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April 27, 2015

State Water Resources Control Board
1001 "I" Street
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STATE WATER RESOURCES
CONTROL BOARD
2015 APR 28 PM 3:23
DIV OF WATER RIGHTS
SACRAMENTO

PETITION FOR RECONSIDERATION AND
STATEMENT OF POINTS AND AUTHORITIES

*Petition for Reconsideration of Water Rights Order 2015-0017-DWR [23 C.C.R. § 769
subs. (a)(1) through (a)(6)]*

Stanford Vina Ranch Irrigation Company ("Petitioner"), located at 6230 Tehama-Vina Road (P.O. Box 248), Vina, CA 96092, hereby requests reconsideration of Water Rights Order 2015-0019-DWR (the "Order"), which was issued by the State Water Resources Control Board ("SWRCB") on April 17, 2015. Issuance of the Order was inappropriate and improper due to irregularities in the proceedings and abuses of discretion; because the Order was not supported by substantial evidence; and due to errors in law. Petitioner hereby requests that the SWRCB vacate its adoption and enforcement of the Order, that the SWRCB not adopt any additional curtailment or other orders attempting to implement 23 CCR § 877 or to reach similar results, and that the SWRCB compensate Petitioner for damages, takings, and reasonable attorneys' fees and costs incurred as a result of the improper approval of the Order.

State Water Resources Control Board

April 27, 2015

Re: Petition for Reconsideration by Stanford-Vina Ranch Irrigation Company

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Copies of this Petition and the accompanying materials have been sent to any other parties because no parties have identified themselves to Petitioner as interested in this matter.¹

Respectfully submitted,

**MINASIAN, MEITH, SOARES,
SEXTON & COOPER, LLP**

By



PETER C. HARMAN, Attorneys for Stanford-Vina
Ranch Irrigation Company

¹ No parties have identified themselves to Petitioner as being interested in this matter, nor have any interested parties or the SWRCB provided contact information for any such interested parties. Petitioner understands this to mean that there are no other interested parties in this matter. The SWRCB implied in its Order Denying Reconsideration (WRO 2014-0028) that all other diverters on Deer Creek are interested parties. (WRO 2014-0028 at p. 13.) The SWRCB further asserted that “[t]he contact information for these diverters is included as Attachment A to Order 2014-0022.” (WRO 2014-0028 at p. 13.) That attachment lists the names of the 18 primary owners of 50 water rights on Deer Creek, but it does not include any contact information. None of the water rights holders on Deer Creek have notified Petitioner that they wish to be considered as interested parties in this matter.

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Page 3.

Statement of Points and Authorities Pursuant to 23 C.C.R. § 769(c)

Petitioner SVRIC hereby provides this Statement of Points and Authorities in support of the legal issues raised in support of its Petition for Reconsideration of Water Rights Order 2015-0019-DWR. Petitioner seeks reconsideration of the Order on three grounds: Irregularity in the proceedings and abuse of discretion; lack of substantial evidence; and errors in law. Petitioner's arguments were adequately explained in the Comments ("Comments") of Stanford Vina Ranch Irrigation Company and Jim Edwards Regarding the SWRCB Proposed Emergency Regulations for Curtailment of Diversions on Certain Sacramento River Tributaries; OAL File No. 2015-0320-06EE, dated March 25, 2015, which was previously submitted to the State Water Board, and is attached hereto and incorporated herein by this reference.

See also, generally, Complaint and Petition ("Complaint") in *Stanford Vina Ranch Irrigation Company v. State Water Resources Control Board*, No. 34-2014-80001957, filed Oct. 22, 2014, which is attached hereto and incorporated herein by this reference.

Very truly yours,

**MINASIAN, MEITH, SOARES,
SEXTON & COOPER, LLP**

By: 

PETER C. HARMAN

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STATE WATER RESOURCES
CONTROL BOARD
2015 APR 28 PM 3:23
DIV OF WATER RIGHTS
SACRAMENTO

March 25, 2015

By email to staff@oal.ca.gov and to daniel.schultz@waterboards.ca.gov

Re: Comments of Stanford Vina Ranch Irrigation Company and Jim Edwards Regarding the SWRCB Proposed Emergency Regulations for Curtailment of Diversions on Certain Sacramento River Tributaries; OAL File No. 2015-0320-06EE

These comments are submitted on behalf of Stanford Vina Ranch Irrigation Company and Mr. Jim Edwards in response to the State Water Resources Control Board's (SWRCB) proposed readoption of amended emergency drought regulations for Antelope, Mill, and Deer Creeks (title 23, California Code of Regulations (C.C.R.) §§ 877; 878; 878.1 subds. (b)-(f); 878.2; 879 subds. (a)-(b); 879.1; and 879.2). In short, the proposed regulations fail to satisfy the procedural and substantive requirements of the Administrative Procedure Act; accordingly, the Office of Administrative Law (OAL) must disapprove the proposed regulations.

Background

Stanford Vina Ranch Irrigation Company (SVRIC) is a nonprofit mutual water company located on Deer Creek in Tehama County, California. SVRIC owns conveyance and diversion structures in and connected to Deer Creek, and manages its shareholders' pre-1914 and riparian senior water rights. SVRIC serves approximately 5700 acres of irrigated land. The land is predominately used for permanent plantings including orchards and pasture. Because SVRIC holds senior water rights in an extremely reliable watershed, it has not developed alternative water supplies, such as groundwater, that may be available to mitigate the effects of drought in other areas with less reliable surface water supplies. Even in historically dry periods such as the early 1990s and 1976-1977, SVRIC was able to divert enough water to keep permanent plantings alive.

Jim Edwards owns the Edwards Ranch, which covers several thousand acres of land east of the Sacramento River in Tehama County. Approximately 2,000 acres in the westerly portion of the ranch are irrigated through a system of ditches and pipelines, which are fed principally from a diversion structure located on Antelope Creek. The Edwards Ranch diverts water from

Antelope Creek under both pre-1914 and riparian senior water rights. The irrigated lands include 900 acres of permanent crops (walnuts, almonds, and prunes) and the remainder is used to grow feed or provide pasture for up to 2,000 head of cattle. Even during dry periods, Antelope Creek has been able to provide sufficient water to support the operations on Edwards Ranch.

Now, via emergency regulation and without enough lead time to develop alternative water supplies, the SWRCB proposes to curtail water supplies in a manner that will kill permanent plantings and devastate cattle operations, resulting in catastrophic economic and societal impacts to SVRIC and the Edwards Ranch, and to the small Tehama County communities, such as Vina, which rely on these operations. In addition, the SWRCB failed to satisfy the procedural and substantive requirements for emergency regulations.

Discussion

The emergency regulations were proposed under the ostensible authority of California Government Code § 11346.1, Water Code § 1058.5, ¶ 17 of the Governor's unnumbered Executive Order dated April 25, 2014, and Executive Order No. B-28-14 (Dec. 22, 2014). Both ¶ 17 of the Executive Order and § 1058.5 of the Water Code authorize the SWRCB to promulgate emergency regulations to, *inter alia*, "prevent the waste, unreasonable use, or unreasonable method of diversion of water" or "to require curtailment of diversions when water is not available under the diverter's priority of right." The SWRCB's issuance of emergency regulations is governed by Government Code §§ 11346.1, 11349.1 and 11349.6, and by Water Code § 1058.5. Because the regulations themselves and the SWRCB's actions in proposing them violate these and other applicable statutes and laws, OAL must disapprove them.

I. The SWRCB Failed to Adhere to Applicable Procedural Requirements.

A. The SWRCB Did Not Meet the Prerequisites for a Readoption of the 2014 Tributary Emergency Regulations.

The SWRCB is purporting to readopt these emergency regulations pursuant to Government Code section 11346.1(h). (See Notice of Publication / Regulations Submission (Form 400), Mar. 20, 2015, at 1.) Section 11346.1 of the Government Code only permits readoption of emergency regulations under the following terms:

[OAL] may approve not more than two readoptions, each for a period not to exceed 90 days, of an emergency regulation that is the same as or substantially equivalent to an emergency regulation previously adopted by that agency. Readoption shall be permitted only if the agency has made substantial progress

and proceeded with diligence to comply with subdivision (e).

(Gov. Code § 11346.1(h).)

The SWRCB here is purporting to readopt the emergency regulations for a period of 270 days, and the SWRCB has not made any progress or proceeded with diligence to comply with section 11346.1(e). OAL must therefore deny this readoption for failure to comport with the requirements of section 11346.1(h).

The SWRCB indicates that these regulations will be readopted for a period 270 days. (See Emergency Regulations Digest at 54, 55.) However, the term of any readoption may not exceed 90 days, and only two readoptions are permitted, for a total of 180 days. (Gov. Code § 11346.1(h).) The SWRCB may not, as it purports to do, make a single 270-day readoption of the emergency regulations. OAL must reject any request to readopt the emergency regulations for any period greater than 90 days.

Even if the SWRCB were only seeking a 90-day readoption as permitted by the Government Code, OAL must deny this readoption due to the SWRCB's failure to make any progress or to show any diligence in complying with section 11346.1(e) of the Government Code. Section 11346.1(h) only authorizes OAL to approve a readoption of emergency regulations "if the agency has made substantial progress and proceeded with diligence to" "compl[y] with Sections 11346.2 to 11347.3, inclusive," and to "transmit to [OAL] . . . a certification that Sections 11346.2 to 11347.3, inclusive, were complied with . . ." (Gov. Code § 11346.1(e), (h).) The SWRCB has failed to make any effort to comply with these mandates, despite having over nine months during which to do so. These statutes "establish the basic, minimum procedural requirements" for promulgating regulations. Among many other requirements, these statutes required the SWRCB, prior to OAL's approval of a readoption of the emergency regulations, to:

- Provide a "description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives" (§ 11346.2(b)(4)(A));
- Provide a "description of reasonable alternatives to the regulation that would lessen any adverse impact on small business and the agency's reasons for rejecting those alternatives" (§ 11346.2(b)(4)(B));
- Provide "Facts, evidence, documents, testimony, or other evidence on which the agency relies to support an initial determination that the action will not have a significant adverse effect on business" (§ 11346.2(b)(5)(A));
- "[A]ssess the potential for adverse economic impact on California business enterprises and individuals . . ." (§ 11346.3(a));

- Provide notice of the proposed regulation “[a]t least 45 days prior to the hearing and close of the public comment period” (§ 11346.4(a)), which notice shall comply with section 11346.5; and
- Submit a statement to OAL including, among other things, “[a] determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulations, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law,” and “[a]n explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses” (§ 11346.9(a)(4), (a)(5)).

The requirements listed above represent only a fraction of the prerequisites to requesting readoption of an emergency regulation, none of which have been completed or even initiated by the SWRCB prior to this action. The SWRCB has made none of the progress and shown none of the diligence required by section 11346.1(h). Nothing in Water Code section 1058.5(c) supersedes or modifies section 11346.1(h)’s requirements for readoptions. (See Gov. Code § 11346(a) (“This chapter shall not be superseded or modified by any subsequent legislation except to the extent the legislation shall do so expressly.”).) OAL must deny this request for readoption due to the SWRCB’s blatant disregard for the due process requirements attendant to readopting emergency regulations pursuant to section 11346.1(h).

