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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF HUMBOLDT

FRIENDS OF THE EEL RIVER, a public benefit corporation,

Petitioner,

v.

COUNTY OF HUMBOLDT, a political subdivision of the State of California; BOARD OF SUPERVISORS OF THE COUNTY OF HUMBOLDT, its governing board,

Respondents.

Case No. CV2201593

RESPONDENTS COUNTY OF HUMBOLDT AND COUNTY OF HUMBOLDT BOARD OF SUPERVISORS' OPPOSITION BRIEF

Date: August 1, 2025
Time: 10:30 a.m.
Dept: 4
Judge: Hon. Timothy A. Canning

Date Action Filed: October 27, 2022

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I. INTRODUCTION

Respondents County of Humboldt and its Board of Supervisors (collectively, the "County") exercised discretion and expressly considered the public trust doctrine and trust uses in developing and adopting the 2022 Eel River Valley Groundwater Basin Sustainability Plan ("GSP"). Rather than challenge any specific administrative action or permit, Petitioner Friends of the Eel River ("FOER") asserts without direct evidence—that groundwater pumping is impairing public trust interests in the Lower Eel River and that the County has a mandatory and continuing duty, enforceable pursuant to Code of Civil Procedure section 1085, to "enact[] an ordinance or program to regulate or otherwise address groundwater pumping" in the Lower Eel River Valley Groundwater Basin ("Basin"). (FAP, p. 2:21–24.) While vague in its First Amended Petition ("FAP"), FOER readily admits in its Opening Brief that it is not challenging the County's recent well permits, acknowledging "relatively few new well permits, or replacement well permits are located or expected in the Lower Eel River Valley. . . ." (Petitioner's Opening Brief ("POB"), p. 34:24–26.) FOER's Opening Brief reveals its primary target for relief: "*existing wells* . . . constructed and . . . operating *since prior to the County's 1990 adoption of its Well Ordinance*." (POB, p. 34:19–21, emphasis added.) Nothing under the common law public trust doctrine compels the County to exercise its discretion in the manner FOER demands.

The public trust doctrine imposes no set "procedural matrix" for how a trustee agency must exercise its duty. The County considered the public trust when it developed and adopted the GSP under the Sustainable Groundwater Management Act ("SGMA")—a plan adopted to provide the framework for sustainably managing groundwater in the Basin. In that public process, the County utilized the best scientific evidence available and considered feedback from a host of stakeholders including FOER and relevant wildlife agencies. With the assistance of expert hydrologists and biologists, the County developed and applied an integrated hydrologic model to simulate the Eel River watershed and establish minimum thresholds to limit potential adverse effects on interconnected surface waters. The County appropriately exercised its discretion in focusing the modeling and protective measures on fish passage criteria for adult salmon—one of

the most sensitive ecological indicators for instream beneficial uses in the Eel River. And contrary to FOER's claims, the County considered potential impacts in the late irrigation season when adult Chinook salmon begin entering the estuary for upstream migration and spawning. In 2022 and 2023, respectively, the County adopted, and the California Department of Water Resources ("DWR") approved the GSP, which is reasonably protective of instream beneficial uses and ensures that groundwater pumping will not result in significant or unreasonable depletion of interconnected surface waters within the Basin. Since approval of the GSP, the County has conducted public trust analyses and, where appropriate, incorporated protective conditions for each new well permit.

Despite the County's considerable efforts to address groundwater pumping and protect the Eel River, FOER baldly claims the County has "never" considered the potential effects of groundwater pumping in the late irrigation season (POB, p. 1:3–5) and, consequently, FOER need not prove the substantiality of harm to any public trust use in order to prevail on its claim (POB, p. 29:9–11). FOER is legally and factually wrong. FOER is legally wrong because it has the burden of proving the factual elements of its claim—that the County failed to consider the effects of an action and that the action will result in substantial impairment of public trust uses. FOER is factually wrong as the County's GSP clearly considered the potential effects of groundwater extractions on surface flows and public trust uses in the Lower Eel River, including effects on fish passage in the late irrigation season. The fact that FOER might prefer a different methodology or criteria for weighing public trust interests is not a basis for issuing a writ under this inherently discretionary common law doctrine.

Likewise, FOER grossly misconstrues the duty of "continuing supervision" referenced by the California Supreme Court in *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 ("*National Audubon*") in contending the County has a mandatory duty to enforce the public trust against "existing wells" constructed and operating since before the County's 1990 Well Ordinance. (POB, p. 34:9–21.) As explained by the Third Appellate District, the duty of continuing supervision over water rights articulated in *National Audubon* belongs to the State Water Resources Control Board ("SWRCB"), not other trustee agencies like DWR. (*Planning &*

Conservation League v. Department of Water Resources (2024) 98 Cal.App.5th 726, 770 ("PCL").) For trustee agencies not involved in determining water rights allocations (e.g., DWR), the duty is triggered "only where [the agency] is taking an action with an impact on public trust uses." (*Ibid.*) Since the County does not allocate water rights and FOER is not challenging a specific well permit or other administrative action, the duty of continuing supervision is not present here.

FOER fails to establish groundwater pumping—as opposed to severe droughts, surface water diversions, or other hydrologic factors—has resulted in any significant depletion of instream flows or substantial impairment of migrating Chinook salmon. In asserting groundwater pumping is causing harm to Chinook salmon, FOER points to low instream flows observed during three drought years (2014, 2015, and 2021). However, FOER's assertion is speculative and confuses correlation with causation. While upstream migration may have been delayed in those years, FOER does not provide any evidence of significant species mortality or statistically significant impairment of salmon returns to select spawning grounds. As confirmed by the County's experts, salmonids adapt to existing circumstances and avoid upstream migration when habitat conditions are unsuitable. Salmon population health and migration in the Eel River is almost entirely dependent on upstream surface flows from the first rains, which typically begin in September, October, or November. FOER has failed to demonstrate that low flow conditions in those years were caused by groundwater pumping or that conditions would have been materially different had the County enjoined all pumping during the irrigation season.

In sum, the County considered the public trust in developing and implementing the GSP and in issuing more recent well permits—discretionary decisions that FOER sidesteps. The County's exercise of discretion is dispositive. And because FOER cannot point to any "clear, present, and ministerial duty" to take some *other* action, such as enact a new ordinance or program to enforce the public trust against wells installed decades ago, FOER is not entitled to traditional mandamus relief under Code of Civil Procedure section 1085.

II. FACTUAL BACKGROUND

A. Eel River Valley Groundwater Basin

The Basin has high-quality and abundant groundwater resources, encompassing a total area of 72,957 acres. (AR 100; Exhibit A [map of Basin].) Due to the favorable climate, geology, and hydrology, the Basin has abundant groundwater resources supporting a multitude of beneficial uses, including important farmlands, individual homes, cities, industry, and instream beneficial uses (e.g., fish migration). (AR 78, 94.) Long-term groundwater levels are stable, with some fluctuations following seasonal variability in precipitation. (AR 79–80.) Overall, groundwater pumping in the Basin is lower compared to hotter and more arid basins due to cool coastal temperatures and elevated moisture levels.

The Eel River Valley also supports a vibrant agricultural community. The region's Mediterranean climate brings most of the annual precipitation from late fall through early spring, leaving the summer growing season in need of supplemental water. (AR 102.) The start-date for irrigation in the spring varies within the Basin and year to year based on a variety of factors. (AR 464.) Irrigation typically ends and groundwater pumping declines significantly on October 1, when plant growth slows considerably. (*Ibid*.)[1] Overall, agricultural groundwater use has likely remained steady or decreased over the last 20 to 30 years because the area of irrigated land has not significantly changed and many producers have increased irrigation efficiencies through technology and management practices. (AR 105.) Water use rates within the Basin are approximately one to two times less than the state average for comparable crops. (*Ibid*.)

In addition to its groundwater sustainability planning under SGMA, the County has been involved in other efforts to help protect fish habitats within the Eel River. For decades, surface waters in the Upper Eel River have been diverted to the Russian River watershed through Pacific Gas & Electric's ("PG&E") Potter Valley Project ("Project"). (AR 100–101.) PG&E is preparing to decommission the Project. (AR-EXP 14780.) On February 11, 2025, the Board of Supervisors approved a Memorandum of Understanding negotiated among a variety of parties

[1] FOER incorrectly describes the irrigation season as "beginning in May and continuing until harvest occurs or the first substantial rains of the season, usually in October or November." (POB, pp. 7:26–8:1.)

from the Eel and Russian River Basins to advance the decommissioning of the Project, remove key Eel River dams, restore a free-flowing Eel River, and re-establish fish passage to upstream habitats. (AR-EXP 14780–14781.) Stakeholders have agreed to support continued water diversions subject to conditions necessary to protect Eel River fisheries. (AR-EXP 14785.) Diversion criteria will be developed using the best available scientific information to ensure such diversions support Eel River fisheries and a functioning ecosystem. (AR-EXP 14783.)

