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MEMO

From: Congressman Devin Nunes

Date: 12/03/2008

Subject: new litigation concerning the Central Valley Project

Please find enclosed a copy of a complaint filed in the Sacramento Superior Court concerning the Central Valley Project.

This new lawsuit alleges a number of claims against the Bureau of Reclamation related to its operation of the Central Valley Project. Among these is that the Bureau has failed to comply with the requirements of Fish and Game Code section 5937 with respect to the operations of its dams, which requires that the operator of a dam release water to keep fish below the dam in good condition. You are undoubtedly aware of this state law because it was the basis of one of NRDC' claims against the Bureau in the Friant litigation.

Although this new lawsuit limits the section 5937 claims to dams in the Sacramento Valley and does not specifically mention Friant dam, there are numerous allegations about how the CVP affects fish in the San Joaquin River and the Delta and a public trust claim that is not limited to dams in the Sacramento Valley. The breadth of this public trust complaint would appear to include Friant: **There is nothing in the San Joaquin River settlement that would prevent the plaintiffs in this new lawsuit from pursuing the public trust claim in state court to require additional releases from Friant nor is there anything in the settlement that would prevent further lawsuits of this kind against Friant.**

Please feel free to call me if you have any questions.

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12

13 SUPERIOR COURT OF CALIFORNIA
14 COUNTY OF SACRAMENTO
15

16 California Water Impact Network (C-WIN)) Case No.:
and California Sportfishing Protection)
17 Alliance (CSPA), Felix Smith (an individual)) **COMPLAINT FOR MANDATE,**
) **DECLARATORY AND INJUNCTIVE**
18 Plaintiffs,) **RELIEF**
vs.)
19 California Department Water Resources, The) Date:
California State Water Resources Control) Time:
20 Board, the United States Bureau of) Dept:
21 Reclamation, and DOES 1-100,)
)
22 Defendants)
)
23

24 The California Water Impact Network (C-WIN), the California Sportfishing Protection
25 Alliance (CSPA), and Felix Smith (hereinafter "Plaintiffs") by and through their attorneys,
26 Michael B. Jackson and Julia R. Jackson allege on information and belief as follows:
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1 vigorous enforcement of environmental laws enacted to protect fisheries, habitat and water
2 quality. Members of both Plaintiff organizations reside along the Central Valley watershed and
3 in the Bay/Delta and enjoy the habitat and species that live there. Plaintiff's members visit the
4 Delta and appreciate the Delta ecosystem.

5 3. Plaintiffs' members view, enjoy, and use the Delta ecosystem. Plaintiffs'
6 members routinely engage in various recreational activities in the Delta – including boating,
7 fishing, and wildlife viewing – and have concrete plans to continue to do so in the future.
8 Plaintiffs' members derive significant use and enjoyment from the aesthetic, recreational, and
9 conservation benefits of the Delta ecosystem, including the Listed Species. Plaintiffs' members
10 have fished for various species of fishes in the Delta, including salmon. Plaintiffs' and their
11 members are deeply concerned about the health of the Delta ecosystem and its evident decline.
12 The decline of the Listed Species has had and continues to have a substantial negative impact on
13 Plaintiffs' organizational members, impairing their use and enjoyment of the Delta and the Listed
14 Species by, among other things, impairing the ability of Plaintiffs' members to fish for and view
15 salmon and other species. Additionally, the decline of native species in the Delta ecosystem,
16 such as the delta smelt, in that same system impair the natural functioning of the Delta
17 ecosystem. The decline of native species, proliferation of invasive species, and impaired function
18 of the Delta ecosystem adversely impacts Plaintiffs' members' use and enjoyment of the Delta
19 ecosystem and Listed Species. Defendants' violations of the state statutes have caused significant
20 harm to the Listed Species and the Delta, which in turn causes significant harm to the plaintiff
21 and its members.

22 4. Plaintiff Felix Smith is a California resident and a retired supervisor for the
23 United States Fish and Wildlife Service. Plaintiff has spent his life working on Bay/Delta
24 fisheries problems, and filed a complaint with Defendant Board regarding the application of
25 water to drainage impaired land on the west side of the San Joaquin Valley. Plaintiff Smith
26 derives significant use and enjoyment from the aesthetic, recreational, and conservation benefits
27 of the Delta ecosystem, including the Listed Species. Plaintiff has fished for various species of
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1 fishes in the Delta, including salmon. Plaintiff is deeply concerned about the health of the Delta
2 ecosystem and its evident decline.

3 5. Defendant State Water Resources Control Board (hereinafter “Board”) performs
4 both adjudicatory and regulatory functions of the state in allocating water rights and ensuring
5 water quality pursuant to the California Water Code. The State Water Board has broad authority
6 to carry out these functions, including the authority to hold hearings and conduct investigations
7 in any part of the state necessary to carry out the powers vested in it. It also may require a state
8 or local agency to investigate or report on technical factors, or comply with waste discharge
9 requirements involved in water quality control. The Board may subject water rights to terms and
10 conditions the board finds necessary to carry out a water quality control plan, and a water quality
11 control plan may require changes to water rights, and it may reserve its jurisdiction to enforce
12 these terms and conditions over time. The Board may hold an adjudicative proceeding to
13 consider any changes to water rights to implement the plan. The proceeding would be subject to
14 the administrative adjudication provisions of chapter 4.5 of the Administrative Procedure Act
15 (APA) (commencing with Gov. Code, § 11400). (See Cal. Code Regs., tit. 23, § 648
16 [incorporating provisions of the APA].) An adjudicative proceeding is used to receive evidence
17 to make a decision regarding “a legal right, duty, privilege, immunity, or other legal interest of a
18 particular person.” (Gov. Code, §§ 11405.20, 11405.50.)

19 6. Defendant Department of Water Resources (hereinafter “DWR”) is a state agency
20 responsible for the State of California's management and regulation of water usage. DWR
21 operates the State Water Project, including the Oroville Reservoir and dam, the Clifton Court
22 Forebay, the John E. Skinner Delta Fish Protective Facility, and the Harvey O. Banks Pumping
23 Plant.

