CASE NOS. H047270 AND H047927

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

CALIFORNIA WATER CURTAILMENT CASES

APPLICATION BY WINNEMEM WINTU TRIBE, SHINGLE SPRINGS BAND OF MIWOK INDIANS, LITTLE MANILA RISING, AND RESTORE THE DELTA FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF IN SUPPORT OF STATE WATER RESOURCES CONTROL BOARD

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

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under Rule 8.208 of the California Rules of Court.

DATED: March 10, 2022

/s/ Stephanie L. Safdi
Stephanie L. Safdi

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE SIXTH DISTRICT COURT OF APPEAL:

Pursuant to Rule 8.200(c) of the California Rules of Court, the Winnemem Wintu Tribe, Shingle Springs Band of Miwok Indians, Little Manila Rising, and Restore the Delta (collectively, "*Amici*") respectfully request leave to file the attached *amicus curiae* brief in support of Appellant State Water Resources Control Board (the "Board").

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are a coalition of groups whose health, identity, cultural practices, and wellbeing are intertwined with California's Sacramento-San Joaquin Delta (the "Delta") and the varied ecosystems the Delta supports. *Amici curiae* comprise or advocate for communities that have been systematically marginalized by California's water rights regime and who share an interest in maintaining the Board's authority to prevent and police the excessive diversions of water that perpetuate this harm. *Amici curiae* are also beneficial users of water in or flowing into the Delta, whose interests will be affected by the Court's decision in this case.[1]

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[1] State Water Resources Control Bd., Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (2018) pp. 7-8 (defining beneficial uses to include support for habitat and fish spawning, threatened and endangered species protection, drinking water supply, and contact and non-contact recreation); cf. North Coast Regional Water Quality

(1) *Amicus* Winnemem Wintu Tribe

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

The Nur, or Chinook salmon, which once flourished in these waterways, are the source of Winnemem Wintu culture and identity. In the Tribe's creation story, the Winnemem Wintu were helpless and could not speak when they were brought forth by the Creator from a sacred spring on Mt. Shasta. The Nur took pity on the Winnemem Wintu and gave their voice to the Tribe. In return, the Winnemem Wintu promised to always speak for the Nur. Side by side, the Winnemem Wintu and the Nur have depended on each other for thousands of years – the Winnemem speak for, care for, and endeavor to protect the salmon, and the salmon give themselves to the Winnemem to provide sustenance throughout the year. Ceremonies, songs, dances, and prayers about the relationship between the Nur and the Winnemem

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Control Bd., Water Quality Plan for the North Coast Region (Jun. 2018) pp. 2-1 to 2-3 (defining beneficial uses to additionally include subsistence fishing and practice of Native American Culture).

Wintu are the fabric of Winnemem Wintu culture, religion, and spirituality.

Excessive appropriation of Delta water resources has contributed to the near extinction of Chinook salmon, thereby threatening the continued existence of the Winnemem Wintu as a people. This existential threat layers on top of centuries of state-supported campaigns and projects to remove the Winnemem Wintu from their historic homelands and divest them of their relationship to the water. These efforts culminated in construction of the Shasta Dam in the 1930s and 40s, which flooded over 90 percent of the Winnemem Wintu's historical village sites, sacred sites, burial sites, and cultural gathering sites and blocked the Nur from migrating into the Delta headwaters to spawn. In the words of the Tribe's Chief, Caleen Sisk: "We used to be 20,000 people along the river and we're dwindling out like the salmon. We only have 126 members of the Tribe left and so if the salmon are going extinct, we can only guess that so will we." The Winnemem Wintu Tribe thus has a deep interest in preventing the continued over-appropriation of Delta resources and restoring the health of the waterways to allow the Nur to return to the headwaters.

(2) *Amicus* Shingle Springs Band of Miwok Indians

Amicus Shingle Springs Band of Miwok Indians are Indigenous Peoples of the Sacramento Valley. Delta waterways – including the Sacramento River, American River, Feather River, Bear River, and Cosumnes River and their watersheds – are the lifeblood of the Tribe. The Tribe has stewarded and utilized

resources from the Delta for sustenance, medicine, transportation, shelter, clothing, and ceremony, among other cultural and subsistence uses, since time immemorial.

The 600 present-day members of the Shingle Springs Band of Miwok Indians are descendants of the Miwok and Southern Nisenan Indians who thrived in California's fertile Central Valley for thousands of years before contact with Europeans. The Tribe is also descended from ten native Hawaiians who were forcibly brought to Nisenan territory in 1839 by John Sutter, a Swiss land baron who enslaved hundreds of Indigenous people to power his nearly 50,000-acre ranch in the Sacramento Valley. The Tribe's deep connection to Delta waterways was severed when its members were forced from their ancestral villages through colonization, disease, state-sponsored violence, and privatization of land, among other forms of dispossession. The Secretary of the Interior purchased the 160-acre Shingle Springs Rancheria east of Sacramento in El Dorado County and placed it into trust for the displaced Tribe in 1920. However, the landlocked and roadless Rancheria remained inaccessible to the Tribe for decades. Further, the Rancheria is devoid of usable surface water resources and far from the Delta waterways that define the Tribe's way of life.

The Tribe's removal from ancestral waterways has eroded its identity, traditional knowledge, and cultural practices. In recent years, the Tribe has been returning to the Delta's waterways and working to restore connections to cultural resources and traditional ways of life. In 2020, the Tribe

purchased a small tract of land at its ancestral village site in Verona, where the Feather River meets the Sacramento River. Yet, despite regaining this limited riparian access to ancestral waterways, the degraded condition of the Delta is impeding the Tribe's long-sought reconnection with it. For example, traditional riparian cultural resources – like tule, a long grassy plant that once lined the waterways and from which the Tribe fashioned fishing boats, regalia, and other important cultural and subsistence implements – either no longer exist or are largely unsuitable for use because of the polluted state of the water. The Tribe thus has a deep interest in restoring Delta flows and improving the health of Delta ecosystems, on which the Tribe's identity, cultural and spiritual practices, health, and food sovereignty depend.

