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Transmitted and served via email (addresses below):

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**Subject: Protest of Temporary Urgency Change Petition (TUCP) by California Department of Water Resources and United States Bureau of Reclamation (collectively Petitioners) to change Petitioners' permit and license conditions of State Water Project and Central Valley Project imposed pursuant to D-1641**

To whom it concerns at the Water Board's Division of Water Rights:

This letter transmits our protest with objections to the above referenced TUCP and related matters.<sup>1</sup>

Specifically, the TUCP as proposed will not best serve the public interest; it is contrary to law and the principle of due diligence; and it will have an adverse environmental impact on the Delta, and to salmon fisheries on which northern California Indian Tribes rely for cultural life and

<sup>1</sup> The TUCP with the State Water Resources Control Board was filed for Permits 16478, 16479, 16481, 16482 and 16483 (Applications 5630, 14443, 14445A, 17512 and 17514A, respectively) of the Department of Water Resources 'State Water Project and License 1986 and Permits 11315, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860, 15735, 16597, 20245, and 16600 (Applications 23, 234, 1465, 5638, 13370, 13371, 5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368, 15764, 22316, 14858A, 14858B, and 19304, respectively) of the United States Bureau of Reclamation's Central Valley Project.

nutrition. Rather than treat each of these objections separately, we see them as elements of a coherent story that must be understood as resulting from the drought and response actions of the Petitioners as operators of facilities of the State Water Project (SWP) and Central Valley Project (CVP). As we stated in our letter of this date to the Water Board on the Draft Reconsideration Order, repetition of good intentions followed by destructive water management decisions strongly indicates that the Water Board engages in behavioral pattern and practice failures at protecting the public trust resources of California in the Delta and upholding reasonable water uses, methods of water use, and reasonable methods of diversion.<sup>2</sup>

Petitioners wish to apply criteria narrowly from state water law, and as administered by the State Water Resources Control Board. At a time when California has seen below normal to critically dry conditions in seven of the last ten years, it will not suffice to apply these criteria narrowly, because the public at large is affected. Since 2000, 13 of 22 years have been below normal to critically dry.<sup>3</sup> The cumulative environmental effects of such persistent drought has had enormous impacts on the public, and water-related impacts figure prominently in these impacts.

In its December 1 cover letter for the latest TUCP, Petitioners state that modifications to their permit conditions (which are also simultaneously part of water right decision [D-1641] provisions and the regulatory water quality objectives and beneficial uses of the 1995-2006 Bay-Delta Plan) are urgently needed because of “extraordinarily dry conditions” of the previous two water years (WYs 2020 and 2021). They based their urgency contention on summertime temperature records in 2021, historically low precipitation in the Northern Sierra 8-station index, and projections (at the beginning of December 2021) of December 31 storage conditions in the state’s important CVP and SWP reservoirs.

Low reservoir conditions have abated to some degree. Accordingly, Petitioners indicate that there may be less urgency to their requests than the department felt in November as it prepared the December 1 TUCP. Reservoir conditions as of January 5, two days back, clearly exceed Petitioners’ storage projections for December 31 of 1.1 million acre-feet (MAF) for Shasta and Oroville—both are above 1.35 MAF. Folsom Lake is nearly 575 thousand acre-feet (TAF)—and well above the projected 336 TAF in the TUCP submitted a month ago, and 141 percent of its historical average storage this date.

On the other hand, Restore the Delta recognizes the uncertainties this poses for Water Board and Petitioners’ decision makers. DWR climatologist Michael Anderson stated at the TUCP public workshop before the Water Board on January 5, that DWR lost numerous hydrologic (snow, precipitation, and runoff) stations to the vast wildfires of 2020 and 2021 and must replace them. He also stated that the next three weeks are expected to be warm and dry—and depending on how warm, could mean loss of potentially significant portions of snowpack accumulated during storms last month. Dry soil moisture conditions may also result in reduced runoff yields from snowmelt this spring, as it did in the last.

But there is a context larger than the immediate uncertainties about need for the TUCP that drive our decision to protest this TUCP.

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<sup>2</sup> Letter of Barbara Barrigan-Parrilla and Tim Stroshane to State Water Resources Control Board Chair E. Joaquin Esquivel, “Comment Letter: 2021 TUCP-TMP Reconsideration,” 7 January 2022, p. 2.

<sup>3</sup> See <https://cdec.water.ca.gov/reportapp/javareports?name=WSIHIST>.

