”
24 during an emergency. Gov. Code § 8571.

25 45. Accordingly, the Proclamation provides: “To ensure adequate, minimal water
26 supplies for purposes of health, safety, and the environment, the Water Board shall consider
27 modifying requirements for reservoir releases or diversion limitations-including where existing
28 requirements were established to implement a water quality control plan-to conserve water

1 upstream later in the year in order to protect cold water pools for salmon and steelhead, improve
2 water quality, protect carry over storage, or ensure minimum health and safety water supplies.
3 The Water Board shall require monitoring and evaluation of any such changes to inform future
4 actions. For actions taken in the Sacramento-San Joaquin Delta Watershed Counties pursuant to
5 this paragraph, Water Code Section 13247 is suspended.”

6
7 46. The Governor did not have lawful authority, however, to suspend SWRCB
8 compliance with the California Constitution, Article X, Section 2, Water Code section 275, Fish
9 and Game Code sections 2050 et seq. and 5937, and the SWRCB’s Settlement Agreement with
10 Petitioners.

11
12 47. On May 14, 2021, the National Marine Fisheries Service commented that the draft
13 TMP had been developed too late in the year to avoid otherwise avoidable harm to fish: “In the
14 future, we recommend developing a process, possibly as part of the drought toolkit, or through
15 adjustments to the Sacramento River Temperature Task Group, where temperature management
16 discussions are triggered earlier in the year. This could result in improved coordination on
17 modeling, and early identification and sequencing of potential actions.” The NMFS comments
further stated:

18 “NMFS recommends that the Final Temperature Management Plan propose an operational
19 scenario that targets the lowest feasible TDM for SRWC.”

20
21 “NMFS recommends prioritizing storage conservation at Shasta Reservoir to the extent
22 that it does not interfere with Reclamation’s obligation to public health and safety.”

23
24 “To address the possibility of dry conditions continuing into WY2022, NMFS
25 recommends, to the maximum extent practicable and given other biological constraints,
26 that a Final Temperature Management Plan identify an End-of-September (EOS) storage
27 target in anticipation of potential dry conditions continuing into the following year.”

1
2 “NMFS Southwest Fisheries Science Center modeling¹ indicates that reduced Keswick
3 releases can improve TDM, EOS storage, and date of first side gate use (Table 1). The
4 additional scenarios in Table 1 are provided for illustrative purposes with the recognition
5 that there is variability in TDM depending on how temperature management windows are
6 shaped. NMFS’ preferred approach is to implement, to the extent feasible, a lower-flow
7 scenario than the base scenarios to reduce TDM and increase EOS storage using a
8 combination of approaches.”

9 48. None of these recommendations were implemented by the TMP or the Approval.

10 49. On May 19, 2021, the NMFS Southwest Fisheries Science Center submitted to
11 SWRCB Center’s modeling showing a range of temperature dependent mortality based on
12 alternative water deliveries within Reclamation’s reasonable control. Under applicable law and
13 the parties’ Settlement Agreement, the SWRCB was required to direct Reclamation to implement
14 a water delivery schedule within Reclamation’s reasonable control that would avoid the tragic and
15 avoidable temperature-induced mortality of salmonids that then resulted over the next four
16 months. It failed to do so.

17 50. On May 21, 2021, the SWRCB provided a three-page letter to Reclamation
18 commenting on its draft TMP. In that letter, the SWRCB stated that:

19 “Our understanding is that actions are being taken to achieve a minimum end of September
20 storage target of 1.25 million acre-feet (MAF) and that this storage target will be reflected
21 in the final TMP submitted next week. Based on the extensive coordination, analysis, and
22 information sharing that has occurred among the agencies over the last few weeks, a 1.25
23 MAF end of September carryover storage target represents a reasonable balance between
24 temperature control this year, maintaining some carryover storage going into next year, and
25 providing for consumptive water supply needs.”

26
27 “While there is still uncertainty, modeling from the National Marine Fisheries Service
28 Southwest Fisheries Science Center indicates that these end of September storage levels

1
2 and associated operations could provide for temperature dependent mortality (TDM) levels
3 for winter-run Chinook salmon eggs as low as 50 percent (with a range up to over 80
4 percent). This is compared to estimated best case TDM levels of nearly 80 percent (with a
5 range up to nearly 85%) for Reclamation's proposed operations under the draft TMP with
6 the reductions in inflows projected in the May hydrology update (end of September storage
7 level under 1 MAF)."

8 51. The SWRCB comments on the draft TMP included no discussion of its obligations
9 under the Public Trust Doctrine, Order 90-5, California Constitution Article X, Section 2, the
10 California Endangered Species Act, Fish and Game Code section 5937 or the parties' Settlement
11 Agreement. The SWRCB comments on the draft TMP failed to include any analysis of
12 alternatives within the reasonable control of Reclamation, such as the timing or amount of
13 deliveries to Reclamation contractors. Contrary to the SWRCB's obligations under applicable
14 law, its comments make no mention of the delivery alternatives modeled by Southwest Fisheries
15 Science Center.

16 52. On May 23, 2021, Petitioners submitted in writing an Alternate Temperature
17 Management Plan showing that alternatives to the Bureau's timing and quantity of water delivery
18 to Bureau contractors were within Reclamation's reasonable control and would considerably
19 improve cold water habitat.

20 53. On June 4, 2021, Petitioner CSPA joined a letter submitted by the Natural
21 Resources Defense Council (NRDC) entitled "Objection to, Protest of, and Request for
22 Reconsideration of State Water Resources Control Board's Approval of Shasta Temperature
23 Management Plan under Water Rights Order 90-5."

24 54. On July 8, 2021, Petitioners joined the petition of the Natural Resources Defense
25 Council (NRDC) for reconsideration of the Approval. The SWRCB failed to take timely
26 corrective action in response to this petition, with the result that excessive mortality of Sacramento
27 River salmonids resulted.

