BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

PETITION FOR RULEMAKING TO REVIEW AND REVISE BAY-DELTA WATER QUALITY STANDARDS	**Pursuant to Cal. Const. art. 1, § 3; Gov. Code § 11340.6; Wat. Code § 13320; and as a Public Trust Complaint**

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INTRODUCTION

The San Francisco Bay/Sacramento-San Joaquin Delta ("Bay-Delta") was once a place of natural abundance – the rivers teeming with salmon and other wildlife, plants, and riparian resources that Indigenous tribes carefully stewarded for thousands of years. It is now in a widely recognized state of crisis. This crisis has its roots in the violence of colonization and the extractive mentality of non-native settlers, and it was exacerbated through the construction and operation of large-scale Delta water export projects to feed the growth of agricultural industries in arid areas to the south. Today, salmon and other native fish species are on a path to extinction. The tribes that stewarded these waterways for millennia struggle to access resources that are fundamental to their identity, culture, spirituality, and ways of life. Vulnerable communities are alienated from stagnant or largely dewatered waterways that surround them and at risk of exposure to increasingly prevalent toxic algal blooms and other water contaminants.

Under state and federal law, the State Water Resources Control Board ("State Water Board" or "Board") is charged with maintaining water quality standards adequate to protect beneficial and public trust uses in the Bay-Delta and with regulating rights to use and divert Bay-Delta water to satisfy those standards. Pursuant to these authorities, the Board in 1978 adopted a water quality control plan for the Bay-Delta, which it is statutorily obligated to review at least once every three years to determine whether an update is required to meet substantive water policy standards.

The Board is in clear violation of these mandatory duties. It has been over *fifteen years* since the Board last completed a comprehensive review of Bay-Delta water quality standards. And the steps it has taken toward doing so have been harmful half-measures. In lieu of an open, public process, the Board has prioritized closed-door negotiation of voluntary agreements with water districts, which fall well short of restoring sufficient flows and alienate California tribes and Delta communities of color most directly harmed by that shortfall. And it has largely eschewed meaningful government-to-government consultation with affected tribes despite its statutory obligations and its own commitments to centering this consultation in decision-making processes.

The Winnemem Wintu Tribe, Shingle Springs Band of Miwok Indians, Save California Salmon, Little Manila Rising, and Restore the Delta now bring this Petition for Rulemaking to urge the State Water Board to fulfill its duties by timely conducting a comprehensive review of Bay-Delta water quality standards through an open, public process. We petition the Board to engage in meaningful government-to-government consultation with affected tribes in updating these standards. We petition the Board to recognize tribal beneficial uses in its update. And we petition the Board to adopt water quality standards adequate to protect all beneficial and public trust uses, and to regulate and restructure water rights as necessary to implement these standards.

PETITIONERS

The undersigned entities hereby petition the State Water Board:

(1) Petitioner Winnemem Wintu Tribe

Petitioner Winnemem Wintu are a California Tribe whose identity and existence are intertwined with the headwaters of the Bay-Delta. In the Winnemem language, "Winnemem Wintu" translates to Middle Water People, reflecting the Tribe's identification with its ancestral homelands along the McCloud River lying between the Sacramento and Pit Rivers. Traditionally, the Winnemem Wintu's historical territory spanned the upper Sacramento River and McCloud River watersheds, which provide freshwater flows into the Bay-Delta. These waters have sustained the life and spirituality of the Tribe since time immemorial.

The Nur, or Chinook salmon, which once flourished in these waterways, are the source of Winnemem Wintu culture and identity. In the Tribe's creation story, the Nur gave the Winnemem Wintu their voice, and the Tribe in turn promised to always speak for the Nur. The Winnemem Wintu and the Nur have depended on each other for thousands of years – the Winnemem speaking for, caring for, and protecting the salmon, and the salmon giving themselves to the Winnemem for sustenance. Ceremonies, songs, dances, and prayers about the relationship between the Nur and the Winnemem Wintu are the fabric of Winnemem Wintu culture, religion, and spirituality.

Damming and diversion of Delta waters and poor water quality in the Bay-Delta have contributed to the near extinction of Chinook salmon, thereby threatening the continued existence of the Winnemem Wintu as a People. This existential threat layers on top of centuries of state-supported campaigns and projects to remove the Winnemem Wintu from their historic homelands and divest them of their relationship to the water. These efforts culminated in construction of the Central Valley Project's Shasta Dam in the 1930s and 40s, which flooded over 90 percent of the Winnemem Wintu's historical village sites, sacred sites, burial sites, and cultural gathering sites and blocked the Nur from migrating into the Delta headwaters to spawn. Continued reliance on Central Valley Project exports and degradation of Bay-Delta water quality impairs the ability of Chinook salmon to reestablish their natural migratory pathways into Winnemem Wintu homelands.

The Winnemem Wintu Tribe thus has an immediate and concrete interest in improving Bay-Delta water quality and fish habitat, including restoring healthy freshwater flows, and reducing exports of Delta waters to allow the Nur to survive, rebound, and eventually return to the headwaters.

(2) Petitioner Shingle Springs Band of Miwok Indians

Petitioner Shingle Springs Band of Miwok Indians are Indigenous Peoples of the Sacramento Valley. The Tribe's ancestral homelands span seven counties, including Sacramento, El Dorado, Amador, Yolo, Placer, Sutter, and Yuba. Delta waterways –

including the Sacramento River, American River, Feather River, Bear River, and Cosumnes River and their watersheds – are the lifeblood of the Tribe. The Tribe has stewarded and utilized resources from the Delta for sustenance, medicine, transportation, shelter, clothing, and ceremony, among other cultural and subsistence uses, since time immemorial.

The 600 present-day members of the Shingle Springs Band of Miwok Indians are descendants of the Miwok and Nisenan Indians who thrived in California's fertile Central Valley for thousands of years before contact with Europeans. The Tribe is also descended from ten native Hawaiians who were forcibly brought to Nisenan territory in 1839 by John Sutter, a Swiss land baron who enslaved hundreds of Indigenous people to power his Sacramento Valley ranch. The Tribe's deep connection to Delta waterways was severed when its members were forced from their ancestral villages through colonization, disease, state-sponsored violence, and privatization of land. In 1920, the Secretary of the Interior purchased the 160-acre Shingle Springs Rancheria east of Sacramento in El Dorado County and placed it into trust for the displaced Tribe. However, the landlocked Rancheria remained inaccessible to the Tribe for decades and is far from the waterways that traditionally sustained the Tribe and their way of life.

The Tribe's removal from ancestral waterways has eroded its identity, traditional knowledge, and cultural practices. In recent years, the Tribe has been returning to the Delta's waterways and working to restore connections to cultural resources and traditional ways of life. In 2020, the Tribe purchased a small tract of land at its ancestral village site of Wallok in present-day Verona, where the Feather River meets the Sacramento River. Yet, despite regaining this limited riparian access to ancestral waterways, the degraded condition of the Delta impedes the Tribe's long-sought reconnection. Traditional riparian resources from which the Tribe fashioned cultural and subsistence implements either no longer exist or are unsuitable for use because of the polluted state of the water. Harmful algal blooms increasingly prevent tribal members from accessing the water for fishing or ceremonial purposes. The Tribe thus has an immediate and concrete interest in restoring Delta flows and improving the health of Delta ecosystems, on which the Tribe's identity, cultural and spiritual practices, health, and food sovereignty depend.

(3) Petitioner Little Manila Rising

Petitioner Little Manila Rising is a 501(c)(3) non-profit organization dedicated to bringing multifaceted equity to the City of Stockton, located on the eastern edge of the Delta along the San Joaquin River. Little Manila Rising was initially founded in 1999 to advocate for the historic preservation and revitalization of South Stockton's Little Manila community, once home to the largest population of Filipinos in the world outside the Philippines. The first generation of Filipino immigration to the Delta occurred in the wake of the U.S. military annexation of the Philippines at the turn of the 20th century, as colonial occupation and the widespread civilian death that it wrought transformed life in the Philippines. The majority of these early migrants were young Filipino men, drawn by demand for low-wage migrant farm workers in the rapidly accelerating agricultural sector in the inner Delta. The Little Manila

community was later decimated in the 1970s by construction of the Crosstown Freeway, which cut through the heart of the community, demolishing homes and displacing residents.

South Stockton, where Little Manila Rising is located, continues to be one of the most disinvested communities in the state, disproportionately burdened by polluting industrial sources that serve agricultural and oil and gas interests at the expense of residents' health and wellbeing. Indeed, multiple census tracts in South Stockton score in the 99th percentile for asthma rates in the state. These burdens fall disproportionately on low-income communities of color. The City of Stockton as a whole ranked as the single-most diverse city in the country as of 2018,[1] though communities of color reside primarily in South Stockton.[2] In the South Stockton neighborhood in which Little Manila Rising is located, for instance, 94% of residents are people of color; the neighborhood also ranks in the 97th percentile nationally for percentage of low-income residents as well as for percentage of residents with less than a high school education and in the top 94th percentile for linguistically isolated residents.[3]

For Little Manila Rising, as a community organization embedded in the Delta, addressing the economic, social, and health conditions for South Stockton residents means addressing the condition of the water. A deep-water shipping channel off the San Joaquin River cuts through the city, dividing North from South Stockton. Various sloughs and waterways, many of which have been largely or wholly dewatered, weave through South Stockton neighborhoods on their way to the San Joaquin River. Thousands of unhoused residents camp in or by these dewatered sloughs, bathing, cooking, and fishing in noxious water and using it for sanitation. Stagnant water in the sloughs hosts harmful algal blooms for much of the year, turning both water and air toxic from cyanobacteria. What remain of Delta fish species, poisoned by mercury and nitrates and driven to near extinction by low freshwater flows and high water temperatures, are themselves a hazard to local residents who fish for subsistence. Residents lack any meaningful access to Delta waterways in and around South Stockton due to their channelized and inhospitable nature. Where access is available in Stockton, the water is too toxic for safe recreation, alienating residents from the water and impairing opportunities for tourism and economic development. Ultimately, residents of South Stockton experience the Delta as a burden on mental and physical health, if they consider it at all.

For these and other reasons, Little Manila Rising understands that the health and wellbeing of the communities it represents are tied to the health and resiliency of the Delta and the ecosystems it supports; the organization cannot correct the economic disempowerment, poor health conditions, and other compounding inequities that South

[1] US News & World Report, *How Diverse is Your City?* (Jan. 22, 2020), https://www.usnews.com/news/cities/articles/2020-01-22/measuring-racial-and-ethnic-diversity-in-americas-cities.

[2] Based on data from U.S. Environmental Protection Agency, EJScreen Version 2.0 (as of May 2, 2022).

[3] *Id.*

Stockton residents experience without addressing the water. Restoring Bay-Delta water quality and instream flows that are essential to a healthy ecosystem are thus core interests of Little Manila Rising.

(4) Petitioner Save California Salmon

Save California Salmon is a fiscally sponsored project of the 501(c)(3) non-profit organization Trees Foundation. Save California Salmon is dedicated to restoring clean and plentiful flows and fish habitat, removing dams, and improving water quality throughout Northern California watersheds to allow Northern California's fish-dependent tribes and communities to thrive. Save California Salmon is also dedicated to fighting emergent threats on rivers, such as new dams, diversions, and pipelines, and empowering communities affected by diversions and poor water management to fight for rivers and salmon. Save California Salmon works with over a dozen California tribes with an interest in water quality and fisheries-related decisions, as well as with tribal members directly. The organization's advisory board is chiefly comprised of leaders and members of tribes from the Northern California watersheds in which the organization works – including Petitioners Winnemem Wintu Tribe and Shingle Springs Band of Miwok Indians as well as the Hoopa Valley Tribe, Karuk Tribe, Pit River Tribe, Wiyot Tribe, Blue Lake Rancheria, Mechoopda Indian Tribe, and the Yurok Tribe – and who depend on healthy and sustainable surface water flows for spiritual, cultural, subsistence, and recreational purposes.

To achieve its mission, Save California Salmon publicly advocates before state and federal agencies to prevent excessive diversions and dewatering of Bay-Delta waterways, their headwaters, and other Northern California waterways of vital importance to tribes; restore natural instream flow conditions; and allow regeneration of healthy fish habitat. Save California Salmon also assists tribes and fish-dependent communities in advocating for their interests before the State Water Board and other public agencies. Save California Salmon has been involved in submitting written comments and public testimony on both phases of the Bay-Delta Plan update, as well as on related issues such as the 2021 and 2022 Temperature Management Plans for the Sacramento River and long-term operation of the Central Valley Project and State Water Project. In these public proceedings, Save California Salmon advocates for the rights and interests of tribes in the Bay-Delta and its headwaters and of the Hoopa Valley and Yurok Tribes on the Klamath and Trinity Rivers, which have been engineered to artificially flow into the Bay-Delta. Save California Salmon thus has direct and concrete interests in the State Water Board's failure to review and update water quality standards for the Bay-Delta through an open, public, and participatory process that centers the needs and interests of the tribes and fish-dependent communities directly harmed by the ecosystem crisis.

(5) Petitioner Restore the Delta

Petitioner Restore the Delta is a 501(c)(3) non-profit organization based in Stockton whose mission is to ensure the health of the Bay-Delta so that fisheries, communities, and family farming can thrive there together again; water quality is protected for all communities,

particularly environmental justice communities; and Delta communities are protected from flood and drought impacts resulting from climate change while gaining improved access to clean waterways. Ultimately, the organization seeks to connect communities to local rivers and empower them to become the guardians of the estuary through participation in government planning and waterway monitoring. Many of Restore the Delta's 75,000 members live in or near the Delta and have a strong personal interest in ensuring healthy freshwater flows to support a thriving ecosystem, safe recreation, safe and sustainable drinking water, and a clean environment.

To achieve its mission, Restore the Delta advocates for the interests of local and marginalized Delta stakeholders to ensure that they have a meaningful voice in water management decisions affecting the wellbeing of their communities. Restore the Delta has been advocating before the State Water Board for improved Bay-Delta water quality standards and restoration of instream flows for over fifteen years. Restore the Delta thus has a direct interest in the Board's failure to review and update the Bay-Delta Plan through an open, public, and participatory process and in the content of water quality regulations promulgated for the Bay-Delta.

BACKGROUND

I. The Historical Delta and its Racial and Ecological Transformation

The San Francisco Bay/Sacramento-San Joaquin Delta is a "critically important natural resource for California and the nation."[4] (Wat. Code, § 85002.) Formed by the convergence of California's two largest rivers, the Sacramento and San Joaquin, the 75,000 square-mile Delta encompasses the "most valuable wetland ecosystem and estuary on the west coast of North and South America." (*Ibid.*) The Sacramento and San Joaquin Rivers and their tributaries drain water from the Central Valley Basin, encompassing about 40% of California's land area and extending from the Cascade Range to the north to the Tehachapi Mountains to the south and from the Sierra Nevada in the east to the Coast Ranges in the west.[5] Nearly half the surface water in California starts as rain or snow within the Delta's vast watershed.[6] When allowed to remain in the system, this water flows through the Delta into the Suisun Marsh and Suisun Bay, emptying into the San Francisco Bay and out into the Pacific Ocean.

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[4] *See* State Water Resources Control Bd., *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, p. 1 (Dec. 13, 2006) (hereafter, "*2006 Bay-Delta Plan*").

[5] State Water Resources Control Bd., *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem*, p. 25 (Aug. 3, 2010) (hereafter, "*Public Trust Flows Report*").

[6] U.S. Envtl. Protection Agency, *San Francisco Bay Delta: About the Watershed*, https://www.epa.gov/sfbay-delta/about-watershed#about (as of Mar. 4, 2022).

"The Bay-Delta was once a vast tidal marsh teeming with fish and wildlife."[7] Historically comprising interconnected wetland, riparian, and grassland ecosystems, the complex Delta watershed has naturally fluctuating salinity levels and significant variability in flows and runoff during and between years.[8] A wide variety of native aquatic species evolved to be adapted to these unique conditions and natural variability, with the Delta historically supporting more than 750 species of plants, fish, and other wildlife.[9] The waterways and riparian habitats that comprised this unique Delta ecosystem – which extends well beyond the bounds of the statutorily-defined Delta as set forth in Water Code section 12220 – function as one interconnected, interdependent system. That is, the health of any one part of the Bay-Delta ecosystem, from the headwaters to the Pacific, affects the whole.

Delta channels serve as a key migratory route and nursery area for many anadromous fish species – including three runs of Chinook salmon, striped bass, white and green sturgeon, American shad, and Steelhead – which spend most of their adult lives in the saline lower estuary bays or the Pacific Ocean and return to inland streams and tributaries to spawn.[10] Winter-run Sacramento River Chinook salmon, for instance, begin their spawning migration from the San Francisco Bay in November, spawning in upstream reaches from mid-April through August where cool and clean headwaters protect embryos and juveniles from warm summer conditions.[11] Historically, Chinook salmon spawned in the upper reaches of the Sacramento River tributaries, including the McCloud and Pit Rivers (home of Petitioner Winnemem Wintu Tribe), but access to this spawning habitat has been blocked since construction of the Shasta and Keswick Dams in the 1940s and 50s.[12] The dynamic nature of Delta salinity also supported a rich and abundant resident fish community, including both brackish-water and freshwater species.[13] And it provided vast nesting areas for migratory and resident birds, as well as extensive habitat for an array of riparian plant

[7] State Water Resources Control Bd., *Summary of Proposed Amendments to the Bay-Delta Water Quality Control* Plan, p. 1 (July 6, 2018).

[8] *Public Trust Flows Report* at p. 28; Delta Stewardship Council, *Draft Program Environmental Impact Report for Delta Plan Ecosystem Amendment*, App. C (Text of Proposed Delta Plan Ecosystem Amendment) p. 4-7 (Sept. 2021) (hereafter, "*Delta Plan Chapter 4 Proposed Amendment*"); *see* Wat. Code, § 85003.

[9] *Delta Plan Chapter 4 Proposed Amendment* at p. 4-7.

[10] *Public Trust Flows Report* at p. 38.

[11] Cal. Dept. of Fish and Wildlife, *Winter-Run Chinook Salmon*, https://wildlife.ca.gov/Conservation/Fishes/Chinook-Salmon/Winter-run (as of Apr. 29, 2022).

[12] *Id.*

[13] *Id.*

species, including tules, sedges, and willows, which in turn contribute woody debris to streams, forming important fish habitat.[14]

Indigenous Peoples have lived in the Delta for thousands of years, using and stewarding native Delta plants, fish species, and other wildlife.[15] Prior to colonization, the Delta is estimated to have supported over 10,000 Indigenous residents, comprising four distinct language groupings and numerous tribes and communities.[16] These Indigenous Californians harvested over 500 Delta plant species for various uses prior to colonization, and native plant and animal species continue to play a central role in the culture, identity, spirituality, health, and subsistence for Delta tribes.[17] Resources of particular importance include "food staples such as fish (e.g., Chinook salmon); certain herbs, roots, and berries used for medicine; and plants which provided fiber for personal use or trade (e.g., tules used to construct shelters, and 'white root' sedges and willows used for basket-weaving)."[18]

Exercising traditional ecological knowledge garnered through millennia of stewardship, Indigenous communities in the Delta sustainably managed plants, wildlife, and landscapes to support a broad diversity and abundance of species and habitat. Such practices included enhancing fish habitat through management of riparian areas, burning to maintain healthy grassland cover and forage for animals and to control chaparral distribution and reduce pathogens, and tending culturally and ecologically important plant species.[19] Petitioner Shingle Springs Band of Miwok Indians, for example, had important village sites at the confluence of the Sacramento River and the American and Feather Rivers. These waterways were the lifeblood of the Tribe, providing them with food, medicine, clothing, shelter, transportation, and other cultural and spiritual uses. The Tribe sustainably managed the fish, bird, wildlife, and plant species that supported these uses for millennia.[20]

Beginning with the explosion of European colonization during the mid-1800s Gold Rush decades, the forcible removal of Indigenous Californians from their lands and waterways and the replacement of traditional ecosystem stewardship with resource

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[14] *Delta Plan Chapter 4 Proposed Amendment* at p. 4-8.

[15] *Id.*; *see generally, e.g.*, Lightfoot & Parrish, *California Indians and Their Environment* (Univ. of Cal. Press, 2009).

[16] Zedler & Stevens, *Western and Traditional Ecological Knowledge in Ecocultural Restoration*, 16(3) San Francisco Estuary & Watershed Science, p. 3 (Oct. 2018) (quoting Whipple et al., *Sacramento-San Joaquin Delta historical ecology investigation: exploring pattern and process*, San Francisco Estuary Institute Aquatic Science Center (2012)).

[17] *Delta Plan Chapter 4 Proposed Amendment* at p. 4-9.

[18] *Id.*

[19] *Id.* at p. 4-8.

[20] Attachment A, Decl. of Malissa Tayaba ¶ 8.

exploitation and large-scale water diversion have devastated the Delta's native communities and ecosystems.[21] As the State Water Board has acknowledged, "white supremacy led to the genocide and forced relocation of Native American people to facilitate white resettlement and the enslavement of Native American and Black people for white economic gain."[22] This state-sponsored dispossession and oppression went hand in hand with the development of the modern California water rights regime, which accorded legal water rights to white settlers claiming to put the water to its first beneficial use while divesting Indigenous People from prior rights to the water and excluding communities of color from access to water rights.[23]

The State and Federal governments played a direct role in the "program of genocide" against native communities and their ways of life and in divesting many of them of their inherent rights to Delta waters. California's first governor, for instance, called for "a war of extermination" against Indigenous Peoples, and the State subsequently provided $1.29 million in 1850s dollars to subsidize private and militia campaigns against California's Indigenous population.[24] In 1850, the newly established California Legislature passed a law cruelly titled "Act for the Government and Protection of Indians," which provided for the removal of tribes from their traditional lands, separation of Indigenous children from their families, and creation of a system of indentured servitude as punishment for minor crimes.[25] When Congress adopted the California Land Claims Act a year later, requiring every person claiming property derived from land grants by the Spanish or Mexican governments to present their claims within two years, tribes had already been removed from their ancestral lands or were unaware of the Act or its implications. In this way, the California Lands Claim Act was used to deny tribes their "legal interest in . . . their aboriginal lands."[26]

Duplicitous treaty negotiations furthered this dispossession. Between 1851 and 1852, California tribes were compelled to sign 18 treaties with the Federal government that would have ceded their ancestral lands in exchange for reservations. But following lobbying by

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[21] *Delta Plan Chapter 4 Proposed Amendment* at p. 4-12.

[22] State Water Resources Control Bd., Resolution No. 2021-0050, ¶ 7(a) (Nov. 16, 2021) (hereafter, "*State Water Bd. Anti-Racism Resolution*").

[23] *See* Attachment F, Amicus Curiae Brief in Support of State Water Resources Control Bd., *California Water Curtailment Cases*, Nos. H047270 & H047927, pp. 15-36 (Sixth Appellate Dist. Ct. of App. Mar. 14, 2022) (hereafter, "*Water Curtailment Cases Amicus Br.*").

[24]Press Release, Off. of Governor Gavin Newsom, *Governor Newsom Issues Apology to Native Americans for State's Historical Wrongdoings, Establishes Truth and Healing Council* (Jun. 18, 2019) (hereafter "*Newsom Apology to Native Americans*").

[25] Stats. 1850, ch. 133, pp. 408-10; *Newsom Apology to Native Americans.*

[26] Advisory Council on Cal. Indian Policy (ACCIP), *Historical Overview Report: Special Circumstances of California Indians*, p. 5 (1997) (hereafter, "*ACCIP Historical Overview*"); Land Claims Act at 9 Stat., 631 and 10 Stat., 612, 33rd Congress, 2nd Session, 114, cited in Paul Wallace Gates, *Land and Land Law in California*, pp. 25 n.1 (Iowa State University Press, 1991)

California legislators and business interests, the U.S. Senate refused to ratify the treaties, instead placing them under an injunction of secrecy for over 50 years. Although many of the signatory tribes were unaware that the treaties had not been ratified and their inherent title to the lands remained intact, state and federal leaders nonetheless acted as if the lands had been ceded, opening them up for settlement by non-natives without establishing the negotiated reservations.[27] The state's duplicity rendered the tribes "landless"[28] and robbed them of federal reserved water rights that would have adhered to the treaty reservations.[29]

Communities of color in the Delta were likewise excluded from rights to water, even as they formed the backbone of the state's burgeoning agricultural and industrial economy fueled by these flows. By 1880, Chinese immigrants were working across Delta regions as farm owner-operators, large- and small-scale tenants, and laborers.[30] After the federal Chinese Exclusion Act of 1882 halted immigration by Chinese laborers, Japanese immigrants increasingly worked on California farms,[31] later joined by Filipino immigrants in the wake of the colonial Philippine-American War at the turn of the 20th century. By the late 1920s, Filipino workers were involved in the processing of every major Delta crop and comprised over 80% of the workforce cultivating and harvesting asparagus, one of the Delta's signature crops.[32]

In an effort to prevent Asian, and particularly Japanese, immigrants from owning and controlling farmland, the California Legislature adopted the Alien Land Law in 1913, and expanded it via a voter-approved initiative in 1920, barring "aliens ineligible to citizenship" from owning and leasing property in the state.[33] At the time, the Naturalization Act of 1870

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[27] *ACCIP Historical Overview* at p. 5.

[28] *Id.* at p. 7.

[29] *See generally*, *Winters v. United States* (1908) 207 U.S. 564 (recognizing that United State implicitly reserves for tribes the amount of water necessary to fulfill the purpose of an Indian reservation when it withdraws land from the public domain to establish the reservation); Attachment F, *Water Curtailment Cases Amicus Br.* at pp. 22-23.

[30] Chan, *Chinese Livelihood in Rural California: The Impact of Economic Change, 1860-1880*, 53(3) Pacific Historical R. 273, 293 (1984).

[31] Higgs, *Landless by Law: Japanese Immigrants in California Agriculture to 1941*, 38(1) J. of Econ. History 205, 206-07 (1978).

[32] Dawn Mabalon, *Little Manila is in the Heart: The Making of the Filipina/o American Community in Stockton, California*, p. 69 (Duke Univ. Press, 2013).

[33] Stats. 1913, Ch. 113, p. 206; Cal.Stats. 1921, p. xxxiii, accessible at https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1034&context=ca_ballot_inits; *Fujii v. State* (1952) 38 Cal.2d 718, 735 ("It is generally recognized . . . that real purpose of the legislation was the elimination of competition by Alien Japanese in farming California land."); *Oyama v. California* (1948) 332 U.S. 633, 658-59 (conc. opn. of Murphy, J.) (discussing the evidence of racial prejudice underlying the Alien Land Law).

denied naturalization rights to Asians and other nonwhite immigrants, with the exception of persons of African descent.[34] In force until 1952, the Alien Land Law thus had the effect of excluding Asian immigrants from riparian water rights (which derive from ownership of property) and from appropriative rights (which inherently turn on property ownership by requiring that water be diverted and put to beneficial use).[35] As a result, Asian-Americans sought refuge in nearby cities like Stockton, where racially restrictive covenants, the discriminatory lending practice known as "redlining," and other forms of de jure and de facto segregation forced Black people, Asian-Americans, and other people of color into the most disinvested neighborhoods.[36]

Beginning in the mid-1800s, the nascent state government, the water rights claimants it recognized, and emergent agricultural and other industries radically transformed the Delta landscape, resulting in the "near total conversion of wetland, riparian, and flood ecosystems."[37] By the early 1900s, construction of levees to control floodwaters, draining of wetlands, forest clearing, and grazing had caused the loss of approximately 95% of native ecosystem and vegetation communities.[38] Draining and farming also caused compaction, oxidation, and erosion of the Delta's peat soils, inducing large amounts of sediment to wash into the Delta.[39] Denuding of hillsides for mining and logging as well as draining and filling of wetland and floodplains for conversion to agriculture changed the Bay's natural runoff patterns.[40] Construction of a vast network of tidal channels isolated waterways from adjacent habitats, prevented channels from naturally meandering and shifting over time, hastened flow velocities, and disrupted the natural interconnectedness of Delta waterways.[41]

Diversions and exports of water from the Delta have also radically reduced freshwater flow volumes and altered natural flow cycles throughout the Bay-Delta "at the expense of natural estuarine processes."[42] In-Delta diversion began as early as 1869 with reclamation of

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[34] Naturalization Act of 1870, 16 Stat. 254 (July 14, 1870).

[35] Attachment F, *Water Curtailment Cases Amicus Br.* at pp. 30-35.

[36] Attachment D, Decl. of Dillon Delvo ¶ 10; *see, e.g.*, Nelson, et al.*, Mapping Inequality: Redlining in New Deal America*, American Panorama, https://dsl.richmond.edu/panorama/redlining/#loc=13/37.956/-121.337&city=stockton-ca (as of Apr. 29, 2022); *see also generally* Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (Liveright Publishing Corp., 2017).

[37] *Delta Plan Chapter 4 Proposed Amendment* at p. 4-12.

[38] *Id.*

[39] *Id.*; *Public Trust Flows Report* at p. 27.

[40] The Bay Institute, *San Francisco Bay: The Freshwater-Starved Estuary*, p. 8 (Sept. 2016) (hereafter, "*Freshwater-Starved Estuary*").

[41] *Delta Plan Chapter 4 Proposed Amendment* at p. 4-13.

[42] *Id.* at p. 4-15.

Sherman Island and grew in the ensuing decades in proportion to the area of reclaimed marshland.[43] Irrigated acreage in the Central Valley has been steadily growing since 1880, increasing upstream diversion of water.[44] These upstream water diversions began to affect Delta salinity around 1916 with the rapid growth of the rice cultivation industry.[45] Reduction in flows then hastened from the 1920s as construction of dams and use of motorized pumps for wells "drove the tremendous expansion of irrigated agriculture" and growing Bay Area cities began importing water from rivers that drained into the Bay.[46] The construction and operation of the massive Central Valley Project from the 1940s and 50s (including the Shasta Dam on the Sacramento River and Friant Dam on the San Joaquin River), followed by the State Water Project in the 1960s and 70s, further transformed flow hydrology.[47] Together these projects are the single largest extractor of Bay-Delta freshwater and comprise the world's largest water storage and conveyance system.[48]

The rerouting of the Trinity River through the construction of the Central Valley Project's Trinity River Division ("TRD") in the early 1960s exemplifies the large-scale reengineering of Northern California watersheds, as well as the costs of that hydrological transformation for communities and the environment. The Trinity River is the largest tributary to the Klamath River, which empties directly into the Pacific River at Requa, California, north of Eureka. The Trinity and Klamath Rivers "once teemed with bountiful runs of salmon and steelhead," which "defined the life and culture of the Hoopa Valley and Yurok Indian Tribes" since time immemorial.[49] Both Tribes retain their traditional fishing and hunting rights, secured to them in the establishment of their reservations along the Klamath River, which are immune from state regulation or interference. [50]

Following adoption of the Trinity River Act of 1955 (P.L. 84-386), the Bureau of Reclamation led the construction of the TRD's expansive new diversion and storage facilities

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[43] Contra Costa Water Dist., *Historical Fresh Water and Salinity Conditions in the Western Sacramento-San Joaquin Delta and Suisun Bay*, Technical Memorandum WR10-001 at App. A, p. A-10 (Feb. 2010).

[44] *Id.*

[45] *Id.*

[46] *Freshwater-Starved Estuary* at p. 9.

[47] *Id.*

[48] *Id.*

[49] U.S. Dept. of Interior, Record of Decision, *Trinity River Mainstem Fishery Restoration, Final Environmental Impact Statement/Environmental Impact Report*, p. 1 (Dec. 2000), available at https://www.trrp.net/program-structure/background/rod/ (hereafter, "*Trinity River ROD*").

[50] *Id.* at p. 4; *see Arnett v. Five Gill Nets* (1975) 48 Cal.App.3d 454, 461 (recognizing that Indians on the Klamath River Reservations "had fishing rights derived from Congress" and that "State qualifications of those traditional rights was precluded by force of the Supremacy Clause").

that largely rerouted the natural flow of the Trinity River from the Klamath River watershed into the Bay-Delta, conveying it through the Clear Creek Tunnel into Whiskeytown Lake and on into the Sacramento River. As a result of this engineering exercise, the Trinity River is legally classified as part of the "Delta tributary watershed" despite lacking any natural hydrological connection to the Delta. (Wat. Code, § 78647.4(b).) In the first decade of its operations, TRD diversions to the Central Valley averaged nearly 90% of the upper Trinity River basin inflow.[51] During this same period, fish populations plummeted in the Trinity River by 60 to 80% and fish habitat by 80 to 90%, due primarily to insufficient instream flows as well as excessive streambed sedimentation caused by the TRD dams.[52] The TRD also directly eliminated 109 miles of important salmonid habitat above Lewiston, California.[53]

Large-scale reengineering of Delta hydrology continues to this day. The Department of Water Resources ("DWR") is currently considering a major new water export infrastructure project to "modernize" State Water Project infrastructure.[54] This project, known as the Delta Conveyance Project, would include construction of a tunnel, 36 feet in diameter, to export up to 7,500 cubic feet per second of water from the Sacramento River north of the confluence with Sutter Slough for use in the south. DWR is in the process of developing the Draft EIR/EIS for the project and anticipates releasing it for review and comment in mid-2022.[55]

II. The Contemporary Bay-Delta is an Ecosystem in Crisis

According to the State Water Board, it is now "widely recognized that the Bay-Delta ecosystem is in a state of crisis."[56] As the Board has recognized, "[f]or decades . . . the quality of water in the channels has been degraded, there has been a substantial overall reduction in flows and significant changes in the timing and distribution of those flows, and

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[51] *Trinity River ROD* at p. 5.

[52] *Id.*

[53] *Id.* at p. 1.

[54] Dept. of Water Resources, *Delta Conveyance*, https://water.ca.gov/deltaconveyance (last visited May 17, 2022).

[55] *See* Dept. of Water Resources, *Delta Conveyance Project Public Engagement Outlook for 2022*, https://water.ca.gov/News/Blog/2022/Feb-22/DC-Public-Engagement-Outlook-2022 (last visited May 17, 2022).

[56] State Water Resources Control Bd., *Scientific Basis Report in Support of New and Modified Requirements for Inflows from the Sacramento River and Its Tributaries and Eastside Tributaries to the Delta, Delta Outflows, Cold Water Habitats, and Interior Delta Flows*, p. 1-4 (2017) (hereafter, "*Phase II Scientific Basis Report*"); *see* State Water Resources Control Bd., *Summary of Proposed Amendments to Bay-Delta Plan* at p. 1 (July 6, 2018).

species have been cut off from natal waters."[57] These changes have profound consequences for the survival of native plant and animal species, the cultural and spiritual survival of Northern California tribes, and the health and wellbeing of other vulnerable Delta communities.