(3) *Amicus* Little Manila Rising

Amicus Little Manila Rising is a 501(c)(3) non-profit organization dedicated to bringing multifaceted equity to the City of Stockton, located on the eastern edge of the Delta along the San Joaquin River. Little Manila Rising was initially founded in 1999 to advocate for the historic preservation and revitalization of South Stockton's Little Manila community. Little Manila was once home to the largest population of Filipinos in the world outside the Philippines. The first generation of Filipino immigrants was driven to the region, in the wake of the U.S. military annexation of the Philippines in the late 1800's, by the need for low-wage migrant farm workers in the rapidly accelerating agricultural sector in the inner Delta. The Little

Manila community was later decimated in the 1970s by construction of the Crosstown Freeway, which cut through the heart of the community, demolishing homes and displacing residents. South Stockton continues to be one of the most disinvested communities in the state, disproportionately burdened by polluting industrial sources that serve agricultural and oil and gas interests at the expense of residents' health and wellbeing. Indeed, multiple census tracts in South Stockton score in the 99th and 100th percentile for asthma rates in the state. The past and present of the Little Manila community, and communities of South Stockton more generally, are tied to the history of agricultural development, the creation of the water rights regime that fueled it, and the many forms of state-sponsored racism that marginalize communities of color in the service of agricultural and industrial interests.

For Little Manila Rising, as a community organization embedded in the Delta, addressing the economic, social, and health conditions for South Stockton residents means addressing the condition of the water. A deep-water shipping channel off the San Joaquin River cuts through the city, dividing North from South Stockton. Various sloughs and waterways, many of which have been largely or wholly dewatered, weave through South Stockton neighborhoods on their way to the San Joaquin River. Thousands of unhoused residents camp in or by these dewatered sloughs, bathing, cooking, and fishing in noxious water and using it for sanitation. Stagnant water in these sloughs hosts hazardous algal blooms for much of the year, turning both water

and air toxic with cyanobacteria. What remain of Delta fish species, poisoned by mercury and nitrates and driven to near extinction by low freshwater flows and high water temperatures, are themselves a hazard to local residents who fish for subsistence. Residents lack any meaningful access to the Delta waterways in and around South Stockton due to their channelized and inhospitable nature. Where access is available in Stockton, the water is too toxic for safe recreation, alienating residents from the water and impairing opportunities for tourism and economic development. Ultimately, residents of South Stockton experience the Delta as a burden on mental and physical health, if they consider it at all.

For these and other reasons, Little Manila Rising understands that the health and wellbeing of the communities it represents are tied to the health and resiliency of the Delta and the ecosystems it supports; the organization cannot correct the economic disempowerment, poor health conditions, and other compounding inequities that South Stockton residents experience without addressing the water. Restoring the health of the Delta and preventing excessive diversions of Delta water are thus core interests of Little Manila Rising.

(4) *Amicus* Restore the Delta

Amicus Restore the Delta is a 501(c)(3) non-profit organization based in Stockton whose mission is to ensure the health of the San Francisco Bay/Delta Estuary and Delta communities. Restore the Delta is committed to restoring the Delta so that fisheries, communities, and family farming can

thrive there together again, water quality is protected for all communities, particularly environmental justice communities, and Delta communities are protected from flood and drought impacts resulting from climate change while gaining improved access to clean waterways. Ultimately, the organization seeks to connect communities to local rivers and empower them to become the guardians of the estuary through participation in government planning and waterway monitoring. Many of Restore the Delta's 60,000 members live in or near the Delta and have a strong personal interest in ensuring healthy freshwater flows to support a thriving ecosystem, safe recreation, safe and sustainable drinking water, and a clean environment.

To achieve its mission, Restore the Delta advocates for the interests of local and often marginalized Delta stakeholders – such as *Amici* Winnemem Wintu, Shingle Springs Band of Miwok Indians, and Little Manila Rising – to ensure that they have a meaningful voice in water management decisions affecting the well-being of their communities. Through this work, the organization has participated extensively in Board hearings and frequently advocates for the Board to exercise its regulatory and enforcement authority to prevent excessive and unauthorized diversions of water from the Delta. Restore the Delta thus has a direct interest in maintaining the Board's authority to regulate and police all water uses.

***

Amici Winnemem Wintu Tribe, Shingle Springs Band of Miwok Indians, Little Manila Rising, and Restore the Delta seek

to protect and restore the health of the Delta. Doing so requires that the Board have the authority to regulate and limit diversions of water by all water users – including pre-1914 appropriators – to protect public trust resources under conditions of perpetual drought and to ensure that water quality standards are satisfied. The existing strain on the Delta's water resources and resulting poor water quality has already caused substantial harm to *Amici* and similarly situated communities. Climate change will exacerbate this harm as drought conditions further deplete the Delta's water supply. *Amici* share an important interest in ensuring that the Court, in deciding this case, reinforces the Board's regulatory and enforcement authority over *all* water rights.

HOW THIS BRIEF WILL ASSIST THE COURT

This case concerns the Board's jurisdiction to enforce against unauthorized diversion or use of water under section 1052 of the Water Code. Respondents in this case are irrigation districts that divert water from the Delta under claims of pre-1914 and riparian water rights and who challenge Board enforcement orders that directed them to suspend diversions during conditions of severe drought. Although the statutory interpretation issue before the Court is a narrow one, its decision could have far-reaching consequences for the Board's authority to regulate and police excessive diversions from the increasingly drained Delta, and for the communities that depend on the Delta.

The proposed *amicus* brief will assist the Court by (1) placing the pre-1914 and riparian water rights at issue in this

case into historical context, which reveals the institutionalized racism, displacement, and marginalization of Indigenous Peoples and communities of color that underly these water rights claims; (2) contextualizing the State Water Resources Control Board's section 1052 enforcement authority within its general obligations under California law to protect water resources for the public trust and to limit diversion and use of water to what is reasonable under the circumstances; and (3) and illustrating the consequences of a decision that would limit Board regulatory and enforcement authority for the health of the Delta and the Indigenous Peoples and vulnerable communities that depend on it, particularly as climate change exacerbates water scarcity. The party briefs do not fully address these issues, which are critical to understanding the implications of the statutory interpretation question before the Court. Accordingly, *Amici* offer the proposed *amicus* brief to facilitate an informed resolution of the matter.[2]

REQUEST FOR LEAVE TO FILE

Because the decision of this Court will affect the Winnemem Wintu Tribe, Shingle Springs Band of Miwok Indians, Little Manila Rising, and Restore the Delta, and because the proposed *amicus* brief brings a unique and important perspective to bear on this matter, *Amici* respectfully request that the Court grant the filing of this *amicus curiae* brief.

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[2] No party or counsel in the pending case authored this brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of the brief. No other person made any monetary contribution intended to fund the preparation or submission of this brief.

