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September 21, 2021

Via Electronic Mail Only

State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
DWR-MillDeerDrought@waterboards.ca.gov

California Department of Fish and Wildlife
Attention: Jason Roberts
P.O. Box 944209
Sacramento, CA 94244-2090
Jason.Roberts@wildlife.ca.gov

National Marine Fishery Service
Attention: Howard Brown
650 Capitol Mall, 5-100
Sacramento, CA 95814
Howard.Brown@noaa.gov

Re: Emergency Regulations and Curtailment Orders for Mill Creek and Deer Creek

Ladies and Gentlemen,

California water rights are real property rights pursuant to 160 years of California and Federal case law. "As such, they cannot be infringed by others or taken by government action without due process and just compensation. [Citations])" (*United States v. SWRCB* (1986) 182 Cal.App.3d 82, 101.) The California and United States Constitutions prohibit government from taking property without due process and compensation. (U.S. Const., 5th, 14th Amendments; Cal. Const., Art. I, § 7, subd. (a), Art. I, §19(A).) Article X, Section 2 of the California Constitution limits the use of water to what is reasonably required for the beneficial use served and prohibits waste and unreasonable use. (Cal. Const. Article X, section 2.) Irrigation is a preferred use of water in California, second only to domestic use. (Water Code § 106.)

Stanford-Vina Ranch Irrigation Company ("Stanford Vina" or "SVRIC") and Los Molinos Mutual Water Company ("Los Molinos" or "LMMWC") and their landowners have vested real property rights to their water and water rights. Without due process or just compensation, and with only a five-minute public comment period, the State Water Resources Control Board ("SWRCB" or "State"), with the stroke of a pen, is proposing to prohibit Stanford Vina, Los Molinos, and their landowners from utilizing their property rights to use their water as they have done for over 100 years. The proposed instream flow requirements are unlawful and will inflict irreparable harm on the targeted Mill Creek and Deer Creek water users and California's long-standing water rights system. LMMWC and SVRIC hereby challenge and object to the proposed emergency regulations and the curtailment orders for Mill and Deer Creeks.

1. A Physical Solution of Streambed Restoration is Required to Maximize the Beneficial Use of Water.

California law requires implementation of a physical solution when physical measures will maximize the beneficial use of water in accordance with California Constitution Article X, section 2. The physical solution in Mill and Deer Creeks is multi-beneficial channel restoration and critical riffle rehabilitation measures that will enhance fishery passage conditions for both juvenile and adult salmonids while reducing instream flows in order to maximize the beneficial use of water for human and instream purposes. The proposed channel restoration and critical riffle rehabilitation measures consist, in the short-term, of hand stacking rocks in a downstream V-shape to channel lower flows at critical locations to increase depth and create improved passage conditions with minimal low flows (flows substantially less than 50 CFS). (Fishbio Dec. p. 13.) These channel restoration measures can be immediately implemented by hand and with minimal cost, and they will enhance fishery conditions in the stream while maximizing the beneficial use of water for crops, livestock, and other human uses. Fishbio concluded, under penalty of perjury, that "The most effective and appropriate mechanism to enhance fish passage conditions is through targeted, and minor, modification of riffles within Mill and Deer Creeks…" (Fishbio Dec. p. 12:251-253.)

Water users on Mill and Deer Creeks have repeatedly requested that the SWRCB, DFW, and NMFS address the root problem, as set forth in our prior comment letters filed on September 2nd, 8th, and 17th of 2021. Water users also requested that such measures be implemented on an emergency basis in light of the prevailing drought year conditions. Yet as recently as April 7, 2021, CDFW personnel stated it is "not feasible" to undertake such an emergency project and listed numerous approvals and prerequisites to implementation of such a restoration project, including CEQA, NEPA, Lake and Streambed Alteration Agreement, Incidental Take Permit, Army Corps of Engineers 404 Permit, State Water Resources Control Board 401 Permit, Central Valley Flood Protection Board permit, Section 7 consultation with NOAA fisheries under the Endangered Species Act.

Historically the local water users would assist the State of California in modifying riffles within Deer and Mill Creeks to facilitate salmon and steelhead passage within minimum instream flows. Local water users would provide equipment and equipment operators, and CDFW (formerly Department of Fish and Game) personnel would utilize the equipment and

operators and would work with water users to modify the channel and riffles to allow salmon and steelhead to traverse the streambed with minimum instream flows. However, since the mid-1980's California and Federal Agencies have opposed such channel restoration measures and demanded that local water users, at their cost, fund environmental studies and engage in impracticable permit application processes before undertaking any measures to modify the channel and riffles within Deer and Mill Creek, as historically occurred. The obstruction and opposition of government agencies has effectively prohibited channel restoration measures for the last thirty years.

A physical solution of channel restoration and critical riffle rehabilitation within Mill and Deer Creeks is required by law. In *City of Lodi v East Bay Municipal Utility District* (1936) 7 Cal 2d. 316, 341, 344, the California Supreme Court held that Article X, section's reasonable and beneficial use mandate required that junior claimants provide for a physical solution that would preserve the full rights and use of water by senior right holders. The Court was clear that senior water right holders have a right to insist that the physical solution be implemented by the party seeking to change the flow regime and "[t]he Court possesses the power to enforce such solution regardless of whether the parties agree." (*Id.* at p. 341.) Prior appropriators and senior water right holders cannot be required to incur "any substantial expense" due to the subsequent demands by junior claimants. (*City of Lodi v East Bay Municipal Utility District*, *supra*, 7 Cal 2d at 341, 344; *Peabody v City of Vallej*o (1935) 2 Cal 2d 351, 376.)

The law requires short term and long-term multi-benefit that a physical solution on Mill and Deer Creeks through the implementation of channel restoration and critical riffle rehabilitation measures that will enhance fishery conditions with minimal instream flows. The lack of any such physical solution here and the use of the regulations and orders to confiscate the water from senior water right holders and to reallocate it to for instream fishery purposes on Mill and Deer Creek rather instead violates California water law.

2. The Proposed Instream Flow Requirements Violate Constitutional Rights to Due Process Under the California and United States Constitutions.

