

Establishment of Minimum Instream Flow Requirements, Curtailment Authority, and Information Order Authority in the Klamath Watershed

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In Title 23, Division 3, Chapter 2, add Article 23.5, Sections 875, 875.1, 875.2, 875.3, 875.4, 875.5, 875.6, 875.7, 875.8 and 875.9 to read:

Article 23.5. Klamath River Watershed Drought Emergency Requirements

§ 875 Emergency Curtailment Where Insufficient Flows are Available to Protect Fish in Certain Watersheds

- (a) To prevent the diversion of water that would unreasonably interfere with an emergency minimum level of protection for commercially and culturally significant fall-run Chinook salmon and threatened Southern Oregon/Northern California Coast coho salmon, surface water and groundwater shall not be diverted from the watersheds listed below at a diversion point or for the benefit of a place of use that is subject to a curtailment order, during the effective period of the curtailment order under this article, except as provided under sections 875.1, 875.2, or 875.3.

- (b) The Deputy Director for the Division of Water Rights (Deputy Director) may issue a curtailment order upon a determination that without curtailment of diversions, flows are likely to be reduced below the drought emergency minimum flows specified in subdivision (c), within the constraints detailed in this article. Curtailment orders shall be effective the day after issuance. Where flows are sufficient to support some but not all diversions, curtailment orders shall be issued, suspended, reinstated, and rescinded in order of water right priority provided in section 875.5. In determining which diversions should be subject to curtailment, the Deputy Director shall consider the need to provide reasonable assurance that the drought emergency minimum flows will be met. If maintaining the flows described in subdivision (c) would require curtailment of uses described in section 875.2 or 875.3, then the Executive Director may determine whether or not those diversions should be allowed to continue based on the most current information available regarding fish populations, health and safety needs, livestock needs, and the alternatives available to protect both public health and safety, livestock, and fish populations.

- (c) Drought Emergency Minimum Flows are as specified below.
 - (1) Scott River. The Scott River enters the Klamath River at United States Geological Survey River Mile 145.1.

(A) As measured in cubic feet per second at United States Geological Survey gage 11519500 located downstream of the city of Fort Jones at the northern end of Scott Valley (Scott River Mile 21):

<u>Jan</u>	<u>Feb</u>	<u>Mar</u>	<u>Apr</u>	<u>May</u>	<u>June</u>	<u>July</u>	<u>Aug</u>	<u>Sept</u>	<u>Oct</u>	<u>Nov</u>	<u>Dec</u>
<u>200</u>	<u>200</u>	<u>200</u>	<u>150</u>	<u>150</u>	<u>125</u>	<u>50</u>	<u>30</u>	<u>33</u>	<u>40</u>	<u>60</u>	<u>150</u>

(B) The California Department of Fish and Wildlife or the National Marine Fisheries Service may notify the Deputy Director that the pertinent life stage(s) of the pertinent species the flows are crafted to protect is not yet, or is no longer present at the time anticipated, or the California Department of Fish and Wildlife, after coordination with the National Marine Fisheries Service, may notify the Deputy Director that lower, alternative flows at the Fort Jones gage, or alternative flows at a different point or points in the watershed, provide equal or better protection for the pertinent species' relevant life stages. Using this information, as well as other information that could affect the need for curtailments to meet minimum flow needs for fisheries purposes, including weather forecasting, the need for flows to ramp up or down, the contributions of voluntary flow measures, and future flow needs, the Deputy Director may determine not to issue curtailment orders, to issue curtailment orders to a smaller priority grouping described in section 875.5, or to suspend curtailment orders already issued in order of priority as described in section 875.5, as applicable.

(2) Shasta River. The Shasta River enters the Klamath River at United States Geological Survey River Mile 179.5, at the junction of State Routes 263 and 96.

(A) As measured in cubic feet per second at United States Geological Survey gage 11517500 located near Yreka:

<u>Jan</u>	<u>Feb</u>	<u>Mar</u>	<u>Apr</u>	<u>May</u>	<u>June</u>	<u>July</u>	<u>Aug</u>	<u>Sept</u>	<u>Oct</u>	<u>Nov</u>	<u>Dec</u>
<u>135</u>	<u>135</u>	<u>135</u>	<u>70</u>	<u>50</u>	<u>50</u>	<u>50</u>	<u>50</u>	<u>50</u>	<u>125</u>	<u>150</u>	<u>150</u>

(B) The California Department of Fish and Wildlife or the National Marine Fisheries Service may notify the Deputy Director that the pertinent life stage(s) of the pertinent species the flows are crafted to protect is not yet, or is no longer present at the time anticipated, or the California Department of Fish and Wildlife, after coordination with the National Marine Fisheries Service, may notify the Deputy Director that lower alternative flows at the Yreka gage, or alternative flows at a different point or points in the watershed,

provide equal or better protection for the pertinent species' relevant life stages. Using this information, as well as other information that could affect the need for curtailments to meet minimum flow needs for fisheries purposes, including weather forecasting, the need for flows to ramp up or down, the contributions of voluntary flow measures, and future flow needs, the Deputy Director may determine not to issue curtailment orders, to issue curtailment orders to a smaller priority grouping described in section 875.5, or to suspend curtailment orders already issued in order of priority as described in section 875.5, as applicable.