DATED: March 10, 2022

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
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By: */s/ Alison L. Cooney*
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BRIEF OF AMICI CURIAE

INTRODUCTION

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

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

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

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

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

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

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

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

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

DISCUSSION

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

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

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

This historical context fractures the legitimacy of water rights claims asserted by senior and riparian rights holders. It also underscores the need for Board authority to prevent excessive diversions that would exacerbate and compound harms to those who were subject to this historic exclusion. The stories summarized in this brief provide only a snapshot of this history, but are illustrative of the ways that structural racism, white supremacy,[3] and violence have gone hand in hand with creating a water rights regime in California which exploits waterways and

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

systematically disadvantages the Indigenous Peoples and communities of color who depend on them.[4]

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

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

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

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

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

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

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

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

Hand in hand with the creation of California's unique hybrid riparian and appropriative rights system, the State, through laws and various forms of State-sponsored violence, was forcing Indigenous Peoples from their ancestral lands and waterways to make way for white settlers and enable mining and agricultural development.[6] In 1850, the newly-established California Legislature passed a law cruelly titled "Act for the Government and Protection of Indians," which provided for the removal of tribes from their traditional lands, separation of children from their families, and creation of a system of indentured servitude as punishment for minor crimes.[7] (Stats. 1850, ch. 133, pp. 408-10.) The actions of the State's early leaders reveal the genocidal motives of this law: California's first governor called for "a war of extermination" against Indigenous Peoples, and the State subsequently provided $1.29 million in 1850's dollars to subsidize private and militia campaigns against

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

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

California's native population.[8] Alongside this State-sponsored "program of genocide,"[9] the "ruthless flood of miners and farmers" who flocked to California during the Gold Rush "annihilat[ed] the natives without mercy."[10] Between 1845 and 1855 – the "worst decade" for California tribes – the state's Indigenous population declined by two thirds, from an estimated 150,000 people to just 50,000.[11] "The direct causes of death were disease, the bullet, exposure, and acute starvation. The more remote causes were insane passion for gold, abiding hatred for the Red man, and complete lack of any legal control."[12] The same mining and agricultural interests that propelled this program of genocide also created and benefitted from California's water rights system.

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

By encouraging use and diversion of water outside of waterways, the California water rights regime fundamentally conflicts with the foundational tenets of many Indigenous communities, which center on stewardship of the water and the plants and animals it sustains. As such, a system which derives individual water rights from property ownership and chronological appropriation, and which prioritizes extracting and

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

diverting water, does inherent violence to the land's original inhabitants. The adoption of this system further displaced and alienated tribes, marginalized Indigenous culture, and "contributed to the loss of water resource and watershed management practices that supported Native American people's traditional food sources and ways of life."[13]

But even taking on its face a system that assigns individual rights to water use, accepting the validity of senior water rights claims requires willfully ignoring Indigenous communities' prior claims to the water. As the original inhabitants of the state, Indigenous Peoples have stewarded and relied upon California's water resources for thousands of years. Tribes living alongside waterways used and diverted the water running through their ancestral lands long before the arrival of colonizers.[14] Yet, California's water rights system refuses to recognize tribes' inherent water rights: the rights that flow from tribes' longstanding water stewardship and use.[15] Moreover, the State's lobbying to deprive California tribes of reservations also limited tribes' access to their rightful federal water rights, which should be prioritized above any later state water rights claim.[16] This history of dispossession and betrayal casts Respondents' claims of priority to their water rights into doubt.

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

1. Indigenous Peoples' riparian and reserved water rights

The violent removal of Indigenous Peoples from their ancestral lands violated their inherent title to land that they occupied for thousands of years, and the water rights that should attach to that title.[17] As non-native settlers flooded California during the Gold Rush, these settlers and the State forcibly removed Indigenous Peoples from their homelands and waterways. When the Legislature adopted the California Land Claims Act in 1851, requiring every person claiming property derived from land grants by the Spanish or Mexican governments to present their claims within two years, tribes had either already been removed from their ancestral lands or were unaware of the existence or implications of the Act.[18] Tribes were thereby "denied any legal interest in . . . their aboriginal lands" or the riparian rights that would have attached to them.[19]

Duplicitous treaty negotiations furthered this dispossession. Between 1851 and 1852, California tribes were compelled to sign 18 treaties with the federal government ceding their ancestral lands – territory that was presumed to encompass the entire state of California.[20] In exchange, treaty negotiators promised the tribes, including *Amicus* Winnemem Wintu Tribe,

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

reservations and the benefits that flow from them. Implicit among these benefits were reserved water rights. Under the doctrine of reserved water rights – also referred to as *Winters* rights after the U.S. Supreme Court decision in *Winters v. United States* (1908) 207 U.S. 564 – when the United States withdraws land from the public domain to establish an Indian reservation, it implicitly reserves for the tribe the amount of water necessary to fulfill the purpose of the reservation. (See *Cappaert v. United States* (1976) 426 U.S. 128, 138.) These reserved water rights "vest[] on the date of the reservation and are superior to the rights of future appropriators."[21] (*Ibid.*) Unlike appropriative rights, reserved water rights cannot be lost through non-use. (See *Colville Confederated Tribes v. Walton* (9th Cir. 1981) 647 F.2d 42, 51.)

Had these treaties been ratified, they would have guaranteed ample reserved water rights in perpetuity to signatory tribes. But the federal government broke its promises. After lobbying from California legislators and business interests, the U.S. Senate refused to ratify the treaties in 1852, instead placing them under an injunction of secrecy for over 50 years.[22] State and federal leaders at the time nonetheless treated the

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

[22] ACCIP Historical Overview at p. 5.

tribal lands as if they were ceded and opened them up for settlement by non-natives, without establishing the promised reservations.[23] Many of the signatory tribes were unaware that the treaties would not be honored and, relying on the treaties, relocated to the promised reservation lands, though they had no formal title to those lands under the law.[24] As a result, "all the California Indians became landless."[25] Robbed of their treaty reservations, the tribes were deprived of the corresponding water rights that should have been reserved to them; and robbed of their land through this duplicity, the tribes were denied access to the rights that attach to their prior, inherent title.[26]

Any subsequent riparian or reserved rights acquired by California tribes under state law fall far short of the inherent rights stemming from ancestral tribal lands or the rights that should have been guaranteed by treaty. After a Senate Archives clerk in 1904 "discovered" and publicized the unratified 1851-1852 treaties, the federal government began trying to acquire land for Indigenous Peoples who were rendered landless by the broken treaty promises.[27] Through this process, the government

