IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

No. C085762

STANFORD VINA RANCH
IRRIGATION COMPANY,
Plaintiff and Appellant,

v.

STATE OF CALIFORNIA, et al.,
Defendant and Respondent.

On Appeal from the Superior Court of Sacramento County
(Case No. 34-2014-80001957CUWMGDS, Hon. Timothy Frawley, Judge)

APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF AND APPELLANT

ANTHONY L. FRANÇOIS, No. 184100
JEREMY TALCOTT, No. 311490
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: tfrancois@pacificlegal.org
E-mail: jtalcott@pacificlegal.org

Attorneys for Amicus Curiae
Pacific Legal Foundation

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL THIRD APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER: C085762
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 184100 NAME: Anthony L. Francois FIRM NAME: Pacific Legal Foundation STREET ADDRESS: 930 G St. CITY: Sacramento STATE: CA ZIP CODE: 95841 TELEPHONE NO.: 916-419-7111 FAX NO.: 916-419-7747 E-MAIL ADDRESS: tfrancois@pacificlegal.org ATTORNEY FOR (name): Amicus Curiae Pacific Legal Foundation	SUPERIOR COURT CASE NUMBER: 34-2014-80001957CUWMGDS
APPELLANT/ PETITIONER: Stanford Vina Ranch Irrigation Company RESPONDENT/ REAL PARTY IN INTEREST: State of California, et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [x] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

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Date: 12/19/2018

Anthony L. Francois
(TYPE OR PRINT NAME)

▶ A L Francois
(SIGNATURE OF APPELLANT OR ATTORNEY)

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APPLICATION TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rule of Court 8.200(c)[1], Pacific Legal Foundation (PLF) respectfully applies to file the accompanying amicus curiae brief in support of Appellant Stanford Vina Ranch Irrigation Company (Stanford Vina). The Proposed Amicus is familiar with the parties' arguments. It believes that the attached brief will aid the Court in its consideration of the issues presented in this case, particularly regarding the importance of due process in administrative proceedings and the clash between the Takings Clause and the Public Trust Doctrine. This brief supports the conclusion that the State of California, through the State Water Resources Control Board (SWRCB), violated the Due Process and Takings Clauses when it issued emergency water right curtailments prohibiting Stanford Vina from exercising its vested right to divert and use water from Deer Creek.

IDENTITY AND INTEREST OF PROPOSED AMICUS CURIAE

PLF is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad

[1] The Proposed Amicus affirms that no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission. No person other than the Proposed Amicus made a monetary contribution to the brief's preparation or submission.

spectrum of public interest issues in state and federal courts, representing thousands of supporters nationwide. These supporters include landowners throughout California who believe in limited government, property rights, and free enterprise. For over 45 years, PLF has been litigating in support of individuals' rights to make reasonable use of their property, free from unwarranted government interference. *Weyerhaeuser v. United States Fish and Wildlife Service*, 139 S. Ct. 361 (2018); *United States Army Corps of Engineers v. Hawkes Co., Inc*., 136 S. Ct. 1807 (2016); *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595 (2013); *Sackett v. EPA*, 566 U.S. 120 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

AMICUS CURIAE BRIEF
INTRODUCTION AND SUMMARY OF ARGUMENT

Stanford Vina is a nonprofit mutual water company serving approximately 5,700 acres of irrigated lands used for irrigated pasture, livestock watering, grain, alfalfa, row-crop production and vineyards, and prune, walnut, and almond orchards. Stanford Vina manages its landowners' senior riparian and pre-1914 water rights to Deer Creek flows which are appurtenant to their lands. These lands are Mexican Land Grant Lands, and landowners have continually diverted Deer Creek water since the mid-1800s.

In early 2014, California Governor Jerry Brown declared a drought emergency and signed legislation amending Water Code § 1058.5(a)(1), which directed SWRCB to adopt, as it deemed necessary, emergency regulations "to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water . . . ." The governor then issued an Executive Order using this same language directing SWRCB to adopt emergency regulations as necessary.

The emergency regulations and resulting curtailment orders issued by SWRCB required minimum in-stream flows for public trust fishery resources, declared all uses and diversions that conflicted with the in-stream flow requirements to be "unreasonable," and ordered diversions to immediately cease or face substantial monetary penalties. The regulations were adopted just five business days after notice was given to the water rights holders, and while agency representatives gave a lengthy presentation on the need for the curtailment orders, the water rights holders were only allowed a five-minute public comment period. Their explicit requests to present evidence and to cross-examine the government's witnesses were denied by the Board. At the meeting, SWRCB staff stated that the proceeding was purposefully styled as quasi-legislative to avoid "cumbersome" evidentiary hearing requirements. Stanford Vina complied with the curtailment action under protest, suffering the loss of livestock and crops, for which it has never been compensated.

The State of California, through SWRCB, deprived Stanford Vina of its vested water rights without just compensation, and without the due process of law required of quasi-adjudicatory administrative proceedings. As such, the trial court's decision upholding SWRCB's illegal actions must be overturned.

ARGUMENT

I.