B. The Lower Eel River

The public trust resource at issue in this case is the Lower Eel River, specifically the stretch between Fernbridge and the confluence of the Eel and Van Duzen Rivers. (POB, p. 9:13–14; Exhibit B [map of the Lower Eel River].) The alluvial aquifer underlying the Lower Eel River has some hydraulic interconnectivity with the river. (AR 122, 206.) Stream flows and water depths in the Lower Eel River are influenced by many factors, including seasonal precipitation, annual precipitation, and upstream diversions (e.g., from the Potter Valley Project). (AR-EXP 5115.) Additionally, channel morphology in the Lower Eel River is dynamic. (*Ibid.*; AR 206 ["Beneficial uses for fisheries are partially a function of geomorphic conditions which change annually as sediment transport modifies features such as riffle crests and pool depths."].) During droughts, a significant portion of the flow in segments of the Lower Eel River can transition to underflow (i.e., subsurface flow) through channel sediments. (AR-EXP 5115.) Due to the variability of these and other factors, the Lower Eel River has experienced periodic low flow conditions even when overall watershed stream flows were unimpaired. (AR 101.)

Chinook salmon inhabiting the Eel River have evolved and adapted to the highly variable hydrologic and seasonal water temperature conditions. (AR-EXP 14591, 15376–15377 [FOER's expert Dr. Gabriel Rossi conceding "the population of Chinook salmon is well-suited and well-adapted to respond appropriately to the natural hydrologic conditions that occur in the Eel River"].) The Lower Eel River serves as a migratory corridor for adult and juvenile steelhead, coho, and Chinook salmon. (AR-EXP 14588.) Adult Chinook salmon begin entering the Eel River estuary in August or early September and wait, often in gathering pools, until conditions are suitable for migrating upstream into spawning areas. (AR 207.) The timing of rainfall events

critically influences the timing of upstream migration. (AR-EXP 14591.)[2] Adult Chinook salmon typically hold in the cooler estuarine waters until upstream migration is cued by increased attraction flows, decreased turbidity, and reduced water temperatures associated with fall rainfall events, runoff, and storm activity. (*Ibid*.)

C. Eel River Valley Groundwater Sustainability Plan

In 2014, the Legislature enacted SGMA, which calls for the creation of local groundwater sustainability agencies ("GSAs") to oversee groundwater management within medium- and high-priority basins through the development and implementation of GSPs. A GSP identifies the methods by which a GSA will restore or maintain groundwater sustainability and avoid "undesirable results," including the chronic lowering of groundwater levels and depletions of interconnected surface water that have significant and unreasonable adverse impacts on beneficial uses of that surface water (e.g., fisheries and other ecological uses). (See Wat. Code, §§ 10721(x), 10727.2(b), 10735(d); Cal. Code Regs., tit. 23, § 354.22 et seq.; AR 186.) SGMA does not, however, determine water rights or alter the existing common law system of rights to extract and use groundwater, which is governed primarily by the courts. (Wat. Code, §§ 10720.5, 10726.8(b); Code Civ. Proc., §§ 830–852; see, e.g., *Antelope Valley Groundwater Cases* (2021) 63 Cal.App.5th 17.)

Following the adoption of SGMA, DWR designated the Eel River Valley Basin as medium priority. (AR 78.) In May 2020, the County Board of Supervisors held a public hearing and formed the Humboldt County Groundwater Sustainability Agency ("HCGSA" or "County") for purposes of developing and implementing a GSP for the Basin under SGMA.[3] The County developed an integrated groundwater-surface water model to help inform the GSP, using the best scientific evidence available. (AR 78–79, 156.)

The GSP's sustainability goal is to "maintain high-quality and abundant groundwater resources in the Basin to support existing and long-term community needs without causing

[2] Downstream migration of juvenile smolt occurs in the late winter and spring, varying based on instream conditions such as flow and seasonal water temperatures. (AR-EXP 14591.)

[3] Under Water Code section 10724, the HCGSA is comprised and governed by the Humboldt County Board of Supervisors. Thus, the HCGSA is referred to herein as the "County."

undesirable results"—e.g., significant and unreasonable depletion of interconnected surface water. (AR 81, 187.) The sustainability goal also recognizes "[g]roundwater is needed within the Basin for drinking water and personal use, agricultural irrigation, industrial process water, and ecosystem services." (AR 187.) To evaluate whether the Basin is meeting the sustainability goal, the County developed five "sustainable management criteria" through in-depth technical analyses, meetings with the County's staff and consultant teams, and stakeholder feedback. (AR 188–190.) Critically, the County's development of the sustainable management criteria also expressly included the County's "consideration of the potential impacts of groundwater pumping on *public trust resources* within the Basin and the conditions when measures to protect those resources may be appropriate." (AR 188, emphasis added.) The GSP determined the Basin is currently achieving sustainability for all five of the sustainability criteria evaluated. (AR 81, 187.)

On January 25, 2022, the County adopted the GSP for the Basin. (AR 12–14.) In adopting the GSP, the County found that "the GSP for the Basin considers potential impacts of groundwater pumping on *public trust resources* within the Basin and the conditions when *measures to protect* those resources may be appropriate." (AR 12, emphasis added.) DWR, the State's water management agency with oversight over SGMA, reviewed and approved the GSP and the County's assessment of undesirable results, sustainable management criteria, and monitoring and corrective actions on October 26, 2023. (AR-EXP 5827–5880.)

D. The County's Regulation of Water Well Permits

The County regulates the construction and reconstruction of water wells under the Humboldt County Code ("HCC"). (AR 7100–7114.) Adopted in 1990, the current HCC sets minimum standards for the construction and alteration of wells and establishes a permitting process to ensure installation and location of wells will not pollute or contaminate the aquifer. (AR 7101 [HCC, § 631-1].) The Humboldt County Department of Health and Human Services, Division of Environmental Health, is responsible for well permitting in the County. (AR 117.) Any person who intends to dig, bore, drill, deepen, modify, repair, or destroy a well must submit a permit application with information regarding the design, location, and construction of the well.

(AR 7103–7104 [HCC, § 631-4].) The County, in turn, may deny a permit application if it is not in the "public interest." (AR 7105 [HCC, § 631-7].)

In March 2023, following the County's adoption of its GSP, the County began preparing public trust analyses for new or replacement well permits. (See, e.g., AR 7381–7787.) For each new or replacement well, the County analyzes the effects on public trust resources. (AR-EXP 7090.) Each well analysis is documented in a technical memorandum prepared by the County at a level of detail appropriate to each application. (*Ibid*.; see, e.g., AR 7445–7447.) The analysis considers information and findings in the GSP, along with other data and scientific information available. (AR-EXP 7090.) While the County does not allocated groundwater in its permitting process, the County exercises its discretion in determining when conditions are required to protect public trust uses and values. (*Ibid*.)

III. STATEMENT OF THE CASE

On October 27, 2022, FOER filed a petition for writ of mandate, alleging the County has a specific duty to "*enact an ordinance* to regulate groundwater pumping to reduce impacts to the Eel River's public trust uses during low flow periods." (Petition, p. 2:20–22, emphasis added.) The County filed a motion for judgment on the pleadings on September 1, 2023, for FOER's failure to allege sufficient facts to state a claim under the public trust doctrine. FOER filed its amended petition on October 2, 2023, alleging instead that the County failed to perform a more nebulous duty to "*take measures within its discretion*, including for example *enacting an ordinance or program* to regulate or otherwise address groundwater pumping to reduce impacts to the Eel River's public trust uses during low flow periods." (FAP, p. 2:21–24, emphasis added.)

On October 17, 2023, the County filed a demurrer, asserting FOER failed to allege facts sufficient to establish a "clear, ministerial, and mandatory duty" under the public trust doctrine. (Demurrer, pp. 14:13–16:10.) The Court overruled the demurrer on January 30, 2024, explaining:

> A reasonable interpretation of the FAP is that Petitioners do not seek to control the County's exercise of discretion or dictate how the County should do so. Instead, the FAP seeks to compel the County to exercise its discretion in the first place. The County's reliance on the GSP created by the Humboldt County Groundwater Sustainability Agency *may ultimately prove dispositive of this issue* – i.e., that the County *has in fact exercised its discretion* – but the

> Court concludes that it would be inappropriate to rule on that issue on a demurrer.

(Order Overruling Demurrer, pp. 2–3, emphasis added.) The County expressly considered the public trust and exercised its discretion in developing and adopting the GSP, a program to protect instream beneficial uses and ensure that groundwater pumping will not result in significant or unreasonable depletion of interconnected surface waters. In this manner, the GSP is dispositive.

IV. THE PUBLIC TRUST DOCTRINE

The public trust doctrine emanates from the common law rule that the State must, as sovereign, administer tidelands, submerged lands, and lands underlying inland navigable waters for the benefit of the people for certain public trust purposes. (See *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 521; *People ex inf. Webb v. California Fish Co.* (1913) 166 Cal. 576, 584.) Such public trust purposes were traditionally confined to "commerce, navigation, and fisheries." (*Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 205.) Over time, trust purposes have been recognized to include the right to hunt, bathe, and swim, as well as to preserve tidelands in their natural state. (*Marks v. Whitney* (1971) 6 Cal.3d 251, 259–260.)

A. Application of the Public Trust Doctrine to Water Rights.

In the California Supreme Court's 1983 decision, *National Audubon*, the Court applied the doctrine for the first time to the administration of water rights by the State:

> As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust [citation], and to preserve, so far as consistent with the public interest, the uses protected by the trust.

