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10 SANTA BARBARA CHANNELKEEPER

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 IN AND FOR THE COUNTY OF SAN FRANCISCO
13 SAN FRANCISCO DIVISION

14 SANTA BARBARA CHANNELKEEPER, a)
15 California non-profit corporation,)

16 Petitioner,)

17 v.)

18 STATE WATER RESOURCES CONTROL)
19 BOARD, a California State Agency; CITY OF)
20 BUENAVENTURA, a California municipal)
21 corporation,)

22 Respondents.)

Case No.

CPF - 14 - 513875

~~COMPLAINT FOR DECLARATORY RELIEF~~
~~AND VERIFIED PETITION FOR WRIT OF~~
MANDATE

Code of Civil Procedure §§ 1060, 1085, 1086;
California Constitution, Article X, § 2;
Water Code § 275

ENDORSED
FILED
Superior Court of California
County of San Francisco
SEP 19 2014
CLERK OF THE COURT
BY: ROSSALY DELAVEGA-NAVARRO
Deputy Clerk

1 **I. Introduction**

2 1. Santa Barbara Channelkeeper (Channelkeeper, SBCK, or Petitioner) hereby seeks from
3 this Court a Declaratory Judgment pursuant to California Code of Civil Procedure section 1060
4 declaring that the City of Buenaventura’s (Ventura or City) use of Reach 4 of the Ventura River (River)
5 from April through October is unreasonable in violation of Article X, section 2 of the California
6 Constitution.

7 2. Channelkeeper also petitions this Court for a Writ of Mandate pursuant to California
8 Code of Civil Procedure section 1085:

9 a. Compelling the State Water Resources Control State Board (State Board or SWRCB)
10 to perform its mandatory duties to prevent unreasonable use of the State’s waters by conducting an
11 analysis of Ventura’s pumping and diversion of water from Reach 4 of the River based on existing
12 conditions in the River, which have changed since Ventura began its use of the River, and to consider
13 impacts to public trust resources resulting from Ventura’s use of Reach 4, as required by Article X,
14 section 2 of the California Constitution and section 275 of the Water Code,

15 b. Compelling the State Board to perform its mandatory duties to consider impacts to
16 public trust resources by conducting an analysis of Ventura’s pumping and diversion of water from
17 Reach 4 of the River based on existing conditions in the River, which have changed since Ventura began
18 its use of the River, as required by the Public Trust Doctrine; and/or

19 c. Enjoining the State Board from further abuse of discretion in failing to conduct an
20 analysis of the reasonableness of Ventura’s use of the River and in failing to conduct an analysis of the
21 impacts to public trust resources resulting from Ventura’s use of the River, as required by Article X,
22 section 2 of the California Constitution, section 275 of the Water Code, and the Public Trust Doctrine.

23 **II. The Parties**

24 **A. Santa Barbara Channelkeeper**

25 3. Channelkeeper is a non-profit public benefit corporation organized under the laws of the
26 State of California and headquartered in Santa Barbara, California.

27 4. Channelkeeper’s office is located at 714 Bond Avenue, Santa Barbara, California 93103.

28 5. Channelkeeper’s mission is to protect and restore the Santa Barbara Channel and its

1 tributaries for the benefit of its ecosystems and the surrounding human communities. Channelkeeper
2 accomplishes its mission through science-based advocacy, education, field work, and enforcement of
3 environmental laws. Because the Ventura River is one of the largest rivers that empties into the Santa
4 Barbara Channel, it is a major focus of SBCK's work.

5 6. SBCK has served as a lead advocate, community organizer, educator, scientist, and
6 monitor in the Ventura River watershed for 15 years. Via the "Ventura River Stream Team" citizen
7 water quality monitoring program, Channelkeeper has trained and engaged 600 volunteers and collected
8 13 years of scientifically sound data characterizing water quality in the Ventura River and its tributaries.
9 This data has been used extensively by various agencies to guide their pollution prevention and clean-up
10 programs. In addition to this monitoring effort, SBCK has also served as the lead environmental
11 advocate on a variety of priority issues throughout the watershed for many years. Channelkeeper and its
12 members have surveyed nearly every mile of the Ventura River and its major tributaries, identifying and
13 mapping water quality and habitat impairments. Channelkeeper served as the primary (and in many
14 cases sole) stakeholder representing environmental interests in critical and technically complex
15 environmental regulatory processes such as the Total Maximum Daily Loads (TMDL) for the Ventura
16 River's impairments.

17 7. Thus, the interests of SBCK and its members have been, are being, and will continue to
18 be adversely affected by the ongoing controversy between SBCK and Ventura and the State Board's
19 failure to comply with the requirements of Constitution, the Water Code, and the Public Trust Doctrine
20 described herein. The relief sought herein will redress the harms to SBCK caused by SBCK's
21 controversy with Ventura and the State Board's failures to act. Continuing commission of the omissions
22 alleged herein will irreparably harm SBCK's members, for which harm they have no plain, speedy or
23 adequate remedy at law.

24 **B. The State Board**

25 8. The State Board is now, and at all times mentioned in this complaint and petition has
26 been, a state agency under the laws of the State of California. *See* Water Code § 174 *et seq.*

27 9. The State Board is directly responsible for carrying out the Constitutional and statutory
28 mandates to prevent the unreasonable use of California's waters. *See* Water Code §§ 174, 179, 275, and

1 1050.

2 10. The State Board is directly responsible for administering public trust resources on behalf
3 of the people of the State. *See* Water Code § 1120.

4 **C. The City of Ventura**

5 11. Ventura is now, and at all times mentioned in this complaint and petition has been, a
6 municipal corporation situated in the County of Ventura of the State of California. *See* Ventura Mun.
7 Code § 100.

8 12. In 2011, Ventura formed a new city department, Ventura Water, which is responsible for
9 managing Ventura’s water supply, stormwater, and wastewater.

10 13. Ventura is obligated to make only reasonable and beneficial use of the waters of the
11 State. *See* Cal. Const., art. X, § 2.

12 **III. Authenticity of Exhibits Attached**

13 14. The documents accompanying this complaint and petition are true and correct copies of
14 the original documents, and were obtained in the manner described in the Declaration of Caroline Koch
15 in support of Channelkeeper’s Complaint for Declaratory Relief and Verified Petition for Writ of
16 Mandate (Koch Dec.), which is filed concurrently herewith. Channelkeeper has consecutively numbered
17 accompanying documents, and the exhibit citations herein refer to those consecutive page numbers.

18 15. The documents attached to the Koch Declaration are incorporated herein by reference as
19 though fully set forth in this complaint and petition.

20 **IV. Jurisdiction and Venue**

21 16. This Court has jurisdiction over this action pursuant to Code of Civil Procedure section
22 1060.

23 17. This Court has jurisdiction over this action pursuant to Code of Civil Procedure section
24 1085. *Elmore v. Imperial Irrigation Dist.* (1984) 159 Cal.App.3d 185, 192-93 (“The doctrine of
25 exhaustion of administrative remedies is inapplicable in water cases. ... The exhaustion of
26 administrative remedies is not a prerequisite to the filing of a mandamus petition in water cases, nor
27 does failure to exhaust preclude the court from exercising its concurrent original jurisdiction.”) (citing
28 *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 449); *see also* Koch Dec., Ex. A

1 (State Board’s Scott River Brief) at 6:19-20 (“The State [] Board and the courts have concurrent
2 jurisdiction to apply the public trust doctrine.”) (citing *National Audubon Society*, 33 Cal.3d at 449-451).

3 18. Venue is proper in this Court pursuant Code of Civil Procedure sections 395 and 401, as
4 defendant State Board is a resident of Sacramento County and the Attorney General maintains an office
5 in San Francisco County.

