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12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **COUNTY OF YUBA**

14 MARIEKE FURNEE, GIDEON BEINSTOCK,
15 JEANETTE CAVALIERE, DONNA CORSON,
16 ISRAEL PERLA, and CHARLES SHARP,

17 Petitioners/Plaintiffs,

18 v.

19 THE NORTH YUBA WATER DISTRICT, and
20 DOES 1 through 100, inclusive,

21 Respondents/Defendants.

22 YOUNG LIFE, INC. a/k/a YOUNG LIFE
23 CAMPAIGN, INC., a Texas Corporation,

24 Real Party in Interest.

Case No.

**PETITIONERS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF *EX PARTE*
APPLICATION FOR A TEMPORARY
RESTRAINING ORDER AND ORDER
TO SHOW CAUSE FOR A
PRELIMINARY INJUNCTION**

Date: May 3, 2021

Time: 8:30 a.m.

Dept.: 4

Judge: Hon. Stephen W. Berrier

[Accompanying Documents: Notice of *Ex Parte*
Application and *Ex Parte* Application; Request
for Judicial Notice; Accompanying
Declarations; and [Proposed] Order]

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1 **I. INTRODUCTION**

2 Petitioners are irrigators within North Yuba Water District (“NYWD”). On March 26, 2021,
3 NYWD’s Board considered an unagendized action to deny water service to irrigators within NYWD
4 due to a purported lack of water resources. This decision was made without supporting evidence and
5 in apparent retaliation for the irrigators’ political opposition to several board members and the board’s
6 proposed piping of the Forbestown Ditch (“FTD”). This decision was not only an abuse of discretion,
7 but it has the potential of causing significant harm to the irrigators, who rely upon the water for
8 grazing, crops, and fire suppression.

9 At the same time NYWD was acting to curtail the irrigators’ water supplies due to a purported
10 lack of water, NYWD was in negotiations to *sell* water to a third-party outside the district: Real Party
11 in Interest Young Life, Inc. a/k/a Young Life Campaign, Inc.’s inactive recreation camp, Woodleaf
12 Young Life Camp (“Woodleaf”). Despite the irrigators’ objections, NYWD voted 4-1 to approve a
13 contract to sell water to Woodleaf on April 23, 2021.

14 NYWD’s actions were unsupported by substantial evidence and are contrary to California law.
15 The decisions were also made without complying with the environmental review provisions of the
16 California Environmental Quality Act, Pub. Resources Code, § 21000, *et seq.* (“CEQA”). The
17 decisions violate the California Water Code and NYWD’s own policies concerning the distribution of
18 water. The directors acted with bias against the irrigators unacceptable under California law. And the
19 decision to curtail all water deliveries was made without substantial evidence. NYWD plainly abused
20 its discretion under California law. NYWD has also placed Petitioners and other irrigators in an
21 untenable position, unable to use *any* water from NYWD for fire suppression.

22 As a result, Petitioners seek relief from this Court prohibiting NYWD from (i) delivering water
23 supplies to Woodleaf and (ii) curtailing irrigation deliveries to the irrigators.

24 **II. FACTUAL BACKGROUND**

25 NYWD was formed in 1952 under Section 30321 of the Water Code, then known as “Yuba
26 County Water District.” NYWD encompasses the northeastern portion of Yuba County, and has
27 approximately 2,500 water users and 741 domestic service connections throughout its service area.
28 NYWD’s domestic service connections are served treated water from the Forbestown Treatment

1 Facility (the “FTTF”). (Declaration of John P. Kinsey (“Kinsey Decl.”), Ex. A; RJN, Ex. “A.”) The
2 FTTF receives its water from the FTD, and has a maximum capacity of 1.6 cubic feet per second
3 (“cfs”). Petitioners understand the average flow used by the FTTF is actually approximately 0.5 cfs.

4 The southern portion of NYWD’s service area is dominated by NYWD customers who use
5 NYWD’s water supplies for irrigation and fire suppression (the “Irrigators”). Water is conveyed to the
6 Irrigators from Dry Creek via the Oregon House Dobbins Canal (“OHDC”).

7 **A. Summary of Relevant NYWD Water Rights**

8 NYWD has two primary water rights at issue in this proceeding:

9 **Dry Creek.** NYWD has the right to divert up to 21.4 cfs/6,060 AFY from Dry Creek, subject
10 to maintaining at least 4 cfs of flows for “the protection of fish and wildlife.” (RJN, Ex. “B” [SWRCB
11 License No. 12984].) Water conveyed by the FTD can be diverted into Costa Creek, which conveys
12 water into Dry Creek. At a point south of the community of Brownsville, a diversion dam on Dry
13 Creek can divert water into the OHDC for use by the Irrigators. (RJN, Ex. A at 4-4.)

