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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SACRAMENTO

17 SAN JOAQUIN TRIBUTARIES ASSN., )  
18 an unincorporated association; )  
19 MODESTO IRRIGATION DISTRICT, a )  
20 public agency of the State of )  
21 California; MERCED IRRIGATION )  
22 DISTRICT, a public agency of )  
23 the State of California; )  
24 TURLOCK IRRIGATION DISTRICT, a )  
25 public agency of the State of )  
26 California; OAKDALE IRRIGATION )  
27 DISTRICT, a public agency of )  
28 the State of California; )  
Petitioners and Plaintiffs, )  
vs. )  
STATE WATER RESOURCES CONTROL )  
BOARD, a public agency of the )  
State of California, )  
Respondent and Defendant. )

FILED  
ENDORSED  
JUN 16 AM 10:16  
LEGAL PROCESS #1



CASE NO: 95CS01422  
PETITION FOR WRIT OF  
MANDAMUS, COMPLAINT FOR  
DECLARATORY RELIEF AND  
INJUNCTION  
(C.C.P. §§ 526, 1060,  
1085, 1094.5, Public  
Resources Code §  
21080.5(g))

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16 SOUTH SAN JOAQUIN IRRIGATION DISTRICT

17

18 Petitioners, SAN JOAQUIN TRIBUTARIES ASSOCIATION (the

19 "ASSOCIATION"), MODESTO IRRIGATION DISTRICT, MERCED IRRIGATION

20 DISTRICT, TURLOCK IRRIGATION DISTRICT, OAKDALE IRRIGATION

21 DISTRICT, and SOUTH SAN JOAQUIN IRRIGATION DISTRICT

22 (collectively, "DISTRICTS") come now and as and for causes of

23 action against Respondent, STATE WATER RESOURCES CONTROL BOARD

24 (the "BOARD"), allege as follows:

25 ALLEGATIONS COMMON TO EACH CAUSE OF ACTION

26 Nature of the Case

27 1. Petitioners, which are public agencies owning senior

28 water rights on the San Joaquin River tributaries, are

challenging a decision of the Board taken on May 22, 1995

1 adopting the "Water Quality Control Plan for the San Francisco  
2 Bay/Sacramento-San Joaquin Delta Estuary" (the "Plan") which  
3 establishes, *inter alia*, minimum flow requirements for the San  
4 Joaquin River. Petitioners allege that, in the guise of setting  
5 flow requirements for the protection of San Joaquin River fall-  
6 run Chinook Salmon ("Salmon") and Delta Smelt ("Smelt"), the  
7 Board effected a water transfer to junior rights-holders, by  
8 expressly allowing the State and Federal Water Projects (the  
9 "Export Projects") to pump from the San Francisco Bay/Sacramento-  
10 San Joaquin Delta Estuary ("Bay-Delta") and to export 100% of the  
11 flow which the upstream water rights holders must produce in the  
12 San Joaquin River at Vernalis.

13 2. As is set forth at length below, Petitioners allege that  
14 the Plan is invalid for the following reasons:

15 a. As a flow standard for the benefit of Salmon and  
16 Smelt, the flow standard at Vernalis is arbitrary, capricious and  
17 without support in the administrative record; in fact, because  
18 the plan allows 100% of the San Joaquin flows to be pumped by the  
19 Export Projects, and because a simple barrier is omitted, thus  
20 directing the San Joaquin River flows and fish directly to the  
21 Exporter's pumps, the Plan is deleterious to outmigrating Salmon  
22 Smolt;

23 b. As an adjudicative proceeding establishing  
24 entitlement of the Export Projects to 100% of the San Joaquin's  
25 mandated flow, the standard is without substantial evidence, in  
26 that the evidence is uncontradicted that the water users on the  
27 San Joaquin tributaries have more senior water rights than the  
28 Export Projects.

1           c. Provision for the Export Projects to take and  
2 export from the Bay-Delta 100% of the San Joaquin's flows is  
3 beyond the Board's standard-setting authority under the Water  
4 Code.

5           d. The Board failed, in dereliction of the Board's own  
6 regulations and its certification under the California  
7 Environmental Quality Act (CEQA) to adopt a feasible mitigation  
8 measure which would have substantially lessened the required  
9 flows.