The proposed emergency regulations and curtailment orders deprive Mill and Deer Creek water right holders of the opportunity to request an evidentiary hearing to challenge the determinations of the SWRCB that their use and diversion of water is "unreasonable" under California Constitution Article X, section 2 and must cease. The SWRCB is proposing a bill of attainder style proceeding in which the unelected SWRCB Members will determine that the use and diversion of water by seventeen (17) Deer Creek water right holders, and eight (8) Mill Creek water right holders, is "unreasonable" and the SWRCB will apply that determination through a sentencing-type proceeding to the targeted water users without ever holding an evidentiary

hearing on whether the use or diversion of water is unreasonable.[1] An evidentiary hearing would uphold constitutional due process requirements while reducing the risk of factual and legal errors. (see SWRCB Order WR 2016-0015, Order Dismissing the Administrative Civil Liability Complaint Against Byron-Bethany Irrigation District and Dismissing the Draft Cease and Desist Order Against the West Side Irrigation District.)

At no point in the process are water right holders afforded an evidentiary hearing to challenge the determination that their use and diversion of water is unreasonable with cross-examination, as required by the United States and California Constitutions. This is exacerbated by failure to timely provide public records. This scheme is simply incompatible with due process and the real property nature of California water rights. (*U.S. v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 727-30, 752-56; *Dugan v. Rank* (1963) 372 U.S. 609, 623-626; *United States v. SWRCB* (1986) 182 Cal.App.3d 82, 101.) The SWRCB may not declare unreasonable or impose a new condition on water rights without an opportunity for an evidentiary hearing. (*United States v. SWRCB* (1986) 182 Cal.App.3d 82, 101; *Dugan v. Rank* ("*Dugan*") (1963) 372 U.S. 609, 623-26; *Casitas Mun. Water. Dist. v. United* States (2008) 543 F.3d 1276, 1288-97.) California water rights, which are vested real property rights protected by the United States and California Constitutions. "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].)

The reasonableness of the targeted water right holders' use and diversion of water is a question of fact subject to due process hearing requirements. "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 (*Joslin*); *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 706 ("what is an unreasonable use is a judicial question depending upon the facts in each case.").) Determining the reasonableness of a diversion and use of water requires an evidentiary hearing with consideration of other water uses and diversions. (*Santa Barbara Channel Keeper v. City of San Buenaventura* (2018) 19 Cal.App.5th 1176, 1188, 1192-1193 (Reasonableness of a diversion is a question of fact and cannot be determined without trial court consideration of other diversions and uses); *In re Waters of Long Valley Creek Stream Sys.* (1979) 25 Cal.3d 339, 354; *Rank v. Krug* (1956) 142 F. Supp. 1, 112 ("What constitutes reasonable beneficial use or unreasonable use of water is a question of fact for judicial determination in the varying circumstances as they arise."), disapproved on other grounds in *State of Cal v. Rank* (1961) 293 F.2d 340.)

Due process requirements do not disappear when the SWRCB applies a "waste and unreasonable use" label to water right holders' diversion and use of water pursuant to their water rights. *(Youakim v. McDonald* 71 F.3d 1274, 1289 (7th Cir. 1995) ("A state… may not defend

[1] The regulations and curtailment orders should be evaluated collectively, as part of a single consolidated action. The regulations themselves determine that the diversions of the targeted Mill and Deer Creek water right holders will be curtailed to meet the minimum flow requirements set forth in the regulations, and the curtailment orders simply notify affected water right holders that the regulatory provisions were put into effect. All arguments herein challenge both the regulations and the curtailment orders.

against a due process claim... by arguing that the plaintiff now lacks a protectable property interest by virtue of the very state action the plaintiff has challenged."); *Bennett v. Tucker*, 827 F.2d 63, 73 (7th Cir. 1987) ("a state may not deprive an individual of his or her property interest without due process, and then defend against a due process claim by asserting that the individual no longer has a property interest."); *Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711, 717 (Holding property owner has no constitutional right to maintain a nuisance but has an "equally elementary… right to have it determined by due process whether… it is such a nuisance.").) The SWRCB must provide an opportunity for an evidentiary hearing with cross-examination for water right holders on Mill and Deer Creek to challenge the determination of the SWRCB that their use and diversion of water is unreasonable.

A. Demand for Evidentiary Hearing.

Los Molinos Mutual Water Company and Stanford Vina Ranch Irrigation Company hereby demand a limited, three-hour evidentiary hearing with the opportunity for cross-examination on the legal and factual basis of the emergency regulations and curtailment orders. There is no need to hold separate evidentiary hearings for each water right holder. The SWRCB has historically held consolidated water right hearings for all water users impacted by a proposed SWRCB action. Indeed, we are unaware of a single instance in the history of the SWRCB in which separate hearings were held for each water user impacted by a single SWRCB action.

We are confident that with witness testimony and cross-examination the SWRCB will agree (1) the instream flow requirements are unnecessary; (2) that the use and diversion of water users on Mill Creek and Deer Creek is not unreasonable; (3) the proposed instream flow requirements will not maximize beneficial use; (4) a physical solution of channel rehabilitation and restoration will enhance fishery conditions with minimal instream flows; (5) the proposed instream flow requirements will have a devastating impact on Mill and Deer Creek water users without enhancing fishery conditions; (6) water users are reasonably and beneficially using Mill and Deer Creek water; (7) the instream flow requirements are a public project and use and require compensation for the taking of property.

3. The Proposed Regulations are Quasi-Adjudicatory.

The regulations are inherently adjudicatory by determining that the diversion and use of water by a small group of water users and landowners in rural Tehama County - seventeen (17) water right holders on Deer Creek, and eight (8) on Mill Creek- is unreasonable, and by implementing that determination to prohibit water users exercising their property rights to water. The SWRCB is not adopting a general regulation applicable to all California water right holders on all California watersheds. Nor is it adopting a general standard to be applied in future proceedings– there is no future proceeding. The function of the proposed regulations is to prohibit targeted water right holders on Mill and Deer Creeks from diverting water. "The character of the proceeding is not determined by the name used in referring to it or statements of officials but by a consideration of what actually occurs during the proceeding and its object and effect." (2 Cal. Jur. 3d Administrative Law § 388; *20th Century Ins. Co. v. Garamendi* (1994) 8

Cal. 4th 216, 275 [Quasi-adjudicative classification contemplates "function performed"].) The regulations do not generally apply to all water right holders in the State, and the targeted water right holders have no meaningful electoral recourse. (*Bi-Metallic Investment. Co. v. State Board of Equalization* (1915) 239 U.S. 441, 445 [Due process inapplicable to actions that are generally applicable to voting population of an electoral jurisdiction because all citizens "stand alike" possess meaningful electoral recourse.].) And SWRCB actions that interfere with or modify water rights are quasi-adjudicatory as a matter of law. (*SWRCB Cases* (2006) 136 Cal.App.4th 674, 721; *United States v. SWRCB* (1986) 182 Cal.App.3d 82, 113-115 (Holding the SWRCB performs an adjudicatory function when undertaking to allocate water rights, when modifying water rights, imposing new conditions on water rights).)

