

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WR 2023-00XX**

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In the Matter of the petitions of

**Stephen Griset and  
Big Springs Irrigation District**

for reconsideration of Order WR 2023-0009,  
which imposed administrative civil liability on  
Stephen Griset.

**Water Right IDs SG005923 and SG005924,**  
for groundwater pumping in Siskiyou County.

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**ORDER DENYING PETITIONS FOR RECONSIDERATION**

**BY THE BOARD:**

**1.0 INTRODUCTION**

This matter came to the State Water Resources Control Board (State Water Board, Board or SWRCB) on the petitions of Stephen Griset and the Big Springs Irrigation District (Big Springs ID) for reconsideration of the Board's Order WR 2023-0009. Order WR 2023-0009 imposed administrative civil liability of \$16,000 on Stephen Griset for his failure in September 2021 to file the required curtailment certification forms for his sales of water pumped from his groundwater wells to people for trucking to other parcels for uses on those parcels.

For the reasons stated in this order, we deny both petitions for reconsideration. We also direct the Division of Water Rights (Division) Enforcement Section (Enforcement Section) to take specified actions regarding the \$12,000 check Mr. Griset has submitted to the Board.

## **2.0 GROUND FOR RECONSIDERATION OF A BOARD ORDER; TIMING OF BOARD'S ORDER ON PETITION FOR RECONSIDERATION**

Any interested person may petition the State Water Board for reconsideration of a water rights order within 30 days after the date on which the Board adopted the order.

(Wat. Code, § 1122.)

The applicable Board regulation (Cal. Code Regs., tit. 23, § 768) provides that a petition for reconsideration may address any of the following causes:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

The State Water Board adopted Order WR 2023-0009 on March 8, 2023. Mr. Griset filed his petition for reconsideration of Order WR 2023-0009 with the Clerk of the Board on April 6, 2023.<sup>1</sup> Big Springs ID filed its petition for reconsideration of Order WR 2023-0009 with the Clerk of the Board on April 7, 2023. Both of these filings were before the 30-day deadline for petitions specified in Water Code section 1122.

Water Code section 1122 provides that the State Water Board shall order or deny reconsideration on a petition within 90 days from the date on which the Board adopts the decision or order. Because of AHO and Board workload issues, we were not able to act on these petitions within 90 days of the date of the Board's adoption of Order WR 2023-0009.

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<sup>1</sup> On April 6, 2023, Paul Minasian of Minasian Law filed a letter with the Clerk of the Board, which stated it was a petition for reconsideration of Order WR 2023-0009. During the AHO hearing the led to Order WR 2023-0009, Mr. Minasian represented Stephen Griset. Thus, although his April 6, 2023 letter did not state whom he was representing, we assume that he filed this letter on behalf of Stephen Griset. Unless the context indicates otherwise, references in this order to "Mr. Griset" are to Stephen Griset.

If the State Water Board does not act on a petition for reconsideration within the 90-day period specified in Water Code section 1122, the petitioner may seek judicial review, but the Board is not divested of jurisdiction to act upon the petition. (State Water Board Order WR 2009-0061, p. 2, fn. 1; see *California Correctional Peace Officers Assn v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151.) We therefore have authority to issue this order on Mr. Griset's and Big Springs ID's petitions for reconsideration.

### **3.0 BACKGROUND**

#### **3.1 Stephen Griset Wells and Water Deliveries; Division of Water Rights Proceedings**

This proceeding concerns Mr. Griset's deliveries of water pumped by his wells on two parcels in Siskiyou County to people who trucked the water to their homes in the Shasta Vista Subdivision for uses there. (See Order WR 2023-0009, pp. 1-4.) The locations of Mr. Griset's parcels and the approximate place of use of the conveyed water are shown in Figure 1 to Order WR 2023-0009.

Following Governor Gavin Newsom's emergency drought proclamations in April and May 2021, the State Water Board adopted emergency drought regulations for the Scott River and Shasta River watersheds in August 2021. (Order WR 2023-0009, pp. 5-6.) As authorized by these regulations, the Division adopted General Order WR 2021-0082-DWR on September 10, 2021. This order directed approximately 100 water users, listed in Attachment A to the order, to cease diverting water on September 21, 2021. (Order WR 2023-0009, p. 6.)