- (3) Compliance with the drought emergency minimum flows will be determined by the Deputy Director.
- (d)
- (1) Initial curtailment orders will be sent to each water right holder, agent of record on file with the Division of Water Rights, or landowner, as applicable. The water right holder, agent of record on file with the Division of Water Rights, or landowner is responsible for immediately providing notice of the curtailment order(s) to all diverters exercising the water right(s) covered by the curtailment order(s).
 - (2) The State Water Board has established the "Scott-Shasta Drought" email subscription and distribution list that water right holders, landowners, and other parties may join to receive drought-related notices and updates regarding curtailments in the Scott River and Shasta River watersheds. Notice provided by email or by posting on the State Water Board's drought web page shall be sufficient for all purposes related to drought notices and updates regarding curtailment orders. The State Water Board's drought web page is:
https://www.waterboards.ca.gov/drought/scott_shasta_rivers/
- (e) Suspension, reinstatement, or rescission of curtailment orders shall be announced using the email subscription and distribution list and web page described in subdivision (d)(2).
- (f)
- (1) Local cooperative solutions by individuals or groups may be proposed by petition to the Deputy Director as an alternative means of reducing water use to meet or preserve drought emergency minimum flows, or to provide other fishery benefits (such as cold-water refugia, localized fish passage, or redd protection), in lieu of curtailment as described in this section.
 - (A) Petitions to implement local cooperative solutions that coordinate diversions, share water, strategically manage groundwater and/or surface water for fisheries benefits, reduce annual water use, or

engage in similar activities may be submitted to the Deputy Director at any time.

- (B) The Division of Water Rights and the Executive Director may coordinate with the California Department of Fish and Wildlife, National Marine Fisheries Service, the Scott River and Shasta River Watermaster District, the developers of any model or other information used as part of the petition, and others in evaluating local cooperative solutions.
 - (C) After approval of a petition, the Deputy Director shall not issue curtailment orders or shall suspend, rescind or modify, as applicable, such orders already issued, affecting those rights relevant to the proposed cooperative solution so long as the Deputy Director finds that any continued diversions under the local cooperative solution are reasonable and do not result in unreasonable harm to other legal users of water.
 - (D) Deputy Director approval of a petition for cooperative solution may be subject to appropriate conditions, including monitoring and reporting requirements, to assure that no unreasonable injury to users of water will occur and that the terms of the petition or the associated underlying binding agreement will be met.
 - (E) The Deputy Director may rescind approval of a cooperative solution and issue or reinstate curtailment orders for the relevant water rights in the order described in section 875.5, notwithstanding approval of the cooperative solution, if monitoring or other reliable information indicates that parties are not meeting their obligations under the cooperative solution or the agreement is not providing the benefits to anadromous fish outlined in the cooperative solution, or based on an objection filed under (f)(2).
- (2) Diversions covered by an agreement approved by the Deputy Director pursuant to this section are subject to this article and violations of such an approved agreement shall be subject to enforcement as a violation of this article. Notice of petitions and decisions under this section will be posted as soon as practicable on the State Water Board's drought webpage. The Deputy Director may issue a decision under this article prior to providing such notice. Any interested person may file an objection to the petition or decision. The objection shall indicate the manner of service upon the petitioner. The State Board will consider any objection, and may hold a hearing thereon, after notice to all interested persons.
- (3) The Division of Water Rights, California Department of Fish and Wildlife, or National Marine Fisheries Service may install and maintain additional

gages in the Scott River and Shasta River watersheds, and may evaluate compliance with the flow requirements defined in subdivisions (c)(1) and (c)(2) on a watershed or tributary scale using these gages, as needed. Diverters may also request to install and maintain a gage to support new flow requirement compliance points by submitting a written request with supporting data and information to the Deputy Director for approval.

(4) The Deputy Director may approve a petition to implement cooperative solutions under this article as follows:

(A) For watershed-wide cooperative solutions: The Executive Director determines that a watershed-wide cooperative solution will provide sufficient assurance that the flows in subdivision (c)(1) or (c)(2) are achieved for a specific time period, considering the amount of flow anticipated and the level of assurance that flows made available by agreements will be protected.

(B) For tributary-wide cooperative solutions: Regardless of whether the flows identified in subdivision (c)(1) and (c)(2) are being met, the Deputy Director may approve the petition submitted under this article if either:

(i) Sufficient information allows the Deputy Director to identify the appropriate contribution of the tributary to the flows identified in subdivision (c)(1) or (c)(2), and the Executive Director makes a finding that a local cooperative solution is sufficient to provide the pro-rata flow for that tributary; or

(ii) The California Department of Fish and Wildlife finds that the in-tributary benefits for anadromous fish are equal to or greater than the anticipated contribution to protections provided by the flows in subdivision (c)(1) or (c)(2).

(C) For individual cooperative solutions: In the absence of watershed-wide or tributary-specific cooperative solutions, the Deputy Director may approve a petition submitted under this article:

(i) Where the watershed-wide flows in subdivision (c)(1) and (c)(2) and tributary-specific pro-rata flows established by the Deputy Director cannot be guaranteed, and there is a binding agreement under which water users have agreed to cease diversions in a specific timeframe. Such binding agreement may be made with a coordinating entity with the expertise and the ability to evaluate and require performance of the agreement, for example with the California Department of Fish and Wildlife, the National Marine

Fisheries Service, the Scott Valley and Shasta Valley Watermaster District, a non-profit organization with expertise and experience in water-saving transactions, or similar qualified entity. Where the diverter or coordinating entity submits a petition under this subdivision that includes a certification that diversion under a specified right has ceased for a certain time period, the Deputy Director shall approve the petition unless there is evidence that the diversion is nonetheless occurring.