4. The Proposed Instream Flow Requirements are a Physical Taking of Real Property Under the California and United States Constitutions.

The proposed instream flow requirements a compensable physical taking of real property that requires compensation. It is well established that interference with the use and diversion of water pursuant to its water rights constitutes a compensable physical taking of private property. (*Dugan v, Rank,* 372 U.S. at 623-26 (Supreme Court treated Friant Dam's interference with downstream water rights as a physical taking requiring compensation); *U.S. v. Gerlach Live Stock Co., supra*, 399 U.S. at 754 (Supreme Court analyzed Friant Dam interference with downstream San Joaquin River water rights as a physical taking of private property requiring compensation); See also *International Paper v. United States* (1931) 282 U.S. 399, 407.)
In *Gerlach* the Supreme Court held that Article X, section 2 does *not* authorize the taking of water rights without just compensation. (*Gerlach,* 399 U.S. at 751-754.) The Supreme Court held that Article X, section 2's waste and unreasonable use standard had not "destroyed and confiscated a recognized and adjudicated private property right" in California water rights, and instead Article X, section 2 was the result of a "studied purposes to preserve" the rights of water right holders. (*Id.* at 751, 753.) The Supreme Court reasoned that alternative proposals to "revoke or nullify all common-law protection to riparian rights" had been rejected as "confiscatory." *Id.* at 751, 753 ("Public interest requires appropriation; it does not require expropriation."). The Court of Claims in *Casitas 3* also affirmed the Fifth Amendment takings protections for water rights notwithstanding Article X, section 2's reasonableness condition and the public trust doctrine. (*Casitas 3,* 102 Fed.Cl. at 458-460.)

Fishery or environmental restrictions on use of water that interfere with California water rights and diversions, even if only for periods of time, constitute compensable physical takings of private property for a public purposes and use. (*Casitas Mun. Water. Dist. v. United* States (2008) 543 F.3d 1276, 1288-97 (*Casitas 1*); *Tulare, supra*, 49 Fed. Cl. at 318-21; *Klamath Irrigation v. United States* (2016) 129 Fed.Cl. 722; Ca*sitas Mun. Water Dist. v. U.S.* (2009) 556 F.3d 1329 (*Casitas 2*); *Casitas Mun. Water. Dist. v. United* States (2011) 102 Fed.Cl. 443, 458-461 (*Casitas 3*).) Here the SWRCB is physically and permanently confiscating water for a public purpose, project, and use – fishery interests – and in doing so the SWRCB is committing a physical taking of real property. Compensation is required.

Even if the regulations are construed as legislative rather than adjudicatory, compensation is still required. (*First English Evangelical Lutheran Church of Glendale v. Los Angeles* (1987) 482 U.S. 304 [General regulation deemed physical taking]; *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection* (2010) 560 U.S. 702, 713-714 ["The Takings Clause…is concerned simply with the act, and not with the governmental actor…"]; *Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 155 at 164 (1980) (Taking Clause prohibits Legislatures and Courts from taking property "simply by recharacterizing" it as public).) The SWRCB is taking the property of water users for a preferred public use and project- instream fishery enhancement in Mill and Deer Creeks. Styling of the taking of property as legislative does not excuse compensation requirements.

5. The Proposed Instream Flow Requirements Violate California Constitution Article X, Section 2. The SWRCB is Not Balancing to Maximize Beneficial Use Without Injury to the Beneficial Use of Water Users.

The SWRCB is utilizing a label of 'unreasonable' to confiscate water from seventeen (17) Deer Creek water right holders, and eight (8) Mill Creek water right holders for an instream public use that the SWRCB Board Members subjectively prefer. This is unlawful. Article X, section 2 is not confiscatory – it only limits the use and diversion of water to what is "reasonably required for the beneficial use to be served…" so that "the water resources of the State be put to beneficial use to the fullest extent of which they are capable…" (Cal. Con. Art. X, sec. 2.) The Amendment authorizes limiting diversions and uses of water when more efficient methods are available, and which can be utilized without injury to the beneficial use of other water users. (Cal. Con. Art. X, sec. 2 ("…nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water …"); *Gin S. Chow v. City of Santa Barbara* 217 Cal. 673, 700, 706 (1933) (Upholding unreasonableness finding to maximize beneficial use through storage when no injury to water right holder).) These directives are consistent with the Amendment's purpose of maximizing beneficial use of water in California without depriving water right holders of their rights and beneficial use. The United States Supreme Court has held Article X, section 2's is not "confiscatory" and is the result of a "studied purposes to preserve" property right in water rights. (*Gerlach, supra*, 339 U.S. 725 at 751-755.)

The injurious and confiscatory nature of the application of Article X, section 2 here is in severe conflict with long standing principles of California water law. The SWRCB is utilizing a label of "unreasonable" to take the water of a small number of rural Tehama County water right holders for an instream public trust use that its' Board Members preferred. No balancing is occurring - purported instream fishery needs are to be fully satisfied while all conflicting beneficial uses are automatically declared unreasonable and ordered to cease. Mill and Deer Creek water right holders' use and diversion of water is not being declared unreasonable because they exceed what is "reasonably required for the beneficial use" being served. It is not even being considered if more efficient methods of diversion or use of water are available. The water users on Mill and Deer Creeks could be the most efficient or inefficient diverter and irrigators in the world, but no examination of efficiency has ever occurred, and no allegations of inefficiency

are made.[2] Moreover, it is unclear how irrigation of the same crops can be reasonable and beneficial one day, but unreasonable the next, without any findings made in an evidentiary hearing. Irrigation is a preferred use of water in California, second only to domestic use. (Cal. Water Code § 106.)