6 19. In 1998, the United States Environmental Protection Agency (EPA) approved
7 California’s list of impaired water bodies identified pursuant to section 303(d) (303(d) List) of the
8 Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1313(d), which first listed Reaches
9 3 and 4 of the Ventura River as impaired for pumping and diversion. On October 11, 2011, the EPA
10 approved the State Board’s triennial review and update to the 303(d) List, which maintained the
11 pumping and diversion impairments for Reaches 3 and 4 of the Ventura River. On June 28, 2013, EPA
12 approved the TMDL for algae, nutrients, and eutrophic conditions in the Ventura River (Ventura River
13 TMDL). Under Code of Civil Procedure section 338(a), this action is properly before this Court, as it is
14 filed not later than three years from the date EPA approved the State Board’s updated 303(d) List and/or
15 from the date EPA approved the Ventura River TMDL, or from the State Board’s ongoing, indivisible
16 course of conduct occurring since Reaches 3 and 4 of the Ventura River were first included on
17 California’s 303(d) List as impaired for pumping and diversion in 1998.

18 **V. Regulatory Background**

19 **A. Water Rights in California**

20 20. All water within the State of California is the property of the people of the State, but the
21 right to the use of water may be acquired by appropriation in the manner provided by law. Water Code
22 §§ 102, 1201.

23 21. California operates under a dual system of surface water rights that recognizes both
24 riparian rights and appropriation rights. *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 136-37
25 (providing review of development of California water law); *see also United States v. State Water Res.*
26 *Control Bd.* (1986) 182 Cal.App.3d 82, 101.

27 22. Riparian rights confer upon a landowner the right to divert the water flowing by the land
28 for use on the land, without regard to the priority in time. *U.S. v. SWRCB*, 182 Cal.App.3d at 101.

1 23. Appropriation rights confer upon the user who actually diverts and uses water the right to
2 do so. *U.S. v. SWRCB*, 182 Cal.App.3d at 101-102. Appropriators are not required to own land
3 contiguous to the watercourse or make use of the diverted water on the adjacent land, but appropriation
4 rights are subordinate to riparian rights and as between appropriators, the rule of priority is “first in time,
5 first in right.” *Id.* at 102.

6 24. The Water Commission Act of 1913 at Water Code, Division 2, section 1000 *et seq.*
7 establishes the regulatory framework governing appropriation rights, including permitting and licensing
8 requirements. Appropriation rights acquired prior to enactment of the Water Commission Act (pre-1914
9 appropriation rights) are not subject to the Act’s permit and licensing requirements. Water Code
10 §§ 1006, 1202(b); *see also Cal. Farm Bureau Fed’n v. State Water Res. Control Bd.* (2011) 51 Cal.4th
11 421, 428-29; *State Water Res. Control Bd. Cases* (2006) 136 Cal.App.4th 674, 741-42.

12 25. California law also recognizes the right to the use of groundwater either as an overlying
13 user or an appropriator. *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240-41.
14 Overlying groundwater users are analogous to riparian users, i.e., overlying groundwater users have the
15 right to use the water beneath their land by virtue of their ownership of the land and must use the water
16 on the overlying property. *City of Barstow*, 23 Cal.4th at 1240. Groundwater appropriators are subject to
17 the “first in time, first in right” rule of priority and their use of the appropriated groundwater is not
18 restricted to the overlying land. *City of Barstow*, 23 Cal.4th at 1241.

19 26. The Water Commission Act’s permit and licensing requirements do not regulate the use
20 of groundwater whether overlying or appropriative. *City of Pasadena v. City of Alhambra* (1949) 33
21 Cal.2d 908, 933-34.

22 27. Groundwater users in Ventura County are, however, required to report the volume of
23 water used pursuant to an overlying or appropriation right to the State Board. Water Code §§ 4999, *et*
24 *seq.*

25 **B. Beneficial Uses of State Waters**

26 28. All waters of the State must be put to beneficial use. *See* Cal. Const., art. X, § 2; *see also*
27 Water Code §§ 1201, 1240.

28 29. Several provisions of California law define beneficial uses and beneficial use categories

1 to be applied to the State’s waters. Pursuant to these provisions categories of beneficial uses include:
2 (1) Aquaculture, raising fish or other aquatic organisms not for release to other waters; (2) Domestic,
3 water used by homes, resorts, or campgrounds, including water for household animals, lawns, and
4 shrubs; (3) Fire Protection, water to extinguish fires; (4) Fish and Wildlife, enhancement of fish and
5 wildlife resources, including raising fish or other organisms for scientific study or release to other waters
6 of the state; (5) Frost Protection, sprinkling to protect crops from frost damage; (6) Heat Control,
7 sprinkling to protect crops from heat; (7) Industrial Use, water needs of commerce, trade, or industry;
8 (8) Irrigation, agricultural water needs; (9) Mining, Hydraulicking, drilling and concentrator table use;
9 (10) Municipal, city and town water supplies; (11) Power, generating hydroelectric and
10 hydromechanical power; (12) Recreation, boating, swimming, and fishing; (13) Stock watering,
11 Commercial livestock water needs; and (14) Water Quality Control, protecting and improving waters
12 that are put to beneficial use. *See* Water Code §§ 100, 106, 1004, 1005.1, 1005.2, 1005.4, 1010, 1011,
13 1011.5, 1012, 1017, 1242, 1242.5, 1243, 1243.5, and 13050(f).

14 30. Under California law, each regional board is required to formulate and adopt “water
15 quality control plans,” commonly known as “Basin Plans,” for all hydrologic areas within their region.
16 Water Code § 13240. A Basin Plan “consists of a designation or establishment for the waters within a
17 specified area” of all of the following: “(1) Beneficial uses to be protected; (2) Water quality objectives;
18 [and] (3) A program of implementation needed for achieving water quality objectives.” Water Code
19 § 13050(j).

20 31. Water quality objectives are numeric or narrative water quality standards that must be
21 attained or maintained in order to protect the designated beneficial uses of a water body. *See* 33 U.S.C.
22 §§ 1312, 1313(a).

23 32. Under the Clean Water Act, when effluent limitations are insufficient to ensure
24 compliance with water quality objectives and a water body can no longer be put to its designated
25 beneficial uses, that water body’s beneficial uses are impaired and the State must place that water body
26 on the list of impaired waters. 33 U.S.C. § 1313(d)(1). The State must also develop a TMDL for the
27 pollutant(s) impairing the water body. 33 U.S.C. § 1313(d)(1). The State must submit its list of impaired
28 water bodies, pollutants causing impairments, and a priority ranking including water bodies targeted for

1 TMDL development to the EPA for review and approval every two years. 40 C.F.R. § 130.7(d).

2 33. TMDLs can be developed by the EPA or the state. 33 U.S.C. 1313(d); 40 C.F.R. § 130.7.
3 Each TMDL must be “established at a level necessary to implement the applicable water quality
4 standards.” 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.2(i). Each TMDL must include the individual
5 waste load allocations (WLAs) for point sources discharging into the water body, as well as load
6 allocations for non-point sources and natural background sources. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R.
7 § 130.2(i). WLAs are “[t]he portion of a receiving water’s loading capacity that is allocated to one of its
8 existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent
9 limitation.” 40 C.F.R. § 130.2(h).

10 C. The Reasonable Use Doctrine

11 34. In addition to the requirement that all water be put to beneficial use, all water rights in
12 California are constrained by the “rule of reasonableness,” which has been preserved in the state
13 Constitution since 1928. *See, e.g., Light v. State Water Res. Control Bd.* (2014) 2014 Cal.App.LEXIS
14 523, at *17 (citing Cal. Const., art. X, § 2). This constitutional requirement is “generally construed as
15 applying a rule of reasonable use ‘to all water rights enjoyed or asserted in this state, whether the same
16 be grounded on the riparian right or the right, analogous to the riparian right, of the overlying land
17 owner, or the percolating water right, or the appropriative right.’” *Joslin*, 67 Cal.2d at 138 (quoting
18 *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 383).

