

Attachment O

WAC's Supplemental Argument



WATER AUDIT CALIFORNIA

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To: Napa County Board of Supervisors
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Re: Water Audit California Additional Written Information

Appeal of Planning Commission Approval of Duckhorn Vineyards Winery
May 3, 2023, decision of the Napa County Planning Commission's adoption of the Mitigated
Negative Declaration and Mitigation Monitoring and Reporting Program, and approval of Use
Permit Major Modification Application P19-00097-MOD

On behalf of Appellant Water Audit California (“Water Audit”), we provide the following additional information in support of Water Audit’s appeal.

Protected Fish

A. Napa River

The Napa River is a keystone watershed for native fishes and other aquatic animals. Historically and presently, the Napa River supports the greatest steelhead spawning runs of any tributary to the San Francisco Bay estuary. Chinook salmon have recently returned to the watershed, and native fishes such as Pacific, western river, and brook lamprey, hitch, and Sacramento splittail are also present. Other special status aquatic animals relying on surface water resources in Napa County are California freshwater shrimp, California giant salamander, foothill yellow-legged frog, and northwestern pond turtle.

B. Tributaries

The occurrence of steelhead trout (*Oncorhynchus mykiss* or *O.mykiss*) is well documented in the Napa River watershed (“watershed”) (Napa RCD 2005). Watershed steelhead belong to the Central California Coast Distinct Population Segment and were federally listed as threatened in 1997 (Stillwater 2018). The watershed has some of the most significant anadromous fish streams within San Francisco Bay. (Napa RCD 2005).

O.mykiss exhibit anadromous and resident life history strategies. Steelhead is the term for the anadromous life history, and rainbow trout is the term for the resident life history. Evidence suggests that the two forms are capable of interbreeding, and that either can produce offspring that exhibit the alternate form. Both life history forms are present in the watershed. (Napa RCD, Upper York Creek Ecosystem Restoration Project 2020-21 Annual Monitoring Report, p. 2.)

Endangered Species Act

Under the Federal Endangered Species Act of 1973 (“ESA”), steelhead found in the Napa River watershed belong to the Central California Coast evolutionarily significant unit (“ESU”). This steelhead population is reproductively isolated from other populations, represents an important component of the evolutionary legacy of the species, and has broad protections under both state and federal law.

The ESA of 1973 expressly states that endangered and threatened “species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” (16 U.S.C. § 1531(a)(3).) Further, the Supreme Court has observed that “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost,” and that, under the act, “[it] intended endangered species [are] to be afforded the highest of priorities.” (*Tenn. Valley Auth. v. Hill*, (1978) 437 U.S. 153, 174, 184.)

A. Critical Habitat

Federally designated critical steelhead habitat¹ includes all of the Napa River reaches and estuarine areas accessible to steelhead².

¹ Critical habitat: Identifies specific areas occupied by threatened or endangered species at the time of their listing that contain physical or biological features essential to conservation of the species and that may require special management considerations or protection.

² Napa River Basin Limiting Factors Analysis, Final Technical Report (2002)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/wq_control_plans/1995wqcp/exhibits/doi/doi-exh-45n.pdf

Although preserving certain state rights under the ESA (16 U.S.C. § 1531 et seq.), those rights are limited as outlined by the Constitution. (see *Hughes v. Oklahoma* (1979) 441 U.S. 322.) Specifically, the rights of states to regulate the taking of certain species of wildlife can be restricted in cases where such species and/or their habitat has been determined to be under the jurisdiction of ESA protections and regulations. (*Id.*)

Congress's intent that habitat plays a vital role in species conservation and protection, is found in the first listed statutory criterion, "the present or threatened destruction, modification, or curtailment of [the species'] habitat or range." (16 U.S.C. § 1533(a)(1)(A).) Providing additional clarity of the legislative intent of the ESA, Congress explicitly outlined that protection of habitat was an essential component of preventing species' extinction and ensuring species recovery:

Man can threaten the existence of species of plants and animals in any of a number of ways. ... The most significant of those has proven also to be the most difficult to control: the destruction of critical habitat. ... There are certain areas which are critical which can and should be set aside. It is the intent of this legislation to see that our ability to do so, at least within this country, is maintained. (H.R. Rep. No. 412, 93d Cong., 1st Sess. 5 (1973).)