Findings of unreasonableness under Article X, section 2 have historically been limited to valueless water uses such as flooding to kill gophers, or non-agricultural uses that interfere with water storage projects that maximize beneficial use, and such findings were only made after a trial. *Tulare Dist. v. Lindsay-Strathmore Dis.* 3 Cal.2d 489, 568 (1935) (Flooding to kill gophers unreasonable); *Gin S. Chow, supra*, 217 Cal. at 706; *Joslin v. Marin Municipal Water District* 67 Cal.2d. 132, 135, 141 (1967). Mill and Deer Creek diversions and use of water which have occurred uninterrupted for over 100 years are being declared unreasonable and ordered to immediately cease "in vacuo" and with great injury. (*Joslin, supra*, 67 Cal. 2d. at 140 (Reasonableness "depends on the circumstances of each case...and cannot be resolved in vacuo…").) Article X, section 2 is intended to maximize beneficial use, not to take water from one beneficial use so that it can be allocated to another, subjectively preferred public purpose, without balancing the competing beneficial uses, and with severe injury to water right holders. Lower courts have endorsed the State's authority to promulgate general policy statements of reasonableness analogous to negligence per se safety standards in tort law. (*Forni, supra,* 54 Cal.App.3d 743 (Regulation "no more than a policy statement which leaves the ultimate adjudication of reasonableness to the judiciary."); C*al. Trout, supra,* 207 Cal.App.3d 585, 623-625 (Legislature has power to adopt broad rules of reasonableness analogous safety standards for negligence per se)*; Light, supra*, 226 Cal.App.4th at 1484-1485 (SWRCB has authority to enact "general rules" of reasonableness under *Cal Trout* negligence per-se analogy).) However, these decisions are limited to facial challenges that did not address the implementation and exercise of such authority – the issue here. (*Forni, supra,* 54 Cal.App.3d 743; *Light, supra*, 226 Cal.App.4th p. 1475, 1490 ("This is a facial challenge to Regulation 862…" and "[t]he section contains no substantive regulation of water diversion…").) The proposed regulations and orders are not general policy statements; they define and implement a prohibition upon diversions and uses of water by a small group of specific Tehama County water right holders under the specific conditions set forth in the regulations. The SWRCB is not adopting a general policy statement of unreasonableness.

6. The Proposed Instream Flow Requirements are a Public Project. Assertions of "Emergency" Do Not Excuse Constitutional Compensation and Hearing Requirements.

For decades government has studied fishery conditions on Mill and Deer Creeks, and the State of California even began public projects on Deer and Mill Creeks paying private landowners and water right holders to forego their surface water diversions and to pump

[2] The SWRCB included provisions in emergency regulations for the Klamath watershed in August 2021 that stated stock watering for livestock is *not* be unreasonable notwithstanding purported needs of instream fishery flows if certain conditions were satisfied. No known authority favors livestock in the Klamath watershed over livestock in Tehama County and Mill and Deer Creeks. .

groundwater to supplement instream fishery flows. However, the instream flow project was not fully completed or financed, and now that drought has struck, the State is proposing to take the water and property of Mill and Deer Creek water right holders to create the same instream fishery flows. The State's actions are a substitute public project, funded by water right holders on Mill and Deer Creeks without compensation.

Government assertions of "emergency" authority for actions that damage real property are invalid when government fails to adequately prepare for foreseeable emergency conditions, or when measures are not sufficiently necessary or imminent to qualify as a "true emergency." (*Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal.App.4th 1670; *Smith v. County of Los Angeles* ("*Smith*") (1989) 214 Cal.App.3d 266, 286-87; *Rose v. City of Coalinga* ("*Rose*") (1987) 190 Cal.App.3d 1627, 1635 (Reversing trial court over whether "true emergency" existed when city waited 57 days after earthquake to destroy building.).) For example, in *Los Osos Valley Associates* the California Court of Appeal held that compensation was owed for damages arising from emergency groundwater pumping because a city knew of insufficient drought water supply that necessitated pumping before drought conditions struck. Compensation is required when government takes or damages private property with "emergency" measures attributable to government's failure to follow through with a project known to be needed or wanted. (*Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal.App.4th 1670 (*Los Osos*) (Compensation owed for damages arising from emergency groundwater pumping because city knew of water shortage before drought); *Odello Brothers v. County of Monterey* (1988) 63 Cal.App.4th 778 (*Odello Brothers*) (Compensation owed for flooding of farmland and crop by emergency levee breach because city knew of flood risk before emergency flood conditions).)

Here, the government's failure to follow through with the project it desired created the conditions in Mill and Deer Creek – the very "emergency" that the water of SVRIC and LMMWC is being taken to mitigate. Like *Los Osos* and *Odello Brothers,* in the years preceding the drought, here the government called for an instream flow projects for Mill and Deer Creek fisheries. The government even began – but didn't complete – flow projects that utilized private groundwater pumping to enhance Mill and Deer Creek fish migration flows during the same periods that Mill and Deer Creek diversions and use of water are being declared "unreasonable." On Mill Creek, LMMWC entered into an agreement in 1990 with California Department of Fish and Wildlife (formerly Fish and Game) and California Department of Water Resources for the installation by the State agencies of groundwater wells that would produce 25 CFS. The groundwater was to be exchanged on a one-to-one basis with LMMWC for LMMWC surface water in Mill Creek that LMMWC, under the Agreement, would forego the diversion of and which would remain within Mill Creek for instream fishery purposes. The State of California was to be bear capital costs for constructing the wells as well as operational and maintenance costs of the wells. To date, *the State has only installed two wells which produce a total of 10 CFS, well below the 25 CFS that was agreed upon in 1990*, and the State has never funded or completed the project to construct and operate the groundwater wells required to provide 25 CFS. (Hardwick Decl. ¶ 6.) LMMWC and the State agencies also entered into a 2007 Agreement to provide for Spring and Fall flows for spring and fall run Chinook salmon.

On Deer Creek, Deer Creek Irrigation District entered into an agreement in 2007 with California Department of Fish and Wildlife (formerly Fish and Game) and California Department of Water Resources for the installation by the State agencies of a groundwater well that would produce 10 CFS, and for implementation of efficiency improvements, for a total of 15-18 CFS of instream flows. The groundwater and water savings were to be exchanged on a one-to-one basis with DCID for DCID surface water in Deer Creek that DCID, under the Agreement, would forego the diversion of and which would remain within Deer Creek for instream fishery purposes. The State of California was to be bear capital costs for constructing the wells as well as operational and maintenance costs of the wells. The 2007 Agreement expressly states that "a preliminary adult upstream fish transportation flow objective of 50 cubic feet per second (cfs) was developed..." and "the proposed Program will operate from April 1 through June 30 and October 15 through November. 15 when the Deer Creek flow, as measured below the Stanford Vina Diversion Dam, *is equal to or less than 50 cfs*...[Emphasis Added]" Had the Fishery Agencies fully completed suitable instream flow projects, there would not be an alleged "emergency" on Deer or Mill Creeks. Mill and Deer Creek water users and landowners cannot be forced to bear the cost of the in-stream flow project here. Doing so would reward government inaction – inaction that created the very "emergency" conditions.