19 35. Specifically, article X, section 2 of the California Constitution states:

20 It is hereby declared that because of the conditions prevailing in this State the general
21 welfare requires that the water resources of the State be put to beneficial use to the fullest
22 extent of which they are capable, and that **the waste or unreasonable use or**
23 **unreasonable method of use of water be prevented**, and that the conservation of such
24 waters is to be exercised with a view to the reasonable and beneficial use thereof in the
25 interest of the people and for the public welfare. **The right to water or to the use or**
26 **flow of water in or from any natural stream or water course in this State is and shall**
27 **be limited to such water as shall be reasonably required for the beneficial use to be**
28 **served, and such right does not and shall not extend to the waste or unreasonable**
Riparian rights in a stream or water course attach to, but to no more than so much of the
flow thereof as may be required or used consistently with this section, for the purposes
for which such lands are, or may be made adaptable, in view of such reasonable and
beneficial uses; provided, however, that nothing herein contained shall be construed as
depriving any riparian owner of the reasonable use of water of the stream to which the

1 owner's land is riparian under reasonable methods of diversion and use, or as depriving
2 any appropriator of water to which the appropriator is lawfully entitled. **This section**
3 **shall be self-executing**, and the Legislature may also enact laws in the furtherance of the
4 policy in this section contained.

5 (emphasis added). The rule of reasonableness, i.e., the reasonable use doctrine, is the overriding
6 principle governing the use of water in California. *See Peabody*, 2 Cal.2d at 367-68.

7 36. The constitutional mandate that unreasonable use and waste of the State's waters be
8 prevented is also codified at sections 100, 101, and 106.5 of the Water Code.

9 37. What constitutes an unreasonable use of water is determined on a case-by-case basis
10 depending on the totality of circumstances. *See Peabody*, 2 Cal.2d at 368; *see also Joslin*, 67 Cal.2d at
11 139; *Imperial Irrigation Dist. v. State Water Res. Control Bd.* (1986) 186 Cal.App.3d 1160, 1165.

12 "What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a
13 reasonable beneficial use in an area of great scarcity and great need." *Tulare Irrigation Dist. v. Lindsay-*
Strathmore Dist. (1935) 3 Cal.2d 489, 567.

14 38. Conformity of a use, method of use, or method of diversion of water with local custom
15 shall not be determinative of its reasonableness, but is considered as one factor to be weighed in
16 determining the reasonableness of the use, method of use, or method of diversion within the meaning of
17 Article X of the California Constitution. Water Code § 100.5.

18 39. "Impacts on public trust uses are a relevant consideration in determining whether a
19 diversion is unreasonable." Koch Dec., Ex. A (State Board's Scott River Brief) at 15:8-12.

20 40. In issuing regulations to prevent unreasonable use of a water body segment, the State
21 Board stated: "The premise underlying the proposed Regulation is that a diversion of water that is
22 harmful to salmonids is an unreasonable use of water if the diversion can be managed to avoid the
23 harm." Koch Dec., Ex. B (State Board's Notice of Preparation and Public Scoping Meeting on Russian
24 River Frost Regulation) at 26.

25 41. The reasonableness of a use of water changes over time. "What is a beneficial use at one
26 time may, because of changed conditions, become a waste of water at a later time." *Tulare Irrigation*
27 *Dist.*, 3 Cal.2d at 576. Further, the reasonableness of a use of water "cannot be resolved *in vacuo*

1 isolated from statewide considerations of transcendent importance. Paramount among these [is] the ever
2 increasing need for the conservation of water in this state, an inescapable reality of life quite apart from
3 its express recognition in the 1928 amendment.” *Joslin*, 67 Cal.2d at 140.

4 42. The California Supreme Court has found the unreasonableness of a specific use of water
5 to be self-evident as a matter of law. *Light*, 2014 Cal.App.LEXIS at *19-20 (citing *Tulare Irrigation*
6 *Dist.*, 3 Cal.2d at 568; *Joslin*, 67 Cal.2d at 141 (holding that the use of waters to expose and carry and
7 deposit sand, gravel, and rock was “as a matter of law unreasonable within the meaning of the
8 constitutional amendment”)).

9 43. A water user cannot acquire a vested right to the unreasonable use of water. *See, e.g.*,
10 *Joslin*, 67 Cal.2d at 145.

11 44. A water right holder’s water use is properly involuntarily curtailed based on the
12 unreasonableness of the use. *See, e.g.*, *Joslin*, 67 Cal.2d at 140-41; *see also* Gray, *The Modern Era in*
13 *California Water Law* (1994) 45 Hastings L.J. 249, 253-72.

14 45. “When the supply of water in a particular stream system is insufficient to satisfy all
15 beneficial uses, water rights users must curtail their use.” *Light*, 2014 Cal.App.LEXIS at *39. While “it
16 is ordinarily the function of the rule of priority to determine the degree to which any particular use must
17 be curtailed, the [State] Board has the ultimate authority to allocate water in a manner inconsistent with
18 the rule of priority, when doing so is necessary to prevent the unreasonable use of water.” *Id.* at 39-40
19 (citing *El Dorado Irrigation Dist. v. St. Water Res. Control Board* (2006) 142 Cal.App.4th 937, 966).

20 46. A dispute as to the reasonableness of a use of water concerning competing beneficial uses
21 does not implicate the rule of priority. *See Light*, 2014 Cal.App.LEXIS at 40-41.

22 **D. The Public Trust Doctrine**

23 47. The public trust doctrine provides that “the sovereign owns ‘all of its navigable
24 waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people.’”
25 *National Audubon Society*, 33 Cal.3d at 434 (internal citations omitted).

26 48. It is well settled in the United States generally and in California that the public trust is not
27 limited by the reach of the tides, but encompasses all navigable lakes and streams. *National Audubon*
28 *Society*, 33 Cal.3d at 435.

1 49. Public trust resources traditionally included navigation, commerce and fishing. *National*
2 *Audubon Society*, 33 Cal.3d at 434. The public trust doctrine now also encompasses the preservation of
3 lands adjacent to navigable waters in their natural state “so that they may serve as ecological units for
4 scientific study, as open space, and as environments which provide food and habitat for birds and marine
5 life, and which favorably affect the scenery and climate of the area.” *National Audubon Society*, 33
6 Cal.3d at 434-35. Such preservation is recognized as “one of the most important public uses of the
7 tidelands.” *National Audubon Society*, 33 Cal.3d at 434.

8 50. “The public trust doctrine also applies to activities that harm fish in all waters within the
9 state.” Koch Dec., Ex. A (State Board’s Scott River Brief) at 6:13-19 (citing cases).

10 51. “The public trust doctrine, as recognized and developed in California decisions, protects
11 navigable waters from harm caused by diversion of nonnavigable tributaries.” *National Audubon*
12 *Society*, 33 Cal.3d at 437 (footnotes omitted). This includes groundwater hydrologically connected to
13 navigable surface waters. *National Audubon Society*, 33 Cal.3d at 436-37.

14 52. “In administering the trust the state is not burdened with an outmoded classification
15 favoring one mode of utilization over another.” *National Audubon Society*, 33 Cal.3d at 436. “The state
16 as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those
17 waters. This principle, fundamental to the concept of the public trust, applies to rights in flowing waters
18 as well as to the rights in tidelands and lakeshores; it prevents any party from acquiring a vested right to
19 appropriate water in a manner harmful to the interests protected by the public trust.” *Id.* at 445.

20 53. “To further the protection of public trust uses, the public trust doctrine limits conduct
21 affecting those uses,” including groundwater extraction impacting public trust uses. Koch Dec., Ex. A
22 (State Board’s Scott River Brief) at 6:20-25.