- (ii) Where an individual diverter or sub-tributary group of diverters has entered into a binding agreement with the California Department of Fish and Wildlife or the National Marine Fisheries Service to perform actions for the benefit of anadromous salmonids, and the California Department of Fish and Wildlife makes a recommendation for an exemption to curtailment based on an assessment that the benefits of the actions to anadromous fish in a specific time period are equal to or greater than the protections provided by their contribution to flow described in section 875, subdivision (c)(1) and (c)(2) for that time period.

(D) For overlying or adjudicated groundwater diversions for irrigated agriculture described under in section 875.5, subdivision (a)(1)(A)(ix) [Scott River] or section 875.5, subdivision (b)(1)(C) [Shasta River] the Deputy Director may approve a groundwater-basin-wide, groundwater-sub-basin-wide, or any number of individual local cooperative solutions totaling at least 400 irrigated acres where:

- (i) The proposal is based on a binding agreement. Such binding agreement may be made with a coordinating entity with the expertise and the ability to evaluate and require performance of the agreement, for example with the California Department of Fish and Wildlife, the National Marine Fisheries Service, the Scott Valley and Shasta Valley Watermaster District, a non-profit organization with expertise and experience in water-saving transactions, or similar qualified entity.
- (ii) For the Scott River: The proposal provides at least:
 1. A net reduction of water use of 30 percent throughout the irrigation season (April 1 – October 31), as compared to the prior irrigation season; and

2. A monthly reduction of 30 percent in the July 1 through October 31 time period, as compared to the prior year or to 2020.

(iii) For the Shasta River: The proposal provides at least:

1. A net reduction of water use of 15 percent throughout the irrigation season (March 1 – November 1), as compared to the prior irrigation season; and
2. A monthly reduction of 15 percent in the June 1 through
3. September 30 time period, as compared to the prior year or to 2020.

Such reduction may be demonstrated by evidence that provides a reasonable assurance that the change in farming practice or other action results in at least the relevant proportionate reduction. Such evidence may include but is not limited to: pumping reports; actions that will be taken to reduce water use; estimation of water saved from conservation measures or changes in irrigation or planting decisions; and electric bills.

(E) Where a diverter receives a curtailment order for fewer water rights than are used on his or her property, the Deputy Director may approve a petition for a comparable reduction in use of a more senior right in favor of continuing diversion under the more junior right otherwise subject to curtailment under the following circumstances:

- (i) The change does not injure other legal users of water, including by reducing the contribution to flows described in subdivision (c) that other users would rely on;
- (ii) The change does not result in an increased consumptive use of water; and
- (iii) The change does not result in elevation of water temperatures above that which would occur from curtailing the original source.

The petition must provide reliable evidence sufficient to support these findings.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art X, Sec. 2; Sections 100, 104, 105, 109, 186, 275, 1011, 1011.5, 1051.1, 1058.5, 5106, Water Code; Environmental Defense Fund v. East Bay Muni. Util. Dist. (1980) 26 Cal.3d 183; Light v. State Water Resources Control Board

{2014) 226 Cal.App.4th 1463; City of Barstow v. Mojave Water Agency (2000) 23 Cal.4th 1224; Stanford Vina Ranch Irrigation. Co v. State of California (2020) 50 Cal.App.5th 976.

§ 875.1 Non-Consumptive Uses

(a) Diversion and use described in this section under any valid basis of right may continue after issuance of a curtailment order under this article without further approval from the Deputy Director, subject to the conditions set forth in this section. Diversions described in this section may not be required to curtail in response to a curtailment order under this article if their diversion and use of water does not decrease downstream flows. Any diverter wishing to continue diversion under this subdivision must submit to the Deputy Director a certification, under penalty of perjury, which describes the non-consumptive use and explains, with supporting evidence, how the diversion and use do not decrease downstream flows in the applicable watershed. The Deputy Director may request additional information or disapprove any certification if the information provided is insufficient to support the statement or if more convincing evidence contradicts the claims. If a certification submitted pursuant to this section is disapproved, the diversions are subject to any curtailment order issued for that basis of right. This section applies to:

- (1) Direct surface diversions solely for hydropower if discharges are returned to the stream from which they are withdrawn, and water is not held in storage.
- (2) Direct surface water or groundwater diversions from the Scott River or Shasta River watersheds and groundwater basins dedicated to instream uses for the benefit of fish and wildlife pursuant to Water Code section 1707, including those diversions that divert water to a different location for subsequent release. This subsection only applies where the location of release is hydraulically connected to the Scott River watershed or Shasta River watershed from which it was withdrawn.
- (3) Direct surface water or groundwater diversions where the Deputy Director, the California Department of Fish and Wildlife, and the Executive Officer of the North Coast Regional Water Quality Control Board have approved a substitution of releases of either stored water or groundwater into the Scott River or Shasta River or a tributary thereof for the benefit of fish and wildlife such that there is not anticipated to be a measurable net decrease in stream flow as a result of the diversion at the confluence of the tributary with the mainstem of the Scott River or Shasta River, or the next downstream United States Geological Survey gage, as applicable. The release of water does not have to be conducted by the owner of the water right proposed for the continued diversions, provided an agreement

between the water right holder and the entity releasing the water is included in the proposal. The party proposing the substitution of releases shall provide documentation supporting no measurable decrease in stream flow is anticipated as a result of the release of water. The Deputy Director may require reporting and monitoring as part of any approval.

