

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2023-0012-EXEC

In the Matter of the Petition for Reconsideration of

Big Springs Irrigation District

Regarding State Water Resources Control Board Order WR 2021-0082-DWR and Addendum 9 (issued March 15, 2022), Curtailment of Water Right ID Nos. SG005918, SG005919, and SG005920

Source: Shasta River

County: Siskiyou

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

Big Springs Irrigation District (BSID or Petitioner) submitted a Petition for Reconsideration (Petition) dated April 14, 2022, requesting reconsideration of **Addendum 9** to **Order WR 2021-0082-DWR**, which imposed curtailment and reporting requirements on water diverters in the Shasta River Imposing Curtailment and Reporting Requirements, (Curtailment Order).² The Curtailment Order was issued on

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

² BSID's petition also challenges **Order WR 2021-0085-DWR**, which was issued on October 12, 2021 to several water rights that should have been curtailed under Order
[footnote continues on next page]

September 10, 2021, pursuant to the regulation establishing drought emergency minimum flows in the Scott River and Shasta River watersheds (Cal. Code Regs., tit. 23, §§ 875-875.9) adopted by the State Water Resources Control Board (State Water Board) on August 17, 2021 (Regulation). After a series of addenda that conditionally and temporarily suspended the Curtailment Order, the Curtailment Order went back into effect as to BSID on March 14, 2022. (Addenda 8, 9.)

Petitioner alleges that: (1) the State Water Board lacks authority to curtail percolating groundwater, such that “curtailment orders can only extend to surface flow or a subterranean stream”; (2) “there is no evidence that BSID’s wells impact the flow of the Shasta River”; (3) “the use of the Yreka USGS [United States Geological Survey] gage is unreasonable for measuring the impact of BSID’s groundwater use on the Shasta River”; and (4) the State Water Board failed in an affirmative duty to consider the relative benefits of BSID’s water use by not considering the effects of BSID curtailment on the lands, wildlife, and citizens within the District. (Petition, pp. 3-5.)

The Petition is denied because its arguments fail on the merits, as explained in detail below.

Petitioner has raised similar arguments in a lawsuit filed prior to the Petition, and currently pending before the Siskiyou County Superior Court (Case No. CVCU 22-317). This case in part involved an improper procedural request for a temporary restraining order (TRO), which has since been resolved in the State Water Board’s favor. Water Code section 1126 requires that any challenge to a Board order be brought as a writ petition under Code of Civil Procedure section 1094.5, not as a complaint for declaratory or injunctive relief. The court has determined that Addendum 9 can be considered a final order for the purposes of Water Code section 1126, and when properly pled, the petition for reconsideration fulfills BSID’s obligation to exhaust administrative remedies for the case to move forward as a petition for writ of mandate.

WR 2021-0082-DWR. BSID’s water rights were all included and properly noticed under Order WR 2021-0082-DWR and citing both orders is not necessary, as there are no separate arguments raised concerning the second order. Subsequent curtailment orders specified that all future addenda to Order WR 2021-0082-DWR would apply to Order WR 2021-0085-DWR.

(Order on SWRCB's Demurrer to BSID's First Amended Complaint, Sep. 19, 2022, Case No. CVCV 22-317, pp. 12-13.)

The TRO hearing generated various submittals and evidence related to the Petitioner's arguments regarding surface water-groundwater interconnectivity, the Yreka United States Geological Survey (USGS) gage, and the uses of water in the BSID service area. However, the Petition does not raise the ground under California Code of Regulations, section 768, subdivision (c), that "[t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced." Nor does the Petition provide an accompanying affidavit to introduce such new evidence. This order includes discussion of the evidence submitted to the court in the TRO litigation as a courtesy, and in order to evaluate whether this new information should inform whether to limit this order or provide direction as to future action. The discussion does not address or resolve the issue of whether such information could have been produced previously. The discussion of BSID's evidence in the TRO proceeding is provided only in the interest of being thorough and is not relied on for any of the Board's conclusions on the issues raised in the Petition. This order's determinations denying the Petition as a whole and its various arguments specifically rests solely on the information that was before the Board at the time it made its decision to issue the Curtailment Order and Addendum 9, and the information provided in the Petition itself.

2.0 GROUNDS FOR RECONSIDERATION

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

- (a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) [t]he decision or order is not supported by substantial evidence;
- (c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) [e]rror in law.

(Cal. Code of Regs., tit. 23, § 768.)

Among other requirements, a petition must specify the specific board action for which the petitioner requests reconsideration, “[t]he reason the action was inappropriate or improper,” “[t]he specific action which petitioner requests,” and contain “[a] statement that copies of the petition and accompanying materials have been sent to all interested parties.” (Cal. Code of Regs., tit. 23, § 769, subds. (a)(2), (4)-(6).) If reconsideration is requested based in whole or in part on Section 768, subdivision (c) [relevant evidence which, in the exercise of reasonable diligence, could not have been produced], the petition shall include an affidavit or declaration stating that additional evidence is available that was not presented to the board and the reason it was not presented. (*Id.* § 768, subd. (c).) A general statement of the nature of the evidence and the facts to be proved shall also be included. (*Id.*, § 769, subd. (b).) Additionally, “[t]he petition shall be accompanied by a statement of points and authorities in support of legal issues raised in the petition.” (*Id.*, subd. (c).)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board’s regulations. (Cal. Code of Regs., tit. 23, § 770, subd. (a)(1).) Alternatively, after review of the records, the State Water Board also may deny the petition if it finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subds. (a)(2)(A)-(C).)³ The State Water Board may elect whether or not to hold a hearing on the petition for reconsideration. Here, the Petition does not include a request for a hearing.

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

3.0 BACKGROUND

California and the entire western United States are facing a significant drought in the wake of one of the driest periods on record, driven by climate change and extreme hydrologic conditions. Water supply in many parts of California, including the Klamath River watershed, is insufficient to meet a significant portion of water demands, including ecological needs.⁴ The water supply shortage is a particular concern in the Scott River and Shasta River watersheds, which are tributaries to the Klamath River. The Scott River and Shasta River watersheds are important salmon producing streams in the Klamath River Basin and support numerous fisheries including Southern Oregon/ Northern California Coast (SONCC) coho salmon and culturally and commercially significant fall-run Chinook salmon. SONCC coho salmon are listed as a threatened species under both the federal and state Endangered Species Acts and are identified as being at high and moderate risk of extinction in the Shasta River and Scott River watersheds, respectively.