(*National Audubon, supra*, 33 Cal.3d at pp. 446–447.) The Court held that the SWRCB, the state agency in charge of administering water rights in California, "has an affirmative duty to take the public trust into account in the *planning and allocation of water resources*, and to protect public trust uses whenever *feasible*." (*Id.* at p. 446, emphasis added.) However, what is "feasible" in a particular instance is a matter of discretion for the State to determine in the "public interest." (*Id.* at pp. 446–447; see also *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674,

777–778 ("*SWRCB Cases*") [it was within the trustee agency's "discretion and judgment" to balance all "competing interests"].) Consequently, the doctrine does not compel the State to resolve conflicts in favor of public trust values. (*SWRCB Cases, supra*, 136 Cal.App.4th at pp. 777–778.) And in balancing competing public interests, the Fifth Appellate District recently affirmed that "it would be clearly unreasonable for the government to allocate all of the state's water resources to the use of preserving wildlife and natural beauty, and none whatsoever to human sustenance (i.e., drinking water and irrigating crops)." (*Bring Back the Kern v. City of Bakersfield* (2025) 110 Cal.App.5th 322, 353.)

Of relevance here, the duty of "continuing supervision" does not apply to every action or every trustee agency; it depends critically on the scope and nature of the action taken by the trustee agency in question. (See *PCL, supra*, 98 Cal.App.5th at p. 770.) As the Supreme Court explained in *National Audubon*, "[o]nce the state has *approved an appropriation*, the public trust imposes a duty of *continuing supervision* over the taking and use of the appropriated water." (*Ibid.*, emphasis added, quoting *National Audubon, supra*, 33 Cal.3d at p. 447.) In *PCL*, petitioners argued that in authorizing long-term water contract renewals for several water users, DWR, a state trustee agency, was required to reconsider water rights SWRCB granted to the State Water Project in 1967. The court found petitioners took the Supreme Court's statement about continuing supervision in *National Audubon* "out of context." (*Ibid*.) In that case, the duty for "continuing supervision" belonged to the SWRCB—the state agency that originally granted the water rights to the State Water Project—*and not* DWR. The court reasoned that if the trustee agency in question did not make the original water right allocation decision and is not taking any discrete action with an impact on the public trust, there is no "continuing duty of supervision." (*Ibid*.)

B. Application of the Public Trust Doctrine to Groundwater and Well Permits.

In 2003, the Sixth Appellate District faced the direct question of whether the public trust doctrine applies to groundwater. (*Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689 ("*Santa Teresa*").) There, a local citizens group challenged a city's extension of recycled water service to a natural-gas-fired power plant on the grounds that

contaminants remaining in the water would infiltrate to groundwater, violating the public trust doctrine. (*Id.* at pp. 695, 697.) In addition to denying the claim for failure to make the requisite evidentiary showing, the Sixth District held the public trust doctrine "has no direct application to groundwater." (*Id.* at p. 709.)

Taking care to distinguish *Santa Teresa*, the Third Appellate District in 2018 held that counties, as political subdivisions of the State, have the duty to consider the public trust when issuing well permits for groundwater pumping that impairs trust uses within interconnected navigable waterways. (*Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844, 867–868 ("*ELF*").) The Third District also held that, in enacting SGMA, the Legislature did not intend the statute, on its face, to "'occupy the field'" or "absolve[]" counties of their duties under the public trust doctrine. (*Id*. at p. 863, citation omitted.) But as the court explained:

> We are asked to determine whether the County and the Board have common law fiduciary duties to consider the potential adverse impact of groundwater extraction on the Scott River, a public trust resource, *when issuing well permits* and if so, whether SGMA *on its face* obliterates that duty. There are no challenges to any specific action or failure to act by the County or the Board in betrayal of their duties to protect the Scott River. . . . The scope of our ruling in this context, therefore, is *extraordinarily narrow*. We eschew consideration of any hypothetical factual scenarios and will not attempt to define the common law public trust duties of the Board or the County in light of how SGMA is *actually implemented*.

(*Id.* at pp. 851–852, emphases added.) The court thus left open the possibility that counties could fulfill their common law public trust duties in developing and implementing groundwater sustainability plans under SGMA.

C. The Common Law Imposes no "Procedural Matrix" on Trustee Agencies.

As a doctrine that is "inherently discretionary," the public trust does not impose on trustee agencies the duty to exercise their authorities in any particular way. (*Monterey Coastkeeper v. Central Coast Regional Water Quality Control Bd.* (2022) 76 Cal.App.5th 1, 21 ("*Monterey Coastkeeper*") [denied claim that SWRCB failed to consider public trust in regulating agricultural discharges with possible impacts on trust resources]; see also *Center for Biological Diversity v. Dep't of Forestry & Fire Protection* (2014) 232 Cal.App.4th 931, 953 [wildlife agency not

obligated to enforce the public trust beyond consultation procedures in CEQA].) Courts have uniformly held the common law imposes no "procedural matrix" on a trustee's compliance. (*PCL, supra*, 98 Cal.App.5th at p. 769; *Monterey Coastkeeper, supra*, 76 Cal.App.5th at p. 21.) For this reason, a trustee agency's efforts to comply with environmental laws or regulatory programs can serve as sufficient "consideration" for public trust purposes. (*Citizens for East Shore Parks v. Cal. State Lands Com.* (2011) 202 Cal.App.4th 549, 576–577 [California Environmental Quality Act]; see also *SWRCB Cases, supra*, 136 Cal.App.4th at pp. 777–778 [State fulfilled its public trust duties in implementing water quality control plan]; *Carstens v. Cal. Coastal Com.* (1986) 182 Cal.App.3d 277, 288–294 [permitting process under the Coastal Act appropriately considered and balanced competing public trust interests].)

V. STANDARD OF REVIEW

A traditional writ of mandate lies "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station." (Code Civ. Proc., § 1085, subd. (a).) On review of a state agency's compliance with the common law public trust doctrine under Section 1085, judicial review is limited to whether the trustee agency's action (or inaction) was arbitrary, capricious, or entirely lacking in evidentiary support or failed to follow appropriate procedures. (See *PCL, supra*, 98 Cal.App.5th at p. 769; *World Business Academy v. California State Lands Com.* (2018) 24 Cal.App.5th 476, 508–510 ("*World Business*"); *County of Orange v. Heim* (1973) 30 Cal.App.3d 694, 718–719; but see *San Francisco Baykeeper, Inc. v. State Lands Com.* (2018) 29 Cal.App.5th 562, 580 ("*Baykeeper II*") [applying substantial evidence standard in upholding State's determination that sand mining would not impair public trust uses or values].)

In applying the arbitrary and capricious standard, courts "do not reweigh the evidence, substitute [their] judgment for that of the [trustee agency], or inquire into the soundness of the [trustee agency's] reasoning." (*World Business, supra*, 24 Cal.App.5th at p. 509.) And on "technical matters requiring the assistance of experts and the study of marshalled scientific data as reflected herein, courts will permit administrative agencies to work out their problems with as little judicial interference as possible." (*Stauffer Chemical Co. v. Air Resources Board* (1982) 128 Cal.App.3d 789, 794–795; accord *O.W.L. Foundation v. City of Rohnert Park* (2008) 168

Cal.App.4th 568, 592–593 [Water Code did not "prescribe" analytical method for assessing water availability in a particular groundwater basin; court deferred to agency's chosen methodology].)

Here, FOER bears the burden of demonstrating that impairment of the trust will occur by the trustee agency's action. (*Santa Teresa, supra*, 114 Cal.App.4th at p. 709 [dismissing public trust claim where petitioner failed to make showing of harm from agency's action]; *American Coatings Ass'n, Inc. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 473 [petitioner bears burdens to show agency's finding is entirely lacking in evidentiary support].) Because FOER has failed to show the requisite causal connection between the County's action and the alleged impairment of public trust uses or values, FOER's claims must fail.

VI. ARGUMENT

A. FOER Is Not Entitled to a Writ of Traditional Mandamus.

FOER claims the County "never" considered the incremental effects of groundwater pumping during the late irrigation season and brings this Section 1085 writ action to secure an order "mandating that the County carry out its duty to consider adverse effects to the Lower Eel River's public trust resources during the dry season. . . ." (POB, p. 6:26–28.) FOER's claim is patently false. The County exercised its discretion and has considered the public trust in two respects. First, the County expressly considered the public trust doctrine in developing *and adopting* its 2022 GSP. (See, *infra*, Section VI.C.1.) Second, the County conducted stand-alone public trust analyses when considering more recent well permits—administrative permits that FOER concedes do not implicate the Lower Eel River. (See, *infra*, Section VI.C.2.) While FOER might disagree as a policy matter with the County's chosen habitat criteria or methodology for evaluating surface water depletions, such policy differences do not mean the County never "considered" the public trust, nor do such policy differences entitle FOER to relief under Section 1085 of the Code of Civil Procedure. (See *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1371 ("*FPL Group*") [counseling judicial abstention where it is apparent that trustee agency did not ignore harm to the public trust].)