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

established roughly 82 small settlements, known as rancherias,[28] for a portion of California's approximately 154 tribes.[29] These rancherias were often located on inhospitable landscapes with scant fresh water sources, with acreage representing only a fraction of tribes' historical territory. In fact, "several rancherias were virtually uninhabitable due to a lack of fresh water supply."[30]

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

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

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

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

needs, the Shingle Springs Rancheria now relies on the El Dorado Irrigation District for its supply of fresh water.[31] To restore their connection to their cultural resources, spiritual identity, and traditional way of life, the Tribe in 2020 purchased a small tract of riparian land at their ancestral village site in Verona, where the Feather River and Sacramento River meet. Yet, despite finally regaining this limited riparian access to their ancestral waterways, the degraded condition of the Delta is impeding that reconnection: for the most part, the Tribe's cultural resources either disappeared or are not suitable for use due to the polluted state of the water, as discussed in Section III below.

Further, many California Tribes, including *Amicus* Winnemem Wintu, never received rancherias and therefore lack even the insufficient water rights tied to that trust land. In lieu of lands held collectively in trust for the Tribe, the federal government in 1893 provided some individual Winnemem Wintu members with 160-acre allotments around the Sacramento, McCloud, and Pit Rivers.[32] Many other Winnemem Wintu

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

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

remained living on traditional homelands along the rivers and Squaw Creek. Amounting to 4,480 acres in total, the Tribe's allotted lands fell far short of the hundreds of thousands of acres of lands encompassed in historical Winnemem Wintu territory.[33] Moreover, many of these allotments were not contiguous to a waterway and thus did not come with any riparian rights. Records of the allotments from 1903 described many as having "no water, no value."[34] Had this land been taken into trust for the Tribe, rather than allotted to individuals, the Tribe would have retained at least a fraction of its inherent water rights along ancestral waterways. But as it stood, tribal members were largely deprived of any riparian rights at all, not to mention the reserved water rights that would have been protected had their treaties been ratified.

The construction of Shasta Dam and filling of the reservoir behind it flooded the few remaining formal riparian rights held by Winnemem Wintu members. The Shasta Dam, built between 1938 and 1945, captured water from the Sacramento, McCloud, and Pit Rivers and collected it in the manmade Shasta Reservoir.[35] In the process, thousands of acres of land along these waterways were permanently flooded – including all 4,480 acres of Winnemem Wintu allotments and all other ancestral lands along the rivers and Squaw Creek, where tribal members

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

still resided. When completed, the dam destroyed over 90 percent of Winnemem Wintu historical village sites, sacred sites, burial sites, and cultural gathering sites.[36] The federal government failed to compensate most Winnemem allotment owners or provide replacement land for relocation. The government thereby contravened the requirements of the Central Valley Project Indian Lands Acquisition Act, Pub. L. No. 198 (1941) 55 Stat. 612, which granted the federal government title to Winnemem lands to make way for the Shasta Dam in exchange for just compensation, replacement lands, and a cemetery to be held in trust.[37] With the flooding of their lands, the Winnemem Wintu lost their few formally recognized riparian rights and have never received trust lands to which reserved water rights might attach.

2. Indigenous Peoples' appropriative rights

Second, California's water rights system also erases Indigenous Peoples' claims to appropriative rights based on their historical use and diversion of water. The "first in time, first in right" doctrine developed during the Gold Rush was founded on the racist fallacy that white settlers were the first people to put California's waters to use. Yet Indigenous Peoples had been diverting and using water for agriculture well before the arrival of non-native settlers in California.[38] For example, the Nüümü

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

people (Paiute-Shoshone) of Payahuunadü ("Land of the Flowing Water," or what is now referred to as Owen's Valley in eastern California) built and maintained complex networks of irrigation ditches for agricultural purposes before colonization.[39] While such water diversion should give rise to the most senior appropriative rights, California's appropriative rights system does not recognize any appropriative rights for the Nüümü arising from their pre-colonial irrigation.[40] Adding to this erasure, any Indigenous Peoples seeking to claim appropriative rights based on their pre-colonial use face a significant barrier: appropriative rights are lost through non-use. (Wat. Code, § 1240.) Absurdly, tribes' ability to gain recognition of their first users' appropriative rights is thus impeded by the fact of their violent removal from their ancestral lands – the site of their historic water use.

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

The same white supremacist system that forced Indigenous peoples from their land and alienated them from the water also drove the "historical seizures of land from people of color" and the exclusion of Black communities, Asian immigrants, and other people of color from property ownership and the water rights that

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

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

attach to it.[41] Laws and government policies – such as "race-focused immigration restrictions, the internment of Japanese Americans, exclusionary housing and labor policies, and lack of investment in Black, Indigenous, and people of color communities" – systematically alienated communities of color from access to resources, including water, and created layers of disadvantage and inequity that adhere today.[42]

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

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

Given the prevalence of Asian immigrants in California agriculture, these enforcement statistics likely represent a small fraction of the people who were prevented from owning or leasing agricultural land because of the Alien Land Law. Throughout the Law's effect, Asian immigrants powered California's agricultural industry. By 1880, Chinese immigrants were working in these regions as farm owner-operators, large- and small-scale tenants, and laborers.[43] After the federal Chinese Exclusion Act of 1882 halted immigration by Chinese laborers, Japanese immigrants increasingly worked on California farms. By 1910, approximately two-thirds of employed Japanese immigrants in the state worked in agriculture, and more than 5,000 Japanese Californians were listed as farm operators in the 1920 census.[44] As a large influx of Filipinos immigrated to the state in the 1920s and 1930s, in the decades after the U.S. forced colonial control of the Philippines through Philippine-American War, many Filipinos became farm laborers in response to the agricultural industry's demand for low-wage workers. By the late 1920s, Filipino workers were involved in the processing of every major crop grown in the fertile Delta region and comprised over 80 percent of the workforce cultivating and harvesting asparagus,

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

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

one of the Delta's signature crops.[45] These Chinese, Japanese, and Filipino farmers and laborers had the agricultural knowledge needed to acquire and operate their own agricultural lands, yet the Alien Land Law made it illegal for them to work as more than farm laborers.