B. The Record Submitted in Support of the Rulemaking Lacks a Showing of “Necessity.”

Government Code § 11349.6(b) requires OAL to disapprove proposed emergency regulations if they do not meet the standard for “necessity.” The necessity standard is described in § 11349(a) and in the California Code of Regulations, title 1, § 10. Section 10(b) of C.C.R. title 1 requires that the record of the rulemaking must include a “statement of the specific purpose of each adoption” and “information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision.” The record submitted in support of these emergency regulations does not include any such statements or explanations, that describe, for instance, why those specific amounts of water are “required” for the survival of the fish, or how those “needs” were balanced against the diverters’ needs and rights to divert water pursuant to their water rights. (See “Curtailed of Diversions due to Insufficient Flow for Specific Fisheries Emergency Regulation Digest,” March 12, 2015, at pp. 16-24, 29-37.) The State Board accepted the flow requests of the National Marine Fisheries Service and the

California Department of Fish and Wildlife at face value,¹ without any investigation or modification of the flow amounts, seasons, frequencies, or durations. (*Id.*) No balancing of competing interests occurred. Although information included in the digest would support lower base flow volumes and temperature-based restrictions on the base flow season, that information was arbitrarily and capriciously ignored. (*Id.* at 30 (indicating that sustained minimum temperatures of 67 degrees or more “appeared to halt adult CV SR salmon migration” and that salmonids had successfully migrated up Mill Creek in flows as low as 28 cubic feet per second (cfs)).) The proposed emergency regulations must be disapproved because the SWRCB has failed to explain the specific need for each provision of the regulations.

II. The Proposed Regulations Fail to Meet Substantive Standards of Authority, Necessity, Clarity, and Consistency.

OAL is required by statute to disapprove the SWRCB’s proposed emergency regulations “if it determines that the regulation fails to meet the standards set forth in [Government Code] Section 11349.1.” (Gov. Code § 11349.6(b).) Section 11349.1 requires that emergency regulations meet six standards: Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. Each of the six standards is defined in Government Code § 11349. If the proposed emergency regulations fail to meet any of the standards, OAL “*shall* disapprove” them. (Gov. Code § 11349.6(b) [emphasis added].) The SWRCB’s proposed emergency regulations for “Curtailed Diversions Based on Insufficient Flow to Meet All Needs” violate at least four of the six standards, so Government Code § 11349.6(b) mandates that OAL disapprove them.

A. The Proposed Regulations Do Not Meet the Standard for Authority.

Because SWRCB lacks the authority to adopt these emergency regulations, OAL is required to disapprove them. (Gov. Code §§ 11349(b), 11349.6(b).) Acceptable authority must be in the form of “a California Constitutional or statutory provision which expressly permits or obligates the agency to adopt . . . the regulation” or one that “grants a power to the agency which impliedly permits or obligates the agency to adopt . . . the regulation in order to achieve the purpose for which the power was granted.” (1 C.C.R. § 14(a).) The SWRCB’s interpretation of its own regulatory power is not conclusive or binding upon OAL because the provisions of 1 C.C.R. § 14(c)(1)(A) through (C) apply in this case: (A) the SWRCB’s “interpretation alters, amends or enlarges the scope of the power conferred upon it”; (B) SVRIC and others challenge

¹ The State Board apparently refused to increase pulse flow volumes over those required by the 2014 emergency regulations, as CDFW and NMFS had apparently requested. CDFW and NMFS gave no support for the request for increased pulse flow magnitudes. However, the 100 cfs pulse flow figure requested by CDFW and NMFS in 2014 is likewise unsupported and unexplained.

the SWRCB's alleged authority; and (C) "a judicial interpretation of a provision of law cited as 'authority' or 'reference' contradicts the SWRCB's interpretation." (*Id.* at subd. (c)(1).) Through these proposed emergency regulations, the SWRCB's novel interpretation of its authority would serve to alter, amend, and enlarge the scope of its authority. This new interpretation contradicts previous judicial interpretations of the same authority and, by this public comment, SVRIC challenges the SWRCB's authority to promulgate these emergency regulations.

1. Section 1058.5 and the Governor's April 25 Executive Order Do Not Authorize the SWRCB to Issue Emergency Regulations for the Purpose of Protecting Public Interests or Public Trust Uses.

The SWRCB has exceeded its authority by attempting to issue emergency regulations for the purpose of protecting public trust (fishery) interests when it was not authorized to issue emergency regulations to serve that purpose. Water Code § 1058.5 and the Governor's April 25, 2014, Executive Order, at ¶ 17, authorize the SWRCB to issue emergency regulations "to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water." These authorities did not authorize the SWRCB to issue emergency regulations for the purpose of protecting public trust interests, nor did they authorize the SWRCB to vastly expand the definitions of waste and unreasonable use in order to include serving the public trust as an acceptable regulatory goal. OAL must disapprove the proposed emergency regulations because the SWRCB was never authorized to issue regulations in this area.

The statute and executive order that authorized the SWRCB to issue emergency regulations simply did not authorize the SWRCB to use that authority for the purpose of protecting public trust uses. The scope of "public trust" interests in water was explained in *National Audubon v. Superior Court* (1983) 33 Cal.3d 419. The public trust is intended to preserve among other things, environmental and recreational values. (E.g., *National Audubon*, 33 Cal. 3d at 425.) Historically, and in the cases upon which the SWRCB relies, the prohibition of waste and unreasonable use is separate and distinct from the public trust doctrine. (See, e.g., *Imperial Irrigation District v. SWRCB (IID I)* (1986) 186 Cal.App.3d 1160, 1168 n.12 ("National Audubon did not involve a charge of unreasonable use under article X, section 2, but rather a claim that use of water is harmful to interests protected by the public trust." Emphases added.)) Water Code § 1058.5 authorizes the SWRCB to promulgate emergency regulations *only* in order

to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, to promote water recycling or water

conservation, to require curtailment of diversions when water is not available under the diverter's priority of right, or in furtherance of any of the foregoing, to require reporting of diversion or use or the preparation of monitoring reports.

(Water Code § 1058.5(a)(1).) The Governor's April 25, 2014, executive order used the same language in its directive to the SWRCB. (Governor's Executive Order, unnumbered, April 25, 2014, ¶ 17.) Had the Legislature or the Governor intended to authorize the SWRCB to promulgate emergency regulations in order to protect fishery or public trust interests, it could have done so explicitly. Other sections of the Water Code and the Governor's drought proclamation make specific mention of "the public interest" and of "public trust uses." (E.g., Water Code § 1335(d); Governor's Drought Proclamation, January 17, 2014, ¶ 14.) No such language is included anywhere in any grant of emergency regulatory authority to the SWRCB. The proposed emergency regulations must be disapproved because the SWRCB was not authorized to promulgate emergency regulations to serve public trust interests.

2. Section 1058.5 and the Governor's April 25 Executive Order Do Not Authorize SWRCB to Redefine "Waste and Unreasonable Use".

The SWRCB was not authorized to redefine established concepts of California water law in order to expand its regulatory authorization; its reliance on Water Code § 1058.5 as authorization to redefine "waste and unreasonable use" is totally misplaced. (See proposed § 877, "Authority" section.) Section 1058.5 authorizes the SWRCB to issue emergency regulations when needed to achieve one or more of the listed goals:

to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, to promote water recycling or water conservation, to require curtailment of diversions when water is not available under the diverter's priority of right, or in furtherance of any of the foregoing, to require reporting of diversion or use or the preparation of monitoring reports

(Water Code § 1058.5(a)(1).)

The SWRCB shoehorned "service of public trust interests" into § 1058.5's authorization by defining any perceived impingement on public trust interests to be "waste and unreasonable use of water." (Proposed § 877 ("The State Water Resources Control Board has determined that it is a waste and unreasonable use under Article X, section 2 of the California Constitution to continue diversions that would cause or threaten to cause flows to fall beneath the drought emergency minimum flows" as established in the proposed emergency regulations.)) By redefining some of the terms included in § 1058.5's grant of authority (waste and unreasonable use) to include a term that was purposefully excluded from that authorization (serving public

trust interests), the SWRCB is clearly attempting to circumvent facial limitations in § 1058.5's grant of authority, as defined by the Legislature. Had the Legislature intended § 1058.5 to permit the issuance of emergency regulations to protect public trust interests, it could have done so in clear language. (See, e.g., Water Code § 1335(d) (specifically mentioning "public trust uses" and "the public interest").) It did not. Similarly, the Governor chose not to include a directive to protect purported public trust interests in his January 17 emergency drought proclamation, in his April 25 executive order, or in Executive Order No. B-28-14. The SWRCB's attempt to shoehorn the protection of public trust interests into § 1058.5's grant of authority is a thinly veiled attempt to make an end-run around § 1058.5's and the April 25 executive order's clear and deliberate limitations on the SWRCB's emergency regulatory authority.

3. The SWRCB Lacks Authority to Declare Uses of Water to be Unreasonable via Emergency Regulations.

The SWRCB lacks authority to declare uses of water to be "unreasonable" in the absence of an evidentiary hearing and particularized factual findings. "What is reasonable use or reasonable method of use of water is a *question of fact* to be determined *according to the circumstances in each particular case.*" (*Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 139 (emphasis added).) "The question of reasonable use or reasonable method of use of water constitutes a factual issue" (*SWRCB v. Forni* (1976) 54 Cal.App.3d 743, 754.) The SWRCB cannot declare a use—or, as in this case, all consumptive uses in a particular watershed or group of watersheds—to be unreasonable without holding a hearing and establishing the factual circumstances that make each individual diverter's use "unreasonable." In the absence of a formal adjudicatory action, a SWRCB proclamation defining a use or class of uses to be unreasonable amounts to no more than an unenforceable "policy statement." (*Forni*, 54 Cal.App.3d at 752.) The SWRCB itself was split as to whether it had the authority to adopt these emergency regulations, with one boardmember correctly asserting at the March 17, 2015, SWRCB meeting that the Board lacked such authority.

4. The Proposed "Authority" Citations are Incorrect.

The SWRCB's "Authority" citations are incorrect because they include Water Code § 1058 as a source of the Board's authority to issue these emergency regulations. The SWRCB cannot conflate its general regulatory authority with the specific and circumscribed authority to issue emergency regulations described in § 1058.5. The Board has not followed the procedural requirements applicable to its general regulatory authority under § 1058, so it may only promulgate regulations for the specific, limited purposes enumerated in § 1058.5 and the Governor's April 25 executive order.

B. The Proposed Regulations Do Not Meet the Standard for Consistency with Existing Law.

Consistency “means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” (Gov. Code § 11349(d).) The proposed emergency regulations are a complete departure from 165 years of California water law. In addition, imposing these regulations would violate U.S. Supreme Court precedent and both the Federal and California Constitutions. OAL is therefore required by statute to disapprove the proposed regulations because they are inconsistent with existing statutes, court decisions, and other provisions of law. (See Gov. Code §§ 11349(d), 11349.6(b).)

1. The Proposed Regulations are Fatally Inconsistent with Foundational Principles of California Water Law.

Water rights are vested property rights. “As such, they cannot be infringed by others or taken by government action without due process and just compensation.” (*United States v. SWRCB* (1986) 182 Cal.App.3d 82, 101 [citations omitted].) SVRIC’s shareholders, Mr. Edwards, and their predecessors-in-interest have been exercising their rights to divert water for well over 100 years. The seniority and reliability of their water rights has become integrated into and inseparable from the local economy and community. To upend these property rights and way of life will do irreparable damage. This damage is even more acute and offensive given the SWRCB’s infringement of legal and Constitutional protections enjoyed by SVRIC and other water right holders subject to the proposed emergency regulations.

a. The Proposed Emergency Regulations Disregard the Established Water Rights Priority System.