To obtain relief under Section 1085, FOER must establish the existence of a "'clear, present, and ministerial duty where the petitioner has a beneficial right to performance of that

duty.'" (*Herron v. San Diego Unified Port Dist.* (2025) 109 Cal.App.5th 1, 10, citation omitted [port's leasing of coastal public trust land for private club was discretionary, not subject to traditional mandamus].) "A ministerial act is one that a public functionary is required to perform *in a prescribed manner* in obedience to the mandate of legal authority, without regard to his or her own judgment or opinion concerning the propriety of such act." (*Ibid.*, emphasis added, internal quotations omitted, quoting *Monterey Coastkeeper, supra*, 76 Cal.App.5th at p. 19 [allegation that state failed to consider public trust impacts of permits and programs related to agricultural stormwater runoff was attack on exercise of discretion and thus not subject to mandamus relief].) Conversely, writ relief is not available to compel the exercise of discretion in a particular manner or to reach a particular result. (See *Center for Biological Diversity, supra*, 232 Cal.App.4th at p. 952 [mandamus relief not available to compel Department of Fish and Wildlife, a trustee agency, to oppose timber management plan under public trust doctrine], citing *Building Industry Ass'n v. Marin Mun. Water Dist.* (1991) 235 Cal.App.3d 1641, 1645–1646.)

In *Monterey Coastkeeper* petitioners contended they were entitled to mandamus relief under Section 1085 to correct the SWRCB's "utter failure of its [mandatory] duty to consider the public trust doctrine" in ensuring that regional water board general agricultural orders (i) considered the impact of agricultural discharges on public trust resources, and (ii) protected public trust resources when feasible. (76 Cal.App.5th at p. 18.) Describing the public trust doctrine as "inherently discretionary," the Third Appellate District held the doctrine "generally does not allow for intervention by the courts other than in the context of judicial review of administrative decisions." (*Id*. at pp. 21–22.) The court rejected the open-ended remedy requested by petitioners, explaining that

> ordering the State Board to apply the public trust doctrine would be an empty judgment, while actually determining whether the State Board is properly applying the doctrine would necessarily require the trial court to consider the many decisions within the State Board's mandate, decisions that will typically require the exercise of administrative discretion and will often require technical expertise.

(*Ibid*.; see also *FPL Group*, 166 Cal.App.4th at pp. 1371–1372.)

Here, the record demonstrates the County acted before FOER filed suit, exercising discretion in expressly considering and protecting public trust uses and values of the Lower Eel River in its preparation and implementation of the GSP. The County has taken the further step of incorporating individual public trust analyses in its review of applications for new or altered groundwater wells, consistent with the reasoning articulated in *ELF*. In this manner, the County "considered" and "protected" the public trust in its water resources planning and well permitting decisions within the Basin, fulfilling its duty as articulated in *National Audubon* and *ELF*.

To the extent FOER challenges the GSP, any such action is untimely. Although FOER does not assert any cause of action against the GSP, most of FOER's factual allegations are improperly aimed at the adequacy of the GSP's analysis. FOER raised many of the same arguments it now advances in the FAP during the County's public process to develop and adopt the GSP. (See POB, p. 27:4–7; AR 438–440.) Two cases are instructive here. First, in *FPL Group, Inc*., *supra*, 166 Cal.App.4th at p. 1372, the First Appellate District found that a petitioner's public trust cause of action against a windfarm operator should have been raised in a writ of administrative mandate challenging the county's issuance of a conditional use permit; however, the statute of limitations for such an action had passed. Second, in *Herron*, *supra*, 109 Cal.App.5th 1, a petitioner sought a writ of mandate asserting the port district breached the public trust doctrine by leasing coastal public trust land for the purposes of operating a private club. The Fourth Appellate District found the petitioner failed to establish a claim for traditional mandamus and, to the extent petitioner sought judicial review of the port district's decision to enter the lease agreement with the private club, it should have been brought in a petition for writ of administrative mandamus, which was untimely. (*Id*. at 13.) Here, at its essence, FOER's claims are aimed at adequacy of the GSP; however, as in *FPL Group* and *Herron*, FOER's opportunity to challenge the GSP has passed. (See, e.g., Wat. Code § 10726.6(a) [180 days].)

FOER is not entitled to writ relief dictating how the County exercises its discretion. Because the County has acted in the first instance to fulfill its public trust duty, and FOER has failed to challenge any specific well permitting decision by the County, any action challenging GSP is now untimely.

B. FOER Misconstrues the State's Duty of Continuing Supervision Over Water Rights.

The County acknowledges that, under the *ELF* decision, it has the power and duty to consider the public trust when authorizing groundwater wells that may substantially impair or impede public trust uses or values in hydrologically connected navigable waters—here, the Lower Eel River. (See *ELF, supra*, 26 Cal.App.5th at pp. 856–862.) However, the County has not, and does not, allocate water rights as was pivotal in *National Audubon*. And contrary to FOER's argument, the duty of "continuing supervision" was never at issue in *ELF* and does not apply in the same way to *every* action or *every* trustee agency—it depends critically on the scope and nature of the action taken by the trustee agency in question. (See *PCL, supra*, 98 Cal.App.5th at pp. 761, 768–771.)

As the Court held in *National Audubon*, "'[o]nce the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water.'" (*Ibid*., quoting *National Audubon, supra*, 33 Cal.3d at p. 447.) In reaching this holding, the Supreme Court was explicit that the SWRCB's special role in deciding priorities between competing appropriators and its ability to directly allocate and reallocate appropriations "necessarily affect[ed] the [SWRCB's] responsibility with respect to the public trust." (*National Audubon* at p. 444.) The SWRCB's expansive responsibility for allocating water rights gave rise to its duty of "continuing supervision" under the public trust. (*Id*. at p. 447.)

The Third District Court of Appeal in *PCL*—an opinion issued seven weeks *after* briefing and hearing on the demurrer in this case—declined to extend the continuing duty described in *National Audubon* to DWR in its approval of contract extensions with certain water users receiving water from the State Water Project. (*PCL, supra*, 98 Cal.App.5th at p. 769.) The court held the continuing duty belonged to the SWRCB, not DWR, noting that, "a closer reading of *National Audubon* indicates that the Supreme Court was specifically concerned with *approvals of water diversions*." (*Ibid*., emphasis added.) Because DWR did not approve or otherwise allocate the original surface water rights, the duty of continuing supervision did not apply.

While *PCL* recognizes there may be circumstances where the continuing duty of supervision may apply to other state agencies, these circumstances are not present here:

> We do not translate the 'continuing duty of supervision' described in this passage of *National Audubon* as imposing a continuing duty of supervision on [DWR] as to the water rights with which it operates the State Water Project. In this context, [DWR's] duty under the public trust doctrine is triggered *only where it is taking an action with an impact on public trust uses*. As that impact is absent here, no duty arises to weigh the public trust interests or consider additional protections to those interests.

(*Id*. at p. 770, emphasis added.) Thus, if the trustee agency did not grant the initial water right *and* the trustee agency is taking no action with an impact on public trust uses, there is no occasion or obligation to revisit the earlier water rights decision.

Here, the County does not administer water rights or otherwise allocate groundwater resources, which rights are governed under accepted principles of California water law. (AR 91 ["Groundwater law in California is established through the common law system. . . ."].) FOER points to no prior "allocation" decisions by the County in association with any individual well permit. Moreover, many of the existing wells targeted by FOER pre-date the County's Well Ordinance and were likely installed without any permit or regulatory oversight by the County. (POB, p. 27:7–22.) While the County is obligated to consider the public trust in taking actions with impacts on public trust uses, it has no "continuing duty of supervision" mandating exercise of its enforcement discretion against decades-old wells and previously exercised rights.

C. The County's Consideration of the Public Trust in Adopting the GSP and Issuing Well Permits Is Dispositive.

The County exercised discretion and performed its public trust duty to consider and protect the public trust through its preparation and implementation of the GSP, which explicitly considered the public trust doctrine and potential impacts to public trust uses in interconnected navigable waters, including the Lower Eel River. In addition, the County's well permitting analysis considers, on an individual basis, the immediate and cumulative effect that pumping may have on the Basin and on interconnected surface waters. (See, *supra*, Section II.D.) Nothing more is required under the common law.

Courts have uniformly held the common law imposes no "procedural matrix" on a trustee agency's compliance with the public trust, and thus trustee agencies enjoy broad discretion in how they consider trust uses and values in their decisions. (See, *supra*, Section IV.C.; *Monterey*

Coastkeeper, supra, 76 Cal.App.5th 1 at p. 22; *World Business*, *supra*, 24 Cal.App.5th 476 [Rejecting claim that public trust requires evaluation of "cumulative impacts"].) Thus, compliance with existing environmental laws *can* serve to fulfill an agency's trust obligations. (*Citizens for East Shore Parks, supra*, 202 Cal.App.4th at pp. 576–577 [California Environmental Quality Act]; *SWRCB Cases, supra*, 136 Cal.App.4th at pp. 777–778 [SWRQB fulfilled its public trust duties in implementing water quality control plan under state clean water laws]; *Carstens, supra*, 182 Cal.App.3d at pp. 288–294 [Permitting process under the Coastal Act appropriately considered and balanced competing interests, including public trust interests].)

1. The County's compliance with SGMA fulfills its public trust duty.

While the *ELF* court held that SGMA, on its face, does not supplant a county's duty to consider the potential adverse impacts of groundwater pumping on public trust resources, it was careful to "eschew consideration of any hypothetical factual scenarios and [did] not attempt to define the common law public trust duties of the Board or the County in light of how SGMA is *actually implemented*." (*ELF, supra*, 26 Cal.App.5th at p. 852, emphasis added.) The *ELF* court, therefore, left open the possibility a county could fulfill its common law public trust duty by developing and implementing groundwater sustainability plans under SGMA.

