

May 8, 2006

Attn: Song Her, Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814



RE: Comment Letter - Sediment and Temperature TMDL in Scott River Watershed

This comment is being made in my single capacity as an individual County Supervisor for District 5. It is my understanding that the State Water Resources Control Board will be addressing the issues of flows and time lines for the Scott River TMDL at its June 7 meeting. These comments pertain to the discussion on flows.

FLows:

(1) At its April meeting, the State Water Resources Control Board referred to Judge Robie's decision in the recent State Water Resources Control Board Cases [CO44714 CA Court of Appeals -Third Appellate District] in regards to the Board's capacity to modify water use rights to provide for flows to meet water quality objectives. I submit that the Robie decision has very limited application to the Scott River.

- Page 13 of the Robie decision cites two cases supporting the state's right to impose conditions on the control, appropriation, use or distribution of water in a federal reclamation project. This would not apply to the Scott River, where there is no federal reclamation project.
- Page 165 of the Robie decision discusses the application of the Public Trust Doctrine. [The public trust doctrine recognizes that "the sovereign owns 'all of its navigable waterways and lands lying beneath them 'as trustee of a public trust for the benefit of the people.'" (National Audubon Society v. Superior Court (1983) 33 Cal.3d 419,434.) "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." (Id. At p. 446) The protection of recreational and ecological values "is among the purposes of the public trust" (Id. at p. 435.)]

The Scott River is not a navigable river. The underlying bed and banks of the Scott are the vested property of adjacent land owners. The state has no

ownership interest in them to which the public trust, as articulated in the Robie case, applies. [See California Codes – Harbors and navigation Code Section 100-107.)

- Pages 17, 23, 31, 32 of the decision refer to the Board's ability to modify existing CVP and SWP permits in order to implement water quality objectives. Page 32-33 refers to the Board's intent to initiate a water rights proceeding following adoption of the water quality control plan that would "address the water supply related objectives in this plan through the amendment of water rights under the authority of the [Board]." "[T]he water right decision ... will allocate responsibility for meeting the objectives among water rights holders in the Bay-Delta Estuary watershed and establish terms and conditions in appropriative water rights." "These flows will be considered by the [Board] in its allocation of responsibility among the water rights holders in the watershed during the water rights proceeding."

Page 48 and 100 of the decision refer to the 1914 Water Commission Act which provided the current process where application for an appropriative right to "surplus water" is now made to the Commission/Board. (California Water Code under Section 1202 defined "surplus" or unappropriated waters.) The Board shall allow the appropriation for beneficial purposes "under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated."

- The 1911 California Statute declaring water the "property of the people" was held to apply only to "surplus water" - water available for use over and above that which was already private property vested as a private riparian right, previously vested appropriative right, or as a federally "reserved" riparian right. These surplus waters were held to be "public waters," the use of which was to be granted by revocable license and subject to regulation by the State as a privilege. [Palmer v. Railroad Commission, (167 Calif. 138 Pac. 997, 1914) the Court ruled that this declaration was not and could not be retroactive and could not operate to divest private property rights already vested at the time it was enacted. The only effect it could have would be as a dedication to the general public use of any riparian rights which the State at the time it was enacted might still have retained by virtue of its ownership of lands bordering upon a stream. San Bernardino v. Riverside (186 Calif. 7, 29-30, 198 Pac. 784, 1921) the court specifically stated that the 1911 amendment did not apply to private water use rights already vested; "Taken literally, this would include all the water in the state privately owned and that pertaining to the lands of the United States, as well as that owned by the state. It should not require discussion or authority to demonstrate that the state cannot in this manner take

private property for public use...The constitution expressly forbids it..."; People v. Shirokow, 1980, 162 Cal.Rptr. 30; 26 Cal.3d 301 "The rights not subject to the statutory appropriation procedures are narrowly circumscribed by the exception clause of the statute and include only riparian rights and those which have been" otherwise appropriated prior to December 19, 1914, the effective date of the statute."

- Although there are some permitted water use rights on the Scott River, (34 permits and 41 licenses,) the majority are vested pre-1914 appropriative and riparian water use rights, which are a right of property and not a license or permit to which conditions may be later added through a Board water rights proceeding. Permitted and license rights are held to be inferior to all other rights except surplus rights.

- A "vested" right is a covenant that cannot be resumed, annulled or later modified by the grantor through legislation or otherwise. (A right vested, cannot be divested. Cited, 2 Dall. 297, 304; 9 Cranch 52; Green v. Biddle, 8 Wheat. 1; Fletcher v. Peck, 6 Cranch 136.)