The Board has long-used the unique water rights of the federal Central Valley Project and the State Water Project to implement water quality objectives in **both** temporary urgency change petitions as well as D-1641 and the Bay-Delta Plan. The projects' water rights are unique for two reasons: First, the scale and operation of their facilities have Delta and watershed-wide hydrologic, ecologic, economic, and environmental justice impacts. Second, because of the projects' scale of impact, the Board has historically conditioned their water rights with quasi-legislated water quality objectives from the Bay-Delta Plan and D-1641 and maintained continuing jurisdiction accordingly. This means that much of D-1641 implementation and compliance is achieved via SWP and CVP operations, including those located in the Delta. Thus, these particular water rights play a dual role: they not only govern operations of the projects, those operations must achieve full compliance with the Bay-Delta Plan and D-1641 on behalf of all water right holders in the Delta watershed. Water right change petitions concerning the CVP and SWP must of necessity address not only injury to other water right holders, but violations of water quality objectives that harm beneficial users of water. In this instance, waiving or relaxing water quality objectives under TUCPs will by definition undo protections for non-propertied beneficial users and therefore harm them; this is what TUCPs pertaining to these particular water rights propose to cause, and therefore exclusion of harms (i.e., injuries) to beneficial users by the Water Board is unreasonable and an abuse of agency discretion.

Because of the dual role of these water rights, it is logical and reasonable that the phrase "legal [or "lawful"] users of water" include both propertied and non-propertied water users and their protection from harms stemming from any type of change petition. This was applied by the hearing officers during the 2016-2018 California WaterFix water right change petition proceeding. Board rejection of this understanding on page 40 of the Draft Order is improper sophistry, and does not make realities of waiving water quality objectives go away, realities like spreading harmful algal blooms, threatening extinction of native fish, and increasing Delta salinity. By defining away non-propertied beneficial users of water like environmental justice communities, your recent racial diversity, equity, and inclusion resolution becomes empty words when the Board addresses water rights of the CVP and SWP.

The larger issue then is to what degree deliveries to all water contractors becomes an obstacle to the constitutional issue posed by Article X, Section 2 of the California Constitution: In short, is continued application of the priority water rights system in the watersheds of the Delta an unreasonable use, unreasonable method of use, and an unreasonable method of diversion of water and therefore unlawful in California during drought of this magnitude?

We contend that it is. At the January 5 workshop, Gary Bobker of the Bay Institute correctly reasoned that the allocations of water permitted under last year's TUCP allocated the burden of the drought from the Settlement and Exchange Contractors of the CVP and SWP to the rivers and fisheries of the Bay-Delta watershed. That choice represented allocation of over 2.5 MAF of water to growers irrigating export crops like rice and almonds, according to Table 1 of the Water Board's Draft Reconsideration Order, while a mere 289 TAF accumulated in Shasta Reservoir by the end of the 2021 water year. This is a moral as well as an ecological catastrophe when we treat natural systems that sustain all life so poorly. It is incorrect to treat the 289 TAF that was saved at Shasta some kind of victory, when so much more could have been done with more equitable allocation priorities in water management. These two

catastrophes are unreasonable, legally speaking, and should be ended for the duration of each drought that strikes the Bay-Delta watershed.

For the native fish of the Delta watershed, two species stand out as bearing the brunt of moral and ecological catastrophe. First, it was reported by the California Department of Fish and Wildlife (CDFW) that zero Delta smelt were found in the department's fall midwater trawl survey. There were just 49 captured the year before. This record of decline comes about because of a pattern and practice in Petitioners' operations based on Board regulatory management that has failed to protect Delta smelt. There is widespread belief in the environmental and scientific communities that Delta smelt is now extinct in the wild.<sup>4</sup> Second, during the previous 2012-2016 drought, the Bureau of Reclamation failed to properly measure temperature conditions in Shasta Reservoir, which later contributed to low production of juvenile Chinook salmon from heavy temperature-dependent mortality. Then this past year, Bureau operations in 2020 left Shasta Lake with such low supplies that once again the Bureau's releases were too warm for baby and juvenile salmon in the Sacramento River. This resulted in egg-to-fry survival of winter-run Chinook salmon (2.56 percent) in 2021, which was the lowest recorded such survival rate in the last quarter-century. Let us remember at this point that according to Table 1 of the Draft Reconsideration Order, the Bureau delivered 1.375 MAF to Settlement Contractors with senior water rights holders.<sup>5</sup> Restore the Delta noted in our June 4, 2021, protest that the Bureau delivered an estimated 362 TAF in the vicinity of Settlement Contractors along the Sacramento River between April 8 and May 26. What if that water had remained in Shasta Lake at depth where a portion of it could have cooled for the summer months?