In a series of proclamations in 2021, Governor Gavin Newsom declared a drought state of emergency under the provisions of the California Emergency Services Act (Gov. Code, section 8550 et. seq.) and directed state agencies to take immediate actions to bolster drought resilience across the state. The proclamation issued on May 10, 2021, includes counties in the Klamath River, Sacramento-San Joaquin Delta, and Tulare Lake watersheds (May 2021 Proclamation). To ensure critical instream flows for species protection, the State Water Board and the California Department of Fish and Wildlife (CDFW) were directed to evaluate minimum instream flows and other actions to protect salmon, steelhead, and other native fishes in critical systems in the state. The State Water Board, in coordination with CDFW, were to work with water users and other

⁴ A recent series of winter storms have alleviated the severity of the immediate water shortages in the Shasta River watershed, and as of December 27, 2022 curtailments have been temporarily suspended. Curtailments were similarly suspended during the winter during the 2021-22 water year (see Addendum 6 issued December 29, 2021). It is still too early in the water year, however, to determine whether this precipitation is part of a larger climate pattern that will provide sufficient moisture to end the multi-year drought. On February 13, 2023, Governor Newsom issued a new **Executive Order N-3-23** reaffirming that California, including particularly the Klamath watershed, remains in drought despite recent storms and winter precipitation.

parties on voluntary measures and also consider emergency regulations to establish minimum drought instream flows.

Water Code section 1058.5 authorizes the State Water Board to adopt emergency regulations concerning waste and unreasonable use, curtailment, water recycling or conservation, and related reporting as a response to extended drought conditions or during a declared drought state of emergency. Regulations adopted under Water Code section 1058.5 remain in effect for up to one year, but may be renewed upon a determination by the Board that the drought situation continues.

CDFW provided emergency minimum flow recommendations to the Board in a letter dated June 15, 2021. The letter urged the State Water Board to adopt these minimum flows in light of the drought emergency. On July 1, 2021, State Water Board and CDFW staff hosted a public meeting on potential drought actions for the Scott River and Shasta River watersheds. Staff presented information on the drought conditions and potential drought response actions that could be implemented in the Scott River and Shasta River watersheds, and solicited comments. On July 16, 2021, State Water Board staff issued a Notice of Public Meeting and Opportunity for Comment: Draft Drought Emergency Regulation for Scott River and Shasta River Watersheds that announced the release of a preliminary draft drought emergency regulation for public comment and advertising a July 20, 2021 public meeting.

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

On August 12, 2021, the State Water Board issued the proposed regulation and the notice, along with a digest of information describing the reasons for proposing the regulation and listing the sources relied upon in its analysis (2021 Informative Digest).

On August 17, 2021, the State Water Board adopted the emergency regulation establishing drought emergency minimum flows in the Scott River and Shasta River watersheds. (Cal. Code Regs., tit. 23, §§ 875-875.9.) The Regulation was reviewed and approved by the Office of Administrative Law (OAL) and went into effect upon filing with the Secretary of State on August 30, 2021.⁵ The Regulation authorizes the Deputy Director for the Division of Water Rights to issue orders curtailing diverters in order of water right priority when flows in the Shasta River watershed fail to meet the drought emergency minimum levels established in the Regulation. Section 875.5 of the Regulation sets forth the order of priority in the Shasta River watershed. It establishes as the lowest priority those appropriative water rights established after issuance of the Shasta River Adjudication⁶ in December 1932, the next priority group as appropriative rights listed in the Shasta River Adjudication (in accordance with the priorities articulated therein), and the most senior group as those diverters exercising riparian or overlying groundwater rights. Section 875.5, subdivisions (b)(1)(A) and (b)(1)(B) of the Regulation specifically identify that both groundwater and surface water appropriations, are subject to curtailment in the order of priority. The Regulation provides guidance as to groundwater appropriations' priority dates, and on how to distinguish overlying from appropriative groundwater rights:

Groundwater appropriations have a priority date from when the well was constructed and water first used. For the purposes of this article, an appropriative

⁵ On June 21, 2022, the State Water Board renewed the Regulation with minor changes, which went into effect on July 29, 2022, when it was approved by the Office of Administrative Law and filed with the Secretary of State. The updated Regulation clarifies that previously-issued curtailment orders do not require further action to remain in effect under the amended Regulation. (Cal. Code Regs., tit. 23, § 875, subd. (d)(3).)

⁶ Certain water rights in the Shasta River watershed were subject to a statutory adjudication that resulted in a judgment and decree approved by the Superior Court of the State of California in Siskiyou County in 1932 (In the Matter of the Determination of the Relative Rights Based on Prior Appropriation, of the Various Claimants to the Use of the Water of the Shasta River and its Tributaries in Siskiyou County, California, Case No. 7035) (Siskiyou County Superior Court, 1932) (hereafter Shasta Adjudication or Adjudication).

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.

(Cal. Code Regs., tit. 23, § 875.5, subdivision (b)(1)(A).)

The Informative Digest includes additional information concerning water rights priorities in the Shasta River watershed, and the reasons that the regulations apply the common source doctrine in administering the water right priority system in this watershed. (2021 Informative Digest, pp. 37-40; 47-53; 68.)

On September 10, 2021, the State Water Board issued a curtailment order (Order WR 2021-0082-DWR) to the most junior water right holders in the Shasta River watershed, including all post-Adjudication appropriative surface water and appropriative groundwater rights described in section 875.5, subdivision (b)(1)(A), as well as more senior appropriative rights with priority dates later than November 1912, as described in section 875.5, subdivision (b)(1)(B).

The Curtailment Order required Petitioner to cease all diversions associated with appropriative groundwater diversions and submit a Curtailment Certification through the online portal by September 27, 2021. The Regulation also provided for exceptions to curtailment for minimum human health and safety, non-consumptive use, and minimum livestock diversions that may continue even after receipt of a curtailment order, if the appropriate form(s) are submitted to the State Water Board.

Petitioner holds three water rights subject to Order WR 2021-0082-DWR and assigned Water Right ID Nos. SG005920, SG005918, and SG005919. These water rights are for three groundwater wells constructed in 1958, 1974, and 1982, respectively. As discussed in more detail below, because BSID is a public irrigation district that sells and distributes water, its water rights are considered appropriative with a priority date of the time the well was constructed and water appropriated. These priority dates are relatively junior compared to other diverters in the Shasta River watershed. BSID ceased groundwater pumping around September 7, 2021 and timely submitted Curtailment Certifications in 2021.

Based on forecasted precipitation, flows, demand projections, and other factors, the State Water Board issued addenda to Order WR 2021-0082-DWR on September 23, October 21, October 29, December 17, December 22, December 29, 2021, January 26, and February 25, 2022, partially suspending curtailment of water rights in order of priority, and contingent on the required minimum flow being met and sustained at the Yreka USGS gage. In addition, pursuant to section 875, subdivision (c)(2)(B) of the Regulation, the State Water Board modified curtailments twice based on the recommendation by CDFW that lower alternative flows at the Yreka USGS gage provide equal or better protection for the pertinent species' relevant life stage. (Addenda 4 and 9.) On March 15, 2022, the State Water Board reinstated water right curtailments for the most junior water rights in the Shasta River watershed based on ongoing dry conditions, the approach of the irrigation season, and multiple unexpected decreases in flows below the minimum flow requirement. (Addendum 9.)