Mr. Griset and Water Right ID's SG005923 and SG005924, the two Water Right IDs the Division assigned to his wells, were included in the list of water users in that Attachment A. (*Ibid.*) The Division also issued another order, which we refer to as Specific Order WR 2023-0082-DWR (Stephen Griset), on September 10, 2021. It contained the same terms as General Order WR 2021-0082-DWR, but was specific to Mr. Griset. (Order WR 2023-0009, pp. 6-7.) Term 4 of Specific Order WR 2021-0082-DWR (Stephen Griset) directed Mr. Griset to submit under penalty of perjury an online Scott-

Shasta Water Right Curtailment Certification form for each Water Right ID by September 20, 2021. (Order WR 2023-0009, p. 7.)

Division staff hosted an in-person compliance meeting in Yreka in December 2021 and sent e-mail messages through the Board's LYRIS e-mail system in January 2022 to community members, reminding diverters of the requirement that they submit their curtailment certification forms. (*Id.*, pp. 8-9.) The Division sent a Notice of Violation to Mr. Griset on January 10, 2022, which gave Mr. Griset another opportunity to submit the certification form without incurring any administrative civil liability (ACL). (*Id.*, p. 9.)

Mr. Griset never submitted any curtailment certification forms. (*Ibid.*) Instead, after the Division issued an ACL complaint to Mr. Griset, he and his attorney filed requests for a hearing with the Administrative Hearings Office (AHO). (*Id.*, p. 9.)

### **3.2 Administrative Hearings Office Proceeding**

The AHO held hearings on May 19 and June 2, 2022. (*Id.*, pp. 11-16.) During the May 19, 2022 AHO hearing, Mr. Griset testified that he never attempted to discuss Specific Order WR 2021-0082-DWR (Stephen Griset) with Division staff, "because he didn't believe it had anything to do with him." (*Id.*, p. 14.) He testified that he did not submit the curtailment certification forms because he contended his pumping was pursuant to overlying rights, so "we went with the reconsideration as our action." (*Ibid.*)

Mr. Griset's attorney filed a petition for reconsideration of the Board's drought emergency regulations and General Order WR 2021-0082-DWR on behalf of Mr. Griset's father, George Griset, for George Griset's parcels and Water Right IDs, but this petition did not refer to Stephen Griset's parcels or Water Right IDs. (*Id.*, p. 8.) This petition did not assert that either Stephen Griset or George Griset had any overlying rights that authorized sales of groundwater pumped on their parcels for trucking to Shasta Vista Subdivision parcels for uses on those parcels. (*Ibid.*)

On April 8, 2022, the Board's Executive Director issued Order WR 2022-0143-EXEC, which denied George Griset's petition for reconsideration. (Order WR 2023-0009, p. 8.)

During the AHO proceeding, Mr. Griset did not argue that he had filed any curtailment certification forms for his pumping of his wells or his sales of water to people who trucked the water to Shasta Vista Subdivision parcels for uses on those parcels. Instead, his primary argument was that he was not required to file these forms because his pumping and sales of water for this trucking and these uses were authorized by groundwater overlying rights. (See *id.*, pp. 21-25, 26-27, 29-31.)

### **3.3 Order WR 2023-0009**

Order WR 2023-0009 imposed administrative civil liability of \$16,000 on Stephen Griset for his failure in September 2021 to file the required curtailment certification forms for his sales of water pumped from his groundwater wells to people for trucking to other parcels for uses on those parcels.

