

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2022-0143-EXEC

In the Matter of the Petition for Reconsideration of

**Stephen D. Griset; George S. Griset; George S. Griset Revocable Trust; and
Griset Farms Inc.**

Regarding State Water Board Order WR 2021-0082-DWR, and Curtailment of
Water Right ID Nos. SG005922 and SG005925

Source: Shasta River

County: Siskiyou

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

Stephen D. Griset; George S. Griset; George S. Griset Revocable Trust; and Griset Farms Inc. (Petitioner) requests reconsideration of the regulation establishing drought emergency minimum flows in the Scott River and Shasta River watersheds (Cal. Code Regs., tit. 23, §§ 875-875.9) adopted by the State Water Resources Control Board (State Water Board) on August 17, 2021 (Regulation), and the Order Imposing Curtailment and Reporting Requirements, [Order WR 2021-0082-DWR](#) (Curtailment Order) issued by Board on September 10, 2021. Petitioner is represented by Paul R. Minasian of Minasian, Meith, Soars, Sexton & Cooper, LLP. Petitioner alleges

¹ State Water Board [Resolution No. 2012-0061](#) delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of a petition for reconsideration of a water right curtailment order falls within the scope of the authority delegated under Resolution No. 2012-0061. Accordingly, the Executive Director has the authority to refuse to reconsider the petition for reconsideration, deny the petition, or set aside or modify the order.

that the State Water Board's actions: 1) constitute a taking of private property that requires compensation; 2) violate the Sustainable Groundwater Management Act; and 3) violate judicial and executive separation because some water rights in the Shasta River watershed are subject to a statutory adjudication. While not stated explicitly in its Points and Authorities, Petitioner's allegations imply that the Board's actions required an evidentiary hearing prior to adoption.

The Petition for Reconsideration is denied because its arguments fail on the merits, as explained in detail below. Water Code section 1122 does not provide for reconsideration of quasi-legislative actions, and therefore this Order will focus on the Curtailment Order that implements the Regulation, although the Regulation itself is also reviewed in context of Petitioner's arguments. The September 10, 2021 Curtailment Order is a valid exercise of the authority delegated to the Deputy Director for the Division of Water Rights (Deputy Director) under the Regulation, specifically under California Code of Regulations, title 23, section 875, subdivision (b). As this Order explains, the adoption and application of the Regulation comports with the most recent and factually relevant precedential decisions addressing the Board's authority to adopt drought emergency regulations authorizing water right curtailment decisions. These decisions have considered and rejected many of the very same arguments that are central to this Petition for Reconsideration.²

2.0 GROUNDS FOR RECONSIDERATION

Any interested person may petition the State Water Board for reconsideration of a decision or order within 30 days on any of the following grounds:

- (a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) [t]he decision or order is not supported by substantial evidence;

² Petitioner's arguments regarding due process and takings were raised in substantially the same form by *amici curiae* in *Stanford Vina Ranch Irrigation Co. v. State* (2020) 50 Cal.App.5th 976, cert. denied (2021) 141 S.Ct. 1387. In addition to rejecting Stanford Vina Ranch Irrigation Co.'s claims, the court summarily rejected all of the *amici* arguments in a footnote. (*Id.* at 984, fn. 2.)

(c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;

(d) [e]rror in law.

(Cal. Code of Regs., tit. 22, § 768.)

Among other requirements, a petition must specify the specific board action for which the petitioner requests reconsideration, “[t]he reason the action was inappropriate or improper,” “[t]he specific action which petitioner requests,” and contain “[a] statement that copies of the petition and accompanying materials have been sent to all interested parties.” (Cal. Code of Regs., tit. 22, § 769, subs. (a)(2), (4)-(6).) Additionally, “[t]he petition shall be accompanied by a statement of points and authorities in support of legal issues raised in the petition.” (*Id.*, subd. (c).)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board’s regulations. (Cal. Code of Regs., tit. 22, § 770, subd. (a)(1).) Alternatively, after review of the records, the State Water Board may deny the petition if it finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subs. (a)(2)(A)-(C).)³ The State Water Board may elect to hold a hearing on the petition for reconsideration. Here, the petition does not include a request for a hearing.

³ The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the Board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061, at p. 2, fn. 1; see *California Correctional Peace Officers Ass’n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-48, 1150-51; State Water Board Order WQ 98-05-UST, at pp. 3-4.)

