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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF HUMBOLDT

FRIENDS OF THE EEL RIVER, a public benefit corporation,

Petitioner,

vs.

COUNTY OF HUMBOLDT, a state entity; BOARD OF SUPERVISORS OF THE COUNTY OF HUMBOLDT, a public entity,

Respondents.

Case No. CV2201593

PETITIONER'S REPLY BRIEF

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

Action Filed: October 27, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES

Code of Civil Procedure

Evidence Code

MISCELLANEOUS

Respondents Humboldt County and the Board of Supervisors (collectively "County") respond to Petitioner Friends of the Eel River's ("Petitioner" or "FOER") opening brief by redrafting the petition's claims to ones easier to oppose. Petitioners claim the County has violated its mandatory public trust duty by failing to consider adverse effects on the trust in a particular context – depletions of flows in the Lower Eel River when threatened Chinook salmon are holding prior to the first rains. Rather than address that claim, the County asks the Court to read the petition as a challenge to the County's Groundwater Sustainability Plan ("GSP"). The County argues against a claim that has not been brought. Presenting FOER's ministerial duty claim as a challenge to a quasi-legislative decision (i.e., the GSP), the County applies an inapplicable standard of review and attempts to object to expert evidence as outside an illusory administrative record. The County pretends the GSP's limited evaluation of one adverse effect – flow depletions once fish passage was already occurring – fulfilled its duty to consider impacts of flow depletions to salmon occurring at other times. However, there is no dispute that the County, in preparing the GSP, only considered flow depletions in the lower Eel when the river was flowing at 130 cfs.

I. ARGUMENT

A. The Standard of Review for a Quasi-Legislative Decision is Not The Standard for a Traditional Mandamus Claim.

Ignoring the criteria for a writ of mandate to compel performance under the public trust doctrine (Opening Br. pp. 24-26), the County maintains a fiction that FOER is challenging the GSP's compliance with SGMA. As a result, the County has failed to rebut the applicable standard and elements of a traditional writ of mandate action enforcing a mandatory duty.

Three of the four cases cited by the County involved challenges to decisions by the State Lands Commission ("SLC"), acting as the State's manager of public trust tidelands and submerged lands, that did consider the trust when deciding to lease or dispose of trust lands. (County Br., p. 18; *World Bus. Acad. v. California State Lands Comm'n* (2018) 24 Cal.App. 5th 476, 509; *Cnty. of Orange v. Heim* (1973) 30 Cal.App.3d 694, 718-719; *San Francisco Baykeeper, Inc. v. State Lands Com.* ["*Baykeeper II*"] (2018) 29 Cal.App.5th 562, 576.) Those claims challenging quasi-legislative decisions by SLC regarding the propriety of leasing or disposing of public trust lands fail to provide any meaningful standard of review for the County's failure to consider the public trust effects of well pumping in the Lower Eel River aquifer prior to the onset of the rainy season and substantial surface flows. Likewise, *Plan. & Conservation League v. Dep't of Water Res.* (2024) 98 Cal.App.5th 726 was limited to the Department of Water Resource's ("DWR") decision to amend water allocation contracts to various water districts (98 Cal.App.5th at 769.) The plaintiffs did not allege that DWR had not made

any public trust determination. (*Id*. at 770 ["While there may be instances in which a CEQA analysis fails to analyze the breadth of potential public trust uses (see, e.g., *San Francisco Baykeeper v. State Lands Comm'n* (2015) 242 Cal.App.4th 202, 240-243 ["*Baykeeper I"*), appellants do not make that contention here"].) Thus, *PCL v. DWR* was a challenge to a particular lease based on an administrative record and not, as here, a traditional writ to enforce the County's violation of an ongoing duty.[1]

Because the County has failed to comply with its public trust duty, there is no administrative record for the court to review. Nor is FOER's expert evidence "extra-record evidence." (*See* County Br., p. 29.) The County has never applied its discretion to consider the adverse effects on the trust in the Lower Eel River from groundwater pumping prior to the beginning of the rainy season. (Opening Br., pp. 17-21.) "[M]andamus is available to challenge an agency's failure to perform an act required by law." (*Water Audit California v. Merced Irrigation Dist.* (2025) 111 Cal.App.5th 1147, *27 [citations omitted].) Although a challenge to a quasi-legislative decision is generally limited to an administrative record, the Supreme Court recognizes there is no such limit for a traditional mandamus action to enforce a mandatory duty. "[W]e will continue to allow admission of extra-record evidence in traditional mandamus actions challenging ministerial or informal administrative actions if the facts are in dispute." (*Western States Petroleum Assn. v. Superior Ct.* (1995) 9 Cal.4th 559, 575–76.) When superior courts are asked to review ministerial actions in a traditional mandamus proceeding, evidence beyond the verified petition is usually necessary "because there is often little or no administrative record in such cases." (*WSPA,* 9 Cal.4th at 575.)

