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13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
14 **FOR THE COUNTY OF SACRAMENTO**

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16 CALIFORNIA SPORTFISHING PROTECTION  
ALLIANCE; CALIFORNIA WATER IMPACT  
17 NETWORK; AQUALLIANCE,

18 Petitioners,

19 v.

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

23 Respondents, and

24 CALIFORNIA DEPARTMENT OF WATER  
25 RESOURCES, UNITED STATES BUREAU OF  
RECLAMATION,

26 Real Parties in Interest.  
27  
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VERIFIED PETITION FOR WRIT OF  
MANDATE AND COMPLAINT FOR  
ATTORNEY'S FEES

(Code Civ. Proc. § 1094.5; Water Code §  
1435; Public Trust Doctrine; Cal. Constitution  
Article X, sec. 2)



1 members who reside in, use, and enjoy the Central Valley watershed, Sacramento River, San  
2 Joaquin River and the San Francisco Bay-Delta ecosystem for nature study, recreation, and aesthetic  
3 enjoyment, which uses will be irreparably harmed by the Order.

4 4. Petitioner AQUALLIANCE (“AquAlliance”) is a California public benefit  
5 corporation organized to protect Northern California’s waters and thereby sustain family farms,  
6 recreational opportunities, vernal pools, creeks, rivers, and the San Francisco Bay-Delta estuary.  
7 AquAlliance has members who regularly use the waters of the Delta and its tributaries for  
8 recreation, including kayaking, paddling, fishing, and wildlife viewing. AquAlliance members also  
9 routinely participate in conservation activities in and around the Bay-Delta estuary and its tributary  
10 vernal pools, creeks, and rivers. AquAlliance and its members have been involved in the  
11 administrative proceedings that have been provided to date for the Order, including attending  
12 meetings and providing written comments objecting to the Order.

13 5. Respondent CALIFORNIA STATE WATER RESOURCES CONTROL BOARD  
14 (“SWRCB” or “Board”) is the state agency charged with regulating water quality and supply within  
15 California. Respondent EILEEN SOBECK is the Executive Director of the Board who signed the  
16 TUC Order approval. When requested, the Board has authority to review and approve or  
17 disapprove, in whole or in part, these decisions of the Executive Director.

18 6. Real Party in Interest UNITED STATES BUREAU OF RECLAMATION  
19 (“Reclamation”) is a subdivision of the Department of the Interior, an agency of the United States of  
20 America, that operates the federal Central Valley Project, and requested approval of the TUCP.  
21 Reclamation is named in an abundance of caution, as the TUCP applicant for which the Order was  
22 made, but petitioners seek no relief as against Reclamation, whose participation is therefore neither  
23 necessary nor indispensable. Moreover, Water Code section 1126, subdivision (e) provides that:  
24 “In any court case reviewing a decision or order by the board relating to . . . a permit or license to  
25 appropriate water held by the United States through the Bureau of Reclamation . . . , the election by  
26 the United States, or any agency thereof, not to be a party shall not, in and of itself, be the basis for  
27 dismissal pursuant to Section 389 of the Code of Civil Procedure or any other provision of law.”  
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1 the Board's Executive Officer and the Board. Petitioners have a beneficial interest in this Court's  
2 issuance of a writ of mandate or other order requiring the Executive Director or the Board to set  
3 aside the Order in conformance with all requirements of applicable law including the Water Code.  
4 Petitioners are vitally interested in having the laws properly executed and respondents' duties  
5 properly performed so that the public's right to, and interest in, environmental protection is fully  
6 secured.

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

9 24. As applicable, here, Code of Civil Procedure section 1094.5, subdivision (b)  
10 provides that "[t]he inquiry in such a case shall extend to . . . whether there was any prejudicial  
11 abuse of discretion. Abuse of discretion is established if the respondents has not proceeded in the  
12 manner required by law, the order or decision is not supported by the findings, or the findings are  
13 not supported by the evidence."

14 25. For the reasons summarized below, the Board's administrative record demonstrates  
15 that the TUCP Order approval constituted an abuse of discretion, because the Board failed to  
16 proceed in the manner required by law, failed to support the approval with adequate findings, and  
17 failed to support its findings with evidence.

18 WATER CODE SECTION 1435

19 26. Water Code section 1435 governs the Board's approval of the TUCP Order. It  
20 provides as follows:

21 (a) Any permittee or licensee who has an urgent need to change a point of  
22 diversion, place of use, or purpose of use from that specified in the permit or  
23 license may petition for, and the board may issue, a conditional, temporary change  
24 order without complying with other procedures or provisions of this division, but  
subject to all requirements of this article.

25 (b) Prior to issuing a change order pursuant to this article, the board shall make all  
26 of the following findings:

27 (1) The permittee or licensee has an urgent need to make the proposed  
change.