Order WR 2023-0009 discusses Mr. Griset's argument that his pumping of his wells and sales of that water to others for trucking to Shasta Vista Subdivision parcels were authorized by overlying rights, and therefore, that he was not required to file a curtailment certification form for the pumping and use of this water. (*Id.*, pp. 21-25.) In addressing Mr. Griset's argument, Order WR 2023-0009 discusses the applicable principles of California groundwater-rights law and describes the Shasta Valley Groundwater Basin. (*Id.*, pp. 17-21.) Order WR 2023-0009 concludes that Mr. Griset's argument about overlying rights was an affirmative defense, and that, to prevail on this defense, Mr. Griset had to demonstrate that the owners of the parcels where this water was used could have developed and pumped wells on their parcels that would have produced the same amounts of water they obtained from Mr. Griset. (Order WR 2023-0009, p. 24, fn. 19.)

On this issue, Order WR 2023-0009 has the following findings:

While wells developed on some of these parcels might tap the parts of volcanic formations that transmit large quantities of water, wells developed on most parcels in this area probably would not produce any significant amounts of water.

(Order WR 2023-0009, p. 23.)

Based on the [Larry Walker Associates] memorandum and Mr. Griset's testimony, we find that it is very unlikely that the owners of all the parcels

where water trucked from Respondent's wells was used could develop productive wells on their parcels. The fact that many of these parcels are within the boundaries of the current DWR-designated Shasta Valley Groundwater Basin alone is not sufficient to change this finding.

(*Id.*, p. 24.)

Following these findings, Order WR 2023-0009 concluded that Mr. Griset's pumping of his wells and his sales of the pumped water to people for trucking to parcels in the Shasta Vista Subdivision for uses on those parcels were not authorized by overlying rights. (*Id.*, p. 25.) Order WR 2023-0009 rejected Mr. Griset's defense based on overlying rights and concluded that Mr. Griset was required to file a curtailment certification form for Water Right IDs SG005923 and SG005924, which he did not do.

### **3.4 Stephen Griset's Petition for Reconsideration**

Mr. Griset's petition for reconsideration contains four arguments asserting that errors of law occurred when the Board adopted Order WR 2023-0009. Those arguments and our responses are discussed in the following paragraphs.

Griset Argument: "No proper notice was given to sustain fines or prohibitions. Due process requirements have been violated." (2023-04-06 S. Griset Petition for Reconsideration (Griset Petition), p. 4.) The Division's September 10, 2021 transmittal letter stated that the curtailment order "does not extend to overlying groundwater users in the Shasta River watershed," and "the Grisets are overlying users." (*Ibid.*)

"No language was included in the Order which stated, without a hearing, all water transported in a truck from specified wells was deemed to go to non-overlying land and prohibited." (*Ibid.*)

Response: The Division's September 10, 2021 transmittal letter issue is discussed in Order WR 2023-0009, on pages 26-27. Mr. Griset's petition correctly quotes the statement in this letter that the curtailment order "does not extend to overlying groundwater users in the Shasta River watershed." (*Id.*, p. 26.) But Mr. Griset's petition ignores the sentence later in the same paragraph of this letter that stated "**Selling groundwater to be hauled and used at a different location is an appropriative use**

**and must cease immediately (subject to exceptions described below), if the use started after November 1912.”** (*Id.*, pp. 26-27, bolding in original.)

It is not appropriate for Mr. Griset to quote one sentence of the Division’s transmittal letter while ignoring this subsequent sentence. These two sentences together clearly notified Mr. Griset that the Division’s position was that, while Specific Order WR 2021-0082-DWR (Stephen Griset) did not extend to overlying groundwater users in the Shasta River watershed, selling groundwater to be hauled and used at a different location was an appropriative use subject to the curtailment order, and not an overlying use.

Term 2 of Specific Order WR 2021-0082-DWR (Stephen Griset) stated, subject to some exceptions that Mr. Griset never asserted applied to his sales of water, that all diversions of water in the Shasta River watershed pursuant to his Water Right IDs had to cease on September 11, 2021, or upon delivery of this Order, whichever is later. (Exh. PT-3, p. 9, ¶ 2.) This included all water transported by truck from Mr. Griset’s wells.

For the present proceeding, the Enforcement Section’s administrative civil liability complaint alleged that Mr. Griset had violated Specific Order WR 2021-0082-DWR (Stephen Griset) by failing to file the required curtailment certification forms. (Exh. Respondent-5, pp. 2-3, ¶¶ 11-18.) This notice satisfied the requirements of Water Code section 1052, subdivision (a).