14 **Slate Creek, Lost Creek, and South Fork Feather River.** NYWD has the right to use up to
15 23,700 acre-feet per year (“AFY”) from Slate Creek (a tributary to the North Fork of the Yuba River),
16 Lost Creek, and South Fork Feather River for consumptive uses within NYWD’s service area. (RJN,
17 Exs. “C,” “D” [SWRCB Licenses Nos. 11516, 11518].) These water supplies originate in Lost Creek,
18 South Fork Feather River, and Slate Creek, and are then diverted by South Feather Water & Power
19 Authority (“SFWPA”) into the Sly Creek Reservoir. (RJN, Ex. A at 1-4, 2-1, 3-1.) From the Sly
20 Creek Reservoir, the collected waters can be released to run through the Woodleaf Power Tunnel and
21 into a diversion facility called SF14-Woodleaf Penstock (“SF14”), both of which are operated by
22 SFWPA. At SF14, the water can be sent (i) west to the Woodleaf Powerhouse or (ii) south into the
23 FTD, which converges with Costa Creek, and then to Dry Creek near Brownsville. From there,
24 NYWD has the capability of diverting these water supplies into the OHDC the Irrigators. (*Id.*)

25 The Lost Creek, South Fork Feather River, and Slate Creek water supplies are affected by a
26 2005 agreement between SFWPA and NYWD. (RJN, Ex. “E” (the “2005 Agreement”).) Under the
27 2005 Agreement, NYWD is required to release water from the FTD at up to 11 cfs to SFWPA, for
28 irrigation purposes, at a turnout located downstream from OHDC called “WD6.” (RJN, Ex. “E,”

1 p. 47].) According to NYWD, the FTD experiences up to 35% losses. (Kinsey Decl., Ex. “D.”) As
2 such, when SFWPA demands 11 cfs, approximately 16.92 cfs must be released from SF14 (11 cfs /
3 0.65 = 16.92 cfs). NYWD also asserts the capacity of the FTD is 22 cfs, but USGS data show the
4 flows through the FTD have regularly been up to 24 cfs in the recent past. (RJN, Ex. “G.”)

5 Under the 2005 Agreement, NYWD can divert up to 3,700 AFY of its water through the FTD,
6 free of charge. (RJN, Ex. “E”) The water received by SFWPA at WD6 is not counted against the
7 3,720 AFY that NYWD receives for free; however, the 3,700 AFY is reduced by the 35% losses in the
8 FTD. (*Id.*) NYWD also has the capability of using more than the 3,720 AFY; however, because the
9 diversions into FTD do not go through SFWPA’s hydroelectric facility, NYWD must pay SFWPA a
10 fee based on SFWPA’s loss of hydroelectric revenues for amounts above 3,700 AFY.

11 **B. Despite the Need for Water Supplies for Fire Suppression, the Board Voted**
12 **on March 26, 2021, to Curtail Water Deliveries to the Irrigators**

13 The Irrigators rely on regular irrigation deliveries from NYWD for fire suppression, crops and
14 grazing land, and for domestic uses. The need for water is particularly acute due to the increased
15 frequency of wildfires in the area. Nearly all of NYWD is located within the highest level Fire Hazard
16 Severity Zone (FHSZ), according to the State of California.¹ CalFire regularly uses water from the
17 Irrigators’ ponds to fight fires. (Declaration of Charles Sharp [“Sharp Decl.”] at ¶¶ 4-6.) In addition,
18 the delivery of water reduces wildfire impacts by reducing the amount of dry brush that can accelerate
19 wildfires.

20 On March 26, 2021, NYWD held a public meeting. The agenda did not include any proposed
21 action to curtail deliveries to the Irrigators. Despite this, at the public meeting, Director Eric Hansard
22 made “a motion that [NYWD] forego the irrigation season altogether.” (Furnee Decl., at ¶ 8.) The
23 motion was approved on a 4-1 vote. (*Id.*)

24 During the course of the discussion on Director Hansard’s motion, the NYWD Board and
25 General Manager made several unsubstantiated and conflicting statements as to why the water
26 supplies could not be delivered to the Irrigators. NYWD’s rationale can be boiled down to the
27 following points, none of which are based on confirmed, actual conditions:

28

¹ *California Fire Hazard Severity Zone Viewer, available at*
<https://gis.data.ca.gov/datasets/789d5286736248f69c4515c04f58f414>

- 1 • The flows in Dry Creek are only 5.8 cfs, and NYWD needs to allow 4 cfs of
- 2 bypass flows for fish, leaving only 1.8 cfs for the Irrigators
- 3 • NYWD cannot operate the OHDC unless it can divert 12 cfs; and
- 4 • NYWD is unable to supplement its water supplies from the FTD because the
- 5 capacity of the FTD is only 22 cfs, and there is no water left after (i) the 11.0 cfs
- 6 requested by SFWPA, (ii) the 1.6 cfs for the FTTF, and (iii) 35% losses.