The proposed regulations are inconsistent with the water rights priority system, which “has long been the *central principle in California water law*.” (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1243 [emphasis added]; see also Civ. Code § 1414.) Section 878.1 of the proposed regulations would give domestic and municipal uses priority over all other uses, regardless of seniority. This disruption extends to any diversion claimed for public safety. (See proposed § 878.1.)

In addition, during the May 20, 2014, SWRCB hearing on the last iteration of these proposed regulations, Board Member D’Adamo suggested—and SWRCB staff agreed—that the Board’s adoption of these regulations would elevate public trust uses of water to a super-senior priority. All uses that compete with this super seniority are declared unreasonable and wasteful.

This is totally inconsistent with the Supreme Court's long-standing holding that the public trust interests are not a part of the California water rights priority system. (*National Audubon*, 33 Cal.3d at 452.) Instead, public trust interests are to simply be taken "into account in the planning and allocation of water resources" when water rights are initially adjudicated in a quasi-judicial proceeding by the Board or in a proceeding in state court. (*Id.* at 446.)

Moreover, the SWRCB has not explained why the rule of priority must be abandoned by curtailing all diversions in favor of instream uses. The case of *El Dorado Irr. Dist. v. SWRCB* (2006) 142 Cal.App.4th 937, 966, notes that the rule of priority and the rule against unreasonable use of water occasionally clash. However, "Every effort . . . must be made to respect and enforce the rule of priority." (*Id.*) Indeed, the regulatory authorizations themselves specifically limit the SWRCB's emergency regulatory curtailment authority to "curtailment of diversions when water is not available under the diverter's priority of right." (Wat. Code § 1058.5(a)(1); Governor's Executive Order, unnumbered, April 25, 2014, ¶ 17.) It is the SWRCB's duty to make every effort to protect the rule of priority before resorting to emergency regulations that upend the established legal water right priority system.

b. The Proposed Emergency Regulations Ignore the Governing Judicial Water Rights Decrees.

As to Deer Creek, whose water rights, like Mill Creek's, were adjudicated in Tehama County Superior Court, "[t]he decree [entered by the court] is conclusive as to the rights of all existing claimants upon the stream system lawfully embraced in the determination." (Wat. Code § 2773.) The Board cannot change the decreed allocations absent an order from the court (which maintains continuing jurisdiction over these issues) or a formal adjudication under Water Code § 2500 et seq.

c. The Proposed Regulations Rewrite the Law of Waste and Unreasonable Use of Water and the Public Trust Doctrine.

The proposed regulations ignore and attempt to collapse the distinction between the state Constitution's prohibition of waste and unreasonable use of water on the one hand, and the public trust doctrine on the other. As discussed *supra*, these two overarching ideas are totally separate aspects of California water law. (See, e.g., *IID I*, 186 Cal.App.3d at 1168 n.12 ("National Audubon did not involve a charge of unreasonable use under article X, section 2, but rather a claim that use of water is harmful to interests protected by the public trust." Emphases added.)) These regulations represent a wholesale reconfiguration of the law, combining the two theories into a single idea.

The Legislature has declared that “the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.” (Water Code § 106.) Without an evidentiary hearing finding SVRIC’s, Mr. Edwards’s, or any other water right holder’s irrigation practices to be unreasonable or wasteful, the SWRCB’s proposed emergency regulations upend the Legislature’s declared policy by declaring instream environmental uses to be the highest use of water. All other uses, including domestic and irrigation, are declared wasteful and unreasonable without *any* reference to how each water right holder’s water is used.

d. The Proposed Regulations Evade Established Due Process Requirements.

Adoption of the proposed regulations would effect a blanket determination that all uses by an entire class of users are per se unreasonable, without any of the required elements of due process: an evidentiary hearing, an opportunity for stakeholders to be heard, and, most importantly, a factual inquiry guided by “the circumstances in each particular case.” (*Joslin*, 67 Cal.2d at 139.) Such a determination of reasonableness requires an exercise of adjudicatory—not regulatory—authority by the Board or by a superior court, with attendant due process. (See, e.g., *IID I*, 186 Cal.App.3d at 1168-69.) An adjudication of the reasonableness of a particular use of water “is far different in nature and effect from the adoption of a regulation declaring unreasonable the diversion of water from a particular river during a specified season” (*Id.* at 1170-71 citing *SWRCB. v. Forni* (1976) 54 Cal.App.3d 743.) When such a determination is made via regulatory, as opposed to adjudicatory, action the determination amounts to “no more than a policy statement.” (*Id.* citing *Forni*, 54 Cal.App.3d at 752.)

e. The Proposed Regulations Seek to Impose Public Trust Duties on Established Water Rights Without Engaging in the Requisite Balancing of Harms.

This blanket application of public trust requirements to existing water rights, without any of the required balancing of those interests against those of the affected water rights holders, is inconsistent with *National Audubon* and subsequent law. Questions such as what constitutes waste and unreasonable use of water and the quantity of instream flows that may or may not be necessary to protect public trust resources cannot be resolved *in vacuo*, without the benefit of the SWRCB or the superior court conducting an evidentiary hearing to receive and consider evidence and testimony. The State and Federal Constitutions and applicable case law demand that these important questions be considered in an adjudicatory process.

Protecting public trust resources while at the same time respecting long-held property rights to water is not a zero-sum game. Indeed, holding an evidentiary hearing to receive and

consider evidence could have borne this out. For example, creating a low-flow channel in the creeks while coordinating irrigation diversions could have provided adequate instream flows and enough water to keep permanent plantings alive. OAL should not undermine legal requirements and the rule of law and should instead reject these proposed emergency regulations.

2. The Application of the Public Trust Doctrine to SVRIC's and Mr. Edwards's Water Rights is Inconsistent with U.S. Supreme Court Authority.

Summa Corp. v. California State Lands Comm'n (1984) 466 U.S. 198, holds that the public trust doctrine does not apply to former Mexican land grants annexed under the Treaty of Guadalupe Hidalgo that were patented pursuant to the Act of March 3, 1851 (9 Stat. 632). The land encompassing the area served by SVRIC was patented under the Act, and the General Land Office (GLO), U.S. Department of the Interior, issued Land Patent Nos. CACAAA002833 and CACAAA001106 for that land. The western portion of Edwards Ranch was also patented under the Act, and the GLO issued Land Patent No. CACAAA001373 for that land. Under the Supreme Court's holding in *Summa Corp.*, "California cannot at this late date assert its public trust easement over" these patented lands, because the predecessors-in-interest to SVRIC's shareholders (the landowners) and to Mr. Edwards "had their interest[s in the land] confirmed without any mention of such an easement in proceedings taken pursuant to the Act of 1851." (*Summa Corp.*, 466 U.S. at 209.) Because the public trust doctrine has no applicability to the land served by SVRIC or within the western portion of Edwards Ranch, the SWRCB cannot impose these emergency regulations for the purpose of serving public trust interests.

3. These Regulations are Inconsistent with the Federal and California Constitutions.

It is undisputed that the right to reasonably and beneficially use water is a protectable property right. The imposition of the proposed emergency regulations on long-standing water rights is a taking of property without just compensation or due process of law, in violation of the Federal and California Constitutions. Both the Federal and state Constitutions prohibit the government from taking private property for public use without just compensation and due process of law. (U.S. Constitution, 5th Amendment; California Constitution, art. 1, § 19(a).) The California Constitution further requires that, before the state government may take or damage private property, it must first pay just compensation directly to the owner or to the court on behalf of the owner. (Cal. Const., art. 1, § 19(a).) The taking of water by the government with the intention of protecting state and federally listed fish is undeniably a public use of the water, though the burdens fall disproportionately on a small number of Tehama County farmers and ranchers. Because the SWRCB is seeking to take and damage the landowners' water rights

without any adjudicatory proceeding, without any advance deposit, and without even any acknowledgment that compensation is owed to the landowners for their condemned property, these proposed emergency regulations violate both the California and Federal Constitutions and must be rejected.

C. The Proposed Regulations Do Not Meet the Standard for Necessity.

Proposed regulations meet the necessity standard only if “the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the . . . provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record.” (Gov. Code § 11349(a).) The record of the rulemaking proceeding for these emergency regulations lacks substantial evidence to support the need for these emergency regulations, so OAL is required by statute disapprove them. (Gov. Code § 11349.6(b). See generally, “Curtailed of Diversions Due to Insufficient Flow for Specific Fisheries Emergency Regulation Digest,” March 12, 2015.)

Further, in order to meet the necessity standard, the record of the rulemaking must include a “statement of the specific purpose of each adoption” and “information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision.” (1 C.C.R. § 10(b).) The record submitted in support of these emergency regulations does not include any such statements or explanations, and only contains the most generalized statements of need. (See “Curtailed of Diversions Due to Insufficient Flow for Specific Fisheries Emergency Regulation Digest,” March 12, 2015, at pp. 16-24, 29-37)

1. The Record Lacks Substantial Evidence Showing that the Regulations are Necessary.

The record of the rulemaking does not demonstrate, by substantial evidence, that these regulations (particularly the minimum flow requirements) are necessary to implement Cal. Const. art. X, § 2, as the SWRCB claims.² First, as was explained above, the SWRCB’s redefinition of “waste and unreasonable use” to include uses that may affect purported public trust interests is a wholesale departure from existing law. Thus, the SWRCB’s position that the regulations are necessary to implement art. X, § 2 of the California Constitution rests entirely on circular reasoning. The proposed regulations are only deemed “necessary” to implement the Constitutional provision because the SWRCB is now reinterpreting the Constitutional provision

² Water Code § 100 repeats and implements art. X, § 2 of the California Constitution, so references in this comment letter to the Constitutional provision may be deemed to include a reference to the related Water Code provision.

as encompassing the subject matter of the proposed regulations. The subject matter of the regulations (water for public trust purposes) is entirely unrelated to “waste and unreasonable use of water,” *but for* the regulations’ new definition of that phrase as including any uses that could affect public trust interests.

Further, the SWRCB’s own supporting documents indicate that the proposed minimum flow requirements are not what are necessary to achieve the stated purposes (i.e., “to protect ESA-listed species”). The NMFS memorandum states that these flows are necessary “to prevent extirpation of *late-returning* adult spring-run and *late emigrating* juvenile spring-run and steelhead.” (NMFS Technical Memorandum at pp. 1-2 (included as Attach. 11 to the Emergency Regulations Digest).) “Late returning” spring-run and “late emigrating” juveniles are not evolutionarily significant units—they are not defined groups at all. Although the Emergency Regulations Digest, (at p. 20) describes the purpose of these emergency regulations as “to protect ESA-listed species,” the flow recommendations were developed to protect an amorphous subset of certain listed species—the “late returning” and “late emigrating” groups. The Digest fails to acknowledge that these recommendations were intended for the benefit of these purported subgroups, rather than for the listed species. The Technical Memorandum warns that, should some “late” individuals not be able to migrate, diversity of the listed species may be “diminished.” (*Id.* at p. 2.) Regulations intended to protect against “diminished” diversity are not the same as regulations intended to protect listed species from imminent extirpation (e.g., Emergency Regulations Digest at p. 22). These proposed regulations go far beyond what is needed to effectuate these regulations’ purported goal.

