

**ENDORSED**

JUN 02 2021

Clerk of the Napa Superior Court  
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12 SUPERIOR COURT OF CALIFORNIA

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14 COUNTY OF NAPA

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19 WATER AUDIT CALIFORNIA,  
20 A Public Benefit Corporation,

) Case No. 21CV000784

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22  
23 Plaintiff and Petitioner,  
24  
25 v.

) VERIFIED  
)) COMPLAINT FOR NEGLIGENCE  
)) BREACH OF TRUSTEE DUTIES;  
)) FOR DECLARATORY JUDGMENT  
)) PETITION FOR WRIT OF  
)) MANDATE; PRELIMINARY  
)) AND PERMANENT INJUNCTION

26  
27  
28 THE COUNTY OF NAPA  
29 AND DOES 1 to 10,000,

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30  
31 Defendants and Respondents.

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33 ) Jury trial requested

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1

2     **I. INTRODUCTION**

- 3     1. Plaintiff and Petitioner Water Audit California (“Petitioner”) brings this  
4         action to challenge the failure of the Defendant and Respondent County  
5         of Napa (“County”) to manage groundwater resources interconnected  
6         with the Napa River in a manner consistent with the public trust  
7         doctrine of California. Petitioner brings this action on its own behalf, on  
8         behalf of the general public and in the public interest.
- 9     2. The County has the authority to issue permits to extract groundwater.  
10         Concurrently, the County has the duty under the public trust doctrine to  
11         protect public trust resources on behalf of the people of California.
- 12     3. By issuing permits to extract groundwater interconnected with the  
13         Napa River without adequate analysis of the impacts to the river, its  
14         public trust uses and resources, the County is acting in a manner  
15         contrary to its duties under the public trust doctrine.
- 16     4. Petitioner seeks an order from the Court that groundwater  
17         interconnected with the Napa River is within the County’s authority  
18         and duty under the public trust doctrine.
- 19     5. Petitioner seeks an order from the Court setting forth the duties that the  
20         County owes the people of this state as a trustee of the public trust.
- 21     6. Petitioner seeks a judgment that the County has been negligent in its public  
22         trust duties, and for an award of damages in the amount required to  
23         remediate the injuries to the public trust caused as a result of this negligence.

1      7. Petitioner seeks a writ compelling the County to provide an accounting  
2            of the cumulative impact of the County's water extraction decisions on the  
3            public trust, and enjoining the County's issuance or renewal of well-  
4            drilling permits until such a time as the County has provided said  
5            accounting and established permitting and other management practices  
6            that will protect public trust resources of the Napa River.

7

8      **II. PARTIES**

9      8. The plaintiff and petitioner, WATER AUDIT CALIFORNIA, ("Water Audit" or  
10        "Petitioner") is a California public benefit corporation organized and existing  
11        under the laws of the State of California. Water Audit is a "person" under  
12        California Corporations Code Sections 18 ("Person" includes a corporation as  
13        well as a natural person"); 15901.02(y) ("Person" means an individual . . .  
14        corporation . . .); and 25013 ("Person" means an individual, a corporation . .  
15        ."). Water Audit brings this action as a private attorney general advocating for  
16        the interests of all of the people of California.

17      9. The defendant and respondent, COUNTY OF NAPA ("County") is a general  
18        law county authorized by the California Constitution Article XI and as set forth  
19        in Government Code § 23000 et seq. General law counties must adhere to  
20        state laws and statutes.

21      10. Water Audit does not know the true names of defendants and respondents  
22        DOES 1 to 10,000, inclusive, and therefore sues them by these fictitious  
23        names. Water Audit is informed and believes, and on the basis of such

1 information and belief alleges that each of these parties is in some manner  
2 legally responsible for the events and happenings alleged herein. Water Audit  
3 is further informed and believes, and on the basis of such information and  
4 belief alleges, that at all times mentioned the respondents were the partners,  
5 agents, coventurers, and/or employees of their co-respondents and  
6 defendants, and in doing the things herein alleged were acting within the  
7 course and scope of such agency and employment. Alternatively, the DOES  
8 have acted in reliance on permission granted by the County to extract  
9 groundwater, and their future action must be equitably amended to avoid  
10 injury to the public trust. Alternatively, the DOES have acted without  
11 permission to extract groundwater, and their future action must be equitably  
12 amended to avoid injury to the public trust. The Petitioner will seek leave to  
13 amend to insert the true names of the DOES when such parties have been  
14 identified.

15 11. The County and DOE defendants/respondents will collectively be referred to  
16 as “defendants.”

17 12. The real party in interest STATE WATER RESOURCES CONTROL BOARD  
18 (“SWRCB” or “Water Board”) is an agency of the State of California, with a  
19 stated mission to preserve, enhance, and restore the quality of California's  
20 water resources and drinking water for the protection of the environment,  
21 public health, and all beneficial uses, and to ensure proper water resource  
22 allocation and efficient use, for the benefit of present and future generations.

1           The administrative offices of the SWRCB are located in the County of  
2           Sacramento, California.

3           13. The real party in interest DEPARTMENT OF FISH & WILDLIFE (“CDFW,”  
4           formerly Department of Fish & Game (“CDFG”)) is an agency of California,  
5           with a stated mission to manage California’s diverse fish, wildlife, and plant  
6           resources, and the habitats on which they depend, for their ecological values  
7           and for their use and enjoyment by the public. The administrative offices of  
8           DFW are located in the County of Sacramento, California.

9           14. The real party in interest NOAA FISHERIES (previously National Marine  
10          Fisheries Service) is a scientific agency within the United States Department  
11          of Commerce that focus on the conditions of the oceans, major waterways,  
12          and the atmosphere. NOAA FISHERIES California Coastal Region maintains  
13          offices in the City of Santa Rosa, California.

14           15. The real party in interest the U.S. FISH and WILDLIFE SERVICE (“USFWS”)  
15          is a federal government agency dedicated to the conservation, protection, and  
16          enhancement of fish, wildlife and plants, and their habitats. FWS Pacific  
17          Southwest Regional Headquarters are located in the City of Sacramento,  
18          California.

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1      **III. VENUE**

2      16. Venue is proper in this court under California *Code of Civil Procedure* (“CCP”)  
3                §395(a) because the *res* of the public trust discussed herein and the offices of  
4                the County are within the County of Napa, California.

5

6      **IV. JURISDICTION**

7      17. The writ relief sought in this action is pursuant to the California *Code of Civil*  
8                *Procedure* (“CCP”) §1085. Plaintiffs have performed all conditions precedent  
9                to filing suit or are excused from such conditions. *Water Code* § 1851.

10     18. Additionally, this Court has subject matter jurisdiction because the causes of  
11                action arise, *inter alia*, under the California *Constitution*; the California *Fish &*  
12                *Game Code*, (“FGC”); the California *Water Code*; the CCP; the California  
13                *Public Resources Code*; and the California public trust doctrine. Common law  
14                imposes public trust considerations upon the defendant’s decisions and  
15                actions. *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (“Bio  
16                *DiversityEnvironmental Law Foundation v.*  
17                *State Water Resources Control Board* (“ELF”) 237 Cal.Rptr. 3d 393 (Cal. Ct.  
18                App. 2018) 26 Cal.App.5th 844.