Petitioner does not dispute that it bears the burden to establish some adverse effect on the public trust to prevail on the portion of its claim that the County's duty to consider the trust has been triggered for groundwater wells permitted in the Lower Eel River from 1990 to May 2023 and for older wells over which the County has police power authority. (County Br., p. 19.)[2] FOER laid out the applicable criteria for a traditional writ of mandate. (Opening Br., p. 25.) The petitioner must establish facts showing that "(1) [respondent] has a clear duty; (2) [petitioner] has a beneficial interest in

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[1] Likewise, *Stauffer Chem. Co. v. Air Res. Bd.* (1982) 128 Cal.App.3d 789 – a case challenging air pollution control regulations by the California Air Resources Board – and *O.W.L. Found. v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 593 – challenging a city's adoption of a water supply assessment – were record review cases bearing no resemblance to FOER's case enforcing an agency's public trust duty to consider impacts to the trust.

[2] Because the County has not yet made any determination complying with its ongoing duty to consider the effects on the public trust from pumping during the summer months in the Lower Eel River, the challenge to findings made by an air district adopting an air quality control rule addressed in *Am. Coatings Assn. v. S. Coast Air Quality Mgmt. Dist.* (2012) 54 Cal.4th 446, 473, has no bearing on the Court's determination of FOER's claim. (County Br., p. 19.)

[respondent]'s performance of that duty;[3] (3) [respondent] has the ability to perform the duty; (4) [respondent] has failed to perform the duty …; and (5) [petitioner] has no other plain, speedy or adequate remedy." (*Elmore v. Imperial Irrigation Dist.* (1984) 159 Cal.App.3d 185, 193 [abrogation recognized on other grounds by *Griset v. Fair Pol. Pracs. Comm'n* (2001) 25 Cal.4th 688, 697–98].) The County ignores those elements of a claim to enforce a mandatory duty, as well as the numerous other cases guiding the Court's authority under CCP § 1085(a). (Opening Br., p. 25.)

Even if FOER's action were framed as a challenge to the County's GSP for failing to comply with the County's duty to consider effects on the public trust in the Lower Eel River from groundwater pumping during the dry season, FOER would still prevail. The County's public trust duty does not permit it to arbitrarily or capriciously ignore adverse effects to the trust. (*See PCL*, 98 Cal.App.5th at 769.) In *PCL*, the court reviewed a DWR report to determine the contract amendments would have no effect on DWR's water allocations. (98 Cal.App.5th at 744–45.) Unlike DWR's report, the County's GSP avoids making any determination on impacts to surface flows in the Lower Eel River, or to salmon holding and waiting to migrate upstream of that stretch of the river prior to the rains and surface flows of 130 cfs. (Opening Br., pp. 17-19, 32.) Hence, even if a quasi-legislative review standard is applied, the GSP fails to demonstrate that the County complied with its duty to consider adverse effects of groundwater pumping on the public trust in that circumstance.

B. The County Does Not Dispute That Groundwater Pumping Depletes Flows by 9 to 15 cfs at Critical Riffle Areas in the Lower Eel River During Low Flow Months.

The County does not, and cannot, dispute that groundwater pumping depletes flows in the Lower Eel River. The County does not dispute that its model calculates maximum monthly averages of flow depletions in the Lower Eel River of 9 to 15 cfs during the irrigation season at the critical riffle areas between the Van Duzen confluence and Fernbridge. (AR-EXP000203-206. *See* Opening Br., p. 15.) The County's focus on the average monthly percentage reduction in total flows, including subterranean flows, of from 0.01% to 12%, only confirms that groundwater pumping does deplete flows in the Lower Eel River at the riffle areas. (County Br., p. 27; AR-EXP000203-206.) Likewise, the County does not dispute that its own expert confirmed that "[g]roundwater production has some effect on interconnected surface waters in the lower Eel River." (AR-EXP015099:11-16.)

The County also does not dispute that when the Lower Eel River was impassable to salmon on August 26, 2021, surface flows at riffles ME-4 and ME-6 where the California Department of Fish & Wildlife ("CDWF") observed passage being blocked, were as low as 8.8 and 14.0 cfs. (AR-EXP000011.) FOER accurately cites evidence submitted by the National Marine Fisheries Service that

[3] Except where, as here, there is public interest standing. (*See* Opening Br., p. 25, n. 11.)

"[t]his modelled reduction in flow near ME-7 is attributed to groundwater use and may be removing a majority of the flow in the Eel River during the summer and early fall, leading to disconnected and dry reaches, like what occurred in September of 2014 when a large stretch of the Eel River went dry." (AR7811.) FOER does not "distort" any evidence by focusing on drought years, conditions when groundwater pumping's adverse effects on flows are of the highest concern. It was during drought conditions that both Mr. Kamman and NMFS were of the opinion that, given the flow depletion calculated by the County's model, and the particularly low flow conditions that occur during critical and dry water years, such as 2014, 2015, and 2021, streamflow depletions due to groundwater use were depleting a majority of the remaining surface flow in that stretch of the river. (AR-EXP011884; AR7811.) The depletion of flows by existing groundwater pumping is sufficient by itself to trigger the County's duty to consider the effects of that depletion on the public trust in the critical riffle stretch of the Lower Eel River between Fernbridge and the confluence of the Van Duzen River.

C. The County Does Not Dispute That the GSP did not Evaluate Impacts of Groundwater Pumping Prior to the Onset of the Rainy Season.