28 (2) The proposed change may be made without injury to any other lawful  
user of water.

1 (3) The proposed change may be made without unreasonable effect upon  
fish, wildlife, or other instream beneficial uses.

2 (4) The proposed change is in the public interest, including findings to  
3 support change order conditions imposed to ensure that the change is in the  
4 public interest, and may be made without injury to any other lawful user of  
the water, and without unreasonable effect upon fish, wildlife, and other  
instream beneficial uses.

5 THE PUBLIC TRUST DOCTRINE

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

9 28. The Public Trust Doctrine mandates that “before state courts and agencies approve”  
10 actions that may harm public trust resources, they consider the potential impact “upon interests  
11 protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those  
12 interests.” *National Audubon*, 33 Cal.3d at 426. “[T]he pivotal fact is not whether water is diverted  
13 or extracted or the fact that it is water itself adversely impacting water within the public trust.

14 Rather, the determinative fact is the *impact of the activity on the public trust resource*.”  
15 *Environmental Law Foundation v. State Water Resources Control Board* (2018) 26 Cal.App.5th  
16 844, 859 (emphasis added). The Board failed to consider the Public Trust when it approved the  
17 TUCP Order. But in approving the Order, the Board had an “affirmative dut[y] to take the trust into  
18 account and protect public trust uses whenever feasible.” *San Francisco Baykeeper, Inc. v. State*  
19 *Lands Com.* (“*Baykeeper II*”) (2018) 29 Cal.App.5th 562, 571. Moreover, the Board’s compliance  
20 with the Public Trust Doctrine cannot be “taken in some fragmentary and publicly invisible way.”  
21 *San Francisco Baykeeper v. State Lands Commission* (“*Baykeeper I*”) (2015) 242 Cal.App.4th 202,  
22 234. “The obligations a government may have as . . . trustee are more complex and demanding than  
23 its general obligation to act for the public benefit . . .” *Zack’s Inc. v. City of Sausalito* (2018) 165  
24 Cal.App.4th 1163, 1176.

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

1           30.     A necessary first step in any Public Trust Doctrine analysis must be to identify the  
2 public trust resources that would be affected:

3           The trustee must disclose to the beneficiaries all matters pertaining to the health  
4 of the trust. This disclosure, called an ‘accounting,’ provides the process by which  
5 beneficiaries may ensure proper management of their assets. In the financial  
6 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* . . .

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

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

18           32.     Water diversions for agriculture, commerce, industrial, and municipal consumptive  
19 uses do not constitute established Public Trust uses.

20           33.     Fish and Game Code section 5937 states that “[t]he owner of any dam shall allow  
21 sufficient water at all times to pass . . . around, or through the dam to keep in good condition any  
22 fish . . . below the dam,” and the Court has interpreted 5937 to be “a legislative expression of the  
23 public trust protecting fish as trust resources when found below dams.” *California Trout v. State*  
24 *Water Res. Control Bd.* (1989) 207 Cal.App.3d 585, 626 (“*Cal Trout I*”). “The Legislature, not the  
25 Water Board, is the superior voice in the articulation of public policy concerning the reasonableness  
26 of water allocation;” where the Legislature has adopted a specific rule governing the public trust in  
27 Fish and Game Code 5937, “the Water Board has no authority to disregard it.” *Id.* at 631. Here,  
28 “the Legislature has already balanced the competing claims for water . . . and determined to give

1 priority to the preservation of their fisheries.” *NRDC v. Patterson*, 333 F.Supp.2d 906, 918 (E.D.  
2 Cal. 2004); *Marks v. Whitney*, 6 Cal.3d at 259-260.

3 WASTE AND UNREASONABLE USE

4 34. Article X, section 2 of the California Constitution mandates that **all** uses of  
5 California’s water resources—regardless of the particular rights under which water uses occur—  
6 must be reasonable and for a beneficial purpose:

7 [B]ecause of the conditions prevailing in this State the general welfare requires  
8 that the water resources of the State be put to beneficial use to the fullest extent of  
9 which they are capable, and that the waste or unreasonable use or unreasonable  
10 method of use of water be prevented, and that the conservation of such waters is  
11 to be exercised with a view to the reasonable and beneficial use thereof in the  
12 interest of the people and for the public welfare. The right to water . . . is and shall  
13 be limited to such water as shall be reasonably required for the beneficial use to  
14 be served, and such right does not and shall not extend to the waste or  
15 unreasonable use or unreasonable method of use or unreasonable method of  
16 diversion of water.

14 35. Water Code section 275 states that “The department and board shall take all  
15 appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste,  
16 unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this  
17 state.”