Drastically Reduced Flow Levels

Dams and water diversions have drastically reduced flows into and through the Bay-Delta. On average, around 31% of the watershed's flow is diverted before it ever reaches the Delta.[58] Some of this water is returned to Delta tributaries through wastewater effluent or agricultural return flows, though at degraded quality.[59] Within the Delta, agricultural growers and residents use about 0.9 million acre feet, or 4%, of Delta inflows. Together, the State Water Project and Central Valley Project then divert around 5.1 million acre feet per year from the Delta, accounting for 24% of Delta inflows, exporting these vast water supplies south for largely agricultural as well as municipal use.[60]

On average, the combined effect of these upstream diversions and water exports cut average annual outflow from the Delta by nearly one half between 1986 and 2005.[61] Depletion in flows is greatest in May and June, when outflow is typically less than 44% and 46% of unimpaired flow, respectively.[62] In dry conditions, diversions and exports reduce January to June flows by more than 70% and annual flows by more than 65%.[63] In certain months, reduction in outflows exceeds 80%.[64] Between 1990 and 2010, Sacramento River inflows were cut by 50% on average from April through June, while in drier years San Joaquin River inflows were cut by 80%.[65] This is so despite massive import of water to the Sacramento River. Between the inception of its full operation in 1964 and 2000, TRD exports of Trinity River water to the Sacramento River averaged 75% of the Trinity River

[57] State Water Resources Control Bd., *Fact Sheet: Phase II Update of the Bay-Delta Plan: Inflows to the Sacramento River and Delta and Tributaries, Delta Outflows, Cold Water Habitat and Interior Delta Flows*, p. 1 (Oct. 2017).

[58] Delta Stewardship Council, *Delta Plan*, ch. 3 at p. 83 (2018).

[59] *Id.*

[60] *Id.*; *see also* Wat. Code, § 85003.

[61] *Public Trust Flows Report* at p. 28 (reporting that outflows were reduced on average by 48% relative to unimpaired conditions between 1986 and 2005).

[62] *Phase II Scientific Basis Report* at p. 2-76.

[63] *Id.* at p. 1-5.

[64] *Id*.

[65] *Public Trust Flows Report* at p. 5.

natural flow, or roughly 988,000 acre-feet per year.[66] In some years, diversion to the Sacramento River basin reached as high as 90% of annual Trinity River inflow.[67] Since 2000, Trinity River exports have been limited by a U.S. Department of Interior decision requiring variable annual instream flows for the Trinity River from the TRD ranging from 369,000 acre-feet in critically dry years to 815,000 acre-feet in extremely wet years.[68]

Depletion of freshwater flows has been worsening over time, with increasing reduction in spring outflows as well as reduction in natural variability of Delta outflows throughout the year observed since the 1990s.[69] Reduced releases from upstream dams help drive this trend by diminishing total inflow into the Delta. For instance, releases from Friant Dam averaged 25% of unimpaired flow from 1984 through 2009 and only 20% of unimpaired flow from 2000 through 2009.[70] As another example, completion and filling of the New Melones Reservoir in 1983 greatly reduced monthly flows and annual runoff volumes, with median annual runoff on the San Joaquin River at Vernalis constituting only 38% of unimpaired flow in recent decades.[71] According to the State Water Board, under current conditions, "flows are completely eliminated or significantly reduced at certain times in some streams in the []Delta watershed, and a significant portion of the inflows that are provided to the Delta are exported without contributing to Delta outflows."[72]

Reductions in freshwater flows through diversions and exports – exacerbated by the historic droughts of recent years[73] – cause a cascade of ecological impacts and resulting harms to Delta communities. Reductions in flows cause, among other impacts: altered salinity levels, higher water temperatures, changes to water circulation patterns, increases in pollution levels, alteration of dissolved oxygen and other water quality parameters, and

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[66] *Trinity River ROD* at p. 20.

[67] *Id.*

[68] *Id.* at p. 2.

[69] *Phase II Scientific Basis Report* at p. 2-76.

[70] State Water Resources Control Bd., *Substitute Environmental Document in Support of Potential Changes to the Water Quality Control Plan for the San Francisco Bay-Sacramento San Joaquin Delta Estuary*, ch. 2, p. 2-9 (July 2018) (hereafter, "*2018 SED*").

[71] *Id.* at ch. 2, p. 2-36.

[72] State Water Resources Control Bd., *July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan*, p. 6 (July 2018) (hereafter, "*Phase II Framework*").

[73] State Water Resources Control Bd., *Order Approving Temporary Urgency Changes to Water Right License and Permit Terms Relating to Delta Water Quality* Objectives, In the Matter of Specified License and Permits of the Dept. of Water Resources and U.S. Bureau of Reclamation for the State Water Project and Central Valley Project, p. 1 (Apr. 4, 2022) (hereafter, "*April 2022 TUCO*") ("The Delta watershed is currently experiencing extreme dry hydrologic conditions, with January to March 2022 being among the driest on record.").

disruptions of fish migratory routes and nursery conditions.[74] Water exports also remove vital food sources for native Delta fish species. And poorly managed releases from upstream dams and reduced inflows coupled with diversion and export of water from the Delta alter peak, base, and pulse flows to which aquatic species are adapted.[75]

According to the State Water Board itself, the best available science demonstrates that current flow conditions will, if not corrected, result in permanent impairment of the Delta's native fish and wildlife populations and to other public trust resources.[76] In a 2010 flows report required by the 2009 Delta Reform Act (Wat. Code § 85086(c)(1)), the State Water Board reported that, based on its analysis of the data, 75% of unimpaired Delta outflow from January through June, 75% of unimpaired Sacramento River inflow from November through June, and 60% of unimpaired San Joaquin River inflow from February through June would be required "to preserve the attributes of a natural variable system to which native fish species are adapted."[77]

Without regulatory intervention, harms to the Delta – including reductions and alterations to the volume, timing, and duration of flows; degradation of water quality; and resulting ecological impacts – are certain to exacerbate over time, as climate change heightens water scarcity and, together with population growth, increases demand for freshwater. Already, the face value of consumptive water rights accounts for more than five times the average unimpaired flow of water through the San Joaquin and Sacramento River basins.[78] According to the State Water Board, "in the future there could be even greater diversions under existing rights and claims of right (including riparian and pre-1914 appropriative claims) that place additional demands on the available supplies," as well as under new water rights claims filings.[79]

Collapse of Native Fish Populations

Native Delta fish species require specific conditions to survive and procreate – including, among other things, adequate flows to enable migratory species to reach their

[74] *See, e.g.*, *Phase II Framework* at p. 6.

[75] *Id*.

[76] *See, e.g.*, *Phase II Scientific Basis Report* at p. 1-5 ("The best available science . . . indicates that [existing legal requirements in Revised Water Rights Decision 1641 and biological opinions addressing Delta smelt and salmonids] are insufficient to protect fish and wildlife.")

[77] *Public Trust Flows Report* at p. 5.

[78] Written Testimony of Tim Stroshane, Senior Associate, California Water Impact Network, Submitted to Workshop by the State Water Resources Control Bd. on Analytical Tools for Evaluating the Water Supply, Hydrodynamic, and Hydropower Effects of the Bay-Delta Plan, pp. 11-12 (2012); *Phase II Framework* at p. 6.

[79] *Phase II Framework* at pp. 6-7.

spawning habitats, natural flow variabilities, adequate dissolved oxygen levels, preferred temperature ranges, and specific salinity characteristics.[80] Insufficient Delta flows disrupt these unique conditions. Indeed, studies have concluded that "flow modifications greater than 20% likely result in moderate to major changes in natural structure and ecosystem function" and that withdrawals exceeding 30% of spring unimpaired flow and 40-50% of annual flow deteriorate water quality and fish resources "beyond their ability to recover."[81] As discussed above, modifications to Bay-Delta flows far exceed these thresholds.

Importantly, modifications to Bay-Delta outflows affect the location where freshwater from the rivers mixes with seawater, referred to as the low salinity zone, or X2. "Generally, more downstream X2 locations past the confluence of the Sacramento and San Joaquin river benefit a wide variety of native species . . . through improved habitat conditions for various life stages."[82] With increasing diversions, the X2 location has been pushed further upstream, raising salinity levels in the Delta.[83] Indeed, the U.S. Bureau of Reclamation ("Reclamation") and DWR recently warned that low flows combined with water scarcity from drought could "result in a 'loss of control' over salinity encroaching in the Delta in 2022 and into 2023," devastating native fish populations as well as "jeopardiz[ing] the ability to provide for minimum health and safety supplies for communities."[84] In addition to impacting the location of X2, reduction in inflows also diminishes natural variability in salinity levels, which allows invasive non-native plant and animal species to take over.[85]

Heavy diversions throughout the Bay-Delta watershed also affect cold water temperatures necessary for salmon spawning and survival, both within and outside the Delta.[86] In recent years, Reclamation has allocated more water to San Joaquin River Exchange Contractors and Sacramento River Settlement Contractors than naturally flows through these respective rivers.[87] As the water projects squeeze as much water as possible out of the Delta, they also induce heavy reliance on imports of water from the Trinity River

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[80] *See, e.g., Public Trust Flows Report* at pp. 28, 36-37, 43, 87; *Freshwater-Starved Estuary* at p. 47.

[81] *Phase II Scientific Basis Report* at p. 1-5.

[82] *Phase II Framework* at p. 8.

[83] *See, e.g.*, *Freshwater-Starved Estuary* at pp. iii-iv.

[84] Cal. Dept. of Water Resources and U.S. Bureau of Reclamation, *Temporary Urgency Change Petition Regarding Delta Water Quality*, pp. 1-17 to 1-18 (Mar. 18, 2022); Restore the Delta, *Protest: Temporary Urgency Change Petition Filed by the Cal. Dept. of Water Resources and U.S. Bureau of Reclamation Regarding Permits and a License of the State Water Project and Central Valley Project*, p. 9 (Apr. 4, 2022).

[85] *Freshwater-Starved Estuary* at p. 19.

[86] *See id.* at p. 47.

[87] *See generally*, Doug Obegi*, Who's Getting Unreasonable Water Allocations in CA*, Natural Resources Defense Council (July 12, 2021).

for supply. During the extreme drought years of 2020 and 2021, for instance, the TRD conveyed approximately twice the volume of water into the Sacramento River as was allowed to flow through the Trinity River into the Klamath.[88] TRD diversions into the Delta in turn significantly lowered Trinity Reservoir storage levels, raising temperatures of stored water that is then released into the Trinity River from Lewiston Dam, and in turn raising overall water temperatures in the Trinity.

These higher water temperatures threaten salmon populations, which begin their life in headwaters of the Trinity River.[89] The association between increasing water temperatures and salmonid egg mortality is well documented.[90] According to the National Marine Fisheries Service, water temperatures in the Trinity River reach levels dangerous to salmonid spawning and fry survival whenever Trinity Reservoir storage levels drop below 1.2 million acre-feet.[91] By comparison, end-of-September storage in the Trinity Reservoir under the Sacramento River TMP is projected to be only 423,000 acre-feet, at least 250,000 acre-feet less than in 2021 and well under the minimum end-of-September carry-over storage of 600,000 acre-feet identified by the Department of Interior.[92]

Native fish species "have been significantly impacted by these reductions in flows" and related impacts on water quality, "with many species currently on the verge of extinction."[93] Already six native Delta species are listed as threatened or endangered under the Federal and/or California Endangered Species Acts, including Delta smelt, longfin smelt, green sturgeon, Central Valley steelhead, winter-run Chinook salmon, and spring-run Chinook salmon.[94] Delta smelt suffered a steep decline in the early 1980s and sharp drop in

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[88] Trinity River Restoration Project, *Flow Volume Summary*, available at https://www.trrp.net/restoration/flows/summary (last visited May 10, 2022).

[89] *See generally*, Pacific Coast Fed. of Fishermen's Assns., *Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act Regarding the Operation of the Trinity River Division of the Central Valley Project on Threatened Species* (May 15, 2022).

[90] *See, e.g.*, NOAA Fisheries West Coast Region, *Scientists Improve Predictions of How Temperature Affects the Survival of Fish Embryos*, ScienceDaily (Dec. 6, 2016).

[91] *NMFS Comments on 2022 TMP*.

[92] *See id.*; U.S. Bureau of Reclamation, *Sacramento River Temperature Management Plan for Water Year 2022*, Att. 1 (May 2, 2022), available at https://www.waterboards.ca.gov/drought/sacramento_river/; *Trinity River ROD* at p. C-5.

[93] *Phase II Scientific Basis Report* at p. 1-5.

[94] State Water Resources Control Bd., *Order Conditionally Approving a Petition for Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought* Conditions, In the Matter of Specified License and Permits of the Dept. of Water Resources and U.S. Bureau of Reclamation for the State Water Project and Central Valley Project, p. 6 (June 1, 2021) (hereafter, "*June 2021 TUCO*").

the early 2000s, reaching record low detections across all life stages in recent years.[95] Abundance of Delta smelt as well as longfin smelt are now "at such low levels they are difficult to detect in the estuary, survival of juvenile salmonids and returns of spawning adults are chronically low, and risks of extirpation for multiple fish species are high."[96] In 2021, for instance, the California Department of Fish and Wildlife detected only one Delta smelt in the Sacramento Deep Water Ship Channel throughout all spring-time sampling.[97] And whereas typical Chinook salmon populations have cohort replacement rates greater than 8, the cohort replacement rate on the Stanislaus River, for instance, is less than 0.2.[98] "Any cohort replacement rate less than 1.0 is trending toward extinction."[99]

Reliance on Trinity River water diversions for Delta flows has caused similar fishery collapse on the Trinity and Klamath Rivers. On the Trinity River, high temperatures of water released from Lewiston Dam destroyed approximately 75% of Coho salmon eggs at the Trinity River Hatchery and similar proportions of protected wild Coho salmon eggs during the first four weeks of spawning in November 2021.[100] According to the National Marine Fisheries Service, even lower Trinity Reservoir levels this year may cause "[c]omplete loss of cold water less than 50 degrees F."[101] As a consequence, "mortality of coho salmon could be even greater than 2021 this coming fall."[102]

The collapse of native fish populations represents a profound and irreparable injury to tribes and other fish-dependent communities. Native fish species are an irreplaceable cultural, religious, and subsistence resource for the watershed's Indigenous communities.

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[95] Cal. Dept. of Fish and Wildlife, *Letter RE April – June 2022 Temporary Urgency Change Petition Regarding Delta Water Quality*, p. 5 (Apr. 1, 2022).

[96] *June 2021 TUCO* at pp. 6-7.

[97] Cal. Dept. of Fish and Wildlife, *Letter RE April – June 2022 Temporary Urgency Change Petition Regarding Delta Water Quality*, p. 5 (Apr. 1, 2022) (reporting that data from long-term monitoring across the Delta "indicate continued record low detections of Delta Smelt across all life stages").

[98] U.S. Envtl. Protection Agency, *Letter RE Bay-Delta Water Quality Control Plan; Phase 1*, p. 3 (Dec. 29, 2016).

[99] *Id.*

[100] Letter from Justin Ly, NOAA, to Eileen Sobeck, State Water Resource Control Bd., RE Comments on Reclamation's Draft Sac River Temperature Management Plan (Apr. 27, 2022), Ex. C to Natural Resources Defense Council et. al., *Objection to and Protest of the Shasta Temperature Management Plan Submitted Pursuant to Water Rights Order 90-5* (May 6, 2022), available at https://www.waterboards.ca.gov/drought/sacramento_river/docs/exhibit-c-protest-shasta-tmp.pdf (hereafter, "*NMFS Comments on 2022 TMP*").

[101] *Id.*

[102] *Id.*

From time immemorial, Petitioner Winnemem Wintu have held the Chinook salmon sacred in their spirituality and religion. In the words of Ponti Tewis (Gary Mulcahy), Government Liaison for the Winnemem Wintu:

> The Winnemem Wintu are a spiritual people. We believe in a Creator who gave life and breath to all things. In our creation story we were brought forth from a sacred spring on Mt. Shasta. We were pretty helpless, couldn't speak, pretty insignificant. But the Salmon, the Nur, took pity on us and gave us their voice, and in return we promised to always speak for them. Side by side, the Winnemem Wintu and the Nur have depended on each other for thousands of years – the Winnemem speaking and caring for and trying to protect the salmon, and the salmon giving of themselves to the Winnemem to provide sustenance throughout the year.[103]

The Nur are woven into Winnemem culture, identity, and spirituality and are essential to the Winnemem way of life. For the Winnemem Wintu, the extinction of the salmon would amount to cultural genocide.[104]

Morning Star Gali, a member of the Pit River Tribe and board member of Petitioner Save California Salmon, also describes the loss of salmon as a genocide against her Tribe and its culture. Without the salmon, her people experience "a loss in terms of the spiritual health of our community when something that is so essential to us and that we have this symbiotic relationship with doesn't exist and is not within our rivers. It is a genocidal effort against us to keep the salmon from our rivers."[105]

For thousands of years before colonization, members of the Shingle Springs Band of Miwok Indians have likewise stewarded and utilized resources from Delta waters – including the Sacramento, American, Feather, Bear, and Cosumnes Rivers – for sustenance, medicine, transportation, shelter, clothing, and ceremony, among other cultural and subsistence uses.[106] At Wallok, a Nisenan village at the confluence of the Sacramento and Feather Rivers in present-day Verona, ancestors of today's tribal members caught salmon, catfish, sturgeon, eel, lamprey, and other native fish species – sometimes with their bare hands from the abundant pre-colonial fish runs.[107] The rivers provided the Tribe with the necessary materials for ceremonial regalia: feathers from waterfowl; barks of willows and other riparian plants for skirts; abalone, clams, and other shells for adornments. Riparian plants and berries sustained by the river flows also played essential roles in religious ceremony. For Petitioner

[103] Attachment B, Decl. of Gary Mulcahy ¶ 5.

[104] *Id.* ¶ 37.

[105] Attachment C, Decl. of Morning Star Gali ¶ 12.

[106] Attachment A, Decl. of Malissa Tayaba ¶ 2.

[107] *Id.* ¶ 9.

Shingle Springs Band too, loss of these native fish, wildlife, and riparian plant species amounts to cultural genocide.[108]

The decline of fish populations, coupled with the pollution of Delta waters, have contributed to poor health outcomes for communities that rely on these species for sustenance. Petitioner Shingle Springs Band of Miwok Indians reports that the fish species that were traditionally a staple of their diets are no longer available in the waterways. For Petitioner Winnemem Wintu, the Shasta Dam wholly blocks Chinook salmon and other anadromous fish – once the central component of the Winnemem Wintu diet – from entering the waterways where the Tribe has resided and fished since time immemorial. The unavailability of these species has eroded the Tribes' food sovereignty and contributed to health issues amongst tribal members, including obesity, type 2 diabetes, and cardiovascular disease.[109]

The impacts of impaired native fisheries extend to other vulnerable fish-dependent communities throughout the Delta. Even with declining fish populations, an estimated 24,000 to 40,000 subsistence fishing visits are made to the Delta annually.[110] Subsistence fishers throughout the Delta, many of whom are immigrants and/or people of color,[111] experience loss of food supply as fish populations decline. Impaired Delta water quality also puts subsistence fishers at heightened risk of exposure to contaminants that accumulate in waterways and in the bodies of the fish they consume.[112] Indeed, the California Office of Environmental Health Hazard Assessment advises against consumption of 25 separate fish species in the Sacramento River and Northern Delta and 12 fish species in the Central and South Delta based on the presence of PCBs, mercury, and other toxins, and it advises against consumption of all fish and shellfish species in the Port of Stockton.[113]

Proliferation of Harmful Algal Blooms

Insufficient instream flows, changes to water circulation patterns, warm water temperatures, and nutrient discharge also contribute to the emergence and spread of harmful

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[108] *Id.* ¶ 17.

[109] *See, e.g.*, DeBruyn et al., *Integrating Culture and History to Promote Health and Help Prevent Type 2 Diabetes in American Indian/Alaska Native Communities: Traditional Foods Have Become a Way to Talk About Health*, 17(12) Preventing Chronic Disease 1 (2020); *see also* Decl. of Gary Mulcahy ¶ 31.

[110] Barrigan-Parrilla et al., *The Fate of the Delta,* p. 54 (2018) (hereafter, "*Fate of the Delta*").

[111] Shilling et al., *Contaminated Fish Consumption in California's Central Valley Delta*, 110(4) Envtl. Research 334, 335, 337 (2010).

[112] *Fate of the Delta* at pp. 54-55.

[113] *See* Cal. Office of Envtl. Health Hazard Assessment, *Fish Advisories*, https://oehha.ca.gov/fish/advisories (last visited May 12, 2022).

algal blooms throughout Delta waterways. Harmful algal blooms are overgrowths of microscopic algae or algae-like bacteria that produce toxins dangerous to humans and animals.[114] These foul-smelling, green blooms are a product of low freshwater flows, still water, and high water temperatures – all of which are driven by excessive diversions – combined with excess nutrients from agricultural runoff and wastewater and bright sunlight.[115] When these conditions converge in the warm season, harmful algal blooms proliferate across the surface of Delta waterways. Since their emergence in the Delta in 1999, harmful algal blooms have become pervasive in Delta waterways.[116] In 2021 alone, 46 incidents of harmful algal blooms were voluntarily reported in the Delta.[117] This number likely only scratches the surface of the extent and duration of the problem.

The World Health Organization considers cyanobacterial toxins to be "among the most toxic naturally occurring compounds."[118] People can be exposed to cyanobacterial toxins from harmful algal blooms by swallowing or swimming in affected waters, eating contaminated fish or shellfish (even when food is cooked, algal toxins can remain), or inhaling airborne droplets of contaminated water that irritate lung tissue.[119] Depending on the level of exposure and the type of algal toxin, health consequences may range from mild to severe. High levels of exposure can be fatal, especially to pets.[120] Harmful algal blooms can damage the human central nervous system and liver and lead to respiratory distress.[121] Moreover, aerosolized toxins from harmful algal blooms can be mobilized by wind and travel

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[114] *See* State Water Resources Control Bd., *Freshwater and Estuarine Harmful Algal Bloom (FHAB) Program Legislative Mandated Reports: 2021 Water Code Section 13182(a) Report*, p. 1 (2021) (hereafter, "*FHAB Legislative Mandated Reports*").

[115] *See* Smith et al., *California Water Boards' Framework and Strategy for Freshwater Harmful Algal Bloom Monitoring: Full Report with Appendices*, pp. 1-3 (2021) (hereafter, "*FHAB Framework*"); *see also, e.g.*, Lehman et al., *Impact of Extreme Wet and Dry Years on the Persistence of* Microcystis *Harmful Algal Blooms in the San Francisco Estuary*, 621 Quaternary Intl. 16-25 (2022) (identifying a "strong correlation of *Microcystis* abundance with the X2 index and water temperature" and reporting that "[a] shift of the X2 index by only 3 km was associated with a factor of 3 increase in the percent abundance of subsurface Microcystis cells in the cyanobacterial community between the extreme drought years 2014 and 2015").

[116] *See* Cooke et al., Regional Water Quality Control Board, *Central Valley Region: Delta Nutrient Research Plan*, p. 12 (2018).

[117] Delta Stewardship Council, *Harmful Algal Blooms*, https://viewperformance.deltacouncil.ca.gov/pm/harmful-algal-blooms (as of Feb. 28, 2022).

[118] World Health Org., *Toxic Cyanobacteria in Water: A Guide to Their Public Health Consequences, Monitoring and Management*, ch. 1, p. 2 (2d ed. 2021).

[119] Ctrs. for Disease Control and Prevention, *Avoid Harmful Algae and Cyanobacteria*, https://www.cdc.gov/habs/be-aware-habs.html (as of Mar. 8, 2022).

[120] *Id.*

[121] *Id.*

for many miles, contributing to human respiratory problems like asthma.[122] Even when the toxins are no longer a direct human health threat, decomposition of cyanobacteria consumes dissolved oxygen in the water, resulting in low oxygen levels in the water that impact fish and other aquatic species.[123]

In Stockton, where Petitioners Restore the Delta and Little Manila Rising are located, the dangerous effects of harmful algal blooms are borne disproportionately by members of vulnerable and disadvantaged communities who live near polluted or largely dewatered waterways or rely on them for subsistence fishing, bathing, sanitation, and recreation.[124] The South Stockton zip codes immediately surrounding the Port of Stockton and the largely dewatered Mormon Slough, for instance, are in the highest national percentiles for residents of color, low-income, and linguistic isolation.[125] Since 2017, Restore the Delta staff have witnessed hundreds of residents in these and surrounding areas fishing in or near bloom-infested waters, boating and jet skiing through toxic algal blooms with small children present, launching boats into bloom-filled waterways, living in houseboats and floating encampments on top of toxic algal blooms, and living adjacent to waterways filled with toxic algae.[126] Harmful algal blooms are also a direct threat to unhoused Stockton residents who regularly camp adjacent to Mormon Slough, the Stockton Deep Water Shipping Channel, the San Joaquin River, Smith Canal, and the Calaveras River – all water bodies that are hydrologically connected to the rest of the Delta estuary.

These disproportionate effects compound environmental and health burdens that already heavily plague Stockton's communities of color. Stockton communities are overburdened with air pollution and respiratory distress. Multiple Stockton census tracts within a half-mile of Delta waterways score in the 96th through 99th percentiles of all California communities for pollution burdens, as defined by the California Office of Environmental Health Hazard Assessment's mapping tool, CalEnviroScreen.[127] Construction of the Crosstown Freeway, which destroyed historic Little Manila, the subsequent development of a constellation of transportation infrastructure, and the siting of multiple heavy industrial sources all contribute to the area's intense air pollution problem.[128]

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[122] *See, e.g.*, Freeman, *Seasick Lungs: How Airborne Algal Toxins Trigger Asthma Symptoms*, 113(5) Envtl. Health Perspectives 632 (2005); *see also, e.g.*, Decl. of Barbara Barrigan-Parrilla ¶¶ 18, 20.

[123] Cal. Water Quality Monitoring Council, *Fish and Wildlife and HABs*, *https://mywaterquality.ca.gov/habs/resources/fish_wildlife.html* (last visited May 13, 2022).

[124] *Fate of the Delta* at p. 54.

[125] *See* U.S. Envtl. Protection Agency, *EJScreen Version 2.0*, https://ejscreen.epa.gov/mapper/.

[126] Attachment E, Decl. of Barbara Barrigan-Parrilla ¶ 21.

[127] *See* Cal. Office of Envtl. Health Hazard Assessment, *CalEnviroScreen Version 4.0*, https://oehha.ca.gov/calenviroscreen.

[128] Attachment D, Decl. of Dillon Delvo ¶ 14.

Impacts of aerosolized cyanobacteria from harmful algal blooms layer on top of these outsized respiratory health burdens.[129]

Harmful algal blooms compound economic distress and disinvestment experienced by Stockton communities by undermining long-term growth in jobs, economic output, and sustainable economic development in the Stockton region. Stockton has some of the highest "distress" conditions in the country: among large U.S. cities, it ranked sixth nationally and first in the state in the Economic Innovation Group's 2016 "Distressed Communities Index."[130] This ranking is based on combined indicators of educational attainment, housing vacancy, unemployment, poverty, median income, and changes in employment and business establishments.[131] The community's ability to use Stockton's waterways as a vehicle for economic development, tourism, and recreation is impaired by the unhealthy state of the San Joaquin River in the vicinity of Stockton – particularly during warm seasons when people most want to be out on the water but when harmful algal blooms are often at their worst.[132]

Harmful algal blooms also perpetuate the alienation of Indigenous Peoples from their ancestral waterways and the cultural resources found therein and impair tribal beneficial uses of the water.[133] Petitioner Shingle Springs Band of Miwok Indians is working to restore the Tribe's traditional ecological knowledge and cultural and spiritual connection to the Sacramento River, American River, Feather River, and other Delta waterways that are their ancestral homes.[134] This restoration work includes returning to these rivers to fish, gather estuarine plants and species to create ceremonial regalia, and collect plants for medicinal use. Yet, in the last two to three years, the proliferation of harmful algal blooms in locations significant to the Tribe has blocked them from accessing the water and its cultural resources. For example, tribal leaders take groups of children fishing in the Verona area, near the Tribe's ancestral village site of Wallok. However, these trips were cancelled last year because the sloughs up-river from Verona were covered with noxious algal blooms.[135] As

[129] *See e.g.*, Attachment E, Decl. of Barbara Barrigan-Parrilla ¶ 18.

[130] Economic Innovations Group, *The 2016 Distressed Communities Index: An Analysis of Community Well-Being Across the United States*, p. 26 (2016).

[131] *Id.* at pp. 5-7.

[132] Attachment D, Decl. of Dillon Delvo ¶¶ 19-20.

[133]Jayme Smith et. al, *California Water Board's Framework and Strategy for Freshwater Harmful Algal Bloom Monitoring*, pp. 162-63 (Mar. 2021), available at https://ftp.sccwrp.org/pub/download/DOCUMENTS/TechnicalReports/1141_FHABStrategy_FullReport.pdf.

[134] Attachment A, Decl. of Malissa Tayaba ¶ 13.

[135]*Id.* ¶ 16.

long as harmful algal blooms infest these waters, the Tribe's alienation from their cultural and spiritual practices persists.

If nothing changes, the climate crisis will push these already tenuous conditions to the brink of disaster. Climate change will increase extreme weather events, including severe droughts that will make disastrous conditions like those seen during the 2014-15 drought and the current drought all too common.[136] Changing precipitation patterns make the dry summer season even longer and even drier – further imperiling the spawning journey of migratory fish species like the Chinook salmon during these months.[137] Warming is predicted to cause a devastating 35% flow reduction this century in the Colorado River, one of Southern California's key water sources – creating more demand on Delta waters.[138] Increasing wildfires, sea level rise, heatwaves, and other threats will further exacerbate the strain on the state's water resources.[139] Without improved management, the results will include increasing salinity, proliferation of harmful algal blooms, spread of nonnative invasive species, decline of native fish species, and other harms to the estuarine ecosystem – all of which will do further violence to tribes and other vulnerable Delta communities.

III. The State Water Board's Failure to Effectively Regulate Bay-Delta Water Quality

State Water Board Responsibilities for Bay-Delta Water Quality

The State Water Board is the primary agency charged with regulating water flows and water quality in the Bay-Delta and throughout California to meet federal and state water quality objectives.[140] The federal Clean Water Act (33 U.S.C. § 1251 et seq.) aims to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." (33 U.S.C. § 1251(a), (a)(2).) Toward these ends, the Clean Water Act requires each state to establish water quality standards for bodies of water within the state's boundaries. (33 U.S.C. §§ 1313(a)-(c); 40 C.F.R. § 130.3.) Each state must first designate uses of a particular body of water, and then designate water quality criteria sufficient to protect the designated uses. (33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.6(c),

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[136] *See* State Water Resources Control Bd., *Climate Change Considerations for Appropriative Water Rights Applications* (2021) (hereafter, "*Climate Change Considerations*"); *see also* Exec. Order No. N-7-22 (Newsom) (Mar. 28, 2022) (recognizing that "climate change continues to intensify the impacts of droughts on our communities, environment and economy").

[137] *See* State Water Resources Control Bd., Division of Water Rights, *Recommendations for an Effective Water Rights Response to Climate Change*, p. 13 (2021).

[138] Udall & Overpeck, *The Twenty-First Century Colorado River Hot Drought and Implications for the Future*, 53(3) Water Resources Research 2404, 2410 (2017).

[139] *See Climate Change Considerations*.

[140] *See Phase II Framework* at p. 4.

131.11.) Under California's Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.) – which established a "statewide program for the control of the quality of all waters in the state" (*id.* § 13000) – the State Water Board alone is responsible for statewide policy concerning water quality control (*id.* §§ 13140-47). The Porter-Cologne Act also designates the State Water Board as "the state water pollution control agency for all purposes stated in the [Clean Water Act] and any other existing or subsequently enacted federal water quality control law." (*Id.* § 13160.)

Under the Porter-Cologne Act, regional water quality control boards have primary responsibility for formulating and adopting water quality control plans for their respective regions, which must conform to any state policy for water quality control. (Wat. Code, § 13240). However, the State Water Board is also empowered to formulate its own water quality control plans, which supersede any conflicting regional plans. (Wat. Code, § 13170; *see United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 109.) Since 1978, the State Water Board has exercised this authority to establish water quality control standards for the Bay-Delta.[141]

The State Water Board "must conduct a triennial review of its water quality standards," including those contained in the Bay-Delta Plan.[142] (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 108 [citing 33 U.S.C. § 1313(c)(1)]; Wat. Code, § 13240 [requiring that water quality control plans be "periodically reviewed"].) This triennial review process requires "public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards." (33 U.S.C. § 1313(c)(1).) The U.S. Environmental Protect Agency ("EPA") then reviews any updated standards to ensure that they meet the requirements of the Clean Water Act, including ensuring that they are adequate "to protect the public health or welfare" and "enhance the quality of water." (33 U.S.C. § 1313(c)(2)(A); *see also* 40 C.F.R. § 131.5.) If a standard fails to meet applicable criteria, the EPA must disapprove the standard and, unless the state submits an acceptable revised standard within ninety days, promulgate a federal water regulation that satisfies the Clean Water Act's requirements. (33 U.S.C. §§ 1313(c)(3)-(4); 40 C.F.R. § 131.5.)

In addition to these statutory responsibilities, the State Water Board has an affirmative duty to "protect the people's common heritage" in public trust resources and uses. (*Nat. Audubon Society v. Super. Ct.* (1983) 33 Cal.3d 419, 441.) The range of resources protected by the public trust is expansive, encompassing tidelands, baylands, and navigable waters, as well as inland tributaries, non-navigable streams, and groundwaters hydrologically connected to other public trust resources. (*See, e.g.*, *S.F. Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal.App.4th 202, 233; *Nat. Audubon Society*, 33 Cal.3d at p. 437; *Envtl. Law Found. v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844.) So too, public trust uses include "not just navigation, commerce, and fishing, but also the public right to

[141] *See 2006 Bay-Delta Plan* at p. 4.