Unlike the despite in *ELF*, the County here is not denying it has a duty to consider the effects of groundwater wells on interconnected surface waters. The County expressly considered the public trust in developing and adopting the GSP. The GSP's development of criteria to evaluate whether the Basin is being sustainably managed (i.e., avoiding undesirable results) represents the County's "consideration of the potential impacts of groundwater pumping on public trust resources within the Basin and the conditions when measures to protect those resources may be appropriate." (AR 188.) In the resolution adopting the GSP, the County affirmed that "the GSP for the Basin considers potential impacts of groundwater pumping on public trust resources within the Basin and the conditions when measures to protect those resources may be appropriate." (AR 12.)

The GSP developed the following sustainability criteria to evaluate the potential incremental impacts of groundwater pumping on interconnected surface waters:

> Depletion of interconnected surface water . . . would be considered significant and unreasonable if surface water depletion caused by groundwater extraction degrades the beneficial uses of an interconnected surface water or threatens the viability of special status species, and reasonable reductions or limitations in groundwater pumping could avoid these effects without jeopardizing other beneficial uses of groundwater.

(AR 190, 206.) To evaluate this criterion, an integrated groundwater-surface water model was developed for the Basin to estimate the volume of surface water depletion caused by groundwater extraction. (AR 206.) The County, in its discretion, decided to focus the model on fish passage criteria and the minimum water depth required for passage of adult salmon. (AR 207.) The potential change in river stage relative to minimum fish passage depth was selected because fish passage is considered one of the most sensitive indicators of surface water beneficial uses and a quantitative framework for establishing thresholds for riffle depths was available. (*Ibid*.) This approach was supported by the U.S. Geological Survey ("USGS") and DWR. (AR-EXP 7626 [USGS finding the modeling approach "generally accepted as a reasonable approach for developing an initial calibrated model of a surface water/groundwater system"]; AR-EXP 5835 [DWR finding "the [GSP's] descriptions of the Basin's groundwater conditions appear to utilize the best available science"].) Additionally, the County's experts in this litigation, Dr. Charles Hanson and Anthony Brown, have opined that the County's modeling approach is logical because the lower reach of the Eel River primarily functions as a seasonal migratory corridor for upstream migration of adult salmon and downstream migration of juveniles or smolts. (AR-EXP 15014 ["The GSP's focus on fish passage is informed by a practical understanding of salmonid migration patterns"]; AR-EXP 5152.)

Consistent with the County's focus on adult fish passage, the model's time period of analysis is the time period for adult fish passage—September through November. (AR 208.) Adult Chinook salmon begin entering the estuary in August and early September and typically hold until upstream migration is triggered by a significant rain event and the associated increase in flows. A review of migration timing and riffle depth data collected between 2010 and 2020 showed that upstream migration is blocked by riffle depths of 0.4 feet or less and inhibited by riffles that are 0.5 to 0.6 feet deep. (AR 207.) The California Department of Fish and Wildlife

uses a standard of 0.7 feet as the minimum critical riffle height to allow fish passage. (AR 208.) This is consistent with observations of adult Chinook salmon in pools at the confluence of the Eel and Van Duzen Rivers when riffle depths met or exceeded 0.7 feet. (AR 207.)

The County identified critical riffle areas within the Lower Eel River watershed, referred to in the GSP as ME-1 through ME-7, for detailed stream depletion analysis. (AR 208.) The critical riffle areas span the Lower Eel River: ME-1 is located near the confluence of the Eel and Van Duzen Rivers and ME-7 is located near Fernbridge. (*Ibid*.) To analyze potential impacts from stream depletion when fish passage may occur, the GSP set a benchmark of a lowering in stage at the critical riffle areas of 0.1 feet. (AR 208.) The County next used the model to estimate the differences in river flows between existing conditions and the no-pumping scenario for each month in the study period from 2000 to 2020. The County used stream rating curves for each critical riffle area to calculate the river stage when the minimum fish passage flows occur under existing pumping conditions, which the County determined was 130 cubic feet per second ("cfs"). (*Ibid*.) Fish have been observed at the mouth of the Van Duzen River when flows were as low as 130 cfs at the Scotia streamgage. (AR 207.) As FOER's expert Rossi conceded this is a conservative threshold for fish passage. (AR-EXP 2016 ["This is a conservatively low estimate of fish passage—which I applaud."].)

The modeling results showed that the change in river stage caused by current pumping levels ranged from 0.02 to 0.05 feet, which did not exceed the benchmark for potential impacts (i.e., a lowering of stage of 0.1 feet). (AR 208; AR-EXP 5168.) This small change in river stage evidences the small incremental influence of groundwater pumping at various river stages and surface flows. (See AR-EXP 5186.) The model was also used to calculate the difference in river flows between existing conditions and a range of increased-pumping scenarios. (AR 208–209.) Simulation modeling, using conservative assumptions, indicated that groundwater pumping could increase by 150% above current conditions before the stage of the Eel River would be reduced by 0.1 feet. (AR 210.) The County exercised its discretion and conservatively set the minimum threshold for this sustainability criterion at the 100%-increase scenario to keep reductions below 0.1 feet. (*Ibid*.)

Despite setting conservative sustainability criteria and minimum thresholds, the GSP emphasizes that exceedances of this criterion does not necessarily evidence undesirable results—e.g., depletions of interconnected surface water that have significant and unreasonable adverse impacts on instream uses. (AR 210.) If groundwater pumping exceeds the GSP's thresholds, the County must undertake further analysis to determine if instream beneficial uses are or will be degraded. (AR 213.) These multiple layers of minimum standards and thresholds reinforce the County's finding that current groundwater pumping within the Basin is not adversely affecting public trust resources.

FOER's entire argument that groundwater extraction has harmed public trust waters in the Lower Eel River in certain drought years is premised on a fundamental misapplication of the GSP's simulated surface flow depletion rate (which was based on conservative assumptions for comparative purposes) to actual historical low-flow conditions during extreme drought years. (See, POB, at p. 28.) For instance, FOER lists the calculated depletion rates at seven different critical riffle locations over the modeled 20-year period, but neglects to include that the average simulated changes based on those simulated depletion rates ranged from a minimum of 0.01% to a maximum of 12% of flows. (See AR-EXP 203–206.) FOER distorts the evidence by applying the modeled maximum changes in flows, as measured in cfs, to drought years when observed flows at those riffle locations were as low as 8.8 and 14.0 cfs. (POB, p. 15:12–14.) In so doing, FOER misleadingly suggests groundwater pumping was responsible for depleting 50% to 100% of observed surface flows. FOER's hydrology expert, Greg Kamman, admitted he did not analyze the actual effect of groundwater pumping on streamflow in the Lower Eel River before forming his conclusions, meaning FOER provides no evidentiary support for its allegations of harm. (AR-EXP 15246:2–10.)

FOER also incorrectly argues the GSP did not evaluate impacts of groundwater pumping on dry season surface flows in the Lower Eel River or to fish present in staging areas (pools) prior to the rainy season. (POB, pp. 17:12–18, 32:7–12.) Although the GSP's analysis focused on the period when fish passage occurs, the County considered all life stages for Chinook and coho salmon and steelhead in technical memoranda developed to support the GSP. In particular, TM-

3: Assessment of Groundwater Dependent Ecosystems, which informed the GSP's development of sustainable management criteria, addresses the extent and condition of groundwater dependent ecosystems in the Basin. (AR 498.) This assessment reviewed special status species in the Basin and evaluated the potential impacts of changing groundwater conditions on groundwater dependent ecosystems in the Lower Eel River. (AR 540–542, 560–561.)[4] TM-9: Surface Water Beneficial Use Assessment addressed baseline conditions for surface water beneficial uses in the Basin, including beneficial uses of hydrologically connected surface waters. (AR 1150.) TM-9 summarizes available habitat for several fish species, including Chinook salmon, to assess whether there are any temporal trends in habitat distribution and to help ascertain whether current groundwater management could be affecting habitat availability. (AR 1159–1177.) That FOER would prefer to have the County prioritize staging habitats rather than fish passage does not mean the County never considered the effects of groundwater pumping in the late irrigation season or failed to fulfill its public trust duty. The public trust imposes no such procedural matrix.

Further, the conclusions reached in the 2022 GSP are not the end of the County's consideration of potential public trust impacts. The County prepares and submits annual reports to DWR, which must evaluate whether the Basin's sustainability goals are being met and whether changed conditions are present that may affect continued management. (AR 229–230; Wat. Code, § 10728.) The County must also update the GSP every five years, which can adapt as further data becomes available. (AR 230–231.) The GSP recognizes "continued . . . monitoring of future fish passage conditions once the GSP is adopted will help to ensure . . . conditions are not being adversely impacted by groundwater management." (AR 155.) Through this iterative process, the County continues to consider the impacts of groundwater pumping on interconnected public trust resources and the conditions where feasible protective measures may be required.

[4] The stretch from Fernbridge to the confluence of the Eel and Van Duzen Rivers is referred to as the "Middle Eel River" in the Technical Memorandum.