Similarly, the spring/summer base and pulse flow regime imposed in 2014—which was limited to only a portion of June— was determined by NMFS to be “very successful.” (NMFS Technical Memorandum at p. 2.) No justification was provided for now tripling the season during which base and pulse flows are to be provided in 2015, to include April, May, and June. If 2014’s one-month flow program was “very successful,” then a three-month program is surely not “necessary” to achieve the same purpose this year, and the SWRCB has not attempted to explain why it might be necessary or otherwise justify this increase.

2. Acceptability of Voluntary Agreements to Achieve the Same Goals Clearly Indicates that the Regulations are Unnecessary.

The SWRCB’s recognition that voluntary agreements can achieve the same ends as the proposed minimum flow requirements (see proposed § 878.2.) shows that these regulations are not necessary to implement art. X, § 2 of the California Constitution. A member of the SWRCB went so far as to state during the May 20, 2014, SWRCB meeting on last year’s iteration of these emergency regulations that “as long as there are [voluntary] agreements, [she did not] see the

need for going forward with the regulations.” (Remark of Boardmember D’Adamo, May 20, 2014 SWRCB Meeting.) Such voluntary agreements can achieve maximum benefit for fish more efficiently than one-size-fits-all regulations, and they are backstopped by the Endangered Species Act to ensure compliance. Given that the same goals can be achieved with more flexibility via voluntary agreements, this emergency regulatory scheme is clearly not “necessary.” Not only do voluntary agreements more effectively achieve the same goals, but they do not resort to the extra-legal procedures that the SWRCB appears to prefer.

The voluntary agreements that CDFW is asking entities to enter in 2015, which would establish flow regimes applicable in lieu of these emergency regulations, differ materially from the emergency regulations, even though they purport to achieve the same result. For instance, pulse flows on Deer and Mill Creeks may last up to 72 hours under the proposed emergency regulations, while the longest possible pulse flow on those creeks under the voluntary agreements would last only 60 hours.³ The voluntary agreements also have specific temperature triggers for reduced flows, which the emergency regulations lack. Pulse flows under the proposed voluntary agreements are limited to once every two weeks, while the emergency regulations do not limit the frequency of pulse flows. Given that CDFW has proposed less stringent requirements in the voluntary agreements than it is now requesting from the SWRCB’s emergency regulations, and given that both programs are explicitly intended to produce the same result, the more onerous proposed emergency regulations’ flow prescriptions are not “necessary” to achieve the goal.

Finally, the record before OAL does not include a description of the water right holders that have voluntarily agreed to provide instream flows for fishery protection. As a result, the record fails to establish, by substantial evidence, that such voluntary agreements are inadequate to address the stated need for instream flow. In order to satisfy the necessity standard, the SWRCB must analyze the voluntary agreements and (a) accept them in lieu of emergency regulations as adequate protection of public trust resources or (b) explain on the basis of substantial evidence why the emergency regulations are necessary notwithstanding voluntary efforts.

D. The Proposed Regulations Do Not Meet the Standard for Clarity.

OAL must disapprove the proposed emergency regulations because they lack the required degree of clarity—they are not “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.” (Gov. Code §§ 11349(c), 11349.6(b).) A regulation does not meet the standard for clarity if “the regulation can, on its

³ This would occur if a 100 cfs pulse flow was followed by a drop to 20 cfs juvenile flows.

face, be reasonably and logically interpreted to have more than one meaning” or if “the language of the regulation conflicts with the agency's description of the effect of the regulation.”
(1 C.C.R. § 16(a)(1), (a)(2).)

1. The Proposed Regulations are Impermissibly Vague and Ambiguous.

The proposed regulations include several patently ambiguous and vague provisions, which require that OAL disapprove them. For instance, proposed § 878.1(c)(1)(B) allows junior water rights to take priority over more senior water rights if, *inter alia*, “all other alternate sources of potable water have been used” and no “other potable water is available.” It is completely unclear what constitutes alternate sources or availability. Does this refer only to sources located upon the affected parcel (e.g., wells and storage)? Or does this truly refer to “all . . . alternate sources,” as the plain language of the regulation would suggest (e.g., deliveries from water trucks; bottled water)? Do expense and financial means come into play? This provision is impermissibly unclear.

Similarly, the provisions describing the Deputy Director’s standard of review are completely contradictory. Proposed § 878.2 first states that “[t]he Deputy Director *shall* approve the request [for approval of a voluntary agreement] so long as other users of water will not be injured.” (Emphasis added.) However, the very next sentence states that “[t]he Deputy Director's approval *may be subject to any conditions . . . that the Deputy Director determines to be appropriate.*” (*Id.* [Emphasis added.]) So while the Deputy Director is mandated to approve any voluntary agreement (and thus excuse the landowner-signatories from curtailment) so long as it does not injure other water users, she is contradictorily authorized to condition her mandatory approval on the inclusion in the agreement of any additional provisions that she deems “appropriate.” How is it possible that the Deputy Director is mandated to approve any agreement that meets the single statutory criterion, but at the same time enjoys the discretionary authority to require that the parties include additional conditions before she will approve it? And to complicate matters further, the SWRCB’s Executive Director, not the Deputy Director, has the discretion to put the minimum flow requirements into effect (proposed § 877(c)) if *he* decides that a voluntary agreement is insufficient to protect a watershed—completely independent (and without any mention) of the Deputy Director’s quasi-“mandate” to approve the same agreements. OAL is required to disapprove these confusing, internally contradictory regulations because they are so unclear that they cannot “be easily understood by those persons directly affected by them.” (Gov. Code § 11349(c).)

2. The Proposed Regulations Fail to Explain How Compliance on Antelope Creek will be Measured.

There are no gauging stations to monitor flows in Antelope Creek. Both Deer and Mill Creeks have multiple stream gages. Because there are no such gages on Antelope Creek, there is no way to determine compliance on Antelope Creek, leaving enforcement of these proposed emergency regulations entirely to the whims and caprices of the enforcing agencies. This lack of any explanation of the means of reliable and fair enforcement of the regulations on Antelope Creek demands that OAL reject these emergency regulations.

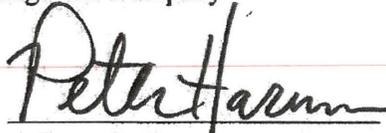
Conclusion

The emergency regulations should be disapproved because they are procedurally and substantively defective. The SWRCB failed to follow procedural prerequisites prior to transmitting the proposed emergency regulations and rulemaking record to OAL. Additionally, the emergency regulations suffer substantive defects insofar as the SWRCB is attempting to circumvent clearly established limitations on its authority to push through ill-advised "emergency" regulations, and in the process is rewriting California water law, undermining case law precedent, and violating Constitutional protections, such as the prohibitions on taking private property without due process or just compensation. While the SWRCB has chosen not to abide by the statutes, regulations, Constitutional provisions, and judicial precedent that govern these regulations and the emergency regulatory process, OAL's statutory mandate is clear: The proposed emergency regulations must be disapproved.

Respectfully submitted,

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By:


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BY FAX

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DIV OF WATER RIGHTS
SACRAMENTO

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By _____, Deputy
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Attorneys for: Plaintiff-Petitioner

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

STANFORD VINA RANCH
IRRIGATION COMPANY,

Plaintiff-Petitioner,

v.

STATE OF CALIFORNIA, STATE
WATER RESOURCES CONTROL
BOARD, STATE WATER RESOURCES
CONTROL BOARD MEMBERS FELICIA
MARCUS, DOREEN D'ADAMO,
FRANCES SPIVY-WEBER, STEVEN
MOORE, AND TAM DODUC; and DOES
1 THROUGH 20,

Defendants-Respondents.

CASE NO.

**VERIFIED COMPLAINT AND
PETITION FOR (1) INVERSE
CONDEMNATION, (2)
DECLARATORY RELIEF
JUDGMENT, (3) WRIT OF
MANDATE, (4) WRIT OF MANDATE,
AND (5) INJUNCTION OR WRIT OF
MANDATE**

I. Introduction

Plaintiff-Petitioner STANFORD VINA RANCH IRRIGATION COMPANY
complains against the STATE OF CALIFORNIA; STATE WATER RESOURCES
CONTROL BOARD; STATE WATER RESOURCES CONTROL BOARD MEMBERS
FELICIA MARCUS, DOREEN D'ADAMO, FRANCES SPIVY-WEBER, STEVEN
MOORE, TAM DODUC; and DOES 1 THROUGH 20, as follows:

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Oroville, California 95965 (530) 533-2885 facsimile (530) 533-0197

1 **GENERAL ALLEGATIONS**

2 **I. Parties.**

3 1. Plaintiff-Petitioner Stanford Vina Ranch Irrigation Company (hereinafter,
4 "Plaintiff") is a nonprofit mutual water company formed under California law, whose
5 shareholders own land in the vicinity of Deer Creek in Tehama County, California.
6 Plaintiff holds and administers water rights appurtenant to the lands of its shareholders
7 and its service area, as a trustee for its shareholders and pursuant to the provisions of
8 California law relating to the functioning of mutual water companies. Plaintiff's water
9 rights were adjudicated by the Tehama County Superior Court on November 27, 1923.
10 The adjudication and judgment of the Tehama County Superior Court was amended in or
11 about 1926. Pursuant to those court decrees, the water rights held by Plaintiff were
12 affirmed and adjudicated as the right to utilize approximately 66% of the flow of Deer
13 Creek as measured below United States Geological Survey gage 11383500. Plaintiff
14 owns conveyance and diversion works in and connected to Deer Creek, which are used to
15 distribute the water diverted from Deer Creek to and for its shareholders' use, at cost.
16 Plaintiff serves approximately 5700 acres of irrigated land, which is predominantly used
17 for permanent plantings, including orchards, and for irrigated pasture, stockwatering, and
18 similar beneficial uses.

19 2. Plaintiff's shareholders' lands hold riparian rights to the flows of water in
20 Deer Creek. The plan and system for diverting and distributing water from Deer Creek
21 was a part of the plan to divide, sell, and transfer the lands presently owned by Plaintiff's
22 shareholders. That plan and the development of the water system, including dams,
23 ditches, pipelines and other apparatus, was implemented pursuant to actions undertaken
24 prior to 1914, and has been continually maintained since the plan was initially developed.
25 The rights to and access to the surface water flows of Deer Creek, via Plaintiff's water
26 system and facilities, are essential to and an integral portion of maintenance of the
27 irrigated land served by Plaintiff. The water supply system and water rights, as the corpus
28 of the trust administered by Plaintiff, are administered, managed, and protected by

1 Plaintiff because groundwater, and wells to extract groundwater, are not available on all of
2 Plaintiff's shareholders' lands and local groundwater supplies are insufficient to
3 sustainably irrigate lands within Plaintiff's service area without the recharge provided by
4 the surface water that Plaintiff diverts from Deer Creek, and without the reduction of
5 groundwater use caused by the availability of surface water from Deer Creek for
6 irrigation.

7 3. Defendant-Respondent State Water Resources Control Board is a California
8 state Board consisting of five members, named above, and created by Water Code section
9 175.