18 36. In turn, the SWRCB is also bound to act in accordance with Article X, section 2, of  
19 the California Constitution and Water Code section 275. The law is settled that article X, section 2 is  
20 a “universal limitation” on all water use. *United States v. State Water Resources Control Bd.* (1986)  
21 182 Cal.App.3d 82, 105, citing Cal. Const., art. X, § 2). “All uses of water . . . are subject to the  
22 constitutional standard of reasonable use.” *Environmental Law Foundation v. State Water Resources*  
23 *Control Board* (2018) 26 Cal.App.5th 844, 861 (emphasis added), citing *National Audubon, supra*,  
24 33 Cal. 3d at 443; see also *Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463,  
25 1482 (holding article X, section 2 applies to all water users). Article X, section 2 is “plain and  
26 unambiguous” (*Gin S. Chow* (1933) 217 Cal. 673, 700), and “admit[s] of no exception” (*Peabody v.*  
27 *City of Vallejo* (1935) 2 Cal.2d 351, 367).

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CENTRAL VALLEY PROJECT IMPROVEMENT ACT

37. The Central Valley Project Improvement Act, Pub. L. No. 102-575, 106 Stat. 4600, (1992), was passed in 1992 “[t]o address impacts of the Central Valley Project on fish, wildlife and associated habitats.” *Id.* at section 3402(b). Section 3406(b) of the CVPIA directs the Secretary of the Interior to operate the CVP “to meet all obligations under state and federal law...and all decisions of the California State Water Resources Control Board establishing conditions on applicable licenses and permits for the project.” *Id.* at section 3406(b).

38. Section 3406(b)(2) directs the Secretary of the Interior to “dedicate and manage annually 800,000 acre-feet of Central Valley Project yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title” and “to assist the State of California in its efforts to protect the waters of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary.”

39. Pursuant to Section 3406(b)(7) of the CVPIA, the Secretary of the Interior is required to “[m]eet flow standards and objectives and diversion limits set forth in all laws and judicial decisions that apply to Central Valley Project facilities, including, but not limited to, provisions of this title and all obligations of the United States under the ‘Agreement Between the United States and the Department of Water Resources of the State of California for Coordinated Operation of the Central Valley Project and the State Water Project’ dated May 20, 1985, as well as Pub. L. 99-546.”

DELTA PROTECTION ACT OF 1959

40. The Delta Protection Act of 1959 requires that salinity in the Delta be controlled before DWR and the Bureau can export any water from the Delta. Water Code §§ 12200-12205. The Delta Protection Act prohibits project exports from the Delta until necessary water is provided for salinity control. Water Code §§ 12202, 12204; *United States. v. State Water Resources Control Board, supra*, 182 Cal.App.3d at 139.

1 **GENERAL ALLEGATIONS**

2 41. The CVP, SWP, and the Board have not been diligent in conserving SWP and CVP  
3 water.

4 42. Decision 1641 already allows DWR and Reclamation to meet far weaker protections  
5 for fish and wildlife during critically dry years like 2021 than other water year types. Rather than  
6 planning for drought and reducing water allocations to their contractors in order to meet the  
7 projects' obligations to the public, pursuant to Water Rights Decision 1641 and Water Rights Order  
8 90-5, once again DWR and Reclamation instead sought to waive their obligations to the public in  
9 order to maximize the private benefits for their contractors.

10 43. Despite the trends of declining inflow to CVP and SWP reservoirs, the Projects  
11 persisted in using 90% exceedance modeling in their runoff estimations.

12 44. In April and May of this year, Reclamation released hundreds to thousands more  
13 cubic feet per second from Shasta Reservoir than it did in 2014 and 2015 despite the fact that it was  
14 well known that this was a critically dry year. Reclamation made its April and May releases in spite  
15 of the fact that storage in Shasta Reservoir was less in April and May, 2021 than in either 2014 or  
16 2015.

17 45. Reclamation's reckless release of water from Shasta Reservoir storage in April and  
18 May 2021 severely circumscribed options for water management throughout the SWP and CVP  
19 system in the remainder of 2021 and needlessly created the circumstances in which it was likely that  
20 DWR and Reclamation would then claim the need to file their TUC Petition.

21 46. Petitioners sent letters to the Board on March 12 and 14, 2021 informing it of the  
22 urgent need to hold storage in Shasta Reservoir.

23 47. The Board was not diligent, and failed to halt Reclamation's improvident storage  
24 releases.

25 48. DWR similarly failed to object to the improvidence of Reclamation's releases and to  
26 actively oppose the unnecessary crisis that these releases created.