2. The County continues to fulfill its public trust duty through its well permitting program.

Consistent with the *ELF* decision, the County considers the public trust doctrine and the possible effects on trust resources and values (if any) in evaluating new well permit applications. (See, *supra*, Section II.D.) The County's analysis of individual wells accounts for the information and findings in the GSP, along with other data and scientific information available. (AR-EXP 7090.) The County utilizes its discretion in evaluating the site-specific facts and evidence of each well permit and determining when conditions may be required to protect public trust resources. (*Ibid*.) Notably, FOER does not challenge a single public trust analysis prepared by the County. Instead, FOER recognizes that, in 2023, the County began conducting reviews of new well permit applications considering each proposed well's effects, if any, on public trust resources in the Eel River watershed. (POB, p. 24:13–20.)

D. FOER's Extra-Record Expert Reports and Deposition Testimony Fail to Overcome the County's Exercise of Discretion.

FOER claims the County "never" considered the potential effects of groundwater pumping in the late irrigation season, and thus it need not prove the substantiality of harm to any public trust uses. FOER attempts to bolster its claims by citing expert reports and deposition testimony from the limited discovery conducted in this case. FOER's claims are unavailing.

First, as set forth in Sections I and V, FOER has the burden of proving its factual claim: that the County's action will substantially impair public trust uses or values. (*Santa Teresa, supra*, 114 Cal.App.4th at p. 709; *American Coatings Ass'n, supra*, 54 Cal.4th at p. 473; see also *Baykeeper II, supra*, 29 Cal.App.5th at pp. 580–581 [while parties continued to "take different sides in the scientific controversy," such disagreement was not a ground for overturning the State's finding that sand mining project "would not impair public trust uses by either substantially depleting the sand resource or substantially interfering with sand transport and coastal morphology. . . "].) Absent sufficient evidence of impairment, there is no public trust violation.[5]

[5] FOER's reference to *San Francisco Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal.App.4th 202 ("*Baykeeper I*") is misplaced. There, the State conceded it had not conducted a public trust inquiry and that (a) bay sand (a trust resource) is "not a renewable resource," (b) sand

Second, as the County asserts in its accompanying Objections, FOER's expert witness reports and deposition testimony represent inadmissible extra-record evidence. Such extra-record evidence is generally precluded in actions challenging quasi-legislative decisions. (See *Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1269-1271 [extra-record evidence precluded in challenge to quasi-legislative decision where, despite lack of formal hearing, agency provided public with opportunity to provide input]; *Western States Petroleum Ass'n v. Superior Ct.* (1995) 9 Cal.4th 559, 579 [extra-record evidence inadmissible to "merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision"].) To justify its admission of expert reports and testimony, FOER avoids challenging the County's administrative proceedings or decision to adopt the GSP, which expressly considered the public trust doctrine in the process of sustainability planning under SGMA. Nonetheless, as in *Carrancho*, the County's public GSP process afforded FOER the opportunity to present expert evidence, and to challenge the adoption decision, which it neglected to do. FOER should not be allowed to do so now by mischaracterizing the scope of the County's prior administrative efforts to enact a program to address groundwater pumping in the Basin.

Third, even if a challenge to the GSP was timely, FOER's experts do not establish that the County's sustainability criteria for depletion of interconnected surface waters is patently unreasonable, that groundwater pumping is causing a substantial depletion in surface flows, or that such incremental depletion of surface flows (if any) is resulting in substantial impairment of Chinook salmon staging and migration in the Lower Eel River.

1. FOER fails to demonstrate groundwater pumping caused diminished Eel River flows in low flow periods.

While arguing that existing wells are having "an adverse effect on flows in the Lower Eel River" (POB, p. 27:23), FOER fails to establish a causal link between groundwater pumping from wells permitted by the County and low flow conditions observed during the summers of 2014,

mining "is inherently not a sustainable activity," and (c) mining "will generally deplete that resource." (*Id.* at pp. 226, 239.) That is a far cry from the circumstances here.

2015, or 2021. For example, Kamman acknowledged that his report did not identify groundwater pumping as specifically contributing to low flow conditions observed during the summer months of critical dry years. (AR-EXP 15257:12–14 ["My report doesn't identify groundwater pumping specifically contributing to these low flows measured at Scotia on these dates (Summer of 2014 and 2015)."].) Indeed, Kamman admits he did not analyze the effects of groundwater pumping from any groundwater wells within the Basin. (See AR-EXP 15246:2–5 [Q: "In preparing this statement, did you analyze the effects of pumping from any actual groundwater well on surface levels in the lower Eel River?" A: "No, I didn't."].) Nor can Kamman identify a specific groundwater well that contributes to lower surface levels. (AR-EXP 15246:6–10I [Q: "And to confirm you did not identify any specific groundwater well or wells within the basin that contribute to lower water surface levels and streamflow rates?" A: "I did not."]; AR-EXP 13586 ["there is no reasonable degree of scientific certainty to [Kamman's] analysis."].)

While the County acknowledges the Basin is hydraulically connected to the Eel River, this does not mean groundwater pumping was a substantial or material cause of the low flow conditions in 2014, 2015, or 2021. (AR 206.) The County's hydrology expert, Anthony Brown, opined that while groundwater pumping may have *some* effect on interconnected surface water flows in the Lower Eel River, the more likely cause for stream flow depletions are other natural causes (e.g., declines in seasonal precipitation and changes in stream morphology) and anthropogenic causes (e.g., surface diversions at the Potter Valley Project). (AR-EXP 5186; 13584; 160-161 [FOER stating low flow conditions in 2014 were largely caused by "megadrought"].) The Eel River watershed also experiences natural climate and weather variability, which is the determining factor on Eel River flows in the dry season. (AR-EXP 5114–5115, 5135, 13597.)

The GSP model results further demonstrate that groundwater pumping at current levels has a minor, insignificant impact on surface flows. The model estimated the average change in monthly average stream flow due to groundwater extraction at current conditions was between 1% to 2% of total flow across the seven critical riffle areas. (AR-EXP 203–206.) Brown reported the model found that flow reductions resulting from groundwater pumping are between 4.0% and

8.1% in the most sensitive riffle ME-7 (i.e., 92 to 96% of the flow remains), even in the lowest flow periods. (AR-EXP 5187.) Additionally, when applying rating curves, the model results indicate a negligible change in stage resulting from groundwater extraction under current conditions. (AR-EXP 208.) Groundwater pumping at current conditions only accounts for a change in stage between 0.02 feet at ME-1 to 0.05 feet at ME-7, a negligible amount. (*Ibid*.)

2. FOER fails to establish groundwater pumping caused substantial impairment of salmon during low flow periods.

In addition to failing to establish that groundwater is causing substantial depletions in the Eel River, FOER fails to establish a causal link between groundwater pumping from wells authorized by the County and any adverse impacts to fish species. Rossi opined that groundwater pumping with any measurable effect on surface flow during periods of low flow "*would have likely* led to adverse effects on adults or juvenile salmonid trapped in the lower Eel River. . . ." (POB, p. 15:21–26; AR-EXP 2030, emphasis added.) Further, Rossi opined that groundwater pumping that "might" extend the duration of intermittency is "likely" to affect fish (AR-EXP 12751), later referencing the "potential" for pumping to impact adult salmon (AR-EXP 2024). But Rossi was quick to acknowledge that he was not offering any opinion as to the causes of any surface water depletions or actual physical impacts on salmon in the drought years identified:

> Q: "So again, you're not opining today on the cause of any given level of surface water depletion; is that right?" Rossi: "That's correct." (AR-EXP 15349:15–19.)
>
> Q: "Do you have any physical evidence; for example, monitoring or sampling data, confirming the groundwater pumping caused adverse effects to salmon or other species in 2014?" Rossi: "I don't have physical evidence of that." (AR-EXP 15350:4–8.)
>
> Rossi: "I have not conducted a study, and I'm not aware of a study that definitively or quantitatively links groundwater extraction in the Eel River to summer water in the location of interest." (AR-EXP 15368:24–15369:3.)

While Rossi provides conceptual linkages, he does not offer physical evidence, monitoring data, or definitive opinion that groundwater pumping is causing adverse effects on salmonids. Rossi's opinion is speculative and cannot be considered substantial evidence that groundwater pumping caused adverse effects on fish species in the Lower Eel River in 2014, 2015, or 2021. (See

Apartment Ass'n of Greater Los Angeles v. City of Los Angeles (2001) 90 Cal.App.4th 1162, 1176 ["We do not believe an expert's opinion which says nothing more than 'it is reasonable to assume' that something 'potentially…may occur' constitutes . . . substantial evidence . . . ."].)

Additionally, Rossi's opinion relies largely on Kamman's expert report, which Rossi characterizes as "clearly [showing] that groundwater extractions have significant and measurable effects on surface water flow in [the Lower Eel River]." (AR-EXP 2030–2031.) This is inaccurate. As noted above, Kamman concedes that his expert report does not reach this conclusion. (See, *supra*, Section VI.D.1.) Rossi's opinion, therefore, lacks a proper foundation and must be disregarded. (See Respondents' Written Objections, pp. 4–5.)[6] Conversely, Rossi applauded the conservative thresholds and passage criteria in the GSP. (AR-EXP 2016 [applauding "conservatively low estimate of fish passage flows" and noting that it was "wise of the GSP to use a lower threshold for evaluating Chinook salmon passage"].)