On March 29, 2022, BSID filed a Complaint for Declaratory Relief and Writ of Mandate, and on March 30, 2022, filed Application to Show Cause and for Temporary Restraining Order in Siskiyou County Superior Court. (Case No. CVCV 22-317.)

On April 14, 2022, the State Water Board received a Petition that requests reconsideration of Addendum 9 to the Curtailment Order. Petitioner alleges that: (1) the State Water Board lacks authority to curtail percolating groundwater, such that "curtailment orders can only extend to surface flow or a subterranean stream"; (2) "there is no evidence that BSID's wells impact the flow of the Shasta River"; (3) "the use of the Yreka USGS gage is unreasonable for measuring the impact of BSID's groundwater use on the Shasta River"; and (4) the State Water Board failed in an affirmative duty to consider the relative benefits of BSID's water use by not considering the effects of BSID curtailment on the lands, wildlife, and citizens within the District. (Petition, pp. 3-5.) For these reasons, Petitioner requests the State Water Board to rescind all curtailment orders issued to BSID and defer all groundwater decisions to the local agency under the Sustainable Groundwater Management Act (SGMA).

Each of these allegations is addressed below.

4.0 ANALYSIS

4.1 Water rights are subject to the reasonableness and water right priority provisions of the emergency regulation and curtailment orders, regardless of whether such diversions are from surface water or groundwater.

Petitioner argues that the State Water Board lacks authority to curtail percolating groundwater and, relatedly, that curtailment orders can only extend to surface flow or a subterranean stream. Petitioner argues that because underground water is generally presumed to be “percolating,” BSID’s wells fall outside of the State Water Board’s jurisdiction. (Petition, p. 3.) This argument improperly conflates the law associated with the State Water Board’s water right permitting jurisdiction with its broader regulatory authority applied in the Regulation. Here, the Board is not requiring BSID to seek a water right permit or alleging unlawful diversion in the absence of such a permit. Rather, the State Water Board is requiring BSID to curtail in order of water right priority when flows in the Shasta River are required for drought emergency minimum instream uses.

The reasonable and beneficial use doctrine, enshrined in article X, section 2 of the California Constitution, establishes that in light of competing needs for water and its importance to the State, water use in the state is limited to the amount reasonably required and “does not and shall not extend to the waste or unreasonable use” of water. The doctrine is a “cardinal principle of California water law” and extends to all water users in the state, specifically including groundwater users, and applies to all uses of water, including instream fisheries needs. (*United States v. State Water Resources Control Bd.*, (1986) 182 Cal.App.3d 82, 105; *Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1479-1480 (*Light*), *Stanford Vina Ranch Irrig. Co. v. State of Calif.* (2020) 50 Cal.App.5th 976, pp. 994–995, 1003–1004 (*Stanford Vina*); *National Audubon Society v. Superior Court* (1983) 33 Cal. 3d 419, 443; *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 370.) The reasonable use doctrine is “self-executing,” meaning that water rights must at all times be exercised in a manner consistent with evolving standards of reasonableness. (Cal. Const., art. X, § 2; see also *People ex rel. State Water Resources Control Board v. Forni* (1976) 54 Cal.App.3d 743, 750 (*Forni*).

The Board “is charged with acting to prevent unreasonable and wasteful uses of water, regardless of the claim of right under which the water is diverted.” (*Light, supra*, 226 Cal.App.4th at p. 1482 [affirming that Board’s authority to adopt reasonable use regulations as to riparian rights not subject to permitting requirements].) In particular, the Board has the legal authority to adopt regulations establishing that a particular use of water is unreasonable. (Wat. Code, §§ 1058, 1058.5; *Stanford Vina, supra*, 50 Cal.App.5th at pp. 1003–1004; *Light, supra*, at pp. 1483 - 1485.)

Water uses that would otherwise be reasonable may become unreasonable and warrant Board curtailment in light of changed circumstances, including water scarcity and when continued pumping or diversion affects the survival and recovery of a federally- or state-listed endangered or threatened species. (See, e.g., *Forni, supra*, 54 Cal.App.3d at p. 750; *Light, supra*, 226 Cal.App.4th at pp. 1472–1473; *Stanford Vina, supra*, 50 Cal.App.5th at pp. 1003–1004.) Specifically, the Board may exercise its emergency authority under Water Code section 1058.5 to adopt minimum drought emergency flows to ensure the survival and recovery of imperiled fisheries and to establish that diversions that hamper meeting those minimum flows are unreasonable. (*Stanford Vina, supra*, at p. 976.) The Board’s curtailment orders implement minimum flows required for the protection of a fishery critical for both tribal and commercial purposes, and to protect fish listed as threatened under the federal and state Endangered Species Acts. (Cal. Code Regs., tit. 23, § 875.)

Given the reach of the reasonable use doctrine, the broad authority of the State Water Board to implement it, and the specific grant of regulatory authority to provide for its implementation in drought emergencies, Petitioner’s broad claims that the Board lacks such authority absent a determination that their water use is subject to permitting requirements defined in Water Code section 1200, or a “stream system” definition for purposes of a statutory adjudication in Water Code section 2500, are unavailing. (See *Env’t L. Found. v. State Water Res. Control Bd.* (2018) 237 Cal.App.5th, 844, 862 [dismissing as a “familiar rabbit hole” the contention that the Water Code restricts the Board’s overall authority by defining permitting authority] (*ELF*).) Similarly, the implication on pages 2-3 of its Petition, that BSID’s water use is governed by the SGMA, Water Code § 10720 et seq, *instead of* by other water laws, is not viable. Water Code section 10726.8, subdivision (c) establishes that “nothing in this part [SGMA] is a

limitation on the authority of the board, the department, or the State Department of Public Health.” Thus, the Board’s authority to adopt emergency regulations is unchanged by the long-term planning actions under SGMA. (See also *ELF, supra*, at pp. 862-67 [SGMA does not subsume or eliminate existing law, including application of the common law public trust doctrine to groundwater diversions that affect navigable waters].) The State Water Board’s implementation of its Regulation does not interfere with, and is not barred by, SGMA.