1 55. The TMP’s temperature management period expired on “October 31, or when the
2 SRTTG determine[d], based on real-time monitoring that an estimated 95 percent of Winter-run
3 Chinook Salmon eggs have hatched, and alevin have emerged, whichever is earlier.” TMP p. 11.
4 Although the terms of the TMP apply to Reclamation’s management of Sacramento River waters
5 during water year 2021, petitioners are informed and believe that the SWRCB will fail to enforce
6 and uphold the requirements of Water Rights Order 90-5 in water year 2022 for any subsequent
7 TMP developed by Reclamation, absent judicial intervention. As each TMP addresses a single
8 water-year, the SWRCB’s Approval is the type of action that “present[s] questions that are capable
9 of repetition, yet evade review.” *Californians for Alternatives to Toxics v. California Dept. of*
10 *Pesticide Regulation* (2006) 136 Cal. App. 4th 1049, 1069 (citing *Rawls v. Zamora* (2003) 107
11 Cal.App.4th 1110, 1113; *Hammond v. Agran* (1999) 76 Cal.App.4th 1181, 1186).

GENERAL ALLEGATIONS

15 56. The Approval never assessed whether any of the more protective temperature
16 compliance points recommended by Petitioners could be attained through adjustment of
17 “controllable factors” such as altering the quantity and/or timing of water deliveries from Shasta
18 Reservoir. For example, the TMP does not include any assessment of alternatives for water
19 allocations to water users, and comes on the heels of months of excessive allocations and releases
20 from the prior September through May, which are ignored but crucial to effective temperature
21 management planning.

22 57. The only “uncertainties” or variables modeled for the TMP are the weather: if
23 summer and fall months are warmer or drier than predicted, then Reclamation will simply ask the
24 Board to move the temperature compliance point farther upstream. This “response” is as
25 meaningless and corrupt as a referee ruling that the kicking team may be given a “do-over,” and
26 that the goal posts be moved closer to the kicker, when he fails to kick a field goal through the
27 uprights.

58. The Approval includes no meaningful analysis or evaluation of the SWRCB's Public Trust duties.

59. The Approval makes no findings as to the feasibility of improved Public Trust resource protection as required by the Public Trust Doctrine.

60. Both the TMP and the Approval fail even to mention, much less assess compliance with, Fish and Game Code section 5937.

61. The Approval and the final TMP both fail to analyze or prescribe the implementation of actions within Reclamation's reasonable control that would improve or maintain water temperatures in the Sacramento River this year and therefore violates Order 90-5.

62. The Approval fails to require any analysis of whether Reclamation could attain Order 90-5's temperature compliance points through the exercise of controllable factors, including a failure to assess whether an adequate cold water storage pool will be maintained at the end of the "water year" sufficient to provide adequate cold water releases the following year.

63. Throughout the summer and fall of 2021, the Board participated in ad-hoc meetings of the Sacramento River Temperature Task Group (“SRTTG”), which includes Reclamation and other agencies with an interest in relaxing temperature controls to accommodate diversions of water from the Sacramento River for consumptive uses to the detriment of Public Trust resources and uses, and which routinely and serially weakened the Sacramento River temperature compliance point even further.

64. The final TMP and Approval fail to reduce releases to the extent reasonable and necessary to control water temperatures, and instead prioritize water delivery to Reclamation’s contractors – in excess of their reasonably claimed water rights – over its permit obligations. The Approval fails to address and rectify the fact that Reclamation’s draft and final TMPs were not based on early-season planning, which is essential to safely account for the recurring possibility of dry years.

1
2 65. The Approval fails to reduce water allocations to settlement and exchange
3 contractors to their reasonably claimed water rights, which would demonstrably reduce water
4 temperatures and thereby reduce the unreasonable impacts to salmon under the final TMP.

5 66. Based on modeling conducted by NMFS Southwest Fisheries Science Center, the
6 SWRCB projected in its May 21, 2021 comments on Reclamation' draft TMP that a storage of
7 1.25 million acre feet ("MAF") at the End-of-September ("EOS") would result in a temperature
8 dependent mortality ("TDM") to winter-run Chinook of 50%. Based on this modeling, the
9 SWRCB indicated that it would not approve the final TMP unless it included an EOS storage
10 requirement of at least 1.25 MAF.

11 67. The Approval states, however, that new modeling included in the final TMP
12 projects significantly higher TDM to winter-run Chinook under two potential operational
13 scenarios, S13 and S14, assuming 1.25 MAF EOS.

14 68. The Approval states further that updated modeling from NMFS projects mean and
15 median TDM of 64% and 71% for S13, and 73% and 81% for S14, respectively. Each of these
16 ranges is significantly greater than the 50% TDM that the SWRCB initially considered acceptable
17 on May 21, 2021. Yet, the SWRCB approved the TMP despite the significant increases in
18 expected TDM.

19 69. Reclamation's HEC5Q model set forth in the final TMP, moreover, projects even
20 higher TDM at 1.25 MA EOS, with mean and median TDM of 66.6% and 77.3% for S13, and
21 80.1% and 87.6% for S14, respectively.

22 70. The SWRCB approved the final TMP without explanation or analysis as to why
23 approval was warranted despite the new modeling evidence indicating that the 1.25 MAF EOS
24 target will fall well short of assuring no greater than 50% TDM.

25 71. The Approval fails explain, let alone demonstrate, how these excessive levels of
26 mortality are reasonable and unavoidable – because such a showing is impossible in light of the
27 overwhelming contrary evidence -- and fails to explain whether and how the Board balanced its
28 obligations under the Public Trust Doctrine, particularly in light of the lower mortality that would

1
2 occur if Reclamation took actions within its reasonable control to increase Shasta Reservoir
3 storage and reduce reservoir releases this year.