7 These rationalizations are demonstrably inaccurate. And during the course of the meeting, it
8 quickly became clear the decision to curtail irrigation deliveries was being made in response to the
9 Irrigator’s opposition to NYWD’s proposed piping of the FTD. For example, Director Hansard—who
10 made the motion—blamed “a small group” that had been “constantly [trying] to stop our pipeline
11 project going forward” for NYWD’s decision to curtail water deliveries to the Irrigators. During the
12 meeting, Director Hansard was plainly agitated by the Irrigators’ opposition to the FTD, asserting it
13 was their opposition that caused NYWD to curtail deliveries. (Furnee Decl., at ¶ 8.) Director Hansard
14 was also agitated that the Irrigators had campaigned against the sitting NYWD board. Noting the fact
15 that, after the 2020 election, the downstream Irrigators won two of the five NYWD seats (which was
16 one seat shy of a majority), Director Hansard stated, “I would say the voters spoke in the last election”
17 before yelling four times, “You guys lost!” (*Id.*)

18 At least one Director appeared to express concern that NYWD did not have any concrete data
19 to support its decision to curtail water deliveries to the Irrigators. He suggested amending the motion
20 to suggest that NYWD first put “out the feelers and the measuring instruments” to see if sufficient
21 water had or would materialize. (*Id.*) While the Directors suggested they may reconsider their
22 decision if there were further storms, they declined to use such data for the initial determination to
23 curtail irrigation deliveries. Nor did NYWD consider any lesser remedies, such as those required
24 under Section 2, subd. H of NYWD’s Irrigation Water Policy and Regulations, which contemplates
25 gradual cutbacks to ensure NYWD customers receive at least *some* water supplies. (RJN, Ex. “F.”)

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1 **C. Shortly After Determining Water Was Unavailable for the Irrigators,
2 NYWD Voted to Enter into a Contract to Deliver Water to Woodleaf**

3 Although on the one hand NYWD claimed no water is available to deliver to Irrigators,
4 NYWD is at the same time seeking to convey its water supplies to third-parties. For example, on
5 April 23, 2021, NYWD’s board considered a water supply agreement to deliver 0.2 cfs of water to
6 Woodleaf Young Life Camp for “irrigation purposes” (the “Woodleaf Contract”). (Declaration of
7 Giulio Sanchez, Ex. “B.”) When it considered the Woodleaf Contract, NYWD did not consider the
8 impact of the agreement on the Irrigators or the potential environmental impacts under the CEQA.

9 Several Irrigators, including Petitioners, objected to the Woodleaf Contract. They rightly
10 asserted NYWD lacked any basis to sell its water supplies while at the same time denying water
11 deliveries to the Irrigators. The Irrigators also pointed out that NYWD may not consider the Woodleaf
12 Contract without performing environmental review under CEQA. The Irrigators likewise asserted
13 NYWD’s decision violated Section 35420 of the Water Code by delivering water without apportioning
14 water ratably to each landowner. Despite these objections, NYWD approved the Woodleaf Contract.

15 **D. The Irrigators Will Suffer Irreparable Harm If They Receive No Water in 2021**

16 Petitioners are irrigators in the NYWD service area. Petitioner Furnee owns ten-acres (10) of
17 land in Oregon House. (Furnee Decl., at ¶ 2.) She needs irrigation water to sustain her orchard,
18 vineyard, community vegetable gardens, and to maintain defensible space for fire suppression. (*Id.*, at
19 ¶ 3.) NYWD’s continuing failure to deliver irrigation water has caused her trees to die in large
20 numbers—their removal costing approximately \$20,000 since 2014. (*Id.*, at ¶ 4.) The resulting
21 overreliance on her well is putting stress on the groundwater supply, as the water table lowers
22 noticeably when the supply from the creek is halted. (*Id.*, at ¶ 5.) The stress on the well has caused
23 Petitioner to spend \$12,000 on storage tanks for the eventuality of well failure. All of these harms are
24 compounded by the heightened fire risk from Petitioner’s inability to maintain her property. (*Id.*, at ¶
25 7.)

26 Another Irrigator, Fellowship of Friends (“Fellowship”), owns approximately 1,250 acres of
27 land around Oregon House and relies on the irrigation water to sustain its vineyards, orchards,
28 vegetable gardens, and animals, as well as fire suppression. (Declaration of Greg Holman at ¶ 3.) Due
to NYWD’s failure to deliver water, Fellowship has been forced to nearly exhaust its potable water

1 wells to irrigate. (*Id.*, at ¶¶ 5–8.) Without water from NYWD, Fellowship’s wells will be overused
2 and crop yields will fall, all while fire risk increases as a result of the dry terrain. (*Id.* at ¶ 9.)