The State Water Board has not contended that BSID’s wells directly divert surface water subject to State Water Board permitting authority, and does not need to do so in order to properly curtail use under the Regulation, which provides for curtailment of both surface water and groundwater in order of water right priority. (Cal. Code Regs., tit. 23, §§ 875, 875.5, subd.(b).) Rather, the curtailment stems from application of the water right priority system in a watershed in which the surface water and groundwater share hydrological connectivity. California law recognizes “no rational ground for any distinction” between groundwater and connected surface water. (See *Hudson v. Dailey* (1909) 156 Cal. 617, 628 [interconnected groundwater, “together with the surface stream supplied by [it], should be considered a common supply”].) Groundwater and surface water are connected as a matter of law when, as here, “the extraction of water from either source diminishes the amount of water in the other.” (See *U. S. v. Fallbrook Public Utility Dist.* (S.D. Cal. 1958) 165 F.Supp. 806, 847 [collecting cases].) The Board has jurisdiction over BSID’s pumping and may curtail it because, as established in the Regulation, diversion by a junior water right holder is not reasonable where such diversion would affect the Shasta River’s ability to meet minimum surface water flows, regardless of whether such diversion is from surface water or groundwater. (Cal. Code Regs., tit. 23, § 875, subd. (c)(2)(A)); see *Light, supra*, 226 Cal.App.4th at pp. 1472–1473, 1479–1488 [upholding Board regulation applicable to “pumping of hydraulically connected groundwater” to protect salmonids]; *ELF, supra*, 26 Cal.App.5th at p. 859; *Stanford Vina, supra*, 50 Cal.App.5th at pp. 1003–1004.)

Separate and apart from the Regulation, the State Water Board administers a water right permit and license system for water appropriations initiated after December 19, 1914. (Wat. Code, § 1200 et seq.) Surface waters and “subterranean streams flowing through known and definite channels” are subject to the statutory water rights system.

(*Ibid.*) Under the *Garrapata* test, a subterranean stream is a subsurface channel with relatively impermeable bed and banks; the course of the channel must be known or capable of being determined by reasonable inference; and groundwater must be flowing in the channel. (*In re Garrapata Water Co.*, State Water Board Decision 1639 at p. 4.) If it is determined that a subterranean stream exists, appropriative groundwater extraction would require a water right permit from the State Water Board if initiated after 1914. A subterranean stream would also be included in any statutory adjudications. (Wat. Code, § 2500 et seq.)

The State Water Board has not initiated a formal investigation as to whether BSID is pumping water from a subterranean stream flowing through known and definite channels. The Curtailment Order, which implements limited-term drought emergency measures for fishery protection, does not attempt to address whether BSID or any other well owner requires a water right permit. The Board's authority to implement constitutional reasonable use requirements and implement the water rights priority system – including protecting the public, other water users, and the environment in drought emergencies – does not depend on or require a subterranean stream determination.

Reconsideration on this ground is denied.

4.2 Groundwater and Surface Water are Interconnected in the Shasta River.

Petitioner states that “there is no evidence that BSID’s wells impact the flow of the Shasta River” (Petition, p. 4). Petitioner states that landowners familiar with the wells and Big Springs Creek have seen no draw down while BSID wells are operating. Petitioner also states that BSID boundaries are located entirely within the Shasta Valley Groundwater Basin and the groundwater pumped is applied exclusively in that basin.⁷ As described in more detail below, the State Water Board relied on ample evidence demonstrating the interconnectivity between groundwater and surface water in the

⁷ BSID does not explain, and it is not clear why its statement that the application of groundwater occurs solely within the basin is relevant to the asserted lack of evidence for interconnectivity.

Shasta River watershed when it adopted the Regulation's curtailment methodology as applying to both surface water and groundwater.

As described in the 2021 Informative Digest, groundwater and surface water are interconnected in the Shasta River watershed, including the Big Springs area where BSID's wells are located. The volcanic aquifers include highly permeable basalt flows from the High Cascades volcanic series. Numerous productive groundwater springs emerge from these basalt flows, particularly from the Pluto's Cave basalt formation. In the spring, once snowmelt and rainfall precipitation end for the season, groundwater springs become the primary source of baseflow to the Shasta River and its tributaries for the remainder of the spring, summer, and fall. During dry seasons, groundwater springs in the Big Springs Complex provide an estimated 95 percent of baseflow to the lower Shasta River via the Big Springs Creek tributary. One study reported that during the irrigation season, irrigation diversions and groundwater pumping reduce baseflows in Big Springs Creek by 35 percent. Following the end of the irrigation season, baseflows in Big Springs Creek rapidly rebound. Another study found that during April 1 to April 12, 2008 streamflow at the Shasta River Montague gage decreased by approximately 70 percent, from 143 cubic feet per second (cfs) to 43 cfs. The authors concluded that the onset of surface water diversions and groundwater pumping for irrigation caused the swift and significant reduction of groundwater-fed baseflows throughout the Shasta River basin. (2021 Informational Digest, p. 48-50 [internal citations omitted].)

In 2014, the legislature passed the SGMA to address groundwater overpumping and consequences of that over-extraction. SGMA requires local agencies adopt sustainability plans for high- and medium-priority groundwater basins. Under SGMA, undesirable results include significant and unreasonable depletions of interconnected surface waters that affect beneficial uses of surface waters (Wat. Code § 10721, subd. (x)). The Shasta Valley groundwater basin is designated as a medium priority basin and subject to the requirements of SGMA. The Siskiyou County Flood Control and Water Conservation District Groundwater Sustainability Agency (GSA) submitted the Shasta Valley Groundwater Sustainability Plan (GSP) to the Department of Water Resources on January 28, 2022. The GSA is operating under the GSP while the Department of Water Resources reviews the GSP.

As discussed on pages 52-53 of the 2021 Informational Digest, interconnectedness of surface water and groundwater in the Shasta Valley basin is acknowledged in the GSP. The Shasta Valley basin boundary was expanded in 2018 to incorporate the volcanic regional aquifer system based on evidence of seasonal groundwater pumping reducing streamflow in Big Springs Creek. During the irrigation season, when groundwater is being pumped by water users in the region, Big Springs Creek base flows drop by approximately 35 percent. After irrigation season when pumping stops, base flows quickly rebound to normal levels. (2021 Informative Digest, p. 50.)⁸

Petitioner's contention that no evidence exists to show that BSID pumping impacts the Shasta River ignores the multiple studies cited in the State Water Board's Informative Digest available at the time the Regulation was adopted. As discussed in more detail in 4.3 below, the Regulation applies the rule of priority, including the common source doctrine, for curtailing water rights to meet the minimum instream flow requirement. BSID's Petition asserts a lack of evidence of interconnectivity but fails to address the robust evidentiary bases for the Regulation or the regulatory determination that groundwater curtailment should occur in order of water rights priority. The challenged Curtailment Order includes the findings required by the Regulation regarding flow and implements the Regulation; it need not re-state the basis for regulatory determinations.

Reconsideration on this ground is denied.