Because property ownership is a prerequisite for riparian rights, Asian immigrants and their children who were deprived of the right to own property were also directly excluded from the riparian rights system. For Chinese and Japanese immigrants, this exclusion lasted from the Alien Land Law's enactment in 1913 until 1952, when the California Supreme Court finally declared the law unconstitutional. (See *Fujii*, 38 Cal.2d. at p. 737-38.) For Filipino immigrants, the exclusion lasted until 1945, when the California Supreme Court decided they were not "aliens" for the purpose of property ownership because of the history of U.S. colonization in the Philippines. (See *Alfafara v. Fross* (1945) 26 Cal.2d 358, 364.) During the intervening decades, Asian immigrants – barred from owning and leasing agricultural lands and facing a wave of anti-Asian violence[46] – sought refuge in nearby cities. There, de facto segregation,

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[45] Mabalon, Little Manila is in the Heart: The Making of the Filipina/o American Community in Stockton, California (2013) p. 69 (hereafter Mabalon).

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

racially restrictive covenants that limited property ownership to white families, and the discriminatory lending practice known as "redlining" forced Asian immigrants and other people of color into the most disinvested neighborhoods.[47] South Stockton, where *Amicus* Little Manila Rising is located, was one such place. Many of Little Manila Rising's constituents bear the multigenerational wounds caused by their relatives' exclusion from property ownership and riparian rights.

The Alien Land Law – which formalized a legacy of de facto discrimination preventing many Asian immigrants from buying land – also effectively barred Asian immigrants from appropriative rights. Under the permitting process for acquiring appropriative rights, which the legislature adopted the same year the Alien Land Law was enacted, the Board may only issue appropriation permits for proposals to remove water from its source and put it to beneficial use elsewhere. (See *Cal. Trout, Inc. v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 816, 820.) With no access to agricultural land to irrigate or other property where water could be used, people affected by the Alien Land Law had little ability to meet these permit requirements; in fact, they had little need to divert water at all. This was precisely the intent of the Alien Land Law. A 1920 voter pamphlet advocating for the expansion of the Alien Land Law stated that the statute's "primary purpose is to prohibit Orientals

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[47] See, e.g., Nelson et al., *Mapping Inequality: Redlining in New Deal America*, American Panorama <https://dsl.richmond.edu/panorama/redlining/#loc=13/37.956/-121.328&city=stockton-ca> (as of March 10, 2022).

who cannot become American citizens from controlling our rich agricultural lands,' that 'Orientals, largely Japanese, are fast securing control of the richest *irrigated* lands in the state,' and that 'control of these rich lands means in time control of the products and control of the markets.'" (*Fujii* 38 Cal.2d at p. 735, italics added.) The relentless and ever-expanding discrimination and violence against Asian immigrants went hand in hand with exclusion from property ownership and water rights.

Discriminatory laws and policies and forced segregation also effectively excluded Black Californians from the water rights system.[48] The first Black farm workers came to the San Joaquin Valley in the late 1800s following the Chinese Exclusion Act, recruited by local farmers to grow cotton.[49] During the early twentieth century, tens of thousands of Black migrants moved to California farm country as cotton acreage grew. By 1950, there were over 40,000 Black Americans in the San Joaquin Valley.[50]

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

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

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

Cities and localities responded to the growing Black population with racist laws and policies, including discriminatory practices like racially restrictive covenants and redlining, as well as outright violence.[51] These discriminatory tactics pushed Black farm workers to move to settlements on the arid outskirts of cultivated Central Valley farmland, such as Lanare in Fresno County and Fairmead in Madera County. These and similar settlements were some of the few available options where people of color could acquire rural property in the mid twentieth century precisely because they lacked access to water; the previous white inhabitants had abandoned them for that very reason.[52]

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

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

Although the question before the Court is limited to the scope of Board enforcement authority under section 1052 of the Water Code, Respondents posit at points in their argument a sweeping theory that pre-1914 and riparian rights are wholly beyond Board regulatory and enforcement jurisdiction. For

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[51] Eissinger, *Re-Collecting the Past: An Examination of Rural Historically African American Settlements across the San Joaquin Valley* (2017) pp. 3-4 (Ph.D. dissertation, Univ. of Cal., Merced) (hereafter *Re-Collecting the Past*).
[52] *Re-Collecting the Past* at p. 136.

instance, Respondents characterize the holdings in *Millview Cnty. Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, and *Young v. State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397, as relying on the "logic that . . . valid pre-1914 rights are" "beyond the State Board's reach." (Resp. Br. at p. 36; see also *id.* at p. 51.) Respondents, that is, concede that the Board has authority to "investigate the existence and scope of the Senior Rights," but only as a "mere[] . . . accompaniment to the State Board's authority over unappropriated Division 2 water." (Resp. Br. at p. 52.) In Respondents' view, the Board's authority goes no further. "[I]f a water user's diversion is authorized under a pre-1914 right, then the State Board's task is at its end. 'The Water Board does not have jurisdiction to regulate riparian and pre-1914 appropriative rights.'" (*Id.* at p. 34 [quoting *Young*, 219 Cal.App.4th at p. 404.]; see also *id.* at pp. 51-52.)

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

expansion of the Board's enforcement authority to encompass curtailments of valid senior rights due to drought"].)

This reasoning would hobble the exercise of Board jurisdiction, with implications well beyond the section 1052 question at hand. As discussed in Section III below, it would also have sweeping policy implications for management of state water resources. And this reasoning is at odds with decades of jurisprudence and nearly a century of legislative enactments that confirmed and extended the scope of State regulatory and enforcement authority over all water uses.

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

that depend on it. Finally, upholding the Board's authority to regulate and enforce against all water users through the intertwined doctrines of public trust and reasonable use is critical as the State enters a future of increasingly severe and perpetual drought.

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

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

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

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

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

state when it gained statehood in 1850, and thus holds both the power and obligations that come with that role. (See *Nat. Audubon*, 33 Cal.3d at p. 434 [recognizing that "the State of California acquired title as trustee . . . upon its admission to the union," and "from the earliest days its judicial decisions have recognized and enforced the trust obligation"] [internal citation omitted].)

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

environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." (*Marks v. Whitney* (1971) 6 Cal.3d. 251, 259-60.)