19     19. If trustee agencies fail to adequately consider the public trust, whether due to  
20                conflicting priorities, limited financial resources, political considerations, or for  
21                any other reason, a private person has standing to commence an action to  
22                protect the public trust, including the right to obtain preliminary relief.

1       California's Supreme Court has stated "[A]ny member of the general public ...  
2       has standing to raise a claim of harm to the public trust." *National Audubon*  
3       *Society v. Superior Court ("Audubon")* (1983) 33 Cal.3d 419, 435 fn. 11,  
4       citations omitted.) A plaintiff may commence an action challenging a  
5       permitting entity or "any other state agency or subdivision of the state [that]  
6       failed to discharge its responsibilities under the public trust." *Bio Diversity*,  
7       *supra*, p. 1370.

8

9       **V. PRIOR TO LITIGATION**

- 10      20. Twice in January 2020, Petitioner wrote to the County regarding the proposed  
11       Small Winery Ordinance, explaining in detail its contention that groundwater  
12       extraction was causing injury to the public trust. The County did not respond,  
13       and the thoughtful comments from Water Audit and the Center for Biological  
14       Diversity were not placed on the public record.  
15      21. In February 2020, Petitioner hosted a public Water Forum to fully explain its  
16       concerns. A full video and transcript of the proceedings is web-hosted at  
17       <https://waterauditca.org/napa-water-forum/>. The event was reported in the  
18       Napa Register on February 10, 2020 under the heading "*Water Forum looks*  
19       *to defuse Napa County water issues.*" Water Audit's General Counsel was  
20       reported as saying "We're here because you folks have a golden opportunity.  
21       You have the ability to show everyone else how to take care of the problems  
22       not by litigation and fighting and saying, 'Mine, mine, mine.'" The chair of

1 Petitioner's scientific advisory committee, Dr. Peter Moyle is a Distinguished  
2 Professor Emeritus at the University of California, Davis, and co-founder of  
3 the Center for Watershed Sciences. Dr. Moyle presented to the Forum an  
4 approach he called ecosystem-based management. "Basically, it's a  
5 management protocol designed to support good ecological conditions in a  
6 river system and these conditions are supposed to be good for both people  
7 and fish," Moyle said. He explained that this approach manages water, land  
8 and species to improve the ecosystem for both native biodiversity and human  
9 use in a process requires that various stakeholders and experts agree on a  
10 desired ecosystem condition. "This 'desired ecosystem condition' is an  
11 important aspect of it, because it says we're in charge," Moyle said. Other  
12 presenters dealt with the problem of adverse public trust impacts caused by  
13 thoughtless groundwater extraction.

14 22. County planning staff were instructed by their supervisor not to attend the  
15 Forum and they did not.

16 23. In April 2020, Water Audit started The Refugia Project. With support from  
17 Save Napa Valley Foundation and the Mennen Environmental Foundation  
18 it surveyed and reported on a range of environmental injuries and issues  
19 in the Napa Valley. Foremost of the problems revealed by The Refugia  
20 Project was a diminution in the public trust condition by inadequate  
21 surface water flows.

22 24. In June 2020, the County formed the *Groundwater Sustainability Plan*  
23 *Advisory Committee* ("GSPAC") to assist the County in preparing a  
24 Sustainable Ground Water Plan. GSPAC rejected a Water Audit

1 application for participation because its nominated restoration specialist  
2 was not a resident in Napa County, as is frequently the case with  
3 consultants in largely rural areas. Subsequently a GSPAC member  
4 repeatedly urged the GSPAC steering committee to consider the work  
5 being done by Water Audit and The Refugia Project but was rebuffed.

6 25. In August 2020, Petitioner completed and delivered to the City of St.  
7 Helena (“CSH”) an analysis of the public trust injury likely caused by the  
8 CSH’s groundwater extraction from the Pope Street wells. Copies of  
9 Petitioner’s report were provided by the CSH Clerk to two of CSH’s  
10 representatives on GSPAC.

11 26. In September 2020, Water Audit was identified in the Key Audiences/  
12 Stakeholder Groups in the Subbasin Groundwater Sustainability Agency  
13 Stakeholder Communication and Engagement Plan, prepared by  
14 CONCUR, Inc. When Water Audit was not contacted by the GSPAC or  
15 CONCUR it reached out through a respected member of GSPAC and  
16 asked to be allowed to contribute to the SGMA process. It was rebuffed.

17 27. In February 2021, Petitioner wrote an email to the County objecting to a  
18 finding of fact in an environmental matter in which “there are very few of  
19 the facts found that are based on empirical evidence.” It continued by  
20 quoting at length a recent comment of the former U.S. Attorney for the  
21 Southern District of New York. “There are ways to pervert the purpose of  
22 the rule of law. There are ways to corrupt it. And there are ways to pull  
23 off miscarriages of justice, no matter how good the laws are.” The County  
24 did not respond, change its conduct, or place the comment on the public  
25 record. This litigation has resulted.

26

1      **VI. REGULATORY BACKGROUND**

2      28. California Constitution Article X, section 2, requires “that the water resources  
3            of the State be put to beneficial use to the fullest extent of which they are  
4            capable, and that the waste or unreasonable use or unreasonable method of  
5            use of water be prevented.” *Water Code § 1243* provides that the “use of  
6            water for recreation and preservation and enhancement of fish and wildlife  
7            resources is a beneficial use of water.”

8      29. California law distinguishes between surface water and groundwater. Both  
9            surface and groundwater may be put to beneficial use, but any use of water  
10          without a water right is a trespass against the State of California.

11     30. In some locations surface and groundwater water sources are hydrologically  
12          connected. A location where this occurs is described as a  
13          groundwater/surface water interface. In such a situation groundwater  
14          extraction can diminish or eliminate the surface flow, and thereby  
15          impermissibly injure the public trust. *ELF, supra, p. 393.*

16     31. Surface water rights are administered by the Water Board. Within the Water  
17          Board the Division of Water Rights (“DWR”) acts on day to day matters. The  
18          SWRCB is the only agency with authority to administer surface water rights in  
19          California. The Water Board shares concurrent jurisdiction with the state  
20          courts to enforce surface water rights. *Audubon, supra.* Only the courts may  
21          adjudicate both surface water and groundwater. A referral process allows the  
22          courts to access the surface and allocate expertise of the Water Board while

1 concurrently utilizing their *Article X section 3* reasonable use jurisdiction to  
2 consider groundwater extraction. "In any suit brought in any court of  
3 competent jurisdiction in this State for determination of rights to water, the  
4 court may order a reference to the board, as referee, of any or all issues  
5 involved in the suit ... [or] ... for investigation of and report upon any or all of  
6 the physical facts involved." *Water Code § 2000-2001*

7 32. Similar principles govern rights to water in an underground basin. First priority  
8 to use goes to the landowner whose property overlies the ground water.  
9 These "overlying rights" are analogous to riparian rights in that they are based  
10 on ownership of adjoining land, and they confer priority. *City of Barstow v.*  
11 *Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240, 99 Cal.Rptr.2d 294, 5  
12 P.3d 853. Surplus groundwater also may be taken by an appropriator, and  
13 priority among "appropriative rights" holders generally follows the familiar  
14 principle that "the one first in time is the first in right." *Id.* at p. 1241.