10 4. The identities of Defendants-Respondents Does 1-20 are currently unknown.
11 Does 1 through 20 were involved in and had a role in the actions and omissions
12 complained of in this action and their identities will be added by amendment at such time
13 as they are identified.

14
15 **II. Jurisdiction and Venue.**

16 5. This court has jurisdiction over the inverse condemnation cause of action
17 alleged in this petition and complaint pursuant to article VI, section 10, of the California
18 Constitution. This court has jurisdiction over the declaratory relief cause of action
19 pursuant to Code of Civil Procedure (CCP) section 1060. This court has jurisdiction over
20 the mandamus causes of action alleged in this petition and complaint pursuant to Water
21 Code section 1126 and CCP section 1094.5.

22 6. This venue is appropriate here pursuant to CCP section 393(b) because
23 Defendants-Respondents (hereinafter, "Defendants") undertook these acts and omissions
24 in the County of Sacramento.

25
26 **III. Standing.**

27 7. Plaintiff has standing to assert the claims raised in this complaint and
28 petition. Plaintiff is beneficially interested in the subject matter of the emergency

1 regulations and the property rights held, maintained, and administered as a mutual water
2 company on behalf of the landowners within Plaintiff's service area. Defendants, through
3 their actions and undertakings, took, damaged, and interfered with the said rights and
4 shares of the Plaintiff by taking the water as alleged herein, which physical taking
5 damaged Plaintiff's trust corpus and interest, without compensation or due process of law,
6 in violation of the California Constitution and the United States Constitution.

7 8. Plaintiff also brings this action on behalf of its shareholders whose lands and
8 shares in Plaintiff represent their beneficial right to use and enjoy water rights appurtenant
9 to their respective lands and for which the trust administered by Plaintiff is maintained and
10 exercised. Plaintiff's shareholders were injured due to Defendants' taking of the water
11 rights appurtenant to their lands and by the lack of water available for irrigation and
12 incidental groundwater recharge on their lands, which was caused by Defendants' acts and
13 omissions described herein.

14
15 **V. Exhaustion of Administrative Remedies.**

16 9. Plaintiff participated orally and in writing in the meetings at which
17 Defendants voted to adopt the proposed emergency regulations, described below, and
18 Plaintiff filed comments with the Office of Administrative Law ("OAL") objecting to the
19 emergency regulations.

20
21 10. After the OAL approved the emergency regulations and Defendants issued
22 an order curtailing Plaintiff's exercise of its water rights, Plaintiff sought reconsideration
23 of the emergency regulations, curtailment order, and draft cease and desist order.
24 Defendants denied Plaintiff's petition for reconsideration at Defendant State Water
25 Resources Control Board's regularly scheduled meeting on September 23, 2014. No
26 further administrative remedies are available to Plaintiff.

27 //

28 //

1 **VI. Factual Background.**

2 **A. Governor's Drought Actions**

3 11. On January 17, 2014, Governor Edmund G. Brown, Jr., issued a
4 proclamation declaring a drought state of emergency in California and issuing directives
5 to state agencies to take particular actions in response to the drought.

6 12. On March 1, 2014, Governor Brown signed a drought relief package, Senate
7 Bill 104 (2014). Among other things, the drought relief package amended Water Code
8 section 1058.5, which governs Defendants' drought-related emergency regulatory
9 authority, limited OAL's review of drought-related emergency regulations promulgated by
10 Defendants, and increased penalties for violations of such emergency regulations.

11 13. On April 25, 2014, the Governor issued an executive order that, among
12 other things, reiterated the declaration of emergency and directed Defendants, on behalf of
13 the State of California, to adopt, as it deemed necessary, emergency regulations in order
14 "to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable
15 method of diversion of water, to promote water recycling or water conservation, and to
16 require curtailment of diversions when water is not available under the diverter's priority
17 of right."
18

19 **B. Proposed Emergency Regulations, California Code of Regulations, title**
20 **23, sections 877-879.2**

21 14. On May 13, 2014, Defendants issued a Notice of Proposed Emergency
22 Rulemaking which proposed to adopt emergency regulations, sections 877 through 879.2,
23 title 23, California Code of Regulations (the "emergency regulations") to implement
24 minimum instream flows for the represented purpose of protecting anadromous fish. To
25 achieve these minimum instream flows, the proposed emergency regulations would
26 require Plaintiff and its shareholders to forbear from exercising their vested rights to use
27 water from Deer Creek during the irrigation season, thereby eliminating those rights.
28 Water rights holders elsewhere on Deer Creek and on Mill and Antelope Creeks, also in

1 Tehama County, would be similarly affected. The regulations would require this
2 surrender of rights to divert water so that those same rights could be used for the benefit
3 and enhancement of steelhead trout and spring- and fall-run salmon in Deer Creek,
4 without regard for the relative priority of the rights. The water required to be transferred,
5 conveyed, or relinquished for these public purposes under Defendants' plan would flow
6 down Deer Creek, enter the Sacramento River, and thereafter be available for other public
7 uses and purposes. These other public uses and purposes include maintaining river flows,
8 using the bypassed Deer Creek flows as a substitute for water quality flows from the
9 Central Valley Project and the State Water Project, and supporting other downstream
10 public water flow and quality purposes by using the bypassed Deer Creek flows in the
11 place of stored water or the bypass of other, more junior water rights.

12 15. The proposed emergency regulations would accomplish the protection of
13 anadromous fish—without a hearing or other evidentiary basis—by automatically
14 declaring any conflicting use or diversion of water in the three named creeks to be “waste
15 and unreasonable use.” This declaration of unreasonableness would hold regardless of
16 how the water would have been used. The usual and permitted uses of the water—for
17 irrigation, stockwatering, and incidental groundwater recharge—were, are, and continue to
18 be reasonable uses under California law. Water Code section 106 states that “the use of
19 water for domestic purposes is the highest use of water and that the next highest use is for
20 irrigation.” The automatic determination of unreasonableness is based on a belief that
21 putting the water to the public uses of achieving or maintaining instream fish flows and
22 enhancing the conditions for fish species is more valuable than any other use of the water.
23 The automatic determination of unreasonableness is made without an evidentiary hearing,
24 without any consideration of how the water would otherwise be used and consumed, and
25 without consideration of the rights' relative priorities. Nor does the automatic
26 determination consider the number of fish that would benefit or the ultimate consumptive
27 or instream purposes the water would be put to after it exits the Deer Creek watershed, at
28 which point it is no longer subject to a prohibition on diversion.

1 16. The lands of Plaintiff's shareholders and those otherwise within Plaintiff's
2 service area, to which the water rights at issue are appurtenant, lie within a former
3 Mexican land grant, title to which was confirmed and patented by the Public Land
4 Commission in 1862, pursuant to the California Land Act of March 3, 1851 (9 Stat. 613).
5 The state has not retained any public trust easements in this or the other former Mexican
6 land grants that were patented pursuant to this process, including the area encompassing
7 the land at issue here. (See *Summa Corp. v. California Ex Rel. State Lands Comm.* (1984)
8 466 U.S. 198.) Pursuant to *Summa Corp.*, the state has no public trust right to withdraw,
9 prohibit the use of, or otherwise require the bypass, nonuse, or forbearance of water or
10 water rights in order to serve purposes or uses that are deemed to be in the public interest,
11 serve the public trust, or are otherwise deemed to be more valuable to the public than
12 irrigation use, on lands such as these that were patented pursuant to the Act of March 3,
13 1851.

14 17. The use of water to provide minimum instream flows for fish protection is a
15 public trust use of the water. (E.g., *National Audubon Society v. Superior Court* (1983) 33
16 Cal.3d 419, 425.) The emergency regulations were adopted to serve public trust purposes
17 in an instance where the state has not retained a public trust easement in the land to which
18 the water rights are appurtenant. These public trust interests are being asserted pursuant to
19 the emergency regulations without any evidentiary hearing to provide for the required
20 balancing and evidentiary support for the exercise of a public trust reservation.

21 18. The California Department of Fish and Wildlife (CDFW) has been
22 attempting to develop a project upon Deer Creek to provide for measures to increase the
23 numbers of anadromous fish for a number of years prior to 2014. This effort included the
24 study and financing of measures to develop water supplies from groundwater wells in the
25 vicinity of Deer Creek and Mill Creek to provide for additional flows at the expense of the
26 public. Such efforts were in addition to proposals to provide for separate, detailed, public
27 trust-type proceedings before Defendants to determine and obtain the optimum water
28 flows and conditions to increase fish populations. These efforts by CDFW were

1 underway for many years prior to the drought conditions in 2014 and had generally been
2 unsuccessful because of a lack of funding, flawed planning, flawed assumptions of the
3 public benefits to be realized, and disorganization of the state and federal agencies
4 involved in the studies and planning. Plaintiffs are informed and believe that in 2014,
5 when the drought conditions were evident and being experienced, personnel of CDFW
6 and National Marine Fisheries Service determined and developed an opportunistic plan to
7 claim an "emergency" existed and to obtain water flows from Plaintiff which could not
8 otherwise be obtained for their public project and undertaking without the payment of just
9 compensation; their plan was to pay no compensation at all. Plaintiffs are informed and
10 believe that the Defendant State Water Resources Control Board joined in that plan and
11 effort to utilize a claimed emergency to attempt to obtain the property interests in the
12 water flowing in Deer Creek and Mill Creek for the periods of the regulations and
13 curtailment notices for a public project without payment because the previous studies,
14 proposals, and planning had all indicated that the funding requirements of alternative
15 measures to obtain additional water and additional fish populations would make those
16 alternative plans impractical.

17 19. Plaintiff is informed and believes that the anadromous fish populating Deer
18 Creek have adjusted their life cycle over the approximately 100-plus years of irrigation
19 diversions by Plaintiff during drought cycles, to prosper and survive and to avoid damage
20 to the respective runs of spring run salmon, fall run salmon, and steelhead. Despite these
21 adjustments and stability, Plaintiff is informed and believes that Defendants
22 opportunistically elected to avoid the expense and time necessary to develop a public
23 project on Deer Creek to condemn water rights or obtain groundwater or stored water
24 supplies or to avoid the costs and difficulties of obtaining legal authority to implement the
25 public project envisioned, by utilizing emergency regulations and curtailment orders based
26 upon emergency conditions when in fact the fish had long ago adjusted to irrigation use of
27 water in the spring and fall by Plaintiff and its shareholders, and their migration and use of
28 Deer Creek was already attuned to the irrigation diversion patterns of Plaintiff. Plaintiffs

1 are informed and believe and on that basis allege that Defendants in 2014 used the labels
2 “emergency,” “drought,” and “harm” (to important and Endangered Species Act-listed
3 species) as opportunistic labels to finance, implement, and initiate a public project
4 utilizing Plaintiff’s and its shareholders’ property and requiring them to bear and suffer
5 the costs of that plan.

6 20. The use of water for the achievement of minimum instream flows for the
7 protection of fish is a public use because the protection of such fish provides no special
8 benefit to the Deer Creek water rights holders and the benefit accrues to the public as a
9 whole.

10
11 **C. Adoption of the Emergency Regulations**

12 21. On May 20 and May 21, 2014, Defendants considered the proposed
13 emergency regulations at a regularly scheduled meeting of Defendant State Water
14 Resources Control Board.