24 7. Defendant Bureau of Reclamation (hereinafter “Bureau”) is a federal agency,
25 required by the Reclamation Act of 1902 to comply with state laws relating to the control,
26 appropriation, use, or distribution of water. Defendant Bureau operates the Central Valley
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1 Project, which reaches from the Cascade Mountains near Redding in the north some 500 miles to
2 the Tehachapi Mountains near Bakersfield in the south. The Project is comprised of 20 dams and
3 reservoirs, 11 powerplants, and 500 miles of major canal as well as conduits, tunnels, and related
4 facilities.

5 8. The true names and capacities of defendants sued in the Complaint under the
6 fictitious names of Does 1 through 100, inclusive, are unknown to plaintiffs who therefore sue
7 such defendants by such fictitious names.

8 9. Whenever reference is made in this complaint to any act of Defendants, such
9 allegation shall mean that each Defendant acted individually and jointly with the other
10 Defendants named in that cause of action.

11 10. At all relevant times, each of the Defendants has acted as an agent, representative,
12 or employee of each of the other Defendants and has acted within the course and scope of said
13 agency or representation or employment with respect to the causes of action in this complaint.

14 11. At all relevant times, each Defendant has committed the acts, caused others to
15 commit the acts, or permitted others to commit the acts referred to in this complaint and has
16 made, caused, or permitted others to ignore the legal obligations referred to in this complaint.

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18 **JURISDICTION AND VENUE**

19 12. This court has jurisdiction pursuant to Code of Civil Procedure § 1085.

20 13. Section 1085(a) provides that “[a] writ of mandate may be issued by any court to
21 any inferior tribunal, corporation, board, or person, to compel the performance of an act which
22 the law specially enjoins, as a duty resulting from an office, trust, or station. . . .”

23 14. Venue is proper in this court pursuant to Code of Civil Procedure § 393 because
24 some of the facilities at issue are located in Sacramento County and Petitioner’s cause, or some
25 part of that cause, arises in that county.

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27 **FACTUAL ALLEGATIONS**

1 15. The Bay-Delta is the largest estuary on the west coast of the Americas, and serves
2 as one of California’s most environmentally important and economically valuable ecosystems. It
3 provides a recreational resource for millions of people.

4 16. The Bay/Delta is home to 500,000 residents and is a major recreation and tourist
5 destination. The Delta’s 635 miles of boating waterways are served by 95 marinas containing
6 11,700 in-water boat slips and dry storage for 5,500 boats. In 2000, there were an estimated 2.13
7 million boating trips in the Delta.

8 17. Of the Delta’s 738,000 acres, roughly two-thirds support agriculture. More than
9 500,000 acres of the Delta currently are in agricultural production. The Delta also serves as a
10 drainage area for vast areas of agricultural land located in the watershed of the Sacramento, San
11 Joaquin and other creeks and rivers leading into the Bay/Delta.

12 18. The Delta supports more than 750 plant and animal species, including 130 species
13 of fish. The Delta serves as an important fishery habitat; it supports an estimated 25 percent of
14 all warm water and anadromous (meaning fish that move between fresh and salt-water)sport-
15 fishing species, and 80 percent of California’s commercial fishery species live in, or migrate
16 through, the Delta.

17 19. The Delta also provides habitat for a number of species that are protected by the
18 Endangered Species Act (“ESA”), including the Sacramento winter-run chinook salmon, Central
19 Valley spring-run chinook salmon (*Onchorhynchus tshawytscha*), Central Valley steelhead
20 (*Onchorhynchus mykiss*), and delta smelt (*Hypomesus transpacificus*, collectively, the “Listed-
21 Species”).

22 20. The Sacramento River winter-run chinook salmon is an anadromous fish that
23 migrates through the Delta to the upper Sacramento River from December to May. Anadromous
24 fish spend most of their life in the ocean but must enter fresh water rivers and streams to spawn.
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1 21. The National Marine Fisheries Service (“NMFS”) listed the Sacramento River
2 winter-run chinook salmon as an endangered species on January 4, 1994. 59 Fed. Reg. 440 (Jan.
3 4, 1994).

4 22. NMFS designated the Bay/Delta as critical habitat for the Sacramento River
5 winter-run chinook salmon on June 16, 1993. 58 Fed. Reg. 33,212 (June 16, 1993).

6 23. The Central Valley spring-run chinook salmon is an anadromous fish that
7 migrates through the Delta to the upper Sacramento River from March to July.
8

9 24. NMFS listed the Central Valley spring-run chinook salmon as a threatened
10 species on September 16, 1999. 64 Fed. Reg. 50,394 (Sept. 16, 1999).

11 25. NMFS designated the Bay/Delta as critical habitat for the Central Valley spring-
12 run chinook salmon on September 2, 2005. 70 Fed. Reg. 52,488 (Sept. 2, 2005).

13 26. The state's largest salmon run (the Central Valley fall Chinook salmon), while not
14 listed as an endangered or threatened species, is suffering an unprecedented collapse which is
15 part of a broader decline throughout the West.
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17 27. The collapse of the California salmon run has triggered severe fishing restrictions
18 that have resulted in the complete closure of commercial and recreational salmon fishing in
19 California for the 2008 fishing season.
20

21 28. The number of chinook, or king, salmon returning from the Pacific Ocean to
22 spawn in the Sacramento River and its tributaries this past fall dropped 67 percent from a poor
23 year earlier, according to an internal memo to members of the Pacific Fishery Management
24 Council published in many newspapers in California around the first of February, 2008.

25 29. Indications are that the closure of salmon fishing will extend beyond the 2008
26 fishing season, and into the 2009 season.
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1 30. The Central Valley steelhead is a coastal steelhead that occupies the Sacramento
2 and San Joaquin rivers and their tributaries. Steelhead and rainbow trout are the same species;
3 the distinguishing characteristic between these fish is that steelhead are anadromous whereas
4 rainbow trout permanently reside in freshwater.