[142] *Id.* (explaining submittal requirement.)

hunt, bathe, and swim" (*S.F. Baykeeper*, 242 Cal.App.4th at p. 233), as well as preservation of lands as open space or habitat to satisfy ecological, aesthetic, or spiritual values (*Marks v. Whitney* (1971) 6 Cal.3d 251, 259-60).

The public trust doctrine "imposes a duty of continuing supervision over the taking and use of . . . appropriated water." (*Nat. Audubon Society*, 33 Cal.3d at p. 426.) Among other things, the State Water Board must "consider the effect of [water] diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests." (*Ibid.*) This duty applies not only to oversight of "permitted appropriative water rights" but also "in the context of riparian and pre-1914 appropriative rights." (*Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1489.) The Legislature has declared the public trust doctrine "the foundation of state water management policy" as well as "particularly important and applicable to the Delta." (Wat. Code, § 85023.)

California law further requires that the State's water resources be put to reasonable use and directs the Board to limit water use to what is reasonable under the circumstances. This reasonable use doctrine derives from the California Constitution, Article X, Section 2, which declares that "the waste or unreasonable use or unreasonable method of use of water [is to] be prevented" and that "[t]he right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served." (Cal. Const., art. X, § 2.) The Legislature has codified the Board's authority and duty to realize this constitutional principle by limiting use and diversion of water to what is reasonable. (*See, e.g.*, Wat. Code, §§ 100, 275, 1050, 1831, 85023.) For instance, in furtherance of the State policy to prevent unreasonable use or diversion of water (Wat. Code § 100), section 275 of the Water Code requires the State board to "take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state." As with the public trust doctrine, the Legislature has declared the "longstanding constitutional principle of reasonable use" to be "the foundation of state water management policy and . . . particularly important and applicable to the Delta." (Wat. Code, § 85023.)

The Bay-Delta Plan

In 1978, the State Water Board prepared and adopted the first Water Quality Control Plan for the Bay-Delta (the "Bay-Delta Plan" or "Plan") under the Porter-Cologne Act. The Bay-Delta Plan designates beneficial uses for the Bay-Delta,[143] establishes water quality

[143] Beneficial uses included in the 2018 Bay-Delta Plan are: municipal and domestic supply; industrial service supply; industrial process supply; agricultural supply, groundwater recharge; navigation; water contact recreation; non-contact water recreation; shellfish harvesting; commercial and sport fishing; warm freshwater habitat; cold freshwater habitat; migration of aquatic organisms; spawning, reproduction and/or early development; estuarine habitat; wildlife habitat; and rare, threatened or

objectives for the protection of beneficial uses, and sets forth a program of implementation to achieve those objectives. The 1995 version of the Bay-Delta Plan stated that its water quality standards would be implemented "by assigning responsibilities to water rights holders because the factors to be controlled are primarily related to flows and diversions."[144] Thus in 1999, the State Water Board adopted Water Right Decision 1641 ("D-1641"), revised in March 2000, to implement portions of the Bay-Delta Plan by imposing terms and conditions for water rights permits to meet the Plan's flow and operational objectives. D-1641 assigned primary responsibility for meeting these objectives to Reclamation and DWR, as the largest exporters from the Delta.

The State Water Board has completed only three full reviews of the Bay-Delta Plan since its initial adoption: in 1991, 1995, and 2006.[145] The current 2006 Bay-Delta Plan made only minor changes to the implementation program set forth in the 1995 Bay-Delta Plan, and no changes to water quality standards, including the Plan's flow objectives.[146] Recognizing that water quality standards in the 2006 Bay-Delta Plan were failing to protect fish and wildlife beneficial uses, the State Water Board in 2008 initiated a bifurcated process for review and update of the Bay-Delta Plan, beginning with salinity and flow objectives for the southern Delta and San Joaquin River (Phase I) followed by standards to protect native fish and wildlife in the Sacramento River, Delta, and associated tributaries (Phase II).[147] Over a decade later, review and update of the 2006 Bay-Delta Plan remains pending.

On December 12, 2018, the State Water Board adopted Phase I amendments to the Bay-Delta Plan, with new and revised water quality objectives for the Lower San Joaquin River and a revised southern Delta salinity water quality objective, and it approved and adopted an accompanying Final Substitute Environmental Document. Despite this step, the Phase I amendments were only partial – making implementation contingent on additional reports and regulatory actions, as well as future development of implementation pathways. Among other things, the Phase I amendments required the State Water Board to consider approval of a Comprehensive Operations Plan and biological goals for lower San Joaquin River salmonids and potentially other species within 180-days of approval of the Phase I

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endangered species. State Water Resources Control Bd., Resolution 2018-0059, pp. 7-8 (Dec. 12, 2018).

[144] State Water Resources Control Bd., *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, p. 4 (WR 95-1) (May 1995).

[145] State Water Resources Control Bd., Resolution 2018-0059 at p. 1.

[146] *See Public Trust Flows Report* at p. 18.

[147] State Water Resources Control Bd.*, Strategic Workplan for Activities in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, Resolution No. 20008-0056 (July 2008); *Phase II Scientific Basis Report* at p. 1-1.

amendments by the Office of Administrative Law.[148] Both remain pending several years after the Office of Administrative Law approved the Phase I regulatory action on February 25, 2019.[149] Nor has the Board to date issued any proposal on implementation pathways for the Phase I amendments. This is so despite the State Water Board's acknowledgment that the D-1641 approach of implementing water quality objectives through restrictions on "a limited subset of water users, on a limited subset of streams, for only parts of the year . . . has failed to protect fish and wildlife that require protection throughout the watershed and throughout the year."[150]

In fall 2017, the State Water Board released a Fact Sheet and Scientific Basis Report describing staff recommendations for the Phase II update, followed by release of a Framework document in July 2018 describing the intended Phase II update process. In the 2018 Phase II Framework document, staff projected that the State Water Board would release a draft staff report with a comprehensive Phase II amendment analysis later in 2018.[151] Four years later, the State Water Board has not released a staff report or any further information or analysis on Phase II updates. Rather, at a public meeting in December 2021, State Water Board staff indicated that the staff report would not be released until the Board received a forthcoming proposal for voluntary agreements with Sacramento River Basin users and water agencies outlining privately negotiated flow and habitat improvements.

In lieu of updating the Bay-Delta water quality standards to make them adequately and timely protective of beneficial uses, the State Water Board has instead adopted a pattern and practice of repeatedly waiving outflow restrictions, salinity objectives, and temperature controls during the extreme drought conditions of recent years to the detriment of native fish, wildlife, tribes, and other resident communities and public trust resources. At the request of DWR and Reclamation, the State Board issued temporary urgency change orders in 2014, 2015, 2021, and on April 4, 2022 waiving Delta outflow requirements over protests by Petitioner Restore the Delta, among many other groups.[152] The State Water Board has adopted this approach even though the 2006 Bay-Delta Plan and D-1641 include criteria

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[148] State Water Resources Control Bd., *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, pp. 28, 35 (Dec. 12, 2018).

[149] *See* State Water Resources Control Bd.*, Draft Initial Biological Goals for the Lower San Joaquin River*, p. 1-1 (Sept. 2019). At the State Water Board's December 21, 2021 public meeting, staff projected releasing a draft Final Biological Goals Report in winter/spring 2022.

[150] *Phase II Framework* at p. 5.

[151] *Id.* at p. 35.

[152] *See* State Water Resources Control Bd., *State Water Project and Central Valley Project Temporary Urgency Change Petition*, https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/index.html (last visited May 3, 2022).

specific to low-flow conditions,[153] and despite the Board's own recognitions that water quality objective waivers are "not sustainable for fish and wildlife and that changes to the drought planning and response process are needed to ensure that fish and wildlife are not unreasonably impacted in the future and to ensure that various species do not go extinct."[154]

Similarly, the State Water Board has granted successive requests by Reclamation to waive temperature controls on the Sacramento River imposed by Water Order 90-5, despite evidence that doing so will result in significant fish kills in both the Sacramento River basin and in the Trinity and lower Klamath Rivers. Approval of Reclamation's May 28, 2021 Sacramento River Temperature Management Plan ("TMP") resulted in a "record low egg-to-fry survival rate of 2.6%" for endangered winter-run Chinook salmon in the Sacramento River basin, with only 0.4% of viable eggs successfully surviving to reach the Delta as smolts.[155] Most recently, on May 6, 2022, the Board conditionally approved Reclamation's latest Sacramento River TMP over protests by environmental groups, fishery advocates, and Petitioner Save California Salmon that the TMP violates Water Order 90-5 because, among other things, Reclamation failed to show that it had taken all measures within its reasonable control to maintain adequate water temperatures.[156] The National Marine Fisheries Service likewise faulted the TMP for failing to make any mention of violations of Order 90-5 water temperature objectives in the Trinity River caused by the TMP's reliance on Trinity River diversions for Sacramento River temperature control.[157] As the Service noted, "Reclamation is already using the Trinity River for water temperature control on the Sacramento, despite the model results indicating it will not meet the [Order 90-5] criteria for the Trinity River."[158] Implementation of the TMP is anticipated to cause up to 58% mortality of endangered winter-run Chinook salmon eggs in the Sacramento River, and greater than 75% mortality of Coho salmon eggs in the Trinity River basin.[159]

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[153] *See* State Water Resources Control Bd., Revised Water Right Decision 1641 (Mar. 15, 2000); State Water Resources Control Bd., Resolution 2018-0059.

[154] State Water Resources Control Bd., Water Rights Order 2015-0043, p. 39 (corrected) (Jan. 19, 2015).

[155] State Water Resources Control Bd., Order Denying in Part and Granting in Part Petitions for Reconsideration and Addressing Objections, Order WR 2022-0095, pp. 18-19 (Feb. 15, 2022)

[156] *See* State Water Resources Control Bd., Order 90-5 Sacramento River Draft Temperature Management Plan (May 6, 2022); Natural Resources Defense Council et al., *Objection to and Protest of the Shasta Temperature Management Plan Submitted Pursuant to Water Rights Order 90-5* (May 6, 2022), available at https://www.waterboards.ca.gov/drought/sacramento_river/docs/nrdc-et-al-protest-shasta-tmp-5-6-22.pdf.

[157] *NMFS Comments on 2022 TMP*.

[158] *Id.*

[159] *Id.*; State Water Resources Control Bd., Order 90-5 Sacramento River Draft Temperature Management Plan at p. 3.

The State Water Board has also made clear its intent to organize the Bay-Delta Plan review and update process around separately negotiated voluntary agreements between state and federal agencies and a limited subset of Delta stakeholders – water agencies, districts, and contractors that divert Bay-Delta freshwater flows.[160] On March 29, 2022, the California Natural Resources Agency released a Voluntary Agreement Memorandum of Understanding calling on the State Water Board to consider and approve an updated Bay-Delta Plan that includes the voluntary agreement as a pathway within the Plan's implementation program and consider it as an alternative to be analyzed in the eventual substitute environmental document.[161] The current proposed voluntary agreements would reduce the amount of additional Delta outflow that would be required from a 2017 proposal of 1.3 million acre feet to less than 500,000 acre feet per year on average – far less than the increased outflows than the Board has indicated are necessary to protect beneficial uses and the public trust.[162] In exchange for these reductions and certain habitat restoration commitments, the Voluntary Agreement framework would provide for the payment of hundreds of millions of dollars of taxpayer funds to water rights claimants.[163] The voluntary agreements are also silent on Trinity River Division diversions into the Delta and Trinity River releases, even though the TRD is a major artificial supplier of Sacramento River inflow.

STATEMENT OF JURISDICTION

This petition is brought under the Petition Clause of the First Amendment to the U.S. Constitution; Article I, section 3 of the California Constitution; section 11340.6 of the California Government Code; section 13320 of the California Water Code; and as a public trust complaint.

Pursuant to Government Code section 11340.6, any "interested person may petition a state agency requesting adoption" of a regulation. Water quality control plans, like the Bay-Delta Plan, are regulatory in nature, and thus subject to rulemaking petitions. (Gov. Code, § 11353.) Upon receipt of such a request, the State Water Board has 30 days to either

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[160] *See* State Water Resources Control Bd., *Proposals for Voluntary Agreements to Update and Implement the Bay-Delta Plan*, https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/proposed_voluntary_agreements.html (May 3, 2022).

[161] Memorandum of Understanding Advancing a Term Sheet for the Voluntary Agreements to Update and Implement the Bay-Delta Water Quality Control Plan, and Other Related Actions, pp. 2-3 (Mar. 29, 2022) (hereafter, "*2022 VA Memorandum of Understanding*").

[162] *See 2022 VA Memorandum of Understanding* at Term Sheet App. 1 (Table 1a detailing proposed new contributions to Delta outflow); *see generally* Doug Obegi*, Honey, the VAs Shrunk the Delta Flows*, Natural Resources Defense Council, https://www.nrdc.org/experts/doug-obegi/honey-i-shrunk-delta-flows-aka-voluntary-agreements (April 11, 2022).

[163] *See 2022 VA Memorandum of Understanding* at Term Sheet App. 3 (outlining $2,589 million in voluntary agreement implementation costs).

schedule the matter for a hearing or deny the petition in writing, providing reasons for any such denial.[164] (Gov. Code, §§ 11340.7(a), (d).)

The State Water Board has concurrent jurisdiction with the courts over claims made under the public trust doctrine. [165] (*See Nat. Audubon Society*, 33 Cal.3d at p. 452.) The Board "prioritizes complaints based on the amount of alleged unauthorized water diverted, the stream type affected, public trust and drinking water resources impacted, and other watershed specific or site-specific relevant factors."[166] This complaint regards extensive water diversions throughout the state's most expansive watershed – the Delta – and their devastating impacts to public trust resources, including fish, wildlife, habitat, aesthetics, and recreational opportunities. The Board should prioritize this complaint accordingly.

RULEMAKING REQUEST

I. The State Water Board Must Promptly Review and Update the Entire Bay-Delta Plan Through an Open, Inclusive, and Participatory Process.

A. The State Water Board is in violation of its statutory obligation to review the Bay-Delta Plan every three years.

The State Water Board has a statutory duty under the federal Clean Water Act and California's Porter-Cologne Act to review the Bay-Delta Plan at least once every three years for the purpose of determining whether to modify adopted water quality standards. The Clean Water Act requires "the State water pollution control agency" – here, the State Water Board – to "from time to time (*but at least once each three year period* . . .) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards." (33 U.S.C. § 1313 [emphasis added].) The Porter-Cologne Act similarly requires that every state water quality control plan be "periodically reviewed." (Wat. Code, § 13240.) California courts have repeatedly affirmed the State Water Board's responsibility to conduct this triennial review of water quality standards contained in basin plans like the Bay-Delta Plan. (*See e.g.*, *City of Arcadia v. State Water*

[164] Water Code section 13320 likewise entitles aggrieved persons to petition the State Water Board "[w]ithin 30 days of any action or failure to act by a regional board." Here, the State Water Board is acting in the capacity of a regional water board in adopting the Bay-Delta Plan, making it the appropriate recipient of this petition regarding the State Water Board's failure to act on Bay-Delta Plan review and update.

[165] *See also* Wat. Code, § 85023 (The California Water Code affirms that "[t]he longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta.")

[166] State Water Resources Control Bd., *Water Rights Enforcement Complaints*, https://www.waterboards.ca.gov/waterrights/water_issues/programs/enforcement/complaints/ (last visited May 12, 2022).

Resources Control Bd. (2011) 191 Cal.App.4th 156, 175 [regional water board must conduct triennial review of basin plan]; *City of Duarte v. State Water Resources Control Bd.* (2021) 60 Cal.App.5th 248, 265 ["The Clean Water Act requires that California regularly review water quality standards and set controls necessary to support the designated beneficial uses of the bodies of water within the state." (citing 33 U.S.C. § 1313(c))]; *United States v. State Water Resources Control Bd.*, 182 Cal.App.3d at 108 [same]; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 632 (Brown, J., concurring) [regional water board quality control board violated triennial review requirement for basin plan].) The Board itself recognizes that the triennial review requirement adheres to the Bay-Delta Plan.[167]

The State Water Board is in obvious violation of this statutory mandate. It has been *over fifteen years* since the State Water Board completed its most recent comprehensive review of the Bay-Delta Plan in 2006. And while the Board completed a partial review of the south Delta salinity standards and San Joaquin River flow requirements in 2018, it has already exceeded its three-year statutory deadline to reinitiate a review of standards in this portion of the watershed. Meanwhile, "Phase II" review of the remainder of the Bay-Delta system – including flows and cold-water habitat in the Sacramento River, its tributaries and tributaries to the Delta (the Mokelumne, Consumnes, and Calaveras Rivers), Delta outflows, and water project operations in the interior Delta – remains pending.

While the State Water Board has made repeated pronouncements about its intentions to complete the Phase II review for the remainder of the Bay-Delta, these commitments have been illusory. In a July 2018 Phase II Framework document, the State Water Board reported that a draft Staff Report, including a comprehensive analysis of proposed Phase II changes, would be available for public comment and review later in the year.[168] But four years later, the Board has neither released the promised report nor held public hearings or workshops to inform it. Instead, at the Board's December 8, 2021 public meeting, staff announced a Phase II review timeline that anticipates further postponing release of a draft staff report until fall 2022, followed by a public workshop in winter 2023, and adoption of a Phase II plan in late fall 2023. Given the Board's practice of flouting statutory deadlines for its triennial review, there is little reason to believe that these attenuated timelines will stick.

To meet its statutory obligations, the State Water Board must immediately initiate and timely complete a comprehensive review of the full Bay-Delta Plan. Further, as discussed below, this review process must be public and participatory, centering the voices and interests of tribes and Delta communities directly harmed by the Delta's degraded conditions rather than subordinating their interests to those of water diverters and exporters.

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[167] State Water Resources Control Bd., Resolution 2018-0059 at p. 5 ("The Bay-Delta Plan will be reviewed every three years in compliance with Water Code section 13240 and federal Clean Water Act section 303(c) (33 U.S.C. § 1313(c)).")

[168] *See Phase II Framework*.

B. The process for revising the Bay-Delta Plan must be inclusive and transparent, centering the experiences and perspectives of affected Delta communities and Tribes.

The Clean Water Act and Porter Cologne Act both mandate public participation in the review and update of water quality standards. The triennial review mandated by the Clean Water Act requires "public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards." (33 U.S.C. § 1313(c)(1).) Likewise, the Porter-Cologne Act requires a noticed public hearing prior to adoption of any water quality control plan. (Wat. Code, § 13244.) As discussed in Section III.A, below, the State has also memorialized its specific commitments to meaningfully consult with affected tribes as well as communities most directly impacted by state water quality management decisions.[169]

To realize these commitments, the Board's process for reviewing and revising the Bay-Delta Plan's water quality standards must begin with and be meaningfully shaped by government-to-government consultation with tribes and consideration of the views, interests, and experiences of communities most severely impacted by the Delta's ecological crisis. This includes all tribes whose rights and interests will be affected by decisions about Delta water management: tribes within the Delta (such as Petitioner Shingle Springs Band of Miwok Indians), in Delta headwaters (such as Petitioner Winnemem Wintu Tribe and the Pit River Tribe), and tribes in water basins affected by Delta imports and exports (such as the Yurok and Hoopa Valley Tribes). This also includes affected residents of areas like South Stockton, whose health, wellbeing, and economic opportunities are directly impaired by the degraded state of adjacent Delta waterways.

C. Voluntary agreements are not an adequate substitute for participatory review and update of the Bay-Delta Plan.

Instead of reviewing and updating the Bay-Delta Plan through a public and participatory process, the State Water Board has prioritized closed-door negotiation of flow-based standards through voluntary agreements between separate state and federal agencies and a subset of water rights claimants. The Board's reliance on voluntary agreements to organize its review and update of the Bay-Delta Plan is improper and risks further injury to tribes, Delta communities, and Delta ecosystems.

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[169] *See* State Water Bd. Anti-Racism Resolution; Gov. Code, § 65040.12(e)(2)(D) (defining "environmental justice" to include "[a]t a minimum, the meaningful consideration of recommendations from populations and communities most impacted by pollution into environmental and land use decisions"); *see generally, e.g.*, Pub. Resources Code, § 21080.3.1 (codifying tribal consultation requirements under CEQA).

First, although the State Water Board has characterized these negotiations as involving "interested stakeholders,"[170] only a small subset of stakeholders has been invited to the table.[171] Tribes, community and environmental organizations, and Delta residents in communities most directly impacted by the ecological crisis in the Delta have been wholly shut out of the conversation. Confidentiality agreements further shield the negotiations from public input and shroud them in secrecy.[172] When the Board did eventually extend an invitation to tribes and other non-party stakeholders, including Petitioner Restore the Delta, to engage in any discussion about the voluntary agreements, it did so nearly two months after the voluntary agreement framework had been settled and with only three days' notice.[173] Further, the invitation was limited to workshops on "implementation of the [voluntary agreement] program," which presumed incorporation of the voluntary agreement framework into the Phase II update.[174]

Second, while the Board has described the voluntary agreements as an implementation program alternative,[175] it is clear that they will constrain the revised water quality standards themselves, rendering any public participation at a pre-adoption hearing illusory and illegally pre-determining the results of the State Water Board's review. The March 29, 2022 Memorandum of Understanding for the Phase II Voluntary Agreements sets forth specific flow measures that the parties would agree to meet for Delta tributaries and outflows.[176] Given that the voluntary agreements define the obligations of the largest claimants of Delta water – e.g. the State Water Contractors – the flow-based standards in the Bay-Delta Plan will likely need to be organized around the voluntary agreement commitments to make any implementation plan feasible.

This is made clear in the State's rush to review and approve the Delta Conveyance Project – the major new infrastructure for State Water Project Delta exports – ahead of a

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[170] State Water Resources Control Bd., Item 13, Board Meeting Session – Division of Water Rights (Dec. 8, 2021), available at https://www.waterboards.ca.gov/board_info/agendas/2021/dec/120821_13.pdf.

[171] *See 2022 VA Memorandum of Understanding.*

[172] *See* Common Interest and Confidentiality Agreement (Feb. 12, 2019), https://www.nrdc.org/sites/default/files/media-uploads/va_water_user_common_interest_agreement.pdf.

[173] Attachment E, Decl. of Barbara Barrigan-Parrilla ¶ 24.

[174] *Id.*

[175] *2022 VA Memorandum of Understanding* at p.1; *Phase II Framework* at p. 5.

[176] *2022 VA Memorandum of Understanding* at App. 1.

comprehensive Bay-Delta Plan update.[177] Publicly, DWR has stated that once the Bay-Delta Plan is updated, the Delta Conveyance Project will comply with its standards.[178] Privately, however, DWR has made clear that when it "bring[s] the Delta Conveyance Project to the State Board, [it] will be pointing to the Water Quality Control Plan or [voluntary agreements] to establish the outflow requirements that the project will need to comply with."[179] By tethering the Delta Conveyance Project to the voluntary agreements, DWR and the State Water Board all but ensure that any eventual updates to water quality standards will be organized around these privately negotiated outflow compromises.

The Porter-Cologne Act does not sanction this approach. The Act requires the State Water Board to adopt a program of implementation to achieve water quality objectives (Wat. Code, § 13242), whereas the State Water Board's solicitation of voluntary agreements would do the reverse, setting export levels as the constraint on water quality standards. This backwards standard-setting would also substitute the private interests of the negotiating parties for the statutory factors that must guide adoption of water quality objectives. (*See* Wat. Code, § 13241 [requiring adoption of water quality objectives that "ensure the reasonable protection of beneficial uses and the prevention of nuisance," taking into account enumerated factors].) And it would make later public participation at a pre-adoption hearing irrelevant, as water quality objectives would have been pre-determined by the closed-door negotiations. So too, prior approval of the Delta Conveyance Project and through it greenlighting of the major plumbing for Delta exports would inappropriately constrain the Board's discretion to adopt appropriately protective water quality standards when it eventually reaches the Bay-Delta Plan update.

Relatedly, private negotiation of water quality standards would amount to an illegal surrender of State Water Board authorities. In California, "[a]s a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment and discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization." (Op. Atty. Gen No. 88-305, pp. 5-6

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[177] *See* Dept. of Water Resources, *California Environmental Quality Act and AB52 Consultation Milestones* (Sept. 2020), available at https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Delta-Conveyance/Tribal-Engagement/DCP_AB52_CEQA_FS_Sept2020_Final_508.pdf (scheduling public circulation of Draft Environmental Impact Report for Delta Conveyance Project for Spring 2022).

[178] Cal. Dept. of Water Resources, *Frequently Asked Questions Related to the Delta Conveyance Project*, p. 5 (Aug. 20201), available at https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Delta-Conveyance/Public-Information/DCP_FAQ_Final_August_2021.pdf.

[179] *See* Decl. of Barbara Barrigan-Parrilla, Ex. A, Email from Carolyn Buckman, Department of Water Resources, to Diane Riddle, State Water Resources Control Board, RE Delta Conveyance/VA Discussion (Nov. 4, 2021).

(1988) [citing *Cal. Sch. Employees Assn. v. Personnel Com.* (1970) 3 Cal.3d 139, 144]; *see Morrison Homes Corp. v. City of Pleasanton* (1976) 58 Cal.App.3d 724, 734 [recognizing the general rule that public agency "may not 'contract away' its legislative and governmental functions"].) The Porter-Cologne Act confers authority on the Regional Water Quality Control Board – or the State Water Board, acting in its stead – to exercise its "judgment" to establish appropriate water quality objectives. (Wat. Code, § 13241.) By endorsing voluntary agreements rather than updating the Plan through the mandated public process, the Board would surrender its discretion to a select group of private water rights holders negotiating with separate state and federal entities.

Third, the voluntary agreement negotiations would yield dangerously inadequate water quality standards that disregard the needs of Delta ecosystems, native fish and wildlife species, and communities.[180] As discussed above, the State Water Board has acknowledged that the best available science shows that current flow requirements are incapable of sustaining the Delta and its inhabitants.[181] Yet the current voluntary agreement framework would increase annual outflows by only 500,000 acre feet per year above the D-1641 baseline, far less than the 1.3 million acre feet proposed in the 2017 voluntary agreements and only a fraction of the additional flow requirements that the Board has itself concluded are necessary to protect public trust uses.[182] The voluntary agreement framework attempts to offset the shortcomings of these flow commitments with certain non-flow habitat restoration commitments.[183] But not even the habitat restoration projects themselves will survive without sufficient water at the right times and quantities in the system. Nor can they substitute for instream flows adequate to support resident fish populations and fish migration and rearing, reduce the incidence of harmful algal blooms, restore aesthetics and recreational opportunities, and support other public trust uses.

II. The State Water Board Should Revise Bay-Delta Water Quality Standards to Protect the Full Range of Beneficial Uses and Public Trust Interests.

[180] Indeed, the proposed voluntary agreements omit entirely any commitments or measures regarding Trinity River diversions, flows, or habitat protections. As discussed in Section III below, given that the Trinity River is a major source of artificial inflow into the Bay-Delta, regulation of Bay-Delta inflows and outflows necessarily implicates flows through the Trinity River and the federally reserved rights of tribes in the Trinity and lower Klamath basins.

[181] *See Phase II Scientific Basis Report* at p. 1-5.

[182] *See 2022 VA Memorandum of Understanding* at Term Sheet App. 1 (Table 1a detailing proposed new contributions to Delta outflow); *see generally* Doug Obegi*, Honey, the VAs Shrunk the Delta Flows*, Natural Resources Defense Council (April 11, 2022).

[183] *2022 VA Memorandum of Understanding*, Term Sheet, p. 5.

A. The State Water Board should recognize Tribal Beneficial Uses for the Bay-Delta.

Under federal and state law, the State Water Board must declare beneficial uses for bodies of water and then set water quality standards to protect those uses. (33 U.S.C. § 1313 ["[A] water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses."]; Wat. Code, § 13241 ["Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses"].) The State Water Board has recognized the same seventeen beneficial uses for the Delta since its 1995 Bay-Delta Plan update.[184] Notably absent from these beneficial uses are uses that directly recognize and protect tribal interests, and those of other subsistence fishers.

The State Water Board and the nine Regional Water Boards have made it a priority to recognize and incorporate tribal beneficial uses in water quality control plans. In 2016, the State Water Board adopted Resolution No. 2016-0011 directing staff to develop proposed tribal beneficial uses. The tribal beneficial uses definitions, established by the State Water Board in 2017, include Tribal Tradition and Culture, Tribal Subsistence Fishing, and Subsistence Fishing.[185] Tribal Tradition and Culture beneficial uses protect uses of water to support "cultural, spiritual, ceremonial, or traditional rights or lifeways of California Native American tribes," including consumptive and non-consumptive practices.[186] Tribal Subsistence Fishing and Subsistence Fishing beneficial uses protect use of water for tribal and non-tribal fishers for non-commercial catching or gathering of aquatic resources to meet individual, household, and community subsistence needs.[187] The nine Regional Water Quality Control Boards are currently in the process of amending their Basin Plans to recognize tribal beneficial uses and designate surface waters related to those uses.[188]

The State Water Board should do the same for the Bay-Delta Plan. California tribes have resided in the Delta and its watershed since time immemorial, developing a rich tapestry of ongoing cultural, ceremonial, and spiritual practices and using and stewarding its resources for millennia. Tribes continue to carry out these traditions and cultural practices today throughout the Delta and its headwaters despite centuries of colonial oppression, violence, and displacement. The degraded state of Delta waters impedes these practices,

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[184] *2006 Bay-Delta Water Quality Control Plan* at pp. 8-9.

[185] *See* State Water Resources Control Bd., *Tribal Beneficial Uses Fact Sheet* (Nov. 2020), available at https://www.waterboards.ca.gov/tribal_affairs/docs/tbu_fact_sheet_v04.pdf.

[186] *Id.* at p. 2.

[187] *Id*.

[188] State Water Resources Control Bd., *Regional Water Board Progress Updates on Tribal Beneficial Uses*, https://www.waterboards.ca.gov/tribal_affairs/regional_tbu_updates.html (last visited May 13, 2022).

threatening a second cultural genocide for Delta tribes. For Petitioner Shingle Springs Band of Miwok Indian, loss of native riparian vegetation, degraded water quality, and proliferation of harmful algal blooms interferes with tribal members' ability to carry out traditional ceremonial practices, gather riparian vegetation for cultural implements, carry out traditional fishing practices, and practice and pass on traditional ecological knowledge.[189] For Petitioner Winnemem Wintu Tribe, continuing declines in Nur (Chinook salmon) populations threaten the very core of tribal identity and the Tribe's existence as a People.[190] Recognizing tribal beneficial uses dignifies the needs, practices, and lifeways of these communities and is a first step toward ensuring their protection.

B. The Board must increase inflow and outflow requirements to protect the full range of beneficial uses.

Current Bay-Delta water quality standards fail to protect a range of beneficial uses recognized in the 2006 Bay-Delta Plan, including those that protect native fish and wildlife and their habitat, contact and non-contact recreation, and domestic water supply.[191] Native fish populations have plummeted to near-irrecoverable levels.[192] Low supplies of stored cold water and low flows have made temperatures too high to sustain cold freshwater habitat, impeded fish migration upstream through the watershed, and destroyed areas that had previously supported native fish populations.[193] Inadequate water quality standards have facilitated protected species' continuing decline.

Further, the loss of native fish species coupled with water contamination compromises important tribal cultural, tribal subsistence fishing, and non-tribal subsistence fishing beneficial uses of Bay-Delta water. For instance, disappearance of salmon and other native aquatic species from Delta waterways and headwaters has caused irreparable damage to the cultural survival of Petitioners Shingle Springs Band of Miwok Indians[194] and Winnemem Wintu Tribe,[195] as well as the Pit River Tribe,[196] while also impairing the Tribes'

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[189] *See* Attachment A, Decl. of Malissa Tayaba ¶¶ 15-16.

[190] Attachment B, Decl. of Gary Mulcahy ¶¶ 5, 31.

[191] State Water Resources Control Board 2006 Water Quality Control Plan at p. 8.

[192] July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan at p. 5.

[193] Cal. Department of Fish and Wildlife, *Winter-Run Chinook* Salmon, https://wildlife.ca.gov/Conservation/Fishes/Chinook-Salmon/Winter-run (last visited Fri May 13).

[194] *See* Attachment A, Decl. of Malissa Tayaba ¶ 9.

[195] Attachment B, Decl. of Gary Mulcahy ¶¶ 5, 31.

[196] Attachment C, Decl. of Morning Star Gali ¶¶ 10-12.

health and food sovereignty.[197] Thousands of non-tribal subsistence fishers, many of whom are immigrants and/or people of color, also rely on Bay-Delta waterways as an important food source.[198] The beneficial use of Bay-Delta water to meet their subsistence fishing needs is impaired by collapse of native fish populations as well as widespread contamination of waterways with PCBs, mercury, and other toxins, rendering many fish and shellfish species unsafe for consumption in much of the watershed and estuary.

Low flows and poor water quality also impair recreational access to Delta waterways and access to safe and affordable drinking water for Delta residents. Poor water quality and low flows lead to wildlife die-off, interfering with the Delta's many wildlife-centered recreational activities like fishing, sightseeing, and tide pooling.[199] Low flows and dewatering of Delta channels make certain Delta waterways inaccessible for water-based activity. And the proliferation of harmful algal blooms, coupled with the presence of other toxins like PCBs and mercury, make safe contact recreation in Delta waterways impossible for much of the year.[200] Likewise, the aerosolization of particles from harmful algal blooms impairs safe non-contact recreation such as hiking near affected bodies of water.[201] Low flows also increase the strain on potable water treatment plants[202] – such as the City of Stockton's drinking water treatment plant, which sits downstream from a wastewater treatment plant that discharges into the Delta – with the potential to raise costs of clean water and compromise drinking water access for lower-income residents.

The State's failure to maintain water quality standards adequate to protect recognized beneficial uses is a clear violation of its duties under state and federal law. (*See* Wat. Code, § 13241 [water quality standards must "ensure the reasonable protection of beneficial uses and the prevention of nuisance"].) As the State Water Board has recognized, the Clean Water Act requires the EPA Administrator to issue new or revised standards necessary to meet federal water quality requirements should the State continue to delay in correcting these failures. (*See* 33 U.S.C. § 1313(c)(4).)

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[197] Attachment B, Decl. of Gary Mulcahy ¶ 31.

[198] Attachment E, Decl. of Barbara Barrigan-Parrilla ¶¶ 7, 16, 21.

[199] State Water Resources Control Board 2006 Water Quality Control Plan at p. 8.

[200] *June 2021 TUCO* at pp. 23-24.