15 22. Throughout the two-day meeting, significant revisions were made to the
16 proposed regulations. The revised regulatory language was not made publicly available
17 during this period except via handouts only available to some of those physically present
18 at the meeting and by a single reading of the amended language before Defendants voted
19 to adopt the proposed emergency regulations. No evidentiary hearing or balancing of
20 alternative uses of the water supplies was conducted to support the assertion of the public
21 trust reservation and revocation of the right to use water, as required by *National*
22 *Audubon*, even though Plaintiff requested such hearing, pointed out that the lands and
23 waters were subject to the *Summa Corp.* determination that the affected water rights were
24 not subject to withdrawal for public trust purposes, and that condemnation and taking
25 would occur if the emergency regulations were adopted and implemented.

26 23. On May 21, 2014, Defendants approved Resolution No. 2014-0023, which
27 adopted the proposed emergency regulations as modified at the meetings.

28 //

1 24. On May 22, 2014, Plaintiff requested that the Defendants circulate the
2 revised proposed emergency regulations' language at least five days before submitting the
3 proposed emergency regulations to OAL for approval, as required by Government Code
4 section 11346.1(a)(2).

5 25. In violation of Government Code section 11346.1(a)(2), Defendants
6 submitted the proposed emergency regulations to OAL on May 23, 2014, for review and
7 approval without having circulated the specific language proposed to be adopted for the
8 requisite five-day period, notwithstanding Plaintiff's request for compliance with
9 Government Code section 11346.1(a)(2).

10 26. On May 28, 2014, Plaintiff submitted to the Office of Administrative Law
11 comments on and objections to the proposed emergency regulations.

12 27. On June 2, 2014, OAL approved the proposed emergency regulations, and
13 the regulations thereafter went into effect.

14
15 **D. The Adopted Emergency Regulations**

16 28. As relevant to this proceeding, the emergency regulations adopted by
17 Defendants (specifically 23 CCR section 877) declared any diversions in Deer Creek,
18 regardless of how Plaintiff or its shareholders would have used the water or the water
19 rights' relative priorities, to be "waste and unreasonable use" if the diversions would
20 reduce the flow of Deer Creek below the emergency regulations' target instream fish
21 flows. The emergency regulations therefore prohibit water rights holders from diverting
22 any water pursuant to their vested water rights if the said diversions would interfere with
23 achieving the emergency regulations' target instream fish flows, and to the extent they
24 would interfere, such historically and legally reasonable uses would be deemed "waste
25 and unreasonable use." (23 CCR § 877.) Diversion and use of water under the water
26 rights that Plaintiff administers was therefore "reasonable and not wasteful" for
27 approximately 100 years prior to the date and hour that the emergency regulation-based
28 curtailment order took effect and will not be wasteful or unreasonable as soon as the

1 curtailment order is lifted. But the exact same diversions and uses are “waste and
2 unreasonable use” during the period of emergency regulation-based curtailment, even
3 though there is no change in the amounts diverted or in the uses the water is applied to.
4 Defendant State Water Resources Control Board’s Deputy Director for the Division of
5 Water Rights is further authorized by the emergency regulations to preemptively issue
6 curtailment orders to water rights holders on Deer Creek, and thereby deem their use of
7 water “waste and unreasonable” if, in his judgment, he believes that continued diversions
8 pursuant to vested rights would interfere with achieving the emergency regulations’ target
9 instream fish flows. (23 CCR § 877(b).) The emergency regulations also establish the
10 minimum instream fish flows for Deer Creek, which vary based on time of year and the
11 presence of certain species of anadromous fish. (23 CCR § 877(c)(2).)

12 29. The emergency regulations therefore require water rights holders to forgo
13 exercise of their water rights in order to serve and satisfy a higher public purpose and goal
14 than private use of the water, and gives Defendants the authority to order water rights
15 holders to forgo exercise of their vested property rights so that those rights may be used in
16 service of public trust interests, without regard to the permitted uses of the water or the
17 priority of the rights.

18
19 **D. Implementation of Regulations; Curtailment of Exercise of Water Rights**

20 30. On June 5, 2014, Defendants issued Water Rights Order (WRO) 2014-0022-
21 DWR, which ordered water rights holders in Deer Creek, including Plaintiff, to curtail
22 exercise of their water rights on Deer Creek, beginning on June 6, 2014. The order
23 mandated water rights holders on Deer Creek to cease or reduce their diversions in order
24 to meet the emergency regulations’ minimum instream flow goal of 50 cfs (23 CCR
25 section 877(c)(2)(A) & (B)). Because natural flows in Deer Creek at that time were less
26 than 50 cfs, this meant that Plaintiff and its shareholders/ landowners were required to
27 entirely forgo exercise of their vested water rights and their rights to irrigated land.

28 //

1 31. On June 12, 2014, Defendants decreased the effective minimum instream
2 flow requirement under WRO 2014-0022-DWR to 20 cfs, pursuant to 23 CCR section
3 877(c)(2)(D).

4 32. Also on June 12, Defendants sent a draft cease and desist order (CDO) to
5 Plaintiff for an alleged violation of WRO 2014-0022-DWR and for an alleged unlawful
6 diversion of water.

7 33. On June 24, 2014, Defendants suspended WRO 2014-0022-DWR, as
8 Defendants claimed anadromous fish were no longer present.

9 34. On July 3, 2014, Plaintiff filed a petition for reconsideration of Defendants'
10 adoption of the emergency regulations, of Defendants' issuance of WRO 2014-0022-
11 DWR, and of the draft CDO.

12 35. On September 23, 2014, Defendants denied Plaintiffs' petition for
13 reconsideration at a regularly scheduled meeting of Defendant State Water Resources
14 Control Board. Plaintiffs, as they had done in the previous Board meetings and in their
15 objections and Petition for Reconsideration, again requested an evidentiary hearing and, if
16 Defendants sought condemnation in part or in total of their water rights and rights to
17 maintain irrigated land, that legally required eminent domain proceedings be commenced.
18 Notwithstanding such requests, Defendants refused to hold an evidentiary hearing or
19 otherwise comply with requisite due process.

20 36. On October 14, 2014, Defendants issued Water Rights Order 2014-0029-
21 DWR, which established minimum instream flows of 50 cfs for Deer Creek pursuant to 23
22 CCR section 877(c)(2)(C), which would require Plaintiff to again forgo exercise of its
23 water rights from and after October 15, 2014.

24
25 ***E. Effects of the Curtailments***

26 37. Defendants' promulgation of the emergency regulations and issuance of the
27 orders curtailing Plaintiff's exercise of its water rights prevented Plaintiff from exercising
28 the vested water rights it administers on behalf of the shareholders and their lands to

1 which the shares are appurtenant. Because the orders required Plaintiffs to bypass all (or
2 substantially all)¹ of the flow of Deer Creek, Plaintiff was unable to divert the water it was
3 entitled to during the time the curtailment orders were in effect and therefore the property
4 rights of Plaintiff, the trust corpus it administers for the benefit of its shareholders, and the
5 lands to which the shares are appurtenant have been damaged, and the water, the right to
6 divert water, and the reasonable value of the water were taken for public use by
7 Defendants.

8
9 **FIRST CAUSE OF ACTION**

10 **(Inverse Condemnation)**

11 38. Plaintiffs reallege and incorporate herein each and every allegation of
12 paragraphs 1 through 37 of the General Allegations.

13 39. Article I, section 19 of the California Constitution provides that “[p]rivate
14 property may be taken or damaged for public use when just compensation, ascertained by
15 a jury unless waived, has first been paid to, or into court for, the owner.” Article I, section
16 7, provides that “a person may not be deprived of . . . property without due process of
17 law.”

18 40. The Fifth Amendment to the United States Constitution provides that “No
19 person shall . . . be deprived of . . . property, without due process of law; nor shall private
20 property be taken for public use, without just compensation.” This amendment applies to
21 the State of California through operation of the Fourteenth Amendment to the United
22 States Constitution.

23 41. Water rights in California are private property and therefore “cannot be
24 infringed by others or taken by government action without due process and just
25 compensation.” (*United States v. State Water Resources Control Board* (1986) 182
26 _____)

27 ¹ A rain event on or about October 14, 2014, increased the flow of Deer Creek to slightly above
28 the minimum flow required by WRO 2014-0029-DWR, allowing Plaintiff to potentially divert a
nominal proportion of the face value of its vested water right.

1 Cal.App.3d 82, 101.)

2 42. The emergency regulations and related curtailment orders take Plaintiff's
3 water rights which are appurtenant to its shareholders' lands for public purposes and to
4 implement a public project. This was accomplished by requiring Plaintiff to forgo
5 exercise of its water rights so that those same usufructory rights could be used for the
6 purpose of providing water in Deer Creek, the Sacramento River, and the Sacramento-San
7 Joaquin River Delta, for fishery enhancement purposes in Deer Creek and downstream,
8 together with other consumptive and non-consumptive uses of the bypassed water. By
9 requiring Plaintiff to forgo exercise of the water rights and instead requiring Plaintiff to
10 allow water to pass by Plaintiff's diversion facilities, Defendants have physically occupied
11 Plaintiffs' property.

12 43. This invasion of Plaintiff's vested property rights had the effect of
13 prohibiting Plaintiff from diverting water for agricultural purposes pursuant to those
14 vested rights, causing a direct and proximate injury to Plaintiff and the lands of its
15 shareholders, caused by the loss of water and the effects of that loss. Plaintiff's
16 shareholders were directly and proximately injured by Defendants' taking of these water
17 rights due to decreased agricultural yields, monies expended to mitigate the effects of the
18 curtailments, decreased business and property valuations due to increased uncertainty
19 concerning the ability to exercise and benefit from vested water rights, and decreased
20 groundwater recharge caused by the decrease of irrigation water applied to the land within
21 the local groundwater basin.

22 44. This invasion and taking of property rights forces Plaintiff alone (with its
23 shareholders and similarly situated water rights holders) to bear burdens which, in all
24 fairness and justice, should be borne by the public as a whole. Requiring Plaintiff and its
25 shareholders to give up the exercise of water rights during these periods of time causes
26 financial injuries to Plaintiff and to its shareholders' lands for the benefit of anadromous
27 fish, which Defendants have deemed to be a more important public purpose and project,
28 and for preferred consumptive and instream uses in areas downstream of Deer Creek. The

1 burdens associated with providing water to endangered fish species should therefore be
2 borne by the public as a whole, and not just by Plaintiff and similarly situated water rights
3 holders.

4 45. Defendants' acts and omissions in promulgating, implementing, and
5 enforcing the emergency regulations constitute a physical invasion of the real property
6 rights held and administered by Plaintiff, for a public use. The burden placed on these
7 property rights is direct, substantial, and peculiarly burdens Plaintiff and its shareholders,
8 to their detriment. Defendants have not provided due process or reasonable compensation
9 in accomplishing the taking of the property interests held by Plaintiff and administered in
10 the form of the right to divert and utilize water of Deer Creek. The property rights
11 administered and held in trust by Plaintiff have been damaged as a proximate result of the
12 actions and omissions of Defendants and the reasonable value of the damages and the
13 interests in real property taken exceeds the minimum jurisdiction of this Court and will be
14 added by amendment hereafter in accordance with proof submitted at trial.

15 46. Defendants have not compensated Plaintiff for the invasion, taking, and
16 damaging of Plaintiff's property rights and water, nor have Defendants deposited just
17 compensation with the court.