- Water use rights of the Scott River were Adjudicated [Scott River Adjudication decree No. 30662 of the Superior Court of Siskiyou County was entered on January 30, 1980.] The Superior Court of Siskiyou County has retained continuing jurisdiction "of parties of the proceedings, and of the subject matter hereof, and upon application of any party hereto, or successor in interests thereto, or upon its own motion or the motion of the State Water Resources Control Board to review its decree and to change or modify the same as the interests of justice may require." The SWRCB would not conduct water rights proceedings.

- The adjudication identifies 40 tributaries or stream segments that are independent in respect to rights on other streams or segments. Rights to divert the natural flow of the mainstem Scott River are separated into 5 separate sections. Rights within each section may be exercised independently from those in another section but relative to the priority established for the section in which they lie.

Relativity of rights within a section are established by priority classes. Should available water be insufficient to satisfy all water use rights of any particular class, the available water shall be prorated as a correlative right with others of that class in that section

- The adjudication does not establish minimum instream flows for aquatic life. However, the U.S. Forest Service does have a junior reserved water right for instream fisheries and recreation flows downstream of Scott Valley, but the requirements are rarely met.

(2) The majority of water use rights in the Scott are vested property rights. Any regulation of the use of those rights would fall under the "police powers." The Supreme Court has established three requirements or "tests" for regulations.

- The first is proximate cause – This means that an activity must produce a foreseeable risk of injury, (in this case pollution,) and that the injury (pollution) must be caused directly by the activity. (Sweet Home at 2412 n.9)
- The second is "essential nexus" – This means that there must be a necessary nexus or connection between conditions of use imposed by the regulation and actual amelioration or elimination of the aspects of the use that are considered injurious (pollution.) (Nollan v. California Coastal Commission.)
- The third is "rough proportionality" – This means that the degree of "exactions" imposed by permit conditions must bear a proportional relationship to the projected impact of the activity. (Dolan v. City of Tigard.)

The Staff Report for the Action Plan for the Scott River Watershed Sediment and Temperature Total Maximum Daily Loads states that: "The primary human-caused factor affecting stream temperatures in the Scott River watershed is increased solar radiation resulting from reductions of shade provided by riparian vegetation." (Chapter 4, Pg. 1) The report goes on to indicate that "Diversion of surface water lead to relatively small temperature impacts in the mainstem Scott River, but have the potential to affect temperatures in smaller tributaries, where the volume diverted is large relative to the total flow." (Pg. 2) "The results of the surface diversion analysis indicate that reduction of surface diversions from the Scott River would result in modest temperature decreases, relative to the groundwater and vegetation scenarios." (Chap. 4 Pg. 26.)

It would appear that regulation to increase flow in the mainstem Scott River would not be supported by the evidence. Regulation simply to produce an increase in "flows" would not satisfy the three established tests.

(3) The Porter-Cologne Water Quality Control Act, Chapter I, 13141. California Water Plan states:

"However, prior to implementation of any agricultural water quality control program, an estimate of the total cost of such a program, together with an identification of potential sources of financing, shall be indicated in any regional water quality control plan."

Also, Article 3. Regional water quality control plans states:

13241, Water quality objectives

Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

- (a) Past, present, and probable future beneficial uses of water.
- (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.
- (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.
- (d) Economic considerations.
- (e) The need for developing housing within the region.
- (f) The need to develop and use recycled water.

The current Economic Impact Analysis in the EIR fails to examine the social and economic impacts of any new significant constraints on the continued ability of agriculturalists to divert irrigation water for farming and ranching that the Board may impose. In fact, the document assumes that there will be no new regulatory impact and, therefore, no economic impact.

Staff Report for the Action Plan for the Scott River Watershed Sediment and Temperature Total Maximum Daily Loads Chapter 5 states that "no new burdens are imposed on dischargers. The Plan is geared toward using ongoing efforts and existing regulatory standards and enforcement tools more effectively than in the past, using available watershed-specific information and applicable science to inform those efforts."

Agriculture drives the economy of Siskiyou County with gross ag receipts in 2004 totaling \$130,390,000. Tourism contributes about \$53.5 million and timber \$51.5 million. There is little to no industry. Scott Valley is a primary agricultural area. Based on the number of acres farmed and crop types, a rough estimate of one third of the total farm sales arises from Scott valley, \$43,463,000.