15 33. The State permit and licensing requirements that apply to in-stream water  
16 rights do not apply to groundwater. *City of Pasadena v. City of*  
17 *Alhambra* (1949) 33 Cal.2d 908, 933–934, 207 P.2d 17. Those wishing to drill  
18 a well in the County must first obtain a permit pursuant to Napa County  
19 Ordinance 13.12. The County is required to conduct an environmental  
20 analysis of all discretionary permits submitted to the County for approval.  
21 (California Environmental Quality Act ("CEQA") (*Public Resources Code*  
22 *21000–21177*) and the CEQA Guidelines (California *Code of Regulations*,

1       Title 14, Division 6, Chapter 3, Sections 15000–15387). If, however, the  
2       County makes a negative *CEQA* determination, or the water extraction is to  
3       irrigate vineyards, or the applicant declares no net increase in use, a well  
4       permit is issued without a required review or consideration of either the  
5       individual or cumulative impact.

6       34. Groundwater gives rise to a third category of rights. Under certain  
7       circumstances, an appropriator may gain prescriptive rights by using  
8       groundwater to which it is not legally entitled in a manner akin to squatting,  
9       that is actual, open and notorious, hostile and adverse to the original owner,  
10      continuous and uninterrupted for the statutory period of five years, and under  
11      claim of right. This situation will typically present itself when a well is drilled  
12      substantially deeper or better placed than its neighbors, thereby allowing the  
13      new well to draw water from the adjacent property.

14      35. Property rights are not absolute, however, and remain subject to the public  
15      trust. *Audubon, supra*.

16

17      **VII. FACTS**

18      36. The Napa River Watershed is a 426 square mile drainage flowing from north  
19      to south, with its outlet at San Pablo Bay, near Vallejo. It is roughly 50 miles  
20      long and 10 miles wide, reaching its highest elevation on Mt. St. Helena, at  
21      about 3,900 feet. The climate is Mediterranean, with warm, dry summers and

- 1                   most precipitation falling as rain in cool winter months. Proximity to the ocean  
2                   - and its coastal fog - moderates summer air temperatures.
- 3                   37. Natural surface water abundance is strongly seasonal, with high flows  
4                   following atmospheric river events, and otherwise moderate to low flows.  
5                   Natural summer flow conditions in waterways range from drying in smaller  
6                   reaches, groundwater and spring-fed perennial flow in mountain canyons,  
7                   continuous or intermittent flow where tributaries cross alluvium in the floor of  
8                   Napa Valley, and perennial flow primarily fed by subsurface flow in lower  
9                   reaches of larger tributaries and the mainstem Napa River.
- 10                  38. Today, the Napa River is important for maintaining native aquatic animals  
11                  because it is the least urbanized of the sizable watersheds directly feeding  
12                  San Francisco Bay. It is larger and has more summer flow than Petaluma,  
13                  Sonoma, and other bay-frontage creeks. Perhaps most importantly,  
14                  anadromous fishes migrating to and from the Napa River avoid perils of the  
15                  Sacramento-San Joaquin Delta, such as confusing flow patterns, predation,  
16                  and poor habitat quality. By virtue of its location and overall condition, the  
17                  Napa River is now a keystone watershed for native fishes and other aquatic  
18                  animals.
- 19                  39. The Napa River watershed presently supports a diverse assemblage of native  
20                  aquatic species, though many populations are smaller than they were  
21                  historically, and some now have special status. The Napa River, historically  
22                  and presently, supports the greatest steelhead spawning runs of any tributary

1 to San Francisco Bay estuary. In the past, USFWS estimated that 6,000 to  
2 8,000 steelhead returned annually (USFWS 1968). Chinook have recently  
3 returned to the watershed, and native fishes such as brook lamprey, hitch,  
4 and Sacramento splittail are also present. Other special status aquatic  
5 animals relying on surface water resources in Napa County are California  
6 freshwater shrimp, California giant salamander, foothill yellow-legged frog,  
7 and northwestern pond turtle.

8 40. The Napa River watershed is under constant development pressure.  
9 Historically, agricultural and urban development have eliminated habitat,  
10 introduced fish passage barriers, altered surface flow regimes, and affected  
11 groundwater contributions to streams. Ongoing conversion of wildland to  
12 agriculture is occurring at a rate averaging 200 acres per year, county-wide.  
13 Newly planted vineyards are routinely permitted to extract groundwater at an  
14 average annual rate of 0.5 acre-foot of water for each acre planted. Vineyards  
15 require additional water in droughts and when vines are young. Once grapes  
16 reach wineries, wine production requires approximately 6 gallons of water per  
17 gallon of finished wine.

18 41. These changes in use have steadily increased water demand, with wineries  
19 relying on a mix of municipal and groundwater sources. Winery demands on  
20 municipal water supplies can compete with potable use by residents, and  
21 groundwater extractions can compete with environmental flows. Bottling  
22 facilities' industrial demand competes with landscape watering for priority.

1       42. Cumulative impacts caused by projects have not been considered. To the  
2           contrary, Napa Ordinance 13.15.040 provides that agricultural activities are  
3           exempt from groundwater permitting requirements. Reporting of extractions  
4           is at the discretion of the County, and the County seldom exercises its  
5           discretion. Of the universe of more than 10,000 wells less than 225 report  
6           data to the County.

7       43. Federally designated critical steelhead habitat<sup>1</sup> includes all of the Napa River  
8           reaches and estuarine areas accessible to steelhead.<sup>2</sup> Under the Endangered  
9           Species Act, steelhead found in the Napa River watershed belong to the  
10           Central California Coast evolutionarily significant unit (“ESU”). This population  
11           is reproductively isolated from other populations and represents an important  
12           component of the evolutionary legacy of the species.

13       44. For approximately seventy-five years the Napa County Resource  
14           Conservation District (“NCRCD”) has surveyed and reported on the public  
15           trust of the Napa River. For the last twelve years, the NCRCD has monitored  
16           steelhead and salmon out-migration using a rotary screw trap (RST) at a  
17           location about 2 miles downstream of the Oak Knoll Avenue Bridge crossing  
18           south of Yountville. Approximately 70% of the total anadromous salmonid  
19           spawning and rearing habitat reported in the Napa River watershed is located

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<sup>1</sup> *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.

<sup>2</sup> Stillwater final technical report 2002 p. 23

1 upstream of this site. During the spring of 2020, the RST captured a total of  
2 1,457 fishes including 11 native species. Native species comprised 99.5% of  
3 the total catch.<sup>3</sup> Only 42 steelhead smolts were PIT<sup>4</sup> tagged by NCRCD. From  
4 2013 through 2020 564 steelhead smolts have been tagged.

5 45. Since 1929, United States Geological Services (USGS) gauge no. 1145600  
6 has monitored stream flows at Pope Street crossing of the Napa River in  
7 CSH. Proximately located are two monitoring wells operated by the County,  
8 and two potable water production wells operated by the CSH (the “Pope  
9 Street wells”). Since the Pope Street wells went into production to supply  
10 potable water to CSHSGS monitoring shows that the adjacent segment of the  
11 Napa River has dried up in more than half of the ensuing years.

12 46. The Watershed Information & Conservation Council (“WIIC”) was created by  
13 the County in 2002 “to assist the Supervisors in their decision-making  
14 process.” Members include representatives of the councils of Napa Valley  
15 cities and County Board of Supervisors.