5 31. NMFS listed the Central Valley steelhead as a threatened species on March 19,
6 1998. 63 Fed. Reg. 13,347 (March 19, 1998).

7 32. NMFS designated the Bay/Delta as critical habitat for the Central Valley
8 steelhead on September 2, 2005. 70 Fed. Reg. 52,488 (Sept. 2, 2005).

9 33. The delta smelt is a small translucent fish with a narrow geographic range limited
10 to low salinity and freshwater habitats of the Delta. 58 Fed. Reg. 12,854 (March 5, 1993) (final
11 rule listing the delta smelt as threatened).

12 34. The delta smelt is the only true native estuarine fish species found in the Delta.

13 35. The Fish and Wildlife Service (“FWS”) listed the delta smelt as a threatened
14 species on March 5, 1993. 58 Fed. Reg. at 12,854.

15 36. FWS designated the Bay/Delta as critical habitat for the delta smelt on December
16 19, 1994. 59 Fed. Reg. 65,256 (Dec. 19, 1994).

17 37. Millions of Californians depend upon the Bay-Delta Estuary as one of the sources
18 of their drinking water.

19 38. An extraordinary variety of wildlife, including many species found nowhere else,
20 lives in the Bay-Delta. Many other species depend upon the Bay-Delta for migratory corridor
21 habitat, and several commercial and sport fisheries depend upon the Bay-Delta for their
22 continued existence.

23 39. The Bay-Delta Estuary is one of California’s most threatened ecosystems.
24 Violations of federal and state water quality standards are chronic, and the California State Water
25

1 Resources Control Board has designated the Delta's channels, the Sacramento and San Joaquin
2 Rivers, and areas throughout the Bay as water-quality-limited water bodies. *See* Final 2002
3 Clean Water Act Section 303(d) List of Water Quality Limited Segments, Region 2 (San
4 Francisco) and Region 5 (Central Valley).

5 40. Many of the Bay-Delta's fish are threatened with extinction, and in the last three
6 years populations of several previously healthy species are suffering catastrophic declines. Other
7 species, including plankton and other food organisms that underpin the Bay-Delta's entire food
8 chain, are in similarly poor health.

9 41. In 1992, Congress passed legislation, the Central Valley Project Improvement
10 Act, specifically intended to restore the Bay/Delta's fishery. Tens of millions of dollars have
11 gone to restoration projects, but fishery populations have continued to dramatically decline.

12 42. A primary cause of these problems is the network of massive federal and state
13 diversion pumps that supply the Central Valley Project (CVP) and State Water Project (SWP).

14 43. The CVP is the United States government's largest water storage and diversion
15 project, and one of the largest water projects in the world.

16 44. The CVP diverts and delivers an annual average of about seven million acre-feet
17 of water, and manages an average of approximately 12 million acre-feet of water per year,
18 including water for wildlife refuges in the Central Valley watershed.

19 45. Much of the CVP water is pumped from the project's Tracy Pumping Plant,
20 located at the southern edge of the Delta, into the Delta-Mendota and San Luis canals, which
21 transport that water to predominantly agricultural users south of the Delta.

22 46. DWR's SWP is a similarly massive water storage and diversion project. More
23 than 20 million people rely on water that comes at least partly from the SWP.

24 47. Table A of the SWP contracts allocate approximately 4.2 million acre-feet of
25 annual delivery amounts. Almost all of Table "A" water is pumped from the SWP's Banks
26 pumping facility, located at the southern edge of the Delta close to the Clifton Court Forebay,
27 into Bethany Reservoir and the California Aqueduct. The California Aqueduct then conveys the
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1 water to southern California users, with the largest contractors for its water including the Kern
2 County Water Agency and the Metropolitan Water District of Southern California.

3 48. The SWP is the subject of a coordinated operations agreement with the CVP, and
4 shares the use of the San Luis Reservoir and other facilities with the CVP, and the two projects
5 have received a permit from the State Water Resources Control Board to operate their projects
6 through joint point of diversion (JPOD) arrangement.

7 49. The two projects' pumps have altered the entire Bay-Delta ecosystem, reducing
8 the quantity and quality of freshwater within the Bay-Delta, altering flow patterns, and killing
9 millions of fish over the last half-century.

10 50. Winter exports from the CVP and SWP have increased since the late 1990's.

11 51. Winter flows of the Old River and Middle River [ORMR] have been consistently
12 negative (e.g., net flow is upstream) since 2000. The Old and Middle Rivers are channels of the
13 San Joaquin River that are used by DWR and the Bureau as routes to draw Sacramento River
14 water through the Bureau's Delta Cross Channel and from the confluence of the Sacramento and
15 San Joaquin Rivers across the Delta to the project pumps and hence to the California Aqueduct
16 and the Delta Mendota Canal for contractor use.

17 52. Reverse flows that draw water through numerous Delta channels and sensitive
18 nursery areas to the export facilities bring with them an array of pollutants harmful to aquatic
19 life.

20 53. Reverse flows in Old and Middle Rivers cause small fish, phytoplankton, and
21 juvenile stages of species important to the food web of the Delta to be drawn into the project
22 pumps and killed or exported out of the Bay/Delta.

23 54. Fish screens at each project site are intended to shield larger, more mature fish
24 from being directly sucked into the export pumps.

25 55. Due to the strength of the reverse flows caused by the draw of the pumps, many
26 of these fish cannot swim against the current entering the diversion facilities and become
27 entrained on the screens or destroyed in the pumps themselves.

1 56. Periodically, agents of Defendant Bureau and Defendant DWR “salvage” (scrape
2 off) live fish off the screens and transport them in trucks for downstream reentry into the Delta.

3 57. Many of these fish reenter the Delta weakened and disoriented and quickly die.
4 Those who do not immediately die are at a significantly increased risk of predation by other fish
5 at points of re-entry downstream.

6 58. In recent years, there appears to have been a step increase in “salvage density”
7 (number of fish killed per acre-foot of water diverted) of adult Delta smelt, threadfin shad, and
8 longfin smelt at the SWP and CVP pumps, even as these fish have declined in species numbers
9 (population).