Critical habitat is defined under the ESA to include both:

- (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
- (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(16 U.S.C. § 1532(5)(A).)

The ESA expressly defines critical habitat to include both "specific areas within the geographical area occupied by the species" at the time of listing "and specific areas outside the geographical area occupied by the species." (16 U.S.C. §1532(5)(A)(i)-(ii); see *Crooks v. Harrelson*, (1930) 282 U.S. 55, 58 (used in its "ordinary sense," conjunctive term "and" requires "not one or the other, but both".)

Furthermore, the Ninth Circuit has repeatedly found that federal agencies consider site-specific, localized, and cumulative impacts on critical habitat impacts. (See *Pac. Coast Fed'n of Fishermen's Ass'n v. NMFS* (9th Cir. 2001) 265 F.3d 1028, 1036-37 (NMFS was required to consider aggregate effect of multiple logging projects in making Section 7 determination); *Gifford Pinchot Task F. v. U.S. Fish W* (9th Cir. 2004) 378 F.3d 1059 ("Focusing solely on a vast scale can mask multiple site-specific impacts that, when aggregated, do pose a significant risk to a species."); *Nat'l Wildlife Fed'n v. NMFS*, (9th Cir. 2008) 524 F.3d 917, 930-31, 934-35 (NMFS violated ESA by failing to consider short-term effects of dam operations on listed salmon species).)

B. Unauthorized Take

Taking of wildlife under the ESA "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" (16 U.S.C. 1532(19).) As harm

has been defined to include the use of land and/or water in ways that may indirectly impact listed species, those activities can be a form of “take” and are prohibited under the ESA. (See *Babbitt v. Sweet Home Chapt. of Cmty. for a Great Oregon* (1995) 515 U.S. 687 (upholding the Secretary of Interior’s definition of “harm”: an act, including “significant habitat modification or degradation . . . which actually kills or injures wildlife”); See also 50 C.F.R. § 17.3 (defining that “[h]arass in the definition of “take” in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering[, and [h]arm in the definition of “take” in the Act means an act which actually kills or injures wildlife”.) Such acts may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”). (*Id.*)

“Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.” (50 C.F.R. § 402.02.)

“Harm is further defined by the U.S. Fish and Wildlife Service (“FWS”) to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. Harass is defined by FWS as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. [50 CFR §17.3].” (ESA Section 7 Consultation Handbook, 1998, p. xix.)

In *Wishtoyo v United Water*, the court found that the plaintiffs were “entitled to a declaratory judgment that Defendant United’s operation and maintenance of Vern Freeman Dam (“VFD”), including its operation and maintenance of the fish ladder at the VFD, and United’s diversion of water from the VFD, constituted unauthorized “take” of the Distinct Population Segment of Southern California Steelhead (“Steelhead”) in violation of section 9 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1538.” (*Wishtoyo Foundation v. United Water Conservation District*, Dist. Court, CD California 2018, Amended Judgment and Permanent Injunction.)

Sustainable Groundwater Management Act (SGMA)

In September 2014, the Legislature adopted SGMA; Water Code, section 10720 et seq. The valley portion of Napa County was identified as a priority sub-basin.

The Department of Water Resources (“DWR”) has stated that:

23 CCR § 354.28(c)(1) specifies that the MT³ for chronic lowering of groundwater levels shall be based on groundwater elevations indicating a depletion of supply that may lead to undesirable results;

23 CCR § 354.28(c)(2) specifies that the minimum threshold for depletions of interconnected surface water shall be the rate or volume of surface water depletions caused by groundwater use that has adverse impacts on beneficial uses of the surface water and may lead to undesirable results; and

³ Management criteria set out in the GSP Regulations: undesirable results, [UR] minimum thresholds, [MT] and measurable objectives [MO]. (DWR, 2019.)

23 CCR § 354.32 requires that each basin be monitored, and that a monitoring network include monitoring objectives, monitoring protocols, and data reporting requirements be developed that shall promote the collection of data of sufficient quality, frequency, and distribution to characterize groundwater and related surface water conditions in the basin and evaluate changing conditions.

(see DWR's rejection of Napa County's Alt Plan, September 2019.)