- (4) Other direct diversions solely for non-consumptive uses, if those diverters file with the Deputy Director a certification under penalty of perjury demonstrating that the diversion and use are non-consumptive and do not decrease downstream flows in the Scott River or Shasta River watersheds.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 187, 275, 348, Water Code

§ 875.2 Minimum Health and Safety Needs

- (a) Definition: For the purposes of this article, “minimum human health and safety needs” refer to the amount of water necessary for prevention of adverse impacts to human health and safety, for which there is no feasible alternate supply. “Minimum human health and safety needs” include:

- (1) Indoor domestic water uses including water for human consumption, cooking, or sanitation purposes. For the purposes of this article, water provided outdoors for human consumption, cooking, or sanitation purposes, including but not limited to facilities for unhoused persons or campgrounds, shall be regarded as indoor domestic water use. As necessary to provide for indoor domestic water use, water diverted for minimum human health and safety needs may include water hauling and bulk water deliveries, so long as the diverter maintains records of such deliveries and complies with the reporting requirements of section 875.6, and so long as such provision is consistent with a valid water right.
- (2) Water supplies necessary for energy sources that are critical to basic grid reliability, as identified by the California Independent System Operator, California Public Utilities Commission, California Energy Commission, or a similar energy grid reliability authority.
- (3) Water supplies necessary to prevent tree die-off that would contribute to fire risk to residences, and for maintenance of ponds or other water sources for fire fighting, in addition to water supplies identified by the California Department of Forestry and Fire Protection or another appropriate authority as regionally necessary for fire preparedness or post-fire recovery and reforestation efforts.

- (4) Water supplies identified by the California Air Resources Board, a local air quality management district, or other appropriate public agency with air quality expertise, as necessary to address critical air quality impacts to protect public health.
 - (5) Water supplies necessary to address immediate public health or safety threats, as determined by a public agency with health or safety expertise.
 - (6) Other water uses necessary for human health and safety which a state, local, tribal, or federal health, environmental, or safety agency has determined are critical to public health and safety or to the basic infrastructure of the state. Diverters wishing to continue diversions for these uses must identify the health and safety need, include approval or similar relevant documentation from the appropriate public agency, describe why the amount requested is critical for the need and cannot be met through alternate supplies, state how long the diversion is expected to continue, certify that the supply will be used only for the stated need, and describe steps taken and planned to obtain alternative supplies.
- (b) Diversions for human health and safety may be authorized to continue after receipt of a curtailment order as described in Article 24, section 878.1.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 100.5, 104, 105, 106.3, 275, 1058.5, Water Code; Environmental Defense Fund v. East Bay Muni. Util. Dist. (1980) 26 Cal.3d 183; Light v. State Water Resources Control Board (2014) 226 Cal.App.4th 1463; Stanford Vina Ranch Irrigation Co. v. State of California (2020) 50 Cal.App.5th 976.

§ 875.3 Minimum Diversions for Livestock Watering

- (a) Limited diversions for minimal stockwatering, through means that do not result in seepage losses, may be authorized to continue after receipt of a curtailment order as specified in this section. Such diversions may include, but are not limited to, pipes, wells, or lined ditches.
- (b) Limited stockwatering diversions may be authorized to continue after receipt of a curtailment order upon submission of self-certification to the Deputy Director, under penalty of perjury, that the diversion: (1) is necessary to provide adequate water to livestock, (2) is conveyed without seepage through a means specified in the certification, and (3) either, shall not, on average, exceed the reasonable livestock watering quantities set forth in Article 5, section 697 for livestock addressed in that section, or, for livestock not addressed in Article 5, section 697, shall not, on average, exceed the closest analogous livestock in Article 5, section 697 or a minimum water amount set forth in the certification with reference to supporting evidence regarding the particular livestock needs. The self-certification shall also include the number of livestock being provided with water,

diversion location, water source information, the anticipated daily amount diverted to provide water for livestock, and whether the water source is an alternate source used to comply with the emergency regulation. The Deputy Director may request additional information or disapprove any self-certification if the information provided is insufficient to support the statement or if more convincing evidence contradicts the claim(s). If a self-certification submitted pursuant to this section is disapproved, the diversions are subject to any applicable curtailment order issued for that basis of right.