[201] *See* Surface Water Ambient Monitoring Program, *California Water Boards' 2021 Framework and Strategy for Freshwater Harmful Algal Bloom Monitoring: Full Report with Appendices* at p. v (Mar. 2021), available at https://ftp.sccwrp.org/pub/download/DOCUMENTS/TechnicalReports/1141_FHABStrategy_FullReport.pdf.

[202] *See* U.S. Envtl. Protection Agency, *Unabridged Advance Notice of Proposed Rulemaking for Water Quality Challenges in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, p. 20 (Feb. 2011).

C. The Board should establish and enforce water quality standards that protect public trust interests and prevent unreasonable use or diversion of Bay-Delta water.

The State Water Board's delays in reviewing and updating Bay-Delta water quality standards and its lax oversight and supervision of water diversions and exports also put the Board in violation of its duties to safeguard public trust resources and to protect against unreasonable use or diversion of water.

First, the public trust doctrine imposes on the Board "a duty of continuing supervision over the taking and use of . . . appropriated water." (*Nat. Audubon Society*, 33 Cal.3d at p. 447; *see also State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 677 [explaining that the Board has an "affirmative duty . . . to protect public trust uses whenever feasible" (quoting *Nat. Audubon Society*, 33 Cal.3d at p. 446)].) This means that among other things, the Board, "in undertaking planning and allocation of water resources, is required by statute to take [public trust] interests into account." (*Id.* at p. 444.) In doing so, it must "consider the effect of . . . diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests." (*Id.* at p. 426.) Among the recognized public trust interests that the Board is obligated to protect are fisheries, navigation, and commerce, as well as "recreational and ecological" values. (*State Water Resources Control Bd. Cases*, 136 Cal.App.4th at 677.) The Legislature has declared the public trust doctrine "particularly important and applicable to the Delta" and deemed it "the foundation of state water management policy." (Wat. Code, § 85023.)

Likewise, the Board is required to "take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state." (Wat. Code, § 275.) No state water right extends to the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water. (Cal. Const., art. X, § 2.) Diversion, use, and methods of diversion of water that impair recognized beneficial uses of a water body or threaten public trust resources are manifestly unreasonable.

As the State Water Board itself has recognized, current water quality standards for the Bay-Delta are failing to protect public trust uses and are resulting in unreasonable diversion and use of the water. According to the Board, "[t]he overall health of the estuary is in trouble, and expeditious action is needed on the watershed level to address the crisis, including actions by [the State Water Board]."[203] In 2010, the Board released a report mandated by the Delta Reform Act of 2009, Water Code section 85086, setting forth flow criteria for the Delta ecosystem necessary to protect public trust uses. In it, the State Water Board reported that, based on its analysis of the data, 75% of unimpaired Delta outflow from January through June, 75% of unimpaired Sacramento River inflow from November through

[203] *July 2018 Framework* at p. 4.

June, and 60% of unimpaired San Joaquin River inflow from February through June would be required "to preserve the attributes of a natural variable system to which native fish species are adapted."[204] By contrast, diversions and exports have cut unimpaired Delta flows by more than half.[205] In dry conditions, diversions and exports reduce January to June flows by more than 70% and annual flows by more than 65%.[206] In certain months, reductions in outflows exceed 80%.[207] Between 1990 and 2010, Sacramento River inflows were cut by 50% on average from April through June, while in drier years San Joaquin River inflows were cut by 80%.[208] These conditions are made worse by the State Water Board's pattern and practice of waiving water quality standards during extreme drought conditions through temporary urgency change orders, which further impairs flows and the public trust uses they support.

Weak water quality standards and their lax enforcement have done severe damage to public trust interests. As discussed above, low flows, increasing salinity, and modified water circulation patterns have led to the collapse of native fish populations. Dewatering of rivers destroys once rich riparian habitat and the aesthetics of the landscape. Low flows, higher water temperatures, and excessive discharge of nutrients have enabled the spread of harmful algal blooms throughout the Delta, turning the water green, depleting it of oxygen, and producing toxins lethal to fish, other wildlife, and to humans and pets. Harmful algal blooms also impede safe water recreation and, when aerosolized, add to the respiratory burden for nearby residents. Far from making public trust values and reasonable use the "foundation of state water management policy" for the Delta, the State Water Board has abnegated its affirmative duties to safeguard public trust interests in the Delta, prevent unreasonable use of its water, and police water diversion and exports to minimize harm to public trust interests.

To fulfill these obligations, the Board will need to reform the way it approaches water quality and flow management in the Delta. It must immediately curtail unreasonable uses and diversions of water. It must evaluate in its review of the Bay-Delta Plan the changes to water quality standards that are necessary to protect public trust interests and prevent ongoing damage to ecosystem health, tribal cultural survival, and community well-being – including whether the flow criteria outlined in its 2010 Public Trust Flows report are necessary or adequate to meet these duties. It must integrate these protections into its water quality standards update. As discussed below, it must regulate and restructure water rights to ensure effective implementation of the new standards. And it must continuously monitor use and diversion of Bay-Delta water to ensure that public trust interests are protected and that ecosystem, community health and wellbeing, and tribal cultural survival are prioritized.

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[204] *Public Trust Flows Report* at p. 5.

[205] *Id*.

[206] *Phase II Scientific Basis Report* at p. 1-5.

[207] *Id*.

[208] *Public Trust Flows Report* at p. 5.

D. The Board should regulate and restructure water rights to implement revised Bay-Delta water quality standards.

The voluntary agreement framework is based on the premise that to obtain reductions in diversion and use of Bay-Delta water outside of temporary emergency curtailment measures, the State will need to negotiate with and pay off water rights claimants to guarantee even marginal reductions in their water withdrawals. But this premise is flawed, as regulating and even restructuring water rights is clearly within the State Water Board's scope of authority. If the Board refuses to exercise that authority and instead relies on the voluntary agreement framework, it would undercut its own commitment to reducing structural disparities in the water rights regime by transferring even more capital and control to the most entrenched interests.

The State Water Board has the regulatory authority – and, indeed, the obligation – to restructure water rights to meet water quality and flow objectives to support a living Delta. All water rights are usufructuary only: the water itself "is the property of the people of the State." (Wat. Code, § 102; *see also id.* § 104 [declaring that "the people of the State have a paramount interest in the use of all the water of the State"].) The State has express authority to "determine what water of the State, surface or underground, can be converted to public use or controlled for public protection," irrespective of any water rights claims. (Wat. Code, § 104.) The Board also has a specific statutory duty to take "all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent . . . unreasonable use of . . . water in this state." (Wat. Code, § 275; *see also id.* § 100.) The public trust doctrine too imposes an affirmative obligation on the Board to ensure that there are sufficient instream flows to safeguard existence and enjoyment of public trust resources now and in the future. (*See, e.g.*, *Nat. Audubon Society*, 33 Cal.3d at p. 434.) The Board's authorities and duties extend not only to permitted water rights, but also to pre-1914 and riparian rights, which are equally subject to the constitutional proscription on unreasonable use of water and to public trust protections. (*See, e.g.*, *Light*, 226 Cal.App.4th at pp. 1487, 1489.) The State Water Board itself has repeatedly recognized its authority to implement Bay-Delta water quality controls through regulation of water rights.[209]

Instead of relying on this authority, the State Water Board has signaled its intent to implement water quality controls in the Bay-Delta by paying off water rights claimants with

[209] *See, e.g.*, State Water Resources Control Bd., *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, p. 22 (Dec. 12, 2018) ("The State Water Board may implement the objectives by conducting water right proceedings, which may include adopting regulation, conducting adjudicative proceedings, or both, that take into consideration the requirements of the Public Trust Doctrine and the California Constitution, article X, section 2.").

taxpayer funds to voluntarily reduce their exports.[210] These payments would provide a massive public subsidy to the largest water rights holders in the state to curtail uses that are manifestly unreasonable and thus beyond the scope of any water right. (*See* Wat. Code, § 100 [declaring that no water right shall "extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water"]; Cal. Const., art. X, § 2.) They would also perpetuate centuries of harm that the state's water rights and water management system itself has done to tribes and communities of color. As the State Water Board has recognized, the Board's own "programs were established over a structural framework that perpetuated inequities based on race."[211] They also facilitated displacement of tribes from their homelands, exclusion of communities of color from water rights, and the dewatering and devastation of ecosystems. If the State Water Board is truly committed to repairing the injustices and inequities baked into its own programs and the water rights regime it implements, as it has expressed, it should begin by meaningfully regulating all water rights claims in the Delta rather than transferring more public capital to the most powerful and entrenched interests.

III. Failure to Increase Bay-Delta Flows Causes Irreparable Harm to Tribes and Other Vulnerable Communities.

By leaving in place water quality standards for the Bay-Delta that fail to adequately protect public trust interests and beneficial uses – including tribal cultural resources, fish and wildlife protection, safe drinking water, and recreational use of waterways – the State Water Board is violating the rights of California tribes, Delta communities of color, and other vulnerable groups.

A. Bay-Delta water quality mismanagement threatens tribal sovereignty and religious freedoms.

Tribal Sovereignty

As the state's original inhabitants and as sovereign tribal nations, California tribes are entitled to participate in managing the resources, landscapes, and sacred sites they have stewarded and relied upon for millennia. The California Legislature recognizes "tribal sovereignty and the unique relationship of California . . . public agencies with California Native American tribal governments." (Assem. Bill No. 52 (2014) ch. 532 § 1(b).) In furtherance of tribal sovereignty, the Legislature adopted Assembly Bill 52 ("A.B. 52") in 2014, enshrining in the California Environmental Quality Act the legal duty of public agencies to consult with tribes traditionally and culturally affiliated with the geographic area

[210] *See 2022 VA Memorandum of Understanding* at App. 3 (Costs to Implement VAs), Table 4 (Funding for VAs' Framework) (identifying over 75% of funding coming from federal and state sources).

[211] State Water Bd. Anti-Racism Resolution ¶ 7.

affected by a project prior to project approval (Pub. Resources Code, § 21080.3.1(b)), and their obligation to "avoid damaging effects to any tribal cultural resource" whenever feasible (*id.* § 21084.3). The State Water Board has expanded upon A.B. 52's requirements, adopting its own tribal consultation policy.[212] Recognized tribal cultural resources include "sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a 'California Native American tribe.'" (*Id.* § 21074(a)(1).) The State Water Board identifies "sacred places, traditional gathering and hunting areas, viewsheds, and landscapes" as examples of tribal cultural resources that may be present along or in the vicinity of waterways.[213]

Effectuating tribal sovereignty in resource management decisions is also a central state policy priority. In 2011, Governor Brown issued an executive order requiring government-to-government consultation on policies that may affect tribal communities. (Exec. Order B-10-11 (2011).) Governor Newsom extended these commitments in 2019, issuing a formal apology to California tribes and establishing a Truth and Healing Council to begin addressing the State's "war of extermination" against native Californians in the early decades of statehood, and subsequent discriminatory laws and policies that "den[ied] the existence of tribal government powers that persisted well into the twentieth century." (Exec. Order N-15-19 (2019).) This executive order reaffirmed the state policy of government-to-government consultation with tribes on matters affecting tribal communities. (*Id.*)

The State Water Board's recent Anti-Racism Resolution likewise recognizes that "colonization, displacement, and genocide of Native American people in the United States have contributed to the loss of water resource and watershed management practices that supported Native American people's traditional food sources and ways of life" and to deprivation of inherent tribal water rights.[214] This Resolution acknowledges that current State watershed management practices privilege "large-scale diversion of water for municipal, industrial, agricultural, and commercial beneficial uses" to the detriment of tribes.[215] As one step toward repairing these historic and ongoing injustices, the State Water Board has committed to "improving communication, working relationships, and co-management practices with all California Native American tribes, including seeking input

[212] *See* State Water Resources Control Bd., *Tribal Consultation Policy* (June 2019), available at https://www.waterboards.ca.gov/about_us/public_participation/tribal_affairs/docs/california_water_board_tribal_consultation_policy.pdf.

[213] *See, e.g.*, State Water Resources Control Bd., *Draft Restoration Projects Statewide Order Program Environmental Impact Report*, p. 3.18-4 (Jun. 30, 2021).

[214] State Water Bd. Anti-Racism Resolution ¶ 7(b).

[215] *Id.*

and consultation on the Water Boards' rules, regulations, policies, and programs to advance decisions and policies that better protect California's water resources."[216]

The State Water Board's failure to timely update the Bay-Delta Plan through a participatory process in consultation with affected tribes impairs tribal sovereignty and contravenes these commitments to government-to-government consultation and repair. Multiple tribal nations, including Petitioners Winnemem Wintu and Shingle Springs Band of Miwok Indians, have deep ancestral ties to the Delta watershed, its headwaters, and hydrologically connected waterways like the Trinity River.[217] Myriad landscapes, sites, and species that are fundamental to these Tribes' identity, culture, spirituality, and economy fall within the scope of tribal cultural resources impacted by State water quality mismanagement. (*See* Pub. Resources Code, § 21074(a).) As the State Water Board recognized in its Anti-Racism Resolution, the ecological harms of excessive water diversion and export impair these interests, furthering the alienation of tribes from their waterways and the species and cultural resources they contain.[218] Far short of fulfilling its commitment to co-managing waterways with affiliated tribes,[219] the State Water Board has failed to meaningfully consult with tribes in the process of reviewing and updating Bay-Delta water quality standards, eschewing fulsome public participation and consultation in favor of closed-door negotiation of flow measures.[220] Nor has the State consulted with tribes at all in the voluntary agreement

[216] *Id.* at p. 8, ¶ 7.

[217] *See, e.g.*, Attachment C, Decl. of Morning Star Gali ¶ 2; Attachment B, Decl. of Gary Mulcahy ¶¶ 3, 4; Attachment A, Decl. of. Malissa Tayaba ¶ 2.

[218] State Water Bd. Anti-Racism Resolution ¶ 7.

[219] *Id.* at p. 8, ¶ 7 (reaffirming State Water Board's "commitment to improving communication, working relationship, and co-management practices with all California Native American Tribes, including seeking input and consultation" on regulations, policies, and programs).

[220] The State Water Board's substitute environmental document for the Bay-Delta Plan Phase II update must comply with CEQA substantive requirements and policy goals, including A.B. 52's tribal consultation requirements and avoidance of impacts on tribal cultural resources. While the Bay-Delta Plan substitute environmental document is created under a certified regulatory program pursuant to Public Resources Code section 21080.5 (23 Cal. Code Regs. § 3775), this exemption only embraces Chapters 3 and 4 and section 21167 of CEQA. (Pub. Resources Code, § 21080.5(c).) It therefore does not exempt the Board from complying with A.B. 52 requirements in its environmental reviews, which are codified in chapters 2.5 and 2.6 of CEQA. (*See* Pub. Resources Code, §§ 21073, 21074, 21080.3.1, 21084.3.) In addition, environmental reviews under the Board's certified regulatory program "remain[] subject to the broad policy goals and substantive requirements of CEQA." (*Pesticide Action Network N. Am. v. Dept. of Pesticide Regulation* (2017) 16 Cal. App. 5th 224, 243.) In A.B. 52, the Legislature expanded CEQA's substantive requirements and policy goals to include consideration of impacts on tribal cultural resources and incorporation of tribes' unique expertise in environmental assessments. (Assem. Bill No. 52 (2014) ch. 532 § 1(b)(4), (5).) The Legislature intended for these substantive requirements to be fulfilled early in the environmental review process. (*Id.* § 1(b)(7).) Moreover, the State Water Board's own tribal consultation policy contains no indication that substitute environmental documents have distinct tribal consultation requirements.

negotiations, despite their obvious impacts on tribal cultural resources and other tribal interests. (*See* Section I.C, above.)

Moreover, the State Water Board's ongoing failure to protect tribal cultural resources and correct the recognized ecological crisis in the Delta threatens tribes' sovereign right to exist, as protected under international law in the United Nations Declaration on the Rights of Indigenous Peoples.[221] For Petitioners Winnemem Wintu and Shingle Springs Band of Miwok Indians, the loss of these Delta resources amounts to cultural genocide.[222] In the words of the Winnemem Wintu Chief, Caleen Sisk: "We used to be 20,000 people along the river and we're dwindling out like the salmon. We only have 126 members of the Tribe left and so if the salmon are going extinct, we can only guess that so will we."[223]

Likewise, annual export of over half the natural flow of the Trinity River to the Sacramento River to satisfy Central Valley Project contractors has decimated fish populations on the Trinity River and lower Klamath River basin, which have "defined the life and culture of area Indians since time immemorial."[224] For the Yurok and Hoopa Valley Tribes, the "[f]ishery resources of the area have been characterized as 'not much less necessary to the existence of the Indians than the atmosphere they breathed.'"[225] Klamath River basin tribes historically consumed in excess of 2 million pounds of salmon annually from runs estimated to have exceeded 500,000 fish.[226] Salmon play an essential role in the Tribes' food sovereignty and subsistence, livelihoods, economy, and ceremony and are foundational to their culture, identity, and ways of life. As a consequence, the collapse of Klamath River basin fisheries presents an existential threat to tribal existence. As one Yurok tribal member explained, "When we can't be in our river, can't eat our fish, it kind of takes our purpose away. We have one of the highest suicide rates . . . and I think that's directly

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Instead, the policy affirms the importance of tribal consultation beyond what A.B. 52 mandates: "In the absence of legal consultation requirements, a best practice is to consult with tribes out of respect for their status as sovereign governments or based on the unique tribal interests that may be affected by a proposed action, policy, or set of activities." (State Water Resources Control Bd., Tribal Consultation Policy, p. 10 (2019)).

[221] U.N. Decl. on the Rights of Indigenous Peoples, Sept. 13, 2007, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (hereafter, "UNDRIP").

[222] Attachment A, Decl. of Malissa Tayaba ¶ 17; Attachment B, Decl. of Gary Mulcahy ¶ 37.

[223] Attachment F, *Water Curtailment Cases Amicus Br.* at p. 6.

[224] *Trinity River ROD* at p. 4; *see also id.* at p. 20 (explaining that decision allows for the "continued export to the Central Valley of a majority of the waters flowing into the TRD (averaging 52%) and the continued generation of power).

[225] *Id.* at p. 4 (quoting *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981).)

[226] *Id.* at pp. 3-4.

correlated to our lack of salmon and our inability to continue our way of life."[227] The disappearance of these fisheries, and the violence it does to tribal existence, is the predicted and predictable result of mismanagement of Delta waters and prioritization of water contracts and agricultural demands in the south over the California tribes' rights to cultural survival.

Free Exercise of Religion

Tribes' fundamental right to exercise their religion is enshrined in the U.S. and California Constitutions. The First Amendment of the U.S. Constitution protects free exercise of religion, prohibiting all "governmental regulation of religious beliefs as such." (*Sherbert v. Vernier* (1963) 374 U.S. 398, 402.) The California Constitution likewise guarantees "[f]ree exercise and enjoyment of religion without discrimination or preference." (Cal. Const., art. 1, § 4.) These freedoms extend to traditional tribal religious and spiritual practices. In particular, the American Indian Religious Freedom Act ("AIRFA") protects Indigenous Peoples' "inherent right of freedom to believe, express, and exercise [their] traditional religions . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." (42 U.S.C. § 1996). The State Water Board recognizes that AIRFA "requires policies of all governmental agencies to eliminate interference with the free exercise of Native religion and to accommodate access and use of religious sites to the extent that is practicable and consistent with an agency's essential functions."[228] Likewise, international law enshrines the religious freedoms of Indigenous communities, including those expressed through the "distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources."[229]

The religious freedoms of Petitioners Winnemem Wintu, Shingle Springs Band of Miwok Indians, and similarly situated tribes are impaired by the State Water Board's failures to maintain adequate water quality standards for the Bay-Delta and to prevent excessive water diversions and exports. Many of these tribes' religious practices are inextricably tied to Delta species and resources, and to sacred sites located along Delta waterways. The loss of these species and alienation from Delta resources and sacred sites, resulting from

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[227] Lisa Morehouse, *'It Takes Our Purpose': With No Salmon, Yurok Tribe Struggles with Identity*, National Public Radio (Nov. 29, 2017), available at https://www.npr.org/sections/thesalt/2017/11/29/561581193/it-takes-our-purpose-with-no-salmon-yurok-tribe-struggles-with-identity.

[228] State Water Resources Control Bd., *Draft Restoration Projects Statewide Order Program Environmental Impact Report*, p. 3.18-4 (Jun. 30, 2021).

[229] UNDRIP, art. 25; *see also, e.g.*, *id.* at art. 12 (recognizing the right of Indigenous communities to "manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies" and to "maintain, protect, and have access in privacy to their religious and cultural sites").

impairment of natural flows and the presence of harmful algal blooms, prevents tribes from exercising their religion.

For example, mugwort, a river plant found in Delta waterways, is an essential resource in almost every religious ceremony practiced by the Shingle Springs Band of Miwok Indians. Tribal members harvest mugwort from their ancestral village sites along Delta waterways, including Pusune and Wallok. The mugwort found in these locations is sacred – the plants there today are descended from those harvested by the Tribe's ancestors for their religious ceremonies. After harvesting, tribal members dry the mugwort and burn it for cleansing during ceremonies, much like sage is used. This religious exercise requires access to mugwort at Pusune, Wallok, and other sacred sites throughout the year. However, polluted waters and harmful algal blooms at and around these sites often make the mugwort growing there unsuitable for use, due to concerns about potential exposure to cyanobacterial toxins and other harmful pollutants. The Tribe's loss of access to mugwort and other similarly impacted Delta resources that are used in ceremony prevents the Tribe from fully exercising their religion.[230]

Impairment of Tribal Reserved Rights

The Board's failure to adequately manage Bay-Delta water quality threatens the federal reserved rights of Tribes. This is particularly apparent for the Yurok and Hoopa Valley Tribes in the Trinity and lower Klamath Rivers. "[N]umerous court decisions have confirmed that when the United States set aside in the nineteenth century what are today the Yurok and Hoopa Valley Indian reservations along the Klamath and Trinity Rivers, it reserved for the Indians federally protected fishing rights to the fishery resources in the rivers running through the reservations."[231] The Tribes' fishing rights guarantee them the "right to harvest quantities of fish on their reservations sufficient to support a moderate standard of living," up to fifty percent of the harvest in any given year.[232] The Tribes' fishing rights also carry with them non-consumptive reserved rights to sufficient levels of instream water flows to support tribal fishing practices. (*Baley*, 942 F.3d at pp. 1321-22.) These water rights vested "at the latest in 1891 and perhaps as early as 1855" and are senior to all subsequent appropriative rights. (*Id.* at p. 1323 [citation omitted]; *see also id.* at p. 1322 [explaining that

[230] Attachment A, Decl. of Malissa Tayaba ¶¶ 10, 15; *see also* Attachment B, Decl. of Gary Mulcahy ¶ 32 (describing how harmful algal blooms in Delta headwaters prevent exercise of Winnemem Wintu religious ceremonies, including girls' coming of age ceremony and water blessings).

[231] Memorandum of Solicitor to Secretary, Fishing Rights of the Yurok and Hoopa Valley Tribes, M-36979 at p. 2 (Oct. 4, 1993) (citing cases), available at https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-36979.compressed.pdf; *see also Baley v. United States* (Fed. Cir. 2019) 942 F.3d 1312, 1323 ("Federal and California state courts have recognized that the right of the Yurok and Hoopa Valley Tribes to take fish from the Klamath River for ceremonial, subsistence, and commercial purposes was reserved when the Hoopa Valley reservation was created."); *Parravano*, 70 F.3d at p. 546.

[232] *Id.*

Yurok and Hoopa Valley Tribes hold "the right to prevent other appropriators from depleting the streams[']s waters below a protected level in any area where the non-consumptive right applies." (quoting *United States v. Adair* (9th Cir. 1983) 723 F.2d 1394, 1411)].) As federal reserved rights, they preempt any competing water rights claims under state law. (*Id.* at 1340 [citing *Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.* (9th Cir. 2017) 849 F.3d 1262, 1272].)

The Board's mismanagement of Delta flows and its failure to timely and transparently review and update the Bay-Delta Plan infringe on these rights in several respects. First, during the extreme drought conditions of recent years, the State Water Board has allowed Reclamation to draw down already depleted Trinity Lake reserves for temperature control on the Delta. Reclamation's actions pursuant to these Board decisions have raised temperatures of water released from Lewiston Dam into the Trinity River, resulting in massive fish kills along the Trinity and lower Klamath and infringing the Tribes' right to maintain a "reasonable livelihood" or "moderate standards of living" from the fish runs. (*Baley*, 942 F.3d at p. 1337.) This is so despite warnings from the National Marine Fisheries Service that existing temperature controls for the Trinity River under Order 90-5 are already inadequate to protect salmon and that the exceedances allowed under Reclamation's Sacramento River TMP would result in even greater temperature exceedances.[233] And it is so despite case law clearly barring both the State and Reclamation from interfering with tribal reserved rights.[234] To the contrary, federal courts have confirmed that Reclamation must halt water delivery to avoid placing Yurok and Hoopa Valley tribal fishing resources in jeopardy. (*See id.* at p. 1335.)

Second, inadequately protective flow-based standards under the current Bay-Delta Plan and the Board's inaction in reviewing and updating them have produced the emergency temperature management conditions on the Sacramento River that Reclamation and the State Water Board seek to avoid through increased reliance on Trinity River imports. Continued Board inaction on the Bay-Delta Plan will predictably worsen assaults on Yurok and Hoopa Valley Tribes' reserved rights, as climate change-driven droughts decrease Delta flows and increase demand for Central Valley Water Project exports, thereby also increasing demand for Trinity River imports.

Third, the State has failed to engage in any consultation with the Yurok and Hoopa Valley Tribes on key Bay-Delta measures that would affect their reserved fishing rights. The Yurok and Hoopa Valley Tribes have, for instance, been excluded from negotiations over Sacramento River basin flow criteria in the voluntary agreements, which are themselves entirely silent on flows in the Trinity River basin despite directly affecting them.

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[233] *See NMFS Comments on 2022 TMP.*

[234] *See, e.g.*, *Agua Caliente Band of Cahuilla Indians*, 849 F.3d at p. 1272; *Arnett*, 48 Cal.App.3d at 461.

B. Bay-Delta water quality mismanagement impairs civil rights and contravenes the Board's racial equity commitments.

The harms resulting from the State Water Board's inaction on the Bay-Delta Plan fall disproportionately on Northern California tribes and other communities of color, in violation of civil rights protections and the State's commitment to advancing environmental justice and racial equity.

Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.) and the EPA's implementing regulations (40 C.F.R. Part 7) prohibit entities that receive federal financial assistance from engaging in activities that subject individuals to discrimination on the basis of race, color, or national origin. When any part of an agency is extended federal financial assistance, all of its operations are considered a "program or activity" subject to Title VI requirements. (42 U.S.C. § 2000d.) As a recipient of federal funds from the EPA,[235] the State Water Board must adhere to these Title VI requirements with respect to all of its programmatic and regulatory activities, including regulation of Bay-Delta Plan water quality. The EPA must also ensure that its funds are not used to support discrimination on the basis of "race, color, or national origin." (42 U.S.C. § 2000d; 40 C.F.R. Part 7.) The State Water Board's failure to adhere to Title VI requirements may result in termination or refusal of federal assistance and other measures necessary to obtain compliance. (*See* 40 C.F.R. § 7.130.)

Agencies violate Title VI by carrying out activities that either have discriminatory intent or, as is the case here, create a disparate impact on protected groups (40 C.F.R. § 7.35(b)), including tribes and other communities of color (*id.* § 7.25). This includes adoption or administration of policies, programs, and regulations that are neutral on their face but have the effect of discriminating against protected groups. (*Id.* § 7.35(b).) Title VI disparate impact protections prevent "public funds, to which all taxpayers of all races contribute, [from being] spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." (H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963).) Agencies that have previously discriminated against protected classes must "take affirmative action to provide remedies to those who have been injured by the discrimination." (40 C.F.R. § 7.35(a)(7).)

In addition to these federal requirements, California state law codifies the duties of public agencies to address racial inequities in land use and environmental planning. California Government Code section 11135 contains parallel language to Title VI, prohibiting discriminatory activities administered by state agencies, including the State Water Board. (Gov. Code, § 11135(a); *Darensburg v. Metropolitan Transportation Com.* (9th Cir. 2011) 636 F.3d 511, 519.) Section 11135 applies to discrimination in

[235] In fiscal year 2021, EPA awarded over $252 million to the State Water Board – equaling 2.12% of EPA spending and the second highest obligated amount to grantees. *See* USA Spending, *FY 2021 Spending by Agency*, https://www.usaspending.gov/explorer/agency (last accessed May 22, 2022).

environmental matters. (*See Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal. App. 4th 1116, 1137 (conc. & dis. opn. of Rubin, J.)) Through more recent legislative enactments specific to environmental justice, the Legislature has also expressed its recognition of the need to address the "inequitable distribution of environmental benefits and burdens" resulting from "generations of injustice towards people of color, low-income residents, tribal communities, and other marginalized populations in California through discriminatory environmental and land use policies." (Assem. Bill No. 1628, § 1 (2019).) And it has memorialized its intent to rectify these disparities. (*Id.*)

California law seeks to correct these disproportionate environmental burdens by advancing "environmental justice," defined as the "fair treatment and meaningful involvement of people of all races, cultures, incomes, and national origins, with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies." (Gov. Code, § 65040.12(e).) Recent laws designed to promote environmental justice include, among others, laws that: direct funding to communities facing disproportionate environmental burdens (Sen. Bill No. 535 (2012); Assem. Bill No. 1550 (2016)); create a community air quality protection program (Assem. Bill No. 617 (2017)); and require environmental justice to be addressed in local government planning (Sen. Bill No. 1000 (2016)). Recognizing the State's role in entrenching racial inequity in water rights and water management, the State Water Board has also resolved to "center [its] work and decision-making on Black, Indigenous, and people of color who are disproportionately represented in the most vulnerable communities and in unsheltered populations."[236]

The State Water Board's mismanagement of Delta waters, including its failure to review and update the Bay-Delta Plan water quality standards, disparately impacts tribes and other communities of color, contravening these federal and state protections. For instance, the collapse of native fish populations severely impacts tribes and low-income communities of color. These fish species historically have played an important role in tribal diets, and the loss of this food source has impaired the health of tribal members – contributing to high rates of obesity, type 2 diabetes, and cardiovascular disease – and eroded tribal religious, spiritual, and cultural practices. The loss of fish species also impairs access to safe food sources by Delta subsistence fishers, who are predominantly people of color.[237]

Likewise, the proliferation of harmful algal blooms most severely affects communities living in the vicinity of Delta waterways and tribes whose access to traditionally important waterways and water-based practices is impaired. In South Stockton, where Petitioners Little Manila Rising and Restore the Delta are located, communities residing near polluted and largely dewatered Delta waterways are disproportionately low-income communities of color which were segregated into disinvested neighborhoods through discriminatory real estate and lending policies. Members of these communities may be

[236] State Water Bd. Anti-Racism Resolution at p. 7, ¶ 3.

[237] Attachment E, Decl. of Barbara Barrigan-Parrilla ¶¶ 7, 16, 21.

directly exposed to the hazardous blooms in the water or breathe in aerosolized toxins from the blooms. Air quality impacts from aerosolized blooms layer on top of some of the heaviest levels of air pollution in the state, which already put these communities at serious health risk.[238] These algal blooms pose a particularly acute risk for unhoused residents living near and even in polluted waterways in South Stockton.[239] Harmful algal blooms also alienate communities of color living near Stockton waterways from these resources, depriving them of the economic development and recreational benefits the waterways would otherwise afford.[240] Additionally, the blooms prevent tribes from accessing and utilizing cultural and spiritual resources in and around waterways, from practicing tribal subsistence fishing, and from otherwise exercising water-based traditional practices, further entrenching the State's long history of alienating tribes from Delta waters and headwaters.[241]

On top of these environmental injustices, the State Water Board's failure to adopt sufficiently protective water quality standards entrenches a discriminatory system of water rights that was founded on the dispossession of Indigenous Californians and exclusion of communities of color, and that continues to prioritize large-scale agricultural interests over those of vulnerable Californians living in the Delta. Yet, despite the discriminatory origins of senior water rights, the preferential treatment afforded to senior water users persists today. The Bay-Delta Plan water quality standards to-date have been effectively constrained by senior water rights allocations, which have remained largely overlooked by the Board, with rare exceptions like the emergency curtailments of diversions by senior water users in Mill and Deer Creeks to protect salmon in 2014-15 and 2021.[242] The result is a Delta in crisis, the harms of which fall disproportionately on California tribes and Delta communities of color. Delay of a fulsome Bay-Delta Plan update maintains this discriminatory status quo, privileging senior water users and other legal water rights claimants at the expense of California tribes, marginalized Delta communities, and public trust interests. Backwards, non-participatory processes like negotiation of the voluntary agreements further entrench exclusion of protected classes and their interests, in violation of Title VI's purpose of preventing the use of public funds to "entrench" racial discrimination. (*See* H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963).)

To correct these disparate impacts, the State Water Board will need to follow through on its commitments to updating the Bay-Delta Plan through open, participatory processes that center the voices, interests, and needs of communities most heavily burdened by the ecological crisis. The Board will also need to follow through on its commitments to

[238] Attachment D, Decl. of Dillon Delvo ¶ 14.

[239] *Id.* ¶ 17.

[240] *Id.*

[241] *See, e.g.*, Attachment A, Decl. of Malissa Tayaba ¶ 16; Attachment B, Decl. of Gary Mulcahy ¶ 32.

[242] State Water Resources Control Bd., *Low water levels trigger curtailments for water right holders in Mill and Deer creeks* (Oct. 11, 2021).

engaging in government-to-government consultation with tribes affected by Bay-Delta water quality controls. And it will need to regulate rights to the use and diversion of Bay-Delta waters to ensure protection of the full range of beneficial and public trust uses.

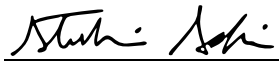
CONCLUSION

The State Water Board must realize its commitments to racial equity and repair of past injustice through an inclusive, participatory process for governance of Bay-Delta water resources that prioritizes the health of the ecosystem and the communities it sustains. For the reasons set forth above, Petitioners respectfully request that the State Water Board: (1) immediately undertake and timely complete review of water quality standards in the Bay-Delta Plan; (2) engage in meaningful government-to-government consultation with affected tribes and center opportunities for meaningful public participation by other impacted Delta communities in the review and revision process; (3) revise beneficial uses in the Bay-Delta Plan to incorporate tribal beneficial uses and non-tribal subsistence fishing beneficial uses; (4) issue new and revised water quality standards adequate to protect the full range of beneficial uses and public trust interests; and (5) initiate a rulemaking to regulate all recognized rights to Bay-Delta water – including pre-1914 appropriative rights – and limit water diversions and exports to levels consistent with the revised water quality standards.