10          e. The adoption of the provision for the Export  
11 Projects to take and export from the Bay-Delta 100% of the San  
12 Joaquin's flows was procedurally improper, as it was beyond the  
13 subject matter of the Board's required notice of the proceedings,  
14 and the Board was therefore powerless to adopt such provisions.

15          3. The reason that the Board's action did not fit within  
16 the procedural requirements of administrative law, the  
17 substantive requirements of the Water Code, or the evidence in  
18 the Board's record is that, as the record reflects, the Board  
19 simply adopted wholesale the results of private negotiations  
20 between the Export Projects, and certain agencies, other water  
21 users and environmental interest groups. Agreement between those  
22 parties was reached on December 15, 1994. Petitioners, however,  
23 were excluded from those private negotiations. Those other  
24 parties reached their own compromise using the Petitioners'  
25 water, and the Board simply adopted their agreement.

26          4. The Board responds to these problems with the assurance  
27 that the flow requirement for the San Joaquin River, and the  
28 allowance for the Export Projects to export 100% of those flows,

1 does not directly impose any obligations on the Petitioners; that  
2 those obligations will be imposed at forthcoming "water rights"  
3 hearings which the Board is commencing, whose purpose is to fix  
4 obligations among the water users of the San Joaquin River to  
5 meet the standards. This response does not meet the objections  
6 for several reasons:

7           a. It simply fails to address the facts that the flow  
8 standards and water reallocations were (1) beyond the subject  
9 matter of the hearing notice; (2) beyond the Board's standard-  
10 setting authority; and (3) without scientific evidence in the  
11 administrative record;

12           b. At the water rights proceedings, the standards, and  
13 the right of the Export Projects to export 100% of the San  
14 Joaquin flows, will be the basis for the contribution  
15 allocations;

16           c. The flow standard for the San Joaquin is set at a  
17 level that requires the taking of Petitioners' water rights  
18 regardless of the outcome of those hearings.

19           d. Because the flow standard was set at an amount  
20 required to push Smelt away from the Export Projects' pumps, they  
21 assume the level of pumping which they allow; if the pumps were  
22 not operating, or were operating at a lower level, these flows  
23 would be unnecessary.

24           e. The absence of the Old River Barrier, coupled with  
25 the mandated high flows to the Export Projects' pumps and the  
26 export pumping of 100% of the San Joaquin flows, fails to  
27 protect, indeed harms, the outmigrating San Joaquin Salmon  
28 smolts, as they are propelled toward destruction at the Export

1 Projects' pumps.

2 Parties

3 5. The DISTRICTS are public agencies organized and existing  
4 pursuant to the Irrigation District Law, California Water Code  
5 section 20500 et seq. Pursuant to Water Code § 22650, each  
6 Petitioner "may commence and maintain any actions and proceedings  
7 to carry out its purposes or protect its interests." Pursuant to  
8 Water Code section 22654, each DISTRICT may commence and maintain  
9 "any action or proceeding involving or affecting the ownership or  
10 use of waters or water rights within the district used or useful  
11 for any purpose of the district or of benefit to any land." The  
12 DISTRICTS have senior water rights to waters tributary to or on  
13 the San Joaquin River, which water must make up the flows  
14 mandated by the Plan. The DISTRICTS' uses of water are within  
15 protected "areas of origin" within the meaning of Water Code  
16 sections 10505, 11460 and 12231. The DISTRICTS are directly  
17 affected by the Plan, in that by the terms of the Plan junior  
18 rights-holders may export the entirety of the flows of the San  
19 Joaquin River which are mandated by the Plan, and because the  
20 adoption of the Plan subjects the DISTRICTS to subsequent water  
21 rights proceedings before the Board. The DISTRICTS appeared and  
22 presented the positions presented herein to the Board orally and  
23 in writing. The DISTRICTS are therefore beneficially interested  
24 parties within the meaning of Code of Civil Procedure section  
25 1060 and 1086.