27 49. Hydrology does not justify the TUCP. The planning for both the CVP and SWP  
28 included the recognition of the limited hydrology in the Delta Watershed and the need to carry over

1 sufficient stored water to meet obligations in a series of dry years such as occurred in 1929 through  
2 1934. The CVP and SWP are clearly aware through their own studies that longer and more critical  
3 droughts have occurred in the past. The Projects have on multiple occasions delivered water to  
4 contractors in prior years without retaining sufficient water in storage to meet needs in subsequent  
5 drought years. The SWRCB has in the past allowed this to occur without demanding a clear  
6 demonstration of the capability of the Projects to meet requirements or forthrightly disclose the real  
7 deficiency. These actions have resulted in increasing demand for unavailable permanent supply to  
8 serve tree crops, residential development and other uses which require uninterrupted supply.

9         50.     In their TUCP, Reclamation and DWR characterize the need for the TUCP as  
10 resulting from extremely dry conditions in the Delta watershed, and the resulting inadequate water  
11 supply to meet water right permit obligations for instream flows and water quality under D-1641.

12         51.     The inadequate supply of stored water is only partly due to hydrology. The lack of  
13 supply is also due to Reclamation's failure to curtail and ultimately halt deliveries to the  
14 Sacramento River Settlement Contractors, limit releases from Shasta Reservoir, limit water exports  
15 from the Trinity River, prohibit late-season transfers of water from Shasta Reservoir, reduce Shasta  
16 Reservoir releases in October and November overall, and prioritize water released from Shasta  
17 Reservoir for Delta salinity control and outflow.

18         52.     The claimed inability of DWR and Reclamation to meet water right permit  
19 obligations for instream flows and water quality under D-1641 is largely of their own making.

20         53.     DWR and the Bureau have failed to take any action to amend their permits to address  
21 drought related circumstances including reduction of authorized exports, despite multiple years of  
22 experience of these shortages and the resulting claimed needs for permit variances.

23         54.     The Order does not conserve reservoir storage for this water year, or sufficient for  
24 any resiliency for the next water year.

25         55.     The Order approved unreasonable effects to fish and wildlife.

26         56.     The Order failed to adequately consider the long-term adverse impacts that are likely  
27 to result from granting the TUCP. Reducing Delta inflows and outflows through the TUC Order are  
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1 likely to cause significant harm to salmon and other native fish and wildlife compared to baseline  
2 conditions over the long-term.

3 57. Impacts to fish species are magnified and cumulatively considerable due to present  
4 drought conditions.

5 58. The TUCP Order failed to account for the already fragile condition of fisheries in the  
6 Delta and its tributaries throughout the Central Valley, and their inability to endure additional  
7 pressure.

8 59. There is insufficient stock of many species to allow recovery through extensive  
9 recruitment in good years to sustainable levels. Under these conditions, the significance of the loss  
10 of small numbers is magnified as each subsequent recovery becomes a temporary plateau lower  
11 than its predecessor.

12 60. The TUCP Order fails to account for the inability of fisheries to recover fast enough  
13 during “non-drought” years to return to pre-drought conditions.

14 61. The TUCP Order fails to account for the semi-permanent condition of man-made  
15 drought in the Bay-Delta watershed due to the over appropriation of water resources.

16 62. The TUCP Order fails to account for the inadequacy of flow and other protections  
17 for fisheries during droughts.

18 63. The TUCP Order fails to account for the fact that the current conditions of Delta and  
19 Central Valley fisheries are not simply a function of drought.

20 64. The TUCP Order treats baseline conditions as simply the current meteorological and  
21 single-year hydrology: the drought. It does not consider the cascading effects and baseline  
22 conditions of past droughts and TUCP orders, combined with the Board’s continuing and worsening  
23 failure to protect fisheries and riverine and estuarine ecology. The Board’s incremental analysis of  
24 the TUCP Order fails to account for the adverse effects to the Delta smelt which are nearing  
25 extirpation. The close-to final decline of Delta smelt occurred under exactly the conditions in 2014  
26 and 2015 that the TUCP Order erroneously asserts will have no unreasonable effects on fish.

27 65. The TUCP Order fails to account for the fact that the Delta smelt have still not  
28 recovered from the effects of the 2014-2015 TUCP Orders and remain at record lows.

1           66.     The TUCP Order considers only impacts to fisheries within the Delta. However, the  
2 TUCP Order will also have unreasonable effects to fisheries outside the Delta. The Board’s  
3 analysis is too narrow. Here, the fisheries of the upper Sacramento River are directly at stake,  
4 because the underlying rationale of the TUCP Order is to maintain high deliveries to Sacramento  
5 River Settlement Contractors at the expense of water temperatures and fisheries in the Sacramento  
6 River downstream of Keswick Dam. The fisheries of the Trinity and Klamath rivers also are at  
7 stake because the 2021 reservoir operations scheme that the TUCP Order is designed to support also  
8 relies on high exports from the Trinity River system to the Sacramento River system; these exports  
9 will severely deplete Trinity Reservoir’s cold-water pool. Finally, and in the same vein, the planned  
10 over-delivery of water to Sacramento River Settlement Contractors in 2021 will reduce already  
11 severely depleted storage in Oroville and Folsom reservoirs, worsening a year of widely recognized  
12 high temperatures in the lower Feather and lower American rivers.