Respectfully Submitted,

DATED: May 23, 2022

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By: 

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DATED: May 23, 2022 Shingle Springs Band of Miwok Indians

By: _____
Malissa Tayaba

DATED: May 23, 2022 Winnemem Wintu Tribe

By: _____
Caleen Sisk

DATED: May 23, 2022 Save California Salmon

By: _____
Regina Chichizola

DATED: May 23, 2022 Little Manila Rising

By: _____
Dillon Delvo

DATED: May 23, 2022 Restore the Delta

By: _____
Barbara Barrigan-Parrilla

ATTACHMENTS

Attachment A: Declaration of Malissa Tayaba

Attachment B: Declaration of Gary Mulcahy

Attachment C: Declaration of Morning Star Gali

Attachment D: Declaration of Dillon Delvo

Attachment E: Declaration of Barbara Barrigan-Parrilla

Attachment F: Amicus Curiae Brief in Support of State Water Resources Control Bd., *California Water Curtailment Cases*, Nos. H047270 & H047927 (Sixth Appellate Dist. Ct. of App. Mar. 14, 2022)

Attachment A

Declaration of Malissa Tayaba

I, Malissa Tayaba, declare as follows:

1. I submit this declaration in support of the Petition for Rulemaking by Petitioners Little Manila Rising, Restore the Delta, Save California Salmon, Shingle Springs Band of Miwok Indians, and Winnemem Wintu Tribe. The matters stated herein are stated upon my personal knowledge and, if called to testify, I could and would testify competently to them.

2. I am a member of the Shingle Springs Band of Miwok Indians, Indigenous Peoples of the Sacramento Valley. Since time immemorial, our ancestors stewarded and utilized resources from Delta waterways – including the Sacramento, American, Feather, Bear, and Cosumnes Rivers – for sustenance, medicine, transportation, shelter, clothing, and ceremony, among other cultural and subsistence uses. Our history, sacred sites, and cultural resources are found throughout these waterways. I was raised in the west side of Sacramento, near the Nisenan village of Pusune at the confluence of the American and Sacramento Rivers. When I was four, my family relocated to the Shingle Springs Rancheria in El Dorado County, about 40 miles east of Sacramento. Two years ago, I moved my family from the Rancheria to Verona, near the Nisenan village of Wallok at the confluence of the Feather and Sacramento Rivers, to deepen our connection with the waterways, natural resources, and sacred sites that are our lifeblood.

3. For nearly two decades, I have worked for the tribal government. I founded our Traditional Ecological Knowledge (TEK) program to help preserve the Tribe's traditional lifeways, natural resource management, and spiritual practices so that these teachings can be passed down through the generations. Traditional knowledge and cultural revitalization are vital elements of who we are as tribal people. In 2021, I began a three-year term as a Vice Chair of the Tribe, where I am continuing to serve as a cultural leader and culture keeper for the Tribe. I submit this testimony based on my personal experience of conditions in and around Verona, as well as my experience as Vice Chair with the challenges the Tribe has faced accessing cultural resources and sacred sites along our ancestral waterways.

My Timeless Connection to Delta Waters

4. My family is descended from the Nisenan and Miwok Tribe, who had village sites along the Sacramento River, stretching at least from the confluence with the Feather River down to

what is now the Freeport area of southern Sacramento. This particular area of my Tribe's vast ancestral territory is also known as Nissim Pawenan. Among many others, two sites of particular importance to me, my family, and Tribe are the Nisenan villages of Pusune and Wallok.

5. Pusune lies at the confluence of the Sacramento and American Rivers, located in what is today downtown Sacramento in an area known as Discovery Park. Pusune was the birthplace of Pamela Cleanso Adams, the matriarch of my family. Pamela is believed to have been born between 1832 and 1850; though the exact date is unknown, a newspaper referred to her as a centenarian when she passed in 1932. Pamela witnessed and experienced firsthand the colonialism, State-led violence, disease, privatization of land, and other forms of dispossession that decimated Native populations and forced many people from their ancestral lands and waterways. Through these attacks on her way of life and existence, Pamela survived. She carried my family's name and is the one the Adams clan are all descended from. To my family, she is our matriarch – who we are evolved from. Despite the State's and colonizers' efforts to remove and dispossess our ancestors, Pamela always remained at the water, connected to Delta species and natural resources. Emblematic of her deep relationship to Pusune, Pamela tethered her houseboat to the confluence and lived there until her death. This relationship is timeless; she was born at the confluence, lived and died at the confluence, and her presence, along with many other ancestors, remains there today. Many members of my family – direct descendants from Pamela – remained near the confluence for generations.

6. In addition to Pusune's importance as the birthplace of Pamela and the ancestral home of the Adams clan, the village's strategic location also makes it a significant site. Situated where the Sacramento and American Rivers meet, Pusune was highly trafficked, as our ancestors traveled up and down the rivers. The value of this confluence as a center of life was recognized by non-Native settlers, who chose to build Sacramento on the same site.

7. Wallok is located at the confluence of the Sacramento and Feather Rivers, in what is now known as Verona. In the mid-nineteenth century, this area was a haven where Nisenan and Hawai'ian communities comingled. Alongside Wallok, this confluence was also home to a Hawai'ian village established by native Hawai'ians who were forcibly brought to Nisenan territory

in 1839 by Swiss land baron John Sutter. Sutter enslaved hundreds of Native people to power his nearly 50,000-acre ranch in the Sacramento Valley. Both Wallok and the Hawai'ian village were fishing villages, and residents often traveled up and down the rivers to catch and sell fish. The Nisenan and Hawai'ian communities interacted in Verona, and the cultures became mixed as they married and had children together. This is my family's story: Pamela traveled from Pusune to Wallok, where she married a Hawai'ian man from the village. Though Pamela was rooted in Pusune, she would travel to Verona often, lived there for a period, and spent significant time there within the community.

8. These confluences are not only the location of important village sites; they also symbolize the interconnectivity of our rivers, mirroring our interconnectivity with the water and the life it gives to us, the land, and all living beings.

9. The rivers were my ancestors' grocery store; their stewardship of Delta plant, animal, and fish species sustained them for millennia. When my ancestors fished these waters, they were abundant. Salmon, striper, catfish, sturgeon, eel, lamprey, and all other fish in the Sacramento area were part of their diet. Ethnographers have documented stories of people walking into the river and catching fish with their hands, they were so plentiful.

10. The rivers were also a source of my ancestors' spiritual and religious practice, providing materials for traditional regalia, cultural practices, and sites for ceremony. Traditional regalia is fundamental to our religious practice. Every part has a purpose – it describes who we are and why, and it connects us with the land. My ancestors precisely and skillfully crafted regalia from various traditional resources found along the rivers. They created headpieces from feathers of waterfowl like egrets and blue heron; fashioned skirts from the barks of willows, cottonwoods, dogwoods, dogbane, and other river plants; and adorned regalia with abalone, clam, and other shells gathered from the rivers. Plants, roots, and berries found along the rivers also played an important role in religious ceremony. For example, my ancestors harvested mugwort along the rivers near Pusune and Wallok and burned it for cleansing purposes in almost all of their ceremonies. The mugwort that I and other members of the Tribe harvest at these sites today is descended from the plants gathered by my ancestors, connecting us to them.

My Cultural Survival Requires a Healthy Delta

11. When my family was removed from their ancestral rivers through colonialism, genocide, discriminatory laws, disease, and other forms of dispossession, much of our language and many of our cultural and spiritual practices were lost. At that time, my family and other tribal ancestors were known as the Verona Band of Homeless Indians. Later, we became the Shingle Springs Band of Miwok Indians, after the Secretary of the Interior purchased 160 acres for our ancestors in Shingle Springs, California in 1920. This rocky, inhospitable land is about 40 miles from Pusune and the Delta waterways that have been our lifeblood since time immemorial. The Rancheria land was inaccessible to my family and many other tribal members for decades after it was put into trust for our Tribe.

12. Despite these many obstacles, I have remained connected to the Delta waterways and landscapes that have always been my family's home. I spent much of my childhood driving back and forth between the Shingle Springs Rancheria and Sacramento to access my family's ancestral home in Pusune and the cultural and spiritual resources found at the confluence of the Sacramento and American Rivers.

13. I have been working to return the Tribe to our ancestral Delta waterways and restore connections to our ancestors' culture and way of life. I founded the Tribe's Traditional Ecological Knowledge (TEK) program 5 years ago to begin this process of relearning and reclaiming our culture and healing the alienation that exists for many tribal members. I began TEK's work focused on building traditional regalia for our ceremonies, using resources from Pusune, Wallok, and other sites with river plants and species descended from those gathered by our ancestors. Building that regalia deepened my awareness of the importance of being connected to our villages, the rivers, and the resources they contain. From there, we have spent a lot of time reeducating the Tribe about who we are and where we are from, bringing people back to our land and village sites, and teaching them how to make regalia, food, clothing, shelter, and transportation all out of natural resources like our ancestors did. This work reforges and sustains our connection to the rivers and enables us to practice our true way of life, now and for future generations.

14. Our TEK program has come a long way in the last few years, including purchasing land in Verona that enables us to access our ancestral village sites and the resources found at the confluence of the Sacramento and Feather Rivers. Beyond physically getting back to Verona, there is a newer generation of our tribal youth that need to be exposed to the river, need to learn how to fish, and how to live our traditional ways of life.

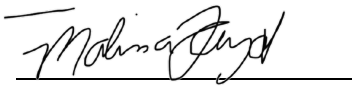
15. Despite our successes building our cultural knowledge and regaining access to our ancestral waterways and resources, the degraded condition of the Delta interferes with our efforts to do the reeducation that is vital to our cultural survival. For example, traditional riparian cultural resources – like tule, a long grassy plant that once lined the waterways and served many purposes for our ancestors and is continued to be used by tribal members today, including in regalia, basket weaving, transportation, and shelter – either no longer exist or are not safe to gather and use because of water quality issues. For example, I was down at Pusune recently and saw elderberry (which is an important medicine), one of the last sedge beds in the area, and new growth of willow and mugwort. But I also saw the polluted, stagnant quality of the water that sustained them. And the question is, how healthy are these plants for our medicinal, cultural, and spiritual uses, which together amount to religious uses?

16. Harmful algal blooms are becoming more and more of an obstacle for us every year in accessing traditional cultural resources, furthering the alienation already posed by the Delta's degraded state. For example, one of our tribal council members takes youth to the Verona area on group fishing trips, as part of our work to restore traditional diets and food sovereignty. Last year, these fishing trips were derailed because there were blooms all over the sloughs just up-river from Verona. So even if they could catch fish, they knew they could not eat them because of the risk of toxic exposure from the harmful algal blooms.

17. Although the landscape and the waterways have changed, we remain. We continue the seasonal gathering and the traditional teachings, we bring back the medicine, the ceremonies, and songs. We are the survivors of disease, colonization, genocide, and removal. We return to Pusune, Wallok, and other important sites to remember, reconnect, teach, learn, and restore. We cannot do this work without healthy rivers – the lands, plants, fish, and animals that connect me and

my Tribe to our ancestors and that are interwoven with my culture, religion, and identity cannot exist if there is not enough water in the Sacramento River and its tributaries to create the conditions needed to support life. If Delta water quality continues to deteriorate, I fear that the resources and landscapes we are working so hard to restore our connection to will become increasingly unsuitable for use or disappear altogether. Such loss would amount to cultural genocide for our Tribe.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and recollection. I executed this declaration on 23 May 2022 in Shingle Springs, CA.



Malissa Tayaba

Attachment B

Declaration of Gary Mulcahy

I, Gary Mulcahy, declare as follows:

Background

1. My English name is Gary Mulcahy. My Winnemem Wintu name is Ponti Tewis. I am a member of the Winnemem Wintu Tribe, and the Government Liaison for the Tribe. I have worked on and represented the Tribe on issues related to water flows, salmon runs, and tribal sovereignty and cultural use and access continuously from the late 1990s. I am testifying in that capacity. The matters set forth herein are stated upon my personal knowledge, and if called to testify, I could and would testify competently as to them.

2. I submit this declaration in support of the Petition for Rulemaking by Petitioners Little Manila Rising, Restore the Delta, Save California Salmon, Shingle Springs Band of Miwok Indians, and Winnemem Wintu Tribe.

3. We, the Winnemem Wintu, are a historic Native California Tribe listed as a recognized California Native Tribe by the California Native American Heritage Commission (NAHC), a California Agency. The Winnemem Wintu are also known as: Northern Wintoon, Baird Indians, McCloud River Indians, McCloud Wintu, Okwanuchu (a Shasta Indian word for people of the north), Oylaca (un-ratified Cottonwood Treaty of 1851), Wailacca (various spellings meaning northern people), Northern Wintu, Baird Auxiliary, and many others. The traditional name is Winnemem Wintu (Winnemem: meaning Middle Water (the McCloud River) and Wintu: meaning People – Middle Water People).

4. The Winnemem's historical territory includes the east side of the upper Sacramento River watershed, the McCloud River watershed from origin to termination, the Squaw Creek watershed from origin to termination, and approximately 20 miles of the Pit River from confluence of the McCloud River, Squaw Creek, and Pit River up to Big Bend.

5. The Winnemem Wintu are a spiritual people. We believe in a Creator who gave life and breath to all things. In our creation story we were brought forth from a sacred spring on Mt. Shasta. We were pretty helpless, couldn't speak, pretty insignificant. But the Salmon, which we call the Nur, took pity on us and gave us their voice, and in return we promised to always speak for them. Side by side, the Winnemem Wintu and the Nur have depended on each other for thousands

of years – the Winnemem speaking and caring for and trying to protect the salmon, and the salmon giving of themselves to the Winnemem to provide sustenance throughout the year. Ceremonies, songs, dances, and prayers of the relationship between the salmon and the Winnemem Wintu are intricately woven into the very fabric of Winnemem Wintu culture and spirituality.

6. Prior to colonization, there were around 20,000 Winnemem Wintu people living in several hundreds of villages in our traditional homeland, mostly situated up and down the McCloud River. Each village had a head person – a spiritual leader – and conducted ceremonies together at sacred sites, most of which were located in and around the rivers.

7. The deterioration of water quality and instream flows on rivers and tributaries in our traditional homeland has been damaging to our Tribe's cultural resources and practices, sacred sites, village sites, burial grounds, and access to traditional food resources.

Broken Treaty Promises

8. Long has the State of California prospered on the backs of the Indigenous Peoples – from the time this State was conceived, up to and including this very day. You, the State of California, lobbied in Congress to make sure the treaties were never ratified because you wanted all the resources for yourself. You, the State of California, paid $5 dollars a head for Native scalps, because you didn't want us here. You, the State of California, have destroyed millions of acres of Indigenous cultural lands, which included sacred sites, village sites, burial grounds and medicinal gathering areas, by allowing them to be paved over, dug up, planted over, dammed up, flooded out, logged out, siphoned off, or polluted to an uninhabitable state.

9. We, the Winnemem Wintu Tribe, signed a Treaty of Peace and Friendship on August 16, 1851, at Reading's Ranch in Cottonwood with the Federal Government and other Northern California tribes. This treaty promised the Winnemem Wintu a 25-square mile reservation comprising land along the Pit, McCloud, and Sacramento Rivers. This reservation was to be established in consideration for the ceding of all other Winnemem Wintu tribal lands to the Federal Government. This treaty, like the 17 others signed by California Tribes between 1851 and 1852, was never ratified. The U.S. Senate rejected the treaties in secret session at the request of the State of California and placed them under an injunction of secrecy for the next 50 years. The treaties

only resurfaced in 1905, after Congress had taken away the power of the President to make treaties with Native American tribes.

10. Although the Winnemem Wintu's land was never legally ceded, the State of California and the federal government acted as if it had been and began issuing land patents to settlers, mining claims to miners, and designating large swaths of our homelands as national forests. The Winnemem believed our treaty to be final and binding and relied on the federal government's promise that it would establish the reservation guaranteed by the treaty to protect the Winnemem from being massacred by the influx of white settlers and miners onto our lands. But the government broke its promise and the reservation never materialized. Despite increasing violence and threats to our survival, the Winnemem Wintu remained in our traditional homeland along the rivers with no place else to go.

11. We would like to state for the record that any and all determinations of water rights recognized or permitted under California state law are, in the view of the Winnemem Wintu, *illegal* on their face, and any diversion or use of water under color of these rights should be enjoined until such time as the inherent water rights of the Indigenous People of this state are recognized, protected, and preserved first and foremost, before and above, any and all other claims to water in the State of California.

Baird Fish Reservation

12. In 1872 the U.S. Fish Commission (now U.S. Fish and Wildlife Service) began construction of a salmon egg collection facility on the McCloud River about two miles above the confluence of the McCloud and Pit Rivers. This salmon egg collection facility was first known as the McCloud River Facility and later as the Baird Fish Hatchery.

13. The Winnemem Wintu were told that a 250-acre reservation had been established around the Baird Fish Hatchery, and that the Winnemem who worked at the hatchery would be protected. These Winnemem would become known as the "Baird Indians" or the "Baird Auxiliary." Unfortunately, the Winnemem Wintu later learned that the "reservation" was not a reservation for them, but a "fish reservation."

14. With the help of the Winnemem Wintu, the hatchery was successful in its egg exportation. From 1872 until it finally ceased operation in 1935, salmon eggs were sent all over the world to either augment existing salmon populations or to establish new salmon populations. The most significant were the salmon population and runs that were established in the rivers of New Zealand. (Based on U.S. Fish Commission reports [i.e., Stone and USFC references 1871 – 1907].)

15. New Zealand, a country where once no salmon existed in its rivers, now has teeming salmon runs throughout the year in all its rivers thanks to the Baird Fish Hatchery and the Winnemem Wintu that worked there. Meanwhile, here at home in California, our salmon runs are inching ever closer to extinction. The winter-run Chinook and the spring-run Chinook once thrived in vast numbers, but, with the loss of hundreds of miles of historical spawning grounds in the Upper Sacramento and McCloud River watersheds, the runs are now just a faint echo of what they once were.

16. Today, the winter-run salmon are listed as endangered under both the federal and California Endangered Species Acts. The spring-run salmon are listed as endangered under the state ESA and threatened under the federal ESA.

17. If the salmon go extinct, it is likely the Winnemem will too, as our numbers have dwindled with them. But there is a small light of hope. We believe that the salmon sent to New Zealand from the McCloud River to establish the New Zealand runs, if brought back home to the McCloud River from whence they came, could be the salvation from the probable extinction of the winter-run Chinook salmon.

Allotments

18. In 1893 President Grover Cleveland authorized the issuance of land allotments to members of the Winnemem Wintu Tribe. These allotments, some 4,480 acres in total, at 160 acres each, located on and around the Sacramento, McCloud, and Pit Rivers, allowed the Winnemem to remain somewhat in our traditional homeland. However, many of the allotments were on land that was unsuitable even for grazing.

19. Not all the Winnemem received allotments. On October 3, 1914, Horace Wilson, Supervisor within the Department of Interior, submitted to the Commissioner of Indian Affairs in

Washington, D.C. a letter indicating that a tract of land should be purchased for the Baird Indians along the McCloud River. The Winnemem were included in previous lists of Indian bands deserving of allotments, but while other bands listed in the letter eventually received land bases, the Winnemem (Baird) band did not.

20. On April 20, 1915, in a letter to Cato Sells, agent Terrell reported on his progress of purchasing lands for California's Indians. Terrell described the Indians near Redding as not fitting within the guidelines of the Allotment Act. He stated, however, that the Baird (Winnemem) Indians were in need of homes. He further stated that he investigated lands above the government fishery at Baird and proposed the purchase of these lands for the Winnemem. He described the self-sufficiency of the Winnemem based on the salmon and other sustenance crops. D.P. Doak, who owned several tracts of this land, was approached and was mentioned in later letters.

21. The Terrell letter also included a census of the Indians present, which included the name of Flora Curl, age 5. Florence Curl Jones was the Spiritual and Tribal Leader of the Winnemem Wintu Tribe. Florence passed away at the age of 95, but before she did, she passed leadership down to her great niece Caleen Sisk, who is the Spiritual and Tribal Leader of the Winnemem Wintu today.

22. In August 1915, Terrell sent a letter reporting to Washington that D.P. Doak, the man who had obtained land on the McCloud River, refused to sell land for the Indian Allotments, waiting instead for higher prices due to speculation about the building of a new dam that would provide power to the state. According to Terrell, Doak stated that he would not cause problems for the Indians living on his land, but he would not sell. The letter also stated that the government would provide lands for the Indians once removed due to the dam's construction.

Central Valley Project Indian Lands Acquisition and Construction of Shasta Dam

23. The idea of constructing a dam on the Sacramento River began to come to fruition in the 1930s. Agents were dispatched to landowners and allottees in the area that would be affected by any dam construction and the resulting inundation it would cause. Many of the Indian allottees could neither be found nor contacted, for a variety of reasons, regarding the possible sale or

exchange of their land for other land that would not be inundated. This proved to be problematic and delayed the beginning of construction of the dam.

24. To remedy this problem, in 1937 Public Law 198 [S1120] was introduced and titled the Central Valley Project Indian Land Acquisition Act ("Act"). This Act was signed into law in 1941, as 55 Stat. 612. The purpose of this Act specifically states:

> That, in aid of the construction of the Central Valley project, authorized by the Acts of April 8, 1935 (49 Stat. 115), and August 26, 1937 (50 Stat. 850), there is hereby granted to the United States, subject to the provisions of this Act, (a) all the right, title, and interest of the Indians in and to the tribal and allotted lands within the area embraced by the Central Valley project ....

25. This Act, which took all the Indian Lands within the area embraced by the Central Valley Project, also set out provisions for compensating those affected, e.g., (1) provide just compensation for the lands that would be flooded (55 Stat. 612, sec. 2); (2) acquire lands and improvements for the land taken (55 Stat. 612, sec. 3); and (3) provide a cemetery to be held in trust for the appropriate tribe or family, as the case may be (55 Stat. 612, sec. 4).

26. 1938 brought the beginning of construction on a new dam at Kennett, CA, known first as the Kennett Dam and later as Shasta Dam. When completed, the dam would capture flows from three rivers, the Sacramento, McCloud, and Pit, as well as the flow from other tributaries such as Squaw Creek. The captured water would eventually inundate thousands of acres of land, including hundreds of miles of prime salmon spawning grounds, historical tribal village sites, sacred sites, burial sites, and cultural gathering sites. The dam would also effectively extirpate all existing salmon runs in the upper Sacramento, McCloud, and Pit Rivers.

27. The removal of the Winnemem from the river began with the taking of Winnemem allotments. In 1943 the Winnemem living on traditional homelands on the lower McCloud River (Baird and surrounding areas) were removed. The Winnemem Wintu that were removed from the area were not removed by relocation, because no like land was ever provided to replace the land that would be flooded; they were removed by virtue of their homes being bulldozed down. The filling of Shasta Lake inundated Winnemem lands and sacred sites. The Department of Interior and its Bureau of Reclamation never fulfilled the requirements of the Act. No compensation was ever provided for the over 4,480 acres of allotment lands that were taken, nor were there ever any other

lands acquired for the Winnemem to replace the lands that were taken. The 4,480 acres of allotment lands did not even include the thousands to hundreds of thousands of acres of additional Winnemem Wintu historical homeland that were also taken. Over 90% of the Winnemem Wintu's historical village sites, sacred sites, burial sites, and cultural gathering sites along the three rivers and tributaries were inundated by the filling of Shasta Lake.

28. The only promised item from the Act that was somewhat completed was the creation of a cemetery in Central Valley, CA (now Shasta Lake City). But the Bureau of Reclamation failed to hold the cemetery in trust for the "appropriate tribe" as the statute directed, even though ALL the Indians that were originally interred in this cemetery were members of the Winnemem Wintu Tribe either by marriage or birth. The Bureau named the cemetery the Shasta Reservoir Indian Cemetery, thereby denying the Winnemem Wintu listing on the Bureau of Indian Affairs' list of tribes with assets held in trust.

29. Shasta Dam has since become known as the "keystone" of the Central Valley Project to both state and federal agencies, but to the Winnemem Wintu, it is an instrument that destroyed our homeland, culture, and identity as a People. Today, there are fewer than 130 Winnemem Wintu living. We have no tribal trust lands. We have no federal recognition. Despite being original inhabitants of the Delta headwaters, we have no recognized rights to the water.

30. Today, the Shasta Dam continues to wholly block the Nur's migration. In an effort to save our salmon, which we believe are a cultural and spiritual Tribal Property, the Winnemem Wintu Tribe submitted a draft Volitional Fish Passage Project to the Bureau of Reclamation in 2016 for the reintroduction of salmon into the McCloud River, and the means to progress through their natural life cycle – a swim-way that would allow the salmon to swim to the ocean from their spawning grounds and return from the ocean to spawn again of their own volition. So far, the State and Federal governments continue to reject our proposal in favor of a "trap and truck" plan to move fish in and out of the river. We believe this path is set up for failure.

Interests in Bay-Delta Plan Update and Consultation

31. The Winnemem Wintu will not survive as a People if the Nur do not return to our homeland. The Nur are at the center of Winnemem Wintu cultural and spiritual life. They were

also once the staple of our diet, sustaining us throughout the year. The salmon are gone now, as are our other traditional food stocks. Our people now suffer among the highest rates of diabetes of any population in the United States. Obesity and heart disease are common. Our inability to access the salmon and for the salmon to access our watershed are destroying our bodies as well as our spiritual and cultural existence. Even if there were a passageway around Shasta Dam, the salmon will not return to our headwaters if they cannot survive the migration through the Delta due to low flows and high temperatures. For this reason, and because we act in solidarity with Delta tribes suffering from the ecological crisis in their homelands, it is critical to the Winnemem Wintu that natural flows throughout the Delta be restored.

32. About four years ago, I began to hear reports from Winnemem Wintu tribal members of foul green algal blooms emerging in Shasta Lake, the Upper Sacramento, and on the Pit River arm and Squaw Creek arm. These harmful algal blooms ("HABs") have grown larger and more expansive on the years since. The HABs hurt the river ecosystems, further diminishing the Nur's chance of survival. They also block us from sacred sites and prevent us from holding many of our ceremonies. One of our coming-of-age ceremonies requires girls to swim across the river near a sacred rock, but if HABs are present, the water will be too toxic to swim in. We have also not been able to perform any water blessings in the areas affected by HABs – that is, cupping water in our hands from the from the river and placing it on our heads and hearts. These ceremonies can be performed on everyone, especially to introduce new souls to the site, and we conduct them frequently when not impeded by HABs.

33. We are ready to and insist on consulting government-to-government on water quality issues in the Bay-Delta. As described above, our home is in the headwaters of the Bay-Delta, and our continued existence as a People as impacted by the Bay-Delta water projects, including the Shasta Dam. Flows into and through the Delta determine the ability of the Nur to survive and eventually return to their headwaters in Winnemem Wintu homeland. We are in the geographic area of the Bay-Delta Plan and believe that we are entitled to be consulted as a sovereign government on setting of water quality standards and water rights and flow management for the Bay-Delta and its headwaters.

34. In 2018, I first learned of the State of California's decision to conduct secret negotiation of so-called "voluntary agreements" with water exporters and large agricultural water users that would determine any obligations they would have to reduce their diversions and exports of Bay-Delta water. As stated above, we do not believe in the legitimacy of the asserted water rights of these negotiating parties and see any attempt to recognize and even pay off these rights through the voluntary agreements as a further act of violence against our People.

35. Even though the voluntary agreements would directly affect the interests of our People and the interests of other Northern California tribes, neither I, nor any representative of the Winnemem Wintu, nor any representative of any tribe to my knowledge, have been invited into the negotiations nor consulted on the State's approach to use of the voluntary agreements for the Bay-Delta.

36. We, the Winnemem Wintu, have not been able to meaningfully participate in setting water quality standards for the Bay-Delta, despite how long the Board has had to update the 2006 Bay-Delta Plan. The Winnemem Wintu have never received notice or invitation for consultation with the State Water Board on any proceedings related to updates to the Bay-Delta Plan or either phase of its updating process. This is despite the fact that our tribal cultural resources are directly affected by the outcome of any proceeding on the Bay-Delta Plan or decision on the voluntary agreements. This lack of consultation is also in stark to contrast to the more inclusive and participatory process implemented by the former CALFED Bay-Delta Authority.

37. It seems clear to us, the Winnemem Wintu, that the survival of the fish and the Tribes that depend on them is secondary to appeasing wealthy water exporters. The salmon and the rivers that sustain them are the lifeblood of my Tribe. By failing to update the Bay-Delta Plan and to adopt and enforce water quality standards that protect the rivers rather than those that divert their waters for profit, the State is knowingly facilitating the death of the rivers and of the salmon they sustain and the cultural resources they provide. And through this, the State is enabling yet another genocide against our culture, our People. We urge the State to do better, to begin to truly repair the violence it has done to my Tribe and to Indigenous People throughout the state and to engage with

us in meaningful government-to-government consultation on matters affecting our interests, rather than making these commitments yet another in a series of broken promises.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and recollection. I executed this declaration on 23 May 2022 in Sacramento.

Gary Mulcahy

Attachment C

Declaration of Morning Star Gali

I, Morning Star Gali, declare as follows:

Background

1. I submit this declaration in support of the Petition for Rulemaking by Petitioners Little Manila Rising, Restore the Delta, Save California Salmon (SCS), Shingle Springs Band of Miwok Indians, and Winnemem Wintu Tribe. The matters stated herein are stated upon my personal knowledge and, if called to testify, I could and would testify competently to them.

2. My name is Morning Star Gali. I am a member of the Pit River Tribe, which is comprised of eleven autonomous bands: Ajumawi, Atsugewi, Atwamsini, Ilmawi, Astarawi, Hammawi, Hewisedawi, Itsatawi, Aporige, Kosalektawi, and Madesi. The Pit River Tribe has resided since time immemorial in a 100-square mile area located in areas now referred to as Shasta, Sikskiyou, Modoc, and Lassen Counties.

3. I was born and raised in the San Francisco Bay Area into a life of activism and advocacy work. I was born at the American Indian Movement (AIM) for Freedom Survival School's AIM House in Oakland, California in 1979. It was a decade after the Alcatraz student-led occupation, and native peoples were very committed in the fight for self-determination and sovereignty of their communities.

4. I was one of many home births of the time. When I was born, Alameda County's local county hospital, Highland Hospital, had the second highest infant mortality rate in the nation. At Indian Health Service Clinics, native women would go in for routine operations and come out sterilized. There was a lot of intention in terms of the activism and organizing to better the conditions for native peoples.

5. In 2010 I moved back to my tribal homeland. I lived in my tribal homeland for seven years, during which I served as the Tribal Historic Preservation Officer for the Pit River Tribe.

6. I moved to the Sacramento area after my time working as the Tribal Historic Preservation Officer. I began working with Save California Salmon at its inception in 2017, taking on the role of Water Organizer, a position I continue to hold today. I am also the Vice Chair of the Board of Directors of SCS, a title I officially acquired in March of this year, but I had been unofficially serving in this capacity long before that date. I also serve as the California Tribal and Community Liaison with the International Indian Treaty Council and as Project Director with Restoring Justice for Indigenous People.

7. SCS has offices in Sacramento, California, Mount Shasta, California, Orleans California and Arcata, California. We work with at least a dozen federally recognized Tribes in California, and several California Tribes that do not have federal recognition, as well as with Tribal members, on water quality and fisheries-related issues and decisions.

8. SCS works to make sure that those most impacted by water quality and fisheries decisions can engage in the processes that impact them. We have supported many members of the public that are impacted by water quality decisions to engage in public comment processes at the State Water Resources Control Board and before Regional Water Quality Control Boards and other state and federal agencies on matters related to Bay-Delta water flows and water quality. These members of the public include Tribal subsistence fishermen, ceremonial leaders, recreational business leaders, commercial fishermen, recreational fishermen, and youth.

9. SCS has been involved in writing comments and public testimony related to the Bay-Delta Water Quality Control Plan updates on several occasions, including in December 2021 when the State Water Board made the decision to move forward with Phase II. We have also engaged in public comment periods for related water quality decisions that impact the Bay-Delta such as the triennial review process for basin plans, 303(d) listings, temperature management plans, writing of policies, and setting of emergency drought standards.

We Are a Salmon People

10. After my father passed away, I was living back home in Pit River upon our tribal family's land. We did not have electricity or running water at the time. I learned a lot from relatives in terms of gathering practices and practices for salmon season, which included fileting and smoking salmon. I learned about the whole process of what it means to spend the Fall fileting, drying out fish, smoking it in traditional smoke houses, and then jarring and canning it. I learned all of that from our elders.

11. When PG&E put the hydroelectric dams on our rivers, they failed to install fish ladders. When they failed to make good on the promise to install fish ladders, we stopped having salmon in our rivers. It has been 80 plus years now that we have not had salmon running in our river. The salmon are so important to us that the symbol of our flag is three salmon swimming in a circle. Salmon are integral to our lifeway and who we are. We are salmon peoples.

12. It must be understood that there is a deep loss that is suffered in our community when we do not have the salmon and they are missing from who we are. There is a loss in terms of the spiritual health of our community when something that is so essential to us and that we have this symbiotic relationship with doesn't exist and is not within our rivers. It is a genocidal effort against us to keep the salmon from our rivers. I compare it to the situation of the Plains tribes which people are more familiar with. With Plains tribes, bison were killed off intentionally because without the bison, the native people that depended on them could no longer exist. For us as California native peoples, if our salmon relatives do not exist in the rivers, then that challenges our very existence.

Experiences with Tribal Consultation and Agency Participation

13. I was the first tribal member, first female, and first non-white person without a PhD to serve as the Tribal Historic Preservation Officer for Pit River. There was a lot I had to navigate and a lot of times that I felt I had to prove myself, both within and outside of the tribal council

where people were challenging and questioning what I knew. The white, Ph.D. archaeologists were not being questioned about how they learned about the Tribe and what their experiences were, but I had to prove myself.