23 **E. The State Board Has Mandatory Duties to Prevent Unreasonable Use and to Consider**
24 **Public Trust Resources in Regulating the Use of the State’s Waters**

25 54. Article X, section 2 of the California Constitution is self-executing and imposes a
26 mandatory duty on the State Board to prevent unreasonable use, among other obligations. *See Env’t*
27 *Defense Fund v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 195 (“the [State Board’s] duties and
28 responsibilities over appropriative rights include insuring that they meet the mandate of article X,

1 section 2”); *see also* *City of Barstow*, 23 Cal.4th at 1236; *Elmore*, 159 Cal.App.3d at 193-97; *see also*
2 Koch Dec., Ex. A (State Board’s Scott River Brief) at 14:15-15:4.

3 55. The mandatory duty imposed by Article X, section 2 is ongoing. *City of Barstow*, 23
4 Cal.4th at 1243.

5 56. Provisions of the Water Code also impose upon the State Board a mandatory, affirmative
6 duty to prevent unreasonable use of the State’s waters, such as uses resulting in harm to trust resources.
7 Specifically, section 275 of the Water Code states: “The department and board shall take all appropriate
8 proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable
9 use, unreasonable method of use, or unreasonable method of diversion of water in this state.”

10 57. Consistent with the duty under section 275, section 104 of the Water Code states: “The
11 people of the State of California have a paramount interest in the use of all the water of the State and the
12 State determines what water of the State, surface or groundwater, can be converted to public use or
13 controlled for public protection.”

14 58. The State Board has interpreted section 275 as imposing a mandatory duty: “Water Code
15 section 275 directs the State Water Board to ‘take all appropriate proceedings or actions before
16 executive, legislative, or judicial agencies . . .’ to enforce the constitutional and statutory prohibition
17 against waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion,
18 commonly referred to as the reasonable use doctrine.” Koch Dec., Ex. B (State Board’s Notice of
19 Preparation and Public Scoping Meeting on Russian River Frost Regulation) at 26; *see also* Koch Dec.,
20 Ex. A (State Board’s Scott River Brief) at 14:3-8.

21 59. Part of the State Board’s mandatory duty to prevent unreasonable use includes
22 considering impacts to public trust resources caused by water use. *National Audubon Society*, 33 Cal.3d
23 at 446; *see also* Koch Dec., Ex. A (State Board’s Scott River Brief) at 14:3-15:16 (explaining that to
24 carry out its duty under Water Code section 275, the State Board applies the public trust doctrine, among
25 other considerations).

26 60. The State Board’s mandatory duties prescribed by article X, section 2 and section 275,
27 which include carrying out its obligations under the Public Trust Doctrine, apply to all types of water
28 rights, including riparian, pre-1914, and groundwater appropriation rights. *Env’tl Defense Fund*, 26

1 Cal.3d at 194-95, 198; *see also* Koch Dec., Ex. B (State Board’s Notice of Preparation and Public
2 Scoping Meeting on Russian River Frost Regulation) at 26-27; Koch Dec., Ex. C at 48-50 (explaining
3 that the State Board’s regulation applies to interconnected groundwater).

4 61. The State has a duty to exercise continued supervision over trust resources. *National*
5 *Audubon Society*, 33 Cal.3d at 437-440. As applied to a water user’s right to use water of the State, the
6 State Board “has an affirmative duty to take the public trust into account in the planning and allocation
7 of water resources, and to protect public trust uses whenever feasible.” *National Audubon Society*, 33
8 Cal.3d at 446.

9 62. The continuing, affirmative duty to take impacts on public trust resources from use of the
10 State’s waters into account applies to all types of water rights. *National Audubon Society*, 33 Cal.3d at
11 445. This is especially true when an appropriation of water has never been reviewed for its impact on
12 public trust resources. *Id.* at 446.

13 63. The State may not abdicate its public trust duties. *National Audubon Society*, 33 Cal.3d at
14 437-38.

15 **VI. Facts and Procedural Background**

16 **A. The Ventura River Watershed**

17 64. As described in the Ventura River TMDL, the Ventura River Watershed is located in the
18 northwestern portion of Ventura County with a small portion in the southeastern portion of Santa
19 Barbara County. Koch Dec., Ex. D (EPA Draft TMDL) at 94. The watershed drains a fan-shaped area of
20 about 220 square miles with an elevation from 6,000 feet to sea level. *Id.*

21 65. The River has several major tributaries, including Matilija Creek, North Fork Matilija
22 Creek, San Antonio Creek, Coyote Creek, and Cañada Larga. Koch Dec., Ex. D (EPA Draft TMDL) at
23 94.

24 66. The cities of Ojai and Ventura are the largest urban areas in the watershed and the
25 communities of Casitas Springs, Foster Park, Oak View, Valley Vista, Mira Monte, Meiners Oaks,
26 Upper Ojai, and Live Oak Acres are within the unincorporated Ventura County. Koch Dec., Ex. D (EPA
27 Draft TMDL) at 98.

28 67. The Ventura River consists of five reaches, which, upstream from the Pacific Ocean, are:

1 Reach 1 (Ventura River Estuary to Main Street), Reach 2 (Main Street to Weldon Canyon), Reach 3
2 (Weldon Canyon to Casitas Vista Road), Reach 4 (Casitas Vista Road to San Antonio Creek), and Reach
3 5 (San Antonio Creek to Camino Cielo Road). Koch Dec., Ex. D (EPA Draft TMDL) at 101-102; Koch
4 Dec., Ex. E (Basin Plan) at 195.

5 68. There are two major dams, Matilija and Casitas; a river diversion, Robles Diversion
6 Facility; and a subsurface diversion, Foster Park Subsurface Diversion, on the River. Koch Dec., Ex. D
7 (EPA Draft TMDL) at 101.

8 69. Flow in the Ventura River varies seasonally due to a Mediterranean climate pattern of
9 wet cool winters from November through March and dry warm summers from April through October.
10 Koch Dec., Ex. D (EPA Draft TMDL) at 98. High flows predominate during the rainy season, starting in
11 winter through early spring. *Id.*

12 70. As shown in the Ventura River TMDL, between October 2000 and October 2008 peak
13 flows in the Foster Park vicinity, i.e., Reaches 3 and 4, occurred after winter storm events and the flows
14 declined to very low levels, less than 1 cubic foot per second (cfs), during the summer dry season. Koch
15 Dec., Ex. D (EPA Draft TMDL) at 99. This dry pattern was mitigated in the lower Ventura River,
16 Reaches 1 and 2, by effluent from the Ojai Valley Waste Water Treatment Plant, which constitutes a
17 majority or, at times, all of the flow in this section of the river during the summer and fall of dry years.
18 *Id.*

19 71. In addition to natural variations in flow, based on annual rainfall, flow regimes in the
20 Ventura River have been altered to support water supply and allow for municipal development,
21 including by the City. Koch Dec., Ex. D (EPA Draft TMDL) at 99; Koch Dec., Ex. F (Historical
22 Ecology of the Ventura River) at 204, 274-75, 280.

23 72. Flow in any particular reach of the River is additionally affected by the status of the
24 underlying groundwater basin (whether full, filling, or emptying), the occurrence of natural recharge
25 areas where surface flows will disappear at times, flow between groundwater basins, and the amount of
26 surface or groundwater withdrawals for municipal, domestic, or agricultural uses. Koch Dec., Ex. D
27 (EPA Draft TMDL) at 100.

28 73. According to the National Marine Fisheries Service (NMFS), flows in the Ventura River

1 are naturally perennial, due to the geology of the bedrock formation beneath the river facilitating
2 groundwater from the aquifer to rise, and partially because of the Foster Park subsurface dam. Koch
3 Dec., Ex. G (Draft Biological Opinion) at 355.

4 74. The flow in the river is disrupted at Foster Park (which overlies the Upper Ventura River
5 Groundwater Basin) due to subsurface diversions and groundwater extraction. Koch Dec., Ex. D (EPA
6 Draft TMDL) at 100.