3.0 BACKGROUND

California and the entire western United States are facing a significant drought in the wake of one of the driest periods on record, driven by climate change and extreme hydrologic conditions over the past two years. Water supply in many parts of California, including the Klamath River watershed, is insufficient to meet a significant portion of water demands, including ecological needs. The water supply shortage is a particular concern in the Scott River and Shasta River watersheds, which are tributaries to the Klamath River. The Scott River and Shasta River watersheds are important salmon producing streams in the Klamath River Basin and support numerous fisheries including Southern Oregon/Northern California Coast (SONCC) coho salmon and culturally and commercially significant fall-run Chinook salmon. The SONCC coho salmon is listed as a threatened species under both the federal and state Endangered Species Acts and are identified as being at high and moderate risk of extinction in the Shasta River and Scott River, respectively.

On April 21, 2021, Governor Gavin Newsom declared a drought state of emergency under the provisions of the California Emergency Services Act (Gov. Code, § 8550 et. seq.), in Mendocino and Sonoma counties due to drought conditions in the Russian River watershed (April 2021 Proclamation). The April 2021 Proclamation also directed state agencies to take immediate actions to bolster drought resilience across the state. On May 10, 2021, Governor Newsom expanded the drought proclamation to include counties in the Klamath River, Sacramento-San Joaquin Delta, and Tulare Lake watersheds (May 2021 Proclamation). The May 2021 Proclamation directed the State Water Board to consider emergency regulations to curtail water diversions when water is not available at water right holders' priority of right or to protect releases of stored water in the Delta watershed. Additionally, to ensure critical instream flows for species protection, the May 2021 Proclamation directs the State Water Board and the California Department of Fish and Wildlife (CDFW) to evaluate minimum instream flows and other actions to protect salmon, steelhead, and other native fishes in critical systems in the state and work with water users and other parties on voluntary measures to implement those actions. To the extent voluntary actions are not sufficient, the State Water Board,

in coordination with CDFW, is to consider emergency regulations to establish minimum drought instream flows.

On June 15, 2021, with drought conditions worsening, CDFW sent a letter to the State Water Board recommending drought emergency minimum flows for the Scott River and Shasta River watersheds, urging the State Water Board to adopt minimum flows in the current drought emergency. On July 1, 2021, State Water Board and CDFW staff hosted a public meeting on potential drought actions for the Scott River and Shasta River watersheds. Staff presented information on the drought conditions and potential drought response actions that could be implemented in the Scott River and Shasta River watersheds, and solicited comments. On July 16, 2021, State Water Board staff issued a Notice of Public Meeting and Opportunity for Comment: Draft Drought Emergency Regulation for Scott River and Shasta River Watersheds that announced the release of draft drought emergency regulations for public comment and advertising a July 20, 2021 public meeting. In addition to the text of the proposed regulation and the notice, on August 12, 2021, the State Water Board circulated a digest of information describing the reasons for proposing the regulation and listing the sources relied upon in its analysis (Informative Digest).

During the public meeting on July 20, 2021, State Water Board and CDFW staff described the draft drought emergency regulation, presented responses to past comments on the CDFW flow recommendations, answered questions, and solicited comments. The public comment period on the early draft of the emergency regulation extended from July 16, 2021 to July 23, 2021, and the State Water Board received more than 100 written comments. State Water Board staff met with members of the agricultural community, approximately five times in July through August 2021 (July 8, 2021, July 15, 2021, July 22, 2021, July 30, 2021, and August 10, 2021) to solicit additional input on drought response actions and emergency regulation development, as well as to provide support for development of voluntary/collaborative actions to enhance flow and habitat for SONCC coho salmon and fall-run Chinook salmon. Several changes were made to the Regulation based on this input.

On August 17, 2021, the State Water Board adopted the emergency regulation establishing drought emergency minimum flows in the Scott River and Shasta River watersheds. (Cal. Code Regs., tit. 23, §§ 875-875.9.) The Regulation was reviewed and approved by the Office of Administrative Law (OAL) and went into effect upon filing with the Secretary of State on August 30, 2021. The Regulation is in effect for one year, but could be repealed earlier if water supply conditions improve. The State Water Board may readopt the regulation if drought conditions continue.