Reduction of irrigation could result in the removal of land from agricultural production and open space. This would have a corresponding economic impact on Siskiyou County.

Thank you for the opportunity to comment.

Sincerely,

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COUNTY OF SISKIYOU

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May 9, 2006

6/7/06 Bd Mtg: Scott River-
Item _ Deadline 5/10/06



Attn: Song Her, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812 0100

RE: Comment Letter - Sediment and Temperature TMDL in Scott River Watershed

Dear Board Members;

It is our understanding that the State Water Resources Control Board will be addressing the issues of flow options and Action Plan time lines for the Scott River Sediment and Temperature TMDL at its June 7 meeting. These comments pertain to that discussion.

GROUNDWATER

Scott River Adjudication

- As noted in the Staff Report for the Action Plan for the Scott River Watershed Sediment and Temperature Total Maximum Daily Loads Chapter 4, Page 6: "The Scott River Adjudication was the first in California to recognize the linkage between groundwater and surface water. In fact, new legislation was required (resulting in water code section 2500.5) to allow ground water resources to be included in the adjudication."

The Scott River Adjudication decree No. 30662 of the Superior Court of Siskiyou County was entered on January 30, 1980. The Superior Court of Siskiyou County has retained continuing jurisdiction "of parties of the proceedings, and of the subject matter hereof, and upon application of any party hereto, or successor in interests thereto, or upon its own motion or the motion of the State Water Resources Control Board to review its decree and to change or modify the same as the interests of justice may require."

Chap 4. Pg. 7: "The interconnected zone is defined in the adjudication as follows (Superior Court of Siskiyou County, 1980):"

'Interconnected ground water means all ground water so closely and freely connected with the surface flow of the Scott River that any extraction of such ground water causes a reduction in the surface flow in the Scott River prior to the end of a current irrigation season.' [State Water Resources Control Board map shows zone from the confluence of Clarks Creek and the Scott River to Meamber Bridge - mainstem only.]

Chap. 4 Pg. 7: "The Scott River Adjudication allows for irrigators to switch from surface water to interconnected ground water, provided that any new wells are located at least 500 feet from the Scott River, or at the most distant point from the river on the land that overlies the area of interconnected groundwater, whichever is less. The only restriction placed on the use of interconnected groundwater is that the water pumped shall be used for irrigation of crops overlying the 'Scott River ground water basin' in amounts reasonable for the acreage irrigated. The adjudication does not address groundwater use outside the interconnected zone."

County Groundwater Jurisdiction

- Siskiyou County has jurisdiction over groundwater resources not specifically adjudicated in Scott Valley by virtue of its police powers. The decision in Baldwin v. County of Tehama (1994) 31 Cal.App.4th 166, 36 Cal.Rptr.2d 886 explored the issue of State preemption of the field precluding County regulation of groundwater. The court cites In re Maas (1933) 219 Cal. 422-425 [27 P.2d 373,] where the right of Orange County to use groundwater to flood land for hunting by duck clubs was upheld, denying claims the ordinance was an invasion of the police power of the state. The case stated two requirements for the exercise of County police powers:

1. That the exercise was a legitimate exercise of the police powers; and
2. That the ordinance did not conflict with general laws of the State.

In Baldwin, the Court stated that when determining whether State law preempted local regulation, "it must be shown that the general law directly or impliedly 'covers' the whole of the claimed field of regulation." ... "The criteria for such an implication have been articulated as follows. "[W]e may infer an intent to preempt [the field] only if " (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; [or] (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action" [Galvan v. Superior Court (1969)] 70 Cal.2d [851] at pp. 859-860 [76 Cal.Rptr. 642, 452 P.2d 930], quoting [In re] Hubbard [(1964)] 62 Cal.2d [119] at p. 128 [41 Cal.Rptr. 393, 396 P.2d 809]; see also [citations]; cf. Rossmann & Steel, Forging the New Water Law: Public Regulation of "Proprietary" Groundwater Rights (1982) 33 Hastings L.J. 903, 937-942.)" (Fisher v. City of Berkeley (1984) 37 Cal.3d 644, 708 [209 Cal.Rptr. 682, 693 P.2d 261].)"

The Court in Baldwin further stated : "Even in matters of state-wide concern ..., the city or county has police power equal to that of the state so long as the local regulations do not conflict with general laws." (Chavez v. Sargent (1959) 52 Cal.2d 162, 176 [339 P.2d 801], citations omitted.) fn. 4 Nor do

the references to "the State," a phrase which may include counties. (See, e.g., Cal. Const. art. XI, § 1, subd. (a) ["The State is divided into counties which are legal subdivisions of the State."].)