Had growers comprising the Settlement and Exchange Contractors of the two projects accepted the same burden as their grower-colleagues in other junior water contractor-districts, the pain of drought would have been more equitably endured in the agricultural community and salmon species likely would have fared better—since fish do need flowing water to complete their life histories. But as it happened, winter-run Chinook salmon edges closer to extinction, rushed along by decisions driven by a priority water rights system applied in the Central Valley Project and the State Water Project. This threat hangs like a sword of Damocles over Northern California Indian Tribes dependent on Chinook salmon, sportfishing anglers, the commercial fishing industry, and their public customers who enjoy salmon in their diets. In this scenario, the water rights system unreasonably allowed diversion and use of water at a time when a searing drought required more equitable sacrifice to protect all life, not unfair and inequitable protections almond and rice exports.

Finally, there are less well-recognized beneficial uses (that is, ones not officially designated by the State Water Board) not yet accounted for by any TUCP work done by either Petitioners or the Water Board. Despite being unrecognized, they deserve protection as a matter of human rights. As inequality has increased in our society, the Delta is not exempt from the epidemic not

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<sup>4</sup> Tom Cannon, "Delta Smelt Status," *California Fisheries Blog*, November 15, 2021, accessible at <https://calsport.org/fisheriesblog/?p=3978>. A refuge population of Delta smelt is maintained at the University of California at Davis, in the hope that someday Delta conditions will be more suited to their reintroduction into their original geographic habitat.

<sup>5</sup> State Water Resources Control Board, *Draft Reconsideration Order*, released December 15, 2021, Table 1, p. 11; accessible at <https://www.waterboards.ca.gov/drought/tucp/docs/2021/2021-12-15-draft-order-on-reconsideration.pdf>.

only of the coronavirus but of people losing their stable jobs and homes in recent years. In 2019, the San Joaquin County Point in Time count identified 921 unhoused residents. Since then, due to events like the pandemic and affordable housing crisis, that number has grown tremendously to approximately 5,000, a dramatic increase. A more exact figure awaits completion of this year's Point in Time count conducted by our local colleagues, and is currently underway. Whole communities of unhoused residents are forced to move from encampment to encampment. More and more, they migrate toward Delta water ways to set up camp. Living along the waterways puts these individuals at a higher danger of being exposed to HABs than others in our community and this must not be overlooked by the DWR, USBR, or the Water Boards.

In addition, we will be working on an effort coordinated by our partner organizations to implement trash collection programs led by the unhoused in coming months. Prioritization of accountability for local government agencies regarding water quality conditions and trash associated with encampments for the unhoused is welcomed assistance.

Restore the Delta has repeatedly stated our case for why the TUCPs since 2014 (including the one before us now dated December 1, 2021) are contrary to law for lack of due diligence by Petitioners, are not in the public interest, and have unreasonable impacts on fish and wildlife. We attach each of our protests from 2014 to 2021 to this one in 2022 to help illustrate the pattern and practice of TUCP decisions by Petitioners and the State Water Board that treat the Delta and its watersheds so poorly.

We urge you to deny the TUCP because it would have unreasonable impacts to fish and wildlife; its basis lacks due diligence by Petitioners on behalf of equitable allocation of stored supplies in their reservoirs (i.e., they have stubbornly failed to diligently hew to their obligations to protect natural systems with flow releases and cold water pool management while favoring claims of senior Settlement and Exchange Contractors); and consequently continuing the practice and pattern of denying water to riverine and estuarine ecosystems in the Bay-Delta watershed during drought, all contrary to the public interest.

We, the undersigned, have carefully read the TUCP notice and the TUCP:



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Tim Strohane  
Policy Analyst  
[tim@restorethedelta.org](mailto:tim@restorethedelta.org)

Attachments:

1. Restore the Delta Protest Petition Form for January 7, 2022
2. Restore the Delta Protest of TUCP, 13 February 2015
3. Restore the Delta Protest of TUCP, 5 May 2015
4. Restore the Delta Protest of TUCP, 17 June 2015
5. Restore the Delta Protest of TUCP, 22 July 2015

*Re: Protest of Temporary Urgency Change Petition (TUCP) by California Department of Water Resources and United States Bureau of Reclamation (collectively Petitioners) to change Petitioners' permit and license conditions of State Water Project and Central Valley Project imposed pursuant to D-1641*