18 47. Plaintiffs have incurred and will incur attorneys' and expert fees and costs
19 related to this proceeding, in amounts that cannot yet be ascertained, which are
20 recoverable in this action under the provisions of Code of Civil Procedure section 1036.

21 WHEREFORE the Plaintiffs pray for judgment as set forth hereafter.

22
23 **SECOND CAUSE OF ACTION**

24 **(Declaratory Relief)**

25 48. Plaintiffs reallege and incorporate herein each and every allegation of
26 Paragraphs 1 through 37 of the General Allegations and Paragraphs 38 through 47 of the
27 First Cause of Action.

28 //

1 49. A real and justiciable dispute exists between Defendants and Plaintiff
2 requiring resolution under the provisions of Code of Civil Procedure section 1060.

3 50. Defendants claim and maintain that they may, without providing for the
4 implementation of eminent domain action proceedings, take and acquire the interests in
5 water held and administered by Plaintiff for its shareholders without first providing for
6 due process, reasonable compensation, and satisfaction of the requirements of California
7 Constitution article I, sections 7 and 19, and statutory law. These requirements include
8 the conduct of hearings (CCP section 1250.01 et seq.), the adoption of resolutions of
9 necessity (CCP section 1245.210 et seq.), the deposit of estimated damages and
10 reasonable value of the interests taken before the taking occurs (California Constitution
11 article 1, sections 7 & 19 and CCP section 1255.010 et seq.), and the conduct of
12 proceedings to authorize the immediate possession of the interests sought to be obtained
13 (CCP section 1255.410 et seq.).

14 51. Defendants claim and maintain that they are not required, prior to asserting a
15 public trust type use of water as superior and advantageous to the public interest, to
16 conduct evidentiary hearings examining alternative uses and the public interest and benefit
17 from comparative uses of water as required by *National Audubon v. Superior Court* and as
18 required in any eminent domain action in regard to public necessity. Defendants instead
19 assert that they may simply adopt an emergency regulation and thereafter delegate to its
20 employees the decision of whether and when to order the taking of water and water rights
21 for public purposes. Defendants further claim that they have the right to assert a public
22 trust reservation even though no such reservation was included in the confirmation of title
23 and patent issued to Plaintiff's and its shareholders' predecessors-in-interest pursuant to
24 the original Mexican land grant and the Act of March 3, 1851 (9 Stat. 613).

25 52. Plaintiff is informed and believes that Defendants may not perform or cause
26 to be performed such required acts and that Defendants' actions therefore would be in
27 violation of the requirements of the Government Code, California Constitution, and Code
28 of Civil Procedure. Such acts would result in a multiplicity of actions, which would cause

1 the citizens of California to incur substantial and repetitive costs pursuant to Code of Civil
2 Procedure section 1036 and which would constitute trespasses to agricultural property
3 pursuant to Code of Civil Procedure section 1021.9, requiring the payment of expert
4 witness and attorneys' fees.

5 WHEREFORE Plaintiff prays for a declaratory relief judgment as set forth
6 hereafter, that such actions are in violation of law and would if conducted in the future by
7 Defendants be in violation of law.

8
9 **THIRD CAUSE OF ACTION**

10 **(Petition for Writ of Mandate to Prevent Violation of Due Process in the Taking of**
11 **Water Rights for Public Use)**

12 53. Plaintiffs reallege and incorporate herein each and every allegation of
13 Paragraphs 1 through 37 of the General Allegations and Paragraphs 38 through 47 of the
14 First Cause of Action, and paragraphs 48 through 52 of the Second Cause of Action.

15 54. Article I, section 19, of the California Constitution allows private property
16 to be taken or damaged for a public use if and only if just compensation has *first* been paid
17 to, or into court for, the owner.

18 55. Defendants took Plaintiff's vested water rights so that the rights could be
19 exercised for the benefit of the public by providing water for anadromous fish in Deer
20 Creek and for use downstream for other public purposes.

21 56. Defendants did not first pay just compensation to Plaintiff or deposit that
22 sum into court for the Plaintiff, nor did Defendants at any time afterward compensate
23 Plaintiff for the taking.

24 57. Plaintiff alleges that Defendants failed to abide by the procedural
25 requirements of sections 7 and 19(a) of article I of the California Constitution, when it
26 took the water and real property rights as described in the First Cause of Action without a
27 hearing on reasonable compensation.

28 //

1 the notice sent on May 13, 2014, which did not include the specific language that
2 Defendants adopted and ultimately submitted to OAL for approval.

3 62. Defendants therefore violated Government Code section 11346.1(a)(2). In
4 doing so, Defendants violated Plaintiff's due process rights, proceeded in a manner not
5 authorized by law, and abused its discretion by implementing and enforcing regulations
6 not promulgated according to law. Defendants had the ability to perform the duty, the
7 duty was ministerial and not discretionary, and Plaintiff has no other adequate remedy.

8 63. Water Code section 1058.5(a)(1) authorizes Defendants to promulgate
9 emergency regulations for the following exclusive list of purposes: "to prevent the waste,
10 unreasonable use, unreasonable method of use, or unreasonable method of diversion, of
11 water, to promote water recycling or water conservation, to require curtailment of
12 diversions when water is not available under the diverter's priority of right, or in
13 furtherance of any of the foregoing, to require reporting of diversion or use or the
14 preparation of monitoring reports."

15 64. Nothing in section 1058.5 authorizes Defendants to promulgate emergency
16 regulations for the purpose of serving public trust interests.

17 65. Defendants exceeded their authority and violated due process when they
18 approved and enforced emergency regulations that were promulgated for the purpose of
19 serving public trust interests, which is not a purpose authorized by Water Code section
20 1058.5.

21 66. Defendants attempted to conceal the emergency regulations' public trust
22 purpose by declaring, without an evidentiary hearings, that all diversions that would
23 interfere with minimum instream flows established to serve public trust interests are per se
24 a "waste and unreasonable use," without any consideration how the diverted water would
25 have otherwise been used.

26 67. California law considers the prohibition on waste and unreasonable use of
27 water to be separate and distinct from the public trust doctrine. (E.g., *Imperial Irrigation*
28 *District v. State Water Resources Control Board* (1986) 186 Cal.App.3d 1160, 1168 n.12

1 (“*National Audubon* did not involve a charge of unreasonable use under article X, section
2 2, but rather a claim that use of water is harmful to interests protected by the public
3 trust.”.)

4 68. The reasonableness of any particular use of water is a question of fact.
5 (E.g., *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 139; *State Water Resources*
6 *Control Board v. Forni* (1976) 54 Cal.App.3d 743, 754.) A determination of the
7 reasonableness of a particular water use must be adjudicated by either Defendant State
8 Water Resources Control Board or by a superior court, with attendant due process.
9 (*Imperial Irrigation District, supra*, 186 Cal.App.3d at 1168-69.)

10 69. Defendants’ promulgation of emergency regulations pursuant to Water Code
11 section 1058.5, for the purpose of acquiring Plaintiff’s water and water rights, which are
12 appurtenant to Plaintiff’s shareholders’ lands, to serve uses deemed to be more valuable
13 and of a higher purpose as public trust interests, without any evidentiary hearing,
14 exceeded Defendants’ emergency regulatory authority, in violation of Water Code section
15 1058.5 and Plaintiff’s due process rights. Defendants violated Plaintiff’s due process
16 rights, proceeded in a manner not authorized by law, and abused their discretion by
17 implementing and enforcing regulations not promulgated according to law. Plaintiff has
18 no other adequate remedy at law, and Defendants’ duty to comply with the requirements
19 of law was ministerial and mandatory and not discretionary and was a clear and present
20 duty.

21 WHEREFORE the Plaintiffs pray for judgment as set forth hereafter.

22
23 **FIFTH CAUSE OF ACTION**

24 **(Request for Injunction / Petition for Writ of Mandate to Prohibit Defendants’**
25 **Adoption of Further Orders Relating to Unreasonable Use of Water Without**
26 **Compliance with Constitutional and Statutory Legal Requirements.)**

27 70. Plaintiffs reallege and incorporate herein each and every allegation of
28 Paragraphs 1 through 37 of the General Allegations and Paragraphs 38 through 47 of the

1 First Cause of Action, Paragraphs 48 through 52 of the Second Cause of Action,
2 Paragraphs 53 through 58 of the Third Cause of Action, and Paragraphs 59 through 69 of
3 the Fourth Cause of Action.

4 71. Plaintiff is informed and believes and on that basis alleges that Defendants'
5 illegal taking, actions in excess of authority, abuses of discretion, actions to proceed in
6 manners not authorized by law, and other violations of due process and of statute, as
7 alleged above, will likely continue into the future for the reasons that follow.

8 72. The emergency regulations have a nominal expiration date of 270 days after
9 they go into effect, and the currently effective curtailment order has a nominal expiration
10 date of February 28, 2015. However, Plaintiff is informed and believes and on that basis
11 alleges that the Defendants will attempt to extend or renew the emergency regulations
12 and/or the curtailment order, or issue additional curtailment orders, based on their claimed
13 authority to declare Plaintiff's traditional water uses to be per se wasteful and
14 unreasonable, without an evidentiary hearing or conformance with other due process
15 requirements. Such actions would result in a multiplicity of actions and the incurrence of
16 further damages and expenses, including attorneys' fees compensable under CCP section
17 1036. Such damages and expenses can be avoided or reduced through the adoption of an
18 injunction and/or writ of mandate requiring the Defendants to comply with the legal
19 requirements related to condemning vested property rights for public use.

20 73. These requirements include adopting resolutions of necessity demonstrating,
21 pursuant to CCP section 1245.230, that the public use is planned in a manner that will be
22 most compatible with the greatest public good and the least private injury; holding a
23 hearing in accordance with CCP section 1250.010 et seq., before the taking is ordered;
24 after the hearing, making a determination of reasonable estimated value of the interests to
25 be taken and the severance damages arising from the taking and depositing the same, as
26 required by CCP section 1255.010 et seq.; and developing an administrative record to
27 authorize the immediate possession of the interests sought to be obtained, as required by
28 CCP section 1255.410, et seq..

1 interests in the water rights held, administered, and managed by Plaintiff and taken,
2 without due process as required by article 1, sections 7 and 19, of the California
3 Constitution, the reasonable value of those amounts of water and caused severance
4 damages to the remainder of the rights to water and the real property to which those rights
5 are appurtenant; and

6 1.2 For an award of attorneys' fees, expert witness fees, and reasonable costs
7 pursuant to CCP section 1036 and CCP section 1021.9 as the actions of Defendants
8 constitute a trespass upon agricultural lands; and

9 1.3 For an award of costs incurred; and

10 1.4 For such other and further judgments and awards as the court shall deem
11 proper.