- Siskiyou County has declared its intent to regulate groundwater management under County Code Title 3. Public Safety, Chapter 3: Groundwater Management

According to the Staff Report for the Action Plan for the Scott River Watershed Sediment and Temperature Total Maximum Daily Loads Chap 4 Pg. 7: "The aquifer characteristics and groundwater-surface water dynamics of Scott Valley are poorly understood. The degree to which water use affects groundwater accretion cannot be determined from the available information." Chap 4. Pgs. 23-24: "Unfortunately, the Scott Valley groundwater resource has not been well studied. It is not possible to evaluate the degree to which ground water pumping has affected the rate of groundwater accretion at this time."

Implementation of Action Plan for Water Use-Groundwater

There has been significant progress to increase community involvement and understanding of groundwater studies and monitoring by beginning a collaborative effort and by learning from Glenn County's process. Siskiyou County has continued and will continue to increase community support and information needed to move forward on this issue.

TMDL Action Plan Dec. 2005	Action to Date May 2, 2006
The Regional Water Board requests the County, in cooperation with other appropriate stakeholders, to study the connection between groundwater and surface water, the impacts of groundwater use on surface flow and beneficial uses, and the impacts of groundwater levels on the health of riparian vegetation in the Scott River watershed...	The Siskiyou County Board of Supervisors has given its blessing to a local Community Groundwater Measuring Program (CGMP) in Scott Valley – a collaborative effort of the Scott River Watershed Council, Natural Resource Conservation Service (NRCS) U.C.Cooperative Extension. – Davis, Siskiyou County, and the Siskiyou RCD.
Should the County determine that it and its stakeholders are able to commit to conducting the above study, the County, in cooperation with other stakeholders, shall develop a study plan by 1 year from date of EPA approval. The study plan shall include:	Community meetings held in the Fall of 2005 and Winter 2006 helped develop support for the Groundwater Measuring Program. Regional Board staff was notified of these meetings and those of the Groundwater Subcommittee of the Scott River Watershed Council, but did not attend. Monitoring began April 2006 on the 35 volunteered wells, with 2 months of sampling collected to date.

1) goals and objectives	1) These are described in the CGMP materials.
2) data collection methods	2) A Handbook has been completed describing sampling procedures, as prepared by the technical staff of NRCS.
3) general locations of data collection sites	3) Over 30 landowners volunteered their wells throughout the Valley, including the interconnected groundwater zone. These wells are in addition to the 7 wells currently monitored semi-annually by DWR.
4) data analysis methods	4) UCCE's Groundwater Program (Dr. Thomas Harter) will be handling the data analysis, based on requests from the community.
5) quality control and quality assurance protocols	5) The Handbook describes these protocols.
6) responsible parties	An MOU has been prepared describing the relative roles of each of the five parties.
7) timelines and due dates for data collection, data analysis, and reporting	7) Wells are monitored monthly throughout the year. (4 will be monitored semi-annually.)
8) financial resources to be used	8) For 2006-07, funds from the US Fish and Wildlife Service are being used.
9) provisions for adaptive change to the study plan and to the study based on additional study data and results, as they are available.	9) The Watershed Council's Groundwater Subcommittee and the Groundwater Oversight Committee, working with NRCS staff, will review the program's approach and make recommendations for change.

COUNTY ROADS

The Scott River TMDL Action Plan specifies that the Regional Water Board and the County shall work together to draft and finalize a Memorandum of Understanding (MOU) to address county roads in the Scott River watershed. The MOU shall be drafted and ready for consideration by the appropriate decision-making body(ies) of the County by 2 years from the date of U.S. EPA approval. The Plan itemizes 6 actions to be addressed during MOU development, although significant progress has already been made.