7 75. There is a high degree of hydraulic connectivity between the groundwater and surface
8 hydrology in the Foster Park area. Koch Dec., Ex. G (Draft Biological Opinion) at 356. Due to this
9 connectivity a 1-to-1 relationship between groundwater withdrawals in Foster Park and River surface
10 flows in Reaches 3 and 4 has been assumed. *Id.* at 356, 363.

11 **B. Southern California Steelhead Trout and Other Endangered Species in the Ventura**
12 **River Watershed**

13 76. The Ventura River watershed is home to at least 11 endangered or threatened species,
14 including southern California steelhead trout, arroyo toad, California least tern, California red-legged
15 frog, Foothill yellow-legged frog, Least Bell's vireo, southwestern willow flycatcher, and western
16 snowy plover. *See* U.S. Fish & Wildlife Service, Listing and Occurrence for California available at:
17 [http://ecos.fws.gov/tess_public/pub/stateListingAndOccurrenceIndividual.jsp?state=CA&s8fid=112761](http://ecos.fws.gov/tess_public/pub/stateListingAndOccurrenceIndividual.jsp?state=CA&s8fid=112761032792&s8fid=112762573902)
18 [032792&s8fid=112762573902](http://ecos.fws.gov/tess_public/pub/stateListingAndOccurrenceIndividual.jsp?state=CA&s8fid=112761032792&s8fid=112762573902), last visited August 18, 2014; *see also* Cal. Dept. of Fish and Wildlife,
19 Endangered and Threatened Species List available at:
20 <http://www.dfg.ca.gov/biogeodata/cnddb/pdfs/TEAnimals.pdf>, last visited August 18, 2014.

21 77. Before dams were constructed in the Ventura River Watershed, during normal to wet
22 years the steelhead run was estimated at 4,000-5,000 individuals. Koch Dec., Ex. D (EPA Draft TMDL)
23 at 100.

24 78. Following the construction of Matilija Dam (located upstream of Reach 3), which cut off
25 access to about half of the prime spawning habitat, and coincident with a drought in the late 1940s,
26 steelhead runs dropped to about 2,000-2,500 individuals. Koch Dec., Ex. D (EPA Draft TMDL) at 101.

27 79. By the 1990s there had been a 96% decline in the steelhead population in the Ventura
28 River, prompting its listing as an endangered species in 1997. Koch Dec., Ex. G (Draft Biological

1 Opinion) at 352; *see also* Koch Dec., Ex. H (Southern California Steelhead Recovery Plan) at 437
2 (describing declines in steelhead run sizes of 90% or more).

3 80. During dry years, juvenile fish unable to transit back downstream to the ocean due to low
4 flows must survive in pools in the mainstem, i.e., Reaches 3 and 4. Koch Dec., Ex. D (EPA Draft
5 TMDL) at 101.

6 81. The fish are subjected to elevated temperatures, endure competition with other fish for a
7 decreasing food supply, and are exposed to predators. Koch Dec., Ex. D (EPA Draft TMDL) at 101.

8 82. The Ventura River (including Reaches 3 and 4), Ventura River Estuary, San Antonio
9 Creek, Cañada Larga, Matilija Creek and North Fork Matilija Creek, among other tributaries, have been
10 designated as critical habitat for the remaining population of the southern California Steelhead, which is
11 estimated at less than 500 spawning adults. Koch Dec., Ex. D (EPA Draft TMDL) at 104; Koch Dec.,
12 Ex. G (Draft Biological Opinion) at 354.

13 83. Reaches 3 and 4 of the Ventura River are occupied by steelhead and are rated as having
14 high conservation value. Koch Dec., Ex. G (Draft Biological Opinion) at 355-56. These reaches of the
15 River provide spawning and rearing habitat and serve as a migratory corridor for steelhead to upstream
16 reaches. *Id.* at 356-57.

17 84. In 2012, NMFS developed the Southern California Steelhead Recovery Plan, a guidance
18 document the goals of which are to prevent the extinction of southern California steelhead in the wild, to
19 ensure the long-term persistence of viable, self-sustaining populations of steelhead distributed across the
20 Southern California Distinct Population Segment, including the Ventura River, and to re-establish a
21 sustainable southern California steelhead sportfishery. Koch Dec., Ex. H (Southern California Steelhead
22 Recovery Plan) at 417.

23 85. Since southern California steelhead were listed as endangered in 1997, the impacts
24 leading to the listing remain prevalent and widespread. Koch Dec., Ex. H (Southern California Steelhead
25 Recovery Plan) at 447. These impacts include present or threatened destruction, modification or
26 curtailment of habitat or range, over-utilization of the steelhead population for commercial, recreational,
27 scientific, or educational purposes, disease and predation, inadequacy of existing regulatory
28 mechanisms, and other natural or human-made factors affecting continued existence. *Id.* at 448-453.

1 86. As to the steelhead population in the Ventura River, NMFS found the critical recovery
2 actions to include providing fish passage around dams and diversions, including Foster Park, and
3 developing and implementing water management plans for diversion operations such as Foster Park.
4 Koch Dec., Ex. H (Southern California Steelhead Recovery Plan) at 462, 514.

5 87. NMFS also found that diversions from the Ventura River at Foster Park contribute to the
6 present or threatened destruction, modification or curtailment of steelhead habitat or range and disease
7 and predation of steelhead. Koch Dec., Ex. H (Southern California Steelhead Recovery Plan) at 514.

8 88. The inadequacy of existing regulatory mechanisms for diversions at Foster Park
9 contributed to the listing and continuing impacts to endangered steelhead. Koch Dec., Ex. H (Southern
10 California Steelhead Recovery Plan) at 514.

11 89. Reaches 3 and 4 of the River are part of the lower basin. Koch Dec., Ex. I (Steelhead
12 Population Assessment) at 576 (map).

13 90. The fish abundance surveys conducted in the Ventura/Matilija basin over an eight-week
14 period between June 21 and August 11, 2011 counted or captured a total of 1,241 steelhead in the
15 Ventura River. Koch Dec., Ex. I (Steelhead Population Assessment) at 581.

16 91. In most previous years, and in 2011, overall steelhead abundance was highest in the
17 upper basin segment above Matilija Dam, intermediate in the middle basin segment between Robles
18 Diversion Dam and Matilija Dam, and lowest in the lower basin segment. Koch Dec., Ex. I (Steelhead
19 Population Assessment) at 604.

20 92. The upper basin was estimated to contain 77% of steelhead fry, with only 1% in the
21 lower basin. Koch Dec., Ex. I (Steelhead Population Assessment) at 604.

22 93. Relative abundance of juvenile steelhead was more evenly distributed among basin
23 segments in 2011, with 45% in the upper basin, 25% in the middle basin, and 29% in the lower basin.
24 Koch Dec., Ex. I (Steelhead Population Assessment) at 604.

25 **C. The Ventura River Is Impaired for Pumping and Diversion and Cannot Support its**
26 **Beneficial Uses**

27 94. The designated potential and existing beneficial uses of Reach 1 are municipal and
28 domestic supply, industrial service supply, agricultural supply, ground water recharge, freshwater

1 replenishment, warm freshwater habitat, cold freshwater habitat, wildlife habitat, rare, threatened, or
2 endangered species, migration of aquatic organisms, spawning, reproduction, and/or early development,
3 and wetland habitat. Koch Dec., Ex. E (Basin Plan) at 195.

4 95. The designated potential and existing beneficial uses of Reach 2 are municipal and
5 domestic supply, industrial service supply, agricultural supply, ground water recharge, freshwater
6 replenishment, warm freshwater habitat, cold freshwater habitat, wildlife habitat, rare, threatened, or
7 endangered species, migration of aquatic organisms, spawning, reproduction, and/or early development,
8 and wetland habitat. Koch Dec., Ex. E (Basin Plan) at 195.