As explained above, reconsideration of a Board order can be based on relevant evidence which, in the exercise of reasonable diligence, could not have been produced. In its Petition, BSID states that landowners familiar with the wells and Big Springs Creek have seen no draw down while BSID wells are operating; however, Petitioner did not submit any additional evidence to support this claim, or follow the procedures articulated in California Code of Regulations, title 23, section 769, subdivision (b), to submit such evidence. That said, the Board is aware of landowner declarations and additional evidence of the interconnected groundwater and surface water submitted by BSID as

⁸ This effect will need to be addressed in the long-term SGMA planning process. If the local Groundwater Sustainability Agency proves to be unable or unwilling to sustainably manage the basin, the State Water Board can step in using a process called state intervention. (See Wat. Code, §§ 10735.2-10736.)

well as other evidence generated in the context of the TRO proceedings in BSID's lawsuit concerning the interconnected nature of surface water and groundwater in the Shasta River watershed. As a matter of courtesy and acknowledgement of BSID's evidentiary submittals in the BSID lawsuit, a discussion of that evidence is provided below to consider whether any conclusions would change if BSID had submitted evidence used in the TRO proceeding to support this Petition, or if such evidence should support a change in future actions.

In the lawsuit, BSID filed declarations from two prior landowners near Big Springs (who also previously held senior surface water rights): Mr. Newton and Mr. Louie⁹. The declarations state that no effects were observed on lake levels when BSID switched from surface water to groundwater in the 1980s. Declarations by Mr. Newton and Mr. Louie state that around 1980, the Montague Water Conservation District (MWCD) started drilling the Pacey Wells near Big Springs Lake, which resulted in a drawdown of the lake and an impact on the senior water rights there. (Newton Decl., p. 2; Louie Decl., p.2.) This resulted in a lawsuit and settlement that requires certain levels in Big Springs Lake before MWCD can pump from the Pacey wells. Messrs. Newton and Louie state that also in the early 1980s BSID changed its point of diversion from the lake to wells it had drilled about a mile to the northeast of the previous intake. (*Ibid.*; see

⁹ The Shasta Adjudication recognizes three surface water rights from Big Springs Lake. (1) The first priority 10 cfs water right from Big Springs Lake with priority of 1972 and 1893 (defined in the Shasta Adjudication at paragraph 234, POD 241 and 242) originally held by Louie Family was split between Busk and The Nature Conservancy (TNC) in 2009, and is now divided between two landowners, with approximately 2/3 to CDFW and 1/3 to Mr. Tristan Allen, subject to a rotation agreement between the parties. CDFW took ownership of Shasta Big Springs Ranch in 2019 and uses its water rights for beneficial uses, including instream flow dedications. The other portion of the water right is used by Mr. Tristan Allen for irrigated agriculture. (2) The second priority 7.5 cfs right, (defined in the Shasta Adjudication at paragraph 365 and Order Modifying Decree dated January 7, 1936) from Big Springs Lake with priority of 1903 was also subdivided into 23 parcels by Busk in 2010 and approximately 6.1 cfs of that water right that served the former Newton property is owned and used by Mr. Tristen Allen. The 1.4 cfs remainder of that water right is shared among various water users who have suspended service by the Scott Valley and Shasta Valley Watermaster District and are believed to be irrigating from groundwater wells. (3) BSID formerly exercised a third priority, 30 cfs surface water right (defined in the Shasta Adjudication at paragraph 14) from Big Springs Lake with priority of 1913; BSID no longer uses that right and now pumps groundwater from it wells to deliver to its customers.

also Worth 2022 Decl., Figure 3 [location of Pacey wells and other diversions in the Big Springs area] & pp. 13-14 [more detailed discussion of the Pacey Wells case.] Messrs. Newton and Louie did not notice any reduction in lake level once BSID started using its wells, and in fact, stated that more water was available in the lake, which ended up flowing to Big Springs Creek. (Newton Decl., p.2; Louie Decl., p.2.)

BSID also filed declarations from Mr. Nick Bonsignore, who attempted to cast doubt on State Water Board Declarants' conclusions regarding connectivity of groundwater and surface water, and Mr. Peterson, who challenged these same conclusions based on groundwater flow gradient maps and hand-drawn markings suggesting that BSID's wells are "somewhat side-gradient or down-gradient from [Big Springs Lake]" and therefore "may not have a direct hydraulic influence on the springs." (Peterson Decl., p. 5.)

In evaluating BSID's claims in the TRO proceeding, State Water Board and North Coast Regional Water Quality Control Board staff re-evaluated the evidence relied on in adopting the Regulation, evaluated new data developed since adoption of the Regulation, and considered BSID's submittals. Additionally, the State Water Board hired an outside expert, Mr. Vivek Bedekar, to run the groundwater model used by Siskiyou County (which acts as the governing GSA for the purposes of SGMA) to develop its GSP. As described in a series of Declarations submitted in April, May, and June of 2022, the result of this concerted effort at evaluating the impacts of BSID's pumping on surface water resulted in a strong affirmation of connectivity. Key results were:

- Gage information from 2020, 2021, and 2022, when evaluated in conjunction with data BSID provided on pumping dates and volumes, demonstrate a strong correlation between BSID pumping and flows in Big Springs Creek and the Shasta River, as well as between BSID pumping and the levels of Big Springs Lake. A discussion of the type of changes in flow when BSID pumping ceased, and the corresponding water availability for senior water users, is further discussed below. While other factors may also influence measurements, the data indicates a clear pattern of surface water and groundwater connectivity. (Worth April and May 2022 Decls.)

- Water quality monitoring at Big Springs Lake similarly shows a connection between surface water and groundwater connectivity. Temperatures, dissolved oxygen, and pH levels change when BSID ceases pumping, reflecting increased groundwater contributions to Big Springs Lake, with temperatures cooling, dissolved oxygen levels stabilizing, and pH levels dropping as cool groundwater is added to the warmer surface water. (Scott April 2022 Decl.)
- Groundwater modeling indicates that stream depletion is caused by groundwater pumping in the BSID area. (Bedekar 2022 Decl.)