When Mr. Griset alleged that he was not subject to this order because his pumping of water and sales of that pumped water to people who used the water on Shasta Vista Subdivision parcels was authorized by overlying rights, that allegation was an affirmative defense for which he had the burden of proof. (See *Burako v. Munro* (1959) 174 Cal.App.2d 688, 692.) The fact that Mr. Griset’s attorney offered evidence regarding the boundaries of the Shasta Valley Groundwater Basin (see Order WR 2023-0009, pp. 19-20), and made detailed arguments about overlying rights (see *id.*, p. 21), during the AHO proceeding demonstrates that he was aware that the issue of whether Mr. Griset’s sales of water to others for uses on parcels in the Shasta Vista Subdivision

were authorized by overlying rights would be involved in the AHO hearing, that he needed to present evidence and legal arguments to support his affirmative defense, and that he had an opportunity to present such evidence and arguments.

If Mr. Griset's attorney wanted to submit additional evidence to the AHO regarding this defense, then he could have asked the AHO to hold additional hearing days to consider such evidence, or he could have asked the Board to direct the AHO to hold such additional hearing days. He never made any such request to the AHO, and he never made such a request to the Board when he submitted his comments to the Board on the AHO's proposed order before the Board adopted Order WR 2023-0009.

For these reasons, we reject Mr. Griset's arguments. Mr. Griset received sufficient notice and due process of law from the Division, the AHO and the Board before we adopted Order WR 2023-0009. (See *Burako v. Munro*, *supra*, 174 Cal.App.2d, at p. 691 ("Here appellants demonstrated amply their readiness to meet the department's evidence. Further, they were afforded sufficient time, after presentation of the department's evidence, to secure any further refutation available to them. They cannot now complain."); *JMS Air Conditioning & Appliance Service, Inc. v. Santa Monica Community College Dist.* (2018) 30 Cal.App.5th 945, 963 ("notice comports with due process where it provides sufficient information, in light of the particular circumstances, to 'fully and fairly apprise[ ] [an administrative litigant] of the charges with sufficient certainty to prepare his defense thereto.' [Citation.] Where a litigant receives "reasonable notice and a reasonable opportunity to be heard, that is all that is required." (brackets in original).)

Griset Argument: "The SWRCB does not have jurisdiction over percolating groundwater unless a claim of waste or non-beneficial use is raised." (Griset petition, p. 5.)

Response: Water Code section 1058.5, subdivision (a)(1), gives the State Water Board the authority to adopt emergency regulations "to require curtailment of diversions when water is not available under the diverter's priority of right." This authority includes the authority to adopt regulations that may require curtailments of the pumping of percolating groundwater when such pumping is not authorized under the pumper's water-right priorities.



Using this authority, the Board adopted drought emergency regulations for the Scott River and Shasta River watersheds. (See Order WR 2023-0009, pp. 5-6; Cal. Code Regs., tit. 23, §§ 875-875.9.)

Griset Argument: “The SWRCB, if it approves this Order, is approving the SWRCB acting as a legislative authority. This would constitute a violation of the separation of powers authority and an error of law.” (Griset petition, p. 6.) “No right to create a new priority system or adjudicate rights to groundwater without hearings is being granted [by Water Code section 1058.5].” (*Id.*, p. 7.)

Response: The Board’s adoption of the drought emergency regulations was a quasi-legislative act authorized by Water Code section 1058.5. As discussed in our preceding response to Mr. Griset’s previous comment, Mr. Griset’s argument about the Board’s authority to adopt these regulations is incorrect.

Order WR 2023-0009 did not create a new water-right priority system and it did not adjudicate any claims to groundwater rights. It made findings that are supported by evidence in the light of the whole administrative record. Based on these findings and principles in the relevant reported court decisions, Order WR 2023-0009 rejected Mr. Griset’s affirmative defense that overlying groundwater rights authorized Mr. Griset to sell water pumped by his wells to others for trucking to their parcels in the Shasta Vista Subdivision for uses there and that Mr. Griset was therefore not required to file a curtailment form.