As trustee of the People's water resources, the Board may regulate, enforce, and curtail any use that is detrimental to the public trust, no matter how the usufructuary right was acquired. It is well established that in regulating use of water resources, state agencies – including the Board – must be guided by consideration of the public trust. "[B]efore state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests." (*Nat. Audubon*, 33 Cal.3d at p. 426; see also *S.F. Baykeeper*, 242 Cal.App.4th at pp. 240-42 [holding that State Lands Commissions failed to fulfill its public trust obligations during environmental review process of sand mining leases on trust land].) This duty arises when the Board exercises its authority under the Water Code by, for instance, approving permits for exercise of new appropriative rights. But in addition, "the Board's authority to apply the public trust doctrine extends to rights not covered by the permit and license system"; it is "independent of and not bounded by the limitation of the Board's authority [to permit]" water rights. (*Envtl. Law Found.*, 26 Cal.App.5th at p. 862.) Thus, the Board has an "affirmative duty" to protect the public trust in relation not only "to permitted appropriative water rights" but also "in the context of riparian

and pre-1914 appropriator rights." (*Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1489.)

At issue in this case, Delta waterways and ecosystems are threatened by both upstream diversions and massive water exports from further south in the Delta, many of which are undertaken under claims of pre-1914 water rights. The public trust doctrine should protect against any of these uses when they imperil the watershed. Water use entitlements, whatever their progeny, are always subsidiary to the public trust: "when the public trust doctrine clashes with the rule of priority, the rule of priority must yield." (*El Dorado*, 142 Cal.App.4th at p. 966.)

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

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

The Legislature acted to constrain water rights when it amended the State Constitution in 1928 through the adoption of Article X, Section 2. Resoundingly ratified by voters, this

amendment requires that the State's water resources be put to reasonable use and authorizes the State to limit uses of water to what is reasonable under the circumstances:

> It is hereby declared that because of the conditions prevailing in this State . . . the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and **such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water**.

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

The Legislature subsequently amended the Water Code to give the Board authority to apply the rule of reasonableness to all water rights. Contrary to Respondents' assertions (Resp. Br. at

pp. 35-36), the rule of reasonableness is incorporated throughout multiple divisions of the Water Code. For instance, the Code requires the Board to "take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state." (Wat. Code, § 275.) The Board's constitutional obligation to protect reasonable use is also codified in Division 2 of the Code (which also houses section 1052):

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

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

What constitutes a reasonable use depends on the circumstances, particularly under changing environmental, social, hydrologic, economic, and technological conditions. (See *Light*, 226 Cal.App.4th at p.1479 [recognizing that

"reasonableness of any particular use depends largely on the circumstances"].) Thus, what may be a reasonable use when water is plentiful may be unreasonable during drought conditions. A severe drought, which may have "the effect of further damaging the habitat of an endangered fish species" or causing other ecological impairments,

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

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

The Board possesses broad adjudicatory, regulatory, and enforcement powers in the field of water resources, which it must marshal to prevent unreasonable and wasteful uses of water. (See Wat. Code, § 186 [extending to the Board "any powers . . . that may be necessary or convenient for the exercise of its duties authorized by law"]; *id.* § 174 [granting the Board the power to "exercise the adjudicatory and regulatory functions of the state in the field of water resources"]; *id.* § 275 [requiring the Board to take "all appropriate proceedings" to prevent waste and

unreasonable use]; *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 752 [affirming Board authority to enact regulations to prevent unreasonable and wasteful uses of water]; *Light*, 226 Cal.App.4th at pp. 1484-87 [same].) The Board's powers to prevent unreasonable uses of water are at their zenith when public trust uses are at stake, such as the conservation of wildlife habitat. (See *Light*, 226 Cal.App.4th at p. 1473).

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

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

First, Respondents suggest that the Board's temporary emergency authority under section 1058.5 of the Water Code is sufficient to manage any unreasonable diversions by senior rights holders and riparian users. They are wrong. As an initial matter, as the State points out on reply, Irrigation Districts are arguing in another case that the Board does not have curtailment authority under section 1058.5 at all. (Reply Br. at p. 26.) Indeed, they have weaponized the trial court's decision here to make precisely that argument. (San Joaquin Tributaries Authority Petition for Writ of Mandate and Verified Complaint for Declaratory and Injunctive Relief, *San Joaquin Tributaries Auth. v. Cal. State Water Resources Control Bd.* (Sept. 2, 2021)

Case No. 21CECG02632, ¶¶ 171-73 [alleging that "[t]he Superior Court in the County of Santa Clara found the State Water Board did not have the authority to regulate pre-1914 and riparian rights"].) Further, as droughts have become the new normal, rather than emergencies requiring temporary fixes, solutions beyond the exercise of temporary emergency authorities are needed.

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

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

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

Nowhere is the Board's need for authority to curtail, regulate, and enforce limits on water rights clearer than in the Delta: the source of the water that Respondents are fighting for in this litigation. (FSOD at pp. 1-2.) The current approach to management of the Delta – which prioritizes appropriations over public trust uses and ecosystem and community health – has pushed the watershed into crisis.

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

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

The Delta is a "critically important natural resource for California and the nation." (Wat. Code, § 85002.) Formed by the convergence of California's two largest rivers, the Sacramento and San Joaquin, the Delta's 75,000 square-mile watershed encompasses the "most valuable" wetland ecosystem and estuary, or body of water where freshwater and tidal saltwater meet, on the west coast of North and South America. (*Ibid.*) The Delta's natural estuarian salinity conditions are highly beneficial to a wide variety of aquatic species that are adapted to the Delta's unique, dynamic ecosystem. (See *id.* § 85003(a).) The Delta also contains much of the state's water resources. Nearly half the surface water in California starts as rain or snow within the Delta's vast watershed.[53] When allowed to remain in the system, this water flows through the Delta into the San Francisco Bay and out to the Pacific Ocean.

Large-scale diversions routinely remove excessive quantities of water from the Delta, pushing the watershed into a state of "crisis." (Wat. Code, § 85001(a).) Federal and state water projects export Delta water and transfer it south, largely for agricultural and municipal use. (See *id.* § 85003(c).) Additionally, diversions by upstream Irrigation Districts and other appropriators remove water supply from Delta headwaters, further squeezing Delta resources.[54] The water rights claimed by

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

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

these appropriators far exceed available Delta water supply. In the San Joaquin and Sacramento River Basins, water rights on paper account for more than five times the amount of water that would be in the waterways in an average year if there were no diversions.[55] The amount of water claimed by riparian users and pre-1914 appropriators alone is over twice the amount that would flow through the San Joaquin and Sacramento River Basin if there were no diversions.[56] The volume of water actually appropriated from Delta waterways routinely exceeds three million acre-feet[57] – the maximum amount of water that many experts believe can be exported from the Delta in an average year without destroying the ecosystem. On average, appropriations have reduced January to June outflows by an estimated 56 percent from the watershed's natural state. In the driest condition, this number rises to more than 70 percent.[58] These low freshwater flows – exacerbated by the recent years of historic

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

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

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

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

droughts – raise water temperatures, increase pollution levels, and destroy habitat, leaving toxic air and water that is harmful to humans and deadly to fish.