3 Jenny Cavaliere, of Oregon House Farms, Oregon House Farm Store, and High Sierra Beef,
4 Inc. is another affected Irrigator. (Declaration of Jeanette L. Cavaliere [“Cavaliere Decl.”], at ¶ 2.)
5 Cavaliere is a cattle rancher and depends on NYWD’s water deliveries to irrigate her pastures,
6 orchard, and garden. (*Id.* at ¶ 2.) The lack of water has already caused the loss of her permanent
7 pasture as well as many 100-year-old oak trees on her property. (*Id.*, at ¶¶ 5, 9.) Moreover, Cavaliere
8 is also concerned about the lack of water for fire suppression purposes. (*Id.* at ¶ 11.)

9 Gideon Beinstock operates a vineyard in Oregon House that also depends on irrigation water
10 from NYWD. (Declaration of Gideon Beinstock, at ¶ 2.) NYWD’s irregular water supply has caused
11 he and his wife to likewise exhaust their well water to keep their grapes alive. (*Id.*, at ¶¶ 4, 11–12.)

12 Karolyn McCall operates a sheep ranch that depends on NYWD’s irrigation water.
13 (Declaration of Karolyn McCall, at ¶ 2.) Due to the lack of water, Ms. McCall recently lost a prized
14 ewe. The ewe typically drank from a pond on the property; however, due to lack of deliveries, the ewe
15 became entangled in the mud, which was all that was left of the pond, and died. (*Id.*, at ¶ 4.) Ms.
16 McCall also notes that the lack of water for firefighting forced her to evacuate her home last year in
17 the Willow Glen fire. (*Id.*, at ¶ 7.) The risk of fires has also hiked her farm insurance to the point that
18 she can no longer afford it, even though her property is next to a Cal Fire station. (*Id.*, at ¶ 7–8.)

19 Donna Corson is another Irrigator who recently wrote to NYWD with concerns about her
20 increased vulnerability to fire. (Declaration of Donna Corson [“Corson Decl.”], at ¶ 7.) Ms. Corson
21 adds that she depends on NYWD’s water to grow her own food and feed her gardens. (*Id.*, at ¶ 3.)

22 Margaret and Wayne Kangas similarly depend on NYWD’s irrigation water for fire protection.
23 (Declaration of Margaret Kangas [“Kangas Decl.”], at ¶ 5-7.) In 1997, the Kangases lost their
24 property to the Dobbins wildfire, and since then built a green zone around their home for fire
25 protection. (*Id.*) Without NYWD’s water, they are unable to maintain this green zone. (*Id.*)

26 Charles Sharp, another irrigation customer of NYWD, relies on NYWD’s irrigation water to
27 service his one-acre gardens and his 1.5-acre vineyard. (Sharp Decl., at ¶ 3.) Without irrigation water
28 from NYWD, Mr. Sharp will be forced to pump water from an adjoining lake. (*Id.*) CalFire uses the

1 lake to withdraw water for fire suppression. (*Id.* at ¶ 4.) The stress on the lake from NYWD’s water
2 deprivation could leave Mr. Sharp and CalFire with no water. (*Id.*)

3 Due to the irreparable harm that will be suffered by the Irrigators, and the lack of evidence
4 behind NYWD’s decision to curtail irrigation deliveries, Petitioners filed this action.

5 **III. LAW AND ARGUMENT**

6 **A. Preliminary Injunction Standard**

7 When reviewing a request for preliminary injunction, the court evaluates two interrelated
8 factors: “(1) the likelihood that the plaintiff will prevail on the merits at trial and (2) the interim harm
9 that the plaintiff would be likely to sustain if the injunction were denied as compared to the harm the
10 defendant would be likely to suffer if the preliminary injunction were issued.” (*Smith v. Adventist*
11 *Health Sys./West* (2010) 182 Cal.App.4th 729, 749.) Here, Petitioners seek an *ex parte* Temporary
12 Restraining Order and Order to Show Cause regarding Preliminary Injunction that: (1) Prohibits
13 NYWD from delivering water supplies to Woodleaf; and (2) Prohibits NYWD from curtailing
14 irrigation deliveries unless and until such time as NYWD complied with Section 2, subd. H of its
15 *Irrigation Water Policy and Regulations*, and supports any such decision with substantial evidence.

16 **B. Furnee Has a High Likelihood of Demonstrating NYWD’s Approval of the** 17 **Woodleaf Contract Was Unlawful**

18 **1. NYWD Failed to Perform CEQA Review of the Woodleaf Agreement**

19 CEQA requires environmental review of “discretionary projects proposed to be carried out or
20 approved by public agencies.” (Pub. Resources Code, § 21080, subd. (a).) A “project” includes any
21 discretionary action by a public agency that “may cause either a direct physical change in the
22 environment, or a reasonably foreseeable indirect change in the environment” (*Id.*, § 21065.)
23 This includes any activity that, “by its general nature,” is merely “capable of causing a direct or
24 reasonably foreseeable indirect physical change in the environment.” (*Union of Medical Marijuana*
25 *Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1197.)