Drought is a regular occurrence in California and does not qualify as an "emergency". CDFW has even declined to consider water user requests to undertaken channel restoration measures on an emergency basis because "A seasonal decline in stream flow as well as variable annual precipitation are not generally considered to be sudden or unexpected occurrences, but rather regular hydrologic fluctuations that should be planned for well in advance." (Exhibit A.1) Stanford Vina and Los Molinos agree, and both have implored State and Federal agencies to take this sound advice and commit to solving the underlying problem, rather than continuing to resort to "emergency regulations". The failure of State and Federal agencies to implement channel restoration measures before the prevailing drought conditions prohibits those same agencies form relying on assertions of "emergency" authority now to confiscate the water of Stanford Vina and Los Molinos.

7. The Emergency Regulations and Eventual Curtailment Orders Violate the Mill and Deer Creek Water Right Adjudications and Subvert the Separation of Powers Between the Executive and Judiciary and Adjudication.

Like thousands of California water rights, Deer Creek and Mill Creek water rights were adjudicated and are subject to Superior Court Judgments and "[t]he decree[s] [entered by the court] is conclusive as to the rights of all existing claimants upon the stream system lawfully embraced in the determination." (Water Code § 2773.) The SWRCB has not petitioned to amend the adjudications before imposing the instream flow requirements in contravention of them, despite res judicata, the finality of court judgments, and case law providing jurisdiction to quantify and affirm riparian and pre-1914 rights only to the courts. (*Young v. SWRCB* (2013) 219 Cal App 4th 397, 404 ("No one disputes that the Water Board does not have jurisdiction to regulate riparian and pre-1914 appropriative rights [Citations]"); *Millview v. SWRCB* (2014) 229 Cal.App.4th 879, 893-4.)

The SWRCB- an agency of the Executive Branch - may not amend and contravene Judicial Branch judgments through Article X, section 2, or other authorities. Nor may the SWRCB quantify, subvert, or amend riparian or pre-1914 water rights of Deer Cree or Mill Creek water users. Only the courts have jurisdiction over disputes and enforcing water rights between and among pre-1914 and riparian rights holders. The SWRCB does not have jurisdiction to "curtail" pre-1914 water rights. (*Young v. SWRCB* (2013) 219 Cal App 4th 397, 404; *Millview v. SWRCB* (2014) 229 Cal.App.4th 879, 893-4.) The SWRCB, as a general rule, does not have jurisdiction to regulate riparian and pre-1914 appropriative rights. (*California Farm Bureau Federation v. State Water Resources Control Bd.* (Farm Bureau) (2011) 51 Cal.4th 421, 429.)

8. The Regulations and Curtailment Orders Violate Public Trust Authorities.

A. The Public Trust Cannot be Applied to Mexican Land Grants.

The use of water to provide minimum in-stream flows for fish protection is a public trust use of water. The US Supreme Court unequivocally held in *Summa Corp, supra,* 466 U.S. 198 that California could not apply the public trust to former Mexican Land Grant lands and waters. (*Summa Corp., supra*, at 206-209.) Deer Creek and Stanford Vina lands, and Mill Creek and the lands within Los Molinos Mutual Water Company, are patented Mexican Land Grant lands. (Whitecotton Decl.¶ 4-6.) The SWRCB is violating the prohibition of *Summa Corp* by confiscating the water and property from former Mexican Land Grant lands and by doing so for public trust interests within former Mexican Land Grants. Deer Creek, Mill Creek, and the lands within LMMWC and SVRIC lands are former Mexican Land Grant lands patented under the Act of March 3, 1851 and the General Land Office, U.S. Department of Interior, and issued Patent Nos. CACAAA002833 and CACAAA001106. *Summa Corp* is unequivocal: the public trust doctrine does not apply to former Mexican Land Grant lands – submerged or not – unless California reserved a public trust interest in the Federal Patent Proceedings. The State of California did not reserve a public trust interest in the patent proceedings for the Mexican Land Grants of Stanford Vina, Los Molinos, Deer Creek, or Mill Creek. The SWRCB is violating *Summa Corp.* by confiscating the water of former Mexican Land Grant lands for public trust interests.

B. The SWRCB is Conflating the Public Trust and Article X, Section 2.

The SWRCB is unlawfully and automatically declaring any use or water diversion unreasonable if the water would benefit purported public trust fishery needs on Mill or Deer Creek. In doing so the SWRCB is failing to balance public trust interests. Public trust interests are only to be taken "into account in the planning and allocation of water resources" in a hearing when water rights are adjudicated by a court or the SWRCB. (*National Audubon, supra*, 33 Cal.3d at 452; *Id.* at 446.) The public trust doctrine is not a mechanism for curtailment and cannot be applied in a vacuum without balancing of competing interests. "Implementation of the public trust doctrine requires not only balancing of the various public trust values, but also weighing of those values against other, broader public interests." (*Casitas 3,* 102 Fed.Cl. 443, 459.) *National Audubon* held that the public trust requires balancing all competing water uses in allocation decisions, and "[t]he state has an affirmative duty to take the public trust into account

in the planning and allocation of water resources, and to protect public trust uses whenever feasible" (*National Audubon*, *supra.*, 33 Cal.3d at 446-447; See also *Id.* at 454-455.) A mere showing of a public trust fishery interest "alone is not enough," and the public trust doctrine does not "presume[s] that the needs of fish trump all other uses…what is in the best interest of a single public trust resources is not necessarily what is in the best interest of the public as a whole." (*Casitas 3,* 102 Fed.Cl. 443, 461.) On the contrary, irrigation and domestic water uses are the highest uses of water in California. (Water Code § 106.)