- (c) Limited diversions may be temporarily increased to up to twice the amount in Article 5, section 697 to support minimum livestock water needs during an excessive heat warning at the location where the livestock are watered as declared by the National Weather Service. If minimum livestock water needs are temporarily increased beyond the quantities set forth in Article 5, section 697 due to an excessive heat warning, the affected livestock diverter shall submit a self-certification to the Deputy Director, under penalty of perjury, no later than five days from the onset of the excessive heat warning that the diversion: (1) is necessary to provide adequate water to livestock, (2) is conveyed without seepage through a means specified in the certification, and (3) shall not, on average, exceed up to twice the reasonable livestock watering quantities set forth in Article 5, section 697 or other amount in the prior-submitted certification under (b)(3) for the duration of the excessive heat warning. The self-certification shall also include the number of livestock being provided with water, diversion location, water source information, the anticipated daily amount diverted to provide water for livestock during the excessive heat warning, and whether the water source is an alternate source used to comply with the emergency regulation. The Deputy Director may request additional information or disapprove any self-certification if the information provided is insufficient to support the statement or if more convincing evidence contradicts the claim(s). If a self-certification submitted pursuant to this section is disapproved, the diversions are subject to any applicable curtailment order issued for that basis of right.
- (d) To the extent that a diversion for minimum livestock water needs requires more than the reasonable livestock watering quantities set forth in Article 5, section 697, the continued diversion of water after issuance of a curtailment order for the diversion requires submission of a petition demonstrating compliance with the requirements of subdivisions (d)(1)-(5), below, and approval by the Deputy Director. The Deputy Director may condition approval of the petition on implementation of additional conservation measures, monitoring, or reporting requirements. Any petition to continue diversion to meet minimum livestock watering needs greater than the reasonable livestock watering quantities set forth in Article 5, section 697 must:

- (1) Describe the specific circumstances that make the requested diversion amount necessary to meet minimum livestock watering needs, if a larger amount is sought.
- (2) Estimate the total amount of water needed.
- (3) Certify that the supply will be used only for the stated need.
- (4) Describe any other additional steps taken to reduce diversions and consumption.
- (5) Provide the timeframe in which the petitioner expects to reduce usage to no more than the reasonable livestock watering quantities specified in Article 5, section 697, or why minimum livestock needs will continue to require more water.

Authority: 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 100.5, 104, 105, 275, 1058.5, Water Code; Environmental Defense Fund v. East Bay Muni. Util. Dist. (1980) 26 Cal.3d 183; Light v. State Water Resources Control Board (2014) 226 Cal.App.4th 1463; Stanford Vina Ranch Irrigation Co. v. State of California (2020) 50 Cal.App.5th 976.

§ 875.4 Emergency Curtailments Due to Lack of Water Availability in the Klamath River Watershed

- (a) This section applies to water diversions in the California portions of the Klamath River watershed.
- (b) After the effective date of this regulation, when flows in the Klamath River watershed as a whole or in the individual tributaries to the Klamath River are insufficient to support all water rights, the Deputy Director may issue curtailment orders to water right holders, requiring the curtailment of water diversion and use, under the same procedures as set forth in section 875, subdivisions (d) and (e).
- (c) In determining the extent to which water is available under a diverter's priority of right, as set forth in section 875.5, for the purposes of issuing, suspending, reinstating, or rescinding curtailment orders, the Deputy Director shall consider:
 - (1) Monthly water right demand projections based on reliable relevant information, including but not limited to: reports of water diversion and use for permits and licenses; statements of water diversion and use; judicial determinations concerning water rights; State Water Board decisions and orders; and other information regarding water needs and use contained in the Division of Water Rights files;
 - (2) Water availability projections, based on best available information, including but not limited to, one or more of the following:
 - (A) Forecast estimates of precipitation and streamflow;

- (B) Historical periods of comparable conditions with respect to daily temperatures, precipitation, or surface flows;
 - (C) Stream gage data, where available; or
 - (D) Information in Division of Water Rights files on the extent to which flows are protected under Water Code section 1707.
- (3) The Deputy Director may also consider additional pertinent and reliable information when determining water right priorities, water availability, and demand projections, including hydrologic models (as applicable and available), water allocation models, available information on crop needs, well logs and related information, and demand projections provided in response to information orders or other sources.
- (4) Evaluation of available supplies against demands may be performed at a watershed-wide level, or at a smaller sub-watershed scale.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 100.5, 104, 105, 275, 1058.5, Water Code; National Audubon Society v. Superior Court (1983) 33 Cal.3d 419; Stanford Vina Ranch Irrigation Company v. California (2020) 50 Cal.App.5th 976.

§ 875.5 Priority for Curtailments in the Scott River and Shasta River Watersheds

(a) Scott River

(1) Regarding curtailment orders in the Scott River watershed:

- (A) Curtailment orders in the Scott River watershed to meet drought emergency minimum fisheries flows in the Scott River shall be issued taking into account water right priority, in groupings from lowest to highest priority, as follows:
- (i) All post-Scott River Adjudication appropriative water rights.
 - (ii) Surplus Class Rights in all schedules of the Scott River Adjudication.
 - (iii) All Post-1914 Appropriative water rights in the Scott River Adjudication, Shakleford Adjudication, and French Creek Adjudication, collectively.
 - (iv) Diversions in Schedule D4 of the Scott River Adjudication.
 - (v) Diversions in Schedule D3 of the Scott River Adjudication.
 - (vi) Diversions in Schedule D2 of the Scott River Adjudication.
 - (vii) Diversions in Schedule D1 of the Scott River Adjudication.
 - (viii) Diversions in French Creek Adjudication, the Shakleford Adjudication, and Schedule B of the Scott River Adjudication, collectively.