26 First, NYWD’s decision to enter into the Woodleaf Agreement was plainly discretionary in
27 nature. “Discretion” means the “exercise of judgment or deliberation when the public agency or body
28 decides to approve or disapprove a particular activity” (CEQA Guidelines, §15357.) NYWD

1 was not required to enter into the Woodleaf Agreement, exercised its judgment when deciding whether
2 to enter into the agreement, and deliberated about whether to approve the agreement.

3 The Woodleaf Agreement contemplates a water transfer that is capable of causing both direct
4 and indirect physical changes to the environment, including significant impacts to:

5 • **Wildfire and Fire Resiliency Impacts.** NYWD's service area is in the highest risk level Fire
6 Hazard Severity Zone (FHSZ). The Woodleaf Agreement diminishes the amount of water available
7 for the Irrigators and CalFire. As a result, Woodleaf Agreement has the capability of contributing to
8 the reduction and/or elimination of water supplies needed for fire suppression. (See *infra* at pp. 5–7.)

9 • **Agricultural and Forestry Resources.** Many of the Irrigators used NYWD to grow crops and
10 feed livestock. The Woodleaf Agreement diminishes the amount of water available to the Irrigators
11 for this purpose, and has the potential to significantly affect the short- and long-term viability of the
12 properties for agricultural purposes. (*Id.*, at 5–6.)

13 • **Aesthetic Resources.** Several irrigators have confirmed that the repeated deprivation of water
14 which the District has imposed on the residents of Oregon House has resulted in the loss of substantial
15 amounts of trees and the inability to fill ponds on their properties. These impacts collectively reduce
16 the scenic character of the area and degrade the existing visual character of the public views. (*Id.*)

17 • **Biological Resources.** As has already been brought to the District's attention in ongoing
18 litigation, the area, and specifically the ditches and canals servicing the area, are home to the protected
19 Foothill yellow-legged frog, the Ringtail Cat, and freshwater shrimp. The presence of sensitive
20 species requires further review before exercising District discretion to deprive these species' potential
21 habitat of necessary water. (Sharp Decl., at ¶ 7.)

22 • **Geology and Soils.** As has also been brought to the attention of the District, the repeated
23 refusal to convey water to the irrigators leaves the land exposed and vulnerable to erosion. Burrowing
24 animals are also able to access parts of the canal that would otherwise be submerged, and can cause
25 significant structural damage to the canal. (*Id.*, at ¶ 8; see also *infra* at pp. 5-7.)

26 Plainly, the Woodleaf Agreement has the capability of resulting in potential environmental
27 impacts. Thus, NYWD must comply with CEQA.

28 ///

1 **2. The Woodleaf Agreement Violates the Water Code**

2 The principal function of a water district is to supply water to its landowners. (*Rock Creek*
3 *Water Dist. v. Calaveras County* (1946) 29 Cal.2d 7, 12.) Water customers have a vested, appurtenant
4 right, to water service from their district. (*Abatti v. Imperial Irrigation Dist.* (2020) 52 Cal.App.5th
5 236, 261.) Section 35429 of the Water Code requires that “[a]ll water distributed for irrigation
6 purposes, except as otherwise provided in this article, shall be apportioned ratably to each holder of
7 title to land upon the basis of the ratio which the last assessment against his land for district purposes
8 bears to the whole sum assessed in the district for district purposes.”

9 Per the California Constitution “water resources of the state” must “be put to beneficial use to
10 the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable
11 method of use of water be prevented” (Cal. Const., Art. X, § 2.) “All uses of water . . . must
12 conform to the standard of reasonable use.” (*National Audubon Society v. Superior Court* (1983)
13 33 Cal.3d 419, 442.) “What constitutes reasonable water use is dependent upon not only the entire
14 circumstances presented but varies as the current situation changes.” (*Environmental Defense Fund,*
15 *Inc. v. East Bay Min. Utility Dist.* (1980) 26 Cal.3d 183, 194.) Aesthetic uses are not recognized as
16 beneficial uses under California Regulations, even when they provide ancillary recreational uses for a
17 small number of people. (See tit. 23 Cal. Code Regs., §§ 659 – 672; see also *In re Matter of*
18 *Applications 23865 and 23943*, (1973) Cal.St.Wat.Res.Bd. 1973 WL 19665 [Storage of water purely
19 for aesthetic purposes to afford recreation for a few was not reasonable].)

20 The Woodleaf Agreement violates each of these principles. First, by providing water to a
21 third-party, and declining to serve the Irrigators, NYWD has undermined the principal function of the
22 District to “develop, preserve and conserve water for the beneficial use of the inhabitants of the
23 district.” (*City of Modesto v. Modesto Irr. Distr.* (1973) 34 Cal.App.3d 504, 507.) It is also interfering
24 with the Irrigators’ vested, appurtenant right, to be served with district water. (See *Abatti, supra*,
25 52 Cal.App.4th at 261.)