9 96. The designated potential and existing beneficial uses of Reach 3 are municipal and
10 domestic supply, industrial service supply, agricultural supply, ground water recharge, freshwater
11 replenishment, warm freshwater habitat, cold freshwater habitat, wildlife habitat, rare, threatened, or
12 endangered species, migration of aquatic organisms, spawning, reproduction, and/or early development,
13 and wetland habitat. Koch Dec., Ex. E (Basin Plan) at 195.

14 97. The designated potential and existing beneficial uses of Reach 4 are municipal and
15 domestic supply, industrial service supply, agricultural supply, ground water recharge, freshwater
16 replenishment, warm freshwater habitat, cold freshwater habitat, wildlife habitat, rare, threatened, or
17 endangered species, migration of aquatic organisms, spawning, reproduction, and/or early development,
18 and wetland habitat. Koch Dec., Ex. E (Basin Plan) at 195.

19 98. The designated existing beneficial uses of Reach 5 are municipal and domestic supply,
20 industrial service supply, industrial process supply, agricultural supply, ground water recharge,
21 freshwater replenishment, warm freshwater habitat, cold freshwater habitat, wildlife habitat, rare,
22 threatened, or endangered species, migration of aquatic organisms, spawning, reproduction, and/or early
23 development, and wetland habitat. Koch Dec., Ex. E (Basin Plan) at 195.

24 99. In 1998, the State Board approved and issued California's 303(d) List which first listed
25 water pumping and diversions as impairing the designated beneficial uses of Reaches 3 and 4 of the
26 Ventura River. Ex. D (EPA Draft TMDL) at 92; *see also* 33 U.S.C. § 13370 (explaining that the State
27 Board is responsible for implementing Clean Water Act requirements, which include approval and
28 issuance of California's 303(d) List).

1 100. Currently, 16 years after the initial impairment listing, Reaches 3 and 4 of the Ventura
2 River remain listed on California’s 303(d) List as impaired for pumping and diversion. Koch Dec., Ex. J
3 (Reach 3 Impairment Listing) at 613-15; Koch Dec., Ex. K (Reach 4 Impairment Listing) at 619-21.

4 101. “[T]he River is considered an impacted habitat that is impaired by dams and diversion
5 structures that impede the seasonal migration of fish, and by groundwater extractions in the upper
6 Ventura Groundwater Basin and Ojai Groundwater Basin (which drains to San Antonio Creek) that
7 reduce river flows.” Koch Dec., Ex. O (Ventura Flows Study) at 662.

8 102. Although low and intermittent flows may be natural in the Ventura River system, low
9 flows due to pumping and diversion activities likely exacerbate the flow and water quality conditions in
10 Reaches 3 and 4. Koch Dec., Ex. D (EPA Draft TMDL) at 102.

11 103. The low flows in conjunction with other existing degraded water quality conditions affect
12 beneficial uses. Koch Dec., Ex. D (EPA Draft TMDL) at 102.

13 104. Beneficial uses impaired by pumping and diversions in Reaches 3 and 4 of the Ventura
14 River include cold freshwater habitat, wildlife habitat, rare, threatened, or endangered species, migration
15 of aquatic organisms, spawning, reproduction, and/or early development, and wetland habitat. *See* Ex. D
16 (EPA Draft TMDL) at 104.

17 **D. Ventura’s Water Rights, and Pumping and Diversions from the Ventura River**

18 105. Ventura has filed groundwater recordations for three diversions from wells in the vicinity
19 of Foster Park and a Statement of Water Diversion and Use under a pre-1914 claim to water from the
20 Ventura River. Koch Dec., Ex. N (PRA Response) at 654; Koch Dec., Ex. Q (Ventura Water Rights) at
21 1017-1027. These rights are identified by the following identification numbers: G561269, G561270,
22 G561025, and S010335. Koch Dec., Ex. N (PRA Response) at 654.

23 106. Based on the nature of its water rights, Ventura is not required to apply for or have permit
24 or license to appropriate water from the Ventura River. And Ventura, in fact, has no permit or license to
25 appropriate water from the River.

26 107. Ventura’s water right pursuant to S010335 was first put to use in 1870. Koch Dec., Ex. Q
27 (Ventura Water Rights) at 1023.

28 108. The Foster Park diversion/subsurface dam was constructed in 1906. Koch Dec., Ex. D

1 (EPA Draft TMDL) at 102. The subsurface dam is downstream of San Antonio Creek near the point at
2 which Reach 4 ends and Reach 3 begins; it also overlies the downstream end of the Upper Ventura River
3 Groundwater Basin (Foster Park Diversion). *Id.*

4 109. “The submerged dam is approximately 975 feet long and extends from the confluence of
5 Coyote Creek almost completely across the river channel,” the purpose of which is to bring subsurface
6 water flow to the surface in the Foster Park area for agricultural and domestic use. Koch Dec., Ex. G
7 (Draft Biological Opinion) at 355.

8 110. In the winter of 2005, Ventura’s facilities at Foster Park were damaged when large
9 storms caused the River to flood. Koch Dec., Ex. G (Draft Biological Opinion) at 346. Ventura applied
10 for a permit from the Army Corps of Engineers (Corps) to repair its well facilities in the Ventura River
11 pursuant to section 404 of the Clean Water Act, and the Corps requested concurrence from NMFS that
12 Ventura’s proposed repairs were not likely to adversely affect endangered steelhead in the River. *Id.*

13 111. In response to the Corps request, and after additional information was provided, NMFS
14 issued a Draft Biological Opinion finding that Ventura’s resumed pumping and diversion in the Foster
15 Park vicinity would likely jeopardize the continued existence of steelhead and would likely destroy or
16 adversely modify critical steelhead habitat. Koch Dec., Ex. G (Draft Biological Opinion) at 346-47, 379.

17 112. After NMFS issued its Draft Biological Opinion, Ventura did not pursue its permit
18 application submitted to the Corps, and did not complete the proposed repairs subject to Corps
19 jurisdiction.

20 113. However, pursuant to its water rights (G561269, G561270, G561025, and S010335),
21 Ventura currently operates 5 water production facilities at the Foster Park Diversion for municipal
22 supply: Nye Well No. 2, Nye Well No. 7, Nye Well No. 8, Nye Well No. 11, and Subsurface Collector.
23 Koch Dec., Ex. O (Ventura Flows Study) at 669, 692 (map), 694 (map).

24 114. Ventura has acknowledged that the appropriation rights Ventura obtained via deed from
25 Southern California Edison in 1923 for appropriation of 58,035 acre-feet per year allows appropriation
26 of more water than the Ventura River normally yields. Koch Dec., Ex. P (Summary of Biological
27 Opinion Timeline) at 1002.

28 115. In 2011, Ventura asserted a right to appropriate 72,397 acre-feet per year from the

1 Ventura River. Koch Dec., Ex. Q (Ventura Water Rights) at 1007.

2 116. Between 1980 and 2000, Ventura extracted an average of approximately 6,350 acre-feet
3 of surface flow and groundwater annually. Koch Dec., Ex. G (Draft Biological Opinion) at 361.

4 117. Between 2008 and 2013, Ventura extracted an average of approximately 2,970 acre-feet
5 of surface flow and groundwater annually. Koch Dec., Ex. R (Production and Flows Summary Table) at
6 1028-1029.

7 118. From January through July 2014, Ventura extracted approximately 1,955 acre-feet of
8 surface flow and groundwater from the Ventura River, which reflects an increase in the average monthly
9 extractions compared to the monthly averages for 2008 through 2013. Koch Dec., Ex. R (Production and
10 Flows Summary Table) at 1028-1029.

11 119. Ventura's extractions from January through July 2014 occurred during California's
12 current drought with 2014 expected to be the driest year on record. Koch Dec., Ex. U (Drought
13 Declaration) at 1053-59.