THE EMERGENCY WATER CURTAILMENTS VIOLATE DUE PROCESS

A. Landowners May Not Be Deprived of Water Rights Without Due Process of Law

Stanford Vina's riparian and pre-1914 California water rights are protected by the U.S. and California Constitutions. *See United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 727-30, 752-56 (1950); *Dugan v. Rank*, 372 U.S. 609, 623-26 (1963); *Locke v. Yorba Irrigation Co.*, 35 Cal. 2d 205 (1950); *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 726-27 (1908). As vested real property rights, SWRCB cannot deprive Stanford Vina of them, or take these rights, without due process and just compensation. *United States v. SWRCB*, 182 Cal. App. 3d 82, 101 (1986).

In 2014 and 2015, SWRCB deprived Stanford Vina of the use of its water rights by declaring the diversions and water use unreasonable, and issuing cease and desist orders. By repeatedly denying Stanford Vina's requests for an evidentiary hearing on whether its diversions and use of water

were unreasonable, SWRCB has deprived Stanford Vina of its opportunity to be heard "at a meaningful time and in a meaningful manner" regarding the taking of its property. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Due process guarantees affected parties "the right to be heard at a meaningful time and in a meaningful manner." *Ryan v. California Interscholastic Federation-San Diego Section*, 94 Cal. App. 4th 1048, 1072 (2001). When government agencies "adjudicate or make binding determinations" which directly impact individuals' rights, those agencies must "use the procedures which have traditionally been associated with the judicial process." *Oberholzer v. Commission on Judicial Performance*, 20 Cal. 4th 371, 391 n.16 (1999) (quoting *Hannah v. Larche*, 363 U.S. 420, 442 (1960)). Stanford Vina had no opportunity to be heard at a meaningful time, in a meaningful manner, or with any of the procedures traditionally associated with the judicial process. Instead, it had only five days' notice and a mere five minutes to speak at a hearing that *purposefully* bore no semblance to the judicial process, as it was designed to avoid the "cumbersome"[2] evidentiary requirements which due process would require at a hearing.

[2] *See* AR 008255 p. 33:10-14 ("Mr. O'Laughlin's arguments notwithstanding, this is not a quasi-judicial proceeding. We're styling this as a quasi-legislative proceeding. That means that the board has considerable flexibility in terms of how it structures this."); AR 008249 p. 11:25-12:3 ("[W]ater right holders may request a full evidentiary hearing . . . . As such, enforcement in the absence of a regulation is cumbersome . . . .").

Such proceedings directly violate Article 1, Section 7, of the California Constitution, which provides that a person may not be deprived of life, liberty, or property without due process of law. These proceedings also violate the Fifth Amendment's Due Process Clause, applicable against SWRCB through the Fourteenth Amendment. Water rights are an acknowledged property right, and California courts have repeatedly held that due process protections apply to administrative proceedings as well as to judicial proceedings. *Today's Fresh Start, Inc. v. Los Angeles County Office of Educ*., 57 Cal. 4th 197, 212 (2013); *see also Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*., 99 Cal. App. 4th 880, 885 (2002); *Burrell v. City of Los Angeles*, 209 Cal. App. 3d 568, 582 (1989); *Golden Day Schools, Inc. v. State Dep't of Educ*., 83 Cal. App. 4th 695, 709 (2000); *Scott v. Meese*, 174 Cal. App. 3d 249, 257 (1985).

To provide adequate due process, an administrative hearing must provide "timely and adequate notice" detailing the reasons for the government action, an "effective opportunity" to personally participate in the hearing, disclosure of the government's evidence, the opportunity to confront or cross-examine adverse witnesses, the right to be assisted by counsel at the hearing, and the right to an impartial decision maker whose decision is limited to the legal rules and evidence presented at the hearing and stated in a decision that allows meaningful appeal. *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970).

The SWRCB procedure in this case falls woefully short of these due process requirements. Instead of timely and adequate notice and disclosure of the government's evidence, Stanford Vina received only five days' notice of the proposed curtailment actions and no prior disclosure of the evidence which SWRCB staff presented at length to the panel during the hearing. Instead of an effective opportunity to participate in the hearing by presenting its own evidence or cross-examining adverse witnesses, Stanford Vina had a scant five-minute public comment period.

Stanford Vina's due process rights did not disappear simply because SWRCB slapped a "waste and unreasonable use" label on the lawful water uses Stanford Vina has engaged in since the mid-1800s. Due process protections apply at the administrative level, and SWRCB was wrong to deny them to Stanford Vina in this case.

B. Public Trust Determinations Are Adjudicative, Not Legislative

The 2014 and 2015 curtailment actions are quasi-adjudicatory and are therefore subject to due process. *See Hannah*, 363 U.S. at 442 ("[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process."). Although the SWRCB's actions applied general standards to individual water rights holders, the trial court erroneously

classified them as quasi-legislative. The curtailment actions determined facts particular to specific water rights holders, including finding Stanford Vina's diversions unreasonable and harmful to the public trust and by ordering Stanford Vina to cease those diversions immediately.