4 72. NMFS' 2017 amendment to the Shasta Reasonable and Prudent Alternative
5 recommended a maximum of 30% temperature dependent mortality of winter-run Chinook salmon
6 in critically dry years like 2021 and warned that it was not clear that the species could avoid
7 extinction even at that rate of temperature dependent mortality. The final TMP approved by the
8 SWRCB will result in more than twice the maximum TDM that NMFS had previously determined
9 would avoid jeopardizing the continued existence of this species.

10 73. On June 9, 2021, moreover, Reclamation submitted a "Notice of Deviation from
11 the Final TMP" notifying the SWRCB that it expects that it will not even be able to meet the 1.25
12 MAF EOS. Instead, Reclamation anticipates an EOS of just 1.1 MAF. The projected TDM as
13 stated in the Approval, which will already result in unacceptable risks to winter-run Chinook, is,
14 therefore, likely a dramatic underestimate given Reclamation's Notice of Deviation.

15 74. Reclamation's reservoir releases from Shasta and Keswick Dams in May were over
16 1,000 cfs greater than estimated in the 90% exceedance operational forecast in the draft TMP.
17 Here, monthly average planned releases in May were supposed to be 7,379 cfs, but actual releases
18 in May were much higher, averaging 8,390 cfs.

19 75. Reservoir releases in June from the Oroville, Folsom, and Shasta Reservoirs have
20 significantly exceeded the monthly averages in the TMP and in the Drought Contingency Plan,
21 with June releases from each Reservoir exceeding planned monthly releases by 39 thousand acre-
22 feet (TAF), 32 TAF, and 88 TAF, respectively.

23 76. These serious errors in reservoir release management in early 2021 including
24 improvidently increased releases and reduced storage, resulting in substantially increased risk of
25 mortality to salmonids already on the brink of extinction due to excessive river temperatures,
26 assured that Reclamation's projections that it would fail to meet the End-of-September storage
27 requirement of 1.25 MAF prescribed by the Approval would prove correct. Reclamation had

1
2 always planned to fail, knowing that the SWRCB would, as in past years, take no corrective, let
3 alone punitive, action.

4 77. The increased reservoir releases described above also caused storage at the end of
5 June at the Oroville, Folsom, and Shasta Reservoirs to be 159,000 acre-feet lower than what was
6 provided in the Drought Contingency Plan, with storage in Shasta Reservoir containing 69,000
7 fewer acre-feet than provided in that plan.

8 78. As a result of the excess releases described above, elevated water temperatures and
9 temperature dependent mortality of salmon eggs are likely to exceed even the unreasonable
10 estimates in the final TMP.

11 79. The Approval asserts conclusorily and without evidentiary support that despite the
12 fact that expected temperature dependent mortality rate for winter-run Chinook salmon resulting
13 from the TMP “could increase the risk of extinction significantly . . . the State Water Board is
14 satisfied that the TMP reflects the currently known feasible and reasonable management actions
15 Reclamation could take to control temperatures this year.” This latter statement regarding known
16 feasible and reasonable management actions is not supported by substantial evidence, in part,
17 because the SWRCB has not required Reclamation to reduce water allocations within its
18 reasonable control in order to maintain water temperatures that are less detrimental to the salmon
19 fishery, including requiring reductions in water allocations to the Sacramento River Settlement
20 Contractors and the San Joaquin River Exchange Contractors.

21 80. The Approval improperly delegates to Reclamation both the authority to determine
22 what actions are “within [Reclamation’s] reasonable control” per Order 90-5, as well as the
23 SRWCB’s statutory responsibility to “take all appropriate proceedings or actions” to prevent the
24 unreasonable use of water per Water Code section 275.

25 81. Specifically, the Approval directs Reclamation to “evaluate additional options to
26 improve temperature management. Reclamation shall submit a report of those evaluations,
27 including evaluation of proposals that have been submitted by stakeholders, by June 21, 2021.”

1
2 The SWRCB never engaged in any evaluation of “additional options to improve temperature
3 management[,]” including those submitted by stakeholders.

4 82. The Approval makes no effort to independently consider, let alone evaluate,
5 feasible alternatives that would reduce salmonid mortality, most notably CSPA’s Alternative
6 Temperature Management Plan submitted to the SWRCB on May 23, 2021.

7 83. Reclamation submitted to the SRWCB an Evaluation of Alternatives to the Shasta
8 Reservoir Final Temperature Management Plan to the SWRCB on June 21, 2021 (hereafter the
9 “2021 Reclamation Evaluation”).

10 84. The SWRCB failed to analyze or comment on the 2021 Reclamation Evaluation.

11 85. The 2021 Reclamation Evaluation rejects alternatives proposed by Petitioners, in
12 part, due to Reclamation’s assertion that Petitioners’ proposal to “decrease the total releases at
13 Keswick to 5,000 cfs [cubic feet per second] . . . while maintaining 3,500-4,000 cfs at Wilkins
14 Slough would not meet downstream diversions by both municipal and industrial contractors and
15 senior water rights holders.”

16 86. The 2021 Reclamation Evaluation states in conclusory terms that “Reclamation has
17 taken all reasonable actions within its authority to maximize water available for temperature
18 management.” Reclamation made this assertion despite the fact that a central feature of CSPA’s
19 Alternative TMP was requiring Reclamation to reduce deliveries to Sacramento River Settlement
20 Contractors – an action Reclamation was fully empowered to take and the SWRCB was obliged to
21 order where, as here, Public Trust resources would otherwise be needlessly sacrificed -- which
22 action Reclamation and the SWRCB continued to refuse to take.

23 87. Reclamation’s obligations to downstream contractors or senior water rights holders
24 to not relieve Reclamation of its permit obligations, Order 90-5’s requirements, or the Reasonable
25 Use Doctrine; nor do those obligations trump or supersede the SWRCB’s responsibilities under
26 the Public Trust Doctrine and Water Code section 275.

27 88. In a June 1, 2021 letter, the SWRCB expressly rejected Reclamation’s position that
28 operational assumptions that are “inconsistent with Reclamation’s contractual obligations are . . .