16 47. In 2009, the County began a study of its groundwater resources to meet  
17 identified action items in the County’s 2008 General Plan update. The study,  
18 by Luhdorff and Scalmanini Consulting Engineers (“LSCE”), was intended to  
19 emphasize developing a sound understanding of groundwater conditions and

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<sup>3</sup> <https://naparcd.org/wp-content/uploads/2020/09/2019-20-Napa-River-Fish-Monitoring-Report.pdf>

<sup>4</sup> The Passive Integrated Transponder (PIT) tag detection system located in the Napa River. See [www.naparcd.org/assessment-programs/fisheries-monitoring](http://www.naparcd.org/assessment-programs/fisheries-monitoring).

1           implementing an expanded groundwater monitoring and data management  
2           program.

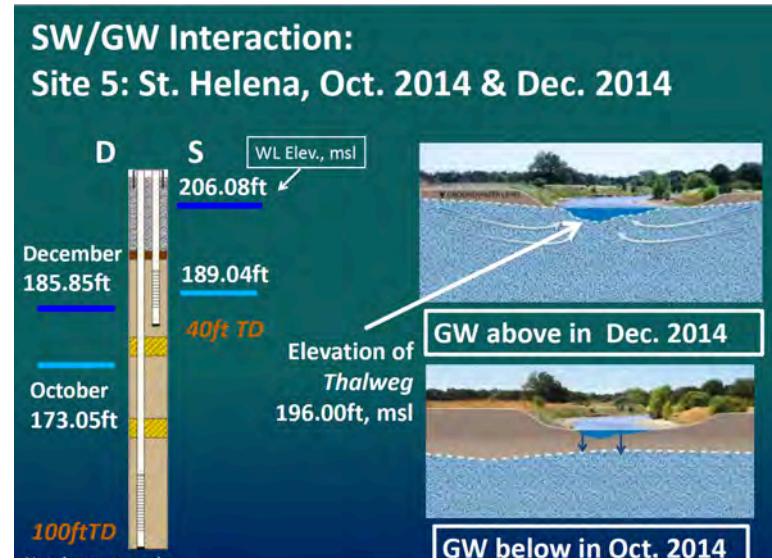
3       48. In 2011, the County appointed members to the Groundwater Resources  
4           Advisory Committee (“GRAC”). Over a period of three years, under the  
5           direction of the County Board of Supervisors, GRAC represents that it  
6           developed the foundation of the County’s groundwater program. GRAC is the  
7           predecessor to GSAC, as discussed below.

8       49. In September 2014, the state adopted three bills that are collectively referred  
9           to as the Sustainable Groundwater Management Act (“SGMA”). The stated  
10          objective of SGMA is to halt groundwater overdraft in high and medium  
11          priority basins and bring them into balance within twenty years. Napa was  
12          identified as one such watershed.

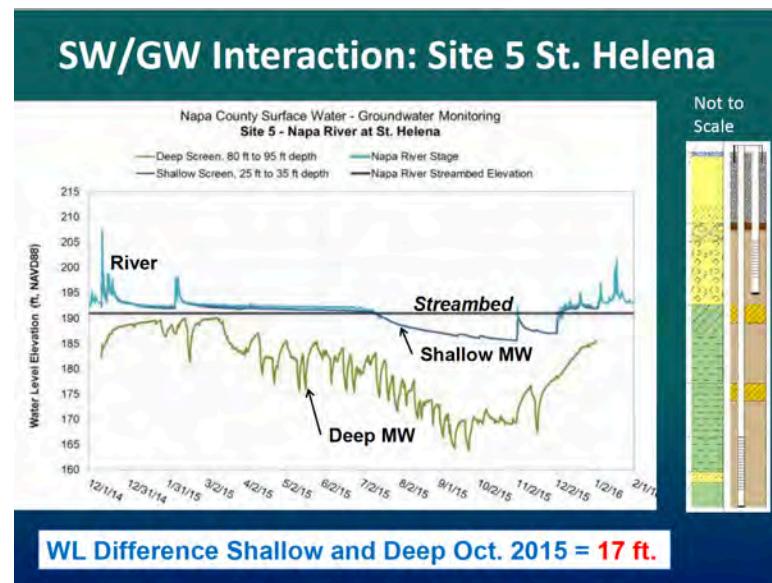
13       50. In the same year, analysis by LSCE detailed the relationship between  
14           groundwater extraction and river dewatering at the Stonebridge wells. Also in  
15           the same year, GRAC considered and rejected a proposition to examine in  
16           greater detail the surface water/groundwater interface and the related  
17           problem of well-to-well impairment.

18       51. In 2015, LSCE reported to WIIC the cause of the Napa River drying at Pope  
19           Street in the CSH with graphic clarity, showing in two slides the relationship  
20           between a lowered groundwater level and a dry river, and the relationship  
21           between groundwater extraction and a lower groundwater level. *Res ipsa*  
22           *loquitur*. No remedial action was taken by any party.

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52. In 2016, LSCE recommended that the County install additional monitoring of  
6 groundwater/surface water interactions in areas where data was lacking. No  
7 additional monitoring was installed.

- 1       53. In December 2016, the County submitted to the state an alternative  
2                  groundwater sustainability plan (Alt-Plan) intended to preclude the SGMA  
3                  process of developing a groundwater sustainability plan. A condition of  
4                  approval was that County had been sustainably managed for at least ten  
5                  years. The Napa River's drying condition was disclosed in the Alt-Plan, but no  
6                  mitigation was proposed. The County asserted that the watercourse drying  
7                  had occurred for such a long time that mitigation was not required. The state  
8                  rejected the Alt-Plan and the argument that mitigation was not required.
- 9       54. In December 2019, County Supervisors appointed themselves the sole  
10                 directors of a newly formed Groundwater Sustainability Agency, ("GSA") and  
11                 assigned it the task posed by SGMA to develop a Sustainable Groundwater  
12                 Plan by January 2022.
- 13       55. In June 2020 the GSA appointed GSPAC, a renewed version of GRAC.
- 14       56. Further, "many requirements in SGMA do not take effect for a number of  
15                 years, and even then, only for some subset of the total corpus of groundwater  
16                 in the state." *ELF*, 407-08. The urgency to protect threatened species does  
17                 not allow a leisurely twenty years for remedy. "[W]e have found no legislative  
18                 intent to occupy the field and thereby to dissolve the public trust doctrine  
19                 within the text or scope of SGMA." *ELF*, 411
- 20       57. The Annual Report of the GSA published in April 2021 ("2021 Groundwater  
21                 Report") reported on Napa groundwater conditions in 2020. Not once in this

1 document do the words “public trust,” “fish,” “steelhead,” “Chinook” or  
2 “salmon” appear.

3 58. Notwithstanding the need for additional monitoring earlier called for by LSCE,  
4 in 2020 the County was only able to measure the groundwater-surface water  
5 interface in the same five locations as in years previous. The most  
6 downstream monitoring location is influenced by tidal waters and is not  
7 directly reflective of groundwater contributions to surface waters. The  
8 remaining monitors in Dry Creek at Washington Street; Napa River at Oak  
9 Knoll Avenue; Napa River at Yountville Cross Road; and Napa River at Pope  
10 Street all show periods of drying of substantial duration.