The County's primary defense is the argument that the County considered the effects of groundwater pumping on the Lower Eel River as part of its GSP process. But the County cannot and does not dispute that it elected not to use the GSP process to consider impacts to salmon in the Lower Eel River during the dry season, but only to consider groundwater-related flow reductions at flows of 130 cfs or greater. (County Br., p. 25 ["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"]; *Id*., p. 26 [only addressed impacts when flows at riffles at 130 cfs when fish passage to upper watershed is already occurring].) As the County acknowledges, "[t]he *ELF* court … left open the possibility a county could fulfill its common law public trust duty ***by developing and implementing*** groundwater sustainability plans under SGMA." (*Id*., p. 24 [emphasis added.) The firm 130 cfs flow boundary fixing the scope of impacts considered by the County in its GSP process also fixes the scope of its consideration of the public trust. (Opening Br., pp. 17-18.)

The County admits it only applied flow depletions calculated by its model to calculate effects on surface flows when the river already was flowing at 130 cfs. (County Br., p. 26.) No effects of the calculated groundwater pumping depletions were considered at lower flows typical of the dry season. (Opening Br., pp. 18-19.) As a result, the County's argument that the admitted change in river stage from groundwater pumping was only 0.02 to 0.05 feet (i.e. a quarter to a half inch in surface flow reduction) only applies to surface flows of 130 cfs – not to late summer low flows an order of magnitude lower. (*See* County Br., p. 32.) Nor does the County dispute that the only effect on Chinook

considered in the GSP was to fish passage already occurring from the riffle areas to the upper watershed. (*Id* ., pp. 25-27.)

The County cites two memoranda prepared in support of the GSP as purportedly addressing effects of groundwater pumping on dry season surface flows or fish present in staging pools prior to the rainy season. (County Br., p. 27.) The County first cites an Assessment of Groundwater Dependent Ecosystems. (*Id*. at 28; AR498.) Although mentioning Chinook salmon in the Eel River (AR540), the memorandum expressly disavows addressing any impacts from groundwater pumping, stating "[t]he degree to which groundwater management affects fish passage will be explored using the groundwater-surface water model." (*Id*.) The memo confirms that evaluation would be limited solely to impacts to fish passage, emphasizing the GSP's focus solely on impacts to conditions when surface flows are at 130 cfs at the riffles. (*Id*. *See also* AR561 ["Fish passage through the [Lower Eel River] reach typically begins during the first storm flows"]. Likewise, the memorandum notes that "[t]he Middle Eel River GDE Unit has an undetermined susceptibility to changing groundwater conditions." (AR561.) However, the report does not consider that susceptibility, instead again deferring to the limited review in the future GSP: "The effect of pumping on aquatic GDEs and critical riffle conditions is unknown and will be investigated in using the groundwater model." (*Id*.)

The County tries this line of reasoning again with the GSP Technical Appendix prepared in 2021 entitled "Eel River Valley Basin ["ERVB"] Surface Water Beneficial Use Assessment." (AR1146.) This memorandum is limited to assessing "the baseline conditions for surface water beneficial uses in the [ERVB]." (AR1150.) Thus, it describes the salmon habitat in the lower Eel River, noting, *inter alia*, that "[a]dult holding habitat for all three salmonids is the most common habitat mapped within the Middle Eel River GDE Unit monitoring reach (Figure 5)." (AR1161.) It also states that, "Chinook salmon are reliant on groundwater-fed rivers to provide adequate water quality, temperature, and volume for upstream migration (***in the fall before rainfall elevates river flows***), as well as for spawning and freshwater residency." (AR1170 [emphasis added].) However, any consideration of effects on flows or fish is again left to the GSP: "The degree to which groundwater management affects critical riffle depths will be explored in the final GSP." (AR1174. *See also* AR1175 [same].) Despite the ample holding habitat in the Lower Eel between Fernbridge and the Van Duzen and the importance of groundwater to that habitat "before rainfall elevates river flows[,]" the GSP opted not address any pumping impacts to that stretch during that time period. (*Supra*, p. 8.)

These references to nonexistent consideration of pumping impacts prior to the rains and the County's analysis of groundwater pumping impacts on surface flows of 130 cfs do not rebut any of the evidence that adverse effects to the trust from groundwater pumping were never considered for surface

flows in the Lower Eel River less than 130 cfs. (County Br., pp. 26-27.)

D. Any Adverse Impact Triggers the County's Duty to Consider the Trust.

The County argues that the evidence does not establish an adverse effect from groundwater pumping because surface flow depletions caused by groundwater pumping are not "substantial." (County Br., pp. 22, 29, 30-32, 36.) Remarkably, the County cites *ELF* for this proposition, ignoring its instruction that the County has "a duty to consider ***any adverse impacts*** groundwater extraction would have on a public trust resource". (*ELF v. State Water Resources Control Bd.* ["SWRCB"] (2018) 26 Cal.App.5th 844, 864 [emphasis added] [*ELF*"]; *see id*. at 860 ["the dispositive issue is … whether the challenged activity allegedly harms a navigable waterway].) "Before … agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize ***any harm*** to those interests." (*Nat'l Audubon Soc'y v. Superior Ct.* (1983) 33 Cal.3d 419, 426.)