Furthermore, DWR has provided instruction for addressing undesirable results that occurred before, and have not been corrected by, January 1, 2015:

the 2015 baseline for undesirable results is simply a limitation on what conditions must be addressed; it does not operate as an exoneration of the undesirable result itself. SGMA may not require a basin to reverse the effect of undesirable results to pre-SGMA conditions, but if undesirable results occurred during the 10-year period of the Alternative, that basin cannot demonstrate that it operated within its sustainable yield. (Emphasis added) (DWR, 2019.)

Although a pre-2015 injury may not require remediation under SGMA, the courts have held that even long-standing injuries are subject to public trust review. (See *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419; *California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585; *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187; *Env'tl. Law Found. v. State Water Res. Control Bd.* (2018) 26 Cal.App.5th 844.)

The Public Trust Doctrine

The public trust doctrine imposes independent and unavoidable obligations on trustee agencies overseeing groundwater extraction. California precedent makes clear that subdivisions of the state⁴ have "a duty to consider the public trust interest⁵ when making decisions impacting water that is imbued with the public trust,"⁶ and merely complying with the SGMA does not discharge that duty.⁷

Although SGMA requirements and a trustee's obligations under the public trust differ in several ways, a key difference lies in the treatment of past harms from groundwater pumping. SGMA provides that a groundwater sustainability "plan [(GSP)] may, but is not required to, address undesirable results that occurred before, and have not been corrected by, January 1, 2015."⁸ In contrast, the public trust requires reconsideration of past or ongoing water use decisions where those decisions were made "without any consideration of the impact upon the public trust."⁹

Thus, compliance with public trust duties is not discretionary, it is obligatory.

In this case, the beneficiaries of the public trust are the people of California, and it is to them that the trustee owes fiduciary duties. As Napa County is a legal subdivision of the state, it must

⁴ *Env'tl. Found. (ELF) v. State Water Res. Control Bd.* (SWRCB) (2018), 26 Cal. App. 5th 844, 868 ("Although the state as sovereign is primarily responsible for administration of the trust, the county, as a subdivision of the state, shares responsibility for administering the public trust and may not approve of destructive activities without giving due regard to the preservation of those resources.") (internal quotation marks omitted).

⁵ The Napa River and its tributaries, and the fish within those water ways, are protected public trust resources.

⁶ *Id.* at 863.

⁷ *Id.* at 868.

⁸ Cal. Wat. Code, § 10727.2(b)(4)(b).

⁹ *Nat'l Audubon Soc'y v. Superior Ct.* (1983) 33 Cal. 3d 419, 426.

deal with the trust property for the beneficiary's benefit. No trustee can properly act for only some of the beneficiaries – for example the trustee must represent them all, taking into account any differing interests of the beneficiaries, or the trustee cannot properly represent any of them. (*Bowles v. Superior Court* (1955) 44 C2d 574.) This principle is in accord with the equal protection provisions of the Fourteenth Amendment to the US Constitution.

Furthermore, there can be no vested rights in water use that harm the public trust. Regardless of the nature of the water right in question, no water user in the State "owns" any water. Instead, a water right grants the holder thereof only the right to use water, a "usufructuary right". The owner of "legal title" to all water is the State in its capacity as a trustee for the benefit of the public. Both riparian and appropriative rights are usufructuary only and confer no right of private ownership in the watercourse, which belongs to the State. (*People v. Shirokow* (1980) 26 Cal.3d 301 at 307.)

If at any time the trustee determines that a use of water other than the then current use would better serve the public trust, the State has the power and the obligation to reallocate that water in accordance with the public's interest. Even if the water at issue has been put to beneficial use (and relied upon) for decades, it can be taken from one user in favor of another need or use. The public trust doctrine therefore means that no water rights in California are "vested" in the traditional sense of property rights.

Furthermore, the courts have recognized the State's responsibility to protect public trust uses whenever feasible. (See, e.g., *Audubon*, supra, 33 Cal.3d 419; *California Trout*, supra, 207 Cal.App.3d 585, 631; *California Trout*, supra, 218 Cal.App.3d 187, 289.) As such, the California Endangered Species Act ("CESA") requires trustees to provide mitigation measures or alternatives (see CESA 2052.1) and pursue "reasonable and prudent alternatives available consistent with conserving the species or its habitat which would prevent jeopardy" (CESA 2053.)

Conclusion

For all of the reasons set forth herein and those set forth in the Appeal Packet, we urge the Board to grant this appeal with the evidence set forth above.

Respectfully,



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