6. Letter of Restore the Delta to State Water Resources Control Board regarding reconsideration of TUCP Order of February 3, 2015, dated 14 December 2015
7. Restore the Delta Protest Petition of TUCP, 4 June 2021
8. Restore the Delta Petition for Reconsideration of State Water Board June 1, 2021 TUCP Order

cc: Dillon Delvo, Little Manila Rising  
Matt Holmes, Little Manila Rising  
Irene Calimlim, Greenlining the Hood  
Jasmine Leek, Third City Coalition  
Tama Brisbane, With Our Words, Inc.  
Regina Chichizola, Save California Salmon  
Tom Stokely, Save California Salmon  
Chief Caleen Sisk, Winnemem Wintu Tribe  
Gary Mulcahy, Government Liaison, Winnemem Wintu Tribe  
Doug Obegi, Natural Resources Defense Council  
Kate Pool, Natural Resources Defense Council  
Brandon Dawson, Sierra Club California  
Jonathan Rosenfield, San Francisco Baykeeper  
John Herrick, South Delta Water Agency  
Dante Nomellini, Central Delta Water Agency  
Harry Black, City Manager, City of Stockton  
Thomas Keeling, Freeman Firm  
Stephen J. Welch, General Manager, Contra Costa Water District  
Kelley Taber, Somach Simmons & Dunn  
Osha Meserve Soluri Meserve

Re: Protest of Temporary Urgency Change Petition (TUCP) by California Department of Water Resources and United States Bureau of Reclamation (collectively Petitioners) to change Petitioners' permit and license conditions of State Water Project and Central Valley Project imposed pursuant to D-1641

**Attachment 1: SWRCB Protest Petition Form**

State of California  
State Water Resources Control Board  
**DIVISION OF WATER RIGHTS**  
**P.O. Box 2000, Sacramento, CA 95812-2000**  
Info: (916) 341-5300, FAX: (916) 341-5400, Web:  
<http://www.waterboards.ca.gov/waterrights>

**PROTEST- PETITION**

This form may also be used for objections

**PETITION FOR TIME EXTENSION, CHANGE, TEMPORARY URGENT  
CHANGE OR TRANSFER ON**

**APPLICATION** *See attached letter* **PERMIT** *See attached letter* **LICENSE** *See attached letter*

**OF California Department of Water Resources and  
United States Bureau of Reclamation**

I (We) have carefully read the notice (state name): *See attached letter.*

Address, email address and phone number of protestant or authorized agent: *See attached letter.*

Attach supplemental sheets as needed. To simplify this form, all references herein are to protests and protestants although the form may be used to file comments on temporary urgent changes and transfers.

**Protest based on ENVIRONMENTAL OR PUBLIC INTEREST  
CONSIDERATIONS (Prior right protests should be completed in the section below):**

- the proposed action will not be within the State Water Resources Control Board's jurisdiction
- not best serve the public interest X
- be contrary to law X
- have an adverse environmental impact X

State facts which support the foregoing allegations: See attached letter.

Under what conditions may this protest be disregarded and dismissed? (Conditions should be of a nature that the petitioner can address and may include mitigation measures.): See attached letter and attachments.

**Protest based on INJURY TO PRIOR RIGHTS:**

To the best of my (our) information and belief the proposed change or transfer will result in injury as follows: Members of our organization and community colleagues consider ourselves legal users of Delta water. See attached letter.

Protestant claims a right to the use of water from the source from which petitioner is diverting, or proposes to divert, which right is based on (identify type of right protestant claims, such as permit, license, pre-1914 appropriative or riparian right)::  
NA

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List permit or license or statement of diversion and use numbers, which cover your use of water (if adjudicated right, list decree).

Where is your diversion point located? \_\_\_<sup>1</sup>/<sub>4</sub> of \_\_\_<sup>1</sup>/<sub>4</sub> of Section \_\_\_\_\_, T\_\_\_\_, R\_\_\_\_,  
\_\_\_\_\_ B&M

If new point of diversion is being requested, is your point of diversion downstream from petitioner's proposed point of diversion?

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The extent of present and past use of water by protestant or his predecessors in interest is as follows:

- a. Source
- b. Approximate date first use made
- c. Amount used (list units)
- d. Diversion season
- e. Purpose(s) of use

Signed: See attached letter. Date: See attached letter.

**All protests must be served on the petitioner.** Provide the date served and method of service used: *January 7, 2021, via email. No other proof of service required by State Water Resources Control Board.*