1
2 beyond Reclamation's reasonable control." The SWRCB stressed that "Reclamation's obligation
3 to deliver water to its contractors does not take precedence over its permit obligations."

4 89. The SWRCB further noted in its June 1, 2021 letter that "Reclamation's water
5 supply contractors are not entitled to more water under their contracts than Reclamation is
6 authorized to deliver consistent with the terms and conditions of its water right permits and
7 licenses."

8 90. Reclamation's contractual obligations do not circumscribe or limit available
9 reasonable control measures to achieve temperature controls required by Order 90-5.

10 91. Article 3(i) of the Sacramento River Settlement Contracts expressly permits
11 Reclamation to reduce project water allocations to comply with its "legal obligations."

12 92. Reclamation's failure to take steps to reduce the allocation of project water to its
13 contractors to protect Public Trust resources is at odds with its legal obligations, including under
14 Section 7 of the federal Endangered Species Act, 16 U.S.C. section 1531 et seq. (ESA) "to ensure
15 that its actions are not likely to jeopardize" endangered or threatened species, or adversely modify
16 their critical habitat. *Center for Biological Diversity v. Salazar* (D.Ariz. 2011) 804 F.Supp.2d 987,
17 1010.

18 93. All of the choices for Sacramento River temperature management in 2021 that the
19 SWRCB evaluated assume that Reclamation will fulfill its contracts with the Sacramento River
20 Settlement Contractors unless those contractors voluntarily forgo some of their allocations.

21 94. The Approval does not find that the SWRCB lacks authority to require reduced
22 deliveries to those contractors.

23 95. The Approval does not discuss or consider requiring that Reclamation first satisfy
24 its obligations under the permit or Order 90-5 prior to satisfying its contractual obligations.

25 96. Reclamation continued to make Project water deliveries to the Sacramento River
26 Settlement Contractors from Shasta Reservoir during the summer of 2021. Those deliveries
27 amount to approximately 200,000 acre-feet in July, August, and September of 2021. This 200,000
28

1 acre-feet figure is greater than the shortfall noted in Reclamation's Notice of Deviation discussed
2 above.

4 97. Reclamation has announced a 75% allocation to the Sacramento River Settlement
5 Contractors, which amounts to 1,586,715 acre-feet.

6 98. Water diversions by the Sacramento River Settlement Contractors this year will be
7 in excess of the amount of water they would reasonably be entitled to receive under their claimed
8 water rights, as their water allocations are greater than the full natural flow of the Sacramento
9 River in many months of the summer of 2021.

10 99. Despite maximum contract amounts of 2,115,620 acre-feet per year, the
11 Sacramento River Settlement Contractors have not taken delivery from Reclamation of as much
12 as 1.6 MAF of water in any given year since 2013, when they diverted 1.7 MAF. This data
13 indicates that Reclamation has failed to ensure that the Sacramento River Settlement Contractors
14 are reasonably and beneficially using the full amount of water under their contracts, as required by
15 their contracts and Article X, Section 2 of the State Constitution.

16 100. On average, over the past decade the Sacramento River Settlement Contractors
17 have diverted less than 75% of their maximum contract totals, suggesting that a reduction in
18 maximum contract deliveries to 75% does not significantly reduce water diversions, because the
19 contractors are not actually reasonably and beneficially using their full contract amounts.

20 101. Allowing water deliveries to the Sacramento River Settlement Contractors during
21 2021 that are in excess of the water they could claim to be reasonably entitled to receive under
22 their claimed water rights, and in volumes that prevent compliance with Reclamation's permits
23 and Order 90-5, is also unreasonable under Article X, section 2 of the State Constitution, in light
24 of the severe impacts to fish and wildlife and other Public Trust users of water.

25 102. Regardless of whether water deliveries under contracts may have been reasonable
26 when they were entered into or whether they are reasonable in other years, the Board has a
27 continuing duty each year to determine whether a use is reasonable under Article X, section 2 of
28 the State Constitution. Given the fact that Reclamation is violating its water rights obligations to

1
2 the public under Order 90-5, causing unreasonable impacts to endangered species, fisheries, and
3 the Public Trust, and under the particular circumstances of 2021, delivery to these contractors in
4 volumes that otherwise prevent compliance with Order 90-5 and the preservation of Public Trust
5 resources, constitutes a waste and unreasonable use of water under Article X, section 2 of the State
6 Constitution.

7 103. Reclamation's allocation of water to the San Joaquin River Exchange Contractors
8 is also unreasonable because the monthly deliveries specified per Article 8 of the contract are far
9 in excess of the volume of water that would be available to these contractors under their claimed
10 water rights. Specifically, the contractual allocations for the months of April to September exceed
11 the projected available unimpaired runoff by 206%.

12 104. NMFS' modeling shows that curtailing allocations to the contractors would
13 significantly reduce water temperatures and resulting TDM of salmon this year, including winter-
14 run Chinook salmon. Limited deliveries to water supply contractors in this way to facilitate
15 compliance with permit obligations is within Reclamation's reasonable control.

16 105. NMFS identified feasible alternatives to dramatically reduce TDM during 2021.
17 Specifically, modeling by NMFS has estimated that CVP operations that reduce reservoir releases
18 by approximately 500,000 acre feet, resulting in End-of-September Shasta Reservoir storage of
19 1.47 million acre feet, and which limit maximum monthly average Keswick releases to 6,000 cfs
20 during the months of June, July and August, would significantly reduce temperature dependent
21 mortality of winter-run Chinook salmon eggs (as low as 32% assuming 90% exceedance
22 hydrology and 2015 meteorology, and as low as 50% under 99% exceedance hydrology and 2015
23 meteorology) and substantially improve water temperatures in October and November, reducing
24 mortality of spring-run and fall-run salmon.