Santa Teresa Citizen Action Grp. v. City of San Jose (2003) 114 Cal.App.4th 689 never uses the term "substantial" to describe petitioner's required showing. (114 Cal.App.4th at 709; County Br., p. 29.) On the contrary, that decision states that evidence of a ***threat*** to Coyote Creek would have been sufficient to trigger the duty to consider the trust. (*Id.*) *Baykeeper II* also does not hold that a trustee agency's duty to consider the trust is only triggered by a substantial impact on the trust. (County Br., p. 29.) In *Baykeeper II*, petitioner challenged SLC's analysis conducted to comply with the duty found to be triggered in *Baykeeper I*. (Opening Br., p. 29.) In *Baykeeper I*, despite the SLC's determination that the proposed sandmining would not have any significant impacts, its duty to consider the public trust was still triggered by the removal of sand. (242 Cal.App.4th at 240.) Indeed, the County's effort to distinguish *Baykeeper I* is most notable for acknowledging that the sand mining at issue in that case "will generally ***deplete*** the resource[,]" (County Br., p. 30 n. 5 [emphasis added]), the same effect identified by the County's own modeling of the riffle areas. (AR206 ["[T]he integrated groundwater-surface water model that was developed for the Basin … can be used to estimate the volume of surface water depletion caused by groundwater extraction in the Basin…"].) Even an ultimately insignificant depletion of a trust resource triggers the duty for the trustee agency to consider that adverse effect and its scope. [*Baykeeper I*, 242 Cal.App.4th at 238 ["we are not persuaded by the SLC's factual contention that Bay sand mining does not deplete a trust resource"].) Whether the trust resource at issue was not renewable or the activity at issue not sustainable was not relevant to the significance of the sandmining or the triggering of SLC's public trust duty. (*See* County Br. P. 29-30, n. 5.)

E. The County Fails to Demonstrate That Dr. Rossi's Expert Opinions Regarding Impacts to Salmon and Other Species is Speculative.

The County argues that Dr. Rossi's expert opinions regarding the adverse effect of reduced flows on fish are "speculative." (County Br., p. 32.) The County suggests Dr. Rossi must rely only on "physical evidence, monitoring data, or definitive opinion that groundwater pumping is causing adverse effects on salmonids." (*Id*.) The County provides no authority for this purported evidentiary bar, which has no basis in the rules governing expert opinion evidence. The County incorrectly argues Dr. Rossi must be an expert on the causes of surface water depletions in the Eel River, i.e. an expert hydrologist, to provide expert opinion on the effects of flow depletions on fish. (*Id*.) On the contrary, Dr. Rossi may rely upon the flow depletions as hypotheticals evidenced by the County's modeling and confirmed by the parties' expert hydrologists, including Petitioner's expert Greg Kamman.

Dr. Rossi's expert opinions are based on his first-hand knowledge of the importance to salmon of the habitat in the Lower Eel River between Fernbridge and the confluence of the Van Duzen during the period of time when salmon are staging in that river stretch prior to the rains, waiting for several months to migrate further upstream. (Opening Br., pp. 9-12.) Unlike Dr. Hanson, Dr. Rossi has conducted monitoring and surveys of this stretch of the river. (*See* AR-EXP002026-2028; 2030; AR-EXP015051. *Compare* Opening Br., p. 10 n. 2; AR-EXP015430:21 – AR-EXP015433:5.) In addition, the studies and data specific to the Lower Eel River and Chinook salmon relied upon by Dr. Rossi are matters of "a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code § 801(b).) "[A]n expert may rely on inadmissible hearsay to support his or her opinion if reliance on such hearsay is reasonable for that purpose." (*People v. Landau* (2016) 246 Cal.App.4th 850, 866.) Dr. Rossi also may base his expert opinion on "assum[ing] a certain set of case-specific facts for which there is independent competent evidence…." (*People v. Valencia* (2021) 11 Cal.5th 818, 832.) ""An expert's opinion is substantial evidence if it has evidentiary support and is accompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion." (*San Diego Gas & Elec. Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1292.) "An [expert] opinion is an inference or conclusion the witness draws from the witness' observations." (Cal. Prac. Guide Civ. Trials & Ev. Ch. 8C-H, §§ 8:626 - 8:627 [Opinion Evidence] [Rutter 2024].)

The County focuses on two sentences where Dr. Rossi uses the term "likely" and, from that narrow sample, argues his expert opinion is based on speculation. (County Br., p. 32.) On the contrary, Dr. Rossi provides ample explanation linking low flows and existing stress on salmon holding in pools in the critical riffle areas during critical water years to the conclusion that any incremental reductions in flow in that stretch of river, including that reported by the County's modeling and confirmed by Mr. Kamman, would have adverse effects on those salmon. (AR-EXP015379:15 - 15380:9; AR-EXP015378:7 - 15379:4; AR-EXP015386:16-19; AR-EXP012749-12751; AR-EXP015356:6-13; AR-

EXP002012-2103, 2030-2031; AR-EXP015372:21 - 15372:1; Opening Br., pp. 15-17.) Dr. Rossi's assessment of the 2015 events, including undisputed evidence of the collection of pre-spawning Chinook with damage to their eyes, brain and spinal cords in the critical riffle stretch of the river, bears repeating:

> (1) the obvious inhospitable environmental conditions in 2015 (low flow, warm temperatures, algal accretion and low dissolved oxygen…); (2) the direct linkage between groundwater extraction and surface flow (Kamman testimony 2025); and (3) the linkage between surface flow and these environmental conditions…, it is reasonable to conclude that any reductions in surface flow from groundwater pumping during an extremely low flow event would have negatively affected holding Chinook salmon and rearing juvenile salmonids already under metabolic stress.