13           67.     The TUCP Order incorrectly includes “commerce” among the Public Trust uses the  
14 Board intends to protect, but general commerce is not a recognized Public Trust use.

15           68.     The TUCP Order asserts, without evidence or analysis, that Public Trust uses will be  
16 protected to the extent feasible. The Board fails to disclose whether any alternatives were  
17 considered and on what basis such alternatives were determined to be infeasible.

18           69.     The TUCP Order will have unreasonable effects on the Bay-Delta ecosystem.

19           70.     The TUCP Order will increase the risk of harmful algal blooms.

20           71.     Moving the salinity compliance point from Emmaton to the Three Mile Slough as  
21 authorized by the Order causes a significant increased risk of harmful *Microcystisi* algal blooms in  
22 the Delta.

23           72.     The Board’s approval of the TUCP Order and installation of the salinity barrier  
24 reduced Delta inflows and Delta outflows below even the minimum water quality objectives  
25 established in the 1995 Bay-Delta Water Quality Control Plan, which are already inadequate to  
26 provide reasonable protection for fish and wildlife.

27           73.     The TUCP Order expands the abundance and distribution of non-native submerged  
28 aquatic vegetation. Specifically, elevated temperatures and low flow conditions resulting from the

1 Order contributes to the proliferation of submerged aquatic vegetation, such as *Egeria densa*, which  
2 also provide habitat for predators of Delta smelt.

3 74. The TUCP Order increases the abundance, distribution, and overall grazing rate of  
4 non-native Asian clams (*Potamocorbula amurensis*) by reducing Delta outflow under drought  
5 conditions. The Order fails to consider this harm to the Delta ecosystem. Here, *Potamocorbula*  
6 *amurensis* has negatively affected the food web that support pelagic and salmonid species.

7 75. The TUCP Order reduces important parts of the food chain for native species.  
8 Specifically, the TUCP Order reduces Delta outflow, which in turn will reduce the density of the  
9 zooplankton *Pseudodiaptomus forbesi*. *Pseudodiaptomus forbesi* is an important prey item for  
10 Delta smelt and longfin smelt.

11 76. The TUCP Order is not in the public interest because it deprives already decimated  
12 fisheries of already inadequate flow protections while delivering ten or more times the amount of  
13 water conserved to rice farmers and other agricultural producers in the Sacramento Valley.

14 77. The TUCP Order is designed to enable Reclamation to make water deliveries to  
15 Sacramento River Settlement Contractors in excess of their water rights. The underlying water  
16 rights on the Sacramento River do not justify the level of deliveries that Reclamation is making to  
17 them. Those underlying water rights are limited to natural flows and must be further reduced by  
18 flows devoted to riparian diverters and senior appropriative diverters.

19 78. The improvidence of the Board's repeated approvals of the TUCP Order and its  
20 predecessors is brought into stark relief this year. Millions of acre feet of water is being allocated to  
21 settlement and exchange contractors who claim senior water rights (largely corporate  
22 agribusinesses), while allocations to municipal and industrial contractors (which serve residents in  
23 cities such as San Jose) are cut to health and safety levels, and protections for the environment are  
24 cut below the minimum water quality objectives for a critically dry year in the 1995 Water Quality  
25 Control Plan and D-1641 – which already are inadequate to protect fish and wildlife. But the Board  
26 has ample authority, under the reasonable use and Public Trust doctrines, to begin to address this  
27 inequity. Granting the TUCP Order without first reducing water allocations for DWR's and  
28 Reclamation's settlement and exchange contractors to the amounts of water they could reasonably

1 claim to be entitled under their claimed water rights is contrary to the public interest and the Public  
2 Trust Doctrine.

3 79. Based on a very conservative interpolation of planned diversions, it appears that  
4 water diversions by the Sacramento River Settlement Contractors this year will be in excess of the  
5 amount of water they would reasonably be entitled to receive under their claimed water rights, as  
6 their water allocations are greater than the full natural flow of the Sacramento River in many  
7 months this summer.

8 80. Allowing water deliveries to the Sacramento River Settlement Contractors this year  
9 that are in excess of the water they could claim to be reasonably entitled to under their claimed  
10 water rights is unreasonable under Article X, section 2 of the California Constitution, in light of the  
11 severe impacts to fish and wildlife and other users of water.

12 81. Reclamation's allocation of water to the San Joaquin River Exchange Contractors is  
13 also unreasonable in light of the fact that the deliveries are far in excess of the water that would be  
14 available to these contractors under their claimed water rights.