10 59. There is a strong causal relationship between winter “salvage” of adult Delta
11 smelt and the occurrence of negative (reverse) flows in Old and Middle Rivers.

12 60. Recent modeling analyses indicate that losses of larval Delta smelt at the SWP
13 and CVP pumps can be very high (up to 40 percent) in early spring under certain conditions that
14 can occur in some dry years

15 61. Preliminary results from Bodega Marine Laboratory suggest that losses of early
16 (winter) spawning Delta smelt and their progeny may be especially important to the population.
17 Their evidence indicates that the quality of eggs and young from these winter spawning events
18 may be superior to those produced in spring.

19 62. Science indicates that unless there is a decrease in the amount of water delivered
20 through those pumps, continued pumping at the current levels will inevitably produce significant
21 adverse environmental effects, thus compounding already existing problems.

22 63. The flow regime of the Bay/Delta’s watershed rivers (primarily the Sacramento
23 and San Joaquin rivers) has been fundamentally altered by the construction and operation of
24 upstream project dams and subsequent construction and operation of Delta pumping facilities to
25 export water into Defendant DWR’s California Aqueduct and the Delta-Mendota Canal.

26 64. Historically, the Bay/Delta’s hydrology was characterized by highly variable
27 flows during winter and rapid attenuation of flows in the summer.

1 65. Under the present hydrologic regime, controlled by the projects, the magnitude of
2 winter flows has been significantly reduced while the magnitude and consistency of summer
3 flows for water export has dramatically increased.

4 66. Populations of anadromous and pelagic fish have dropped dramatically in recent
5 years, due to insufficient stream flows and export pumping during critical times of the year,
6 impairment of migration due to dams, and unscreened agriculture and municipal diversions.

7 67. The Central Valley upstream watersheds sustain fall and spring-run chinook
8 salmon and their habitat.

9 68. The management and use of water by the USBR, DWR and their contractors
10 under permitted water rights issued by the SWRCB have adversely affected the fall-run Chinook
11 salmon and their habitat.

12 69. The Central Valley spring-run Chinook salmon species have been listed as
13 threatened by the NMFS pursuant to the federal ESA.

14 70. The Central Valley watersheds also sustain a remnant population of steelhead
15 trout (*Oncorhynchus mykiss*) and their habitat. In 1998, the “Evolutionarily Significant Unit” of
16 Central Valley steelhead was listed as “threatened” by NMFS pursuant to the provisions of the
17 federal Endangered Species (ESA).

18 71. The Central Valley rivers and the Bay/Delta were listed as critical habitat for
19 Central Valley steelhead trout in February 2000 and September 2005.

20 72. There are no mandatory minimum daily flows from upstream dams that are
21 sufficient to protect the anadromous and pelagic fisheries of the Central Valley Rivers and the
22 Bay/Delta below the Central Valley rim dams owned by DWR and the Bureau.

23 73. The Bureau and DWR control most releases of water stored in Central Valley
24 watershed dams, with the exception of releases for flood control purposes, water in the minimum
25 pool and prior riparian entitlements.

26 74. Restoration of California’s anadromous fish populations is mandated by the
27 Salmon, Steelhead, and Anadromous Fisheries Program Act of 1988 (full cite) which states that
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1 it is the policy of the State to significantly increase the natural production of salmon and
2 steelhead by the end of the 20th century.

3 75. Delta pumping by the state and federal projects has been identified as a cause
4 (stressor) of the general decline of the health of the San Francisco Bay/Delta estuary by
5 numerous scientific and legal investigations including: 1) the SWRCB Decision 1485 hearing
6 record; 2) the 1995 Water Quality Control Plan EIR/EIS; 3) the CALFED programmatic
7 EIS/EIR; and, 4) the SWRCB Decision 1641 hearing record, and 5) even the unlawful 2004
8 USBR Operating Criteria and Plan.

9 76. Operation of the projects without harm to listed species is a requirement of both
10 project permits and existing law and the above-summarized evidence indicates that project
11 operations are presently harming the pelagic fishery of the Bay/Delta.

12 77. On March 18, 2008, Plaintiffs filed a complaint before the SWRCB against the
13 U.S. Bureau of Reclamation and the California Department of Water Resources for violations of
14 the Public Trust, waste and unreasonable use, and unreasonable method of diversion on the
15 Central Valley rivers.

16 78. Plaintiffs further requested that, following Defendant's investigation of the
17 complaint, that Defendants grant Plaintiffs an evidentiary hearing in accordance with the
18 California Code of Federal Regulations and the State Water Board complaint procedure.

19 79. On October 28, 2008, Plaintiffs received a letter from the SWRCB stating that the
20 CWIN/CSPA complaint was dismissed by the State Board without investigation or hearing.
21 Plaintiff has exhausted any administrative remedies other than filing this action.

22 **FIRST CAUSE OF ACTION**

23 **Violation of California Public Trust Doctrine**

24 80. Plaintiffs restate and reallege and incorporate herein the foregoing paragraphs 1
25 through 79 of this Complaint.

26 81. Defendant Board has an affirmative duty to protect trust resources. *See Illinois*
27 *Central Railroad v. Illinois*, 146 U.S. 387; and *National Audubon Society v. Superior Court*

1 (1983) 33 Cal.3d 419 (The state may not abdicate its supervisory role any more than the state
2 may abdicate its police power); *see also* Stevens, The Public Trust: A Sovereign's Ancient
3 Prerogative Becomes the People's Environmental Right, 14 U.C. Davis Law Review 195, 223.

4 82. Over the years and continuing to the present time, the Defendant Board's
5 permitting process and Defendants DWR's and Bureau's methods of diversion caused there to be
6 insufficient in stream flow and Delta outflow to support the environmental needs of the estuary
7 which has caused injury to the ecosystem and to members of the public, including Plaintiffs.

8 83. Since 2000, Bay/Delta exports have been substantially increased to meet
9 downstream water demands.