(AR-EXP012749.) This reasoned explanation by a qualified expert is substantial evidence. (*San Diego Gas & Elec.*, 228 Cal.App.4th at 1292.) Each factual link identified by Dr. Rossi is supported by undisputed evidence. There is no dispute that groundwater pumping from the alluvial aquifer depletes flows in the Lower Eel River. (Opening Br., pp. 27-28.) There is no dispute that during critical water years, the Lower Eel River at the critical riffle areas have lost all surface flows (2014) or been extremely low (2015 and 2021). (*Id*., pp. 13-15.) Dr. Rossi explains the science and provides study citations establishing that reduced surface flows into pools where salmon are holding has detrimental consequences to those fish. (AR-EXP002012-2015, 2018-2032; AR-EXP012747-12757.) For example, he reports on his own observations and measurements of depleted oxygen levels in the Lower Eel River associated with acute mortality in salmon taken at the time of the low flows blocking fish passage in 2021. (AR-EXP002029-2030.) Thus, contrary to the County's argument, Dr. Rossi's opinions are not based on inferences but a sequence of sound facts supported by evidence.

Dr. Rossi confirmation that he was not providing expert opinion "on the cause of any given level of surface water depletion" does not undermine his expert opinion. (AR-EXP 15349:15–19; County Br., p. 32.) Dr. Rossi properly relied upon other expert opinions and case-specific depletion of surface flows for which there is independent competent evidence. (*See Valencia*, 11 Cal.5th at 832.) Likewise, the absence of "physical evidence" of adverse effects to individual salmon during the absence of surface flows in August and September of 2014 does not rebut Dr. Rossi's conclusion that those conditions "would have negatively affected holding Chinook salmon and rearing juvenile salmonids already under metabolic stress" at that time in the riffle area pools. (AR-EXP012749.)

Dr. Rossi's acknowledgment that he's not aware of a study "that definitively or quantitatively links groundwater extraction in the Eel River to summer water in the location of interest" says more about the County's failure to consider the effects of groundwater pumping at the critical riffle areas prior to the rainy season than it does to detract from Dr. Rossi's well-reasoned and fully explicated

expert opinions. (County Br., p. 32.)

The County's suggestion that Dr. Rossi's testimony lacks sufficient foundation because he relies on Mr. Kamman's expert reports ignores the fact that Dr. Rossi also relies directly on the County's modeling and its estimated flow depletions. (AR-EXP002030-2031.) Likewise, Mr. Kamman relies on that same evidence to estimate the magnitude of those flow reductions prior to the start of the rainy season in the critical riffle areas. (AR-EXP000006; 11884; *Supra*, pp. 8, 11.)

The County's selective citations misconstrue its own fishery expert's reports and testimony. The County suggests that Dr. Hanson's testimony shows that "[d]uring summer, low instream flow and warm temperatures do not provide suitable habitat in the Lower Eel River for adult salmon[,]" suggesting that Chinook are not present in the critical riffle holding pools from August through the start of the rains. (County Br., p. 33, citing AR-EXP 14588; AR 581.) The cite to the 2022 GDE Assessment at AR 581 does not support this statement. And when asked specifically whether adult salmon use this habitat, Dr. Hanson clarified that adult salmon "[a]bsolutely" migrate into the riffle areas during the summer months. (AR-EXP015442:1-4 ["do you agree that a number of adult salmonids do migrate into these reaches during the summer months? A. Absolutely"]; AR-EXP015435:2-7 ["Q. And you state a few adults may stage in deeper pools. Did you have a number in mind when you said that or wrote that? A. The numbers that I had in mind were in the hundred to 200 fish range."]; AR-EXP015435:24 - AR-EXP015436:1 ["Q. But over the course of, say, September, would the numbers in general go up or down? A. In general, they would tend to go up.]; AR-EXP015461:10-17) Prior to the rains, there is no evidence disputing that chinook salmon move into and hold in the critical riffle areas beginning in late August and in increasing numbers until the first significant rains in October or November. (Opening Br., pp. 9-12.)

Citing to Dr. Hanson's rebuttal report, the County admits "there may have been increased stress for fish migrating early in drought years" but makes the conclusory assertion that such effects would "not support a finding of substantial impairment from groundwater pumping." (County Br., p. 34, citing AR-EXP015012.) However, "any adverse effect" – not just effects prejudged to be "substantial" – triggers the County's duty to consider the public trust. (*See supra*, p. 10.)

Dr. Hanson's attempted statistical analysis using fish count data from one station on one tributary 156 miles upstream of the Lower Eel River was firmly criticized by Dr. Rossi. (AR-EXP012743-12746. *See* County Br., p. 34; AR-EXP 14599–14604, 14616–14627.) Reviewing the same data, Dr. Rossi found the "data clearly show much lower than average returns of Chinook salmon during Critically Dry years," and notes Dr. Hanson's review obscures this fact by combining critical dry years with dry years. (AR-EXP012743.) Dr. Rossi explains why the data used by Dr.

Hanson are an unreliable indicator of adverse effects to salmon occurring in the Lower Eel River during the late summer, concluding that "it is impossible to derive any meaningful assessment of groundwater pumping on Chinook salmon based on Dr. Hansen's analysis of the cohort replacement rate at the VAFS." (AR-EXP012745-12746.) For each of these reasons, the Court should disregard that unreliable effort by Dr. Hanson.