11 59. Approximately two-thirds of the total anadromous salmonid spawning and  
12 rearing habitat reported is located upstream from Pope Street. As a result, in  
13 the critical segment of the Napa River known to, *inter alia*, support chinook  
14 reproduction, the relationship between groundwater extraction and surface  
15 water flows is inadequately monitored. The County admits “[t]he lack of well  
16 pump test information makes hydraulic properties ... difficult to access.” (2021  
17 Groundwater report, p. 24) Such limited data as was collected reported there  
18 were “losing stream conditions (flow from surface water into groundwater)  
19 throughout 2015.” (2021 Groundwater Report, p. 28)

20

1           **VIII. CAUSES OF ACTION**

2           **FIRST CAUSE OF ACTION**

3           **(Negligent Breach of Trustee Duties - County  
4           and Does 1 to 10,000)**

5  
6       60. The plaintiff incorporates and restates paragraphs 1 to 60 above as if set forth  
7           in full here.

8       61. The public trust arises from the fundamental relationship between a  
9           government and its citizens, and from the basic expectation that renewable  
10          natural resources should remain abundant, justly distributed, and available to  
11          future generations. Such resources form a perpetual trust to sustain the  
12          present and future generations of citizens.

13       62. Over a century ago the U.S. Supreme Court defined the public trust as  
14           property that "is a subject of concern to the whole people of the state." *Illinois*  
15          *Central R.R. Co. v. Illinois*, 146 U.S. 387, 454 (1892) at p. 455.

16       63. The public trust provides that certain natural resources, including water  
17           resources, are held by the state "as trustee of a public trust for the benefit of  
18          the people." *Audubon*, at p. 434.

19       64. The state as sovereign is primarily responsible for administration of the public  
20           trust. A county is a legal subdivision of the state and references to the "state"  
21          includes counties. *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166,  
22          175-176, 36 Cal.Rptr.2d 886. The county "may not approve of destructive  
23          activities without giving due regard to the preservation of those [public trust]

1 resources." *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166  
2 Cal.App.4th 1349, 1370, fn. 19, 83 Cal.Rptr.3d 588.

3 65. When standing for public office, a candidate by necessary implication  
4 declares him or herself willing to faithfully perform the legal duties implied by  
5 the office sought. Their election is conditioned upon this affirmation. *Cal*  
6 *Constitution Article XX section 3.*

7 66. The beneficiaries of the public trust are the people of California, and it is to  
8 them that the trustee owes fiduciary duties. The trustee deals with the trust  
9 property for the beneficiary's benefit. No trustee can properly act for only  
10 some of the beneficiaries – he/she must represent them all, taking into  
11 account any differing interests of the beneficiaries, or he/she cannot properly  
12 represent any of them. *Bowles v. Superior Court* (1955) 44 C2d 574.

13 67. "No discussion is necessary to establish that the conditions placed by the  
14 Legislature on public trust land granted by the state for the benefit of 'all of the  
15 people of this state' (Pub. Resources Code, § 6009.1 , subd. (b)) are a matter  
16 of statewide concern." *Madden v. City of Redwood City* (Nov. 25, 2020,  
17 A156288) \_\_\_ Cal.App.1st \_\_\_ [pp. 21]

18 68. A state law on a matter of statewide concern prevails over conflicting  
19 provisions of local law. *Johnson v. Bradley* (1992) 4 Cal.4th 389, 399-  
20 400; *City of Huntington Beach v. Becerra* (2020) 44 Cal.App.5th 243, 271,  
21 273, 277.)

22 69. The duties of a trustee for the public trust are:

- 1      a. The duty of loyalty;
- 2      b. The duty of care;
- 3      c. The duty of full disclosure;
- 4      d. The duty to keep clear and adequate records and accounts;
- 5      e. The duty to administer the trust solely in the interest of the  
6                beneficiaries;
- 7      f. The duty to act impartially in managing the trust property;
- 8      g. The duty to not use or deal with trust property for the trustee's own  
9                profit or for any other purpose unconnected with the trust, and to not  
10              take part in a transaction in which the trustee has an interest adverse  
11              to the beneficiaries;
- 12     h. The duty to take reasonable steps under the circumstances to take and  
13              keep control of and to preserve the trust property;
- 14     i. The duty to make the trust property productive under the  
15              circumstances and in furtherance of the purposes of the trust;
- 16     j. The duty to keep the trust property separate from other property not  
17              subject to the trust and to see that the trust property is designated as  
18              property of the trust;
- 19     k. The duty to take reasonable steps to enforce claims that are part of the  
20              trust property;
- 21     l. The duty to take reasonable steps to defend actions that may result in  
22              a loss to the trust;

1                   m. The duty to not delegate to others the performance of acts that the  
2                   trustee can reasonably be required to perform and to not transfer the  
3                   administration of the trust to a co-trustee. If a trustee has properly  
4                   delegated a matter to an agent, the trustee has a duty to exercise  
5                   direct supervision over the performance of the delegated matter.

6                   *(Public Resource Code § 6009.1)*

7                  70. “[A]nalogizing this action to the enforcement of a traditional trust agreement,  
8                   the action must be brought against the appropriate representative of the state  
9                   as the trustee of the public trust. *Center for Biological Diversity, Inc. v. FPL*  
10                 *Group, Inc.* (2008) 166 Cal.App.4th 1349, 1367.

11                 71. The courts have an obligation to enforce the government’s fiduciary  
12                 obligations to the beneficiaries. *Audubon, supra*. As one court stated: “Just as  
13                 private trustees are judicially accountable to their beneficiaries for dispositions  
14                 of the resources, so the legislative and executive branches are judicially  
15                 accountable for their dispositions of the public trust.” *Arizona Center for Law*  
16                 *in the Public Interest v. Hassell*, 837 P.2d 158, 168-69 (Az. Ct. App. 1991)

17                 72. The County has issued permits for hundreds of new wells in the last decade  
18                 without having considered the cumulative impact of these decisions on the  
19                 public trust. As operating reports are not assembled for the universe of wells,  
20                 it is unknown which wells are presently in production, their status, or their  
21                 yields.

- 1       73. The County has an approval process for wells that as a pattern and practice  
2                  methodically precludes public consideration of the impact of these approvals  
3                  on the public trust.
- 4       74. Only at the discretion of County staff does the County require a Water  
5                  Availability Analysis (“WAA”). The WAA directs, but does not require, the  
6                  County to use a screening process for discretionary permit applications and to  
7                  determine if a proposal may have an adverse impact on the groundwater  
8                  basin as a whole, or on the water levels of neighboring non-project wells, or  
9                  on surface waters. WAA footnote 2 states in relevant part: “For the purposes  
10                 of this procedure, surface waters are defined to include only those surface  
11                 waters known or likely to support special status species or surface waters  
12                 with an associated water right ...” The location and identity of such waters is  
13                 unstated.
- 14      75. The WAA provides procedures for analysis when screening criteria are  
15                 exceeded, however the County has a pattern and practice of improperly  
16                 approving water extractions that should, by a plain reading of the WAA,  
17                 require enhanced hydrological review.
- 18      76. The County has a pattern and practice of not requiring drawings submitted in  
19                 support of water extractions to clearly show proximate watercourses, or when  
20                 the watercourses are shown, ignoring their presence in the decision-making  
21                 process. Numerous approved developments, building and well applications