15 82. Regardless of whether water deliveries under contracts may have been reasonable  
16 when they were entered into or whether they are reasonable in other years, the Board has a  
17 continuing duty to determine whether a use is reasonable under Article X, section 2 of the  
18 California Constitution. Given the fact that Reclamation and DWR are violating their water rights  
19 obligations to the public under Order 90-5 and Decision 1641, causing unreasonable impacts to  
20 Delta water quality, fisheries, and the Public Trust, the Board should declare under the particular  
21 circumstances of this year that delivering the quantities of water specified in these contracts, rather  
22 than the amounts those parties could reasonably claim to be entitled to under their claimed water  
23 rights, constitutes a waste and unreasonable use of water.

24 83. Public Trust uses are superior to uses under a water right, including senior rights and  
25 riparian rights. *Light v. State Water Resources Control Board, supra*, 226 Cal.App.4th 1463. The  
26 Sacramento River Settlement Contractors and any other water rights holders do not possess a right  
27 to deliveries of water from Reclamation when that water must be held in storage to maintain  
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1 temperature control in Shasta Reservoir or released into and through the Delta to protect Public  
2 Trust uses.

3 84. The TUCP Order does not show how it considered whether protecting public trust  
4 resources through conditions of approval would be feasible and in the public interest, taking into  
5 consideration all relevant factors. The failure of the Order to make even the most minimal effort to  
6 show its work violates the Public Trust Doctrine.

7 85. The TUCP Order is an unreasonable use of water per Article X, section 2 of the  
8 California Constitution.

9 86. The proposed transfer of water from Sacramento River Settlement Contractors south  
10 of Delta is unreasonable on its face. The very purpose of the TUCP is to maintain storage. That  
11 storage is needed for temperature control throughout 2021 and for carryover storage for 2022.  
12 Transferring water does not maintain storage. Allowing the Sacramento River Settlement  
13 Contractors to transfer water at the end of 2021 defeats the very purpose of the TUCP and discloses  
14 the underlying unlawful transfer of Public Trust water to these CVP diverters.

15 87. The proposed transfer of water assumes that water would have been otherwise  
16 available for diversion. In order to evaluate whether water is available for transfer, the Board must  
17 first determine how much water Reclamation could deliver to Sacramento River Settlement  
18 Contractors in 2021 at their stated places of use and still remain within the requirement that all use  
19 of water must be reasonable. That amount should be the ceiling for releases from Shasta Reservoir  
20 to meet 1) north of Delta deliveries to Sacramento River Settlement Contractors, and 2) transfers  
21 from Sacramento River Settlement Contractors. The Board must not allow Sacramento River  
22 Settlement Contractors to transfer water they could not use north of Delta while still complying with  
23 the requirements of the Public Trust Doctrine and reasonable use. Stated differently, transfers must  
24 not be a workaround to evade reasonable use. The Board's decision to allow otherwise approves an  
25 unreasonable use.

26 88. The TUCP Order's treatment of water transfers is unlawful. Transfers facilitated by  
27 and part of the whole of this project would cause injury to groundwater users ignored by the Board  
28 in its TUCP Order.

1           89.     Water transfers for export from the Delta and other areas of origin should not be  
2 allowed if needed to meet present and future needs within the watershed including the needs for fish  
3 and wildlife. The SWP is required to preserve fish and wildlife at contractor expense (Water Code  
4 section 11912). The CVP has the obligation to protect endangered species and double the natural  
5 production of anadromous fish as per the CVPIA. The interrelated transfers and certainly the  
6 transfers out of the watershed without full compliance with D-1641 are adverse to the environment  
7 and should not be allowed. The repeat of a temporary transfer should not be allowed without  
8 evaluation of the monitoring and accounting for the prior temporary transfer.

9           90.     The Board's approval of the TUCP Order will harm the environment and injure  
10 water right holders in the Delta. The approval is part of a series of planned and proposed  
11 interrelated actions for temporary urgency changes of places of use, temporary water transfers  
12 (some of which are part of a series of similar transfers), and elevation of the priority of deliveries to  
13 those served pursuant to junior water rights while seeking to curtail or planning to curtail water  
14 users with senior entitlement. Such actions result in individual and cumulative impacts including  
15 degradation of water quality and violation of law. The Board's piecemealed consideration restrains  
16 the evaluation of related and cumulative impacts.

17           91.     Farm production and employment in the San Joaquin Valley has significantly  
18 increased since 2000. Between 2000 and 2019, the gross value of agricultural production increased  
19 from 14.4 billion to 36.4 billion dollars representing a 152.5% increase. Farm production actually  
20 tended to increase during the early years of each drought. The situation is similar for the  
21 Sacramento Valley. The gross value of agricultural production increased from \$2.34 billion in 2000  
22 to \$5.26 billion in 2019, representing a 72.4% increase. According to the California Employment  
23 Development Department, agricultural employment in the Sacramento Valley increased 16.6%  
24 between 2000 and 2020.