Griset Argument: “Regulation 875.5 does not authorize or grant authority to the staff of the SWRCB to declare certain uses of groundwater to be appropriative or to limit percolating groundwater use to priority based on well drilling sites.” (Griset Petition, p. 8.)

Response: The drought emergency regulation in California Code of Regulations, title 23, section 875.5, subdivision (b)(1)(A)(3) (quoted above), provided that, when a well owner sold or distributed groundwater to another party for use by that party, the pumping and use of the groundwater was pursuant to groundwater appropriative rights.

Because the regulation provided this, Board staff did not decide this issue when it implemented the regulation. The Board already had decided the issue when it adopted the regulation. The Division properly implemented this regulation when it determined which groundwater appropriative rights were subject to pumping curtailments. (See Order WR 2023-0009, pp. 14-16.)

Mr. Griset's "[o]ther grounds for reconsideration:" Mr. Griset's petition states that Mr. Griset submitted a check for \$12,000, payable to the SWRCB, and that he authorized the Board to cash the check "provided and only upon the condition," and then listed conditions and arguments in five subsequent paragraphs (the last two of which both are number "4". (Griset petition, pp. 8-10.) The Clerk of the Board has received and now is holding this check.

Term 1.a. on page 34 of Order WR 2023-0009 ordered Mr. Griset to pay \$16,000 in administrative civil liability. (Order WR 2023-0009, p. 34.) Of this amount, the first installment was for \$12,000, and the order directed Mr. Griset to remit a check or money order to the Division's Enforcement Section within 30 days of the date on which the Board adopted the order.

The Board will not agree to any conditions under which it may cash checks for payments of administrative civil liabilities. This order therefore directs Mr. Griset to advise the Board in writing whether Mr. Griset is withdrawing the conditions listed on pages 8-10 of his petition. If Mr. Griset does not do this, then Board staff should return his check to him and proceed under the parts of Order WR 2023-0009 that apply if Mr. Griset has not paid this first installment.

### **3.5 May 26, 2023 Letter from Mr. Griset's Attorney**

On May 26, 2023, Mr. Griset's attorney submitted a letter to Michael Lauffer, the Board's Chief Counsel. Some of the arguments in that letter concern Mr. Griset's allegations regarding overlying groundwater rights, due process of law and burden of proof. Those arguments and the Board's responses are discussed above and are not

repeated here. The following paragraphs discussed arguments by Mr. Griset's attorney that he did not make in his petition for reconsideration, and the Board's responses.

Griset Argument: "Factually, there is no question that the wells upon the Griset property were added to the curtailment order and the terms of the curtailment order were tailored to accomplish the same purpose of discrimination against and denial of a drinking water source historically relied upon by the Hmong population living in the Shasta Vista Subdivision located adjacent to the Griset property." (2023-05-26, P. Minasian ltr. to M. Lauffer, p. 1.)

Response: The actual reasons why the Division included entries for Mr. Griset's wells in Attachment A to General Order WR 2021-0082-DWR are discussed in section 2.12.2 of Order WR 2023-0009, at pp. 14-16. During the AHO hearing, Mr. Griset's attorney cross-examined in detail the Division's Senior Water Resource Control Engineer who described these reasons. Neither that cross-examination nor any other evidence in the administrative record for this proceeding indicates that the Division included these entries in Attachment A for any of the alleged discriminatory purposes discussed in Mr. Minasian's letter.

Griset Argument: "By not reconsidering the order, the SWRCB is about to confirm an order that violates the Federal Court's existing preliminary injunction terms at the urging of [Siskiyou] County personnel." (2023-005-26, P. Minasian ltr. to M. Lauffer, p. 2.)

Response: Although not cited, the federal court preliminary injunction referred to in Mr. Minasian's letter apparently is the preliminary injunction in Exhibit Respondent-9. That injunction enjoins Siskiyou County and its officers, agents, employees, and any person acting in concert with the county from enforcing two listed Siskiyou County ordinances. It does not apply to the present proceeding. This proceeding does not concern these ordinances, and there is no evidence that the Board or Board staff have acted in concert with the County in any of the actions involved in this proceeding.