On September 10, 2021, the State Water Board issued a curtailment order (Order WR 2021-0082-DWR) to the most junior water right holders in the Shasta River watershed, including post-Adjudication⁴ appropriative surface water and groundwater rights, as well as surface water rights in the Shasta Adjudication with priority dates later than November 1912. Based on forecasted precipitation and other factors, the State Water Board issued addenda to Order WR 2021-0082-DWR on September 23, October 21, October 29, December 17, December 22, December 29, 2021, January 26, and February 25, 2022, partially suspending curtailment of water rights in order of priority contingent on the required minimum flow at the Yreka United States Geological Survey (USGS) gage being met and sustained. In addition, pursuant to section 875, subdivision (c)(2)(B) of the Regulation, the State Water Board modified curtailments twice based on the recommendation of CDFW that lower alternative flows at the Yreka USGS gage provide equal or better protection for the pertinent species' relevant life stage. (Addenda 4 and 9.) On March 15, 2022, the State Water Board reinstated water right curtailments for the most junior water rights in the Shasta River watershed based on ongoing dry conditions, the approach of the

⁴ Certain water rights in the Shasta River watershed were subject to a statutory stream system adjudication that resulted in a judgment and decree approved by the Superior Court of the State of California in Siskiyou County in 1932 (In the Matter of the Determination of the Relative Rights Based on Prior Appropriation, of the Various Claimants to the Use of the Water of the Shasta River and its Tributaries in Siskiyou County, California, Case No. 7035) (Siskiyou County Superior Court, 1932) (hereafter Shasta Adjudication or Adjudication).

irrigation season, and multiple unexpected decreases in flows below the minimum flow requirement. (Addendum 9.)

Petitioner holds several water rights subject to Order WR 2021-0082-DWR and subsequent addenda. The Curtailment Order required Petitioner to cease all diversions associated with appropriative groundwater diversions and submit a Curtailment Certification response through the online portal by September 27, 2021. The Regulation also provided for exceptions for minimum human health and safety, non-consumptive use, and minimum livestock diversions that may continue even after receipt of a curtailment order, if the appropriate form(s) are submitted to the State Water Board. To date, the State Water Board has not received Petitioner's Curtailment Certification or any of the forms required for exceptions to curtailment.

On September 23, 2021, the State Water Board received a petition that requests reconsideration of the Regulation and Curtailment Order. Petitioner alleges that the Regulation and Curtailment Order: 1) constitute a taking of private property that requires compensation; 2) violate the Sustainable Groundwater Management Act; and 3) violate judicial and executive separation because some water rights in the watershed are subject to the Adjudication. While not stated explicitly in its Points and Authorities, Petitioner's allegations insinuate that the Board's actions required an evidentiary hearing prior to adoption. Each of these allegations is addressed below.

4.0 ANALYSIS

4.1 The Emergency Regulation and Curtailment Order do not constitute a taking of property and did not violate due process rights of Petitioner.

4.1.1 The State Water Board followed proper legal procedure in adopting the Regulation and issuing the Curtailment Order.

Petitioner argues that the Regulation and Curtailment Order takes property interest without due process, asserting that the California Constitution requires that a deposit be made "before a state agency may take possession of property" and that "a hearing and due process is required, even if the use of the property by the public agency is only for a

brief time.” (Petition, p. 5.) Petitioner makes these flat assertions without any reference to the valid and legal process that the State Water Board followed in adopting the Regulation and issuing the Curtailment Order.

It is well-established that the State Water Board possesses legal authority to adopt regulations establishing that a particular use of water under given circumstances is unreasonable, and that the State Water Board is not required to conduct a hearing as to any individual water right before adopting the regulations. (*Stanford Vina Ranch Irrigation Co. v. State* (2020) 50 Cal.App.5th 976, 1004 [citing *Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1484-85] (*Stanford Vina*).) *Stanford Vina* arose from a challenge to an emergency regulation that the State Water Board adopted during a previous drought, and which established minimum flow requirements to protect two threatened species of anadromous fish during their respective migratory cycles. The regulation declared that diversion and use that caused flows to fall below thresholds specified in the regulation were a “waste and unreasonable use of water,” with certain exceptions, and authorized the issuance of curtailment orders to enforce this prohibition. Like Petitioner, plaintiff Stanford Vina Ranch Irrigation Company argued that making such a finding by regulation without holding a hearing deprived it of its constitutional right to due process.