25 106. As noted above, moreover, the Settlement Agreement between Petitioners and the
26 SWRCB states that “[t]he State Water Board will employ staff, with modeling and other relevant
27 expertise, to evaluate the U.S. Bureau of Reclamation's compliance with Order WR 90-5
28 temperature management requirements, including whether different water supply delivery

1
2 alternatives may achieve temperature compliance at temperature control points Red Bluff
3 Diversion Dam, Bend Bridge, Jelly's Ferry, Ball's Ferry, Clear Creek, and Keswick Dam." The
4 SWRCB, either independently or in cooperation with Reclamation, has conducted no modeling or
5 other analysis that would meet the requirements of this provision of the Settlement Agreement.

6 107. The SWRCB conducted no independent modeling of CSPA's Alternative TMP.
7 Thus, the Board never evaluated reasonably feasible scenarios that contemplated alternative water
8 supply measures to achieve temperature compliance at Clear Creek or Keswick Dam. In this
9 regard, the Board doubly failed: it failed to support its Approval with substantial evidence and it
10 failed to fulfill its contractual duties under the Settlement Agreement with Petitioners.

11 108. The SWRCB does not consider, let alone balance, in the Approval or otherwise, the
12 relative benefit to Public Trust resources of maintaining 500,000 acre-feet more in storage under
13 CSPA's Alternative TMP as compared to Reclamation's proposed operations.

14 109. Water transfers included in the final TMP will not improve conditions for salmon.
15 Moreover, such transfers result in unmitigated impacts to Public Trust resources including
16 waterfowl and other fish and wildlife.

17 110. The TDM for winter-run Chinook ranging from 50% to 81% sanctioned by the
18 Approval fail to keep "in good condition any fish" below the dam as required by Fish and Game
19 Code section 5937. If recent trends continue and mortality of winter-run Chinook approaches
20 100% percent in 2021, there is no plausible argument that such fish would be in good condition.

21 111. Except for noting that conditions for fall-run Chinook salmon in the Sacramento
22 River are "concerning," the Approval lacks any analysis of impacts of the TMP on species other
23 than Sacramento River winter-run Chinook salmon, including spring-run and fall-run Chinook
24 salmon. This complete failure to analyze, discuss, or find feasible measures to mitigate impacts to
25 these fisheries violates the Public Trust Doctrine.

26 112. The final TMP anticipates that between September 15 and November 29, 2021,
27 daily water temperatures in the Sacramento River at Clear Creek will likely exceed 60 degrees.

This will cause significant TDM of spring-run and fall-run Chinook salmon that spawn in the Sacramento River this year; yet that mortality is not considered in the final TMP or the Approval.

113. Temperatures in excess of 60 degrees are consistent with elevated disease risk among adult salmon and the reduced viability of gametes in holding adults awaiting the arrival of cooler waters before attempting spawning. The final TMP and Approval ignore these likely impacts and thus risk recreating high rates of pre-spawning mortality among adult fall and spring-run Chinook salmon.

114. The Approval does not discuss or prescribe feasible measures to protect spring-run and fall-run Chinook salmon.

115. Under the TMP, Reclamation planned to draw Trinity Reservoir down to approximately 600,000 acre-feet by the end of September 2021. That drawdown has caused negative thermal impacts to Trinity River spring-run and fall-run Chinook in 2021. The lower Klamath River is also in severe danger of widespread adult winter-run Chinook mortality due to high temperatures and low flows in its tributaries including the Trinity River.

116. The lack of storage in Trinity Reservoir will make it difficult or impossible to mitigate lower Klamath River mortality events with storage releases from Trinity Reservoir.

117. Oroville Reservoir on the Feather River and Folsom Reservoir on the American River are forecast to be at historic lows in the fall of 2021. Salmon and steelhead downstream of these dams are severely threatened by high water temperatures and lack of flow. Yet water must be released from these reservoirs to meet Delta flow and salinity requirements, while the final TMP includes plans for deliveries of 1.2 million acre-feet of water released from Shasta Reservoir is delivered to Sacramento River Settlement Contractors. The Approval, however, does not acknowledge, let alone address, the redirected impacts of these excessive deliveries on the fisheries in the Feather and American rivers.

118. The Board's failure to impose reduced deliveries to the Sacramento River Settlement Contractors under the TMP has unreasonable and detrimental effects on Delta fisheries

1
2 and the Delta ecosystem, and Public Trust resources, none of which are discussed or evaluated in
3 the Approval.

4 119. The Approval does not consider the effects of the final TMP on reservoirs other
5 than Shasta.

6 120. The Approval accepts Reclamation's limited focus on Shasta operations and is
7 silent on the potential impacts of elevated temperatures and high drawdown of storage in the
8 Trinity watershed and other CVP and SWP watersheds.

9 121. The Approval does not state any rationale, let alone provide quantification, for how
10 it weighed release of Trinity water in 2021 against preserving water in storage for 2022.

11 122. The Approval is silent on the final TMP's plans for Sacramento River Settlement
12 Contractors to transfer 170,000 acre-feet of water despite the fact that the water for transfer is
13 surplus to local needs and represents an acre-foot for acre-foot reduction in carryover storage for
14 water year 2022.

15 123. The Approval violates the California Endangered Species Act (CESA) (Fish and
16 Game Code, sections 2050 et seq.)

17 124. State agencies, including the SWRCB, are subject to CESA. *Watershed Enforcers*
18 v. *Department of Water Resources* ("Water Enforcers") (2010) 185 Cal.App.4th 969, 983.

19 125. CESA, "prohibits the killing of endangered species in the course of lawful activity"
20 except as permitted by a duly issued take permit. *Watershed Enforcers*, 185 Cal.App.4th at 981
21 (quoting *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8
22 Cal.App.4th 1554, 1564); Fish and Game Code §§ 2080, 2081.

23 126. Shasta Reservoir storage in 2021 has been consistently lower than in the critically
24 dry drought years of 2014 and 2015 when winter run Chinook salmon suffered almost total
25 mortality.