Regulatory agencies enjoy broad powers within the spheres of expertise assigned to them by law, and courts regularly afford agency decisions significant deference, so long as those decisions have been "reached with due submission to constitutional restraints." *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n of Ohio*, 301 U.S. 292, 304 (1937) (citing *West Ohio Gas Co. v. Pub. Utilities Comm'n of Ohio*, 294 U.S. 63, 70 (1935)). Due to this degree of deference, "[a]ll the more insistent is the need, when [the] power has been bestowed so freely, that the inexorable safeguard of a fair and open hearing be maintained in its integrity." *Ohio Bell*, 301 U.S. at 304 (internal citation omitted); *see also Morgan v. United States*, 298 U.S. 468, 480-1 (1936) ("The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action."). Where an administrative agency acts in a quasi-adjudicative manner to deprive an interest in property, the due process protections of the Fifth and Fourteenth Amendments are required. As the Supreme Court has powerfully stated, "[t]here can be no compromise

on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay," when those constitutional requirements have been neglected or ignored. *Ohio Bell*, 301 U.S. at 305.

In this case, the curtailment actions were not general regulations applicable to all California water right holders across all California watersheds, nor were they general standards to be applied in all future proceedings. Instead, the curtailment actions determined facts and applied legal standards to Stanford Vina and 28 other individually named water rights holders, changing their rights to exercise their water rights thereby. This inherently quasi-adjudicative action cannot be passed off as quasi-legislative in a transparent attempt to ignore the due process rights of the affected property owners, and the trial court was wrong to uphold SWRCB's attempt to do so.

II.

THE PUBLIC TRUST DOCTRINE DOES NOT PERMIT TAKING VESTED WATER RIGHTS WITHOUT JUST COMPENSATION

At the root of this case is the physical taking of Stanford Vina's real property interest in the use and diversion of water without compensation. The use of water made available through the Board's curtailment actions as minimum in-stream flows for the protection of migratory fish, at the behest of public fisheries agencies, is a public use of the taken water and constitutes a compensable physical taking. *See Dugan*, 372 U.S. at 623-26 (dam's

interference with downstream water rights was a physical taking requiring compensation); *Gerlach*, 339 U.S. at 754 (same); *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1288-97 (Fed. Cir. 2008); *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318-21 (2001). Framing this public use of water as beneficial to the public trust does not alter or negate the fact that a taking occurred, and the trial court's acceptance of this argument by SWRCB sets a dangerous precedent.

When first adopted in the United States, the public trust doctrine was limited to submerged lands beneath navigable waters and tidelands, which states hold in trust to preserve the public uses of navigation, commerce, and fishing. *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 435 (1892). California has since expanded the concept of the public trust to protect general recreational uses and preserving tidelands in their natural state, *Marks v. Whitney*, 6 Cal. 3d 251 (1971), and to prevent diversions of tributaries that are necessary to maintain navigable bodies of water, *Nat'l Audubon Soc'y v. Superior Court of Alpine Cty.*, 33 Cal. 3d 419, 437 (1983). Though these expansions of the public trust doctrine were far-reaching and unprecedented[3] they do not "relate back" as background principles that inherently limit title or property rights. *See, e.g., Casitas Mun. Water Dist. v.*

[3] *See generally* Janice Lawrence, *Lyon and Fogerty*: *Unprecedented Extensions of the Public Trust*, 70 Cal. L. Rev. 1138 (1982).

United States, 102 Fed. Cl. 443, 458 (2011) ("We read *National Audubon*, however, as recognizing that the state has a right—indeed a duty—to exercise continuing supervisory control over its navigable waters to protect the public trust, but that the traditional water rights system—with its recognition and protection of water rights as property—remains in place."). California courts have repeatedly held that it is "axiomatic that once rights to use water are acquired, they become vested property rights" that "cannot be infringed by others or taken by governmental action without due process and just compensation." *United States v. State Water Res. Control Bd*., 182 Cal. App. 3d 82, 101, (1986); *see also Ivanhoe Irrigation Dist. v. All Parties and Persons*, 47 Cal. 2d 597 (Cal. 1957), *rev'd on other grounds sub nom.*, *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958); *Gerlach*, 339 U.S. at 752-3.

Stanford Vina's water rights, acquired over 150 years ago, are vested property rights. Despite the expansive reach of the public trust doctrine in California, it does not displace the state's established water rights system. The curtailment orders issued by SWRCB in 2014 and 2015 were a physical taking of Stanford Vina's real property interest in the use and diversion of Deer Creek water, and the law requires Stanford Vina be justly compensated.

CONCLUSION

Pacific Legal Foundation respectfully requests that this Court reverse the opinion of the superior court and hold that the State of California, through

the SWRCB, violated the Due Process and Takings Clauses when it issued emergency water right curtailments prohibiting Stanford Vina from utilizing its vested right to divert and use water from Deer Creek.

DATED: December 19, 2018.

Respectfully submitted,

ANTHONY L. FRANÇOIS
JEREMY TALCOTT

By /s/ Anthony L. François

Attorneys for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF AND APPELLANT is proportionately spaced, has a typeface of 13 points or more, and contains 2,571 words.

DATED: December 19, 2018.

/s/ Anthony L. Francois
ANTHONY L. FRANÇOIS