26 The Woodleaf Agreement also violates Section 35429 of the Water Code because it does not
27 ratably apportion water among water users. Rather, the Woodleaf Agreement results in a third-party
28 receiving water, while the Irrigators in the southern portion of the district receive none.

1 At the April 23, 2021, hearing, Petitioners and others introduced evidence that Woodleaf will
2 not be engaging in a reasonable use of the water. Rather, Woodleaf intends to use the water
3 distributed by the Agreement for, at best, the aesthetic purpose of filling up ponds on its property.
4 This is not a beneficial use of the water under California law, and is therefore unlawful. (Cal. Const.,
5 Art. X, § 2; tit. 23 Cal. Code Regs., §§ 659 – 672.) Based on the foregoing, there is a significant
6 likelihood that Furnee will prevail on the merits of her claims concerning the Woodleaf Agreement.

7 **C. Furnee Has a High Likelihood of Demonstrating NYWD Abused its**
8 **Discretion When it Voted to Deny Water Deliveries to the Irrigators**

9 **1. NYWD’s Vote to Deny Water Deliveries to the Irrigators Violated its**
10 **Own Regulations**

11 Section II, Subdivision H of NYWD’s Irrigation Water Policy and Regulations governs
12 decisions by the NYWD Board to reduce water deliveries based on drought conditions. (RJN, at
13 Ex. “F,” § II, subd. H.) Subdivision H expresses the “Board’s policy . . . to make the full amount of
14 water requested by each Water User available in each irrigation season to the extent possible.” (*Id.*)
15 Subdivision H recognizes drought conditions may occur. In such instances, Subdivision H calls for
16 gradual cutbacks in deliveries—on an even-handed basis—to mitigate anticipated shortfalls in
17 deliveries. The Irrigation Water Policy and Regulations provide that these cutbacks “shall be made in
18 stages” (*Id.*) These stages are: (i) Voluntary Cutbacks; (ii) Secondary Cutbacks, where no
19 person may divert more than 3 miner’s inches; (iii) Tertiary Cutbacks, where no person may divert
20 more than 1 miner’s inch; and (iv) Final Cutbacks, where no allocation is made or guaranteed. (*Id.*)

21 Elsewhere, NYWD’s Irrigation Water Policy and Regulations state that, “[d]uring periods of
22 water shortages, the District may at its sole discretion curtail the delivery of water to any ponds, and
23 particularly to those ponds which are used primarily for aesthetic or recreational purposes.” (RJN,
24 Ex. “F,” § VI, subd. (A).)

25 Although Subdivision H governs cutbacks on water deliveries, the NYWD board did not
26 reference Subdivision H even once during deliberations to deny water service to the Irrigators for
27 2021. Nor did the NYWD board consider cutbacks that would have allowed at least some limited
28 water deliveries to the Irrigators, as required under Subdivision H. Rather, the board simply made the
decision to deny all water deliveries to the Irrigators. Because NYWD ignored its own policies, and

1 failed to consider cutbacks or other alternative measures under its Irrigation Water Policy and
2 Regulations, NYWD abused its discretion when it decided to curtail water deliveries to the Irrigators.

3 **2. NYWD Decided to Curtail Deliveries Without Complying with CEQA**

4 NYWD also did not comply with its duties under CEQA when it made the affirmative decision
5 to deny water deliveries to the Irrigators. The decision was discretionary, as NYWD is not required to
6 depart from Section 2, Subdivision H of its Irrigation Water Policy and Regulations. Nor are there any
7 published objective benchmarks that govern when NYWD may curtail irrigation deliveries. And for
8 the reasons stated above, the decision to deny deliveries to the Irrigators has the potential to result in
9 significant negative environmental effects. NYWD, however, did not make any effort to comply with
10 CEQA before making this discretionary decision. (Sharp Decl., at ¶¶ 7–8.)

11 **3. NYWD’s Decision to Deny Deliveries to the Irrigators Was Not** 12 **Supported by Substantial Evidence**

13 As explained above, NYWD did not follow its Irrigation Water Policy and Regulations when it
14 decided to deny water service to the Irrigators. But even if NYWD had acted pursuant to Section II,
15 Subdivision H, the board’s decision to forego irrigation was not supported by substantial evidence.

16 Prejudicial abuse of discretion occurs when the determination or decision is not supported by
17 substantial evidence in light of the record. (*San Joaquin County LAFCo v. Superior Court* (2008)
18 162 Cal.App.4th 159, 168.) “Substantial evidence exists when there is ‘enough relevant information
19 and reasonable inferences from this information that a fair argument can be made to support a
20 conclusion, even though other conclusions might also be reached. (Citations)’” (*Golden Door*
21 *Properties, LLC v. County of San Diego* (2018) 27 Cal.App.5th 892, 901.) “Substantial evidence does
22 not include argument, speculation, or unsubstantiated opinions or concerns . . .” (*Sierra Club v.*
23 *California Dept. of Forestry & Fire Protection* (2007) 150 Cal.App.4th 370, 381.)