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

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

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

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

The Delta supports some of the most fragile and unique fisheries in California. Since the late 1980s, federal and state agencies have recognized the vulnerability of fish populations in the Delta, listing many native species under the federal and/or California Endangered Species Acts, including: Chinook salmon, Delta smelt, longfin smelt, and green sturgeon.[59] These fish require specific conditions to survive and procreate, including adequate flows for migratory species to reach their spawning habitats, cool water temperatures, and low salinity levels.[60] Excessive appropriations impair these conditions, and – coupled with the effects of severe drought and climate change – threaten to drive these precarious fish species into extinction. "Abundance of longfin and Delta smelt are at such low levels they are difficult to detect in the estuary, survival of juvenile salmonids and returns of spawning adults are chronically low, and risks of extirpation for multiple fish species are high."[61] The Board recognizes that it has a "regulatory responsibility to address" the water diversions and corresponding reduction in flows that have

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[59] State Water Resources Control Bd., Order Conditionally Approving a Petition for Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions (Dec. 15, 2021) p. 6 (hereafter Temporary Urgency Changes Order).

[60] See Temporary Urgency Changes Order at pp. 17-24.

[61] Temporary Urgency Changes Order at pp. 6-7.

played a significant contributing role in pushing these native fish species to the brink of extinction.[62]

The loss of Delta fish populations is as much an environmental justice issue as it is an endangered species issue. While these fish are entitled to protection under federal and/or California Endangered Species Acts, they also merit protection as an irreplaceable cultural, religious, and subsistence resource to the watershed's original human inhabitants. From time immemorial, the Winnemem Wintu have held the Chinook salmon of all races and runs sacred in their spirituality and religion. In the words of Ponti Tewis (Gary Mulcahy), Government Liaison for the Winnemem Wintu:

> The Winnemem Wintu are a spiritual people. We believe in a Creator who gave life and breath to all things. In our creation story we were brought forth from a sacred spring on Mt. Shasta. We were pretty helpless, couldn't speak, pretty insignificant. But the Salmon, the Nur, took pity on us and gave us their voice, and in return we promised to always speak for them. Side by side, the Winnemem Wintu and the Nur have depended on each other for thousands of years – the Winnemem speaking, caring, and trying to protect the salmon, and the salmon giving of themselves to the Winnemem to provide sustenance throughout the year. Ceremonies, songs, dances, and prayers of the relationship between the salmon and the Winnemem Wintu are intricately woven into the very fabric of Winnemem Wintu culture and spirituality.[63]

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[62] Scientific Basis Report at p. 1-5.
[63] Testimony of Gary Mulcahy ¶ 10.

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

The decline of fish populations, coupled with the pollution of Delta waters, has also contributed to poor health outcomes for communities that rely or historically relied upon these species for sustenance. The Winnemem Wintu and Shingle Springs Band of Miwok Indians report that the fish species that were traditionally a staple of their diets are no longer available in the waterways. The unavailability of these species has eroded the Tribes' food sovereignty and contributed to health issues amongst tribal members, including obesity, type 2 diabetes, and cardiovascular disease.[64] Even with declining fish populations, an estimated 24,000 to 40,000 subsistence fishing visits are made to the Delta annually.[65] These subsistence fishers, many of whom are immigrants and/or people of color,[66] experience loss of food supply due to species decline. Additionally, the fish they are able to catch put subsistence fishers at heightened risk of exposure to contaminants that accumulate in the polluted waterways.[67]

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

These damaging conditions are worsened by low or stagnant flows caused by excessive appropriation.

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

Excessive freshwater diversions have further harmed the health of the Delta ecosystem by contributing to the emergence and spread of harmful algal blooms. Harmful algal blooms are overgrowths of microscopic algae or algae-like bacteria found in waterways that produce toxins that are dangerous to humans and animals.[68] These foul-smelling, green blooms are a product of low freshwater flows, still water, and high water temperatures – all of which are driven by excessive diversions – combined with excess nutrients from agricultural runoff and wastewater and bright sunlight.[69] When all of these conditions coalesce in the warm season, harmful algal blooms spread like a cancer across the surface of Delta waterways. Since their emergence in the Delta in 1999, harmful algal blooms have become pervasive in Delta waterways.[70] In 2021 alone, 46 incidents of harmful algal

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[68] See State Water Resources Control Bd., Freshwater and Estuarine Harmful Algal Bloom (FHAB) Program Legislative Mandated Reports: 2021 Water Code Section 13182(a) Report (2021) p. 1 (hereafter FHAB Legislative Mandated Reports).
[69] See Smith et al., California Water Boards' Framework and Strategy for Freshwater Harmful Algal Bloom Monitoring: Full Report with Appendices (2021) pp. 1-3 (hereafter FHAB Framework).
[70] See Cooke et al., Regional Water Quality Control Board, Central Valley Region: Delta Nutrient Research Plan (2018) p. 12.

blooms were voluntarily reported in the Delta.[71] This number likely only scratches the surface of the extent and duration of the problem.