The *Stanford Vina* court rejected this claim, pointing to the broad regulatory authority granted to the State Water Board under article X, section 2 of the California Constitution to prevent waste and unreasonable use, as well as express authority in Water Code section 1058.5 to adopt emergency regulations for that purpose. The court distinguished the precedents finding that an adjudicative hearing is required by noting that those cases all involved an individualized, ad hoc finding of unreasonableness, not a legislative or quasi-legislative per se rule of unreasonableness. On this point, the court concluded:

While we acknowledge that in the absence of a per se rule of unreasonableness, the determination of whether Stanford Vina’s water use was reasonable or not would necessarily have been determined ad hoc, adjudicatively, this does not

mean due process requires the Board to hold an evidentiary hearing before engaging in the legislative function of promulgating a regulation defining diversions of water under certain emergency circumstances to be per se unreasonable. Such a requirement would turn the regulatory process on its head. Nor did the Board violate article X, section 2 by failing to hold such a hearing. As we held in [*California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585], the Legislature may, consistent with this constitutional provision, legislate per se rules of unreasonable use. [...] So too may the Board.

(*Stanford Vina, supra*, 50 Cal.App.5th 976, 1003-04.)

Here, as in *Stanford Vina*, the State Water Board adopted a drought emergency regulation that included a quasi-legislative, per se rule of unreasonableness pursuant to article X, section 2 of the California Constitution. An evidentiary hearing to evaluate that finding specifically as applied to Petitioner's water rights was not required. Nor did due process require a hearing to evaluate application of the Regulation's curtailment criteria prior to issuance of the Curtailment Order. " "[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." (*Matthews v. Eldridge* (1976) 424 U.S. 319, 334 [citations omitted].) Rather, in determining if notice and opportunity to be heard was adequate, a reviewing court considers: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of the private interest; and (3) the Government interest, including the function involved and the fiscal and administrative burdens. (*Id.* at 335.)

The State Water Board has appropriately complied with the statutory process for adoption of emergency regulations in Government Code section 11346.1, as evidenced by both the materials submitted to OAL and OAL's ultimate approval of the Regulation. This process balances the need for public input and notice with the need to act quickly in emergency situations requiring urgent action. The State Water Board issued notice and circulated the proposed regulatory text and a Finding of Emergency more than five days prior to submittal to OAL, exceeding the minimum requirements in Government

Code section 11346.1. In addition to receiving written comments, the State Water Board held a public meeting to receive and consider public comment. OAL then circulated the proposed regulation for a second five-day comment period, and received and considered comments.

4.1.2 Petitioner did not participate in the regulatory process, and it appears that Petitioner has not submitted the required response to the Curtailment Order.

Petitioner fails to acknowledge the regulatory process described above that the State Water Board followed for adoption of the Regulation and issuance of the Curtailment Order. Petitioner did not actively participate in the statutory process set forth for emergency regulations and did not submit any comments in the additional process provided. Though Petitioners did not avail themselves of the process available, Petitioner asserts that the Board's actions constitute a procedurally defective taking that requires a deposit of money for estimated damages, and even suggests that estimating and paying damages to property owners "is much cheaper than the attorney fees and costs which will be owed for this procedurally wrong project." (Petition, p. 8.) Petitioner has not requested, much less supported, any specific sum nor detailed any alleged damages for its compensation request. Ironically, Petitioner does not appear to have responded with the information regarding curtailment and exceptions thereto, and as a result, it is not clear what, if any, of Petitioner's interests has been affected, or how.

Petitioner likely holds several water rights subject to Order WR 2021-0082-DWR. The letter accompanying the Curtailment Order clarified that the curtailment only applied to appropriative groundwater diversions that are more junior to many surface water diversions, including those described in the Adjudication. Groundwater appropriators have a priority date from when the groundwater well was constructed, and water first used for non-overlying use.⁵ The Curtailment Order required Petitioner to cease all

⁵ For groundwater diversions, case law recognizes overlying and appropriative rights to groundwater, analogous to riparian and appropriative rights to surface water. An overlying groundwater right is generally senior and attaches to land overlying a groundwater basin. An appropriative groundwater right is the type of water right one has if one pumps groundwater for beneficial use but: (1) does not own (or rent or lease) [footnote continues on next page]

diversions associated with the selling of groundwater, hauling, and delivery for non-overlying use or fill out any required forms for exemptions. The Curtailment Order also required Petitioner to submit a Curtailment Certification response through the online portal by September 27, 2021. To date, Petitioner does not appear to have submitted the required Curtailment Certification or any of the forms required for exceptions to curtailment. Without this information, it is unclear what portion of Petitioner's water right is subject to the curtailment, if that portion has been curtailed, and whether exemptions could apply. We will assume for the purpose of this Order that some portion of Petitioner's water right is appropriative and junior and therefore subject to the Curtailment Order.