10 84. As a result of increased exports, both the pelagic fishery and the salmon fishery
11 have abruptly and substantially declined.

12 85. With the increase in pumping since 2000, the mid-water trawls that monitor
13 species population data indicate a sharp drop in population totals for salmon, Delta smelt, split-
14 tail, striped bass, long-fin smelt and the food web that supports them.

15 86. Present ecological conditions in the Bay/Delta have contributed to the closure of
16 the commercial and sport-fishing fishing seasons off the California Coast, resulting in the
17 complete loss of recreational fishing opportunities for anglers.

18 87. On information and belief, unless enjoined Defendants will continue to violate the
19 Public Trust, as described above.

20 88. In light of the Defendants' failure to comply with the California Public Trust
21 doctrine, and the significant likelihood of repeated violations in the future, the Defendants must
22 be permanently enjoined from continuing to divert water from the Bay/Delta until such a time as
23 Defendant Board has an evidentiary hearing to establish reasonable water diversions that protect
24 the Public Trust. If Defendants are not so enjoined, Plaintiffs will suffer irreparable injury for
25 which there is no adequate remedy at law.

26 89. An actual controversy exists between Plaintiffs on the one hand and Defendants
27 on the other regarding the degree to which the California Public Trust doctrine protects the
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1 Bay/Delta estuary and mandates Defendant Board’s enforcement. Specifically, Plaintiffs contend
2 and Defendants deny that Defendant Board’s lack of enforcement of the conditions of their
3 respective water rights permits of Defendant DWR and Defendant Bureau violate the Public
4 Trust and injure Plaintiffs. As an actual controversy exists, Plaintiffs are entitled to and hereby
5 seek a declaration that Defendant Board has violated its affirmative duty to protect the public
6 trust.

7 **SECOND CAUSE OF ACTION**

8 **Violation of Article 10, Section 2 of the California Constitution:**
9 **Unreasonable Method of Diversion**

10 90. Plaintiffs restate and reallege and incorporate herein the foregoing paragraphs 1
11 through 89 of this Complaint.

12 91. Article X, Section Two of the California Constitution states that “the right to
13 water or to the use or flow of water in or from any natural stream or water course in this State is
14 and shall be limited to such water as shall be reasonably required for the beneficial use to be
15 served, and such right does not and shall not extend to the waste or unreasonable use or
16 unreasonable method of use or unreasonable method of diversion of water.”

17 92. Water levels in some Delta channels are drawn by operation of the SWP and CVP
18 project pumps to unacceptably low levels harming fish and riparian diverters in the process.

19 93. The CVP/SWP Method of Diversion from the Bay/Delta at the export pumps to
20 sustain present export levels is unreasonable, as it has overwhelmingly contributed to the pelagic
21 fish decline, and the listing of several species as endangered.

22 94. Over the years and continuing to the present time, the Defendant Board’s
23 permitting process and Defendant DWR and Bureau’s methods of diversion caused there to be
24 insufficient in stream flow and Delta outflow to support the environmental needs of the estuary
25 which has caused injury to the ecosystem and to members of the public, including Plaintiffs.

26 95. Over the years and continuing to the present time, Defendants, and each of them,
27 have used an unreasonable method of diversion of water from their facilities in the Bay/Delta in
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1 violation of Article 10, Section Two of the California Constitution by continuing to increase
2 volumes of water drawn from the Bay/Delta ecosystem, and limiting and ignoring research and
3 information that indicated this method of diversion is causing a collapse in the Pelagic fisheries
4 in the Bay/Delta and harm to the listed salmonids and other fish and wildlife.

5 96. On information and belief, unless enjoined Defendants will continue to violate the
6 California Constitution, as described above.

7 97. In light of the Defendants' failure to comply with the California Constitution, and
8 the significant likelihood of repeated violations in the future, the Defendants must be
9 permanently enjoined from continuing to divert water from the Bay/Delta until such a time as
10 Defendant Board has an evidentiary hearing to establish reasonable water diversions that
11 conform to the mandates of Article X, Section Two of the California Constitution. If Defendants
12 are not so enjoined, Plaintiffs will suffer irreparable injury for which there is no adequate remedy
13 at law.

14 98. An actual controversy exists between Plaintiffs on the one hand and Defendants
15 on the other regarding the degree to which the Article 10, Section Two of the California
16 Constitution protects the Bay/Delta estuary and mandates Defendant Boards's enforcement.
17 Specifically, Plaintiffs contend and Defendant Board denies that the Board's inability or
18 unwillingness to halt the fishery crash and/or alter the water rights permits of Defendants DWR
19 and Bureau to correct existing problems constitutes a violation of the state constitutional
20 mandate against unreasonable use of water or unreasonable methods of diversion, causing injury
21 to Plaintiffs. As an actual controversy exists, Plaintiffs are entitled to, and hereby seek, a ruling
22 that Defendant Board has Article X, Section 2 of the California Constitution by dismissing
23 Plaintiffs' complaint.

24 **THIRD CAUSE OF ACTION**

25 **Violation of Article 10, Section 2 of the California Constitution: Unreasonable Use**

26 99. Plaintiffs restate and reallege and incorporate herein the foregoing paragraphs 1
27 through 98 of this Complaint.

1 100. Article X, Section Two of the California Constitution states that, due to the
2 conditions prevailing in the State “the general welfare requires that the water resources of the
3 State be put to beneficial use to the fullest extent of which they are capable, and that the waste or
4 unreasonable use or unreasonable method of use of water be prevented, and that the conservation
5 of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the
6 interest of the people and for the public welfare.”

7 101. Further, Article X, Section Two specifically states that “the right to water or to the
8 use or flow of water in or from any natural stream or water course in this State is and shall be
9 limited to such water as shall be reasonably required for the beneficial use to be served, and such
10 right does not and shall not extend to the waste or unreasonable use or unreasonable method of
11 use or unreasonable method of diversion of water.”