- (ix) Diversions in Schedule C of the Scott River Adjudication, and overlying groundwater diversions not described in the Scott River Adjudication.
- (B) Surface diversions from the Scott River, Big Slough, Etna Creek, or Kidder Creek and described in Scott River Adjudication Schedules D2, D3, D4, B18, B23, and B26 that have moved from surface water to groundwater diversions as permitted under Scott River Adjudication, Paragraph 44, will be curtailed in priority grouping (a)(1)(A)(ix), rather than under (a)(1)(A)(iv), (a)(1)(A)(v), (a)(1)(A)(vi), or (a)(1)(A)(viii).
- (C) Domestic and Livestock Water Uses during the non-irrigation season by diverters in Scott River Adjudication Schedules A, B, C, and D, under paragraph 36 shall follow the priority groups under (a)(1)(A)(iv) through (a)(1)(A)(viii), as applicable.
- (D) To the extent that curtailment of fewer than all diversions in the groupings listed in (a)(1)(A)(i) and (a)(1)(A)(iii) through (a)(1)(A)(viii) would reliably result in sufficient flow to meet drought emergency minimum fisheries flows, the Deputy Director shall maintain the authority to issue, suspend, reinstate, or rescind curtailment orders for partial groupings based on the priorities in the applicable adjudication or through the appropriate right priority date, as applicable. Any partial curtailment of groups (a)(1)(A)(ii) and (a)(1)(A)(ix) shall be correlative, except that the Deputy Director may issue curtailments to groundwater diverters in (a)(1)(A)(ix) first to diversions closest to surface waterbodies, or use other reliable information to determine which diversions have the highest potential impact on surface flows.
- (E) Diversions under Paragraph 39 of the Scott River Adjudication shall be curtailed with the group defined in (a)(1)(A) that corresponds to the schedule in which the diversion would be placed if the right were defined in the adjudication. If partial curtailment of the group is issued, suspended, reinstated, or rescinded under (a)(1)(D), these rights will be subordinated to the other rights in that schedule.
- (F) Diversions under paragraph 41 of the Scott River Adjudication shall be curtailed with the group defined in (a)(1)(A) that corresponds to the schedule in which the diversion would be placed if the right were defined in the adjudication. If partial curtailment of the group is issued, suspended, reinstated, or

rescinded under (a)(1)(D), these rights shall be treated as subordinate to first priority rights in the schedule, and senior to second priority rights in that schedule.

(G) Diversions under paragraph 42 of the Scott River Adjudication shall be curtailed with the group defined in (a)(1)(A) that corresponds to the schedule in which the diversion would be placed if the right were defined in the adjudication. If partial curtailment of the group is issued, suspended, reinstated, or rescinded under (a)(1)(D), these rights shall be treated as first priority rights compared to downstream rights in that schedule, and subordinate to all upstream rights in that schedule.

(H) Diversions under paragraph 43 of the Scott River Adjudication shall be curtailed with the group defined in (a)(1)(A) that corresponds to the schedule in which the diversion would be placed if the right were defined in the adjudication. If an order for partial curtailment of the group is issued, suspended, reinstated, or rescinded under (a)(1)(D), these rights shall be treated as first priority rights in that schedule.

(I) Diversions under paragraphs 49 and 61 of the Scott River Adjudication shall be curtailed with the group defined in (a)(1)(A)(viii). If an order for partial curtailment of the group is issued, suspended, reinstated, or rescinded under (a)(1)(D), these rights will be treated as first priority rights in the schedule for the appropriate tributary.

(2) Curtailment orders in the Scott River watershed for lack of water availability at a diverter's priority of right shall be issued:

(A) First to appropriative rights that were initiated after the relevant adjudication, in the Shackleford Creek watershed, the French Creek watershed, and the Scott River Stream System as defined in paragraph 2 of the Scott River Adjudication,

(B) Then in accordance with the priorities set forth in the Scott River, Shackleford Creek, and French Creek Adjudications, as applicable, and

(C) Then correlatively to unadjudicated overlying groundwater diversions.

(b) Shasta River

(1) Curtailment orders in the Shasta River Watershed to meet drought emergency minimum fisheries flows shall be issued taking into account

water right priority, in groupings from lowest to highest water right priority, as follows:

- (A) Appropriative diversions initiated after the Shasta Adjudication. Appropriative surface water diversions obtained after the Shasta Adjudication in priority of the issuance date specified in the permit or license by the State Water Board. Groundwater appropriations have a priority date from when the well was constructed and water first used. For the purposes of this article, an appropriative groundwater right is distinguished from an overlying groundwater right when the diverter: 1) does not own land overlying the basin, 2) owns overlying land but uses the water on non-overlying land, or 3) sells or distributes the water to another party.
- (B) Post-1914 and pre-1914 water rights under the priorities and quantities set forth in the Shasta Adjudication. Groundwater appropriations initiated prior to the Shasta Adjudication in priority of when the well was constructed and water first used.
- (C) Riparian diversions and overlying groundwater diversions. The Deputy Director may limit overlying groundwater curtailment orders to larger diversions or diversions with the highest potential impact on surface flows.
 - (i) If there is insufficient natural flow to furnish all rights of equal priority, then the available natural flow in excess of the minimum instream flow established in section 875, subdivision (c)(2) shall be distributed proportionally among the rights of the priority in question.
 - (ii) Water released from storage or bypassed pursuant to a Water Code section 1707 Order is not available to downstream users.