4.1.3 The Curtailment Order does not constitute a physical or regulatory taking.

Petitioner asserts that “[r]egardless of fisheries restrictions and protections, the real property nature of California water rights endures and the character of those rights as property rights entitled to constitutional protection continues.” (Petition, p. 4.) Water rights by their nature, including being subject to hydrology, senior demands, and constitutional principles, are “limited and uncertain.” (*People v. Murrison* (2002) 101 Cal.App.4th 349, 359.) Water rights are “usufructory” rights: their holders do not own the water itself, but have a right to use it.

All water rights are subject to the requirements of the reasonable use doctrine, among other limitations. (See *United States v. State Water Resources Control Board* (1986) 182 Cal. App. 3d 82, 105-06.) The reasonable use doctrine of article X, section 2 of the California Constitution imposes an “overriding constitutional limitation” on all water rights in California. (*Ibid.*) This provision is expressly declared to be “self-executing,” meaning that water rights must at all times be exercised in a manner consistent with mutable standards of reasonableness. (Cal. Const., art. X, § 2; see also *People ex rel. State Water Resources Control Board v. Forni* (1976) 54 Cal.App.3d 743,750 (*Forni*),

land overlying the basin that the water is used on; (2) owns overlying land but uses the water on non-overlying land; or (3) sells or distributes the water to someone else. Order WR 2021-0082-DWR extends only to appropriative groundwater diversions established after November 1912.

[citing *Tulare Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 567].) “What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.” (*Tulare Dist. v. Lindsay-Strathmore Dist.*, *supra*, at p. 567.)

What constitutes an unreasonable use of water, method of use, or method of diversion varies as facts and circumstances change. (*Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 140 (*Joslin*); *Environmental Defense Fund, Inc. v. East Bay Municipal Utility Dist.* (1980) 26 Cal.3d 183, 194.) Uses of water that would otherwise be considered reasonable may subsequently become unreasonable in light of changed factual and legal circumstances, such as, for example, during a severe drought where the water source in question provides one of the best opportunities for recovery of a listed endangered or threatened species. (*E.g. Forni, supra*, 54 Cal.App.3d at p.750). The California courts have uniformly held that, because there is no property right in an unreasonable use of water, a water user can never obtain a vested right to use water in a manner inconsistent with article X, section 2 of the California Constitution. (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 367); *Joslin, supra*, 67 Cal. 2d at pp. 144-45; *Imperial Irr. Dist. v. State Wat. Res. Cntrl. Bd* (1990) 225 Cal.App.3d 548, 563-64.)

The state is not required to undertake an eminent domain proceeding or to otherwise compensate a water right holder for a property interest that water right holder does not have. (*American Pelagic Fishing Co., L.P. v. U.S.* (Fed.Cir. 2004) 379 F.3d 1363, 1372.)

Petitioner’s water rights, like all water rights, are usufructury, and have always been subject to the prohibition against unreasonable use. As the *Stanford Vina* court made clear, there is no vested right to use water unreasonably. (*Stanford Vina, supra*, 50 Cal.App.5th, 976, 1006-07 [citing *Joslin, supra*, at p. 145].) A regulation that defines unreasonable use activates a limitation that has always been a component of the water

right. A curtailment order implementing that regulation therefore is not a compensable taking. Reconsideration on this ground is denied.

4.1.4 The State Water Board is not relying on an “emergency” to claim an exemption to takings principles or due process requirements.

Petitioner argues that a government’s declaration of an emergency does not exempt the State Water Board from constitutional requirements and due process procedures for deposit and payment of compensation. (Petition, p. 5.) Here, the State Water Board is adopting an emergency regulation to address an emergency, and, as described above, has exceeded the limited public procedures required. The State Water Board is not relying on an “emergency” exception to takings principles or due process requirements that are raised in Petitioner’s filing. As explained above, there is no taking.