12 102. Defendant Bureau has been delivering Delta water to unsuitable soils in the
13 Western San Joaquin Valley since 1951, through the Delta-Mendota Canal, and since 1967
14 through the federal portion of the State Aqueduct.

15 103. Some 150,000 upslope acres in the Westlands Water District, now known as Area
16 II, were originally excluded from boundaries the original San Luis Unit because the salty soils
17 were considered non-irrigable, or unfit for irrigation. *See* 1979 Special Congressional Task
18 Force Report on the San Luis Unit of the Central Valley Project. Public Law 94-36.

19 104. High levels of selenium in western San Joaquin Valley soils were first
20 documented in the mid-1980s, when species, including small mammals, fish, and birds living in
21 habitats around evaporation ponds and canals on the west side of the San Joaquin Valley began
22 exhibiting deformities associated with selenium poisoning.

23 105. Tests conducted in the area by the Central Valley Regional Water Quality Control
24 Board and the United States Geological Survey discovered toxic amounts of salts, selenium,
25 mercury, lead, nickel, molybdenum, and boron, coming from Bureau water applied to contractors
26 land on the western part of the San Joaquin Valley.

1 106. As a result, the Kesterson reservoir, which impounded drainage water and served
2 irrigators in the west side of the San Joaquin Valley, was ordered closed by the Board in 1985.

3 107. In their decision to close Kesterson reservoir, Defendant Board declared the
4 contaminated drainage water a “public nuisance.”

5 108. Despite this admission, Defendant Board has taken no action to halt the irrigation
6 of these high selenium lands for over 23 years.

7 109. No disposal site has been established for the millions of tons of salts, selenium,
8 mercury, lead, nickel, molybdenum, and boron, coming from Bureau water applied to contracts
9 serving irrigators in the western part of the San Joaquin Valley.

10 110. Due to the lack of proper disposal, the toxins have continued to seep into the
11 groundwater and flow into sloughs, streams, and creeks leading to the San Joaquin river and
12 ultimately to the Bay/Delta estuary and Suisun Marsh for over twenty-three years.

13 111. Since 1985, this flow of contaminated surface and groundwater from the drainage
14 impaired lands has entered the San Joaquin river and has been transported to the South Delta,
15 violating water quality standards in the San Joaquin River and the South Delta waterways.

16 112. Much of the marginal upslope lands on the west side now being irrigated have
17 high levels of selenium and other trace elements and/or heavy metals.

18 113. Continued irrigation of low quality upslope lands insures the permanent
19 contamination and utter destruction of downslope lands that were once very high quality
20 farmlands (i.e. the area around Mendota and all along the San Joaquin River flood plain.

21 114. Since at least 1967, Defendant Bureau has caused an unreasonable use of water in
22 violation of Article X, Section Two of the California Constitution by applying Bay/Delta project
23 water to drainage impaired land on the west side of the San Joaquin Valley, and have limited
24 ignored research and information that indicated this application of water was contributing to the
25 collapse in the Pelagic fisheries in the Bay/Delta and harm to the listed salmonids.

26 115. Over the years and continuing to the present day, Defendant Board has failed to
27 enforce the provisions of Article 10, Section Two of the California Constitution against
28

1 Defendant Bureau for its unreasonable application of water to drainage impaired land on the west
2 side of the San Joaquin Valley, and have ignored research and information indicating this
3 application of water was contributing to the collapse in the Pelagic fisheries and ecosystem in the
4 Bay/Delta and harm to the listed salmonids.

5 116. On information and belief, unless enjoined Defendant Bureau and Defendant
6 Board will continue to violate the California Constitution, as described above.

7 117. In light of the Defendants' failure to comply with the California Constitution, and
8 the significant likelihood of repeated violations in the future, the Defendants Bureau and Board
9 must be permanently enjoined from continuing to divert water from the Bay/Delta and applying
10 it to drainage impaired lands. If Defendants are not so enjoined, Plaintiffs will suffer irreparable
11 injury for which there is no adequate remedy at law.

12 118. An actual controversy exists between Plaintiffs on the one hand and Defendants
13 on the other regarding the degree to which the Article 10, Section Two of the California
14 Constitution protects the Bay/Delta estuary and mandates Defendant Board's enforcement and
15 Defendant Bureau's application of water. Specifically, Plaintiffs contend and Defendants deny
16 that Defendant Board's lack of enforcement of the protective conditions of the water rights
17 permits of DWR and the Bureau violate the Constitution and injure Plaintiffs. As an actual
18 controversy exists, Plaintiffs are entitled to, and hereby seek, a ruling that Defendant Board has
19 Article X, Section 2 of the California Constitution by dismissing Plaintiffs' complaint.

20 **FOURTH CAUSE OF ACTION**

21 **Violation of California Fish and Game Code § 5937**

22 119. Plaintiffs restate and reallege and incorporate herein the foregoing paragraphs 1
23 through 118 of this Complaint.

24 120. California Fish and Game Code Section 5937 states that "the owner of any dam
25 shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway,
26 allow sufficient water to pass over, around or through the dam, to keep in good condition any
27 fish that may be planted or exist below the dam."

1 121. Fish and Game Code Section 5937 creates an express duty in dam owners to
2 maintain adequate cold water storage, and to release this water to maintain, at all times, the fish
3 and fish habitat below the dams.

4 122. Over the years and continuing to the present time, the Defendants have violated
5 California Fish and Game Code Section 5937 by allowing water storage in Shasta, Folsom, New
6 Melones, and Oroville dams to fall below the level in which adequate cold water storage is
7 sufficient to maintain the fish below the dams in good condition.

8 123. Recent examination of temperature regimes below major rim dams surrounding
9 the Central Valley demonstrates that protective temperature criteria are routinely exceeded.

10 124. The principle cause of this storage shortfall is the cannibalization of north-of-
11 Delta storage over the last several years to supply south-of-Delta storage in Semi-Tropic and
12 Kern water banks and Diamond Valley Reservoir.

13 125. These low flows have, and will likely cause and contribute to reductions in
14 spawning and rearing habitat, lethal temperatures for fish, and increases in pollutant
15 concentration the rivers of the Bay/Delta watershed.