14. When I was the Pit River Tribal Historic Preservation Officer, I sat in consultation meetings with the US Forest Service, CalFire, and many state and federal agencies, and watched how they engaged in tribal consultation. I have a lot of first-hand experience witnessing the disrespect, not only towards our Tribe, tribal leadership, and tribal government, but of tribal sovereignty and self-determination. The agencies were just there to check the consultation box, and it did not matter that we are a federally recognized tribe. That did not distinguish us in any way in terms of attention that was paid to our issues.

15. I recognize that for our Tribe, Pit River, although we were afforded federal recognition, there are many tribes in the surrounding area that are not – Winnemem Wintu, Modoc, Shasta, Mountain Maidu. For them, gaining meaningful tribal consultation may be even harder.

16. When I moved to the Sacramento Valley area, I was asked to attend meetings with the Department of Water Resources, State Water Resources Control Board, and Regional Water Quality Control Boards. There was an effort to pile all these meetings on for us to navigate and to keep us busy. I attended those meetings and spoke no longer as an official tribal representative, but still representing my Tribe, as I still work closely with my Tribe and contract and consult with them.

17. A lot of the time our tribal leaders and even tribal staff are not able to attend meetings due to timing, location, or staff availability. I was there as an interested tribal member, but I also recognized that when I did work for my Tribe, I was a one-person department as the Tribal Historic Preservation Officer. There was so much to navigate as a one-person department, and that is the reality for a lot of other tribes' tribal departments.

18. Even though I was able to attend the meetings while in Sacramento, providing public comments was still frustrating because we would get lumped in with various special interest groups. Tribal groups should not be lumped in with concerned bicycle groups.

19. Working with SCS, I found that the limited capacity of tribal staff and tribal leadership to participate and comment needs more recognition. We are inundated with all these meetings, all of the time, and it really requires a separate position just to be able to respond and provide the necessary comments to all of these various water plans and so-called "water solutions" that actually provide false solutions and support big agriculture over salmon restoration.

20. Participating in prior hearings was difficult because those of us there to participate had our young children and at the time my daughter was only attending the local tribal preschool part-time. Often, because of the scheduling, I was not able to leave her at preschool when I needed to participate in, for example, hearing on the Phase I Bay-Delta Plan Update. I had to bring my children to hours and hours long meetings and was told I had to wait to comment until a certain topic began. That was how a lot of interactions with the State Water Board were.

21. There have been many interactions where State Water Board meetings were not welcoming and definitely not kid friendly. Many of the people SCS works with are low income, students, or work full-time. Therefore, it is difficult for them to attend State Water Board meetings because most of the meetings have occurred hours away from their residences and during the work or school day. At times, we have had to bring children, who were not disruptive, to these meetings. As single parents, we don't have any options to take our children anywhere else; they have to be with us. During these meetings, representatives of regulated agencies have tried to suggest that we should not be at these public meetings.

22. It creates a stressful environment when we are basically getting pushed out of the meetings. It is very patronizing. The Board told me since I was not specifically representing my

Tribe anymore that they would wait instead for the tribal consultation. Or they would be dismissive and say that they already consulted directly with the Tribe. But since I had worked for my Tribe, I knew that they were likely dismissive of their concerns as well, because that was exactly how they treated me when I did officially work for my Tribe. It is really frustrating that myself and others , acting as tribal community members, are positioned where we're not directly commenting or providing public comment as 'tribal staff' or 'tribal officials' and therefore being overlooked as tribal people. I remember there was an instance with a beer brewing company in the Central Valley where they were able to speak on their water needs before us and I spoke up about that when it happened.

23. My experience participating in Board hearings has not been a good experience. It is frustrating and patronizing to be treated without dignity or respect. Conversely, I've seen big agriculture come in and it turns into a "good old boys" situation – we see how friendly the Board is to them and how nicely they are treated while we are not treated well. There is a power dynamic, and there is definitely a racialized dynamic.

24. I want the State Water Board to work on their internal issues. I had a recent experience with the State Water Board when I was hosting a radio show, where I reached out to them about an interview that was planned regarding the Klamath Dam removal and asked them if they had any comment on the issue. Immediately, Joaquin Esquivel, the Board Chair, was unavailable. I was then told that one of their attorneys would be available to comment. However, when I asked if they would be able to also comment on the impending fish kills, they decided they were not commenting at all and would not be doing the interview. Why is the Board so afraid to speak on these topics? These are their actions. They think they know what is best, but they are knowingly failing to do the required water releases to keep the juvenile salmon populations alive and able to thrive. They know they are killing 98% of the salmon population. They know there is

not enough water in the rivers, and they know they are sending it all down south. But the Board does not want to talk about it and be held accountable. They are unwilling to go on the record and have a conversation about it. They seem to be totally hands-off. In this respect, the Board needs to be seriously restructured.

25. Regulatory capture is a huge issue at the water boards. SCS has seen staff ignore the best available science and letter of the law due to politics or comments from the regulated. We have rarely seen our comments or the interests of the public impact the decisions made by the State Water Board.

Pit River Tribe's Interest in Bay-Delta Water Quality

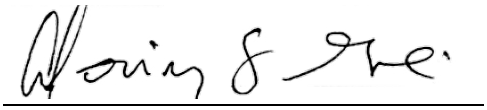
26. The wellbeing of my Tribe is directly connected to the Bay-Delta, and the issue of its problematic management and planning process. Back when we were fighting for the protection of our medicine lake, Sa tit La, we understood that 40% of our water from our sacred lake highlands flows into the Fall River, then into the Pit River, then into the Sacramento River, which flows into the Bay-Delta. If there is any upstream contamination, it threatens our water and the water that flows through the Bay-Delta. For example, when the Calpine Corp. geothermal power plant in the Medicine Lake Highlands was proposed, Calpine was going to put arsenic into the water and conduct various hydrological methods to extract the geothermal steam energy. This would have immediately affected us since all these waterways are interconnected.

27. It must be recognized that this is our water – that this water that flows from the Sacramento River is our water from our sacred homelands. With that relationship, if the water is poisoned, or any sort of toxin enters the waters that flow down to the Bay-Delta, then our salmon populations are harmed. Because our water is Bay-Delta water, we believe we are entitled to government-to-government consultation on decisions and policies related to water quality and water flow management in the Bay-Delta.

28. I live by the American River now and I take my children to the river. It is really beautiful at times to see the salmon within the river. Then there are other times that I take them there and there are all these salmon belly-up that did not survive. It is really heartbreaking.

29. Although right now I am not living within my tribal homeland, I am here in the Sacramento area advocating for clean water and salmon restoration. There is a direct relationship between these two necessities and our tribal communities that needs to be acknowledged. These issues continue to affect all our tribal communities that rely on the water source and on the existence of salmon from the river.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and recollection. I executed this declaration on 23 May 2022 in Sacramento, CA.



Morning Star Gali

Attachment D

Declaration of Dillon Delvo

I, Dillon Delvo, declare as follows:

1. I submit this declaration in support of the Petition for Rulemaking by Petitioners Little Manila Rising, Restore the Delta, Save California Salmon, Shingle Springs Band of Miwok Indians, and Winnemem Wintu Tribe. The matters stated herein are stated upon my personal knowledge and, if called to testify, I could and would testify competently to them.

2. I am a second-generation Filipino American, born and raised in Stockton, California, located in the Delta on the San Joaquin River. I have resided in South Stockton for most of my life. I graduated from Edison High School in South Stockton in 1991 and left the area only to attend San Francisco State University, where I received my B.A. in Cinema in 1998 and M.A. in Asian American Studies in 2003. Unlike most of the people I grew up with, I still live in South Stockton, in the Weston Ranch neighborhood, with my wife and children. My continuous residency as a second-generation Filipino makes me one of the last living links in the neighborhood to the first generation of Filipino immigrants to Stockton – the Manong or elders – who lived in an area of South Stockton known as Little Manila.

3. For over two decades, I have dedicated my work to serving South Stockton. In 2000, I founded Little Manila Rising as a 501(c)(3) organization together with Dr. Dawn Bohulano-Mabalon in response to redevelopment initiatives that would destroy what little was left of the Little Manila neighborhood, much of which was razed in the early 1970s to make way for a highway.

4. We at Little Manila Rising quickly realized that saving our historic buildings without also working to support the marginalized Black, Latinx, Chinese, South Asian, and Southeast Asian communities who now make up this neighborhood would be a betrayal of the legacy we hoped to protect. The disinvestment in this part of the city is obvious – we lack basic services like reliable public transportation, healthy and affordable housing, livable wages, and access to health care services. The concentration of people of color in the most disinvested part of Stockton is not an accident. Rather, it is the product of the legacy of redlining, racial covenants, and other discriminatory laws and lending and real estate practices that forced people of color into chronically disinvested and underserved neighborhoods.

5. Guided by our 14-member Board of Directors, who have deep roots in South Stockton and knowledge of our community's needs, Little Manila Rising became a unique historic preservation organization that nimbly responds to community needs with an anti-racist framework. Accordingly, we provide education and leadership to revitalize South Stockton, including what is left of its historic Filipinx American community, and we help liberate the many other South Stockton communities who have been injured and oppressed by the same policies of white supremacy that destroyed our community. This work includes reclaiming the hidden waterways of South Stockton and improving the health of these waters to transform them into a resource – and not a detriment – for our community.

6. My understanding of South Stockton, its people, and our challenges is informed by more than my education and work with Little Manila Rising. I also have served as the district representative for our state senator, a director for TEAM Charter School in South Stockton, a trustee on the Stockton Unified School Board, a delegate to the Filipino American Democratic Caucus of California, and on the Board of Directors for the Catholic Charities, Diocese of Stockton. I currently serve on the San Joaquin Historical Society Board and the Reinvent South Stockton Coalition steering committee. Up until recently, I served as a community representative on both the A.B. 617 Community Emissions Reduction Planning steering committee for Stockton and on the California Air Resource Board's Environmental Justice Advisory Committee for A.B. 32. Most significantly, I have had the privilege of serving for 21 years as a Catholic Youth Minister. In that role I engaged thousands of young Stockton residents and supported their personal development.

7. I submit this testimony based on my personal experience of conditions in and around South Stockton, as well as based on my experience as a South Stockton community leader for over two decades working closely with South Stockton residents on issues of health, environmental justice, welfare, education, and economic development, among other issues.

Ongoing Legacy of Exclusion from Delta Waters

8. Since my family arrived in California, our lives have been in many ways defined by Delta waters. My California Story begins when my father, Cipriano "Rudy" Delvo, immigrated to California in 1928 as part of the early generation of Filipino immigrants, the Manong, during the

period of U.S. colonial occupation of the Philippines. The Manong exchanged grueling labor for low wages and the promise of being able to send money home to the Philippines. Like the majority of the Manong, my father settled in Stockton because its location in the Delta enabled him to do the limited jobs that were available to non-white immigrants: hard labor in the Delta and in the booming fish packing industry stretching from Alaska to the Bay Area. Through this work, my father and many other Manong laborers like him helped build the artificially engineered Delta and put its waters to use. He worked on reclamation projects, swamp land recovery, and levee building to engineer Delta waterways, and he grew asparagus, onions, lettuce, and other crops on Delta wetlands drained to make farms.

9. Yet, despite my father's role in building the Delta water management system that largely remains in place today, he was not able to use or benefit from Delta waters himself – from 1913 to 1945, California's racist Alien Land Law prevented Filipinos from owning property, which is a prerequisite for acquiring water rights.

10. Delta waterways also shaped my father's and my life in South Stockton in myriad ways. Delta waterways delineated where Filipino immigrants and other people of color could live in the city. The manmade Stockton Deep Water Shipping Channel cuts through the city, separating North and South Stockton. Because of redlining, racial covenants, and other discriminatory lending and real estate practices, the Manong and other communities of color were forced to gather in South Stockton – the most disinvested part of the city. From the 1920s through the 1960s, the Manong transformed South Stockton's El Dorado Street and the surrounding area into what came to be known as Little Manila, home to Stockton's large Filipino community and many Filipino businesses and community establishments. Little Manila shared this space in the so-called "Oriental" side of town with significant populations of Chinese residents as well as Latinx residents in Barrio Del Chivo and Black residents in Boggs Tract. In the early 1970s, the government built a highway (the Crosstown Freeway/State Road 4) through Little Manila and the other neighborhoods of color, destroying what we had collectively built, including many of our important buildings and centers of community life. This single act removed the vast majority of wealth that our communities had managed to accumulate despite racist policies, reducing our power to influence decisions impacting

South Stockton's development. In the decades that followed, most people who could leave South Stockton have left.

11. The history of the Manong's exclusion from and by the waters that defined their lives began a long, painful legacy of alienation from Delta waterways for Filipinx Americans, similar to that experienced by other communities of color in South Stockton. Despite the many ways that the San Joaquin River, Stockton Deep Water Shipping Channel, and various sloughs throughout our neighborhoods affect us, residents of South Stockton do not have a consciousness of living in the Delta. The Delta is not part of our culture because the waterways running through and near our community are largely dewatered, unhealthy, and inaccessible. During my 21 years as a youth minister, not one of my students ever described any activity in the rivers, sloughs, or channels that traverse our community. Not one of them had at any point engaged with the waterways around us. Our ministry routinely traveled to other communities to go canoeing, camping, and fishing because, although we deeply valued our connection to nature and the healing powers of the outdoors, our relationship to our hometown waters had been effectively severed.

12. Like many South Stockton residents, I grew up a few blocks away from a Delta levee but had little awareness that the Delta waterways were there. I never accessed the water in Stockton until my mid-30s. Once I started understanding the Delta, I felt robbed – robbed of the family memories of growing up on the Delta and the culture that goes with that. If you do not know that the Delta exists, access is impossible because you do not know to seek it or advocate for it.

13. Now as a father, I want my children to have access to healthy Delta waterways, to have memories growing up on a Delta that is part of their identity and a source of health and community resilience, and to understand their role as stewards of the Delta ecosystem. We can provide none of these things while Delta waterways in and around our community remain dewatered, degraded, and polluted. The alienation of South Stockton residents from our waters is a continuation of redlining and segregation, and of the destruction wrought by urban redevelopment targeting our community.

Community Impacts of Poor Water Quality in South Stockton

14. Stockton's inaccessible, degraded urban waterways compound the challenges that South Stockton residents face. In my experience, the City of Stockton, San Joaquin County, and the Port of Stockton treat South Stockton as a sacrifice zone for industry, transportation, warehouses, agriculture, and deferred maintenance. South Stockton bears the brunt of the city's air pollution, which comes from a constellation of sources including: heavy duty trucks on the freeway that destroyed historic Little Manila, commercial harbor craft and ocean-going vessels on the Stockton Deep Water Shipping Channel, and stationary industrial sources like a biomass cogeneration facility that constitutes our largest stationary source of air pollution. As a result, the marginalized Black, Latinx, Chinese, South Asian, and Southeast Asian communities that make up South Stockton today are subject to some of the highest rates of poverty, pollution, and associated health burdens in California.

15. The toll of the pollution burden in South Stockton became deeply personal for me in 2018 when Dr. Dawn Bohulano-Mabalon, co-founder of Little Manila Rising, passed away from an asthma attack at age 46. Dawn was a leading historian of Filipinx American History, receiving both her B.A. in American History and M.A. in Asian American Studies from UCLA and completing a Ph.D. in American History at Stanford University. In addition to co-founding and leading Little Manila Rising, she was an Associate Professor with tenure in the Department of History at San Francisco State University. Dawn was a third generation Pinay (Filipina) born in Stockton in 1972. Having grown up in South Stockton, she suffered from severe asthma throughout her life. When Dawn passed away, I learned the hard way that saving Dawn's life at 46 would have required saving her at age six, when she was growing up in a redlined community close to the freeway.

16. That this combination of pollution and intentional disinvestment would eventually take the life of my friend and co-founder and would deprive the nation of its preeminent historian of Filipinx American Historian galvanized me to tackle these planned pollution burdens and advanced mortality rates head on. At Little Manila Rising, we began educating ourselves and working to address air pollution in our community. Through this process, we came to understand the connection between air pollution and water quality and the serious health risks that the degraded

state of Delta waterways pose for South Stockton residents. We realized we had to do more to support those working to improve water quality, and we became water advocates ourselves.

17. Harmful algal blooms are a powerful example of this connection. We have learned that high nutrient levels coupled with warm water temperatures resulting in part from low flows in the San Joaquin River create conditions that enable harmful algal blooms to thrive. These blooms spread like a lime green film across the surface of the water, starting where the Shipping Channel dead ends and extending out towards the San Joaquin River, giving off a smell of slowly rotting grass. These blooms started showing up several years or maybe even a decade ago, and have become a major problem in recent years. Harmful algal blooms are a particular concern for the unhoused population and their pets living in the dewatered Mormon Slough, which juts off the Shipping Channel and runs right by Little Manila. Mormon Slough is home to a large encampment of unhoused residents who use the Shipping Channel and San Joaquin River for hygiene, sanitation, and subsistence fishing. When Little Manila Rising has discussed the health risks posed by harmful algal blooms with people living in the encampment, they have said they cannot worry about the risks of algae in the water when they rely on it for basic needs.

18. Just as Dawn's death galvanized us to address the planned air pollution that cut her life short, we cannot ignore that harmful algal blooms are worsening the respiratory burden we already endure in South Stockton. There are state agencies that have the power to change these conditions, but they refuse to do so. Because of the impacts of harmful algal blooms on the health of our community, Little Manila Rising is working with the California Air Resource Board on an air monitoring protocol for aerosolized toxins from these blooms. Still, monitoring will not be enough to prevent early mortality – we cannot simply tell residents to remain inside for the summer, to avoid breathing air. Addressing the root cause of these toxic blooms will require improving the water quality and adding more flow throughout the Delta. We should not have to spend our precious time and resources developing a monitoring protocol for a problem that everyone knows how to fix.

19. If water quality and flow levels in the Delta waterways surrounding and running through our neighborhoods were improved, they could be a source of economic wealth,

environmental services, and mental health for our community – contributing recreational opportunities, cleaning the air, improving residents' mental and physical wellbeing, providing sustainable food sources, building community resilience, and connecting us to the natural world and to the tribes that stewarded these waterways for thousands of years. We have been and are continually deprived of these benefits. The alienation of South Stockton residents from Delta waterways significantly thwarts Little Manila Rising's efforts to promote economic development and build community resilience. Unlike many waterfront communities that have beautiful waterways that are economic drivers, our waterways are toxic and inaccessible. They are something that residents and would-be tourists run from rather than gravitate toward.

20. As an example of these access impediments, Little Manila Rising received a State Coastal Conservancy grant to implement a youth kayaking program to explore Delta waterways. We wanted to run this program during the summer when kids were out of school. However, because of harmful algal blooms throughout the San Joaquin River by Stockton, we could not take the kids out all summer and had to reschedule to the fall, in hopes that water temperatures would drop enough for the blooms to subside. To facilitate this and other water-based recreational programs, we also typically have to travel significant distances to find water safe enough for these activities. This requires us to allocate burdensome amounts of funding to transportation for Stockton residents to have the same experiences enjoyed by multitudes of California communities whose waters are suitable for use.

21. Improving health of Delta waterways in and around Stockton could also help address the heat island effect that makes South Stockton unbearably hot in the summer months, and which will only continue to worsen as climate change exacerbates extreme temperatures. South Stockton is on average about 10-12 degrees hotter per year than North Stockton. This temperature disparity is the result of the legacy of discriminatory urban planning decisions that left South Stockton more polluted and with less urban greenspace – both of which contribute to the heat island effect. Waterways and riparian buffers around them could absorb heat in South Stockton, reducing temperature disparities and providing an urgently needed intervention to protect our communities

from climate change. Instead, the denuded, dewatered, and paved over waterways in South Stockton do the opposite, amplifying climate risks for this already highly at-risk population.

22. Ultimately, residents of South Stockton experience the Delta as a burden on mental and physical health, if they consider it at all. At Little Manila Rising, we understand that, for these and other reasons, the health and wellbeing of our community is tied to the health and resiliency of the Delta and ecosystems it supports. We cannot correct the economic disempowerment, poor health conditions, and other compounding inequities that South Stockton residents experience without addressing the water. It is thus clear to me and to Little Manila Rising as an organization that updating, implementing, and enforcing significantly enhanced water quality standards for the Delta is critical to the health and wellbeing of Delta communities and must be treated as among the state's highest environmental justice priorities.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and recollection. I executed this declaration on 23 May 2022 in Stockton, CA.

Dillon Delvo

Attachment E

Declaration of Barbara Barrigan-Parrilla

I, Barbara Barrigan-Parrilla, declare as follows:

Background

1. I submit this declaration in support of the Petition for Rulemaking by Petitioners Little Manila Rising, Save California Salmon, Little Manila Rising, Shingle Springs Band of Miwok Indians, Restore the Delta, and Winnemem Wintu Tribe. I have personal knowledge of the facts and statements contained herein and, if called as a witness, I could and would testify competently to them.

2. I am the co-founder and Executive Director of Restore the Delta, a 501(c)(3) non-profit organization based in Stockton, California, whose mission is to restore the health of the San Francisco Bay/Sacramento-San Joaquin Delta. From Restore the Delta's founding in 2006 until 2007, I served in the senior officer role of campaign coordinator. I have served as Executive Director of Restore the Delta continuously since 2007. In this capacity, I have worked on Bay-Delta water quality, water management, and related issues for the past sixteen years, through public education, community outreach and advocacy, negotiation, protest, and litigation. I am a co-author of two Restore the Delta reports: *The Fate of the Delta* (2018) and *Climate Equity and Seismic Resilience for the San Francisco Bay-Delta Estuary* (2019).

3. I received a Bachelor of Arts from the University of California at Berkeley and a Master of Fine Arts from Mills College. I have lived in Stockton, California for 18 years with my family.

Restore the Delta's Interests in Improved Bay-Delta Governance

4. Restore the Delta has grown to 75,000 members from throughout California since its founding in 2006. As an organization, we are committed to restoring the Delta so that: fisheries, communities, and family farming can all thrive there again; water quality is protected for all communities, particularly environmental justice communities; Delta environmental justice communities gain improved public access to clean waterways; and Delta environmental justice communities are protected from flood and drought impacts resulting from climate change. Ultimately, our goal is to connect communities to their nearby rivers and waterways, and to thereby

empower them to become the guardians of the estuary through participation in government planning and waterway monitoring.

5. Restore the Delta advocates for local Delta stakeholders to ensure they have a direct impact on water management decisions affecting their well-being and that of their communities, and on water sustainability policies for all Californians. Restore the Delta fights not only for better water quality standards and environmental health in the Delta, but also for the voices of Delta communities to be heard and included in these decisions and policies. At Restore the Delta, we believe that environmental justice communities, including tribes, must be a central part of planning and government processes.

6. A core concern of Restore the Delta is to ensure that Delta waters are fishable and swimmable in accordance with the objectives of the federal Clean Water Act and to ensure that Delta waterways are a reliable source of safe and sustainable drinking water supplies for Delta communities, in accordance with the Human Right to Water recognized by the California Legislature.

7. In the sixteen years that Restore the Delta has been in operation, we have witnessed Delta conditions deteriorate from bad to worse. All native fisheries and recreational fisheries found in the Delta have experienced serious population declines, limiting fish catches for sustenance and recreational fishers; the Delta ecosystem and habitat conditions are in peril; numerous waterways are stagnant and dewatered; and harmful algal blooms ("HABs") have expanded from small patches into significantly larger areas, threatening recreation, public health, public access to waterways, fish, wildlife, irrigation water, and potentially drinking water supplies for Delta communities.

8. I, along with local Delta advocates, have been frequently attending State Water Board Resources Control Board ("Board") meetings since 2013. When I first began attending these Board meetings, I remember being shocked at the lack of representation of Delta communities in the room. The room did not reflect my neighbors in Stockton, nor the parents of kids that went to school with my daughter.

9. I have witnessed similar patterns of lack of representation of community groups in meetings that I attended before other State and federal agencies on water-related issues. For

instance, in 2009 I attended a joint Department of Water Resources and Army Corps of Engineers public meeting in Stockton on the Bay Delta Conservation Plan. That was the first time I noticed that communities directly affected by state water planning decisions were not represented in the room where those decisions were being made.

10. Given this lack of representation, in 2013 we at Restore the Delta decided to make advocacy for the interests of vulnerable, disadvantaged, and underrepresented Delta communities in state and federal water quality and management decision-making processes a focal point of our work.

Harmful Algal Blooms

11. A central concern of Restore the Delta is the growing presence of HABs in Delta waterways. HABs result from the combination of lack of adequate freshwater flows, warmer water temperatures, pollution with excessive quantities of nutrients like nitrogen and phosphorus, and increased residence time of these pollutants. These conditions are driven in large part by high levels of water export and diversion from the Delta, which reduces freshwater flows, increases, temperature, and concentrates nutrient pollution.

12. Personally, I began seeing small HAB outbreaks near the Stockton waterfront in 2013 but did not understand what they were until I heard Dr. Peggy Lehman's presentation to the Delta Protection Commission in Stockton in 2014. It was at that event, when Dr. Lehman explained that the toxins found northwest of Stockton were at levels high enough to pose danger if ingested by a preschool child, that I understood that we at Restore the Delta had to begin investigating the threat that HABs pose for the health and wellbeing of the communities that we advocate for.

13. Around 2013, Restore the Delta began hearing from members of the Greater Stockton Chamber of Commerce that they were receiving complaints about the smell of HABs along the Stockton waterfront. Around that time, we also began receiving reports and photos directly from our members of the growing HABs problem in Stockton and in Discovery Bay. During this period, Restore the Delta staff, including myself, began to directly observe the smell and presence of blue-green algal blooms at the Stockton waterfront. These complaints have become more frequent in the years since.

14. Beginning in 2017, Restore the Delta started compiling our own photos of HAB outbreaks in San Joaquin County to document that with warming air and water temperatures, reduced flow, and nutrient discharge, HABs were spreading along the Stockton Shipping Channel and into the San Joaquin River system at an alarming rate. Through this documentation project, Restore the Delta has observed that HABs become more visible during warm weather, with bright sunlight, and stagnant water. As water in the sloughs that branch off the San Joaquin River becomes more stagnant from about May to early October, HABs also become more visible. Once water releases increase on the San Joaquin River in early October, and water movement increases in San Joaquin County sloughs and the Deep Water Shipping Channel, we have noticed that algal blooms begin to sink, and reports by our members of blooms decrease, despite warm October temperatures.

15. The HABs covering Stockton's waterways prevent residents from accessing area waterways for recreation, fishing, and other important uses. I and other members of Restore the Delta have watched as HABs have further alienated Stockton's environmental justice communities, who live in areas surrounded by dirty, putrid-looking, and odorous waterways. I have seen countless unhoused residents who camp in regular intervals adjacent to Mormon Slough, the Stockton Shipping Channel, the San Joaquin River, Smith Canal, and the Calaveras River in Stockton.

16. I have also observed many other disadvantaged Delta residents come in close contact with blue-green algae while attempting to fish or recreate in or near waterways. Even when blue-green algal blooms are visibly present, it is very uncommon to see any noticing of public health hazards to warn residents and those fishing and recreating in and around these waterways of the health risks from HABs. At Restore the Delta, we have repeatedly pushed San Joaquin County health officials to adequate public notifications of these risks, but visible warnings to the community of the health risks are still infrequent.

17. HABs are not good for our city. The waterways could provide a source of economic redevelopment in disadvantaged communities, but it is hard to imagine investors wanting to spend money in a downtown area surrounded by stagnant, toxic water.

18. I have raised alarms at the Board and other agencies of the impacts on air quality due to aerosolization of toxic particles from HABs. At Restore the Delta, we represent and support disadvantaged communities that are already exposed to high background levels of air pollution and have high asthma rates because of their proximity to roadways and industry. We are concerned that aerosolization of HABs presents yet another compounding source of air pollution for these communities and contributes to respiratory distress.

19. Restore the Delta is partnering with staff from the Central Valley Regional Water Quality Control Board and the State Water Board, the California Air Resources Board, Duke University, the University of North Carolina, Little Manila Rising, San Francisco BayKeeper, the Delta Stewardship Council, and the Metropolitan Water District to build a water and air data tracking program to evaluate and understand the impacts of HABs, to report conditions rapidly to the public, and to create mitigation strategies to stop and reverse the proliferation of HABs in the Delta. Baselines and standards for HABs tracking and mitigation, however, have still not been developed by the California Water Boards and remain a work in progress. Further, without addressing underlying causes of HABs, including low flows and poor water circulation, it will not be possible to effectively reduce this threat.

20. I am personally concerned that chronic exposure to HABs is impacting my respiratory health. I never suffered from asthma until my family moved to Central Stockton in 2006, into what is now designated an A.B. 617 committee. Both my daughter and I developed severe asthma, which we believe was triggered by traffic pollution and other heavy sources of particulate matter in the area. By 2009, I moved my family to a newly built neighborhood in North Stockton to escape these significant asthma triggers. I, however, have never recovered, and when investigating water quality conditions during HABs season at the Stockton waterfront, I have experienced repeated asthma attacks that have continued for days after each waterfront visit.

21. During the course of my HABs investigations, as well as during environmental justice tours that I have regularly conducted for government officials and members of the press since 2017, I have seen hundreds of area residents fishing in or near HABs-infested waters, boating and jet skiing through algal blooms with small children present, launching boats into waterways filled with

HABs, living in houseboats and floating encampments on top of them, and living adjacent to waterways filled with HABs. I have been told by advocates who work with the unhoused population that pets have died from swimming and/or ingesting algal-infested waters. Though we never learned the precise cause of death, I remember a woman's dead body being pulled from Mormon Slough several years ago. Despite all these risks, unhoused Stockton residents continue to use these waterways for hygiene, lacking other options.

Voluntary Agreements

22. The Board has not completed a full update of the Bay-Delta Plan since Restore the Delta was founded in 2006. Based on my observations of and experience with Board proceedings since that time, it is my opinion that the Board's delay is due in significant part to the State's decision to prioritize public hearings for the California WaterFix project, and now approval of its successor, the Delta Conveyance Project, and to prioritize negotiation of voluntary diversion reduction commitments through the voluntary agreement process over regulatory action. The entanglement of the voluntary agreements with the Delta Conveyance Project is, for instance, reflected in the November 4, 2021 email exchange between Carolyn Buckman at the Department of Water Resources and Dianne Riddle at the Board, produced in response to a Public Records Act request and attached as Exhibit A hereto. With new hearings on the horizon for the Delta Conveyance Project and voluntary agreement discussions ongoing, delays on the update are certain to continue, causing further irreparable harm to the Delta and its wildlife and communities.

23. According to my read of CalEnviroScreen data, Stockton has the proportionally largest environmental justice community in California, and the Delta's regional environmental justice community is close to 30% of the population. These communities, though experiencing the impacts of deteriorating waterways, have not been included in the voluntary agreement negotiations. The negotiations themselves have been kept confidential, and disadvantaged Delta residents and organizations like Restore the Delta that advocate on their behalf do not have meaningful insight into the negotiation process.

24. Restore the Delta has never been invited into any voluntary agreement negotiations despite our decade-and-a-half of advocacy for improved Delta water quality and management.

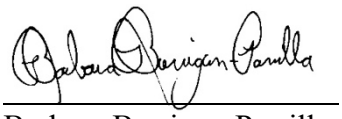
Recently, the Department of Water Resources reached out to Restore the Delta, giving three days' notice to join the first of two meetings with an undisclosed group of stakeholders regarding "development of the governance structure for the [voluntary agreements], including actions that will be taken in the near-term." We were not provided with background briefing or an opportunity to comment on the content of the proposed voluntary agreements themselves. Further, these meetings occurred over a month after the term sheet for the voluntary agreements was released on March 29, 2022, and thus could not present a meaningful opportunity to weigh in on the contents of the agreements or the State's approach to using them to govern water quality in the Bay-Delta. From what we understand, Petitioners Little Manila Rising, Save California Salmon, Shingle Springs Band of Wiwok Indians, and Winnemem Wintu Tribe were not contacted to join the meeting.

25. I recall that Board Member Dorene D'Adamo recently stated at a Delta Leadership training that voluntary agreements are the preferred management tool for the Delta estuary and that any and all agreements will be vetted by the Board as a public process after negotiations are completed. However, based on my experiences participating in agency processes, I believe that at that point it will be nearly impossible for Delta environmental justice communities to give meaningful input on flow management and other standards. Voluntary agreements appear to be the Governor's preferred approach to dealing with Bay-Delta flows, and it is very unlikely that the Board can consider the agreements in an independent and unbiased manner, apart from direction and influence of the Governor's Office. This is reflected in comments made by Board members at almost all public meetings at which I have been present, as the Board continues to insist that its job is to first balance competing water needs, rather than doing the difficult job of regulating water use to bring the Bay-Delta into balance. Restore the Delta strongly opposes the voluntary agreement backroom dealmaking.

26. Restore the Delta also believes that the Board must first establish water quality standards based on the needs of the Bay-Delta ecosystem and its communities before any new conveyance projects are considered. Should the Delta Conveyance Project be considered and approved ahead of a Bay-Delta Plan update, I strongly believe that the pressure on the Department of Water Resources to keep water flowing through the Project would be enormous (to ensure that

water contractors can meet bond debt obligations through water deliveries), regardless of Delta conditions. I believe that the Delta will fare better if the Board begins immediately implementing Phase I of the Bay-Delta Plan and conducting the public process to review and updated water quality standards for the entire Bay-Delta.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and recollection. I executed this declaration on 23 May 2022 in Stockton, CA.



Barbara Barrigan-Parrilla

EXHIBIT A

From: **Riddle, Diane@Waterboards** IMCEAEX-_O=EXCHANGELABS_OU=EXCHANGE+20ADMINISTRATIVE+20GROUP+20+28FYDIBOHF23SPDLT+29_CN=RECIPIENTS_CN=7FABC4664CF64403A0765DBEB54EF660-RIDDLE+2C+20DIA@namprd16.prod.outlook.com
Subject: RE: Delta Conveyance/VA discussion
Date: November 4, 2021 at 8:02 PM
To: Buckman, Carolyn@DWR Carolyn.Buckman@water.ca.gov
Cc: Nemeth, Karla@DWR Karla.Nemeth@water.ca.gov, Ekdahl, Erik@Waterboards Erik.Ekdahl@waterboards.ca.gov, Oppenheimer, Eric Eric.Oppenheimer@waterboards.ca.gov

Hi Carrie,
I also discussed with our exec and confirmed that we believe that DWR's EIR should evaluate a reasonable range of Delta outflow criteria in order to inform the Board's decision making process since the Bay-Delta plan is not complete and we do not know the outcome. In addition, the VA as currently contemplated does not address Delta Conveyance. We think it probably still makes sense to have an exec level meeting on this topic.