It is worth noting, however, that the cases Petitioner cites are inapplicable in this context, regardless, because they concern physical takings and address a narrow exception to compensation for physical takings pursuant to emergency police power for actions to “avert impending peril” such as demolishing buildings to stop a fire, destroying diseased animals, or damage to property while apprehending a criminal. (*Los Osos Valley Associates v. City of San Luis Obispo* (1994) 1670, 1680-81 (*Los Osos*); *Odello Brothers v. County of Monterey* (1998) 63 Cal.App.4th 782, 788-90.) Regulatory takings analysis, rather than the physical takings at issue in the cited cases, is the analysis applicable to administration of water rights and regulation of water diversion and use. (*People v. Murrison, supra*, 101 Cal.App.4th at pp. 362–63; *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1271–75.) The court in *Los Osos* explicitly notes this limitation to its reach: “[c]ases concerning competing uses of water are different than those that deal with damage to property.” (*Los Osos, supra*, 30 Cal.App.4th at p. 1679.)

4.2 The Regulation and Curtailment Order do not violate the Sustainable Groundwater Management Act procedures.

Petitioner argues that the State Water Board, in adopting the Regulation and issuing the associated Curtailment Order, violated the procedural requirements of the Sustainable Groundwater Management Act (Wat. Code, § 10720 et seq.) (SGMA). Because SGMA includes requirements regarding effects of groundwater extractions on interconnected surface water, and a process for state intervention if a local agency does not adequately address this issue, Petitioner argues that the State Water Board has no authority to impose limitations on wells in the Shasta River in the Regulation “without evidence and a groundwater management plan.” (Petition, p. 9.) “Since the State Board has not given notice or held an evidentiary hearing and has not declared the groundwater users subject to a probationary basin status as required by Water Code section 10735.2, no authority exists on the part of the SWRCB to develop an interim plan.” (Petition, p. 10.) This argument overstates the breadth of SGMA and ignores the State Water Board’s authorities under other authorities that remain undisturbed by the adoption of SGMA.

In 2014, the Legislature passed SGMA to address excessive groundwater pumping and consequences of that over-extraction. SGMA requires local agencies adopt sustainability plans for high- and medium-priority groundwater basins. Under SGMA, basins must reach sustainability within 20 years of implementing their plans. Under SGMA, undesirable results include significant and unreasonable depletions of interconnected surface waters that affect beneficial uses of surface waters (Wat. Code § 10721, subd. (x)).

As described in the Informative Digest, groundwater and surface water are interconnected in the Shasta River watershed. In the southern and central parts of the Shasta Valley, numerous productive groundwater springs emerge from the highly permeable basalt flows of the High Cascades volcanic series, especially the Pluto’s Cave basalt. In the spring, once snowmelt and rainfall precipitation end for the season, groundwater springs become the primary source of baseflow to the Shasta River and its tributaries for the remainder of the spring, summer, and fall. During dry seasons,

groundwater springs in the Big Springs Complex provide an estimated 95 percent of baseflow to the lower Shasta River via the Big Springs Creek tributary. One study reported that during the irrigation season, irrigation diversions and groundwater pumping reduce baseflows in Big Springs Creek by 35 percent. Following the end of the irrigation season, baseflows in Big Springs Creek rapidly rebound. Another study found that during April 1 to April 12, 2008 streamflow at the Shasta River Montague gage decreased by approximately 70 percent, from 143 cfs to 43 cfs. The authors concluded that the onset of surface water diversions and groundwater pumping for irrigation caused the swift and significant reduction of groundwater-fed baseflows throughout the Shasta River basin. (Informational Digest, p. 48-50 [internal citations omitted].)

Interconnectedness of surface water and groundwater in the Shasta River basin is acknowledged in the Shasta Valley Groundwater Sustainability Plan (GSP). The Shasta Adjudication does not adjudicate groundwater extractions, yet pumping of interconnected groundwater in the Shasta River system has an effect on surface flows. This effect will need to be addressed in the long-term SGMA planning process. If the local GSP proves to be unable or unwilling to sustainably manage the basin, the State Water Board can step in using a process called state intervention. (See Wat. Code, §§ 10735.2-10736.)