14 **E. Ventura's Pumping and Diversion from Reach 4 of the Ventura River**

15 120. The Foster Park Diversion can impact critical habitat and steelhead at any time of year
16 because Ventura withdraws water at all times of the year. Koch Dec., Ex. G (Draft Biological Opinion)
17 at 361.

18 121. However, negative impacts to steelhead and critical habitat from the Foster Park
19 Diversion are most likely to occur in the summer and fall when the river flows are low, i.e., April
20 through October. Koch Dec., Ex. G (Draft Biological Opinion) at 361.

21 122. Summer and fall withdrawals from the Foster Park Diversion decrease the functional
22 value of the downstream reaches as an oversummering area for juvenile steelhead. Koch Dec., Ex. G
23 (Draft Biological Opinion) at 361. NMFS considers the reduction in quantity and quality of
24 oversummering rearing sites from water diversion unfavorable for steelhead conservation. *Id.*

25 123. To avoid jeopardizing steelhead existence and destruction or adverse modification of
26 critical steelhead habitat, NMFS found that flows in the Ventura River at the Foster Park USGS gauge
27 no. 111185000 should not fall below 11 to 12 cfs. Koch Dec., Ex. G (Draft Biological Opinion) at 378-
28 79.

1 124. In June 2013, Ventura conducted a preliminary hydrogeological study and surface
2 water/groundwater interaction study for the City’s diversions at Foster Park. Koch Dec., Ex. O (Ventura
3 Flows Study) at 658. “The findings of this study indicate a flow threshold exists whereby when flows
4 decrease below the threshold, the steelhead habitat suitability declines significantly.” *Id.* The threshold
5 set by the Ventura study is 2 cfs. Koch Dec., Ex. O (Ventura Flows Study) at 659.

6 125. Ventura continues to pump and divert water from the Foster Park Diversion after water
7 levels in the River fall below 11 to 12 cfs. Koch Dec., Ex. R (Production and Flows Summary Table) at
8 1028-29, Ex. S (Ventura Source Report), Ex. T (Foster Park Flow Data).

9 126. Ventura continues to pump and divert water from the Foster Park Diversion in a manner
10 that contributes to water levels in the River falling below 11 to 12 cfs. Koch Dec., Ex. R (Production and
11 Flows Summary Table) at 1028-29, Ex. G (Draft Biological Opinion) at 378.

12 127. Ventura continues to pump and divert water from the Foster Park Diversion after water
13 levels in Ventura River fall below the 2 cfs threshold. Koch Dec., Ex. R (Production and Flows
14 Summary Table) at 1028-29, Ex. S (Ventura Source Report), Ex. T (Foster Park Flow Data).

15 128. Ventura continues to pump and divert water from the Foster Park Diversion in a manner
16 that contributes to water levels in Ventura River falling below the 2 cfs threshold. Koch Dec., Ex. R
17 (Production and Flows Summary Table) at 1028-29, Ex. G (Draft Biological Opinion) at 378, Ex. O
18 (Ventura Flows Study) at 659.

19 **F. The State Board Has Failed to Conduct an Analysis of the Reasonableness of**
20 **Ventura’s Use of the Ventura River and Has Failed to Consider Impacts to Public**
21 **Trust Resources Resulting from Ventura’s Use of the River**

22 129. On May 3, 2013, the State Board acknowledged that it did not possess any documents
23 that refer, relate, or pertain to a reasonable use analysis of Ventura’s use of Reach 4 of the Ventura
24 River. Koch Dec., Ex. N (PRA Response) at 653.

25 130. Accordingly, Channelkeeper is informed and believes, and thereon alleges, that the State
26 Board has never conducted an analysis of the reasonableness of Ventura’s use of Reach 4 of the Ventura
27 River.

28 131. On May 3, 2013, the State Board acknowledged that it did not possess any documents

1 that refer, relate, or pertain to a public trust analysis of Ventura’s use of Reach 4 of the Ventura River.
2 Koch Dec., Ex. N (PRA Response) at 653.

3 132. Accordingly, Channelkeeper is informed and believes, and thereon alleges, that the State
4 Board has never conducted an analysis to consider impacts to public trust resources resulting from
5 Ventura’s use of Reach 4 of the Ventura River.

6 133. On May 3, 2013, the State Board acknowledged that it did not possess any documents
7 that refer, relate, or pertain to modifications made to Ventura’s water rights. Koch Dec., Ex. N (PRA
8 Response) at 654.

9 134. Accordingly, Channelkeeper is informed and believes, and thereon alleges, that the State
10 Board has never made any modifications to Ventura’s use of Reach 4 of the Ventura River to conform
11 Ventura’s use to the Reasonable Use Doctrine or to the Public Trust Doctrine.

12 **G. The Ventura River TMDL Fails to Adequately Address the Pumping and Diversion**
13 **Impairments**

14 135. On June 28, 2013, the EPA approved the Ventura River TMDL, which established WLAs
15 to address algae, eutrophic conditions, and nutrients in the River. Koch Dec., Ex. L (Ventura River
16 TMDL Approval Letter) at 622-23; Koch Dec., Ex. M (Ventura River TMDL) at 627-28.

17 136. In response to public comments on the Ventura River TMDL that the TMDL will not
18 fully address the pumping and diversion impairments, EPA stated, “The proposed TMDLs were directed
19 at water quality problems associated with nutrient loadings in Reaches 3 and 4 of the Venture [sic]
20 River. USEPA acknowledges that the proposed TMDLs were not expected to address all issues in
21 Reaches 3 and 4 of the Ventura River that might be associated with pumping and water diversions.”
22 Koch Dec., Ex. L (Ventura River TMDL Approval Letter) at 625.

23 137. In response to public comments on the Ventura River TMDL that EPA should collaborate
24 with other agencies to complete a comprehensive assessment of pumping impacts, EPA stated, “Prior to
25 issuance of the draft TMDLs, USEPA worked with the LA RWQCB, the commenters, and other
26 stakeholders on a draft Memorandum of Agreement to put in place an alternative program of activities to
27 address the impacts of pumping and water diversions on steelhead trout habitat and other beneficial uses
28 of the Ventura River. This effort ended without success in September 2012. USEPA supports further

1 efforts by the Ventura River stakeholders to comprehensively assess the impacts of pumping and
2 diversion activities and address its detrimental impacts. USEPA believes that the State and other Federal
3 agencies may be in a better position to lead an assessment and planning process with the involvement of
4 local agencies, water users, nongovernmental organizations, and other stakeholders.” Koch Dec., Ex. L
5 (Approval Letter) at 625-26.

6 138. Accordingly, Channelkeeper is informed and believes, and thereon alleges that the
7 Ventura River TMDL fails to adequately address the pumping and diversion impairments of the Ventura
8 River.

9 139. Channelkeeper is informed and believes, and thereon alleges that the pumping and
10 diversion impairments of the Ventura River will continue notwithstanding the adoption and
11 implementation of the Ventura River TMDL.

12 **H. Ventura’s Use of the Ventura River from April through October is Unreasonable Thus**
13 **the State Board is Required to Conduct a Reasonable Use Analysis and Consider**
14 **Impacts to Public Trust Resources Resulting from Ventura’s Unreasonable Use**

15 140. Given Ventura’s pumping and diversion from Reach 4 of the Ventura River as described
16 in paragraphs 105-128, Channelkeeper is informed and believes, and thereon alleges, that Ventura’s use
17 of the River from April through October is unreasonable.

18 141. Given Ventura’s pumping and diversion from Reach 4 of the Ventura River as described
19 in paragraphs 105-128, Channelkeeper is informed and believes, and thereon alleges, that Ventura’s use
20 of the River impacts public trust resources in the River.

21 142. Given that the State Board determined that the beneficial uses of Reaches 3 and 4,
22 including cold freshwater habitat, wildlife habitat, rare, threatened, or endangered species, migration of
23 aquatic organisms, spawning, reproduction, and/or early development, and wetland habitat, are impaired
24 by pumping and diversion of water from those reaches of the Ventura River, Channelkeeper is informed
25 and believes, and thereon alleges that Ventura’s pumping and diversion from Reach 4 of the River is
26 unreasonable.