1 contained known and ignored misstatements of facts, including but not limited  
2 to:

3           a. Misalignment, omission or mischaracterization of  
4                   watercourses;

5           b. Misalignment or misstatement of property lines;

6           c. Omission or waiver of WAA recommended investigation  
7                   of hydrological interference;

8           d. Misstatements of the grounds on which staff and/or  
9                   supervisorial decisions were made concerning the *res* of  
10                  the public trust;

11           e. Concealment of injury caused by County negligence and  
12                  conduct;

13           f. Failure to disclose to the public “ministerial” building and  
14                  development decisions that cumulatively impact the  
15                  public trust;

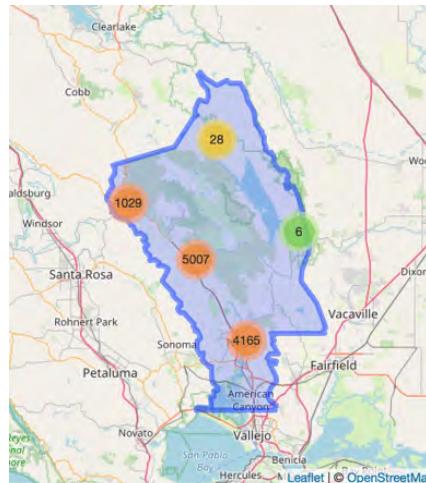
16           g. Failure to disclose or place on the public record  
17                  comments tendered that were opposed to County  
18                  conduct or decisions;

19           h. Misrepresentation and/or failure to disclose comments  
20                  and/or recommendations of consultants employed by the  
21                  County;

- 1                   i. Misappropriated grant funds provided to the County to  
2                   provide for public participation and/or to provide  
3                   information to the public;
- 4                   j. County staff have concealed, misstated and/or  
5                   misconstrued the number, nature, and cumulative effect  
6                   of water extraction decisions being made by the County;
- 7                   k. The County has approved projects based upon a supply  
8                   of water across property boundaries without a recorded  
9                   water agreement.

10                  77. A non-exhaustive list of County applications that did not receive appropriate  
11                  public trust related review in the last year include Alta Winery, Anthem  
12                  Winery, Artesa Wines, Ballentine Vineyards, Basanites Warehouse  
13                  Development, Bremer Family Winery, Cain Cellars Inc. doing business as  
14                  Cain Vineyard & Winery, Caldwell Vineyards, Chappellet Winery, Clover Flat  
15                  Landfill, Dalla Valle Vineyards, Dry Creek-Mt. Veeder Wines, Duckhorn  
16                  Vineyards, Hyde Wines, Jamcan Residential, Kenzo Winery, Mountain Peak,  
17                  Oak Knoll Hotel, Ovid Vineyards, Paraduxx Winery, Rombauer Winery, and  
18                  Scarlett Wines.

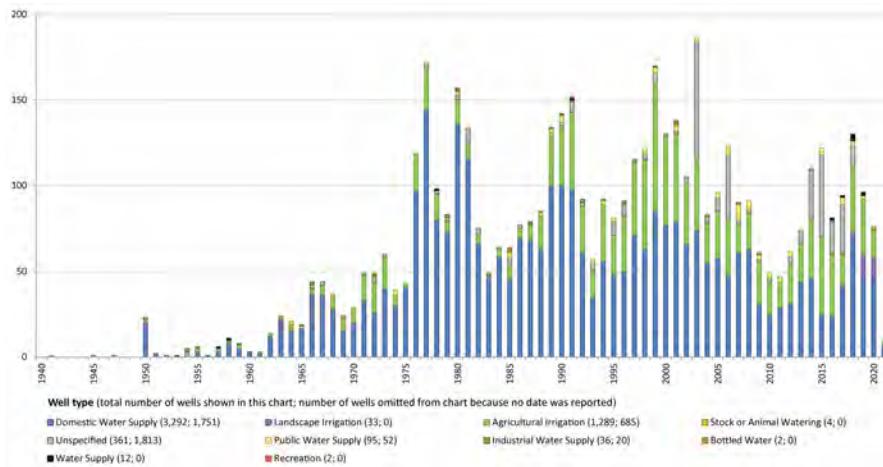
19                  78. The Department of Water Rights (“DWR”) allows wells to be publicly reported  
20                  in the aggregate. The following graphic roughly approximates the distribution  
21                  of the well completion reports filed in the county.



1           79. The most northerly monitoring location, provided by USGS gauge no.  
2  
3           1145600 at Pope Street in the CSH, reports that in addition to increased  
4           drying *frequency*, there has been an increase in the *duration* of the periods  
5           when the river is dry. Dry periods that a decade ago lasted from a month or  
6           less now frequently last months in a row. In 2020, the Napa River at Pope  
7           Street was reported dry from the third week of June until the third week of  
8           December, a new record. This factor indicates an urgency of action required  
9           for the very survival of the public trust. Native aquatic species have adapted  
10          to retreating to deep pool refugia when flows naturally slow or channels dry. If  
11          the deep pools are allowed to dry by extended periods of no flow, fishes and  
12          invertebrates, including special status fishes, are extirpated.

13          80. The following graphic indicates how water extraction has increased over time,  
14          cumulatively creating a different eco-system than existed two decades ago.  
15          Water supply wells and unspecified wells where year built is known are  
16          represented graphically, and totals for each category are included in the chart

1 legend. The number of water supply wells and unspecified wells for each  
2 category where year built is unavailable are also tallied in the chart legend.<sup>5</sup>  
3



4  
5 81. The County reports that in 2020, 39 new wells were authorized, and an  
6 additional 45 wells were put into production (2021 Groundwater Reports  
7 Figure 7-3). In 2020, the County approved 3 new use permits and 13 major  
8 modifications to existing use permits and an unknown number of “minor”  
9 modifications (2021 Groundwater Report, Figure 6.4). The County is  
10 approving development in areas that are inadequately monitored for

---

<sup>5</sup> 9,447 = total wells for categories shown in chart, including those *without* year data available

5,162 = wells with year data available included in chart

3,292 = total domestic wells

1,289 = total ag wells (not including 4 wells labeled stock/animal)

2,174 = total wells where type is "Unspecified" - almost all of these records occur between 2003 and 2018 (these are included in the chart)

1           groundwater/surface water interface and are already alleged to be suffering  
2           from well interference and inadequate water.