The grant of additional authority under certain circumstances under long-term SGMA planning efforts does not somehow prevent the state from applying common law principles of waste and unreasonable use to all water diversions for the purpose of implementing the emergency Regulation. SGMA explicitly preserves existing authorities over groundwater (Wat. Code, § 10720.5 [“nothing in this part modifies rights or priorities to use or store groundwater consistent with Section 2 of Article X of the California Constitution”]; *id.* § 10726.8, subd. (c) [“nothing in this part is a limitation on the authority of the board, the department, or the State Department of Public Health”]), and does not occupy the field of groundwater regulation. (See *Env’t L. Found. v. State Water Res. Control Bd.* (2018) 26 Cal. App. 5th 844, 862-67 [SGMA does not subsume or eliminate existing law, including common law public trust doctrine].) The Legislature

left in place underlying water law principles and authorities like the doctrine of waste and unreasonable use when it established this additional long-term planning and management structure. (See *ibid.*) The State Water Board has authorities related to groundwater diversion, use, and quality that are independent of, and in addition to, SGMA. As relevant here, the State Water Board is authorized under article X, section 2 of the California Constitution and Water Code section 100 to prevent the waste or unreasonable use, unreasonable method of use, or the unreasonable method of diversion of all waters of the State. Water Code section 275 directs the State Water Board to “take all appropriate proceedings or actions before executive, legislative, or judicial agencies . . .” to enforce the constitutional and statutory prohibition against waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, commonly referred to as the reasonable use doctrine. Water Code section 1058.5 specifically provides for adoption of emergency regulations for a variety of purposes during droughts, including to implement reasonable use requirements. The reasonable use doctrine applies to the diversion and use of both surface water and groundwater, and it applies irrespective of the type of water right held by the diverter or user. (*Peabody v. Vallejo* (1935), *supra*, 2 Cal.2d 351, 366-367.)

Where groundwater and surface water are interconnected, such as in the Scott River and Shasta River watersheds, the “common source” doctrine applies, integrating the water rights and applying priorities without regard to whether the diversion is from surface water or groundwater. (*Hudson v. Dailey* (1909) 156 Cal. 617, 627–28.) “[I]t has been recognized by California decisions that a percolating groundwater supply, although not part of the flow of a stream, may nevertheless be hydrologically connected with it, with the result that the extraction of water from either source diminishes the amount of water in the other. In such a situation, the percolating groundwater and the stream are regarded as one common water supply” (*United States v. Fallbrook* (S.D.Cal. 1958) 165 F.Supp. 806, 847 [internal citations omitted].) “Because these basins are interconnected, some of the surface inflow to one basin is outflow from another. The groundwater and surface water within the entire Mojave River Basin constitute a single interrelated source.” (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1234.) Water Code section 1058.5 provides for adoption of drought

emergency regulations, including regulations to implement the water right priority system. The State Water Board was well within its authorities to determine that administering emergency water right curtailments in the Shasta River watershed is best accomplished under the common source doctrine. Petitioner fails to explain, or even address, the question of how, in this context, continued diversion under a junior appropriative groundwater right would avoid harm to very senior surface water right holders with adjudicated rights.

The State Water Board's implementation of its Regulation does not interfere with, and is not barred by, SGMA. Reconsideration on this ground is denied.

4.3 The Regulation and Curtailment Order do not interfere with the Shasta Adjudication.

Petitioner argues without reference to any supporting authority that because certain water rights in the Shasta River watershed were subject to the 1932 Statutory Adjudication, only the Siskiyou County Superior Court has jurisdiction over the establishment of minimum instream flows and determination of waste and unreasonable use of water diversions that affect such flows. At the outset, it appears that Petitioner has confused the Shasta Adjudication with the Scott River Decree because Petitioner notes that that decree includes some groundwater wells. There are no groundwater wells included in the Shasta Adjudication. Nevertheless, Petitioner goes on to argue that the State Water Board must appear before the Siskiyou County Court and present minimum flows and the scope of water diverters subject to such flow requirements, and cannot take such actions on its own absent a quasi-judicial hearing to determine the facts of each particular use. "This is particularly required when the Superior Court still has jurisdiction of the use and diversion of water from the Shasta River." (Petition, p. 12.)

Surface water diversions in the Shasta River watershed were subject to a statutory stream system adjudication that resulted in a judgment and decree approved by the Superior Court of the State of California in Siskiyou County in 1932 (In the Matter of the Determination of the Relative Rights Based on Prior Appropriation, of the Various

Claimants to the Use of the Water of the Shasta River and its Tributaries in Siskiyou County, California, No. 7035). The court recognized at that time that the water supply of the stream system is inadequate for all agricultural needs throughout the irrigation system. At the time the watershed was adjudicated, there were approximately 40,000 acres of irrigated agriculture. Today there are over 50,000 acres under irrigation. The Adjudication contains no requirements for the protection of instream beneficial uses.