26 6. The ASSOCIATION is an unincorporated association whose  
27 members are the DISTRICTS. The Association appeared with the  
28 DISTRICTS at the hearings and in their presentations before the

1 BOARD, raising the points set forth herein with them and on their  
2 behalf.

3 7. The Board is a public agency of the State of California,  
4 organized and existing pursuant to Water Code sections 174 et  
5 seq., 13100 and pursuant to law. The Board administers, *inter*  
6 *alia*, laws, under which permits and licenses to appropriate water  
7 are issued, denied, revoked or modified (Water Code § 1200 et  
8 seq.) The Board is also responsible for adopting Water Quality  
9 Control Plans pursuant to Water Code section 13170.

10 Exhaustion of Remedies

11 8. Petitioners have exhausted their administrative remedies  
12 in that they have each appeared before the Board at its hearings  
13 leading to its decision adopting the Plan, and thereat raised  
14 before the Board each and every point now presented to this Court  
15 and submitted evidence pertinent thereto.

16 Absence of Remedy at Law

17 9. Petitioners have no plain, speedy or adequate remedy in  
18 the ordinary course of law within the meaning of Code of Civil  
19 Procedure section 1086, in that the Board's decision is not  
20 otherwise reviewable, and unless this Court issues its writ,  
21 Petitioners will be required, at great expense and time  
22 commitment, to defend the Board's next round of proceedings  
23 wherein the Board will reallocate water rights as required to  
24 meet the Board's flow standard at Vernalis.

25 FIRST CAUSE OF ACTION

26 (Mandamus, C.C.P. § 1085, Absence of Required Evidence)

27 10. Petitioners incorporate by reference as though set  
28 forth at length at this place the allegations of paragraphs 1

1 through 9, inclusive.

2 11. The water flows of the San Joaquin River mandated by  
3 the plan are arbitrary, capricious and without evidentiary  
4 support in the Board's administrative record in that, although  
5 those flows were purported by the Plan to be based on flow  
6 requirements for the propagation of Smelt and Salmon:

7 a. As to Salmon, no evidence of the need for these  
8 flows appears in the administrative record;

9 b. As to Smelt, the record circularly states that the  
10 San Joaquin River flows are required to propel such Smelt away  
11 from the Export Projects' pumps when those pumps are exporting  
12 those selfsame flows. However, there is no basis in the record or  
13 in law for the obligation of the rightsholders on the San Joaquin  
14 River to supply water to mitigate the effects of exporting water  
15 from the Delta; and there is no basis in the record to conclude  
16 that the Export Projects, as junior rightsholders outside of any  
17 "Area of Origin," have any right to pump 100% of the San Joaquin  
18 River flow.

19 SECOND CAUSE OF ACTION

20 (Mandamus, C.C.P. §§ 1085, 1094.5, Absence of Required Evidence)

21 12. Petitioners incorporate by reference as though set  
22 forth at length at this place the allegations of paragraphs 1  
23 through 11, inclusive.

24 13. The flows of the San Joaquin River required by the Plan  
25 are based on those flows required to push Smelt away from the  
26 Export Projects' pumps when those pumps are exporting those  
27 selfsame flows. The flow prescription would be unnecessary absent  
28 the operation of the Export Projects' pumps. In calculating the

1 required flow volume of the San Joaquin River, the Plan  
2 necessarily prescribes the volume of water extracted by the  
3 Export Projects' pumps.

4 14. No evidence in the record justifies the assumption that  
5 the Export Projects have the right to extract the flow of water  
6 which the Plan assumes, given the senior rights of the San  
7 Joaquin rightsholders and the "Area of Origin" laws.

8 THIRD CAUSE OF ACTION

9 (Mandamus, C.C.P. §§ 1085, 1094.5, Absence of Proper Notice)

10 15. Petitioners incorporate by reference as though set  
11 forth at length at this place the allegations of paragraphs 1  
12 through 14, inclusive.

13 16. The Board provided no notice that the subject of its  
14 hearing on the Plan would include the volume of flow which would  
15 be allowed to be pumped by the Export Projects. Indeed, the Board  
16 gave notice that all water rights would be deferred to a later  
17 hearing and that the hearing on the Plan would be concerned with  
18 water quality standards only.