24 At the March 26, 2021, hearing, NYWD’s General Manager and several NYWD directors
25 asserted there was insufficient water available to NYWD to provide *any* water supplies to the
26 Irrigators. NYWD’s rationale can be summarized as follows:

- 27 • The flows in Dry Creek are only 5.8 cfs, and NYWD needs to allow 4 cfs of
28 bypass flows for fish, leaving only 1.8 cfs for the Irrigators

- NYWD cannot operate the OHDC unless it can divert 12 cfs; and
- NYWD is unable to supplement its water supplies from the FTD because the capacity of the FTD is only 22 cfs, and there is no water left after (i) the 11.0 cfs requested by SFWPA, (ii) the 1.6 cfs for the FTTF, and (iii) 35% losses.

As an initial matter, these rationalizations are not supported by substantial evidence. NYWD did not introduce any evidence in the record supporting its assertion that the capacity of the FTD is limited to 22 cfs. (Furnee Decl., at Ex. “A.”) NYWD likewise introduced no evidence supporting its conclusion that losses in the FTD equal 35%. (*Id.*) There was no evidence that actual diversions into the FTTF were 1.6 cfs. (*Id.*) NYWD also did not proffer any evidence suggesting that it cannot operate the OHDC unless it can divert 12 cfs. (*Id.*) And as to the amount of water in Dry Creek, the only suggestion in the record was the verbal statement of General Manager Maupin, without the introduction of any supporting measurements or other objective evidence. (*Id.*) It is NYWD’s burden to support its decisions with substantial evidence. NYWD did not make its decision based on any actual evidence. As a result, NYWD abused its discretion when it voted to deny water deliveries to the Irrigators.

In any event, the purported factual bases for NYWD’s decisions are demonstrably inaccurate. Although General Manager Maupin asserted at the meeting that the capacity of FTD was limited to 22 cfs, USGS records show that actual diversions into the FTD have recently been as high as 25.54 cfs. (RJN, Ex. “G.”) Moreover, Petitioners understand actual flows into the FTTF are reportedly only approximately 0.5 cfs—not 1.6 cfs. And the amount of water in Dry Creek was not 5.8 cfs, as General Manager Maupin had suggested. Rather, NYWD’s own documents concede that on Friday, March 26, 2021—the day NYWD made the decision to deny water deliveries—flows in dry Creek were 10 cfs. (Kinsey Decl., Ex. “D” [“Friday 3/26/21, Dry Creek water flow measured 6 additional cfs beyond the fish flow requirement”].) And NYWD’s own filings with the SWRCB show *all* the Irrigators are capable of being served by flows of only 6-9 cfs in the OHDC (not 12 cfs). (RJN, at Ex. H.)

Using these figures, which are based on irrefutable evidence, there is plainly enough water to deliver into the OHDC for the benefit of *all* Irrigators:

| Water Available for Irrigators When NYWD Acted on March 26, 2021 | |
|--|-------------|
| Diversions into FTD (minus 0.5 cfs for FTTF) | 23.5 cfs |
| FTD Losses (35%) | - 8.225 cfs |
| Capacity for Deliveries to SFWPA | - 9.0 cfs |
| Dry Creek Flows (less 4 cfs for fish/aquatic resources) | + 6.0 cfs |
| Total Water Potentially Available for Irrigators at OHDC | 12.275 cfs |

And even if NYWD could argue the above figures are inaccurate—and they cannot—NYWD is still required to institute cutbacks in accordance with the Irrigation Water Policies and Regulations, to ensure the Irrigators receive at least *some* water in 2021.

By acting without any information to support the decision to withhold water from its irrigation customers, NYWD has abused its discretion and proceeded without substantial evidence to support its decision. Rather, the evidence reveals sufficient water to serve the Irrigators, whether in full or with cutbacks pursuant to Section 2, Subdivision H of NYWD’s Irrigation Water Policy and Regulations.

4. Because NYWD’s Decision Was Made to Retaliate Against the Irrigators for Running Against the Directors and Opposing the FTD Project, the Decision Reflecting Bias, and Violated the Irrigators’ Substantive Due Process Rights

California law requires that public officers act with “disinterested skill, zeal and diligence primarily for the benefit of the public.” (*Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51.) As a result, project proponents enjoy the right to a fair and unbiased decision maker. (*Petrovich Devel. Co., LLC v. City of Sacramento* (2020) 48 Cal.App.4th 963, 973; *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 557; see also *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 772.) Thus, a decision maker is disqualified from participating in a matter if that decision maker is biased in favor or against a party involved in that decision. (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 486; *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152.)