The SWRCB is unlawfully applying the public trust doctrine as a mechanism for curtailment – in a vacuum – without balancing and weighing competing interests, and outside of any evidentiary hearing. Deer and Mill Creek public trust fishery interests are not being scrutinized, balanced, and weighed against competing interests in the water. The SWRCB is making no inquiry into any interests on Deer or Mill Creek, except fish. There is no inquiry into what measures were "feasible" and necessary for public trust interests, as required by *National Audubon*, nor is there consideration of the water users' needs and irrigation practices, nor whether alternative water supply sources could be utilized, nor whether an alternative low-flow channel solution can satisfy public trust interests. The SWRCB is simply re-appropriated Stanford Vina and Los Molinos' water to fully satisfy purported instream public trust needs on Deer and Mill Creek, and did so outside of any SWRCB hearing or Court proceeding. All uses and diversions impinging on purported public trust needs are being declared unreasonable and ordered to stop, and the leftover water is allocated amongst other beneficial uses. This is not balancing.

The SWRCB is also conflating the public trust doctrine and Article X, section 2. The public trust and reasonable use doctrines are also separate, distinct doctrines, and even in-stream public trust fishery uses of water are subject to Article X, section 2's reasonableness requirement. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443 (*National Audubon*) ("All uses of water, including public trust uses, must now conform to the standard of reasonable use [citations omitted]."); *Imperial Irrigation District v. SWRCB (IID I)* (1986) 186 Cal.App.3d 1160, 1168 fn. 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 trusts.").) Public trust fishery needs do not have priority over all other beneficial water uses under Article X, section 2. Prohibiting a use or diversion as unreasonable when it conflicts with public trust uses conflates Article X, section 2 and the public trust doctrine.

C. Even if the Public Trust Doctrine Could Apply, the Public Trust Doctrine Requires Compensation.

If the public trust doctrine is to be applied to Mexican Land Grant lands and water, the SWRCB must pay compensation for the taking of water and real property for public trust purposes. In *Illinois Central Railroad Co. v. Illinois* (1892) 146 U.S. 387, the United States Supreme Court held that compensation was required pursuant to constitutional guarantees if the public trust revision of rights renders property of individuals valueless or damages private parties relying upon the rights. The Supreme Court stated on page 455 that if the public trust doctrine was utilized to take back the use of property granted, the State "ought to pay" for any "expenses

incurred in improvements made under such a grant" when the State wishes to resume possession of the water or property interest under the public trust doctrine, or the concept that a granted use has become unreasonable because of the public trust. In *Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 533-34, the California Supreme Court confirmed that the exercise of a public trust reservation required the payment of damages or compensation for the value lost because of the reasonable reliance of private parties upon the use of those resources. (See also *National Audubon,* 33 Cal.3d 419, 437-439 (The public trust may not be asserted to retake property without compensation for improvements and reliance).)

Here, livestock herds, orchards and other crops, and entire agricultural operations have been developed and maintained for over 100 years in anticipation of water being available. Debts have been incurred and monies have been invested in the agricultural development in reliance on the riparian and pre-1914 water rights to Deer Creek and Mill Creek flows. Compensation is required even if the SWRCB lawfully asserts the public trust or Article, X, section 2.

9. The SWRCB is Violating Government Code Section 11346.1.

The SWRCB cannot meet the requirements of Government Code section 11346.1(b). Government Code Section 11346.1(b)(1) requires that, prior to adopting an emergency regulation, a state agency must make a finding that the adoption of a regulation is "necessary to address an emergency." Government Code section 11342.545 defines "Emergency" to mean "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." Government Code section 11346.1(b)(2) states:

> A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency. If the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations adopted in accordance with the provisions of Article 5 (commencing with Section 11345), the finding of emergency shall include facts explaining the failure to address the situation through non-emergency regulations.

The SWRCB cannot satisfy Government Code § 11346.1. As set forth herein and in the material submitted herewith, government has been studying and calling for an instream flow project on Mill and Deer Creek for over thirty years, and it even began but didn't adequately fund or complete public projects on Deer and Mill Creeks paying private landowners and water right holders to forego their surface water diversions and to pump groundwater to supplement instream fishery flows.

Recurring drought is also a known situation in California, particularly to the State Water Board. According to the Department of Water Resources, recent severe drought has beset California in 1976-1977, 1987-1992, 2007-2009, and as recently as 2012-2016. (https://water.ca.gov/water-basics/drought). The SWRCB had nearly five years since the last

severe drought (and arguably much longer) to develop and implement a project to enhance fishery conditions in Mill and Deer Creeks through the restoration and rehabilitation of critical riffles within Mill and Deer Creeks. The SWRCB fails to adequately explain its failure to address the situation through non-emergency regulations. (Government Code § 11346.1(b)(2).) Waiting until drought conditions recur to declare the need to issue emergency regulations is merely a matter of expedience and therefore the SWRCB is violating Government Code § 11346.1(b). No findings could substantiate that emergency regulations as reasonably necessary to address an emergency exists in light of the spectacular fishery return numbers on Mill and Deer Creeks in the Spring of 2021- one of the driest years on record.

10. The SWRCB is Violating California's Seminal Water Right Principle of "First in Time, First in Right".

The SWRCB is violating the rule of priority by declaring all Deer and Mill Creek diversions unreasonable and ordering them to cease without accounting for the relative priorities of Deer Creek water rights which differ by type of water right and priority date. The rules of priority and reasonableness can clash, but "[e]very effort…must be made to respect and enforce the rule of priority." (*El Dorado Irr. Dist. v. SWRCB* (2006) 142 Cal.App.4th 937, 966.) Here, the SWRCB made no effort to respect and enforce the rule of priority as *El Dorado* requires. Instead, the SWRCB issued a blanket declaration of unreasonableness irrespective of Deer and Mill Creek water right priorities.

The priority system "has long been the central principle in California water law." (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1243; See also Civ. Code § 1414.) Public trust interests are not a part of the water rights priority system; they are only to be taken "into account in the planning and allocation of water resources" when water rights are adjudicated by the SWRCB or a court. (*National Audubon, supra*, 33 Cal.3d at 452; *Id.* at 446.). The priority of different water rights on a stream must be considered in a hearing before a diversion may be declared unreasonable. (*Santa Barbara Channel Keeper v. City of San Buenaventura, supra*, 19 Cal.App.5th 1176 at 1191-1192.) The SWRCB is not undertaking any measures to consider the priority of different water rights in a hearing before declaring diversions on Mill and Deer Creek unreasonable. This is a violation of the rule of priority.