### **3.6 Big Springs Irrigation District's Petition for Reconsideration**

The arguments in Big Spring ID's petition for reconsideration regarding alleged abuses of discretion and errors in law, and our responses, are discussed in the following paragraphs.

Big Springs ID Argument: Order WR 2023-0009 "exceeds the bounds of the noticed hearing in violation of Water Code section 1112 and administrative separation of functions." (2023-04-07 Big Springs ID petition for reconsideration (Big Springs ID petition), p. 3.)

Response: As discussed in Big Spring ID's petition, the AHO's hearing notice initially specified five issues regarding the Division's curtailment order, whether Mr. Griset filed the required curtailment certification forms, and if not, what amount of administrative civil liability, if any, the Board should impose on Mr. Griset. (Big Springs ID petition, p. 3.)

During the AHO hearing, Mr. Griset's attorney submitted evidence regarding the boundaries of the Shasta Valley Groundwater Basin, and he repeatedly argued that Mr. Griset's groundwater pumping and deliveries of this pumped groundwater to others for trucking to parcels in the Shasta Vista Subdivision were authorized by groundwater overlying rights. Because Mr. Griset's attorney raised this affirmative defense and submitted evidence regarding it during the AHO hearing, the AHO had to evaluate it. It therefore was appropriate for the AHO to direct the parties to address this issue in their closing and supplemental briefs, and for Order WR 2023-0009 to address this issue.

Contrary to Big Springs ID's argument, Order WR 2023-0009 does not violate Government Code section 11425.10, subdivision (a)(4). (See Big Springs ID petition, p. 4.) That statute provides that, when an agency conducts an adjudicative proceeding, "[t]he adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency as provided in Section 11425.30." These functions have been properly separated throughout this proceeding. The Division's Enforcement Section and the Board's Office of Enforcement have conducted all the

investigative, prosecutorial and advocacy functions, and the AHO and the Board have conducted all the adjudicative functions.

Big Springs ID Argument: Order WR 2023-0009 “unlawfully adjudicates groundwater rights and basin boundaries without notice to affected parties or substantial evidence.” (Big Springs ID petition, p. 5.)

Response: Order WR 2023-0009 did not adjudicate any groundwater rights or basin boundaries. While Order WR 2023-0009 ruled on Mr. Griset’s affirmative defense that he did not need to file curtailment certification forms because he asserted that overlying rights authorized his pumping and sales of groundwater, the order otherwise did not determine or quantify any groundwater rights. Order WR 2023-0009 is a precedential decision of the Board, but no party besides Mr. Griset was a party to the proceeding that led to this order, so no other party is subject to any res judicata or collateral estoppel effects from the order. Any party may present evidence and legal arguments in any subsequent proceeding regarding that party’s groundwater-right claims.

Water Code section 10737 and the other provisions of the Sustainable Groundwater Management Act (Wat. Code, §§ 10720-10738) cited by Big Springs ID do not apply here. The Department of Water Resources (DWR) may take any actions regarding the Shasta Valley Groundwater Basin under those statutes that it deems appropriate.

Big Springs ID Argument: Order WR 2023-0009 “improperly shifts the burden of proof from the State to the Respondent regarding the legal status of the place of use.” (Big Springs ID petition, p. 6.)

Response. For this argument, Big Springs ID cites DWR Bulletin 118, in which DWR has designated groundwater basins in California, including the Shasta Valley Groundwater Basin. (See Order WR 2023-0009, p. 19.) DWR’s groundwater basin designations often are relevant evidence in State Water Board water-right proceedings. But DWR’s actions under the Sustainable Groundwater Management Act do not control the Board’s actions in water-right disputes.

In this proceeding, Mr. Griset's argument that his pumping and sales of groundwater were authorized by overlying groundwater rights was an affirmative defense to the Division's ACL complaint against him, and he had the burden of proof on that defense. (See Order WR 2023-0009, p. 24, fn. 19.)