Substantive due process, in turn, “protects against arbitrary government action.” (*County of Sacramento v. Lewis* (1998) 523 U.S. 833; *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 855.) Arbitrary action is action “not supported by a fair or substantial reason.” (*Madonna v. County of San Luis Obispo* (1974) 39 Cal.App.3d 57, 61-62.)

1 At NYWD's March 26, 2021, Board of Director's meeting, when responding to concerns
2 regarding the lack of evidence to withhold water from irrigators, Director Hansard stated as follows:

3 [A] small group has constantly tried to stop our pipeline project going
4 forward; . . . I think someone owes the irrigation customers an
5 explanation. I think Charles Sharp, you owe them an explanation. Alton
6 Wright, Director Flohr, Jenny Cavaliere, all you guys owe an
7 explanation. You are sitting here now complaining that look we don't
8 have water and we are telling you that we are not gonna have a season
and somehow that flipped around as us being complacent and we are not
doing our job. However we have said from Day 1 these people put up
roadblocks to stop irrigation customers getting full seasons on water.
Shame on you guys . . . Sometimes the truth hurts doesn't it.

9 (Furnee Decl., Ex. "A.") Director Flohr the cautioned Director Hansard against attacking irrigation
10 customers. (*Id.*) To this, Director Hansard responded, "you do- you and your group – you take the
11 water from them. You owe them an explanation for your action – you have stopped guaranteeing
12 them water. We have a plan. You guys put up all these different road blocks and now you want to sit
13 here and point your fingers at us. That is our responsible for not having an irrigation season . . . We
14 wouldn't even have to talk about this if we had a pipe in the ditch . . . you and your group are the ones
15 that stopped it." (*Id.*) As evidenced by these public comments, NYWD's Board is, *at best*, biased
16 against a handful of irrigators who opposed the Forbestown Ditch piping project. The decision to
17 forego the irrigation season was not one based on data and evidence, but rather on a retaliatory
18 motive against irrigators like Furnee, who have opposed the Forbestown Ditch piping project. This
19 completely violates Petitioners' right to be free from arbitrary government action.

20 **D. Petitioners Will Suffer Irreparable Harm Unless (i) NYWD Ceases Deliveries**
21 **to Woodleaf and (ii) Reverses its Decision to Deny Service to the Irrigators**

22 The irrigation season began just days ago. As noted above, the deprivation of water to
23 Petitioners and other irrigators during the irrigation season threatens a variety of irreparable harms,
24 such as losses of trees and greenery not only for aesthetic purposes but also fire prevention purposes,
25 losses in crops, livestock, and soil quality, impacts to wildlife that lives in and depends on the water in
26 the surrounding ditches and canals, structural damage to the canals as there is no water to protect
27 them, and the unavailability of water for fire suppression. Some more specific examples of these
28 harms include Jenny Cavaliere's lost pasture and Fellowship of Friends' loss of crops. (Cavaliere

1 Decl., at ¶ 2; Holman Decl., at ¶¶ 3–4.) Also compelling is Karolyn McCall’s loss of an irreplaceable
2 ewe with special genetics in a dried pond (McCall Decl., at ¶ 5), and the general expectation that there
3 will be insufficient water to fight or prevent fires. (See Holman Decl. ¶ 3; Cavaliere Decl. at ¶ 3;
4 McCall Decl., at ¶¶ 4–5; Corson Decl., at ¶ 2; Kangas Decl., at ¶ 2.) To prevent these irreparable
5 harms, Petitioners request that the Court grant temporary injunctive relief by an order prohibiting
6 NYWD from withholding available water from its irrigation customers, including Petitioners.

7 **E. Permitting NYWD to Proceed Renders Judgment Ineffectual**

8 Petitioners bring this action seeking injunctive relief barring NYWD from distributing water to
9 Woodleaf rather than to Petitioners and Irrigators. To the extent this Court is unable to reach the
10 merits of the Petition within the next several months, the requests sought therein will be moot.
11 Therefore, the status quo must be maintained and NYWD must be prevented from delivering any
12 water to Woodleaf under the Agreement until the Court reaches the merits of Petitioners’ Complaint.
13 NYWD must be further prohibited from deviating from its own regulations as to the allocations of any
14 potentially necessary cutbacks.

15 **F. Petitioners Satisfied Requirements to Proceed with this *Ex Parte* Request**

16 As set forth in the Declaration of Giulio Sanchez, Petitioners have provided proper notice of
17 this Application to Defendant. No previous *ex parte* applications have been filed seeking the same
18 relief as this application. (Cal. Rules of Court, Rule 3.1202(b).) The required factual showings are set
19 forth in the accompanying declarations of. (Cal. Rules of Court, Rule 3.1202(c).)

20 **IV. CONCLUSION**

21 Petitioners respectfully request a temporary restraining order prohibiting NYWD from
22 (i) delivering water supplies to Woodleaf and (ii) curtailing irrigation deliveries to the Irrigators.

23 Dated: May 3, 2021

WANGER JONES HELSLEY PC

24 By: _____


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