The weight of the evidence in the Declarations in the TRO litigation further confirms the connection between BSID's groundwater pumping and surface water flows. State Water Board declarations contain citations and exhibits that provide information from independent parties who also have reached the same conclusions supporting interconnectivity of groundwater and surface water within the Shasta Valley Groundwater Basins, within the Plutos Cave Basalt, and within the area of Big Springs and BSID. In contrast, BSID's Declarations, including Mr. Peterson's declaration and two declarations by Mr. Bonsignore submitted to the court and served on the Board April 29 and June 7, 2022 include little to no citations to any scientific analysis, studies, modeling, or well pump tests conducted by BSID or by other researchers or experts over the decades that BSID has operated the wells. (Worth June 2022 Decl., p. 11.) The provisional 2020 data that was relied upon by Mr. Bonsignore to show "no correlative relationship between BSID pumping and flow at the Grenada gage" (Bonsignore June 2022 Decl., p. 8) in fact showed a clear correlation between BSID pumping, streamflow, and lake level when analyzed against updated Department of Water Resources data and BSID pumping data. (Worth June 2022 Decl., p. 9.) Further evidence demonstrated that BSID pumping is affecting streamflow and surface water levels not just in Big Springs Lake and Big Springs Creek, but also Little Springs Creek, and the Shasta River. (*Id.*, pp. 5-8.)

Additional evidence for connectivity is provided by hydrologic and streamflow data collected after the issuance of curtailment orders in September 2021. When Order WR 2021-0082-DWR was issued on September 10, 2021, Big Springs Lake was

1.5 to 2 feet below normal, and only 1 cfs was flowing from the outlet. Water was not available for senior water rights at Big Springs Lake (with priority dates from 1903 to 1872) due to low lake levels and low flows, before the State Water Board issued the September 2021 curtailment orders. (Worth May Decl., pp.11-12.)

By September 13, 2021, after BSID ceased pumping, Big Springs Lake levels and outflow quickly rebounded, with at least 9.5 cfs outflow from Big Springs Lake. Boards were pulled at the dam to allow additional flow to Big Springs Creek, and the flow at the Shasta River at Grenada Pump Plant (SPU) gage rose 20 cfs. These increases in flow can be seen in Figures 5 and 7 of the April 2022 Worth Declaration. Once BSID stopped pumping, surface water in Big Springs Lake became available for diversion and dedication to instream use by senior water right holders. (Worth May 2022 Decl., pp. 11-12.) Other large surface water rights curtailed under Order WR 2021-0082-DWR include Grenada Irrigation District (GID), MWCD, and the Shasta River Water Association (SRWA). As increased surface flow became available at Big Springs Creek and other diversions and pumping shutting off in response to the curtailment order, the State Water Board issued [Addendum 1](#) on September 20, 2021, partially suspending curtailment of SRWA's diversions. SRWA was able to manage its diversions in real time to meet the flow requirement at the Yreka gage while diverting water through the remainder of September. (Worth May Decl., pp. 12-13.) Similar patterns occurred at the start of the irrigation season in 2022.

The clearly discernable impact on current senior water right holders contradict statements made by former landowners that BSID's pumping was not noticeable and did not impact their senior water rights at Big Springs Lake. The change from historic observations could be attributed to the increase over time of BSID's pumping effects on Big Springs Lake, as more groundwater pumps have come online and drought conditions have become more frequent. (Worth May 2022 Decl., p. 12.)

The evidence presented in the TRO proceedings, including landowner declarations and further evidence and analyses of current hydrologic conditions appear to further confirm the impact of BSID groundwater pumping on the surface flows of the Shasta River. The TRO evidence would not change the conclusions supported by the record at the time the Board issued Order WR 2021-0082-DWR and Addendum 9, had that evidence been properly submitted with the Petition.

4.3 The Yreka USGS gage is a Reasonable Compliance Point for the Minimum Instream Flow Requirement under the Emergency Regulation.

Petitioner argues that the Yreka gage is unreasonable for measuring what impact BSID's use of groundwater has on the Shasta River. Petitioner points out that the Yreka gage is over 36 miles from BSID's wells with over 20 surface water diverters in-between, and asserts that "any assumption that BSID wells while in use affect the ... minimum flows at the Yreka gage is ... not supported by data." (Petition, p. 5.)

As the Petition does not articulate why use of this gage would be "unreasonable," the allegation may rely on the faulty assumption that BSID pumping does not affect surface water, which is incorrect as explained in detail above in section 4.2.

To the extent that the Petition suggests that flow impacts that are 36 miles upstream of the Yreka gage do not influence the gage, and that water flows from upstream to downstream in the watershed are somehow unrelated with this distance, this would be mistaken. Flow trends at the Shasta River gage nearest BSID (Shasta River at Grenada Pump Plant, SPU, gage) are generally reflective of flow trends downstream at the USGS Yreka gage, accounting for 20 hours of travel time (for flows around 150 cfs at Yreka gage) to 27 hours of travel time (for flows around 20 cfs at Yreka gage). Similarly, increases at the Big Springs Water Wheel gage generally appear at the Shasta River at Grenada Pump Plant (SPU) gage, and subsequently impact the USGS Yreka gage. BSID's pumping extracts an estimated 20–30 cfs, which is a significant amount compared to the amount required to remain in the Shasta River as minimum flows. As described in the Worth April and May 2022 declarations, BSID's groundwater extractions directly affect flow levels in Big Spring Creek. Because Big Springs Creek is a Shasta River tributary, and BSID pumping affects the flows of Big Spring Creek, it follows that BSID's groundwater pumping affects flows at the Yreka gage. The Board is authorized to prevent and curtail these diversions (including diversions of interconnected groundwater), which unreasonably affect other instream uses and public trust resources.

To the extent that the Petition suggests that the actions of surface water diverters between the BSID wells and the Yreka gage break the upstream-to-downstream connection of the Shasta River, or BSID's influence in it, this argument disregards the

rule of priority which the Regulation follows when curtailing water rights to meet the minimum instream flow requirement. Under the Regulation, where flows are sufficient to support some but not all diversions, curtailment orders shall be issued, suspended, reinstated, and rescinded to ensure that flows are not reduced below the drought emergency minimum flows in order of water right priority provided in section 875.5 of the Regulation. (Cal. Code Regs., tit. 23, § 875, subd. (b).) For groundwater diversions, case law recognizes overlying and appropriative rights to groundwater as analogous to riparian and appropriative rights to surface water. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240; see also *Katz v. Walkinshaw* (1903) 141 Cal. 116, 135-136.) Overlying groundwater rights, which are based on ownership of the land “overlying” the water source, are senior and are limited to the overlying landowner’s reasonable and beneficial use on the overlying land. (*Id.* at p. 1240; *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 304; *California Water Service Co. v. Edward Sidebotham & Son, Inc.* (1964) 224 Cal.App.2d 715, 725.)