F. After FOER Files This Action, the County Begins Reviewing New Well Permits.

The County admits that, despite the 2018 *ELF* decision, they only started reviewing the impact of new well permit applications on the public trust beginning in March 2023 – five months after FOER filed this action. (County Br., p. 14. *See* FAP, ¶¶ 53; 54 [alleging a pattern and practice of issuing new well permits without considering the public trust].) The County concedes that its public trust reviews of new well permits since May 2023 "do not implicate the Lower Eel River." (County Br., p. 19.)

The County nevertheless claims that those new permit reviews should be interpreted to evaluate the effects of groundwater pumping in the Lower Eel River's critical riffle areas during the low flow summer months. (County Br., p. 19.) The County suggests that it made some sort of policy decision to only review new well permit applications from disparate locations in the Eel River watershed and not consider the effects of existing well permits on dry weather flows in the Lower Eel River. (*Id*.) No such policy decision is embodied in the County's public trust reviews of new well permits since May 2023. (*See, e.g.* AR007381.) The County's review of other well permits unrelated to the Lower Eel or flow depletions in that stretch prior to the rainy season do not consider adverse effects on that stretch or at that time and, hence, do not comply with the County's duty still at issue.

Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc. (2008) 166 Cal.App.4th 1349, does not suggest that an agency is free to ignore public trust impacts occurring in a discrete stretch of a river and during a discrete time period by pointing to public trust reviews for other areas and for another period of time. (County Br., p. 19.) In *CBD v. FPL*, the court found that petitioner had failed to name the county as the responsible agency with the ability to address the alleged public trust wildlife impacts. (166 Cal.App.4th at 1372.)

FOER's claims also bear no resemblance to the public trust claim brought in *Monterey Coastkeeper v. Cent. Coast Reg'l Water Quality Control Bd.* (2022) 76 Cal.App.5th 1. That case involved a challenge to area-wide decisions governing pollution discharges from irrigated lands issued by the Regional Water Quality Control Boards in the Central Coast region and Central Valley. (76 Cal.App.5th at 10-11.) In addition to challenging the specific orders, petitioner alleged that the SWRCB had failed "to protect public trust resources statewide" in regard to regulating irrigation discharges. (*Id*. at 11, 22.) In that context, the court could not discern an allegation of a discrete

omission by the SWRCB and the requested relief "would necessarily require the trial court to consider the many decisions within the [SWRCB]'s mandate" and turn the superior court into a "receiver" overseeing the SWRCB's numerous discretionary decisions. (*Id*. at 21-22.) FOER seeks no such open-ended relief. FOER's claims are limited to remedying the County's failure to consider adverse effects to the public trust within a discrete stretch of the Lower Eel River and a discrete time period.

G. The County Has a Continuous Duty to Consider the Public Trust.

The County attempts to dispense with its continuing duty to consider and address effects from ground water well pumping by asserting that any continuous duty under the trust only applies to decisions allocating water rights. (County Br., p. 22.) The County ignores the relevant statements in *Nat'l Audubon* emphasizing that the trustee agencies' duty of continuing supervision stems from the public trust and not the State's water rights allocation system or any other authority: "the ***core of the public trust doctrine*** is the state's authority as sovereign ***to exercise a continuous supervision and control*** over the navigable waters of the state and the lands underlying those waters." (*Nat'l Audubon*, 33 Cal.3d at 425 [emphasis added]; 437 ["In the following review of the authority and obligations of the state as administrator of the public trust, the dominant theme is the state's sovereign power and duty to exercise continued supervision over the trust"]; 440 [referring to "the continuing power of the state as administrator of the public trust…; *id*. at 445 [continuing supervisory control is "fundamental to the concept of the public trust"].) Thus, although it's true that *Nat'l Audubon* addressed adverse effects on the public trust resulting from the LA Department of Water & Power's use of allocated water rights, "***the public trust imposes a duty*** of continuing supervision over the taking and use of the appropriated water." (33 Cal.3d at 447 [emphasis added].)

The Court of Appeal's decision in *PCL v. DWR* did not transfer the source of the trustee agency's continuing supervisory authority over the trust from the public trust doctrine to the Water Code, as the County suggests. Rather, the court noted that the SWRCB was the trustee agency with supervisory control over allocations granted to DWR in the 1960s. (*PCL v. DWR*, 98 Cal.App.5th at 769.) Here, the County is the trustee agency with authority over groundwater wells and continuing supervisory authority over the operation of those wells to ensure the trust is protected, even though the County's authority does not include allocating any groundwater. (*ELF*, 26 Cal.App.5th at 859.) It is the public trust doctrine that invests the County with its continuing duty and authority to address any adverse effects on the trust from well pumping within its jurisdiction.

The County's continuous duty under the public trust doctrine includes groundwater wells for which has issued a permit since 1990. Like the allocation decisions in *Nat'l Audubon*, the permits issued to wells in the Lower Eel River basin are issued subject to the County's supervisory duties

under the public trust doctrine. The County admits that is the case for new permits issued since May 30, 2023, noting in its reviews its authority to reopen a well permit "to consider further actions as necessary and appropriate to protect public trust resources or the public health, safety, and general welfare of the County of Humboldt." (AR7781.) There can be no argument the same duty is present for the numerous permitted wells, pumping from which is depleting flows in the Lower Eel River.