TMDL Action Plan Dec. 2005	Action to Date May 2, 2006
1. A date for the initiation and completion of an inventory of all sediment waste discharge sites caused by county roads within the Scott River watershed, which can be done with assistance from the Five Counties Salmonid Conservation Program	The County has acted in good faith by applying for and receiving a grant from the Department of Fish and Game through the Five Counties Program for road inventory work in the Scott River watershed. Work is scheduled to commence this year and a final project report is scheduled for completion by April 2008.
2. A date for the completion of a priority list of sediment waste discharge sites.	The priority list should be a part of this final report by April 2008.
3. A date for the completion of a schedule for the repair and control of sediment waste discharge sites.	Achieving such a schedule is dependent upon adequate funding, which is becoming increasingly challenging (see below). Priority sites will be targeted as well as possible, with the available funding. A 40 year timetable, as stated in the Action Plan, may be achievable, depending upon funding.
4. A date for the completion of a document describing the sediment control practices to be implemented by the County to repair and control sediment waste discharge sites, which can be done with assistance from the Five Counties Salmonid Conservation Program.	The County Dept. of Public Works actively worked on the development of the Five Counties' Road Maintenance Manual for Water Quality and Stream Habitat Protection, completed in 2002. This guide describes Best Management Practices (BMPs) for sediment control. The Director of Public Works continues to direct his staff to follow the Manual.
5. A description of the sediment control practices, maintenance practices, and other management measures to be implemented by the County to prevent future sediment waste discharges, which can be done with assistance from the Five Counties Salmonid Conservation Program.	The Five Counties' Road Maintenance Manual for Water Quality and Stream Habitat Protection includes BMPs that address existing and potential erosion.
6. A monitoring plan to ensure that the sediment control practices are implemented as proposed and effective at controlling discharges of sediment waste.	County Road crews have been trained, and continue to be trained, in the Manual's implementation. Implementation and Effectiveness Monitoring are addressed in Chapter 10 of the Manual, which serves as a monitoring plan.

Financial Barriers for County Road Improvements

Siskiyou County will need to work with the Regional Board to overcome immediate financial barriers in regard to repair and control of the sites.

Currently, annual revenue to operate our road budget is received as follows:

- (a) \$4 million from the Secure Rural Schools and Communities Self Determination Act
- (b) \$735,000 from TEA 21 Federal Exchange/State Match
- (c) \$750,000 from Prop. 42
- (d) \$3.4 million from gas taxes
- (e) Total current operating revenue is \$8,885,000

Item (a) the Secure Rural Schools and Communities Act money is scheduled to sunset this year. If not reauthorized, revenues would revert to the 25% timber receipt formula established for federal lands. That is estimated currently to be at the level of about \$250,000 per year.

- (b) TEA 21 funds are estimated to increase \$1,100,000
 - (c) Prop. 42 funds may go to \$1,500,000;
 - (d) Gas taxes should stay the same \$3.4 million or decrease.
 - (e) Total post Secure Schools revenue is estimated at \$6,250,000
- This is an annual revenue loss of \$2,635,000

There are 1,364 miles of roadways and 175 bridges in the County Road System - of these are 556 miles of roads are unpaved. Currently, 65% of the Road Department budget goes to salaries (82 employees,) 25% to overhead and/or fixed operational costs, and 10% to materials - asphalt, oil, gravel, etc. for maintenance of roads. (Materials expenditures are currently less than \$1 million per annum or \$750 a mile.) The cost of materials continues to escalate.

To illustrate the severe impact of the \$2,635,000 revenue loss, it is equivalent to laying off 40 employees.

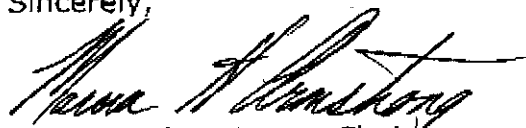
Siskiyou County will continue to use its best efforts to secure adequate funding and resources to accomplish action plan items according to the schedule or as soon as is reasonably possible.

GRADING

TMDL Action Plan Dec. 2005	Action to Date May 2, 2006
The Regional Water Board encourages the County to develop and adopt a comprehensive ordinance addressing roads, land disturbance activities, and grading activities outside of subdivisions in the Scott River watershed, or an equivalent County-enforceable mechanism, by 2 years from the date of USEPA approval. The ordinance may be specific to the Scott River watershed or county-wide in scope.	The County Department of Public Works and the Planning Department are working on a Land Development Ordinance. Jones and Stokes has been hired as a consultant and a draft should be ready for public review shortly (at latest by summer 2006.)

We believe that no changes to the Basin Plan Language/Action Plan and Scott River TMDL as recommended by the North Coast Regional Board are warranted. Siskiyou County believes that local cooperative efforts have been shown to be the most effective way to satisfy water quality and coho salmon recovery and permitting requirements in the Scott River Watershed.

Sincerely,



Marcia H. Armstrong, Chair
Siskiyou County Board of Supervisors

Cc: Catherine Kuhlman, Executive Officer, NCRWQCB
Siskiyou Resource Conservation District
Natural Resource Conservation Service
Scott River Watershed Council
University of California Cooperative Extension