(c) Definitions: For the purposes of this section:

- (1) “Scott River Adjudication” shall refer to the Decree entered on January 30, 1980 in Siskiyou County Superior Court Case No. 30662, In the Matter of Determination of the Rights of the Various Claimants to the Waters of Scott River Stream System, Except Rights to Water of Shackelford Creek, French Creek, and all Streams Tributary to Scott River Downstream from the U.S. Geological Survey Gaging Station, in Siskiyou County, California, and all supplements thereto.
- (2) “Shakleford Adjudication” shall refer to the Decree entered on April 3, 1950 in Siskiyou County Superior Court Case No. 13775, In the Matter of the Determination of the Rights of the Various Claimants to the Waters of

Shakleford Creek and its Tributaries in Siskiyou County, California, and all supplements thereto.

- (3) “French Creek Adjudication” shall refer to the Judgement entered on July 1, 1959 in Siskiyou County Superior Court Case No. 14478, Mason v. Bemrod, and all supplements thereto.
- (4) “Shasta Adjudication” shall refer to the Judgement and Decree entered on December 29, 1932 in Siskiyou County Superior Court Case No. 7035, In the Matter of the Determination of the Relative Rights, Based Upon Prior Appropriation, of the Various Claimants to the Waters of Shasta River and its Tributaries in Siskiyou County, California, and all supplements thereto.

Authority: Sections 101, 103,174, 186, Water Code

Reference: Sections 1058, 1058.5, Water Code; Hudson v. Dailey (1909) 156 Cal. 617; Shasta River Adjudication; Shakleford Adjudication; French Creek Adjudication; Scott River Adjudication; Stanford Vina Ranch Irrigation. Co v. State of California (2020) 50 Cal.App.5th 976.

§ 875.6 Curtailment Order Reporting

- (a) All water users or water right holders issued a curtailment order under this article are required, within the timeframe specified by the Deputy Director, but not less than seven (7) days, to submit under penalty of perjury a certification of one or more of the actions enumerated below, taken in response to the curtailment order. The Deputy Director may grant additional time for the submission of information regarding diversion and use of water upon a showing of good cause. The water user or water right holder shall certify, as applicable, that:
 - (1) Diversion under the identified water right(s) has ceased;
 - (2) Any continued use is under other water rights not subject to curtailment, specifically identifying those other rights, including the basis of right and quantity of diversion;
 - (3) Diversions under the identified water right(s) continue only to the extent that they are non-consumptive, for which a certification for continued diversion has been submitted as specified in section 875.1;
 - (4) Diversions under the identified water right(s) continue only to the extent that they are necessary to provide for minimum human health and safety needs as identified in section 875.2, a certification has been filed as authorized under Article 24, section 878.1, subdivision (b)(1), and the subject water right authorizes the diversion in the absence of a curtailment order;

- (5) Diversions under the identified water right(s) continue only to the extent that they are necessary to provide for minimum livestock watering needs and a certification has been filed as identified in section 875.3, and the subject water right authorizes the diversion in the absence of a curtailment order.
 - (6) Diversions under the water right(s) continue only to the extent that they are consistent with a petition filed under Article 24, section 878.1, subdivision (b)(2) or (d) or under section 875.3, subdivision (d) and diversion and use will comply with the conditions for approval of the petition; or
 - (7) The only continued water use is for instream purposes.
- (b) All persons who are issued a curtailment order and continue to divert out of order of the priority established in section 875.5, as authorized under sections 875.1, 875.3, or Article 24, section 878.2, are required to submit, under penalty of perjury, information identified on a schedule established by the Deputy Director as a condition of certification or petition approval. The required information may include, but is not limited to, the following:
- (1) The water right identification number(s), well information, or, if not applicable, other manner of identifying the water right under which diversions continue. For wells, this includes the location (GPS coordinates) and depth to groundwater.
 - (2) How the diverter complies with any conditions of continued diversion, including the conditions of certification under section 875.3 or Article 24, section 878.1, subdivision (b)(1).
 - (3) Any failures to comply with conditions, including the conditions of certification under section 875.3 or Article 24, section 878.1, subdivision (b)(1), and steps taken to prevent further violations.
 - (4) Conservation and efficiency efforts planned, in the process of implementation, and implemented, as well as any information on the effectiveness of implementation.
 - (5) Efforts to obtain alternate water sources.
 - (6) If the diversion is authorized under an approved petition filed pursuant to section 875.3 or Article 24, section 878.1, subdivision (b)(2), progress toward implementing the measures imposed as conditions of petition approval.
 - (7) If the diversion is authorized under section 875.3, or Article 24, section 878.1, subdivision (d):

- (A) The rate of diversion if it is still ongoing;
- (B) Whether the water has been used for any other purpose; and
- (C) The date diversion ceased, if applicable.

(8) The total water diversion for the reporting period and the total population served for minimum human health and safety needs. The total population must include actual or best available estimates of external populations not otherwise reported as being served by a diversion, such as individuals receiving bulk or hauled water deliveries for indoor water use.

(9) The total water diversion for the reporting period and the total population of livestock watered to meet minimum livestock watering needs identified in section 875.3.

(10) Diversion amounts for each day in acre-feet per day, maximum diversion rate in cubic feet per second, pumping rate in gallons per minute, and anticipated future daily diversion amounts and diversion rates.