Big Springs ID Argument: Order WR 2023-0009 "incorrectly determines the nature of the groundwater rights at issue." (Big Springs ID petition, p. 7.) Order WR 2023-0009 incorrectly concludes that "overlyers cannot use water from elsewhere in the basin if pumping directly from under their own parcel is physically (or financially) difficult or unlikely due to hydrogeologic barriers. (*Ibid.*)

Response: This argument mischaracterizes the relevant parts of Order WR 2023-0009 and misstates the applicable legal rules.

Order WR 2023-0009 discusses the rule stated in *Drake v. Tucker* (1919) 43 Cal.App. 53, 58, that a parcel owner's riparian rights do not authorize the diversion of water from the stream at a point of diversion upstream of the parcel when the natural flow of the stream is not sufficient to reach the parcel. (Order WR 2023-0009, p. 18.) After discussing this rule, Order WR 2023-0009 states:

By analogy, the owner of a parcel with an overlying right to a groundwater basin may not exercise the right by pumping water through a well located somewhere else and conveying the pumped water to the parcel, if water from the basin could not be pumped on the parcel where the water is used.

(*Ibid.*) This statement does not refer to physical or financial difficulties. Rather, it states that this rule applies when it is physically impossible to pump water from the basin on the parcel. As discussed in section 3.3 of this order, we found in Order WR 2023-0009 that it is very unlikely that owners of most parcels in the Shasta Vista Subdivision ever could develop productive wells on their parcels. (See Order WR 2023-0009, p. 24.)

Big Springs ID Argument: "The cited riparian cases are inapposite and do not support the physical/financial difficulty limitation on overlying rights." (Big Springs ID petition, p. 7.)

Response: Big Springs ID's petition argues that the reliance on *Drake v. Tucker* in Order WR 2023-0009 is "misplaced," because "[p]hysically insufficient flows do not change a parcel's status as riparian, nor modify the right to use riparian water when it later becomes available. (Big Springs ID petition, p. 8.) But evidence in the administrative record for this proceeding indicates that water *never* will become available for pumping by wells located on most Shasta Vista Subdivision parcels. Order WR 2023-0009 therefore properly relied on *Drake v. Tucker* to conclude that Mr. Griset's sales of pumped groundwater to others for trucking to and use on Shasta Vista Subdivision parcels were not authorized by overlying rights.

Big Springs ID's petition quotes from the following sentence in *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925:

Generally speaking, an overlying right, analogous to that of a riparian owner in a surface stream, is the right of the owner of the land to take water from the ground underneath for use on his land within the basin or watershed; the right is based on ownership of the land and is appurtenant thereto.

By referring to the appurtenant right of an owner of land to take water from the ground underneath for use on "his land," this sentence is consistent with the rule that the owner of a parcel that is riparian to a stream may divert water from the stream for uses on any part of the same parcel that is in the stream's watershed. (See *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 529.)

Big Springs ID's petition refers to Staff Paper No. 2 of the Governor's Commission to Review California Water Rights Law (1977) (Staff Paper No. 2). This staff paper contains the following discussion about this statement in the *City of Pasadena* decision:

This statement implies that overlying use encompasses use on land within the boundaries of a groundwater basin, whether or not groundwater actually can be pumped from beneath the particular parcel of land overlying a basin.

(Staff Paper No. 2, p. 7.)<sup>2</sup>

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<sup>2</sup> This paper is posted on the internet at: <https://ia800501.us.archive.org/32/items/GovernorsCommissionMemos/Govcomm-GwRights.pdf>. The cover page of this staff paper states that it was not reviewed or approved by the Governor's Commission. (See Staff Paper No. 2 title page.)

This sentence of this staff paper is not supported by the *City of Pasadena* decision or any other legal authority, and we decline to follow it. Instead, we apply the rule stated in *Drake v. Tucker*.