The 1932 Shasta Adjudication was adopted shortly after the 1928 constitutional amendment establishing the reasonable use doctrine as applicable to all water rights, and did not address the doctrine of waste and unreasonable use, or address the needs of public trust uses, including endangered species protection. (Cal. Const., art. X, § 2.) At the time, the statutory adjudication process applied only to the rights “based on prior appropriation,” yet all landowners (including many riparian to the stream) were encouraged to participate in the adjudication. “[S]ince the water supply of the stream system is inadequate for all of the agricultural needs throughout each irrigation season it is also essential that the rights to said water be determined that there may be an orderly distribution of the same to the rightful owners.” (Shasta Adjudication, p. 3.)

The ability of the Adjudication to achieve this goal has been circumscribed to some extent by the exercise of rights that could not be addressed by the Adjudication in 1932 (namely, interconnected groundwater and riparian claims). Since adoption of the decree, some diverters with adjudicated rights have switched to claim a riparian diversion or to divert from interconnected groundwater, further muddying the priorities set forth in the Adjudication. Others never subjected to the decree have similarly claimed and initiated groundwater or surface-water diversions. While some of these new or changed diversions have very senior claims, such as those on riparian or overlying properties, others are quite junior, with a priority based on the date diversion for an appropriative use began. It is these very junior claims that are the basis for this Petition for Reconsideration.

Petitioner does not claim to hold any of the water rights previously adjudicated in the Shasta River decree in 1932. The Shasta Adjudication does not adjudicate

groundwater extractions, yet pumping of interconnected groundwater in the Shasta River system has an effect on surface flows. Petitioner asserts that it was a procedural error to adopt the minimum flows by emergency regulation rather than by petitioning to reopen the Shasta Adjudication. Yet Petitioner's water rights fall outside of the Adjudication.

Petitioner fails to cite, and the Board has not identified, any language in the Adjudication indicating that Siskiyou County Superior Court acted to preclude the State Water Board from exercising future regulatory jurisdiction over water rights – either those rights outside of the Adjudication or the water rights covered by the Adjudication. The judicial branch does not exercise quasi-legislative authority, and it is unclear why the Adjudication would affect quasi-legislative actions by the State Water Board. Inasmuch as the State Water Board's quasi-legislative action created a generally-applicable rule in the Shasta River watershed regarding the reasonableness of affected diversions that does not affect the relative rights of the parties to the Adjudication, it is unclear, and Petitioner does not explain, how the Adjudication could protect diversions from application of that rule. (See also *Stanford Vina, supra*, 50 Cal.App.5th 976, 1007 [while an earlier judicial decree adjudicating water rights settled questions of apportionment among the litigants, "it does not prevent the Board from adopting regulations and issuing curtailment orders to prevent an unreasonable use of water under article X, section 2"].)

The Adjudication apportioned water use among the parties, but Petitioner provides no reason why the general rule of concurrent jurisdiction over water rights should not apply here. (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 359-60 [statutory action by State Water Board not barred by prior decree]; *National Audubon Society v. Superior Court* (1903) 33 Cal.3d 419, 426 [discussing concurrent jurisdiction].) The Petitioner suggests that the Adjudication somehow prevents the State Water Board from exercising its regulatory authority to curtail the Petitioner's diversions, even though such diversions are curtailed only to the extent they are junior to the adjudicated rights. It further suggests that the Adjudication establishes that a different

process is due to the Petitioner, even though Petitioner's appropriative groundwater rights are not addressed in the Adjudication. Reconsideration on this ground is denied.

5.0 CONCLUSION

The Petition for Reconsideration requests that the Regulation be rescinded and withdrawn, and the Curtailment Order (and any amendments or supplements) be rescinded and cancelled. Adoption of regulations is a quasi-legislative action, not a decision or order subject to reconsideration under Water Code section 1122; nevertheless, the State Water Board has considered the entire Petition for Reconsideration, including Petitioner's various arguments set forth against the Regulation. The State Water Board finds that the challenged actions were appropriate and proper. The Regulation and associated Curtailment Order did not violate any of the substantive or procedural rights asserted by Petitioner. The Petition for Reconsideration is denied because it fails on the merits, for the reasons explained above.

ORDER

IT IS HEREBY ORDERED THAT the petition for reconsideration is denied.

April 8, 2022
Date


Eileen Sobeck
Executive Director