(c) The Deputy Director, or delegee, may issue an order under this article requiring any person to provide additional information reasonably necessary to assess their compliance with this article. Any person receiving an order under this subdivision shall provide the requested information within the time specified by the Deputy Director, but not less than five (5) days.

Authority: Sections 1058, 1058.5, Water Code

Reference: Sections 100, 187, 275, 348, 1051, 1058.5, 1841, Water Code

§ 875.7 Inefficient Livestock Watering

(a) During the fall migration season for fall-run Chinook and coho salmon, from September through January, inefficient surface water diversions in the Scott River and Shasta River watersheds for livestock watering, which result in excessive water diversion for a small amount of water delivered for beneficial use, are not reasonable in light of the alternatives available and needs of the fishery. For the purposes of this regulation, inefficient surface water diversions for livestock watering are those that divert, as measured at the point of diversion, more than ten times the amount of water needed to support the number of livestock and reasonable water quantities set forth in Article 5, section 697 (or, for livestock not addressed in Article 5, section 697, the closest analogous livestock to those listed in Article 5, section 697).

(b) When there are no active curtailment orders in the relevant watershed, the Deputy Director shall suspend operation of this provision upon a finding that suspending the provision will not result in a decrease in flows that would either require curtailment or inhibit salmonid migration. Such a finding will include consideration of information that could affect the need for curtailments to meet

minimum flow needs for fisheries purposes, including weather forecasting, the need for flows to ramp up or down, the contributions of voluntary flow measures, and future flow needs.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 100.5, 104, 105, 275, 1058.5, Water Code; Environmental Defense Fund v. East Bay Muni. Util. Dist. (1980) 26 Cal.3d 183; Light v. State Water Resources Control Board (2014) 226 Cal.App.4th 1463; Stanford Vina Ranch Irrigation Co. v. State of California (2020) 50 Cal.App.5th 976.

§ 875.8 Information Orders

- (a) The Deputy Director may issue information orders to some or all landowners, diverters, or other water right holders in the Scott River and Shasta River watersheds, requiring them to provide additional information related to water use as relevant to implementing this article. The Deputy Director will prioritize information orders for larger diverters and landowners or water right holders with the highest potential to impact surface flows. The Deputy Director, in determining whether and the extent to which to impose information orders under this subdivision, will consider the need for the information and the burden of producing it, and will take reasonable efforts to avoid requiring duplicative reporting of information that is already in the State Water Board's possession. Information orders shall follow the same procedures set forth in section 875, subdivision (d).

Information required in an order may include, but is not limited to:

(1) For wells:

- (A) Location of the well;
- (B) Age of well, including date of installation and first use;
- (C) Maximum pump rate and volume pumped per month;
- (D) Place of use and purpose of use (beneficial uses of water);
- (E) Projected estimate of pumping volumes at a frequency of no more than weekly; and
- (F) Estimates of past use.

(2) For surface water diversions:

- (A) Place of use and purpose of use (beneficial uses of water);
- (B) Type of water right;
- (C) Source of water;
- (D) Volume of storage;
- (E) Diversion rate; and
- (F) Projected estimate of diversion at a frequency of no more than weekly.

The orders may additionally request other information relevant to forecasting use, impacts to the surface streams in the current drought year, assessing compliance with this article, or in contingency planning for continuation of the existing drought emergency.

- (b) Any party receiving an order under this subdivision shall provide the requested information within the time specified by the Deputy Director, but not less than five (5) days. The Deputy Director may grant additional time for the submission of information regarding diversion and use of water upon a showing of good cause. Each landowner is responsible for immediately providing notice of any information order(s) to all water users associated with the parcel of land related to the information order.
- (c) New Diversions. For purposes of this subdivision, a new diversion means a diversion initiated after issuance of a general information order to landowners in the watershed in which the new diversion is located. The owner of any new diversion must submit to the Deputy Director any information required by a general information order issued under section 875.8 prior to commencement of the new diversion, unless the Deputy Director approves commencement of the diversion based on substantial compliance with the general information order or one of the exemptions outlined in sections 875.2 or 875.3.

Authority: Sections 1058, 1058.5, Water Code

Reference: Article X, Section 2, California Constitution; Sections 100, 102, 104, 105, 109, 174, 275, 1051, 1052, 1058.5, Water Code; Light v. State Water Resources Control Board (2014) 226 Cal.App.4th 1463.

§ 875.9 Penalties

- (a) A diverter must comply with a curtailment order issued under this article, any conditions of certification or approval of a petition under this article, and any water right condition under this article, notwithstanding receipt of more than one curtailment order. To the extent of any conflict between applicable requirements, the diverter must comply with the requirements that are the most stringent.
- (b) Failure to meet the requirements of this article or of any order issued thereunder constitutes:
 - (1) a violation subject to civil liability pursuant to Water Code section 1846, and
 - (2) an infraction pursuant to Water Code section 1058.5, subdivision (d). Each of these can carry a fine of up to five hundred dollars (\$500) for each day in which the violation occurs.
- (c) Nothing in this section shall be construed as limiting the enforceability of or penalties available under any other provision of law.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 275, 1052, 1055, 1058.5, 1825, 1831, Water Code; National Audubon Society v. Superior Court (1983) 33 Cal.3d 419.