11. The Proposed Regulations and Orders Will Have a Devastating Impact on Mill and Deer Creek Water Users.

The proposed regulations and orders will leave landowners without irrigation water to sustain their crops and livestock during critical irrigation periods. (Wood Dec. ¶ 4-5, 8-9.; Hill Decl. ¶ 2-3, 10.; Hardwick Dec. ¶ 3.) As a result, crops will be stressed, herds were culled, and lands will be fallowed. (*Id.*) Most of the lands within Stanford Vina and Los Molinos consist of small-scale orchard, livestock, and pasture operations. Stanford Vina also includes a monastery that operates and is partially sustained by its vineyard and prune and walnut orchards. The proposed regulations and orders will have a devastating effect on water users by depriving them of their water supply during critical irrigation periods. The use of surface water from Mill and Deer Creek also provides a groundwater recharge benefit to the subbasin and promotes

groundwater sustainability within Tehama County. (Hill Dec.; Hardwick Dec.) By confiscating the surface water from Deer and Mill Creek water right holders, the State will be harming groundwater sustainability within the underlying aquifer as well as the individuals that rely on the water to sustain their crops, livestock, and livelihoods.

12. The Proposed Regulations Omit the Provisions for Livestock that Were Included in the SWRCB's Shasta and Scott River Regulations.

The SWRCB's "Emergency Actions to Establish Minimum Instream Flow Requirements, Curtailment Authority, and Information Order Authority in the Klamath Watershed" include provisions providing for stock watering diversions notwithstanding issuance of a curtailment order and an unreasonableness determination to support minimum livestock water needs as necessary if water is conveyed without seepage and is within specific quantities, or in excessive heat conditions if the diversion is necessary to provide adequate water to livestock, is conveyed without seepage, and is on average no more than twice the reasonable quantities set forth for livestock in SWRCB regulations. No similar provisions are included in the proposed regulations for Mill and Deer Creeks. The inclusion of these livestock exceptions and conditions in the Klamath Regulations affirms the adjudicatory nature of the SWRCB actions- the SWRCB is making and applying factual and legal findings of reasonableness for specific water uses and users. The omission of such provisions in proposed regulations and orders for Mill and Deer Creeks is counter to law. There is no rational or legal basis for the SWRCB to favor livestock in the Klamath region over livestock in Mill and Deer Creek regions of Tehama County. The inclusion of the livestock protections provisions in the Klamath regulations, and the omission of such provisions in regulations for Mill and Deer Creeks, is unlawful including without limitation because it is an abuse of discretion and violates equal protection rights under the California and United States Constitutions. There is no evidence or findings in the record that support the inclusion of the livestock protections provisions in the Klamath regulations and the omission of such provisions in regulations and orders for Mill and Deer Creeks. Nor could there be. No such support exists.

13. There is No Evidence that Flood Irrigation for Domestic Lawn Irrigation Exists in the Mill Creek and Deer Creek Watersheds.

The SWRCB resolution contains statements that flood irrigation for domestic lawn irrigation has been reported and observed in the Mill Creek and Deer Creek watersheds and that it results in excessive water diversions. There is no evidence of that flood irrigation for domestic lawn irrigation occurs in the Mill Creek and Deer Creek watersheds, or that the alleged practice results in excessive diversions. Water that is diverted from Mill Creek and Deer Creek by water right holders is used for livestock, crop, and pasture irrigation purposes. The resolution contains no support for its statement that that any water diverted from Mill or Deer Creek is used for the purpose of flood irrigating domestic lawns. The SWRCB's unsupported statement in the resolution regarding the occurrence of flood irrigation for domestic lawn irrigation affirms the need for an evidentiary hearing, and the lack of any record or evidence to support the SWRCB's proposed regulations and orders.

14. The SWRCB Has Failed to Produce Records to Water Users as Required by Law.

On July 8, 2021 we transmitted a Public Records Act request on behalf of Stanford Vina and LMMWC requesting records related to Mill and Deer Creeks.[3] The State Water Board has not provided any responsive records. Obtaining the records that are the subject of the Request is necessary for water users to be able to submit complete comments. These records are also important for the Board Members of the State Water Board to consider when this item is presented to them on September 22, 2021. The SWRCB's inability to produce responsive records confirms the lack of evidentiary and factual support for the proposed regulations and orders. If the SWRCB cannot provide responsive records regarding Mill and Deer Creeks, it clearly lacks support for the findings on which the proposed regulations and orders are based on.

15. The Proposed Regulations Fail to Acknowledge the Successful Voluntary Measures of Water Users on Mill and Deer Creek in 2021.

Governor Newsom's May 10, 2021 Emergency Drought Proclamation directs the SWRCB and CDFW to "work with water users and other parties on voluntary measures to implement" actions need to protect salmon, steelhead, and other native fishes. (Emphasis added.) The resolution, and the SWRCB's proposed regulations and orders, are inconsistent with the Governor's declaration and the extensive voluntary measures of water users on Mill and Deer Creeks in 2021, and the success of such measures.

Since the last drought and 2014 and 2015 emergency regulations for Mill and Deer Creeks, Stanford Vina and Los Molinos have each year, including 2021, engaged in "voluntary measures" to ensure fishery protection. In 2021 these actions include: (a) providing and adjusting base flows in the Creeks based on real time conditions, including considering agricultural water demands and fishery needs; (b) coordinating and implementing multiple pulse flows; (c) enhanced monitoring of fish screens and ladders; (d) coordinating with CDFW staff on the presence (or lack of presence) of listed species once agricultural demands increased; and (e) on Mill Creek implementing existing conjunctive use and instream flow agreements to provide greater instream flow and "Chinook Flows"[4]. These voluntary measures resulted in over 500 returning adult spring run salmon[5] on each Creek. This is an incredible achievement and success

[3] A Public Records Act request regarding Mill and Deer Creeks was also filed with CDFW on the same day, and a Freedom of Information Act request was filed with NMFS. At the time the regulations were noticed on September 1, 2021, neither DFW or NMFS had produced responsive records, and to date NMFS has not produced any records, while DFW has made only a partial production.

[4] "Chinook Flows" are defined in existing agreements, including the October 5, 2007 Agreement between Los Molinos Mutual Water Company, California Department of Fish and Game (now CDFW), California Department of Water Resources, and the Mill Creek Conservancy. The parties' intent is as follows: "By entering into this Agreement, the Parties intend to coordinate their restoration efforts on Mill Creek to provide Chinook Flows, consistent with the Decree and their respective rights and duties under the 1990 Agreement, in a manner that preserves and protects Irrigation Water." (Background, ¶ J.)

given critical drought conditions, as evidenced by significant fishery issues on other tributaries, including the mainstem Sacramento River and Butte Creek[6].