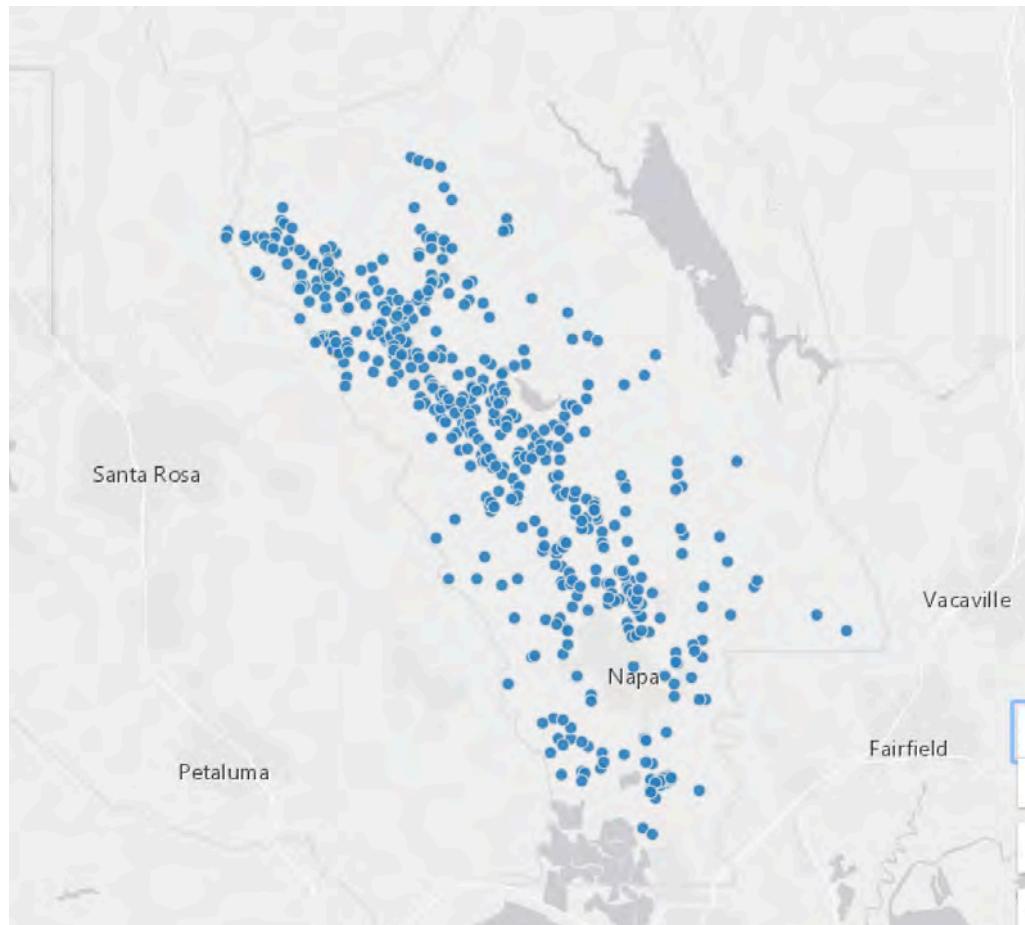
3       82. There are presently 501 wineries in records maintained by Napa County, and  
4           approximately 30 of those are within city boundaries.<sup>6</sup> Over 210 additional  
5           proposed projects are shown as currently pending on the County's website.  
6           For a list of pending projects, see Appendix A.

7       83. The public cannot determine from the current projects list alone which of the  
8           proposals anticipates increased groundwater extraction. A single example of  
9           many illustrates the inadequacy of the trustee's conduct. The Inn at the  
10          Abbey is a proposed hotel development on Highway 29 at Lodi Lane, in  
11          County jurisdiction outside the northern boundary of CSH. The WAA was  
12          performed by RSA+, a firm with a close history to a County elected officer. It  
13          shows that the anticipated water use for the hotel, food and hospitality service  
14          *and associated vineyards* will total 21.68 AF (approximately 7 million gallons),  
15          of which 8.29 AF will be provided by the CSH water supply (sourced from Bell  
16          Canyon, Pope Street wells and the City of Napa) and 15.13 AF from  
17          groundwater extraction. Except for an unidentified dotted line, the parcel plan  
18          submitted with the WAA does not make any reference to the Napa River  
19          which directly adjoins the property being developed and the well proposed to  
20          supply the proposed project. County staff cannot be relied upon to provide

---

<sup>6</sup> The actual number of "wineries" present in the Napa Valley is dependent on the reporting source.

1 independent assessment of submissions. The Inn application does not make  
2 any assessment of the potential of injury to public trust flows.



3

4 Napa County Winery Locations

5 Source: Napa County GIS, data updated 02.02.21

6 [https://hub.arcgis.com/datasets/366cf04e6efd4caca87c432a7faeaa4e\\_0/explore  
7 ?location=38.479828%2C-122.370800%2C10.00](https://hub.arcgis.com/datasets/366cf04e6efd4caca87c432a7faeaa4e_0/explore?location=38.479828%2C-122.370800%2C10.00)

8  
9 84. The County's proposed future enhancement of groundwater-surface water  
10 interface monitoring will not include the monitoring of locations known to be  
11 critical for the public trust, both inside and outside the SGMA sub-basin.

- 1       85. The County has a pattern and practice of improperly delegating to staff the  
2                  review of discretionary matters regarding proposed development and  
3                  extraction decisions.
- 4       86. Even if one accepts, *arguendo*, the presumption that all agricultural users of  
5                  water should be permitted to extract “X” AF of water per parcel acre, that  
6                  decision standing alone fails to discharge the trustee duty to ensure wells do  
7                  not cause mitigatable injury to the public trust by location, extraction rates, or  
8                  timing.
- 9       87. The County has a pattern and practice of authorizing construction or other  
10                 encroachment into protected riparian ways. For example, see the approval of  
11                 the Bremer Family Winery.
- 12      88. The County has a pattern and practice of authorizing timber harvest and  
13                 development that will adversely impact the public trust, in particular in  
14                 watersheds above potable water supplies.
- 15      89. The County has failed to act as a reasonably careful trustee would have acted  
16                 under the same or similar circumstances.
- 17      90. County Supervisors have a persisting bias in favor of vineyard, winery, and  
18                 tourist development at the expense of the public trust.
- 19      91. The County has failed to acquire and/or report to the public the information  
20                 necessary to keep the beneficiaries reasonably informed of the status of the  
21                 public trust. This is admitted in the 2021 Groundwater Report:

Groundwater Sustainability Plan (“GSP”) Regulations require reporting of best available information on water use by sector, groundwater extraction, and surface water used ... [T]here is no comprehensive data collection effort in the Subbasin to monitor groundwater use by agriculture. Limited data on surface water diversions are available from the [SWRCB] Electronic Water Rights Information System ... diversion data reported to the SWRCB are not available in a timely manner for use in SGMA annual reports ...

92. The public interest has been harmed by this conduct. The County's breach of its trustee duties is a substantial factor in harm to the public trust.

WHEREFORE Petitioner prays for relief as hereinafter set forth.

**SECOND CAUSE OF ACTION**  
**(Declaratory judgment - County of Napa  
and Does 1 to 10,000)**

93. The plaintiff incorporates and restates paragraphs 1 to 91 above as if set forth in full here.

94. CCP § 1060 provides that a party may seek a judicial determination of rights in a matter of controversy.

95. There is a real and present controversy between Water Audit and the defendants regarding the existence and extent of the defendants' duties to the public trust.

96. Petitioner prays that the Court declare that groundwater that is hydrologically connected to surface flows must be managed and protected in a manner consistent with the public trust doctrine.

97. Petitioner prays that the court issue a declaratory judgment that County is a trustee of the public trust, and that the duties of said trustee include, but are not limited to, those enumerated at paragraph 70, *supra*.