26 127. The Board's Approval of the TMP has caused unpermitted take of species listed
27 under CESA. Indeed, the final TMP anticipates a *minimum* of 64% TDM of winter-run Chinook
28 salmon, as explained above.

1
2 128. Because the Approval is causing take of CESA-listed species and is not covered by
3 a take permit, it is unlawful and must be set aside.

4 129. The TDM projected, and endorsed, by the Approval is especially unreasonable
5 given the additional mortality risks salmon face throughout the rest of their life stages. Less than
6 50% of the salmon eggs that survive to the fry life stage will successfully migrate downstream to
7 Red Bluff Diversion Dam as smolts, and only about one third of those smolts will survive the
8 migration downstream from Red Bluff Diversion Dam to the Delta. When other sources of
9 mortality in freshwater are considered (including those exacerbated by operation of Shasta Dam),
10 such high levels of egg mortality may result in complete or nearly complete loss of this year's
11 winter-run Chinook Salmon cohort that spawned in the wild. The Approval ignores and causes
12 these cumulative effects, and is thus a substantial cause of the unpermitted take of listed
13 salmonids.

14 130. Reclamation's operations at Shasta Dam have already caused substantial pre-spawn
15 mortality of winter-run Chinook salmon from its disastrous hydropower bypass operations on May
16 11, 2021. There, Reclamation's bypass of the power turbines at Shasta Dam resulted in
17 Reclamation far exceeding water temperatures that NMFS and the California Department of Fish
18 and Wildlife (CDFW) had recommended, as the daily average temperature of the water released
19 from Keswick Dam was 60.7 degrees Fahrenheit, and the daily average temperature of the
20 Sacramento River at Clear Creek was 61.6 degrees Fahrenheit, on May 11, 2021.

21 131. CDFW determined in July, 2021 that weather in excess of 100 degrees for the
22 periods of late May to early June, and for the last week of June through the first week of July,
23 2021 would result in the depletion of cold pool storage sooner than modeled earlier in the season.
24 CDFW determined further that this persistent heat dome over the West Coast would likely result
25 in earlier loss of ability to provide cool water and consequently the possibility that nearly all in-
26 river juveniles would not survive this season.

27 132. The increased temperatures as a result of the bypass operation in May, 2021
28 resulted in significant pre-spawn mortality to winter-run Chinook.

1
2 133. Surveys of winter-run chinook salmon carcasses determined that 12.3% of all fresh
3 females this season were unspawned.

4 134. Based on estimated water temperatures in the Shasta TMP and uncertainties
5 associated with those estimates, Reclamation's operation of Shasta Reservoir is also likely to
6 cause pre-spawning mortality and/or significant reductions in reproductive success for migrating
7 adult fall-run and spring-run Chinook Salmon.

8 135. The Approval does not consider or discuss the cumulative and cascading effect of
9 the May, 2021 bypass incident, or the persistently high summer temperatures, when combined
10 with projected TDM.

11 136. The final TMP resulted in a likelihood that side gate operations would commence
12 in mid-July to early August. During the prior drought, Reclamation lost temperature control soon
13 after side gate operations began.

14 137. The final TMP uses 90% exceedance hydrology to estimate reservoir inflow this
15 summer, rather than the more conservative 99% exceedance hydrology that is more accurately
16 tracking observed runoff this year.

17 138. The final TMP relies on estimates of accretions and depletions from DWR that the
18 document admits "come[s] with substantial uncertainty" and that were very inaccurate during the
19 prior drought.

20 139. Neither the final TMP nor the Approval requires the California Department of
21 Water Resources ("DWR") to reduce the State Water Project allocation to zero and thereby
22 conserve this water behind Shasta Dam to improve temperature management.

23 140. DWR maintains a 5% allocation for its SWP contractors (which equates to
24 approximately 210,000 acre feet). DWR is also allocating 600,000 acre feet to its Feather River
25 Settlement Contractors (50% allocation). Together, these water supply allocations from the CVP
26 and SWP total more than 4.4 million acre feet this year.

27 141. Reducing DWR's 5% allocation to State Water Project contractors could
28 significantly improve storage in Shasta Reservoir and Reclamation's ability to maintain water

1
2 temperatures in the Sacramento River to reduce the impacts to the salmon fishery. Yet, the
3 SWRCB failed to require this.

4 142. Absent a cap on reservoir releases from Keswick and additional actions to conserve
5 upstream storage (such as reducing DWR's State Water Project allocation to zero and conserving
6 the water in Shasta), water temperatures and temperature dependent mortality are likely to exceed
7 even the unreasonable allowances in the final TMP.

8 **JURISDICTION AND VENUE**

9 143. This Court has jurisdiction over this action pursuant to Water Code section 1126
10 and CCP section 1094.5.

11 144. Venue is proper in this Court under CCP sections 393, 395 and 401 as Respondent
12 SWRCB is a state agency, SWRCB's principal offices are located in Sacramento, and the
13 Attorney General has offices in Sacramento County.

14 145. Petitioners are vitally interested in having the laws properly executed and
15 Respondents' duties properly performed so that the public's right to, and interest in, environmental
16 protection is fully secured.

17 146. This complaint is timely filed within any and all applicable statutes of limitations.

18 **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

19 147. Petitioners have performed all conditions precedent to this filing, and have actively
20 participated in Respondents' administrative processes by submitting comments, along with other
21 public agencies, organizations, and members of the public, asserting the claims alleged herein.
22 Accordingly, Petitioners have fully exhausted their administrative remedies, to the extent such
23 remedies exist and to the extent that exhaustion of administrative remedies is legally necessary.

24 148. Petitioners possess no other remedy to challenge Respondents' abuses of discretion
25 and failures to comply with applicable laws and regulations and their Settlement Agreement with
26 Petitioners.