The Governor directed the SWRCB and CDFW to work with water users on *voluntary measures* in his Emergency Drought Proclamation. The Governor did not direct the SWRCB or CDFW to obtain *voluntary agreements* from water users such as those on Mill and Deer Creek, or to adopt and implement instream flow requirements if such "agreements" could not be extorted from water right holders. The resolution and proposed regulations and orders provide for instream flow requirements in the absence of voluntary *agreements* that provide equal or grater instream flows than the regulations. (see Resolution, p. 6, ¶ 20.) Yet this is not what the Governor ordered or authorized, and the SWRCB's resolution and the proposed regulations and orders are in severe conflict with both the Governor's Emergency Drought Proclamation and the extensive voluntary measures of water users on Mill and Deer Creeks in 2021, and the indisputable success of such measures.

16. The Proposed Instream Flow Requirements are Unnecessary and Unsupported.

The excellent 2021 fish passage numbers on Mill and Deer Creek, and the extensive voluntary measures of water users on Mill and Deer Creeks in 2021, confirm that the proposed instream flow requirements are both unnecessary and unsupported. Fishbio has concluded that water diversions on Mill and Deer Creeks were not harmful or detrimental to fish migration conditions on either creek in 2021 despite severe drought conditions, and that the curtailment of water user diversions on Mill or Deer Creeks can be avoided. (Fishbio Dec. p. 6.) Fishbio has also concluded that "The most effective and appropriate mechanism to enhance fish passage conditions is through targeted, and minor, modification of riffles within Mill and Deer Creeks…" (Fishbio Dec. p. 12:251-253.)

The resolution does not even acknowledge these critical issues and facts. Instead, the resolution states that the SWRCB has determined, "based on the best available information, that certain minimum flows are necessary in the identified watersheds…" (Resolution, p. 3, ¶ 12.) The "best available information" does not support the conclusion that the minimum flows are necessary, and the SWRCB does not identify what "best available information" it is relying on. The resolution merely states that the minimum flows identified in the 2021 emergency regulations are unchanged from the 2015 minimum base flow requirements. (Resolution, p. 4 ¶ 12.)[7]

The SWRCB is acting on a record that is both inaccurate and unsupported. Surveys performed by Fishbio show that the channels and riffles within Mill and Deer Creeks have changed substantially since 2014 and 2015, and Fishbio has concluded that the instream flow

[6] See, e.g., September 13, 2021 Washington Post article describing fishery conditions available at https://www.washingtonpost.com/nation/interactive/2021/california-disappearing-salmon/ and that includes quotes from employees at CDFW and NMFS.

[7] The SWRCB's inability to produce records relating to Mill and Deer Creek indicates that the SWRCB has no support for proposed instream flows.

requirements will be in effect during time periods when adult salmonid migration into Deer or Mill Creeks is unlikely to occur. (Fishbio Decl. p. 4, 12:251-253.) Fisbio has unequivocally concluded that "The most effective and appropriate mechanism to enhance fish passage conditions is through targeted, and minor, modification of riffles within Mill and Deer Creeks…" (Fishbio Dec. p. 12:251-253.)

For example, the resolution states, "Fish passage data collected by CDFW in 2014 and 2015 *suggest* that the drought emergency minimum instream flow requirements provided for successful fish passage on both Mill Creek and Deer Creek. [Emphasis Added]" (Resolution, p. 2, ¶ 6.) The resolution does not identify the unidentified data that allegedly "suggests" the instream flow requirements provided for successful fish passage. And as set forth herein, channels and riffles within Mill and Deer Creeks have changed substantially since 2014 and 2015.

The letters of National Marine Fisheries Service (NMFS) dated July 30, 2021, and CDFW dated August 9, 2021 also fail to support the instream flow requirement. The letters fail to disclose that the 2021 spring-run salmon escapement on both Mill and Deer creeks was very large, with approximately 500 returning spring-run migrating up Deer Creek in 2021, and over 662 returning spring-run migrating up Mill Creek. Fishbio concluded that the fish return numbers of spring 2021 in both Mill and Deer Creeks, notwithstanding the lowest discharge conditions on record and lack of diversion curtailment, demonstrates that the proposed regulations are unnecessary, and no documentation suggests that "significant harm" to target species was incurred under these conditions. (Fisbio Decl. p. 10:195-208.)

CDFW's citation to the 2018 Report by CDFW for Mill Creek titled Draft Instream Flow Criteria: MILL CREEK, Tehama County, and to the 2017 Report by CDFW titled "Instream Flow Evaluation: Temperature and 50 Passage Assessment of Salmonids in Deer Creek, Tehama County" as foundation for its recommendation of minimum instream flows during critically dry water years is also unpersuasive. The minimum flows identified in the 2017 and 2018 CDFW Reports would not occur in many instances regardless of water user diversions on Deer or Mill Creeks, and the channels and riffles within Mill and Deer Creeks have changed substantially in recent years, (Fisbio Decl. p. 10-12.) Fishbio concluded that "the channels and riffles within these Mill and Deer creeks have so substantially changed that the 2017 and 2018 CDFW Reports are not an accurate or valid basis for assessing fishery needs and conditions within Mill or Deer creeks." (Fishbio Decl. p. 14: 298-302.)

17. Water Users are Being Deprived of a Meaningful Opportunity to Comment on the Proposed Regulations and Orders.

At 4:43 p.m. on September 1, 2021, the SWRCB sent a lyris email containing the "Notice of Opportunity for Public Comment on the Preliminary Draft Drought Emergency Regulation for Mill Creek and Deer Creek Watersheds" with a comment deadline of noon on September 8, 2021. Accounting for the Labor Day weekend, this provided impacted water users 3.5 business days to comment. The SWRCB then withheld disclosure of the proposed resolution until

September 10, 2021- after the comment deadline set forth in the notice expired. The SWRCB's "Finding of Emergency and Informative Digest" materials were also only disclosed after the noticed September 8, 2021 comment deadline expired. Together with the SWRCB's failure to produce any responsive documents regarding Mill and Deer Creeks to a Public Records Act request that was filed two and a half months ago, the SWRCB has provided water users insufficient notice and opportunity to comment on the proposed actions.

18. Conclusion

We ask that the State Water Board refuse CDFW's and NMFS' requests for emergency regulations.

Very truly yours,

MINASIAN, MEITH,
SOARES, SEXTON & COOPER, LLP

By: _____
JACKSON A. MINASIAN

JAM:lmj
Enc.