19 17. Despite this lack of notice, the Plan's flow  
20 prescription would be unnecessary absent the operation of the  
21 Export Projects' pumps, and in calculating the required flow  
22 volume of the San Joaquin River, the Plan therefore necessarily  
23 prescribes the volume of water to be extracted by the Export  
24 Projects' pumps.

25 18. Regardless of whether a proceeding is labeled as quasi-  
26 adjudicatory or quasi-legislative, prescriptions of statute and  
27 due process require that adequate notice of the subject matter of  
28 the hearing be provided.

1 19. The Plan, however, is a de facto water adjudication in  
2 that, based on the prescription of a pumping volume for the  
3 Export Projects, the Plan then prescribes flows to the San  
4 Joaquin River sufficient to push the Smelt away from the Export  
5 Projects' pumps when they are so operating. Because the flows of  
6 the San Joaquin are fixed by the Plan, no later adjudication of  
7 the more senior water rights of the San Joaquin will be  
8 sufficient to overturn the de facto allocation of the standards.

9 FOURTH CAUSE OF ACTION

10 (Mandamus, C.C.P. §§ 1085 Absence of Jurisdiction)

11 20. Petitioners incorporate by reference as though set  
12 forth at length at this place the allegations of paragraphs 1  
13 through 19, inclusive.

14 21. The Board purported to adopt the Plan pursuant to Water  
15 Code section 13170. Such plans must, under Water Code section  
16 13241, consider various factors, none of which is an adjudication  
17 of the rights of any party to export a given volume of water. In  
18 fact, the Board indicated affirmatively that it would  
19 not consider water rights in the proceedings to adopt the Plan,  
20 but would rather defer such adjudication to later, quasi-judicial  
21 proceedings.

22 22. Nevertheless, in establishing the required flows of the  
23 San Joaquin River, the Board de facto adjudicated the volume of  
24 water which the Export Projects could extract, which was beyond  
25 the jurisdiction of the Board to do in these proceedings.

26 FIFTH CAUSE OF ACTION

27 (Mandamus, C.C.P. §§ 1085,

28 Violation of Areas of Origin Laws)

1           23. Petitioners incorporate by reference as though set  
2 forth at length at this place the allegations of paragraphs 1  
3 through 22, inclusive.

4           24. When the Export Projects' facilities were first  
5 authorized, a major issue was whether those projects would export  
6 waters needed for the use and development of areas of origin of  
7 the water.

8           25. To respond to this issue, the Legislature provided  
9 assurances to the areas of origin, including the enactment of  
10 Water Code sections 1215-22, 10505, 11460, and 12200-12227. For  
11 example, Water Code section 11460 requires that the state project  
12 shall not, in its "construction or operation," deprive areas of  
13 origin of waters reasonably needed to adequately supply their  
14 beneficial needs, and section 10505 provides that no priority  
15 shall be granted to the State Water Project that will "deprive  
16 the county in which the water covered by the application  
17 originates of any such water necessary for the development of the  
18 county." Water Code section 12330 provides in pertinent part that  
19 the "Legislature hereby finds and declares that a serious problem  
20 of water quality exists in the San Joaquin River and the Merced  
21 River and the junction of the San Joaquin River with the Middle  
22 River . . ." Water Code section 12231 declares that it is state  
23 policy that no "public or private agency or the State or the  
24 United States should divert water from the San Joaquin River and  
25 its tributaries to which users along the portion of the San  
26 Joaquin River described in Section 12230 are entitled."

27           26. Despite these areas of origin laws, the State Board, in  
28 the Plan, granted a *de facto* water right to the Export Projects,



1 basin plan process if it, *inter alia*, includes in its basin plans  
2 "mitigation measures to minimize any significant adverse  
3 environmental impact." Public Resources Code § 21080.5(d)(3)(i).  
4 Likewise, the Board's compliance regulations under CEQA provide  
5 in pertinent part: "The board shall not approve a proposed  
6 activity if there are feasible mitigation measures available  
7 which would substantially lessen any significant adverse impact  
8 which the proposed activity may have under the environment." Cal.  
9 Code of Regs. § 3780.