27 **PRIVATE ATTORNEY GENERAL DOCTRINE**

149. Petitioners bring this action as private attorneys general pursuant to California CCP section 1021.5, and any other applicable legal theory, to enforce important rights affecting the public interest.

150. Issuance of the relief requested in this Verified Petition and Complaint will confer significant benefits on the general public, and result in the enforcement of important rights affecting the public interest, by, among other benefits and rights, upholding and enforcing existing protections for threatened, endangered, and imperiled species and other Public Trust resources throughout the Central Valley watershed, and the Bay-Delta.

151. The necessity and financial burden of enforcement are such as to make an award of attorneys' fees appropriate in this proceeding. Absent enforcement by Petitioners, Respondents' Approval might otherwise be deemed valid despite its legal and factual deficiencies, and, as a result, cause significant adverse environmental effects, including potential extinction or extirpation of a species, that might otherwise have been prevented through compliance with law.

152. Petitioners' attorneys are serving a copy of their Verified Petition and Complaint on the Attorney General's office to give notice of Petitioners' intent to bring this proceeding as private attorneys general under CCP section 1021.5 in accordance with CCP section 388.

FIRST CAUSE OF ACTION

(Against all Respondents for Violations of SWRCB Order 90-5 and Water Code section 275,
pursuant to CCP section 1094.5)

153. Petitioners incorporate each allegation of this Petition as though fully set forth herein.

154. Water Code section 275 forbids “waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.”

155. Respondents' Approval violates Water Code section 275's prohibition against the waste and unreasonable use of public water.

156. Respondents' Approval authorizes the TMP without analyzing potential actions "within Reclamation's reasonable control" to achieve temperature control objectives in the

1
2 Sacramento River prescribed by Order 90-5. The TMP and Respondents' Approval thereof
3 therefore violate SWRCB Order 90-5.

4 157. Respondents' Approval authorizes the TMP without requiring Reclamation to
5 implement measures "within the Bureau [of Reclamation]'s reasonable control" to meet the
6 temperature control objectives prescribed by SWRCB Order 90-5, including conditioning the
7 Approval on Reclamation reducing allocations to water contractors, including but not limited to,
8 the Sacramento River Settlement Contractors, as alleged herein. The TMP and Respondents'
9 Approval thereof therefore violates SWRCB Order 90-5.

10 158. Respondents' Approval was therefore rendered without compliance with the
11 procedure required by law and was not based on the findings and evidence required by law, and
12 therefore should be set aside by the Court pursuant to CCP section 1094.5, subdivision (b).

SECOND CAUSE OF ACTION

14 (Against all Respondents for Violations of the Public Trust Doctrine, and Fish and Game Code
15 section 5937, pursuant to CCP section 1094.5)

16 159. Petitioners incorporate each allegation of this Petition as though fully set forth
17 herein.

18 160. Fish and Game Code section 5937 states that “[t]he owner of any dam shall allow
19 sufficient water at all times to pass . . . around, or through the dam to keep in good condition any
20 fish . . . below the dam,” and the courts have interpreted section 5937 to be “a legislative
21 expression of the public trust protecting fish as trust resources when found below dams.”
22 *California Trout*, 207 Cal.App.3d at 626. “The Legislature, not the Water Board, is the superior
23 voice in the articulation of public policy concerning the reasonableness of water allocation,”
24 where the Legislature has adopted a specific rule governing the public trust in Fish and Game
25 Code 5937, “the Water Board has no authority to disregard it.” *Id.* at 631. Here, “the Legislature
26 has already balanced the competing claims for water . . . and determined to give priority to the
27 preservation of their fisheries.” *NRDC v. Patterson*, 333 F.Supp.2d 906, 918 (E.D. Cal. 2004);
28 *Marks v. Whitney*, 6 Cal.3d at 259-260.

1 161. Contrary to these authorities, Respondents' Approval fails even to acknowledge, let
2 alone comply with, the Public Trust Doctrine, including Fish and Game Code section 5937. But in
3 approving the TMP, the Board had an "affirmative dut[y] to take the trust into account and protect
4 public trust uses whenever feasible." *Baykeeper II*, 29 Cal.App.5th at 571. Moreover, the Board's
5 compliance with the Public Trust Doctrine cannot be "taken in some fragmentary and publicly
6 invisible way." *Baykeeper I* at 234; *Zack's, supra*, 165 Cal. App. 4th at 1176 (citation omitted)
7 ("The obligations a government may have as . . . trustee are more complex and demanding than its
8 general obligation to act for the public benefit").
9

10 162. Respondents' Approval of the TMP therefore violates the SWRCB's duties under
11 the Public Trust Doctrine by: failing to identify which resources impacted by the Approval are
12 encumbered by the Public Trust, failing to identify which resources benefited by the Approval are
13 not protected by the Public Trust, failing to evaluate and identify whether Public Trust resources
14 would be preserved to the extent feasible, and failing to identify and assess compliance with Fish
15 and Game Code section 5937.

16 163. Respondents' violations of law are causing the irreparable loss of critically
17 imperiled salmonids, to the detriment of protected Public Trust uses including, but not limited to,
18 fishing, fish and wildlife habitat, recreation, and tourism; and to the benefit of non-trust uses such
19 as commerce and agriculture. *National Audubon* at 446-7 (“an appropriative water rights system
20 administered without consideration of the public trust may cause unnecessary and unjustified harm
21 to trust interests”).

164. Respondents' Approval was therefore rendered without observance of the
procedure required by law, and should be set aside by the Court pursuant to CCP section 1094.5,
subdivision (b).

THIRD CAUSE OF ACTION

(Against all Respondents for Violations of the California Endangered Species Act, Fish and Game Code sections 2050 et seq., pursuant to CCP 1094.5)

165. Petitioners incorporate each allegation of this Petition as though fully set forth herein.

166. The Approval will cause take of winter-run Chinook salmon, a species listed under the California Endangered Species Act, Fish and Game Code section 2050 et seq. (“CESA”) by needlessly causing and allowing substantial temperature dependent mortality to the species, estimated to range from 64% to 81% (and potentially more).