12
13 **2. Under the Second Cause of Action for Declaratory Relief:**

14 2.1 That a Declaratory Relief Judgment be entered against Defendants State of
15 California, State Water Resources Control Board, and State Water Resources Control
16 Board Members, and their agents, employees, and persons working in concert with such
17 parties:

18 2.2 Declaring that California Constitution article I, sections 7 and 19, and the
19 Code of Civil Procedure require that, prior to attempting to utilize emergency regulations
20 or regulations to order that water be bypassed or foregone, due process must be employed,
21 including the conduct of evidentiary hearings, the adoption of findings based upon
22 adequate evidence of reasonable public necessity, the deposit of adequate compensation,
23 and reasonable notice and opportunity to be heard; and

24 2.3 Declaring that Defendants may not contend that public trust reservations in
25 public grants of real property may be reserved and exercised by the Defendants without
26 evidentiary hearings and declaring that no public trust reserved rights exist in land
27 comprising former Mexican land grants that were patented pursuant to the Act of March 3,
28 1851, unless the patent issued by the Public Lands Commission includes a specific

1 reservation of the right to recover a public trust use such as a right to prevent the use or
2 diversion of water or other rights of access to resources useful for the general public; and

3 2.4 That Plaintiffs be awarded their costs and attorneys' fees pursuant to CCP
4 section 1021.5 as providing a substantial public benefit in maintain this action; and

5 2.5 For such other and further relief as the Court shall deem appropriate.
6

7 **3. Under the Third Cause of Action for Writ of Mandate:**

8 3.1 That a peremptory writ of mandate be ordered and entered against
9 Defendants, its Board members, successor board members, officers, and officials, and
10 other public employees acting in concert with Defendants, that:

11 3.2 Defendants rescind, cancel, and nullify any notices to curtail diversions of
12 water pursuant to the emergency regulations and that the emergency regulations be
13 deemed of no lawful effect and null and void until and unless Defendants first provide for
14 compliance with the requirements of the California Constitution, article 1, sections 7 and
15 19, and CCP title 7 (relating to eminent domain), by holding the hearings, providing for
16 the production of evidence of the public necessity of the acquisition and taking of
17 Plaintiff's usufructory water right and the water Plaintiff is entitled to pursuant to that
18 right, and that reasonable compensation has been determined and paid to the Plaintiffs
19 before the taking of the water shall be ordered and accomplished; and

20 3.3 Defendants (1) prior to acting pursuant to emergency regulation or
21 otherwise in an attempt to determine or find that water use is unreasonable or a wasteful,
22 first be required to provide for reasonable due process including the conduct of
23 evidentiary hearings in regard to the determinations of the public interest and public
24 necessity, and balancing alternatives to the acquisition of interests in water and the current
25 uses of water, and (2) further ordering Defendants not act to implement any such
26 regulation or requirement without first complying with the requirement of ascertaining
27 that a valid public trust reservation in the real property and rights to water which are
28 appurtenant to real property was reserved pursuant to *Summa Corp. v. California*; and

1 3.4 For the award of reasonable costs, expert witness fees, and attorneys' fees
2 pursuant to CCP section 1036; and

3 3.5 For such other and further relief as shall be deemed appropriate by the
4 Court.

5
6 **4. Under the Fourth Cause of Action for Writ of Mandate:**

7 4.1 That a peremptory writ of mandate be issued to Defendants ordering that (1)
8 the regulations must be withdrawn, rescinded, cancelled, and not acted upon until all
9 requirements of statute are performed and met because the Emergency Regulations were
10 not adopted or promulgated in accordance with due process due to the Water Code
11 Section 1058.5(a)(1) limitations the purposes for which such a regulation can be utilized,
12 under which the acquisition and taking of water for the service of public trust interests is
13 not a permitted purpose; (2) the regulations must be withdrawn, rescinded, cancelled, and
14 not acted upon until all requirements of statute are performed and met because the
15 regulation was modified without at least five working days' notice of the new language, as
16 required by Government Code section 11346.1(a)(2), before submission to OAL of the
17 modified language; and (3) the regulations must be withdrawn, rescinded, cancelled, and
18 not acted upon until all requirements of statute are performed and met because notice of
19 the specific language to be adopted was not given and served upon all persons as required
20 by section 11346.1(a)(2) of the Government Code.

21 4.2 That Plaintiffs be awarded their costs and attorneys' fees pursuant to CCP
22 section 1021.5 as providing a substantial public benefit in maintain this action; and

23 4.3 For such other and further relief as the Court shall deem appropriate.
24

25 **5. Under the Fifth Cause of Action for Injunction or Writ of Mandate:**

26 5.1 That an injunction and/ or writ of mandate be issued prohibiting Defendants
27 from adopting further orders relating to unreasonable use of water which have the effect
28 of prohibiting one use of water in order to benefit or enhance an alternative use of water,

1 without first complying with constitutional and statutory legal requirements of due process
2 and reasonable compensation. Those requirements include the conduct of hearings,
3 determination of public necessity and use, and the deposit of the estimated value of the
4 interests in property to be acquired and severance damages to be incurred; and

5 5.2 For an award of attorneys fee and expert witness fees pursuant to CCP
6 section 1021.5 on the grounds of the provision of a substantial public benefit and
7 enforcement of a substantial public interest protective of the interests of a substantial
8 population of persons;

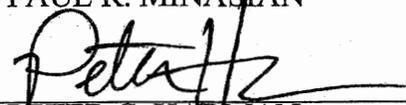
9 5.3 For costs of suit; and

10 5.4 For such other and further relief as the Court shall deem proper.

11 Respectfully submitted,

12 MINASIAN, MEITH,
13 SOARES, SEXTON & COOPER LLP

14 By: 
15 PAUL R. MINASIAN

16 By: 
17 PETER C. HARMAN
18 Attorneys for STANFORD VINA RANCH
19 IRRIGATION COMPANY, Plaintiff-Petitioner
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23
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27
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BY FAX

SUMMONS (CITACION JUDICIAL)

SUM-100

FOR COURT USE ONLY (SOLO PARA USO DE LA CORTE)

Superior Court Of California, Sacramento

10/22/2014

amacias

By _____, Deputy

Case Number:

34-2014-80001957

NOTICE TO DEFENDANT: (AVISO AL DEMANDADO):

STATE OF CALIFORNIA, STATE WATER RESOURCES CONTROL BOARD, STATE WATER RESOURCES CONTROL BOARD MEMBERS FELICIA MARCUS, DOREEN D'ADAMO, FRANCES SPIVY-WEBER, STEVEN MOORE, AND TAM DODUC; and DOFS 1 THROUGH 20

YOU ARE BEING SUED BY PLAINTIFF: (LO ESTÁ DEMANDANDO EL DEMANDANTE):

STANFORD VINA RANCH IRRIGATION COMPANY

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. NOTE: The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case.

AVISO! Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is: (El nombre y dirección de la corte es):

Sacramento County Superior Court 720 9th Street, Sacramento, CA 95814

CASE NUMBER: (Número del Caso):

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es): Paul R. Minasian, Esq. & Peter C. Harman, Esq, P O Box 1679, Oroville, CA 95965 (530) 533-2885

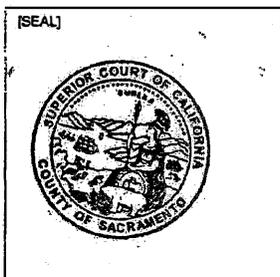
DATE: (Fecha) OCT 22 2014

Clerk, by (Secretario) A. MACIAS

Deputy (Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).



NOTICE TO THE PERSON SERVED: You are served

- 1. as an individual defendant.
2. as the person sued under the fictitious name of (specify):
3. on behalf of (specify):
under: CCP 416.10 (corporation), CCP 416.20 (defunct corporation), CCP 416.40 (association or partnership), other (specify):
4. by personal delivery on (date):

BY FAX

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): PAUL R. MINASIAN (SBN 040972), PETER C. HARMAN (SBN 281171) Minasian, Meith, Soares, Sexton & Cooper, LLP 1681 Bird Street / P O Box 1679 Oroville, CA 95965 TELEPHONE NO.: (530) 533-2885 ATTORNEY FOR (Name): Plaintiffs		FOR COURT USE ONLY FILED Superior Court Of California, Sacramento 10/22/2014 amacias By _____, Deputy Case Number: 34-2014-8000-1957
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO STREET ADDRESS: 720 9th Street MAILING ADDRESS: CITY AND ZIP CODE: Sacramento, CA 95814 BRANCH NAME:		
CASE NAME: Stanford Vina Ranch Irrigation Company v. State of California, et al.		CASE NUMBER:
CIVIL CASE COVER SHEET <input type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000)	<input checked="" type="checkbox"/> Limited (Amount demanded is \$25,000 or less)	JUDGE: DEPT:
Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)		CASE NUMBER:

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

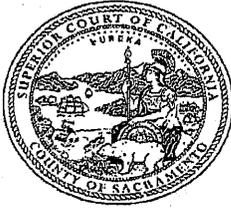
Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46)	Contract <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41)
Other P/PI/PD/W/D (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other P/PI/PD/W/D (23)	Real Property <input type="checkbox"/> Eminent domain/Inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26)	Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20)
Non-P/PI/PD/W/D (Other) Tort <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-P/PI/PD/W/D tort (35)	Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38)	Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42)
Employment <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input checked="" type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (24) <input type="checkbox"/> Other petition (not specified above) (43)

2. This case is is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- | | |
|--|--|
| a. <input type="checkbox"/> Large number of separately represented parties | d. <input type="checkbox"/> Large number of witnesses |
| b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve | e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court |
| c. <input type="checkbox"/> Substantial amount of documentary evidence | f. <input type="checkbox"/> Substantial postjudgment judicial supervision |
3. Remedies sought (check all that apply): a. monetary b. nonmonetary; declaratory or injunctive relief c. punitive
4. Number of causes of action (specify):
5. This case is is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: **October 22, 2014**
PETER C. HARMAN
 (TYPE OR PRINT NAME) 
(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.



SUPERIOR COURT OF CALIFORNIA
County of Sacramento
720 Ninth Street Room 102
Sacramento, CA 95814-1380
(916) 874-5522
www.saccourt.ca.gov

NOTICE OF CASE ASSIGNMENT
Proceeding for Writ of Mandate and/or Prohibition

Case Number : 34-2014-80001957-CU-WM-GDS

This case has been assigned for all purposes to the judicial officer indicated below pursuant to rule 3.734 of the California Rules of Court and Sacramento Superior Court Local Rule 2.01; it is exempt from the requirements of the Trial Court Delay Reduction Act and the Case Management Program under Chapter 11 of the Sacramento Superior Court Local Rules.

JUDGE	COURT LOCATION	DEPT.
Timothy M. Frawley	Gordon D. Schaber Courthouse	29

The petitioner shall serve all parties with a copy of this order and a copy of the Sacramento Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs. The Guide is available in Room 102 of the courthouse, from the clerk of the department to which this matter has been assigned, and on the "Civil" page of the Sacramento Superior Court internet website (www.saccourt.ca.gov).

Scheduling

Contact the clerk in the assigned department to schedule any judicial proceedings in this matter, including hearings on ex parte applications and noticed motions.

JUDGE	DEPT.	PHONE
Hon. Shellyanne W.L. Chang	24	(916) 874-6687
Hon. Timothy M. Frawley	29	(916) 874-5684
Hon. Michael P. Kenny	31	(916) 874-6353
Hon. Allen H. Sumner	42	(916) 874-5672

Other Information

Pursuant to Local Rule 2.01, all documents submitted for filing in this case shall be filed in person at the Civil Front Counter (Room 102) or by mail addressed to the Clerk of the Sacramento Superior Court, Attn: Civil Division-Room 102, with the exception of certain documents filed on the day of the hearing. For specific requirements, please see the Sacramento Superior Court Guide to the Procedures for Prosecuting Petitions for Prerogative Writs.

Any administrative record must be lodged with the assigned department.

Date: 10/22/2014

Signed: /s/ A. Macias
 Ana Macias, Deputy Clerk