25           92.     Agriculture has weathered reoccurring droughts rather well compared to the  
26 devastating impacts to public trust resources and those who utilize, value and depend upon them.  
27 Under these circumstances, continuing to prioritize water transfers for agricultural production at the  
28

1 expense of public trust resources and instream uses is an unreasonable use of water under Article X,  
2 Section 2 of the California Constitution.

3 **PRIVATE ATTORNEY GENERAL DOCTRINE**

4 93. Plaintiff brings this action as a private attorney general pursuant to California Code  
5 of Civil Procedure section 1021.5, and any other applicable legal theory, to enforce important rights  
6 affecting the public interest.

7 94. Issuance of the relief requested in this Petition will confer significant benefits on the  
8 general public, and result in the enforcement of important rights affecting the public interest, by,  
9 among other benefits and rights, upholding existing protections for threatened, endangered, and  
10 imperiled species throughout the San Francisco-San Joaquin Bay-Delta, and protecting lawful water  
11 use for beneficial purposes that would otherwise be injured by the TUCP Order.

12 95. The necessity and financial burden of enforcement are such as to make an award of  
13 attorneys' fees appropriate in this proceeding. Absent enforcement by petitioners, the TUCP Order  
14 might otherwise be deemed valid despite its legal and factual inadequacies, and, as a result, cause  
15 significant, adverse environmental effects that might otherwise have been avoided

16 96. Pursuant to Code of Civil Procedure section 388, petitioners' attorneys are serving a  
17 copy of this Petition on the Attorney General's office to give notice of Petitioners' intent to bring  
18 this proceeding as private attorneys general under Code of Civil Procedure section 1021.5.

19 **FIRST CLAIM FOR RELIEF**

20 **VIOLATIONS OF WATER CODE SECTION 1435**

21 97. Petitioners incorporate each allegation of this Petition as though fully set forth here.

22 98. In order to approve the Temporary Urgency Change Petition, the SWRCB and/or its  
23 Executive Officer was required to make the following findings: (1) that Reclamation and DWR  
24 have an urgent need to make the proposed change; (2) the proposed change may be made without  
25 injury to any other lawful user of water; (3) the proposed change may be made without  
26 unreasonable effect upon fish, wildlife, or other instream beneficial uses; and (4) the proposed  
27 change is in the public interest. Water Code, § 1435, subd. (b)(1-4).  
28

1           99. For the reasons stated above, the TUCP Order’s findings are “not supported by the  
2 evidence” and therefore constitute an abuse of discretion within the meaning of Code of Civil  
3 Procedure section 1094.5(b). It is not in the public interest or consistent with the Public Trust  
4 Doctrine to push fisheries and other public trust resources to the brink of extinction by chronic  
5 relaxation of legally promulgated standards because DWR and Reclamation refuse to pursue  
6 reasonable measures to address drought scenarios that occur more than 40% of the time in  
7 California. The TUCP Order will have a devastating environmental impact by degrading water  
8 quality in the estuary and potentially sending native fisheries that evolved and flourished over  
9 millennia into downward ecological spirals toward extinction by depriving them of water crucial to  
10 their survival.

11           100. For the reasons stated above, in issuing the TUCP Order, respondents have “not  
12 proceeded in the manner required by law” within the meaning of Code of Civil Procedure section  
13 1094.5, subdivision (b) because the Order violates applicable state and federal laws, including but  
14 not limited to:

- 15           (a) The Delta Protection Act of 1959;
- 16           (b) the federally promulgated Estuarine Habitat Criteria for the Bay/Delta estuary, 40 C.F.R.  
17 section 131.37;
- 18           (c) the Striped Bass spawning criteria between 1 April and 31 May, 40 C.F.R. section  
19 131.37;
- 20           (d) the Suisun Marsh criteria, 40 C.F.R. section 131.37;
- 21           (e) the Public Trust Doctrine and California case law thereunder as summarized above;
- 22           (f) Article 10, section 2 of the California Constitution;
- 23           (g) Water Code section 1435;
- 24           (h) SWRCB D-1641;
- 25           (i) SWRCB D-990;
- 26           (j) the California Endangered Species Act;
- 27           (k) Section 5937 of the Fish & Game Code;
- 28           (l) Section 7 of the Federal Endangered Species Act;

- 1 (n) the CVPIA doubling standard for salmon and steelhead;
- 2 (o) the California Governor’s 2014 Declaration of Drought Emergency;
- 3 (p) the Delta Reform Act, Water Code section 85000 et seq., in that the Board’s approval of
- 4 the diversion of water from the Sacramento River and consequent reduction in its flows to
- 5 and through the Delta is a covered action under Water Code section 85225, for which a
- 6 written certification of consistency with the Delta Plan was required but never made; and
- 7 (q) Petitioners’ due process rights to any public evidentiary hearing that is required under
- 8 the California and United States constitutions.