Nor does the absence of a well permit issued by the County terminate the County's duties to consider adverse effects on the Lower Eel from ongoing pumping in pre-1990 wells. As the County acknowledges in its post-2023 well permit reviews, "the County's authority and responsibility to consider impacts to interconnected surface water exist independently under the common law Public Trust Doctrine." (AR7884; *ELF v. SWRCB*, 26 Cal.App.5th at 862.) Because such wells contribute to an adverse effect to a navigable water, the County has a duty to consider the effects of those wells' diversions and determine what, if any, measures must be taken to protect the trust.

H. Groundwater Pumping Need Not be the Sole Cause of the Low Flow Conditions to Contribute Its Own Adverse Effect.

The County claims that FOER has not shown a causal link between groundwater pumping and flow depletion in the Lower Eel River. (County Br., pp. 30-31.) The County's own modeling calculated the depletion of flows in the Lower Eel River at the critical riffle areas caused solely by groundwater pumping. (*See* AR-EXP015106:8-13; AR-EXP015108:5-9; AR206.) FOER's hydrology expert, Greg Kamman, relied on the GSP modeling for his expert opinion that groundwater pumping in the Lower Eel River's alluvial aquifer depletes flows in the Lower Eel River in the stretch where the critical riffle areas are located. (AR-EXP015245:16-15246:1. *See* Opening Br., pp. _-_.)

The County argues that FOER and its experts must measure each individual well directly to show groundwater pumping is causing flow depletions in the Lower Eel River. (County Br., pp. 30-31.) However, the groundwater-surface modeling was considered the best available data (*see, e.g.* AR-EXP015577) because, as the GSP itself emphasizes, "[surface water] [d]epletion caused by groundwater use cannot be measured directly." (AR206.) Likewise, the memorandum describing the modeling explains, "[t]he evaluation and quantification of surface water depletion due to groundwater extraction is challenging due to the complexity and variability of groundwater/surface water exchange and ***the fact that surface water depletion cannot be directly measured***." (AR-EXP000200 [emphasis added].) Mr. Kamman relied on the County's modeling results as evidence establishing a causal link between groundwater well pumping and flow depletions in the Lower Eel River. (County Br., p. 31, ln. 5-11 [ignoring testimony confirming Mr. Kamman's reliance on modeling].) The fact that the County itself relied on the modeling as the best science to estimate flow depletions from groundwater

pumping in its GSP proceeding rebuts its argument that technically infeasible measurements of individual wells are necessary to show that groundwater pumping is causing flow depletions in the Lower Eel. Indeed, there is no dispute from the County that groundwater pumping is depleting those flows to some extent. (County Br., pp. 31-32; (AR-EXP005115 [Brown Report] ["groundwater has some effect on ISW in the Lower Eel River"]; AR-EXP005186 [same]; AR-EXP015099:11-16.)

The County argues without authority that, even if groundwater pumping causes a depletion of surface flows in the Lower Eel River, that does not trigger the County's public trust duty to consider those effects on the trust unless the groundwater pumping also caused the baseline Lower Eel River flows to be low in the summer. (County Br., p. 31.) As *ELF* and *Nat'l Audubon Soc'y* hold, the public trust doctrine extends to "any harm" and "any adverse impact" to the trust. (*ELF*, 26 Cal.App.5th at 864; *Nat'l Audubon*, 33 Cal.3d at 426.) As was the case in the Scott River, "[t]he fact that the Scott River stream system includes groundwater interconnected with the Scott River may exacerbate the adverse impacts on the public trust but the legal issue is whether the state has a fiduciary duty to consider any adverse impacts when groundwater extraction harms a navigable waterway." *ELF*, 26 Cal.App.5th at 852 n. 3.) There is no rule that a trustee agency's duty to consider effects on the public trust is limited to situations where those effects entirely control conditions. (Opening Br., pp. 22, 29.)

I. FOER's Claims Are Ripe.

The County argues that FOER's claims are not ripe. (County, pp. 35-36.) However, the controversy between the County and FOER is "definite and concrete" and the evidence provided to the court frames the issue "with sufficient definiteness to enable the court to make a decree finally disposing of the controversy." (*Santa Teresa*, 114 Cal.App.4th at 708.) FOER's petition does not seek "an opinion advising what the law would be upon a hypothetical state of facts." (*Id*.) The Court has a full documentary record of the facts necessary to render a decision on the merits of FOER's petition.

The County first argues that by adopting its GSP under the SGMA, the County has already complied with the public trust duty alleged by FOER, hence FOER's mandatory duty claim is unripe. (*Id*. at 36.) How the County's compliance renders FOER's claim unripe is not explained.

The County then argues the claims are not ripe because FOER did not file a challenge to the County's adoption of the GSP. However, the SGMA does not require a groundwater sustainability plan to implement the public trust, indeed "the public trust is not expressly mentioned in SGMA." (*ELF*, 26 Cal.App.5th at 867.) The County had no obligation to employ the GSP mechanism to address adverse effects to the public trust from groundwater pumping. (*See* County Br., p. 17 [*ELF* "left open the possibility that counties could fulfill their common law public trust duties in developing and implementing groundwater sustainability plans under SGMA"]; *AquAlliance v. U.S. Bureau of*

Reclamation, 287 F.Supp.3d 969, 1061–62 (E.D. Cal. 2018).) And the County did not consider the trust in the GSP with regard to any well permits when flows at the riffles were less than 130 cfs.