16 126. Given the dramatic crash of pelagic species and the recent acceleration in the
17 long-term decline in salmonid escapement, these expected low flows could trigger a catastrophic
18 disaster to fisheries already hovering on the edge of extinction.

19 127. In light of the Defendants' failure to comply with California Fish and Game Code
20 Section 5937, and the significant likelihood of repeated violations in the future, the Defendants
21 Bureau and DWR must be permanently enjoined from continuing to release water from Shasta,
22 Folsom, New Melones, and Oroville dams in order to supply water exports from the Bay/Delta.
23 If Defendants are not so enjoined, Plaintiffs will suffer irreparable injury for which there is no
24 adequate remedy at law.

25 128. An actual controversy exists between Plaintiffs on the one hand and Defendants
26 on the other regarding the degree to which the California Fish and Game Code § 5937 protects
27 the Bay/Delta estuary and mandates that the project Defendants release water from their dams at
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1 times necessary to protect fish and wildlife in the Bay/Delta. Specifically, Plaintiffs contend and
2 Defendants deny that Defendants actions injure Plaintiffs. As an actual controversy exists,
3 Plaintiffs are entitled to, and hereby seek, a ruling that Defendants DWR and Bureau be ordered
4 to release sufficient water necessary to keep fish in good condition at all times below Shasta,
5 Folsom, Oroville, and New Melones reservoirs.

6 **FIFTH CAUSE OF ACTION**

7 **Violation of Porter-Cologne Act**

8 129. Plaintiffs restate and reallege and incorporate herein the foregoing paragraphs 1
9 through 128 of this Complaint.

10 130. Consistent with the Clean Water Act, the Porter-Cologne Act directs the nine
11 regional water quality control boards to ensure that their basin plans (1) designate one or more
12 “beneficial uses” for a particular water body and (2) to specify “water quality objectives”
13 necessary to “ensure the reasonable protection of beneficial uses and the prevention of nuisance.”
14 Water Code § 13421.

15 131. After water quality standards are established, “[t]he actual administration of the
16 Porter-Cologne Act rests on the power of the regional boards to prescribe waste discharge
17 requirements for all persons discharging waste into inland surface waters enclosed bays and
18 estuaries within their jurisdiction.” *Waterkeepers Northern California v. State Water Resources*
19 *Control Bd.* (2002) 102 Cal. App. 4th 1448, 1452 (citing Water Code § 13263).

20 132. The Board assigned DWR and the Bureau the responsibility for meeting salinity
21 objectives in the 1979 Delta Plan, D-1485, the 1995 Delta Plan, and D-1641, the Board Water
22 Rights decision implementing the 1995 Water Quality Control Plan.

23 133. The San Joaquin River Salinity and Boron TMDL also assign responsibility for
24 controlling salt delivered to the San Joaquin Valley from the Delta to the Bureau.

25 134. The state and federal export projects, which typically export about 10,000 to as
26 much as 13,000 cubic feet per second (cfs) of Delta water, increase the loading, transport, and
27 fate in Delta waters of a variety of pollutants, such as mercury, organochlorine pesticides, PCBs,
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1 organophosphorus and other pesticides, herbicides, aquatic plant nutrients, aquatic life toxic
2 burden, etc. These contaminants accumulate in sediments and are absorbed from the water
3 column and sediments by benthic organisms which initiate bioaccumulation of these toxins up
4 the aquatic and terrestrial food chains.

5 135. A recent review of discharge and ambient monitoring data collected by industrial
6 and municipal dischargers, under the NPDES program, reveal numerous violations of
7 fundamental water quality standards that apply to these and other toxic contaminants.

8 136. Examination of temperature regimes below major rim dams surrounding the
9 Central Valley demonstrates that protective temperature criteria are routinely exceeded.

10 137. Salinity standards have and continue to be routinely violated by the projects.

11 138. In light of Defendants DWR and Bureau's failure to comply with the Porter-
12 Cologne Act, and Defendant Board's failure to enforce the Act, and the significant likelihood of
13 repeated violations in the future, Defendants DWR and Bureau must be permanently enjoined
14 from continuing to export water from the Bay/Delta until such a time as they fully comply with
15 the Porter-Cologne Act. If Defendants are not so enjoined, Plaintiffs will suffer irreparable injury
16 for which there is no adequate remedy at law.

17 139. An actual controversy exists between Plaintiffs on the one hand and Defendants
18 DWR and Bureau on the other regarding the degree to which the Porter-Cologne Act protects the
19 Bay/Delta estuary and mandates Board enforcement. Specifically, Plaintiffs contend and
20 Defendants DWR and Bureau deny that they are in violation of the Porter-Cologne Act. As an
21 actual controversy exists, Plaintiffs are entitled to, and hereby seek, a ruling that Defendants
22 DWR and Bureau have violated the Porter-Cologne Act and Defendant Board has failed to
23 enforce the Act as required by law.

24 **SIXTH CAUSE OF ACTION**

25 **Violation of the 1995 Water Quality Control Plan Narrative Standard for Fish and Wildlife**

26 140. Plaintiffs restate and reallege and incorporate herein the foregoing paragraphs 1
27 through 139 of this Complaint.

1 141. The 1995 Water Quality Control Plan requires that water quality conditions shall
2 be maintained, together with other measures in the watershed, sufficient to achieve a doubling of
3 natural production of chinook salmon from the average production of 1967-1991, consistent with
4 the provisions of State and federal law.

5 142. The Water Quality Control Plan Narrative Standard for Fish and Wildlife
6 (hereinafter “the narrative standard”) contains a requirement that water quality conditions are
7 sufficient to achieve a doubling of natural production of Chinook salmon from the average
8 production of 1967-1991.

9 143. In September, 1999 the National Marine Fisheries Service listed the Central
10 Valley spring-run chinook salmon as a threatened species.

11 144. The collapse of the California various salmon runs has resulted in the complete
12 closure of commercial and sportfishing salmon fishing in California for the 2008 fishing season.