10       30. One of the measures which had operated with success to  
11 assist Salmon smolts in avoiding destruction by the export pumps  
12 has been the erecting of a temporary barrier to the Old River  
13 Channel leading to the pumps. This barrier directs the fish  
14 migration northward from the pumps. Irrespective of any mandated  
15 change in the San Joaquin River flows, this one measure, during  
16 periods of low flow, would increase the San Joaquin River Salmon  
17 population by a factor of three to fourfold. With the high flows  
18 specified in the Plan, the fish whose protection is sought are  
19 instead propelled with greater force toward the Export Projects'  
20 pumps. The benefits of this Old River Barrier were fully  
21 presented to the Board. There was no opposition to the Barrier.  
22 To the contrary, the December 15, 1994 agreement between the  
23 federal agencies, the environmental groups and the Export  
24 Projects expressly endorsed the creation of a permanent barrier  
25 and called for its mandatory construction.

26       31. The State Board, however, and despite the call for the  
27 Barrier, refused to utilize it as a mitigation measure, calling  
28 instead for its "further study." Because the barrier had in fact

1 been used in the past, and its benefits were universally known,  
2 this deferral of consideration of a measure which could increase  
3 smolt survival by a factor of three to four regardless of  
4 mandated flows was arbitrary, capricious and without  
5 justification in the record.

6 32. This action was timely filed under Public Resources  
7 Code section 21080.5(g), which provides in pertinent part:  
8 Any action or proceeding to attack, review, set aside,  
9 void or annul a determination or decision of a state .  
10 . . board . . . approving or adopting a proposed  
11 activity under a regulatory program which has been  
12 certified pursuant to this section on the basis that  
13 the plan or other written documentation prepared  
14 pursuant to paragraph (3) of subdivision (d) does not  
15 comply with the provisions of this section shall be  
16 commenced no later than 30 days from the date of the  
17 filing of notice of the approval or adoption of the  
18 activity.

19 Said notice was received for filing on May 22, 1995.

20 33. Mitigation measures must, under CEQA, be specified as  
21 part of the CEQA process. It is not an answer under CEQA that the  
22 mitigation measures will be "studied" on some undefined future  
23 day. Because the Board did not include in its Plan "mitigation  
24 measures to minimize any significant adverse environmental  
25 impact" (Public Resources Code § 21080.5(d)(3)(i)) viz., the Old  
26 River Barrier as a mitigation to the San Joaquin River flow  
27 requirements, the Plan is invalid.

28 / / /



1 4. The Petitioners be awarded their reasonable attorneys'  
2 fees pursuant to Code of Civil Procedure § 1021.5 and according  
3 to law;

4 5. For such other and further relief as the Court deems  
5 just.

6 Date: June 13, 1995

7 GIBSON, DUNN & CRUTCHER  
8 JOEL S. MOSKOWITZ

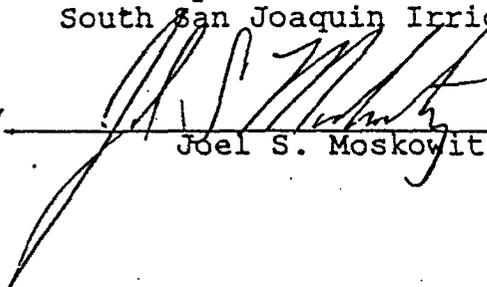
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South San Joaquin Irrigation District

by   
Joel S. Moskowitz

1 VERIFICATION

2 (CCP § 446)

3  
4 I, Allen Short, declare:

5 I am an officer of the San Joaquin Tributaries Association (the  
6 "Association"). The Association is a Plaintiff and Petitioner in the  
7 foregoing action, and I have been authorized to make this verification  
8 on its behalf.

9 I have read the foregoing Petition for Writ of Mandamus,  
10 Complaint for Declaratory Relief and Injunction, and know the contents  
11 thereof. The same is true of my own knowledge.

12 I declare under penalty of perjury under the laws of the State  
13 of California that the foregoing is true and correct.

14 Executed this 15 day of June, 1995, at Modesto, Stanislaus  
15 County, California.

16  
17 Allen Short

18 Allen Short