27 143. Because the State Board listed Reaches 3 and 4 of the Ventura River as impaired for
28 pumping and diversion in 1998, Channelkeeper is informed and believes, and thereon alleges that the

1 State Board knew or should have known for the past 16 years that Ventura’s pumping and diversion
2 from the River is unreasonable.

3 144. Because Ventura’s use of the Ventura River is unreasonable, Channelkeeper is informed
4 and believes, and thereon alleges that the State Board is required to conduct an analysis of Ventura’s use
5 of the River, including but not limited to an analysis to consider the impacts to public trust resources
6 resulting from Ventura’s use.

7 **VII. Counts for Relief**

8 **FIRST COUNT FOR RELIEF**

9 **Against Defendant City of Ventura**

10 **Pursuant to California Code of Civil Procedure § 1060 Channelkeeper Seeks a Declaration Stating**
11 **that Ventura’s Use of Reach 4 of the Ventura River From April through October Is an**
12 **Unreasonable Use In Violation of Article X, § 2 of the Constitution.**

13 145. Petitioner incorporates each paragraph of this complaint and petition, herein.

14 146. Channelkeeper contends that, given the existing conditions in the Ventura River,
15 Ventura’s use of the River is unreasonable.

16 147. Ventura continues to pump and divert water from the Foster Park Diversion during
17 critical summer months, e.g., April through October, and after water levels in the River fall below levels
18 determined to be critical minimum levels required to protect steelhead.

19 148. Ventura has failed and continues to fail to manage its use of the Ventura River in a
20 manner that avoids impacts to public trust resources.

21 149. Thus an actual controversy between Channelkeeper and Ventura exists concerning the
22 reasonableness of Ventura’s pumping and diversion from the Ventura River.

23 WHEREFORE, Petitioner prays for the relief set forth below.

24 **SECOND COUNT FOR RELIEF**

25 **Against Defendant State Board**

26 **Pursuant to California Code of Civil Procedure § 1085**
27 **The State Board Has Failed to Perform Its Mandatory Duties**
28 **Under Article X, § 2 of the Constitution.**

150. Petitioner incorporates each paragraph of this complaint and petition, herein.

151. Pursuant to Article X, section 2 of the California Constitution, the State Board has a

1 mandatory duty to limit Ventura’s use of the Ventura River to such water reasonably required for the
2 River’s beneficial uses.

3 152. The State Board has failed and continues to fail to limit Ventura’s use of the Ventura
4 River to such water reasonably required for the River’s beneficial uses, as the State Board has never
5 conducted an analysis of Ventura’s use of the Ventura River based on existing conditions of the River
6 that have changed over time.

7 153. The State Board has a mandatory duty to consider public trust resources in limiting
8 Ventura’s use of the Ventura River to such water reasonably required for the River’s beneficial uses.

9 154. The State Board has failed and continues to fail to limit Ventura’s use of the Ventura
10 River to such water reasonably required for the River’s beneficial uses, as the State Board has never
11 considered impacts to public trust resources resulting from Ventura’s use of the Ventura River.

12 155. Thus, in violation of Article X, section 2 of the California Constitution, the State Board
13 has failed and continues to fail to carry out its mandatory duty to limit Ventura’s use of the Ventura
14 River to such water reasonably required for the River’s beneficial uses.

15 156. The State Board’s ongoing and continuing failure to perform its mandatory duties has and
16 will cause Channelkeeper, its members, and the general public to suffer substantial, clear, and certain
17 irreparable injury. Unless and until the State Board follows the requirements of Article X, section 2 of
18 the California Constitution, Ventura’s unreasonable use of the River will continue. As a result,
19 Channelkeeper, its members, and the general public will not be assured of their rights to reasonable use
20 of the State’s waters as afforded by the California Constitution.

21 157. Channelkeeper has no plain, speedy, or adequate remedy in the ordinary course of law
22 because the State Board will continue to fail to conduct a reasonable use analysis of Ventura’s use of the
23 Ventura River unless compelled to do so by the Court.

24 WHEREFORE, Petitioner prays for the relief set forth below.

25 **THIRD COUNT FOR RELIEF**

26 **Against Defendant State Board**

27 **Pursuant to California Code of Civil Procedure § 1085**

28 **The State Board Has Failed to Perform Its Mandatory Duty Under § 275 of the Water Code.**

1 158. Petitioner incorporates each paragraph of this complaint and petition, herein.

2 159. Pursuant to section 275 of the Water Code, the State Board has a mandatory duty to
3 prevent Ventura's unreasonable use of the Ventura River.

4 160. The State Board has failed and continues to fail to prevent Ventura's unreasonable use of
5 the Ventura River, as the State Board has never taken action or instituted any proceedings to consider
6 Ventura's use of the Ventura River.

7 161. Thus, in violation of section 275 of the Water Code, the State Board has failed and
8 continues to fail to prevent Ventura's unreasonable use of the Ventura River.

9 162. The State Board's ongoing and continuing failure to perform its mandatory duty has and
10 will cause Channelkeeper, its members, and the general public to suffer substantial, clear, and certain
11 irreparable injury. Unless and until the State Board follows the requirements of section 275 of the Water
12 Code, Ventura's unreasonable use of the River will continue. As a result, Channelkeeper, its members,
13 and the general public will not be assured of their rights to reasonable use of the State's waters as
14 afforded by the Water Code.

15 163. Channelkeeper has no plain, speedy, or adequate remedy in the ordinary course of law
16 because the State Board will continue to fail to conduct a reasonable use analysis of Ventura's use of the
17 Ventura River unless compelled to do so by the Court.

18 WHEREFORE, Petitioner prays for the relief set forth below.

19 **FOURTH COUNT FOR RELIEF**

20 **Against Defendant State Board**

21 **Pursuant to California Code of Civil Procedure § 1085**

22 **The State Board Has Failed to Perform Its Mandatory Duty to Consider Impacts to Public Trust
23 Resources Resulting from Ventura's Use of the Ventura River.**

24 164. Petitioner incorporates each paragraph of this complaint and petition, herein.

25 165. Pursuant to the Public Trust Doctrine, the State Board has a mandatory duty to consider
26 impacts to public trust resources resulting from Ventura's use of the Ventura River.

27 166. In violation of its mandatory duty under the Public Trust Doctrine, the State Board has
28 failed and continues to fail to consider impacts to public trust resources resulting from Ventura's use of
the Ventura River.

1 f. Issue a writ of mandate enjoining the State Board from continuing to prejudicially
2 abuse its discretion by arbitrarily, capriciously, and without any evidentiary support failing to conduct an
3 analysis of Ventura's use of the Ventura River, pursuant to Article X, section 2 of the California
4 Constitution, section 275 of the Water Code, and/or the Public Trust Doctrine;

5 g. Award Channelkeeper its costs and fees for bringing suit for the State Board's
6 violations of State law as provided under Code of Civil Procedure section 1021.5; and/or

7 h. Grant such other relief as the Court deems just and proper.

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9 Dated: September 17, 2014

Respectfully Submitted,

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12 Caroline Koch
13 Daniel Cooper
14 LAWYERS FOR CLEAN WATER, INC.
15 Attorneys for Petitioner
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VERIFICATION

I, the undersigned, declare:

I am the Executive Director of Santa Barbara Channelkeeper, the Petitioner in this action. I have read the foregoing petition and know its contents. The facts alleged in the above petition are within my own knowledge and I know these facts to be true.

I declare under penalty of perjury that the foregoing is true and correct. This declaration was executed on September 17, 2014, in Santa Barbara, California.



Kira Redmond
Executive Director
Santa Barbara Channelkeeper

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