The health risks posed by harmful algal blooms are severe. People can be exposed to harmful algal bloom toxins by swallowing or swimming in affected waters, eating poisoned fish or shellfish (even when food is cooked, algal toxins remain), or inhaling airborne droplets of contaminated water that irritate lung tissue.[72] Depending on the level of exposure and the type of algal toxin, health consequences may range from mild to severe. High levels of exposure can be fatal, especially to pets.[73] Harmful algal blooms can damage the human central nervous system and liver and can lead to respiratory distress.[74] Moreover, toxins from harmful algal blooms can be mobilized by wind to become airborne pollutants and travel for many miles, contributing to human respiratory problems like asthma.[75]

In Stockton, where *Amici* Restore the Delta and Little Manila Rising are located, the dangerous effects of harmful algal

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[71] Delta Stewardship Council, *Harmful Algal Blooms* <https://viewperformance.deltacouncil.ca.gov/pm/harmful-algal-blooms> (as of Feb. 28, 2022).
[72] Ctrs. for Disease Control and Prevention, *Avoid Harmful Algae and Cyanobacteria* <https://www.cdc.gov/habs/be-aware-habs.html> (as of Mar. 8, 2022) (hereafter Ctrs. For Disease Control).
[73] Ctrs. For Disease Control.
[74] Ctrs. For Disease Control.
[75] See, e.g., Freeman, *Seasick Lungs: How Airborne Algal Toxins Trigger Asthma Symptoms* (2005) 113(5) Envtl. Health Perspectives 632.

blooms are borne disproportionately by vulnerable communities – including people of color, people in poverty, and people challenged by language barriers – who live near waterways or rely on them for subsistence fishing, bathing, sanitation, and recreation.[76] Since 2017, Restore the Delta has witnessed hundreds of area residents fishing in or near bloom-infested waters, boating and jet skiing through toxic algal blooms with small children present, launching boats into bloom-filled waterways, living in houseboats and floating encampments on top of toxic algal blooms, and living adjacent to waterways filled with toxic algae. Hazardous algal blooms are also a direct threat to the thousands of unhoused Stockton residents who regularly camp adjacent to Mormon Slough, the Stockton Shipping Channel, the San Joaquin River, Smith Canal, and the Calaveras River – all water bodies that are hydrologically connected to the rest of the Delta estuary.

These disproportionate effects compound long-term disinvestment and environmental and health burdens that already plague Stockton communities. Stockton communities are overburdened with air pollution and respiratory distress. Multiple Stockton census tracts within a half-mile of Delta waterways score in the 96th through the 100th percentile of all California communities for pollution burdens, as defined by the California Office of Environmental Health Hazard Assessment's mapping tool, CalEnviroScreen. Construction of the Crosstown Freeway, which destroyed historic Little Manila, the subsequent development of a constellation of transportation infrastructure,

[76] Fate of the Delta at p. 54.

and the local siting of multiple heavy industrial sources all contribute to the area's intense air pollution problem. This pollution burden falls heavily on communities of color, who were forced to live in heavily impacted neighborhoods by discriminatory laws, policies, and practices, including the Alien Land Law, redlining, and racist real estate and home lending operations.[77] Impacts of aerosolized cyanobacteria from hazardous algal blooms layer on top of this disproportionately heavy load of respiratory health burdens.

Hazardous algal blooms also compound economic distress experienced by Stockton communities by undermining long-term growth in jobs, economic output, and sustainable economic development in the Stockton region. Economically, Stockton has some of the highest "distress" conditions in the country: Among large U.S. cities, it ranked sixth nationally and first in the state in the Economic Innovation Group's 2016 "Distressed Communities Index." This ranking is based on combined indicators of educational attainment, housing vacancy, unemployment, poverty, median income, and changes in employment and business establishments.[78] The community's ability to use Stockton's waterways as a vehicle for economic development, tourism, and recreation is impaired by the

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[77] See, e.g., Nardone et al., Associations between historical residential redlining and current age-adjusted rates of emergency department visits due to asthma across eight cities in California: an ecological study (2020) 4(1) The Lancet Planetary Health e24.
[78] Economic Innovations Group, The 2016 Distressed Communities Index: An Analysis of Community Well-Being Across the United States (2016) pp. 5-7.

unhealthy state of Delta water – particularly during warm seasons when people most want to be out on the water but when harmful algal blooms are often at their worst.

Additionally, hazardous algal blooms perpetuate the alienation of Indigenous Peoples from their ancestral waterways and the cultural resources found therein.[79] *Amicus* Shingle Springs Band of Miwok Indians is working to restore the Tribe's traditional ecological knowledge and cultural and spiritual connection to the Sacramento River, American River, Feather River, and other Delta waterways that were their ancestral homes. This restoration work includes returning to these rivers to fish, gather estuarian plants and species to create ceremonial regalia, and collect plants for medicinal use. Yet, in the last two to three years, the proliferation of hazardous algal blooms in locations significant to the Tribe has blocked them from accessing the water and its cultural resources. For example, tribal leaders took a group of young boys on a trip to Stone Lakes National Wildlife Refuge to teach them to fish as their ancestors did, but they were repelled when they saw the entire surface of the lake covered with noxious algal blooms. As long as the hazardous algal blooms infest these waters, the Tribe's alienation from their cultural and spiritual practices persists.

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

If nothing changes, the climate crisis will push these already tenuous conditions to the brink of disaster. Climate

[79] FHAB Framework at p. 162.

change will increase extreme weather events, including severe droughts that will make disastrous conditions like those seen during the 2014-15 drought all-too common.[80] Changing precipitation patters could cause freshwater flows to slow to a trickle between spring and fall – further imperiling the spawning journey of migratory fish species like the Chinook salmon during these months.[81] Warming is predicted to cause a devastating 35 percent flow reduction this century in the Colorado River, one of Southern California's key sources – creating more demand on Delta waters.[82] Increasing wildfires, sea level rise, heatwaves, and other threats will further exacerbate the strain on the state's water resources.[83] Without improved management, the results will include increasing salinity, proliferation of harmful algal blooms, spread of nonnative invasive species, decline of native fish species, and other harms to the estuarian ecosystem – all of which will do further violence to vulnerable Delta communities and tribes.

As drought conditions worsen with climate change, massive diversions of Delta water by senior appropriators will become increasingly untenable and incompatible with a living Delta. The Board's authority to determine the reasonableness of uses in this

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[80] See State Water Resources Control Bd., Climate Change Considerations for Appropriative Water Rights Applications (2021) (hereafter Climate Change Considerations).
[81] See Climate Change Considerations.
[82] Udall & Overpeck, The twenty-first century Colorado River hot drought and implications for the future (2017) 53(3) Water Resources Research 2404, 2410.
[83] See Climate Change Considerations.

context, to adjudicate and enforce limits on water rights claims, and to limit diversions to what is reasonable and consistent with the public trust will take on even greater importance. *Amici* urge the Court avoid hobbling the Board in its exercise of these well-established and vital regulatory and enforcement powers.

CONCLUSION

As the strain on California's precious water resources continues to grow, everyone across the state will have to make sacrifices. Pre-1914 appropriative and riparian rights cannot be allowed to exist above regulation and enforcement while Indigenous Peoples and communities of color in the Delta bear the costs of excessive water appropriation.

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