13 145. The number of chinook, or king, salmon returning from the Pacific Ocean to
14 spawn in the Sacramento River and its tributaries this fall dropped 67 percent from a year earlier.

15 146. Indications are that the closure of salmon fishing will extend beyond the 2008
16 fishing season, and into the 2009 season.

17 147. The narrative standard’s requirement to double the natural production of salmon
18 from the average between 1967-1991 has clearly not been met by Defendants DWR and Bureau,
19 nor has it been enforced by Defendant Board.

20 148. In light of the Defendants DWR and Bureau’s failure to comply with the 1995
21 Quality Control Plan, including the failure to comply with the narrative standard, and Defendant
22 Board’s failure to enforce the standard, and considering the significant likelihood of repeated
23 violations in the future, Defendants DWR and Bureau must be permanently enjoined from
24 continuing to export water from the Bay/Delta until such a time as they meet the requirements of
25 the narrative standard, as required as a condition of their water rights permits. If Defendants are
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1 not so enjoined, Plaintiffs will suffer irreparable injury for which there is no adequate remedy at
2 law.

3 149. An actual controversy exists between Plaintiffs on the one hand and Defendants
4 on the other regarding their duty to comply with the 1995 Water Quality Control Plan's narrative
5 standard to protect fish and wildlife. Specifically, Plaintiffs contend and Defendants deny that
6 Defendants DWR and Bureau are failing to comply with the standard, and that Defendant Board
7 is required by law to enforce the standard. As an actual controversy exists, Plaintiffs are entitled
8 to, and hereby seek, a ruling that Defendants DWR and Bureau are in violation of the
9 requirements of the 1995 Water Quality Control Plan's narrative standard, and that Defendant
10 Board has failed to enforce the standard as required by law.

11 SEVENTH CAUSE OF ACTION

12 Violation of State Board Decision 1641

13 150. Plaintiffs restate and reallege and incorporate herein the foregoing paragraphs 1
14 through 149 of this Complaint.

15 151. The State Water Resources Control Board adopted Decision 1641 (hereinafter "D-
16 1641") on December 29, 1999. The Decision implements flow objectives for the Bay-Delta
17 Estuary, as a part of the Board's implementation of the 1995 Bay/Delta Water Quality Control
18 Plan.

19 152. D-1641 imposed a series of restrictions on the use of export pumps to protect fish
20 and wildlife.

21 153. D- 1641 assigned responsibilities to the persons or entities holding water rights
22 permits to meet specific flow objectives to protect fish and wildlife.

23 154. One such responsibility was that flow objectives must be met at four different
24 monitoring stations, including the monitoring station at Vernalis.

25 155. Defendant DWR and Defendant Bureau were specifically charged with meeting
26 the flow objectives on the San Joaquin at Vernalis and Brandt Bridge, and on the Old River near
27 Middle River and at the Tracy Road Bridge.

1 1. Declare that Defendants’ operations have violated the California Public Trust in
2 the Bay/Delta;

3 2. Declare that Defendants’ operations have violated Article 10, Section Two of the
4 California Constitution in that present operations constitute an unreasonable method of diversion
5 from the Bay/Delta;

6 3. Declare that Defendants’ operations have violated Article 10, Section Two of the
7 California Constitution in that application of water to drainage impaired lands within
8 Defendants’ service areas on the West side of the San Joaquin valley constitutes an unreasonable
9 use of water from the Bay/Delta;

10 4. Declare that Defendants’ operations have violated California Fish & Game Code
11 § 5937 in that Defendants’ upstream dams have failed to release sufficient cold water to keep
12 fish below the dams in good condition;

13 5. Declare that Defendants’ operations have violated the Porter-Cologne Act in that
14 Defendants’ have failed to meet the required salinity objectives under the Bay/Delta Water
15 Quality Control Plan;

16 6. Declare that Defendants’ operations have violated the 1995 Water Quality Control
17 Plan narrative standard for salmon in that Defendants’ have failed to meet the required doubling
18 of the salmon population under the 1995 Water Quality Control Plan;

19 7. Declare that Defendants’ operations have violated Decision 1641 in that
20 Defendants’ have failed to meet flow objectives necessary to protect beneficial uses in the
21 Bay/Delta;

22 8. Enjoin Defendant DWR from diverting water from the Bay/Delta until such a
23 time as Defendant DWR’s operations conform with the law;

24 9. Enjoin Defendant Bureau from diverting water from the Bay/Delta until such a
25 time as Defendant Bureau’s operations conform with the law;

26 10. Enjoin Defendant Board from allowing operation of state and federal water export
27 projects until such a time that Defendants DWR and Bureau come into compliance with state law
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1 and the Public Trust Doctrine, including the prohibition on unreasonable methods of diversion,
2 California Fish & Game Code section 5937, the Porter-Cologne Act, Decision 1641 and the 1995
3 Water Quality Control Plan.

4 11. Direct Defendants to remedy their violations of the California Public Trust,
5 Article 10, Section Two of the California Constitution, the California Fish & Game Code § 5937,
6 the Porter-Cologne Act, Decision 1641 and the 1995 Water Quality Control Plan within a
7 reasonable time;

8 12. Retain jurisdiction over this matter until such time as Defendants have fully
9 complied with the requirements of California Public Trust, Article 10, Section Two of the
10 California Constitution, the California Fish & Game Code § 5937, the Porter-Cologne Act,
11 Decision 1641 and the 1995 Water Quality Control Plan;

12 13. Award Plaintiffs their costs of litigation pursuant to California Code of Civil
13 Procedure § 1021.5; and

14 14. Grant Plaintiffs such other further relief, including injunctive relief, as the Court
15 may deem just and proper.

16
17 Dated: November 30, 2008

18
19 _____
20 Michael B. Jackson
21 Attorney for Plaintiffs
22 C-WIN, CSPA, and Felix Smith

23
24 _____
25 Julia R. Jackson
26 JACKSON & TUERCK
27 Attorney for Plaintiff
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