167. The Approval is not covered by a take permit pursuant to CESA, Fish and Game Code, section 2081 or otherwise.

168. The Approval therefore violates CESA.

11 169. Respondents' Approval was therefore rendered without observance of the
12 procedure required by law and should be set aside by the Court pursuant to CCP section 1094.5,
13 subdivision (b).

FOURTH CAUSE OF ACTION

(Against all Respondents for failing to support their Approval with essential findings and substantial evidence as required by CCP 1094.5)

17 170. Petitioners incorporate each allegation of this Petition as though fully set forth
18 herein.

19 171. Respondents' Approval of the TMP provides no explanatory findings or
20 evidentiary support for its acceptance of TDM far exceeding that modeled in the draft TMP

172. The Approval is predicated on the false premise that End-of-September storage in
Shasta Reservoir would be at least 1.25 MAF despite overwhelming evidence that this level of
storage in Shasta Reservoir would not remain by the end of September due to excessive releases of
water from storage by Reclamation and allowed by the Board earlier in 2021.

173. The Approval is based on demonstrably flawed estimates for both exceedance
hydrology and accretions and depletions

174. Respondents' Approval was therefore not supported by the findings and substantial evidence as required by CCP section 1094.5, subdivision (b) and should therefore be set aside by the Court.

FIFTH CAUSE OF ACTION

(Against all Respondents for breach of contract and specific performance due to their violations of their Settlement Agreement with Petitioners)

175. Petitioners incorporate each allegation of this Petition as though fully set forth herein.

176. The Settlement Agreement is a valid, existing and presently enforceable contract between Petitioners and Respondents. Petitioners are entitled to Respondents' performance of its obligations under the Settlement Agreement.

13 177. Petitioners have performed all their obligations under the Settlement Agreement.

14 178. Petitioners have no adequate remedy at law, as damages would not remedy
15 Respondents' breach of the Settlement Agreement and the impacts of Respondents' ongoing and
16 continuing breach of the Settlement Agreement on the environment and on Petitioners.

17 179. Petitioners are entitled to specific performance of Respondents' contractual
18 obligations under the Settlement Agreement pursuant to Civil Code sections 3367 and 3384, et
19 seq.

180. Petitioners are entitled to an injunction forbidding Respondents from taking, and
continuing to take, actions that would cause a breach of their contractual obligations under the
Settlement Agreement pursuant to Civil Code sections 3368 and 3420, et seq., and CCP section
526.

24 181. Accordingly, this Court should exercise its equitable discretion and grant
25 Petitioners' request for Respondents' specific performance of their duties under the Settlement
26 Agreement as alleged herein.

27 182. To assure Respondents' compliance with the Settlement Agreement, this Court
28 should issue an injunction vacating and setting aside Respondents' Approval of the TMP, and

1 forbidding Respondents' approval of any future TMP that fails to comply with Respondents'
2 contractual obligations under the Settlement Agreement.

3

4 **PRAYER**

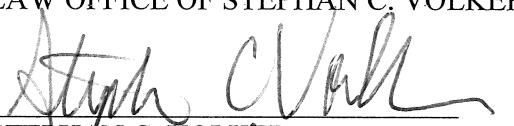
5 WHEREFORE, Petitioners pray for:

- 6
- 7 1. A peremptory writ of mandate compelling Respondents to vacate, set aside, void,
8 and otherwise nullify their Approval of the Sacramento River Temperature
9 Management Plan;
- 10 2. A declaration that Respondents have violated the laws whose violation is alleged
11 hereinabove;
- 12 3. An injunction restraining Respondents from continuing to violate the laws whose
13 violation is alleged hereinabove;
- 14 4. A judgment entered against Respondents and in favor of Petitioners on each of their
15 causes of action alleged hereinabove;
- 16 5. An award of Petitioners' costs and reasonable attorneys' fees; and
- 17 6. Such other relief as the Court deems just and proper.

18 DATED: November 9, 2021

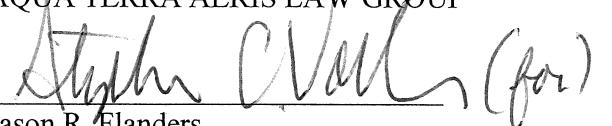
19 Respectfully submitted,

20 LAW OFFICE OF STEPHAN C. VOLKER

21 
STEPHAN C. VOLKER

22 Attorney for Petitioners and Plaintiffs
23 California Sportfishing Protection Alliance,
24 AquAlliance, and California Water Impact Network

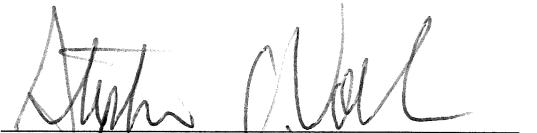
25 AQUA TERRA AERIS LAW GROUP

26 
Jason R. Flanders
27 Attorneys for Petitioners
28 California Sportfishing Protection Alliance,
AquAlliance, and California Water Impact Network

1
2 **VERIFICATION**
3

4 I, Stephan C. Volker, am the lead attorney for petitioners/plaintiffs in this action. I make
5 this verification on behalf of the petitioners and plaintiffs because such parties and their
6 representatives are absent from the county in which my office is located. I have read the foregoing
7 Verified Petition for Writ of Mandate and Complaint for Breach of Contract and Attorneys' Fees
8 and know its contents. The facts therein alleged are true and correct to the best of my knowledge
9 and belief, and are based on documents within the public records underlying the approvals herein
10 challenged.
11

12 I declare under penalty of perjury under the laws of the State of California that the
13 foregoing is true and correct, and that this Verification was executed in Berkeley, California on
14 November 9, 2021.

15 
16 STEPHAN C. VOLKER
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