98. WHEREFORE Petitioner prays for relief as hereinafter set forth.

**THIRD CAUSE OF ACTION**  
**(Writ of Mandate Against the County of Napa  
and Does 1 to 10,000)**

99. The plaintiff incorporates and restates paragraphs 1 to 91 above as if set forth in full here.

100. The defendants are trustees of the public trust. Water Audit is a beneficiary of the trust.

101. The duties of a trustee include the duty to provide an accounting to beneficiaries on demand.

102. The public interest requires an accounting of the impacts of groundwater extraction on surface water flows. The preparation of this accounting requires a sufficient monitoring of surface water flows to permit the performance of a mass balance determination of the effects of groundwater extractions on the Napa River and its tributaries that are known to have historically supported public trust fishes. The accounting requires the determination of in-stream flow objectives sufficient to determine the water needs of the ecosystem. Further, the accounting requires a determination of the cumulative and

1 individual effects of groundwater extractions on surface flows, a balancing of  
2 the uses and the environmental needs, a program to adjust extractions to  
3 avoid continuing injury to the public trust, and a program of implementation.

4 WHEREFORE Petitioner prays for relief as hereinafter set forth.

5

6 **FOURTH CAUSE OF ACTION**  
**(For Preliminary and Permanent Injunction Against the County**  
**and Does 1 to 10,000)**

7

8 103. The plaintiff incorporates and restates paragraphs 1 to **92** above as if set  
forth in full here.

9

10 104. The defendants, and each of them, wrongfully and unlawfully engaged in  
11 and/or authorized conduct that has and continues to cause injury to the public  
12 trust.

13 105. The defendants continue to authorize groundwater extractions, putting  
14 both the public trust and those who are relying upon such approvals at risk.

15 106. Defendants' wrongful conduct, unless and until enjoined and restrained by  
16 order of this court will cause great and irreparable injury to the public trust in  
17 that it will cause additional dewatering of surface flows needed by the  
18 ecosystem.

19 107. Plaintiff has no adequate remedy at law for the injuries threatened and/or  
20 currently suffered as an award of monetary damages would not provide an  
21 adequate remedy.

22 WHEREFORE Petitioner prays for relief as hereinafter set forth.

1

2

3                   **PRAYERS FOR RELIEF**

4

5

6 WHEREFORE, Petitioner prays judgment against respondents and defendant(s) as  
7 follows:

8

9

- 10     1. An order from the Court that groundwater which is hydrologically  
11       connected to navigable surface flows is protected by the public trust  
12       doctrine and must be protected in a manner consistent with the public  
13       trust;
- 14     2. An order from the Court declaring that the County is the trustee for the  
15       public trust interests in the groundwater / surface water interface of the  
16       Napa River and its tributaries to the extent of those duties as set forth in  
17       *Public Resource Code § 6009.1*;
- 18     3. A writ of mandate from the Court directing the County to provide an  
19       accounting of the relationship between groundwater extraction and  
20       surface water flows;
- 21     4. A writ of mandate from the Court directing the County to provide a  
22       determination of the instream flow objectives that will meet the water  
23       needs of the ecosystem;
- 24     5. A referral to the Water Board pursuant to Water Code § 2000-20011 to  
25       determine the riparian and allocated rights to surface water flows;

- 5           7. Compensatory damages sufficient to remediate injury to the public trust;
- 6           8. Reasonable attorney fees and costs of suit incurred in this action as
- 7           provided by CCP 1021.5 and other provisions of law; and
- 8           9. For such other and further relief as the court deems proper.

9

10 June 1, 2021

11



12           William McKinnon  
13           Attorney for the Plaintiff and Petitioner  
14           Water Audit California  
15

## **APPENDIX A**

**NAPA COUNTY PENDING PROJECT NAME AND APPLICATION NUMBER**

Downloaded May 17, 2021

Source:

<https://experience.arcgis.com/experience/e689ed72576041f2ad40b3e8c0f25206/?d>

ata\_id=dataSource\_1-

Current\_PBES\_Projects\_Public\_8744%3A578%2CdataSource\_1-

Current\_PBES\_Projects\_Public\_8744\_6690%3A578

12	Harney Medium Show Reservoir	ENG20-00023
13	Syar Napa Quarry Project	P08-00337
14	Climate Action Plan	P11-00010
15	Benjamin Ranch Winery (formerly Frank Family)	P13-00371
16	Davis Lommel ECP	P14-00043
17	Oak Knoll Hotel	P14-00215
18	Anthem Winery	P14-00320
19	Gonsalves - CE	P14-00357
20	LeColline Erosion Control Plan	P14-00410
21	Hendry	P15-00173
22	The Carneros Inn	P15-00190

1	Skyline Park Rezoning	P15-00354
2	Heiser West Lane Vineyard ECPA	P15-00389
3	New Life Adventist Church	P16-00210
4	Bremer ECP	P16-00271
5	Hard Six Cellars (appeal)	P16-00333
6	Aloft Winery	P16-00429
7	Hyde Winery	P17-00026
8	Mountain Peak Remand to BOS	P17-00081
9	Greenwood Mansion – Vinum	P17-00099
10	Capell Valley School General Plan Amendment	P17-00135
11	Mathew Bruno Tasting Room	P17-00387
12	Nickel & Nickel	P17-00400
13	Keever Winery Major Modification	P17-00427
14	KJS Sorrento ECPA	P17-00432
15	Saintsbury Winery major modification	P18-00027
16	Langelier Residence	P18-00094
17	Piazza Del Dotto Winery Major Modification	P18-00143
18	Safe Harbor 3.0 Winery/Storage Facility	P18-00179
19	Vineland Vista Mobilehome Park	P18-00199
20	Lokoya Cabins	P18-00223
21	Ellman Family Winery	P18-00249
22	Staglin Winery Major Modification	P18-00253

1	Red Lake Winery	P18-00267
2	Delvin Road	P18-00301
3	Chappellet Winery Major Mod	P18-00307
4	Safety Element & Local Hazard Plan Updates	P18-00327
5	Kinsey Telcom Facility	P18-00339
6	Residential/Ag- Viewshed	P18-00341
7	Ballentine Vineyards Major Modification	P18-00382
8	Gateway East Winery	P18-00389
9	Realm Cellars	P18-00392
10	Eagle Vines Telecommunication Tower AT&T	P18-00410
11	Building Color Palette	P18-00421
12	Three Twins ECP	P18-00435
13	Stagecoach North Vineyard ECPA	P18-00446
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19	Dakota Shy Major Modification	P19-00131
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21	Artesa Vineyards and Winery Major Mod	P19-00134
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21	The Terraces Minor Modification	P20-00162
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4	Battuello Family Winery Use Permit	P20-00186
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14	Domaine Carneros Major Modification	P20-00268
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5	Mira Winery	P21-00103
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## **VERIFICATION**

I, GRANT REYOLDS, declare as follows:

I am a director of the plaintiff and petitioner Water Audit California. I have read the above COMPLAINT FOR NEGLIGENCE BREACH OF TRUSTEE DUTIES; FOR DECLARATORY JUDGMENT AND PETITION FOR WRIT OF MANDATE AND PRELIMINARY AND PERMANENT INJUNCTION and know its contents. Based upon information and belief, all of the facts alleged in the petition are true of my own personal knowledge.

I declare under the penalty of perjury that the foregoing is true and correct and that this affidavit was executed June 1, 2021 at San Diego California.



Grant Reynolds