The County's expert biologist Hanson, on the other hand, opined that salmon originating in the Eel River have evolved a synchrony between the seasonal timing of adult upstream migration and the environmental cues associated with fall rainfall. (AR-EXP 14591, 14593; AR-EXP 15376:23–15377:1 [Rossi conceding "the population of Chinook salmon is well-suited and well-adapted to respond appropriately to the natural hydrologic conditions that occur in the Eel River"].) During summer, low instream flow and warm temperatures do not provide suitable habitat in the Lower Eel River for adult salmon. (AR-EXP 14588; AR 581.) Adult salmon begin entering the estuary in August or early September and typically hold in the cooler estuarine waters until instream conditions are more hospitable and upstream migration is cued by attraction flows and reduction in water temperatures associated with rainfall, runoff, and storm activity. (AR 207; AR-EXP 2016, 14591.) Thus, the timing of rainfall events—and not groundwater pumping—critically influences habitat suitability and the timing of adult migration. (AR-EXP 14591; AR-EXP 2016 [Rossi noting "[a]dult Chinook salmon *only* begin upstream migration after rain events raise the level of the river."], emphasis in original.)

[6] Filed concurrently with the County's Opposition Brief.

As for the few fish showing signs of distress in key drought years, Hanson opined that they likely began their move from the estuary early and were met with potentially inhospitable conditions. (AR-EXP 15460:21–15461:6.) Early migration by some fish creates life history diversity, which is natural and a result of the highly variable hydrologic and environmental conditions in the watershed. (AR-EXP 15461:3–6.) While there may have been increased stress for fish migrating early in drought years, that alone does not support a finding of substantial impairment from groundwater pumping. (AR-EXP 15012, 15015, 15462:13–15463:4.) Indeed, some mortality is natural as salmon migrate upstream. (AR-EXP 15516:10–12; AR-EXP 15345:13–18 [Rossi agreeing that "[p]re-spawning mortality does occur in nature"].) And low flows in recent drought years may have spared some early migrating fish by inhibiting passage to upstream staging areas. (AR-EXP 15015–15016; AR 7794–7795 [National Marine Fisheries Service biologist noting flows observed in 2014 could be "blessing in disguise given the river conditions" and "the timing is pretty good for fish"].)

Despite low flow conditions observed in recent drought years, the number of Chinook salmon that successfully migrated upstream through the Van Arsdale Fish Station in 2014, 2015, and 2021 did not appear to be statistically lower than in wetter years, likely due to strong fall rainfall events. (AR-EXP 14599–14604, 14616–14627.) For example, instream flows recorded at the Scotia USGS streamgage in the fall of 2013 (water year 2014) increased from approximately 50 cfs in mid-September to over 600 cfs by early October, peaking at over 1,000 cfs in late November. (AR-EXP 14601.) Hanson conducted a statistical analysis evaluating whether there was any difference in the number of adult Chinook salmon successfully migrating upstream in wetter years. (AR-EXP 14594–14598.) Hanson's analysis found that the number of adults successfully migrating upstream in wetter years was not statistically greater than the critical drought years of concern to FOER. (AR-EXP 14595–14597.) Successful migration up the Eel River likely depended on fall precipitation, and not instream water levels.

FOER might take a different side in the scientific controversy over the interrelationship of groundwater pumping and the health of the salmon population. However, such disagreement is

not grounds for issuing a writ mandating the County to do more to evaluate the incremental effects of pumping and to protect instream beneficial uses (e.g., migrating Chinook salmon).

E. The Petition Is Not Ripe for Review.

The Petition should be denied because it does not present a ripe controversy. A controversy is "ripe" when it "has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." (*Monterey Coastkeeper v. Monterey County Water Resources Agency* (2017) 18 Cal.App.5th 1, 20 ("*MCWRA*"), internal quotations omitted, quoting *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170–171 [denying challenge to coastal permitting guidelines where petitioner failed to assert claim in connection with particular permit application].) Relevant here:

> [The] basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. (*Santa Teresa, supra*, 114 Cal.App.4th at p. 708, citation omitted.)

MCWRA and *Santa Teresa* are instructive. In *MCWRA*, petitioner asserted that the county's discharge of contaminated wastewater into a slough constituted a breach of the agency's public trust duty. The court found the controversy unripe because the discharges were regulated by the Regional Water Board but petitioner failed to seek administrative review under the Porter-Cologne Act. Consequently, the agency with regulatory authority over water quality "did not have the opportunity to prescribe requirements as to the nature of the discharge and to implement applicable water quality control plans." (*MCWRA*, 18 Cal.App.5th at p. 20.) In *Santa Teresa*, petitioner asserted that the city's expanded use of recycled water would contaminate the aquifer, resulting in a public nuisance and violation of the public trust. The court denied both claims as unripe, explaining that, "[a]lthough it is fairly certain that new recycled water users will eventually be brought on line, the likelihood that City will permit new uses without regard to the risks is speculative at best." (*Santa Teresa, supra*, 114 Cal.App.4th at p. 709.)

FOER's public trust claim is unfit for judicial resolution for several reasons in line with

MCWRA and *Santa Teresa*. First, under the guise of the public trust, FOER in its FAP asserts the County has the duty to "enact[]an ordinance or program to regulate or otherwise address groundwater pumping. . . ." (FAP, at p. 2:21–24.) The County has already enacted such a program under SGMA and should be afforded the opportunity to implement its GSP.

Second, FOER did not challenge the County's adoption of the GSP (FAP, pp. 16:23-18:5) and acknowledges that "relatively few new well permits, or replacement well permits are located or expected in the Lower Eel River Valley" (POB, p. 34:24–26). There is no urgency with respect to current and future well permits and, as in *Santa Teresa*, it is speculative that the County would permit new wells without regard to the risks posed to instream public trust uses and values.

Third, FOER has yet to establish that groundwater pumping regulated or authorized by the County—as opposed to other factors—is substantially impairing salmon migration in the Lower Eel River. The GSP found the opposite—that groundwater pumping within the Basin is occurring at a sustainable level and is not resulting in significant depletion of interconnected surface water.

Fourth, as in *MCWRA*, FOER did not initiate an administrative appeal or court proceeding to challenge the GSP or any specific well permits, nor did FOER present any scientific evidence in those proceedings. Consequently, the County and DWR did not have the opportunity to prescribe further requirements and implement the applicable GSP based on that evidence. For all these reasons, the Court should deny the Petition as unripe.

VII. CONCLUSION

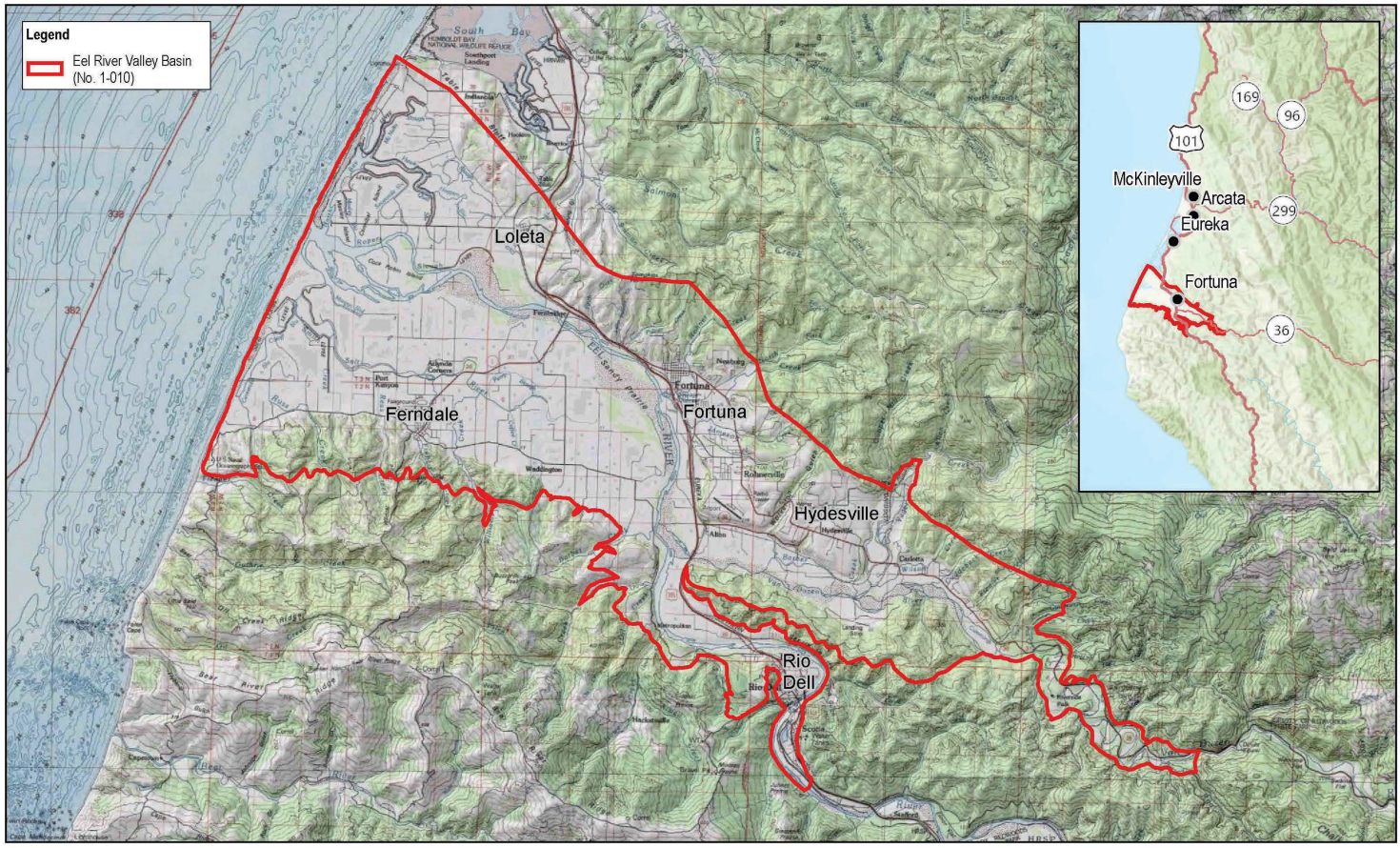
The County properly exercised its discretion in evaluating the potential effects of groundwater pumping and adopting a plan to ensure it will not result in significant depletion of interconnected surface waters. FOER has failed to establish groundwater pumping is resulting in substantial impairment of instream public trust uses, and therefore the Petition should be denied.