In contrast, when a pumper uses the water on non-overlying land, or (like BSID does here) converts the water to public use by selling or distributing the water to other parties, such use is appropriative. (See also Cal. Const., art. X, § 5 [“The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law”].) Public uses of water are considered appropriative - not overlying – irrespective of where they occur, as are exports outside the relevant basin. (*City of Barstow, supra*, 23 Cal.4th at p. 1241.) In accord with this case law, the Regulation defines an appropriative groundwater right as “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.” (Cal. Code Regs., tit. 23, § 875.5, subd. (b)(1)(A).) Further, the Regulation specifies that the priority for groundwater appropriations dates from “when the well was constructed and water first used.” (*Id.*)

As a public agency, BSID sells and delivers the water it pumps to other parties, and does not use it to irrigate its own lands. Its groundwater extractions are thus necessarily appropriative in nature and therefore subject to the “first in time, first in right” rule governing appropriators. (*City of Santa Maria, supra*, Cal.App.4th at p. 279; *El Dorado*

Irrigation District v. State Water Resources Control Bd. (2006) 142 Cal.App.4th 937.) BSID's rights are appropriative, with relatively junior priority dates of 1958, 1974, and 1982, dating to the first extraction from each well.

The Curtailment Order WR 2021-0082-DWR issued on September 10, 2021 curtailed all water diversions in the Shasta River watershed – whether from surface water or groundwater – with water right priority dates junior to and including November 25, 1912. Many of the surface water diverters downstream of BSID are senior to November 25, 1912, and were therefore not subject to Order WR 2021-0082-DWR. (See e.g. list of water rights attached to State Water Board [Order WR 2022-0162-DWR](#) [subjecting more senior water rights to curtailment because the minimum emergency flow requirement cannot be met by the more junior water rights curtailed in Order WR 2021-0082-DWR].) The most senior water right subject to the Curtailment Order is SRWA's water right, defined in paragraph of 341 of the Shasta Adjudication, to divert 42.00 cfs from Point of Diversion (POD) 419 from April 1 to October 1 with a priority date of November 25, 1912. Accordingly, SRWA's water right was the first right subject to "conditional curtailment" – a partial or full suspension of curtailment if and when the required minimum flow was met at the Yreka gage. (See Addendum 1 to the Curtailment Order, issued September 20, 2021 [making SRWA curtailment conditional].) Under the Curtailment Order and its Addenda, conditionally curtailed water users can adjust use to account for the drops in flow by partially curtailing their diversions. Under Addendum 9, which BSID challenges, water rights junior to and including a priority date of February 4, 1926, are curtailed, while diversions with more senior priorities are conditionally curtailed, and may be exercised as conditions allow in working with the Watermaster and State Water Board as appropriate and must curtail, if necessary, in order of priority to ensure that the required minimum flows are met at the Yreka gage.

Accounting for the continued operation of senior water rights between BSID's pumping facilities and the Yreka gage is required by implementation of the water right priority system: the existence of additional senior diverters (including between BSID and the Yreka gage) underscores the basis for the Regulation's requirement that a junior water right contribute to a flow requirement, rather than providing a reason not to require BSID's contribution. The Regulation's application of the water right priority system, including the common source doctrine, is well-supported in the State Water Board's

Informative Digest, available at the time the Regulation was adopted. Allowing BSID to extract water ahead of its date of priority injures water right holders whose rights to divert water from the Shasta River are more senior, and would therefore be inconsistent with California's water right priority system.

Reconsideration on this ground is denied.

4.4 The State Water Board exercised its affirmative duty to take public trust into account in the planning and allocation of water resources, and to protect public trust resources whenever feasible.

Petitioner argues that the State Water Board “failed to exercise their 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” in that the Board “did not consider the relative benefits derived from all beneficial uses of the water which BSID provides, including domestic, irrigation, economic and enhancement of fish and wildlife.” (Petition, p. 5.) Petitioner states further that the State Water Board “did not weigh the devastating effect that a full curtailment would have on the lands, wildlife, and citizens within the BSID district, but proceeded solely with their narrowly fashioned agenda.” (*Id.*) It further alleges that the Board has an unspecified statutory requirement to consider these interests, and cites *National Audubon Society et al. v. Superior Court* (1983) 33 Cal.3d 419 as support for reconsideration of decisions that fail “to weigh and consider public trust uses.” (Petition, p. 5.)

The seminal public trust case cited by Petitioner, *National Audubon Society*, describes the public trust more narrowly than “all public uses,” and states “[i]t is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands.” (*National Audubon Society*, *supra*, 33 Cal. 3d at pp. 440-441.) As such, the case describes such uses as “in-stream.” (*Id.*, pp. 443-444; 446.) In alleging that the State Water Board’s action to protect instream flows at the minimum drought emergency levels to support threatened and commercially- and culturally-vital salmonids abdicates the Board’s public trust responsibilities, the Petition fails to explain how protection of instream flows can violate the obligation to protect those same flows.

Further, as explained below, the adoption of the Regulation reflects due consideration of water uses in setting drought emergency flow standards, including consideration of public trust resources, close coordination with the state's trustee agency for fish and wildlife, and consideration of the other public-interest considerations that the Petition lists, such as irrigation, domestic use and economic impacts. The Regulation adoption far exceeded the statutory requirements for soliciting public input, including on other water uses, as well as meeting specific statutory requirements to analyze fiscal impacts of the decision. The Regulation addresses the severe water shortage in the Scott River and Shasta River watersheds to ensure water supplies are and will remain available to meet minimum instream flows for fish, human health and safety needs, and minimum livestock watering needs.

Notwithstanding recent storms, water supply in many parts of California is insufficient to meet a significant portion of water demands, including ecological needs. The State Water Board recognizes that the Scott River and Shasta River are crucial sources of water for Siskiyou County and have immense economic, ecological, and cultural importance. The Scott River and Shasta River watersheds provide water for agriculture, domestic users, the environment, fire protection, municipalities, Tribal Nations, and recreation. These watersheds are also home to fish that are listed as threatened under the state and federal Endangered Species Acts, as well as fish that hold significant cultural importance to California tribes and that are vital to the commercial and recreational fishing economy. (See Informational Digest, p. 21.)

The Regulation sets forth minimum streamflow for adult salmon migration, rearing, spawning, and out-migrating juvenile fish. The Regulation also ensures that water is available to meet basic minimum human health and safety and livestock needs, notwithstanding the shortage conditions. It is imperative that water right holders and claimants who do not have water available at their priority of right, do not provide water for minimum human health and safety, or do not provide minimum livestock watering needs cease diversions of water that is needed for minimum instream flows to protect fish and more senior water rights (or in the alternative implement other approved actions designed to provide equivalent or better protection to the fishery and without injuring senior right holders).

The Petition asserts that the benefits that BSID water deliveries specifically provide in the district were not provided due consideration in reinstating the curtailment. (Petition, p. 5.) However, where a regulation determines a standard in the public benefit, as the Board did here in weighing the benefits of a drought emergency minimum flow against the potential benefits of water diversion, it is not necessary to re-assess the balancing upon implementation of the Regulation. (See *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal. 4th 216, 312, as modified on denial of reh'g (Sept. 29, 1994) [applying a regulation in a quasi-adjudicatory proceeding does not require reassessing the regulation's underlying premises].) Order WR 2021-0082-DWR and Addendum 9 made the findings required for issuance of a curtailment order under California Code of Regulations, title 23, section 875.