Big Springs ID's petition next argues that Order WR 2023-0009 incorrectly relied on *Hudson v. Dailey* (1909) 156 Cal. 617, 628, and *Burr v. Maclay Rancho Water Co.* (1908) 154 Cal. 428, 434-436, because those decisions did not discuss the "physical or financial practicability of pumping groundwater underneath the parcel." (Big Springs ID petition, p. 8.)

This argument mischaracterizes Order WR 2023-0009. As discussed above, the conclusion in Order WR 2023-0009 that the owner of a parcel may not exercise an overlying right to a basin by pumping water through a well located somewhere else, if water from the basin could not be pumped on the parcel where the water is used, is not based on physical or financial practicability. Rather, this conclusion is that this rule applies when it is physically impossible to pump water from the basin on the parcel. (See Order WR 2023-0009, p. 18.) The conclusions in the *Hudson* and *Burr* decisions concerned similar physical impossibilities.

Big Springs ID Argument: "Existing law supports an overlyer's right to use water pumped from elsewhere in the basin regardless of difficulty in pumping at the place of use." (Big Springs ID petition, p. 8.)

Response: As discussed above, the conclusion in Order WR 2023-0009 that Mr. Griset's sales of water to others for trucking to Shasta Vista Subdivision parcels for uses on those parcels is not based on physical or financial difficulties. Rather, the conclusion applies when it is physically impossible to pump water from the basin on the parcel where the water is used.

This section of Big Spring ID's petition begins with the following statement:

The means of diversion, whether at the place of use or elsewhere in the basin, "is not an element of the right to make the diversion . . ." (Hutchins, p. 473.)

(Big Springs ID petition, p. 8.)



The actual statement in Hutchins is:

The particular means of diverting water from the ground is not an element of the right to make the diversion, unless the right is obtained by grant or contract.

(Hutchins, The California Law of Water Rights, p. 473 (1956).) This statement in the Hutchins treatise does not refer to the location of the diversion, as suggested by Big Springs ID's petition. Nor does the discussion on the next page of this treatise, which discusses diversions by pumping, tunnels and wells as possible "means of diverting water," refer to the location of the diversion. (*Id.*, p. 474.)

Big Springs ID's petition discusses various arrangements where holders of water rights had developed common facilities to divert water and to convey the water to their respective places of use. (Big Springs ID petition, pp. 8-10.) However, contrary to Big Springs ID's argument, the reported court decisions and statutes that have recognized and authorized the development and use of such common facilities did not change the applicable water-right rules. For example, in *Hildreth v. Montecito Creek Water Co.* (1903) 139 Cal. 22, 29, one of the court decisions cited by Big Springs ID's petition, the discussion on this issue begins by stating, "Where a number of persons owning land *are each entitled to take water* from a common stream or source for use upon their respective tracts of land . . ." (Italics added.) None of the authorities cited by Big Springs ID addresses the pumping of water for use on a parcel where it is physically impossible to pump water from the basin.

#### **4.0 CONCLUSIONS**

We have considered the arguments in Mr. Griset's and Big Spring ID's petitions for reconsideration. We conclude that these arguments are not valid, and that we therefore should deny both petitions.

#### **ORDER**

**IT IS HEREBY ORDERED** that:

1. The Board denies Stephen Griset's and Big Springs Irrigation District's petitions for reconsideration of Order WR 2023-0009.

2. If Stephen Griset advises the Clerk of the Board in writing within 10 days after the date on which the Board adopted this order that Mr. Griset is withdrawing the conditions listed on pages 8-10 of his petition for reconsideration, then the Division's Enforcement Section shall cash Mr. Griset's \$12,000 check and treat term 1.a. on page 34 of Order WR 2023-0009 as satisfied. If Mr. Griset does not so advise the Clerk of the Board in writing within 10 days of the date on which the Board adopted this order, then the Division's Enforcement Section shall return Mr. Griset's check to him, and shall proceed under the provisions of term 1.a. on page 34 of Order WR 2023-0009 that apply if Mr. Griset does not make the \$12,000 payment required by this term.

### **CERTIFICATION**

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 18, 2023

AYE:

NAY:

ABSENT:

ABSTAIN:

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Courtney Tyler  
Clerk to the Board