Third, the County argues FOER's claim is not ripe because FOER has not established that groundwater pumping alone is "substantially impairing salmon migration in the Lower Eel River." (County Br., p. 36.) The duty to address any adverse effect is not limited only to sources of adverse effects that are solely responsible for the impact. (*Supra*, pp. 16-17.) Likewise, the County's duty is triggered by evidence showing "any adverse effect," not just effects deemed "substantial" or "significant" in advance of the agency's actual consideration of the trust effects. (*Supra*, p. 10.)

Lastly, without citation, the County argues the claims are not ripe because FOER did not exhaust appeals of either the GSP or any specific well permit. The County does not rebut that the only appeal procedure authorized by the County's Well Ordinance is for the permit applicant. (AR7110-7111 [§ 631-15]; Opening Br., p. 34.) Nor does the County dispute that there is no public notice of a well permit application or any public process in which FOER could participate. (AR7103-7104 [§ 631-4] [application procedure].) "[T]he exhaustion doctrine cannot be invoked without an existing administrative procedure that might serve these dispute resolution and record-building functions." (*Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099, 1105.)

Nor is there any remedy or viable claim that SGMA mandates a GSP include a public trust analysis. "[T]he doctrine [requiring exhaustion of administrative remedies] does not apply in those situations where no specific administrative remedies are available to the plaintiff." *Id*. (quoting *City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277, 1287.) As the County advised CDFW, addressing groundwater pumping impacts during low flow periods is "outside the scope of the GSA's responsibilities under SGMA." (AR449.) Because the County elected not to apply its discretion to the dry season adverse effects of pumping to the public trust in the lower Eel River, there was no decision for FOER to challenge. (*See supra*, pp. 8-10.)

Neither *Monterey Coastkeeper v. Monterey Cnty. Water Res. Agency* ["*MCWRA*"] (2017) 18 Cal.App.5th 1 nor *Santa Teresa* support the County's ripeness claim. *MCWRA* alleged respondent had a duty pursuant to the Porter-Cologne Water Quality Control Act to apply for a waste discharge permit and that respondent's discharges breached its public trust duty. (18 Cal.App.5th at 11, 19.) The administrative review process provided by Porter-Cologne in that case is not relevant to FOER's claim. (*See id*., at 13-14.) Instead, there is no administrative process for FOER to utilize. (*Supra*.) In addition, as characterized by the court, the petition in *MCRWA* claimed that the discharges violated the trust. (*Id*. at 19.) That substantive question directly invoked the regional and state board's water quality authority and expertise, which the court ruled was necessary for a complete record. (*Id*. at 20.)

As for *Santa Teresa*, the nuisance and public trust claims were unripe because irrigation uses had not been approved, never mind whether the speculative irrigation uses of the recycled water would threaten groundwater and then the Guadalupe River. (114 Cal.App.4th at 708–09.) FOER's petition addresses existing groundwater pumping, flow depletions identified by the County's own modeling and existing adverse effects, which have triggered the County's duty to consider these effects on the public trust. (*See ELF*, 26 Cal.App.5th at 860 ["*Santa Teresa* is not on point because there was no evidence in that case of any negative impact on the surface water body and, therefore, no showing of a harmful impact on public trust resources"].) FOER's claims are ripe for decision.

J. FOER's Petition Was Not Late.

In contrast to its ripeness argument, the County also argues FOER's claim was late because "at its essence" the claim is a challenge to the GSP. (County Br., p. 21.) Because the County's effort to repackage FOER's claim as a claim under the SGMA fails, FOER's public trust claim is timely. *FPL Group* does not suggest otherwise. The adverse effects on public trust wildlife complained of in that case were part and parcel of the impacts being balanced and considered by the County of Alameda in issuing its conditional use permit. (166 Cal.App.4th at 1372.) That was an important reason why the court dismissed the public trust claim for failing to name Alameda County or to challenge the use permit for the wind farm directly. (*Id*.) Likewise, the challenge at issue in *Herron v. San Diego Unified Port Dist.* (2025) 109 Cal.App.5th 1 "[did] not allege … that the Port District failed to consider the public trust, and instead asserts the lease violated the public trust as a matter of law." (109 Cal.App.5th at 10.) That claim had to be brought as a petition for writ of administrative mandate within the 90-day statute of limitations in Code Civ. Pro. § 1094.6. (*Id*. at 12-13.) FOER has alleged and demonstrated the County's failure to consider the public trust and was not required to pursue any claim under 1094.5.

II. CONCLUSION.

For all of these reasons, the Court should grant FOER's petition for writ of mandate.

Dated: July 15, 2025

Respectfully submitted,

By: 

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PROOF OF SERVICE

I, Toyer Grear, declare as follows:

I am a resident of the State of California, and employed in Oakland, California. I am over the age of 18 years and am not a party to the action. My business address is 1939 Harrison St., Suite 150, Oakland, CA 94612.

On July 15, 2025, I served a true and correct copy of the following document(s):

PETITIONER'S REPLY BRIEF

☒ **BY ELECTRONIC MAIL:** By transmitting via electronic service, the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

on the following parties or attorneys for parties, as shown below:

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I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed on the 15th day of July, 2025 at Oakland, California.

Toyer Grear