DATED: June 30, 2025

STOEL RIVES LLP

CHRISTIAN L. MARSH
Attorneys for Respondents COUNTY OF HUMBOLDT and COUNTY OF HUMBOLDT BOARD OF SUPERVISORS

EXHIBIT A



Engineers & Geologists

Stillwater Sciences

GHD

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Map Projection: Lambert Conformal Conic
Horizontal Datum: North American 1983
Grid: NAD 1983 StatePlane California I FIPS 0401 Feet

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Humboldt County Groundwater Sustainability Agency
Eel River Valley Groundwater Sustainability Plan

Project No. **11217388**
Revision No. **-**
Date **Jan 2022**

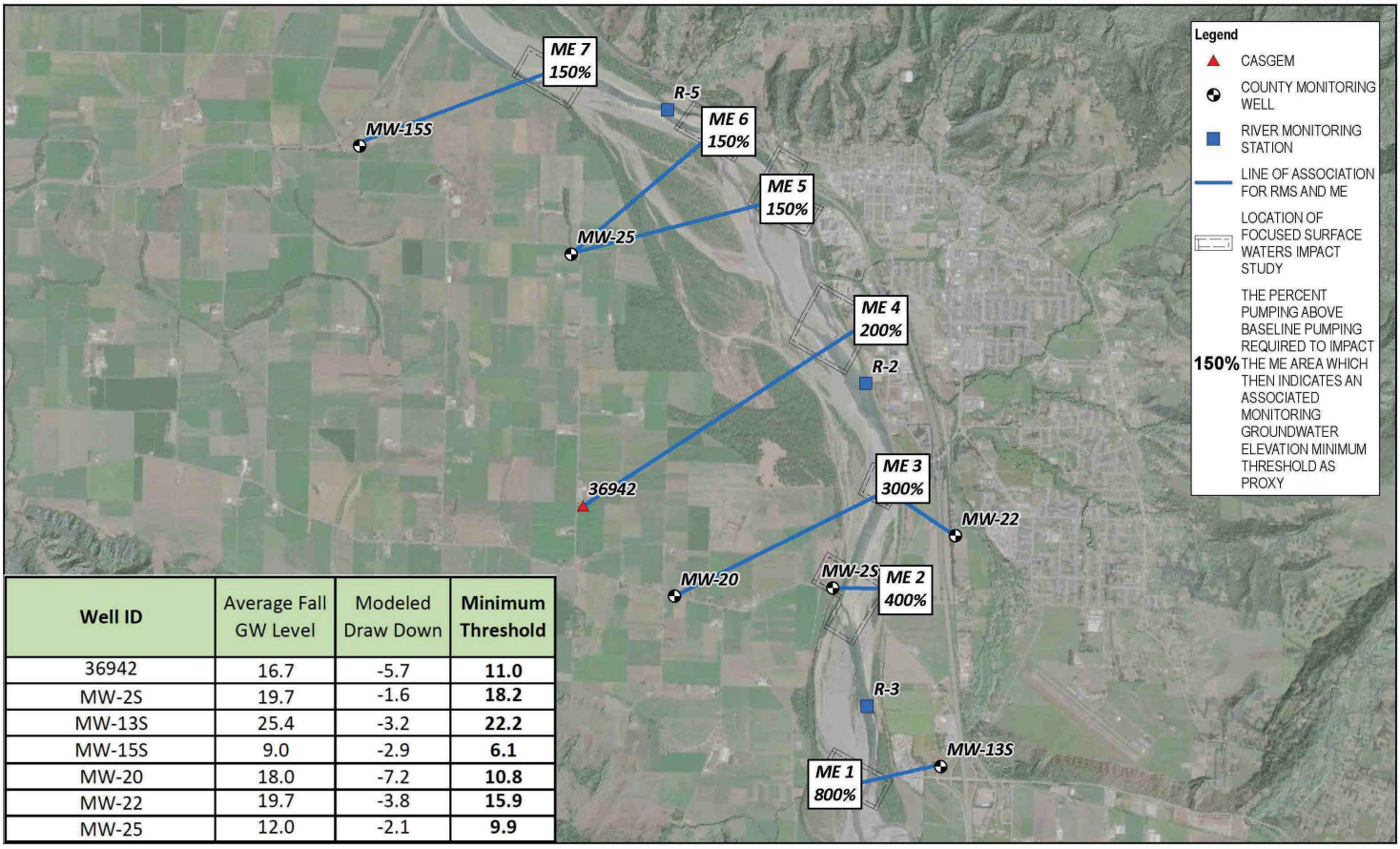
Site Location Map

FIGURE 1

N:\US\Eureka\Projects\561\11217388\GIS\Maps\Deliverables\11217388_ERVP_GSP\11217388_ERVP_GSP.aprx - FIG1_SiteLocationMap
Print date: 20 Jan 2022 - 09:52

Data source: DWR Basin, 2013; World Topographic Map - labelless: Esri, HERE, Garmin, FAO, NOAA, USGS, Bureau of Land Management, EPA, NPS; transportation: USGS The National Map: National Transportation Dataset;U.S. Census Bureau - TIGERLine; U.S. Forest Service. Data Refreshed October, 2021.; World Hillshade: Esri, USGS,USGS National Map: USGS The National Map: National Boundaries Dataset, NationalElevation Dataset, Geographic Names Information System, National Hydrography Dataset, National Land Cover Database, National Structures Dataset, and National Transportation Dataset; U.S. Census Bureau- TIGERLine; HERE Road Data. Created by: jclark2

EXHIBIT B



Well ID	Average Fall GW Level	Modeled Draw Down	Minimum Threshold
36942	16.7	-5.7	**11.0**
MW-2S	19.7	-1.6	**18.2**
MW-13S	25.4	-3.2	**22.2**
MW-15S	9.0	-2.9	**6.1**
MW-20	18.0	-7.2	**10.8**
MW-22	19.7	-3.8	**15.9**
MW-25	12.0	-2.1	**9.9**

SHN Engineers & Geologists | Stillwater Sciences | GHD

Paper Size ANSI A
0 1,000 2,000 3,000 4,000
Feet

Map Projection: Lambert Conformal Conic
Horizontal Datum: North American 1983
Grid: NAD 1983 StatePlane California I FIPS 0401 Feet

N

Humboldt County Groundwater Sustainability Agency
Eel River Valley Groundwater Sustainability Plan

Proxy Groundwater Sites for Surface Water Depletion

Project No. **11217388**
Revision No. **-**
Date **Jan 2022**

FIGURE 39

N:\US\Eureka\Projects\561\11217388\GIS\Maps\Deliverables\11217388_ERVP_GSP\11217388_ERVP_GSP.aprx - FIG39_ProxyGWSitesforSurfaceWaterDepletion
Print date: 20 Jan 2022 - 11:16

Data source: CASGEM; Humboldt County; USGS; SHN; World Imagery: Maxar. Created by: jclark2

PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. I am employed in the City and County of Sacramento, California and my business address is 500 Capitol Mall, Suite 1600, Sacramento, CA 95814 and my email address is ara.jauregui@stoel.com.

On June 30, 2025, at Sacramento, California, I served the attached document(s):

Respondents County of Humboldt and County of Humboldt Board of Supervisors' Opposition Brief

On the following parties:

Lozeau Drury LLP Michael R. Lozeau Mitchell Thielemann 1939 Harrison Street, Suite 150 Oakland, CA 94612 michael@lozeaudrury.com mitchell@lozeaudrury.com	Attorneys for Petitioner *Friends of the Eel River*

✠ **BY FIRST CLASS MAIL:** I am readily familiar with my employer's practice for the collection and processing of correspondence for mailing with the U.S. Postal Service. In the ordinary course of business, correspondence would be deposited with the U.S. Postal Service on the day on which it is collected. On the date written above, following ordinary business practices, I placed for collection and mailing at the offices of Stoel Rives LLP, 500 Capitol Mall, Suite 1600, Sacramento, CA 95814, a copy of the attached document in a sealed envelope, with postage fully prepaid, addressed as shown on the service list. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing contained in this declaration.

✠ **BY EMAIL:** On the date written above, I emailed a copy of the attached documents to the addressee, as shown on the service list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on June 30, 2025, at Sacramento, California.

/s/ Ara Jauregui
ARA JAUREGUI