Please let me know what DWR thinks about a meeting and possible times.

Thanks,
Diane

From: Buckman, Carolyn@DWR <Carolyn.Buckman@water.ca.gov>
Sent: Thursday, November 4, 2021 3:52 PM
To: Riddle, Diane@Waterboards <Diane.Riddle@waterboards.ca.gov>
Cc: Nemeth, Karla@DWR <Karla.Nemeth@water.ca.gov>
Subject: Delta Conveyance/VA discussion

EXTERNAL:

Hi Diane –

I talked to Karla about our question about Delta Conveyance and the VAs. When we bring the Delta Conveyance Project to the State Board, we will be pointing to the Water Quality Control Plan or VAs to establish the outflow requirements that the project would need to comply with. We will not be proposing additional outflow requirements.

Thanks –
Carrie

Attachment F

Amicus Curiae Brief in Support of State Water Resources Control Bd., *California Water Curtailment Cases*, Nos. H047270 & H047927 (Sixth Appellate Dist. Ct. of App. Mar. 14, 2022)

Court of Appeal, Sixth Appellate District
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Court of Appeal, Sixth Appellate District
Baltazar Vazquez, Clerk/Executive Officer
Electronically FILED on 3/18/2022 by W. Wilbourn, Deputy Clerk

CASE NOS. H047270 AND H047927

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

CALIFORNIA WATER CURTAILMENT CASES

[PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF STATE WATER RESOURCES CONTROL BOARD

On Appeal from the Superior Court for the State of California,
County of Santa Clara, Case No. 1-15-CV-285182
(JCCP No. 4838) Honorable Brian C. Walsh, Judge

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BRIEF OF AMICI CURIAE

INTRODUCTION

At issue in this case is whether holders of a subset of water rights – appropriative rights acquired before 1914 ("pre-1914" or "senior" rights) and riparian rights – are immune from enforcement by the State Water Resources Control Board (the "Board") when they seek to divert water beyond the scope of their water right. The statutory interpretation question before the Court cannot be meaningfully answered without an understanding of the dark and violent historical underpinnings of these senior and riparian rights – a history that fractures the presumption of unquestioned legitimacy depicted by the Irrigation Districts in their response brief. Nor can it be answered without attention to the grave consequences of a judicial determination that would improperly narrow Board jurisdiction to police and prevent excessive diversions of already scarce Delta water.

Respondents are Irrigation Districts that divert water from the Delta under claims of pre-1914 appropriative and riparian rights. In 2015, during a period of extreme drought, the Board issued enforcement orders to all appropriative rights holders in the Sacramento and San Joaquin River watersheds with a priority date between 1903 and 1914. These orders directed the Irrigation Districts to cease unauthorized diversion or use of Delta water because there was insufficient water available under their claimed priority of right and continued diversions thus constituted a trespass under section 1052 of the Water Code.

(Curtailment AR 004212-004213; Resp. Br. at pp. 13, 20.) As relevant to this appeal, the trial court agreed with the Irrigation Districts that the Board lacked jurisdiction to enter these orders. The court's decision rested on a narrow reading of section 1052 to authorize the Board to police diversions by senior and riparian appropriators only if they divert water that has not yet been appropriated – a circumstance that, in the over-appropriated Delta, would effectively read section 1052 enforcement authority out of the Water Code.

In defending the trial court's decision on appeal, Respondents posit that their rights are beyond the Board's regulatory and enforcement jurisdiction. They are wrong. Senior and riparian water rights holders do not have an iron-clad claim to divert this water for their own use, nor is this claim legitimate when placed in the historical context in which it arises. For one, California's water rights priority system erases the existence and interests of Indigenous communities, including *Amici* Winnemem Wintu Tribe and Shingle Springs Band of Miwok Indians, who used and stewarded Delta water resources for thousands of years prior to colonization. Not only does the California water rights regime ignore prior tribal claims, but by giving the imprimatur of legitimacy to the claims of miners and settlers, it exacerbates the violent removal of Indigenous Peoples from their ancestral homelands and the waterways that sustained them. Water rights were also unavailable to many immigrants and people of color, who were legally or effectively barred from owning land necessary to support a water rights claim, even as they built the

state's infrastructure and formed the backbone of its burgeoning agricultural economy.

The assertion that senior and riparian water rights are sacrosanct is also wrong on the law. The exercise of any water right – including senior and riparian rights – is subject to important limitations imposed by the doctrines of public trust and reasonable use, among others. Water rights holders do not own the water they use. Water rights are *usufructuary* in nature, meaning water rights claims extend only to *use* of the water; the corpus belongs to the People, held in the public trust. In California, the Board acts as the steward of that trust and is obligated by foundational common law precepts to protect it for the People of the state. Further, the Board exercises authorities codified in the California Water Code that require it to safeguard these water resources, including by preventing unreasonable use or diversion of water.

The Board's power to safeguard this resource is critical for the communities whose health, wellbeing, and very existence depend on the health of the Delta and the ecosystems and species it sustains. The Delta watershed – the source of the water rights at issue here – is the largest estuary on the west coast of North and South America. Excessive water appropriations have driven the Delta ecosystem into a state of crisis, which will only worsen with climate change. Among other threats, low freshwater flows and increasing temperatures, coupled with agricultural runoff, cause frequently recurring harmful algal blooms. These blooms create health harms for surrounding communities and limit

access to waters for tribes practicing their culture and for local communities engaging in subsistence fishing and recreation. Low flows also contribute to the collapse of native Delta fisheries, causing irreparable spiritual and cultural harm to tribes and impairing food sovereignty. These and other such conditions are not limited to critically dry years, but rather stem from routine excessive diversion of Delta waters. These impacts also fall most heavily on many of the same communities whose rights and interests were trammeled by the creation of the California water rights regime.

Far from exceeding its authority, the Board, if anything, has been too tepid in preventing unauthorized and harmful diversions. *Amici* respectfully request that, in rendering its decision in this case, the Court avoid undercutting the Board's authority and thus inadvertently exacerbating the injuries already heaped on Delta communities.

DISCUSSION

I. Exempting Senior Water Rights from Board Authority Perpetuates a *De Jure* Racist Water Rights System and Compounds Historical Harms

The trial court recognized that "[t]o put the Board's curtailment efforts and the parties' arguments in context, a basic understanding of the legal landscape" of California Water Law "is needed." (FSOD at p. 7.) *Amici* agree with that premise, but the trial court's snapshot of the California water rights regime falls short. Missing from the trial court's overview is any discussion of the violence, dispossession, and racism that undergird California's dual water rights system. This history continues to

determine today who can assert a water rights claim – and who cannot because their prior rights were erased or their access to rights was barred. Among the communities excluded from water rights claims are the original Indigenous inhabitants of the state, whose inherent water rights have been largely erased since white settlers arrived on their ancestral lands. Also excluded are many people of color, who were effectively barred from water rights through the first half of the twentieth century by the state's discriminatory property laws, as well as discrimination in civil rights, employment, education, and housing, which segregated and impoverished them.

This historical context fractures the legitimacy of water rights claims asserted by senior and riparian rights holders. It also underscores the need for Board authority to prevent excessive diversions that would exacerbate and compound harms to those who were subject to this historic exclusion. The stories summarized in this brief provide only a snapshot of this history, but are illustrative of the ways that structural racism, white supremacy,[1] and violence have gone hand in hand with creating a water rights regime in California which exploits waterways and

[1] See State Water Resources Control Bd. Resolution No. 2021-0050, ¶ 7(a) (Nov. 16, 2021) (hereafter "State Water Bd. Anti-Racism Resolution") (defining "[w]hite supremacy" as "a systematically and institutionally perpetuated system of exploitation and oppression of nations and people of color by white people for the purpose of maintaining and defending a system of wealth, power, and privilege").

systematically disadvantages the Indigenous Peoples and communities of color who depend on them.[2]

A. California's dual water rights system was born from violence and dispossession against Indigenous Peoples.

California water law gives rise to two types of surface water rights: riparian and appropriative. Riparian rights grant property owners the right to remove reasonable amounts of water from waterways that are contiguous to their land for use on their property. (See Wat. Code, § 101; *People v. Shirokow* (1980) 26 Cal.3d 301, 307.) Riparian rights can only be acquired by owning property that touches a water source. (See *Lux v. Haggin* (1886) 69 Cal. 255, 391-92.) The State Legislature implicitly embraced riparian rights, which are an English common law doctrine, when it adopted the common law of England as the rule for California courts in 1850. (See *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 695 [citing *Lux*, 69 Cal. at p. 390].) The California Supreme Court recognized riparian rights in several cases in the 1870s. (See e.g., *City of Los Angeles v. Baldwin* (1879) 53 Cal. 469; *Pope v. Kinman* (1879) 54 Cal. 3; *Cave v. Crafts* (1878) 53 Cal. 135.)

Appropriative rights grant individuals or entities the right to remove water from a waterway for use elsewhere. California's appropriative rights system was developed alongside the state's booming mining industry, as thousands of miners flocked to

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[2] See State Water Bd. Anti-Racism Resolution ¶ 7 (acknowledging that the "Board's programs were established over a structural framework that perpetuated inequities based on race").

California after the discovery of gold in 1848. These 'Gold Rushers' could not satisfy their water needs through riparian rights because mining largely occurred in the public domain away from streams, so miners and ditch companies built complex systems to deliver water to mining operations.[3] The self-governing Gold Rushers adopted a 'first come, first served' rule to manage this appropriation: Water belonged to the first person to assert ownership, which entailed "simply diverting water and putting it to use." (*People v. Murrison* (2002) 101 Cal.App.4th 349, 361.) Under this rule, water rights were prioritized according to the principle of prior appropriation, or "first in time, first in right." (*Shirokow*, 26 Cal.3d at pp. 307-08.) The California Supreme Court endorsed the miners' rule of prior appropriation in one of its earliest decisions concerning water rights. (*Irwin v. Phillips* (1855) 5 Cal. 140, 146-47.)

The Water Commission Act, Stats. 1913, ch. 586, formalized the appropriative rights system and established a permitting and licensing process for prospective appropriations. (See *Shirokow*, 26 Cal.3d at p. 308.) This statutory system only applied to new diversions; appropriative rights that were posted and recorded before the Act went into effect on December 19, 1914 were grandfathered in without additional permitting requirements – hence the distinction between pre-1914 (or "senior") and subsequent appropriators. Despite the procedural change, the miners' rule of prior appropriation continues to

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[3] See Littlefield, Water Rights during the California Gold Rush: Conflicts over Economic Points of View (1983) 17(4) W. Historical Q. 415, 421-22.

govern how all appropriative rights are prioritized. (See *El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 961.)

Hand in hand with the creation of California's unique hybrid riparian and appropriative rights system, the State, through laws and various forms of State-sponsored violence, was forcing Indigenous Peoples from their ancestral lands and waterways to make way for white settlers and enable mining and agricultural development.[4] In 1850, the newly-established California Legislature passed a law cruelly titled "Act for the Government and Protection of Indians," which provided for the removal of tribes from their traditional lands, separation of children from their families, and creation of a system of indentured servitude as punishment for minor crimes.[5] (Stats. 1850, ch. 133, pp. 408-10.) The actions of the State's early leaders reveal the genocidal motives of this law: California's first governor called for "a war of extermination" against Indigenous Peoples, and the State subsequently provided $1.29 million in 1850's dollars to subsidize private and militia campaigns against California's native population.[6] Alongside this State-sponsored

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[4] See State Water Bd. Anti-Racism Resolution ¶ 7(a) (acknowledging that "white supremacy led to the genocide and forced relocation of Native American people to facilitate white resettlement and the enslavement of Native American and Black people for white economic gain").

[5] Press Release, Off. of Governor Gavin Newsom, *Governor Newsom Issues Apology to Native Americans for State's Historical Wrongdoings, Establishes Truth and Healing Council* (Jun. 18, 2019) (hereafter *Newsom Apology to Native Americans*).

[6] *Newsom Apology to Native Americans.*

"program of genocide,"[7] the "ruthless flood of miners and farmers" who flocked to California during the Gold Rush "annihilat[ed] the natives without mercy."[8] Between 1845 and 1855 – the "worst decade" for California tribes – the state's Indigenous population declined by two thirds, from an estimated 150,000 people to just 50,000.[9] "The direct causes of death were disease, the bullet, exposure, and acute starvation. The more remote causes were insane passion for gold, abiding hatred for the Red man, and complete lack of any legal control."[10] The same mining and agricultural interests that propelled this program of genocide also created and benefitted from California's water rights system.

B. California's water rights system deprives Indigenous Peoples of their inherent water rights.

By encouraging use and diversion of water outside of waterways, the California water rights regime fundamentally conflicts with the foundational tenets of many Indigenous communities, which center on stewardship of the water and the plants and animals it sustains. As such, a system which derives individual water rights from property ownership and chronological appropriation, and which prioritizes extracting and diverting water, does inherent violence to the land's original inhabitants. The adoption of this system further displaced and

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[7] Advisory Council on Cal. Indian Policy (ACCIP), Historical Overview Report: Special Circumstances of California Indians (1997) p. 6 (hereafter ACCIP Historical Overview).
[8] ACCIP Historical Overview at p. 8.
[9] ACCIP Historical Overview at p. 7.
[10] ACCIP Historical Overview at pp. 7-8.

alienated tribes, marginalized Indigenous culture, and "contributed to the loss of water resource and watershed management practices that supported Native American people's traditional food sources and ways of life."[11]

But even taking on its face a system that assigns individual rights to water use, accepting the validity of senior water rights claims requires willfully ignoring Indigenous communities' prior claims to the water. As the original inhabitants of the state, Indigenous Peoples have stewarded and relied upon California's water resources for thousands of years. Tribes living alongside waterways used and diverted the water running through their ancestral lands long before the arrival of colonizers.[12] Yet, California's water rights system refuses to recognize tribes' inherent water rights: the rights that flow from tribes' longstanding water stewardship and use.[13] Moreover, the State's lobbying to deprive California tribes of reservations also limited tribes' access to their rightful federal water rights, which should be prioritized above any later state water rights claim.[14] This history of dispossession and betrayal casts Respondents' claims of priority to their water rights into doubt.

1. Indigenous Peoples' riparian and reserved water rights

[11] State Water Bd. Anti-Racism Resolution ¶ 7(b).
[12] ACCIP, Trust and Natural Resources Report (1997) p. 20 (hereafter ACCIP Trust and Natural Resources).
[13] See State Water Bd. Anti-Racism Resolution ¶ 7(b).
[14] See State Water Bd. Anti-Racism Resolution ¶ 7(b).

The violent removal of Indigenous Peoples from their ancestral lands violated their inherent title to land that they occupied for thousands of years, and the water rights that should attach to that title.[15] As non-native settlers flooded California during the Gold Rush, these settlers and the State forcibly removed Indigenous Peoples from their homelands and waterways. When the Legislature adopted the California Land Claims Act in 1851, requiring every person claiming property derived from land grants by the Spanish or Mexican governments to present their claims within two years, tribes had either already been removed from their ancestral lands or were unaware of the existence or implications of the Act.[16] Tribes were thereby "denied any legal interest in . . . their aboriginal lands" or the riparian rights that would have attached to them.[17]

Duplicitous treaty negotiations furthered this dispossession. Between 1851 and 1852, California tribes were compelled to sign 18 treaties with the federal government ceding their ancestral lands – territory that was presumed to encompass the entire state of California.[18] In exchange, treaty negotiators promised the tribes, including *Amicus* Winnemem Wintu Tribe, reservations and the benefits that flow from them. Implicit among these benefits were reserved water rights. Under the

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[15] See generally *United States v. Adair* (9th Cir. 1983) 723 F.2d 1394, 1413 (recognizing that "uninterrupted use and occupation of land and water created in the Tribe aboriginal or 'Indian title' to all of its vast holdings").
[16] ACCIP Historical Overview at p. 5.
[17] ACCIP Historical Overview at p. 5.
[18] ACCIP Historical Overview at p. 5.

doctrine of reserved water rights – also referred to as *Winters* rights after the U.S. Supreme Court decision in *Winters v. United States* (1908) 207 U.S. 564 – when the United States withdraws land from the public domain to establish an Indian reservation, it implicitly reserves for the tribe the amount of water necessary to fulfill the purpose of the reservation. (See *Cappaert v. United States* (1976) 426 U.S. 128, 138.) These reserved water rights "vest[] on the date of the reservation and are superior to the rights of future appropriators."[19] (*Ibid.*) Unlike appropriative rights, reserved water rights cannot be lost through non-use. (See *Colville Confederated Tribes v. Walton* (9th Cir. 1981) 647 F.2d 42, 51.)

Had these treaties been ratified, they would have guaranteed ample reserved water rights in perpetuity to signatory tribes. But the federal government broke its promises. After lobbying from California legislators and business interests, the U.S. Senate refused to ratify the treaties in 1852, instead placing them under an injunction of secrecy for over 50 years.[20] State and federal leaders at the time nonetheless treated the tribal lands as if they were ceded and opened them up for settlement by non-natives, without establishing the promised

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[19] This is true regardless whether the reservation was established before or after the Court's decision in *Winters*. (*See, e.g.*, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District* (9th Cir. 2017) 849 F.3d 1262 [confirming Tribe's reserved rights to water based on establishment of reservation in 1870s].)

[20] ACCIP Historical Overview at p. 5.

reservations.[21] Many of the signatory tribes were unaware that the treaties would not be honored and, relying on the treaties, relocated to the promised reservation lands, though they had no formal title to those lands under the law.[22] As a result, "all the California Indians became landless."[23] Robbed of their treaty reservations, the tribes were deprived of the corresponding water rights that should have been reserved to them; and robbed of their land through this duplicity, the tribes were denied access to the rights that attach to their prior, inherent title.[24]

Any subsequent riparian or reserved rights acquired by California tribes under state law fall far short of the inherent rights stemming from ancestral tribal lands or the rights that should have been guaranteed by treaty. After a Senate Archives clerk in 1904 "discovered" and publicized the unratified 1851-1852 treaties, the federal government began trying to acquire land for Indigenous Peoples who were rendered landless by the broken treaty promises.[25] Through this process, the government established roughly 82 small settlements, known as rancherias,[26]

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[21] See ACCIP Historical Overview at p. 5.
[22] ACCIP Historical Overview at p. 5.
[23] ACCIP Historical Overview at p. 7.
[24] See State Water Board Anti Racism Resolution at ¶ 7(b) ("Historical land seizures, broken promises related to federal treaty rights, and failures to recognize and protect federal reserved rights, have resulted in the loss of associated water rights and other natural resources of value, as well as cultural, spiritual, and subsistence traditions that Native American people have practiced since time immemorial.")
[25] ACCIP Historical Overview at pp. 11-12.
[26] ACCIP Historical Overview at p. 12.

for a portion of California's approximately 154 tribes.[27] These rancherias were often located on inhospitable landscapes with scant fresh water sources, with acreage representing only a fraction of tribes' historical territory. In fact, "several rancherias were virtually uninhabitable due to a lack of fresh water supply."[28]

The Shingle Springs Rancheria, where *Amicus* Shingle Springs Band of Miwok Indians now reside, is devoid of meaningful riparian rights. The Shingle Springs Band of Miwok Indians are Indigenous Peoples of the Sacramento Valley, with ancestral villages along the Sacramento, American, and Feather Rivers. These Delta waterways are the main artery of culture and spirituality for the Tribe and were sources of sustenance and medicine before the Tribe's relocation to the Shingle Springs Rancheria east of Sacramento. In 1920, a federal agent obtained the deed to a 160-acre parcel of rocky, infertile land in El Dorado County for the Tribe, about 50 miles from the Tribe's original home. Although relocating to this land meant leaving their original home, waterways, and way of life, the Tribe's elders had little choice; the broken treaty promises and subsequent privatization of their ancestral lands had left the Tribe, which was then known as the Sacramento-Verona Band of Homeless Indians, struggling for survival. The land was taken into trust for the Tribe as the Shingle Springs Rancheria. Unlike the Tribe's ancestral lands in the Delta, the Shingle Springs

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[27] See California Courts, *California Tribal Communities* <https://www.courts.ca.gov/3066.htm> (as of Mar. 2, 2022).
[28] ACCIP Historical Overview at p. 12.

Rancheria has no permanent fresh water source. The only surface water running through the trust land comes from two ephemeral streams – stream beds that are dry except for short periods following precipitation. The lack of riparian access at the Shingle Springs Rancheria, and the Tribe's resulting reliance on piped and purchased water to meet daily needs, stands in stark contrast to the riparian uses that were the Tribe's life source pre-colonization.

This loss of riparian access and associated water rights has eroded the Shingle Springs Band of Miwok Indian's identity, traditional knowledge, and cultural practice. Access to clean water sources is essential to the Tribe's traditional ceremonies, including repatriations (burials) and seasonal dances. It is customary during these ceremonies for participants to go into the water and cleanse themselves of anything attaching to them spiritually. For example, during the Tribe's Winter and Spring Dances, dancers take burdens from the community onto themselves and give them to the fire; the dancers must then cleanse to rid themselves of those burdens. Traditionally, participants cleansed in the Delta waterways running through the Tribe's ancestral villages. On the Rancheria, participants are forced to use a hose to cleanse themselves when there is no water available in the seasonal or ephemeral streams, as is often the case. Riparian rights are also intertwined with tribal water sovereignty; whereas rivers previously satisfied the Tribe's water needs, the Shingle Springs Rancheria now relies on the El

Dorado Irrigation District for its supply of fresh water.[29] To restore their connection to their cultural resources, spiritual identity, and traditional way of life, the Tribe in 2020 purchased a small tract of riparian land at their ancestral village site in Verona, where the Feather River and Sacramento River meet. Yet, despite finally regaining this limited riparian access to their ancestral waterways, the degraded condition of the Delta is impeding that reconnection: for the most part, the Tribe's cultural resources either disappeared or are not suitable for use due to the polluted state of the water, as discussed in Section III below.

Further, many California Tribes, including *Amicus* Winnemem Wintu, never received rancherias and therefore lack even the insufficient water rights tied to that trust land. In lieu of lands held collectively in trust for the Tribe, the federal government in 1893 provided some individual Winnemem Wintu members with 160-acre allotments around the Sacramento, McCloud, and Pit Rivers.[30] Many other Winnemem Wintu remained living on traditional homelands along the rivers and Squaw Creek. Amounting to 4,480 acres in total, the Tribe's

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[29] See, e.g., Final Environmental Impact Report, El Dorado Irrigation District Memorandum of Understanding for Water Service to the Shingle Springs Rancheria (2012) State Clearinghouse No. 2011022045.

[30] Hearings before State Water Resources Control Bd. on Cal. Dept. of Water Resources and U.S. Bur. of Reclamation Request for a Change in Point of Diversion for Cal. WaterFix, RTD-50, ¶ 17 (2016) (written testimony of Gary Mulcahy, Government Liaison, Winnemem Wintu Tribe) (hereafter Testimony of Gary Mulcahy).

allotted lands fell far short of the hundreds of thousands of acres of lands encompassed in historical Winnemem Wintu territory.[31] Moreover, many of these allotments were not contiguous to a waterway and thus did not come with any riparian rights. Records of the allotments from 1903 described many as having "no water, no value."[32] Had this land been taken into trust for the Tribe, rather than allotted to individuals, the Tribe would have retained at least a fraction of its inherent water rights along ancestral waterways. But as it stood, tribal members were largely deprived of any riparian rights at all, not to mention the reserved water rights that would have been protected had their treaties been ratified.

The construction of Shasta Dam and filling of the reservoir behind it flooded the few remaining formal riparian rights held by Winnemem Wintu members. The Shasta Dam, built between 1938 and 1945, captured water from the Sacramento, McCloud, and Pit Rivers and collected it in the manmade Shasta Reservoir.[33] In the process, thousands of acres of land along these waterways were permanently flooded – including all 4,480 acres of Winnemem Wintu allotments and all other ancestral lands along the rivers and Squaw Creek, where tribal members still resided. When completed, the dam destroyed over 90 percent of Winnemem Wintu historical village sites, sacred sites, burial

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[31] Testimony of Gary Mulcahy ¶ 26.
[32] Testimony of Gary Mulcahy ¶ 17.
[33] U.S. Bur. of Reclamation, *Shasta Dam* <https://www.usbr.gov/projects/index.php?id=241> (as of Feb. 28, 2022).

sites, and cultural gathering sites.[34] The federal government failed to compensate most Winnemem allotment owners or provide replacement land for relocation. The government thereby contravened the requirements of the Central Valley Project Indian Lands Acquisition Act, Pub. L. No. 198 (1941) 55 Stat. 612, which granted the federal government title to Winnemem lands to make way for the Shasta Dam in exchange for just compensation, replacement lands, and a cemetery to be held in trust.[35] With the flooding of their lands, the Winnemem Wintu lost their few formally recognized riparian rights and have never received trust lands to which reserved water rights might attach.

2. Indigenous Peoples' appropriative rights

Second, California's water rights system also erases Indigenous Peoples' claims to appropriative rights based on their historical use and diversion of water. The "first in time, first in right" doctrine developed during the Gold Rush was founded on the racist fallacy that white settlers were the first people to put California's waters to use. Yet Indigenous Peoples had been diverting and using water for agriculture well before the arrival of non-native settlers in California.[36] For example, the Nüümü people (Paiute-Shoshone) of Payahuunadü ("Land of the Flowing Water," or what is now referred to as Owen's Valley in eastern

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[34] Testimony of Gary Mulcahy ¶ 26.
[35] Testimony of Gary Mulcahy ¶¶ 24, 26 (discussing the Act's requirements to (1) "provide just compensation for the lands that would be flooded" and (2) "acquire lands and improvements for the lands taken.").
[36] ACCIP Trust and Natural Resources at p. 20.

California) built and maintained complex networks of irrigation ditches for agricultural purposes before colonization.[37] While such water diversion should give rise to the most senior appropriative rights, California's appropriative rights system does not recognize any appropriative rights for the Nüümü arising from their pre-colonial irrigation.[38] Adding to this erasure, any Indigenous Peoples seeking to claim appropriative rights based on their pre-colonial use face a significant barrier: appropriative rights are lost through non-use. (Wat. Code, § 1240.) Absurdly, tribes' ability to gain recognition of their first users' appropriative rights is thus impeded by the fact of their violent removal from their ancestral lands – the site of their historic water use.

C. Discriminatory laws deprived communities of color access to water rights.

The same white supremacist system that forced Indigenous peoples from their land and alienated them from the water also drove the "historical seizures of land from people of color" and the exclusion of Black communities, Asian immigrants, and other people of color from property ownership and the water rights that attach to it.[39] Laws and government policies – such as "race-

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[37] JPR Historical Consulting Services & California Dept. of Transportation, Water Conveyance Systems in California: Historic Context Development and Evaluation Procedures (2000) pp. 6-8.

[38] Owens Valley Indian Water Commission, *A History of Water Rights and Land Struggles* <http://www.oviwc.org/water-crusade/> (as of Feb. 28, 2022).

[39] State Water Bd. Anti-Racism Resolution ¶ 7(d).

focused immigration restrictions, the internment of Japanese Americans, exclusionary housing and labor policies, and lack of investment in Black, Indigenous, and people of color communities" – systematically alienated communities of color from access to resources, including water, and created layers of disadvantage and inequity that adhere today.[40]

California's Alien Land Law excluded Asian immigrants from both riparian and appropriative water rights for much of the first half of the twentieth century. Enacted in 1913 – the year before the Water Commission Act formalizing appropriative rights went into effect – and in force until 1952, California's Alien Land Law barred "aliens ineligible to citizenship" from owning or leasing property in the state. (Stats. 1913, ch. 113, p. 206.) The legislature enacted this racialized law to prevent Asian, particularly Japanese, immigrants from controlling California farmlands. (*Fujii v. State* (1952) 38 Cal.2d 718, 735.) In 1920, voters passed an initiative expanding the Alien Land Law to encompass children of Asian immigrants. (*Oyama v. California* (1948) 332 U.S. 633, 658-59 (conc. opn. of Murphy, J.).) California brought at least 79 escheat actions under the Alien Land Law to strip people of their property, of which "4 involved Hindus, 2 involved Chinese and the remaining 73 involved Japanese." (*Id.* at p. 661.)

Given the prevalence of Asian immigrants in California agriculture, these enforcement statistics likely represent a small fraction of the people who were prevented from owning or leasing

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[40] State Water Bd. Anti-Racism Resolution at ¶ 7(a).

agricultural land because of the Alien Land Law. Throughout the Law's effect, Asian immigrants powered California's agricultural industry. By 1880, Chinese immigrants were working in these regions as farm owner-operators, large- and small-scale tenants, and laborers.[41] After the federal Chinese Exclusion Act of 1882 halted immigration by Chinese laborers, Japanese immigrants increasingly worked on California farms. By 1910, approximately two-thirds of employed Japanese immigrants in the state worked in agriculture, and more than 5,000 Japanese Californians were listed as farm operators in the 1920 census.[42] As a large influx of Filipinos immigrated to the state in the 1920s and 1930s, in the decades after the U.S. forced colonial control of the Philippines through Philippine-American War, many Filipinos became farm laborers in response to the agricultural industry's demand for low-wage workers. By the late 1920s, Filipino workers were involved in the processing of every major crop grown in the fertile Delta region and comprised over 80 percent of the workforce cultivating and harvesting asparagus, one of the Delta's signature crops.[43] These Chinese, Japanese, and Filipino farmers and laborers had the agricultural knowledge needed to acquire and operate their own agricultural lands, yet

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[41] Chan, *Chinese Livelihood in Rural California: The Impact of Economic Change, 1860-1880* (1984) 53(3) Pacific Historical R. 273, 293.
[42] Higgs, *Landless by Law: Japanese Immigrants in California Agriculture to 1941* (1978) 38(1) J. of Econ. History 205, 206-07.
[43] Mabalon, Little Manila is in the Heart: The Making of the Filipina/o American Community in Stockton, California (2013) p. 69 (hereafter Mabalon).

the Alien Land Law made it illegal for them to work as more than farm laborers.

Because property ownership is a prerequisite for riparian rights, Asian immigrants and their children who were deprived of the right to own property were also directly excluded from the riparian rights system. For Chinese and Japanese immigrants, this exclusion lasted from the Alien Land Law's enactment in 1913 until 1952, when the California Supreme Court finally declared the law unconstitutional. (See *Fujii*, 38 Cal.2d. at p. 737-38.) For Filipino immigrants, the exclusion lasted until 1945, when the California Supreme Court decided they were not "aliens" for the purpose of property ownership because of the history of U.S. colonization in the Philippines. (See *Alfafara v. Fross* (1945) 26 Cal.2d 358, 364.) During the intervening decades, Asian immigrants – barred from owning and leasing agricultural lands and facing a wave of anti-Asian violence[44] – sought refuge in nearby cities. There, de facto segregation, racially restrictive covenants that limited property ownership to white families, and the discriminatory lending practice known as "redlining" forced Asian immigrants and other people of color into the most disinvested neighborhoods.[45] South Stockton, where

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[44] For example, the Filipino community was subjected to racism and violence throughout the mid-1920s and 30s, and Stockton's Little Manila was a focal point. The first recorded incident of anti-Filipino violence in the United States occurred in Stockton on New Year's Eve, 1926. In January 1930, a white mob bombed the Filipino Federation Building in Stockton. Mabalon at p. 93.

[45] See, e.g., Nelson et al., *Mapping Inequality: Redlining in New Deal America*, American Panorama

Amicus Little Manila Rising is located, was one such place. Many of Little Manila Rising's constituents bear the multigenerational wounds caused by their relatives' exclusion from property ownership and riparian rights.

The Alien Land Law – which formalized a legacy of de facto discrimination preventing many Asian immigrants from buying land – also effectively barred Asian immigrants from appropriative rights. Under the permitting process for acquiring appropriative rights, which the legislature adopted the same year the Alien Land Law was enacted, the Board may only issue appropriation permits for proposals to remove water from its source and put it to beneficial use elsewhere. (See *Cal. Trout, Inc. v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 816, 820.) With no access to agricultural land to irrigate or other property where water could be used, people affected by the Alien Land Law had little ability to meet these permit requirements; in fact, they had little need to divert water at all. This was precisely the intent of the Alien Land Law. A 1920 voter pamphlet advocating for the expansion of the Alien Land Law stated that the statute's "primary purpose is to prohibit Orientals who cannot become American citizens from controlling our rich agricultural lands,' that 'Orientals, largely Japanese, are fast securing control of the richest *irrigated* lands in the state,' and that 'control of these rich lands means in time control of the products and control of the markets.'" (*Fujii* 38 Cal.2d at p. 735,

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<https://dsl.richmond.edu/panorama/redlining/#loc=13/37.956/-121.328&city=stockton-ca> (as of March 10, 2022).

italics added.) The relentless and ever-expanding discrimination and violence against Asian immigrants went hand in hand with exclusion from property ownership and water rights.

Discriminatory laws and policies and forced segregation also effectively excluded Black Californians from the water rights system.[46] The first Black farm workers came to the San Joaquin Valley in the late 1800s following the Chinese Exclusion Act, recruited by local farmers to grow cotton.[47] During the early twentieth century, tens of thousands of Black migrants moved to California farm country as cotton acreage grew. By 1950, there were over 40,000 Black Americans in the San Joaquin Valley.[48] Cities and localities responded to the growing Black population with racist laws and policies, including discriminatory practices like racially restrictive covenants and redlining, as well as outright violence.[49] These discriminatory tactics pushed Black

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[46] Discriminatory laws suppressing the rights of Black people were insidious throughout California history. (See State Water Bd. Anti-Racism Resolution ¶ 7(a).) Many of these laws – such as the 1850 Testimony Exclusion Law barring Black and Indigenous people from giving testimony against whites (Stats. 1850, ch. 99, div. 3, § 14) – though nominally silent on property had the effect of facilitating divestment and exclusion of Black people from property ownership.

[47] Eissinger, *The Transplantation of African Americans and Cotton Culture to California's Rural San Joaquin Valley During the Nineteenth and Twentieth Centuries* (2009) p. 8 (Master's Thesis, Cal. State Univ., Fresno) (hereafter *Transplantation of African Americans and Cotton Culture*).

[48] *Transplantation of African Americans and Cotton Culture* at p.9 (citing the 1950 U.S. Census).