9 101. For the reasons stated above, respondents have proceeded without, or in excess of,  
10 their jurisdiction and the TUCP Order therefore constitutes an abuse of discretion within the  
11 meaning of Code of Civil Procedure section 1094.5, subdivision (b).

12 102. For the reasons stated above, the TUCP Order is “not supported by the findings” and  
13 therefore constitutes an abuse of discretion within the meaning of Code of Civil Procedure section  
14 1094.5, subdivision (b).

15 103. Accordingly, respondents have prejudicially abused their discretion, failed to  
16 proceed in a manner required by law, and failed to support their findings and conclusions with  
17 analysis and facts by authorizing the TUCP Order and the resulting unsustainable, unlawful, and  
18 unreasonable water diversion leading to the imminent demise of Bay-Delta salmonids and pelagic  
19 species, and injury to legal water users and beneficial uses protected bylaw.

20 104. WHEREFORE, petitioners pray for relief as hereinafter stated.

21 **SECOND CAUSE OF ACTION**

22 **VIOLATIONS OF THE PUBLIC TRUST DOCTRINE**

23 105. Petitioners incorporate each allegation of this Petition as though fully set forth here.

24 106. Respondents’ TUCP Order fails to comply with the Public Trust Doctrine, including  
25 Fish and Game Code section 5937. Respondents’ approval of the TUCP Order fails to identify  
26 which resources benefited by the TUCP Order are not protected by the Public Trust Doctrine, fails  
27 to evaluate and identify whether Public Trust resources would be preserved to the extent feasible,  
28

1 and to assure their protection to the extent feasible, fails to transparently balance the effects of the  
2 Order in the public interest, and fails to ensure compliance with Fish and Game Code section 5937.

3 107. Respondents' violations of law will cause the irreparable loss of critically imperiled  
4 salmonids, to the detriment of legitimate public trust uses including, but not limited to, fishing, fish  
5 and wildlife habitat, recreation, and tourism; and to the benefit of non-trust uses such as commerce  
6 and agriculture.

7 108. WHEREFORE, petitioners pray for relief as hereinafter stated.

8 **THIRD CAUSE OF ACTION**

9 **VIOLATIONS OF THE WASTE AND UNREASONABLE USE DOCTRINE**

10 109. Petitioners incorporate each allegation of this Petition as though fully set forth here.

11 110. Respondents' approval of the TUCP Order is contrary to the California  
12 Constitutional requirement that all water in California be put to reasonable and beneficial use.

13 111. The TUCP Order unlawfully and unreasonably permits excessive water releases and  
14 diversions for unreasonable and unsustainable private agricultural demands, in excess of water  
15 rights and water available.

16 112. The TUCP Order unlawfully and unreasonably permits needless and unreasonably  
17 wasteful water management by Real Parties in Interest.

18 113. The TUCP Order failed to consider feasible alternatives to the TUCP requests to put  
19 water to reasonable beneficial uses in a manner that minimized harm to fisheries and other legal  
20 users of water, among other beneficial uses protected by law.

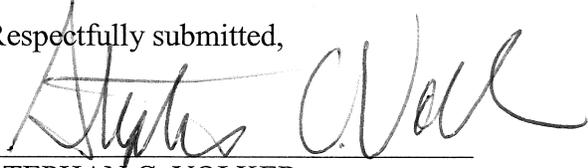
21 114. WHEREFORE, petitioners pray for relief as hereinafter stated.

22 **RELIEF**

23 WHEREFORE, petitioners seek:

- 24 1. A Writ of Mandate compelling the State Water Resources Control Board to set aside,  
25 void, and otherwise nullify its Approval of the Temporary Urgency Change Order;
- 26 2. An award of Petitioners' costs and reasonable attorneys' fees;
- 27 3. The entry of Judgment on the above three Causes of Action for petitioners; and,
- 28 4. Such other relief as the Court deems just and proper.

1 Dated: October 28, 2021. Respectfully submitted,

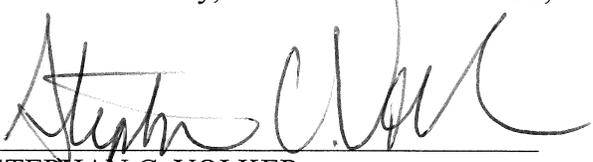
2 

3 STEPHAN C. VOLKER  
4 Attorney for Petitioners and Plaintiffs

5  
6  
7 **VERIFICATION**

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

15  
16 I declare under penalty of perjury under the laws of the State of California that the foregoing  
17 is true and correct, and that this Verification was executed in Berkeley, California on October 28,  
18 2021.

19   
20 STEPHAN C. VOLKER