[49] Eissinger, *Re-Collecting the Past: An Examination of Rural Historically African American Settlements across the San*

farm workers to move to settlements on the arid outskirts of cultivated Central Valley farmland, such as Lanare in Fresno County and Fairmead in Madera County. These and similar settlements were some of the few available options where people of color could acquire rural property in the mid twentieth century precisely because they lacked access to water; the previous white inhabitants had abandoned them for that very reason.[50]

The pre-1914 appropriative and riparian water right claims asserted today stand on these violent, racist origins. Allowing these water rights claims to exist outside of regulation and enforcement would compound historical and ongoing harms to Indigenous Peoples and other people of color.

II. Senior Rights Holders Do Not Have an Absolute Claim to their Water Diversions.

Although the question before the Court is limited to the scope of Board enforcement authority under section 1052 of the Water Code, Respondents posit at points in their argument a sweeping theory that pre-1914 and riparian rights are wholly beyond Board regulatory and enforcement jurisdiction. For instance, Respondents characterize the holdings in *Millview Cnty. Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, and *Young v. State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397, as relying on the "logic that . . . valid pre-1914 rights are" "beyond the State Board's reach." (Resp. Br. at p. 36; see also *id.* at p. 51.) Respondents, that is, concede that

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Joaquin Valley (2017) pp. 3-4 (Ph.D. dissertation, Univ. of Cal., Merced) (hereafter *Re-Collecting the Past*).

[50] *Re-Collecting the Past* at p. 136.

the Board has authority to "investigate the existence and scope of the Senior Rights," but only as a "mere[] . . . accompaniment to the State Board's authority over unappropriated Division 2 water." (Resp. Br. at p. 52.) In Respondents' view, the Board's authority goes no further. "[I]f a water user's diversion is authorized under a pre-1914 right, then the State Board's task is at its end. 'The Water Board does not have jurisdiction to regulate riparian and pre-1914 appropriative rights.'" (*Id.* at p. 34 [quoting *Young*, 219 Cal.App.4th at p. 404.]; see also *id.* at pp. 51-52.)

This same logic is reflected in the trial court's Final Statement of Decision. There, the court reasons that the Board "has the authority to make a preliminary determination of whether unappropriated water is available for purposes of issuing a permit" but not to police or curtail diversions of water by senior or riparian rights holders unless the result of that preliminary determination is that they would be trespassing on unappropriated waters. (FSOD at p. 28; see also *id.* at p. 29 [concluding that "other than the emergency regulation process the Board chose not to pursue . . . there was no similar legislative expansion of the Board's enforcement authority to encompass curtailments of valid senior rights due to drought"].)

This reasoning would hobble the exercise of Board jurisdiction, with implications well beyond the section 1052 question at hand. As discussed in Section III below, it would also have sweeping policy implications for management of state water resources. And this reasoning is at odds with decades of

jurisprudence and nearly a century of legislative enactments that confirmed and extended the scope of State regulatory and enforcement authority over all water uses.

First, senior appropriators and riparian rights holders do not own the water they claim to unrestrainedly control. Under the Water Code, "[a]ll water within the State is the property of the people of the State" – only the right to use the water is available. (Wat. Code, §102.) Further, the beds of navigable streams and tidelands are held in public trust by the State for the benefit of the People. The public trust doctrine protects the public's interest in the water found in or feeding these waterways and imposes an affirmative duty on the State to safeguard public trust resources. The State, through the Water Code, designates the Board as a steward of this resource. (*Id*. § 174 et seq.) Senior appropriators merely hold a right to use the water in ways that do not threaten the public trust. Second, the Legislature has fortified the public trust doctrine by codifying the rule of reasonable use in the State's Constitution and Water Code. This rule provides the Board both the tools and the duty to ensure that sufficient water is kept instream for ecosystems and communities that depend on it. Finally, upholding the Board's authority to regulate and enforce against all water users through the intertwined doctrines of public trust and reasonable use is critical as the State enters a future of increasingly severe and perpetual drought.

A. The Public Trust Doctrine requires the State to safeguard water resources for the benefit of the People.

The public trust doctrine is an ancient common law principle that "enshrin[es] humanity's entitlement to air and water as a public trust." (*Envtl. Law Found. v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844, 856.) With roots in ancient Roman law, the doctrine was integrated into English common law and then embedded in federal and state common law in the United States. (See *Nat. Audubon Society v. Superior Ct.* (1983) 33 Cal.3d 419, 434; see also *Envtl. Law Found.*, 26 Cal.App.5th at p. 856.) The doctrine rests on several related precepts, including that "the public rights of commerce, navigation, fishery, and recreation are so intrinsically important and vital to free citizens that their unfettered availability to all is essential in a democratic society;" that "certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace;" and finally, that "certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate." *Envtl. Law Found.*, 26 Cal.App.5th at p. 856 [internal citation omitted].) The recognition that certain uses are beyond privatization is reflected in the usufructuary rule of water law:

> [O]ne does not own a property right in water in the same way he owns his watch or his shoes, but that he owns only a usufruct . . . It is thus thought to be incumbent upon the government to regulate water uses for the general benefit of the community and to take account thereby of the public nature and the interdependency which the physical quality of the resource implies.

(*Ibid.* [quoting *Zack's, Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1175-76].)

From these precepts, the public trust doctrine guarantees that "the shores, and rivers and bays and arms of the sea, and the land under them . . . [are to be] held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery." (*Martin v. Lessee of Waddell* (1842) 41 U.S. 367, 413.) As trustee, the State must steward these resources according to the public interest and preserve them for future generations. (See generally *Nat. Audubon*, 33 Cal.3d at p. 441.) As such, the doctrine does "more than [provide] a state's raw power to act; it imposes an affirmative duty on the state to act on behalf of the people to protect their interest" in public trust resources. (*Envtl. Law Found.*, 26 Cal.App.5th at p. 857; see also *Nat. Audubon*, 33 Cal.3d at p. 441 [explaining that the public trust "is an affirmation of the duty of the state to protect the people's common heritage" in public trust resources].) A state can only dispose of its public trust resources in very limited circumstances; it may never do so if it would threaten the trust or the preservation of water for its citizens. (See *Ill. Cent. R.R. Co. v. Illinois* (1892) 146 U.S. 387, 435.) The State of California acceded to its role as trustee of the public trust resources in the state when it gained statehood in 1850, and thus holds both the power and obligations that come with that role. (See *Nat. Audubon*, 33 Cal.3d at p. 434 [recognizing that "the State of California acquired title as trustee . . . upon its admission to the union," and "from the earliest days its judicial decisions have recognized and enforced the trust obligation"] [internal citation omitted].)

The range of resources and uses protected by California's public trust doctrine is expansive. (See *Envtl. Law Found.*, 26 Cal.App.5th at p. 857.) "While the public trust doctrine has evolved primarily around the rights of the public with respect to tidelands and navigable waters, the doctrine is not so limited." (*S.F. Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal.App.4th 202, 233.) Courts have, for instance, recognized that public trust protections extend to inland waters and non-navigable streams to the extent that diversions of those streams have impacts on navigable waters, as well as groundwater extractions that could have adverse impacts on other public trust waters. (*People v. Gold Run Ditch & Mining Co.* (1884) 66 Cal. 138, 151-52; see also *Nat. Audubon*, 33 Cal.3d 419; *Envtl. Law Found.*, 26 Cal.App.5th 844.) The range of uses protected by the trust is similarly expansive, "encompassing not just navigation, commerce, and fishing, but also the public right to hunt, bathe, or swim." (*S.F. Baykeeper*, 242 Cal.App.4th at p. 233.) The public rights protected by the trust also embrace aesthetic, spiritual, and ecological values, including "preservation of . . . lands in their natural state, so that they may serve as . . . open space[] and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." (*Marks v. Whitney* (1971) 6 Cal.3d. 251, 259-60.)

As trustee of the People's water resources, the Board may regulate, enforce, and curtail any use that is detrimental to the public trust, no matter how the usufructuary right was acquired. It is well established that in regulating use of water resources,

state agencies – including the Board – must be guided by consideration of the public trust. "[B]efore state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests." (*Nat. Audubon*, 33 Cal.3d at p. 426; see also *S.F. Baykeeper*, 242 Cal.App.4th at pp. 240-42 [holding that State Lands Commissions failed to fulfill its public trust obligations during environmental review process of sand mining leases on trust land].) This duty arises when the Board exercises its authority under the Water Code by, for instance, approving permits for exercise of new appropriative rights. But in addition, "the Board's authority to apply the public trust doctrine extends to rights not covered by the permit and license system"; it is "independent of and not bounded by the limitation of the Board's authority [to permit]" water rights. (*Envtl. Law Found.*, 26 Cal.App.5th at p. 862.) Thus, the Board has an "affirmative duty" to protect the public trust in relation not only "to permitted appropriative water rights" but also "in the context of riparian and pre-1914 appropriator rights." (*Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1489.)

At issue in this case, Delta waterways and ecosystems are threatened by both upstream diversions and massive water exports from further south in the Delta, many of which are undertaken under claims of pre-1914 water rights. The public trust doctrine should protect against any of these uses when they imperil the watershed. Water use entitlements, whatever their

progeny, are always subsidiary to the public trust: "when the public trust doctrine clashes with the rule of priority, the rule of priority must yield." (*El Dorado*, 142 Cal.App.4th at p. 966.)

B. The Legislature expanded Board authority through the reasonable use principle to prevent unrestrained uses by all rights holders.

The parties in this case agree that the Board can regulate pre-1914 and riparian rights through the emergency authority provided under section 1058.5 of the Water Code. (See Resp. Br. at p. 50; Appellant's Reply Br. at p. 26; Wat. Code, § 1058.5.) However, the Board's authority to regulate and enforce against harmful diversions by pre-1914 and riparian rights holders is not limited to emergency circumstances. Rather, "[w]ater use by both riparian users and appropriators is constrained by the rule of reasonableness, which has been preserved in the state Constitution since 1928" and subsequently incorporated into the Water Code. (*Light*, 226 Cal.App.4th at p. 1479.)

The Legislature acted to constrain water rights when it amended the State Constitution in 1928 through the adoption of Article X, Section 2. Resoundingly ratified by voters, this amendment requires that the State's water resources be put to reasonable use and authorizes the State to limit uses of water to what is reasonable under the circumstances:

> It is hereby declared that because of the conditions prevailing in this State . . . the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the

> use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and **such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water**.

(Cal. Const., art. X, § 2, emphasis added.) Soon thereafter, the State Supreme Court recognized that the "rule of reasonableness" codified in this amendment applies to all water uses "under whatever right the use may be enjoyed." (*Light*, 226 Cal.App.4th at p. 1479 [quoting *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 367-68].) Thus, even though the Board does not require riparian users and pre-1914 appropriators to obtain a permit before putting water to reasonable beneficial use, the Board is still empowered to prevent them from making unreasonable use of water. "Any other rule would effectively read Article X, Section 2 out of the Constitution." (*Id.* at p. 1487.)

The Legislature subsequently amended the Water Code to give the Board authority to apply the rule of reasonableness to all water rights. Contrary to Respondents' assertions (Resp. Br. at pp. 35-36), the rule of reasonableness is incorporated throughout multiple divisions of the Water Code. For instance, the Code requires the Board to "take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state." (Wat. Code, § 275.) The Board's constitutional obligation to protect reasonable use is

also codified in Division 2 of the Code (which also houses section 1052):

> This division is hereby declared to be in furtherance of the policy contained in Section 2 of Article X of the California Constitution and in all respects for the welfare and benefit of the people of the state, for the improvement of their prosperity and their living conditions, and the board and the department shall be regarded as performing a governmental function in carrying out the provisions of this division.

(*Id*. § 1050.) Further, section 1831 of Division 2 of the Code authorizes the Board to enforce against these unreasonable and wasteful uses through cease-and-desist orders. (*Id*. § 1831.) Likewise, the Delta Reform Act of 2009, codified in Division 35 of the Water Code, declares the "longstanding constitutional principle of reasonable use and the public trust doctrine . . . the foundation of state water management policy" and deems both "particularly important and applicable to the Delta." (*Id*. § 85023.)

What constitutes a reasonable use depends on the circumstances, particularly under changing environmental, social, hydrologic, economic, and technological conditions. (See *Light*, 226 Cal.App.4th at p.1479 [recognizing that "reasonableness of any particular use depends largely on the circumstances"].) Thus, what may be a reasonable use when water is plentiful may be unreasonable during drought conditions. A severe drought, which may have "the effect of further damaging the habitat of an endangered fish species" or causing other ecological impairments,

> must be part of the factual matrix considered in determining what is a reasonable use of the water – water which belongs to the people, and only becomes the property of users – riparian or appropriative – after it is lawfully taken from the river or stream. Past practices, no matter how long-standing, do not change current reality.

Siskiyou Cnty. Farm Bureau v. Dept. of Fish & Wildlife (2015) 237 Cal.App.4th 411, 447. The Board must also take into account "statewide considerations of transcendent importance," including, in particular, the "ever increasing need for the conservation of water in this state, an inescapable reality of life quite apart from its express recognition in [Article X, Section 2]." (*Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 140.)

The Board possesses broad adjudicatory, regulatory, and enforcement powers in the field of water resources, which it must marshal to prevent unreasonable and wasteful uses of water. (See Wat. Code, § 186 [extending to the Board "any powers . . . that may be necessary or convenient for the exercise of its duties authorized by law"]; *id.* § 174 [granting the Board the power to "exercise the adjudicatory and regulatory functions of the state in the field of water resources"]; *id.* § 275 [requiring the Board to take "all appropriate proceedings" to prevent waste and unreasonable use]; *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 752 [affirming Board authority to enact regulations to prevent unreasonable and wasteful uses of water]; *Light*, 226 Cal.App.4th at pp. 1484-87 [same].) The Board's powers to prevent unreasonable uses of water are at their zenith when public trust uses are at stake,

such as the conservation of wildlife habitat. (See *Light*, 226 Cal.App.4th at p. 1473).

C. The Court should affirm the Board's jurisdiction to regulate and enforce against harmful diversions by all rights holders.

Beyond their textual arguments, Respondent Irrigation Districts advance two policy theories to constrain the Board's authority over senior and riparian rights. Neither is availing and both would impair sound management of Delta resources at the expense of Delta communities and ecosystems.

First, Respondents suggest that the Board's temporary emergency authority under section 1058.5 of the Water Code is sufficient to manage any unreasonable diversions by senior rights holders and riparian users. They are wrong. As an initial matter, as the State points out on reply, Irrigation Districts are arguing in another case that the Board does not have curtailment authority under section 1058.5 at all. (Reply Br. at p. 26.) Indeed, they have weaponized the trial court's decision here to make precisely that argument. (San Joaquin Tributaries Authority Petition for Writ of Mandate and Verified Complaint for Declaratory and Injunctive Relief, *San Joaquin Tributaries Auth. v. Cal. State Water Resources Control Bd.* (Sept. 2, 2021) Case No. 21CECG02632, ¶¶ 171-73 [alleging that "[t]he Superior Court in the County of Santa Clara found the State Water Board did not have the authority to regulate pre-1914 and riparian rights"].) Further, as droughts have become the new normal, rather than emergencies requiring temporary fixes, solutions

beyond the exercise of temporary emergency authorities are needed.

Second, Respondents theorize that rights holders can simply litigate competing claims amongst themselves, without Board involvement. (Resp. Br. at pp. 53-57; see also Reply Br. at pp. 26-27.) Such piecemeal litigation falls well short of the comprehensive regulation that California's imperiled water systems need, particularly as climate change exacerbates existing water scarcity. Further, it fails to utilize available agency expertise on the subject to make accurate and balanced determinations regarding pre-1914 and riparian water rights.

As drought becomes an everyday reality in California, the Board's authority over senior and riparian rights cannot be constrained to its temporary emergency powers, or worse, subordinated to private party litigation of individual claims on a piecemeal basis. The Board has and needs the authority to enforce, regulate, and restructure water rights to safeguard the public's scarce water and the public trust uses it sustains, all of which are increasingly threatened by compounding impacts of climate change. If the Court were to memorialize the notion that senior and riparian water rights are outside of Board jurisdiction, the Delta and its communities will be direct victims.

III. Impairing the Board's Jurisdiction Over Senior Water Rights Would Have Dire Consequences for the Delta and the People and Ecosystems it Supports

Nowhere is the Board's need for authority to curtail, regulate, and enforce limits on water rights clearer than in the Delta: the source of the water that Respondents are fighting for

in this litigation. (FSOD at pp. 1-2.) The current approach to management of the Delta – which prioritizes appropriations over public trust uses and ecosystem and community health – has pushed the watershed into crisis.

Communities of color, including descendants of those who were historically excluded from the water rights system, face compounding harms from the Delta's degraded condition. These harms include the collapse of Delta fisheries and proliferation of hazardous algal blooms, discussed below. As climate change exacerbates water scarcity and creates perpetual drought conditions, Delta water quality will continue to deteriorate. This degradation will further threaten the survival of Indigenous cultures and ways of life that are rooted in Delta species and natural resources, compound health risks to people near toxic waterways, and exacerbate the alienation of communities of color from Delta amenities and beneficial uses. In the face of this accelerating crisis, it is vital that the Court avoid limiting the Board's ability to manage water rights throughout the totality of the Delta watershed.

A. The existing system of excessive appropriation in the Delta is unsustainable and requires holistic reform.

The Delta is a "critically important natural resource for California and the nation." (Wat. Code, § 85002.) Formed by the convergence of California's two largest rivers, the Sacramento and San Joaquin, the Delta's 75,000 square-mile watershed encompasses the "most valuable" wetland ecosystem and estuary, or body of water where freshwater and tidal saltwater meet, on

the west coast of North and South America. (*Ibid.*) The Delta's natural estuarian salinity conditions are highly beneficial to a wide variety of aquatic species that are adapted to the Delta's unique, dynamic ecosystem. (See *id.* § 85003(a).) The Delta also contains much of the state's water resources. Nearly half the surface water in California starts as rain or snow within the Delta's vast watershed.[51] When allowed to remain in the system, this water flows through the Delta into the San Francisco Bay and out to the Pacific Ocean.

Large-scale diversions routinely remove excessive quantities of water from the Delta, pushing the watershed into a state of "crisis." (Wat. Code, § 85001(a).) Federal and state water projects export Delta water and transfer it south, largely for agricultural and municipal use. (See *id.* § 85003(c).) Additionally, diversions by upstream Irrigation Districts and other appropriators remove water supply from Delta headwaters, further squeezing Delta resources.[52] The water rights claimed by these appropriators far exceed available Delta water supply. In the San Joaquin and Sacramento River Basins, water rights on paper account for more than five times the amount of water that would be in the waterways in an average year if there were no

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[51] U.S. Envtl. Prot. Agency, *San Francisco Bay Delta: About the Watershed* <https://www.epa.gov/sfbay-delta/about-watershed#about> (as of Mar. 4, 2022).

[52] See State Water Resources Control Bd., Water Unavailability Methodology for the Delta Watershed (2021) p. 34.

diversions.[53] The amount of water claimed by riparian users and pre-1914 appropriators alone is over twice the amount that would flow through the San Joaquin and Sacramento River Basin if there were no diversions.[54] The volume of water actually appropriated from Delta waterways routinely exceeds three million acre-feet[55] – the maximum amount of water that many experts believe can be exported from the Delta in an average year without destroying the ecosystem. On average, appropriations have reduced January to June outflows by an estimated 56 percent from the watershed's natural state. In the driest condition, this number rises to more than 70 percent.[56] These low freshwater flows – exacerbated by the recent years of historic droughts – raise water temperatures, increase pollution levels, and destroy habitat, leaving toxic air and water that is harmful to humans and deadly to fish.

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[53] Workshop by the State Water Resources Control Bd. on Analytical Tools for Evaluating the Water Supply, Hydrodynamic, and Hydropower Effects of the Bay-Delta Plan, pp. 11-12 (2012) (written testimony of Tim Stroshane, Senior Research Associate, California Water Impact Network) (hereafter Evaluating the Water Supply).

[54] Evaluating the Water Supply at pp. 11-12.

[55] Delta exports have exceeded 3 million acre-feet in eight of the last ten years. Delta Stewardship Council, *Water Exports* <https://viewperformance.deltacouncil.ca.gov/pm/water-exports> (as of Jun. 17, 2021).

[56] State Water Resources Control Bd., Scientific Basis Report in Support of New and Modified Requirements for Inflows from the Sacramento River and its Tributaries and Eastside Tributaries to the Delta, Delta Outflows, Cold Water Habitat, and Interior Delta Flows (2017) p. 1-5 (hereafter Scientific Basis Report).

The Delta Reform Act, passed by the Legislature in 2009 and codified in the Water Code, recognizes that the current status quo of excessive appropriation from the Delta is unsustainable: "Resolving the crisis requires fundamental reorganization of the state's management of Delta watershed resources." (Wat. Code, § 85001(a).) Among the Legislature's goals for this Act are to:

> (a) Manage the Delta's water and environmental resources and the water resources of the state over the long term.
> (b) Protect and enhance the unique cultural, recreational, and agricultural values of the California Delta as an evolving place.
> (c) Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem.
> (d) Promote statewide water conservation, water use efficiency, and sustainable water use.
> (e) Improve water quality to protect human health and the environment consistent with achieving water quality objectives in the Delta.

(*Id.* § 85020.) Additionally, the Delta Reform Act recognizes that the public trust doctrine, along with reasonable use, is "particularly important and applicable to the Delta." (*Id.* § 85023.) Given the Delta's perilous state, these legislative directives cannot be achieved if the Board lacks authority to regulate and enforce against pre-1914 and riparian water rights holders who divert water from the fragile Delta system.

B. The collapse of Delta fisheries will intensify if Delta water rights are not reformed.

The Delta supports some of the most fragile and unique fisheries in California. Since the late 1980s, federal and state

agencies have recognized the vulnerability of fish populations in the Delta, listing many native species under the federal and/or California Endangered Species Acts, including: Chinook salmon, Delta smelt, longfin smelt, and green sturgeon.[57] These fish require specific conditions to survive and procreate, including adequate flows for migratory species to reach their spawning habitats, cool water temperatures, and low salinity levels.[58] Excessive appropriations impair these conditions, and – coupled with the effects of severe drought and climate change – threaten to drive these precarious fish species into extinction. "Abundance of longfin and Delta smelt are at such low levels they are difficult to detect in the estuary, survival of juvenile salmonids and returns of spawning adults are chronically low, and risks of extirpation for multiple fish species are high."[59] The Board recognizes that it has a "regulatory responsibility to address" the water diversions and corresponding reduction in flows that have played a significant contributing role in pushing these native fish species to the brink of extinction.[60]

The loss of Delta fish populations is as much an environmental justice issue as it is an endangered species issue. While these fish are entitled to protection under federal and/or

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[57] State Water Resources Control Bd., Order Conditionally Approving a Petition for Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions (Dec. 15, 2021) p. 6 (hereafter Temporary Urgency Changes Order).
[58] See Temporary Urgency Changes Order at pp. 17-24.
[59] Temporary Urgency Changes Order at pp. 6-7.
[60] Scientific Basis Report at p. 1-5.

California Endangered Species Acts, they also merit protection as an irreplaceable cultural, religious, and subsistence resource to the watershed's original human inhabitants. From time immemorial, the Winnemem Wintu have held the Chinook salmon of all races and runs sacred in their spirituality and religion. In the words of Ponti Tewis (Gary Mulcahy), Government Liaison for the Winnemem Wintu:

> The Winnemem Wintu are a spiritual people. We believe in a Creator who gave life and breath to all things. In our creation story we were brought forth from a sacred spring on Mt. Shasta. We were pretty helpless, couldn't speak, pretty insignificant. But the Salmon, the Nur, took pity on us and gave us their voice, and in return we promised to always speak for them. Side by side, the Winnemem Wintu and the Nur have depended on each other for thousands of years – the Winnemem speaking, caring, and trying to protect the salmon, and the salmon giving of themselves to the Winnemem to provide sustenance throughout the year. Ceremonies, songs, dances, and prayers of the relationship between the salmon and the Winnemem Wintu are intricately woven into the very fabric of Winnemem Wintu culture and spirituality.[61]

For the Winnemem Wintu, because salmon are so intertwined with their identity and spirituality, the extinction of the salmon would amount to cultural genocide.

The decline of fish populations, coupled with the pollution of Delta waters, has also contributed to poor health outcomes for communities that rely or historically relied upon these species for sustenance. The Winnemem Wintu and Shingle Springs Band of

[61] Testimony of Gary Mulcahy ¶ 10.

Miwok Indians report that the fish species that were traditionally a staple of their diets are no longer available in the waterways. The unavailability of these species has eroded the Tribes' food sovereignty and contributed to health issues amongst tribal members, including obesity, type 2 diabetes, and cardiovascular disease.[62] Even with declining fish populations, an estimated 24,000 to 40,000 subsistence fishing visits are made to the Delta annually.[63] These subsistence fishers, many of whom are immigrants and/or people of color,[64] experience loss of food supply due to species decline. Additionally, the fish they are able to catch put subsistence fishers at heightened risk of exposure to contaminants that accumulate in the polluted waterways.[65] These damaging conditions are worsened by low or stagnant flows caused by excessive appropriation.

C. Excessive appropriation is also contributing to the spread of harmful algal blooms throughout Delta waterways.

Excessive freshwater diversions have further harmed the health of the Delta ecosystem by contributing to the emergence and spread of harmful algal blooms. Harmful algal blooms are

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[62] See, e.g., DeBruyn et al., *Integrating Culture and History to Promote Health and Help Prevent Type 2 Diabetes in American Indian/Alaska Native Communities: Traditional Foods Have Become a Way to Talk About Health* (2020) 17(12) Preventing Chronic Disease 1.
[63] Barrigan-Parrilla et al., The Fate of the Delta (2018) p. 54 (hereafter Fate of the Delta).
[64] Shilling et al., *Contaminated fish consumption in California's Central Valley Delta* (2010) 110(4) Envtl. Research 334, 335, 337.
[65] Fate of the Delta at pp. 54-55.

overgrowths of microscopic algae or algae-like bacteria found in waterways that produce toxins that are dangerous to humans and animals.[66] These foul-smelling, green blooms are a product of low freshwater flows, still water, and high water temperatures – all of which are driven by excessive diversions – combined with excess nutrients from agricultural runoff and wastewater and bright sunlight.[67] When all of these conditions coalesce in the warm season, harmful algal blooms spread like a cancer across the surface of Delta waterways. Since their emergence in the Delta in 1999, harmful algal blooms have become pervasive in Delta waterways.[68] In 2021 alone, 46 incidents of harmful algal blooms were voluntarily reported in the Delta.[69] This number likely only scratches the surface of the extent and duration of the problem.

The health risks posed by harmful algal blooms are severe. People can be exposed to harmful algal bloom toxins by swallowing or swimming in affected waters, eating poisoned fish

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[66] See State Water Resources Control Bd., Freshwater and Estuarine Harmful Algal Bloom (FHAB) Program Legislative Mandated Reports: 2021 Water Code Section 13182(a) Report (2021) p. 1 (hereafter FHAB Legislative Mandated Reports).
[67] See Smith et al., California Water Boards' Framework and Strategy for Freshwater Harmful Algal Bloom Monitoring: Full Report with Appendices (2021) pp. 1-3 (hereafter FHAB Framework).
[68] See Cooke et al., Regional Water Quality Control Board, Central Valley Region: Delta Nutrient Research Plan (2018) p. 12.
[69] Delta Stewardship Council, *Harmful Algal Blooms* <https://viewperformance.deltacouncil.ca.gov/pm/harmful-algal-blooms> (as of Feb. 28, 2022).

or shellfish (even when food is cooked, algal toxins remain), or inhaling airborne droplets of contaminated water that irritate lung tissue.[70] Depending on the level of exposure and the type of algal toxin, health consequences may range from mild to severe. High levels of exposure can be fatal, especially to pets.[71] Harmful algal blooms can damage the human central nervous system and liver and can lead to respiratory distress.[72] Moreover, toxins from harmful algal blooms can be mobilized by wind to become airborne pollutants and travel for many miles, contributing to human respiratory problems like asthma.[73]

In Stockton, where *Amici* Restore the Delta and Little Manila Rising are located, the dangerous effects of harmful algal blooms are borne disproportionately by vulnerable communities – including people of color, people in poverty, and people challenged by language barriers – who live near waterways or rely on them for subsistence fishing, bathing, sanitation, and recreation.[74] Since 2017, Restore the Delta has witnessed hundreds of area residents fishing in or near bloom-infested waters, boating and jet skiing through toxic algal blooms with small children present, launching boats into bloom-filled waterways, living in houseboats

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[70] Ctrs. for Disease Control and Prevention, *Avoid Harmful Algae and Cyanobacteria* <https://www.cdc.gov/habs/be-aware-habs.html> (as of Mar. 8, 2022) (hereafter Ctrs. For Disease Control).
[71] Ctrs. For Disease Control.
[72] Ctrs. For Disease Control.
[73] See, e.g., Freeman, *Seasick Lungs: How Airborne Algal Toxins Trigger Asthma Symptoms* (2005) 113(5) Envtl. Health Perspectives 632.
[74] Fate of the Delta at p. 54.

and floating encampments on top of toxic algal blooms, and living adjacent to waterways filled with toxic algae. Hazardous algal blooms are also a direct threat to the thousands of unhoused Stockton residents who regularly camp adjacent to Mormon Slough, the Stockton Shipping Channel, the San Joaquin River, Smith Canal, and the Calaveras River – all water bodies that are hydrologically connected to the rest of the Delta estuary.

These disproportionate effects compound long-term disinvestment and environmental and health burdens that already plague Stockton communities. Stockton communities are overburdened with air pollution and respiratory distress. Multiple Stockton census tracts within a half-mile of Delta waterways score in the 96th through the 100th percentile of all California communities for pollution burdens, as defined by the California Office of Environmental Health Hazard Assessment's mapping tool, CalEnviroScreen. Construction of the Crosstown Freeway, which destroyed historic Little Manila, the subsequent development of a constellation of transportation infrastructure, and the local siting of multiple heavy industrial sources all contribute to the area's intense air pollution problem. This pollution burden falls heavily on communities of color, who were forced to live in heavily impacted neighborhoods by discriminatory laws, policies, and practices, including the Alien Land Law, redlining, and racist real estate and home lending operations.[75] Impacts of aerosolized cyanobacteria from

[75] See, e.g., Nardone et al., Associations between historical residential redlining and current age-adjusted rates of emergency

hazardous algal blooms layer on top of this disproportionately heavy load of respiratory health burdens.

Hazardous algal blooms also compound economic distress experienced by Stockton communities by undermining long-term growth in jobs, economic output, and sustainable economic development in the Stockton region. Economically, Stockton has some of the highest "distress" conditions in the country: Among large U.S. cities, it ranked sixth nationally and first in the state in the Economic Innovation Group's 2016 "Distressed Communities Index." This ranking is based on combined indicators of educational attainment, housing vacancy, unemployment, poverty, median income, and changes in employment and business establishments.[76] The community's ability to use Stockton's waterways as a vehicle for economic development, tourism, and recreation is impaired by the unhealthy state of Delta water – particularly during warm seasons when people most want to be out on the water but when harmful algal blooms are often at their worst.

Additionally, hazardous algal blooms perpetuate the alienation of Indigenous Peoples from their ancestral waterways and the cultural resources found therein.[77] *Amicus* Shingle Springs Band of Miwok Indians is working to restore the Tribe's traditional ecological knowledge and cultural and spiritual

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department visits due to asthma across eight cities in California: an ecological study (2020) 4(1) The Lancet Planetary Health e24.
[76] Economic Innovations Group, The 2016 Distressed Communities Index: An Analysis of Community Well-Being Across the United States (2016) pp. 5-7.
[77] FHAB Framework at p. 162.

connection to the Sacramento River, American River, Feather River, and other Delta waterways that were their ancestral homes. This restoration work includes returning to these rivers to fish, gather estuarian plants and species to create ceremonial regalia, and collect plants for medicinal use. Yet, in the last two to three years, the proliferation of hazardous algal blooms in locations significant to the Tribe has blocked them from accessing the water and its cultural resources. For example, tribal leaders took a group of young boys on a trip to Stone Lakes National Wildlife Refuge to teach them to fish as their ancestors did, but they were repelled when they saw the entire surface of the lake covered with noxious algal blooms. As long as the hazardous algal blooms infest these waters, the Tribe's alienation from their cultural and spiritual practices persists.

D. Climate change will place further strain on scarce Delta water resources.

If nothing changes, the climate crisis will push these already tenuous conditions to the brink of disaster. Climate change will increase extreme weather events, including severe droughts that will make disastrous conditions like those seen during the 2014-15 drought all-too common.[78] Changing precipitation patters could cause freshwater flows to slow to a trickle between spring and fall – further imperiling the spawning journey of migratory fish species like the Chinook salmon during

[78] See State Water Resources Control Bd., Climate Change Considerations for Appropriative Water Rights Applications (2021) (hereafter Climate Change Considerations).

these months.[79] Warming is predicted to cause a devastating 35 percent flow reduction this century in the Colorado River, one of Southern California's key sources – creating more demand on Delta waters.[80] Increasing wildfires, sea level rise, heatwaves, and other threats will further exacerbate the strain on the state's water resources.[81] Without improved management, the results will include increasing salinity, proliferation of harmful algal blooms, spread of nonnative invasive species, decline of native fish species, and other harms to the estuarian ecosystem – all of which will do further violence to vulnerable Delta communities and tribes.

As drought conditions worsen with climate change, massive diversions of Delta water by senior appropriators will become increasingly untenable and incompatible with a living Delta. The Board's authority to determine the reasonableness of uses in this context, to adjudicate and enforce limits on water rights claims, and to limit diversions to what is reasonable and consistent with the public trust will take on even greater importance. *Amici* urge the Court avoid hobbling the Board in its exercise of these well-established and vital regulatory and enforcement powers.

CONCLUSION

As the strain on California's precious water resources continues to grow, everyone across the state will have to make

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[79] See Climate Change Considerations.
[80] Udall & Overpeck, The twenty-first century Colorado River hot drought and implications for the future (2017) 53(3) Water Resources Research 2404, 2410.
[81] See Climate Change Considerations.

sacrifices. Pre-1914 appropriative and riparian rights cannot be allowed to exist above regulation and enforcement while Indigenous Peoples and communities of color in the Delta bear the costs of excessive water appropriation.

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Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that the text of this brief consists of 12,597 words, not including caption, tables, signature block, and required certificates, as counted by Microsoft Word, the computer word processing program used to generate the brief.

DATED: March 14, 2022

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