For these reasons, reconsideration on this ground is denied.

In the Petition, BSID states that the State Water Board did not consider the relative benefits derived from all beneficial uses of the water which BSID provides, including enhancement of fish and wildlife; however, Petitioner did not submit any additional evidence to support this claim, or follow the procedures articulated in California Code of Regulations, title 23, section 769, subdivision (b), to submit such evidence. That said, the Board is aware of declarations submitted by BSID in the Shasta River TRO proceedings in BSID's lawsuit regarding harm to wildlife that use off-stream wetlands, specifically sandhill cranes. As a matter of courtesy and acknowledgement of BSID's evidentiary submittals in the separate but related lawsuit, a discussion of that evidence is provided below to consider whether any conclusion would change, if BSID had submitted TRO evidence to support its argument on reconsideration, or whether it would support a change in future actions.

BSID submitted a declaration from Mr. R. Robert Smith, a former Department of Fish and Game Wildlife Area Manager who was part of a twelve-year research study, ending in 2010, on the preferred habitat and behaviors of the Sandhill Crane in the Shasta Valley. Mr. Smith stated that sandhill cranes prefer irrigated, grazed pastureland over natural conditions, and opined that curtailing BSID in particular would cause a "severe impact" on sandhill crane habitat, because other areas will not be irrigating under the dry conditions. Mr. Joe Croteau, a Program Manager at the California Department of Fish and Wildlife with eighteen years of experience at CDFW performing sandhill crane

consultations and surveys similarly provided a declaration in the proceedings. He conducted and submitted current searches of sandhill crane habitat in Siskiyou County. From these, he notes that there are more numerous habitat areas than those described by Mr. Smith, and that the areas with 2021 nesting observations in the Big Springs area are areas not dependent on irrigation. Mr. Croteau further noted that the birds are capable of traveling long distances to find suitable nesting and foraging areas, that these behaviors are not limited to agricultural areas, and that the birds are long-lived and do not nest every year. In the absence of any known specific population data on sandhill cranes in the area, he cites national increases in population and personal observation of population stability. He contrasts this stability with the high risk of extirpation of coho in the Shasta River, and the decline of the Chinook salmon. Both salmon species are short-lived, have only a narrow window in which to reproduce, and have high location fidelity to reproducing in natal-stream-habitat.

BSID has provided no argument or evidence that the type of curtailment impacts in the BSID area that the Petition summarily lists are not of the same type that would occur throughout the watershed, which were appropriately considered upon adoption of the Regulation.¹⁰ Not curtailing BSID would simply shift the same hardships on areas served by more senior water rights.¹¹

The State Water Board carefully considered the benefits of continued diversions of water for current uses and the potential for harm to SONCC coho salmon, steelhead and fall-run Chinook salmon from such diversions under the drought emergency. The Board reviewed existing information on water use and agricultural needs in the area including from a range of academic and governmental sources, and also solicited and received information regarding the benefits and harms of curtailment regulations to protect minimum instream flows. (2021 Informational Digest, pp. 29-31, 71-76.) The

¹⁰ In the TRO litigation, BSID submitted the declaration of Mr. James Smith, the Siskiyou County Agricultural Commissioner, about the harms associated with ceasing irrigation to pasture lands in the BSID service area. As noted above, these are the types of considerations the Board considered in development and adoption of the Regulation.

¹¹ According to evidence generated in the litigation and not relied on to support this order, BSID does not disagree about the shifting of hardships, as the point was conceded in a deposition in the litigation. (See Scala Deposition, p. 27.)

State Water Board understands that hardship is brought about under the drought emergency due to adverse water supply conditions, and has created a pathway for local solutions that would balance harms differently. BSID's argument does not contain any new information that would change the State Water Board's balancing for the purpose of implementing the Regulation.

The evidence presented in the TRO proceedings including declarations regarding sandhill crane habitat and other impacts in the BSID area, does not contradict the evidence considered at Regulation adoption. Had the new evidence been properly submitted with the Petition, it would not change the conclusions supported by the record at the time the Board issued Order WR 2021-0082-DWR and Addendum 9.

5.0 CONCLUSION

The Regulation addresses the severe water shortage in the Shasta River watershed to ensure water supplies are and will remain available to meet minimum instream flows for fish, human health and safety needs, and minimum livestock watering needs. The State Water Board has the authority to regulate extraction of groundwater under the Board's reasonable use authority, and it does not matter whether the groundwater BSID extracts from the Pluto's Cave basalt is determined to be a subterranean stream. As the state agency authorized to regulate water resources, the Board may adopt regulations implementing constitutional reasonable use requirements for waters beyond those for which it has permitting and licensing authority. (*Light, supra*, 226 Cal.App.4th at p. 1482 [affirming Board's authority to issue reasonable use regulations affecting water diversions outside its permitting and licensing authority]; *In re Water of Hallett Creek Stream System* (1988) 44 Cal.3d 448, 472 fn. 16 [Board's authority to apply the waste and unreasonable use and public trust doctrines extends to rights not covered by the permit and license system, such as riparian rights]; *Stanford Vina, supra*, 50 Cal.App.5th at pp. 994–995 [same].)

The hydrological connection between BSID's appropriative groundwater extractions and surface water flows in the Shasta River watershed is well documented. BSID's groundwater extractions directly affect flow levels in Big Spring Creek, which in turn directly affect minimum flows in the downstream Shasta River. The Board is authorized to prevent and curtail these diversions, which unreasonably affect other instream uses

and public trust resources. Not curtailing BSID would simply shift the same hardships on areas served by more senior water rights, and exacerbate and/or shift environmental harm to other areas in the watershed or to in-stream resources.

The State Water Board understands that hardship is brought about under the drought emergency due to adverse water supply conditions, and has created a pathway for local solutions that can balance harms of curtailment differently than strict adherence to the water right priority system. The Regulation enables the State Water Board to enforce the water right priority system with respect to all water right holders and claimants in a timely manner and to protect critical water supply needed for the protection of important fish species, minimum health and safety needs, and minimum livestock watering. That said, the State Water Board acknowledges that the priority system can be a blunt instrument, resulting in substantially different burdens on water users in times of shortage, according to the priority of a right. In this case, BSID is fairly junior and experiences a full curtailment while other more senior diverters can use the full amount of their water rights. That is the application of the rule of priority for appropriative rights, and it is the rule that the State Water Board must apply with very few exceptions. If BSID were not fully curtailed, the burden would fall on the next in line in order of priority, and simply transfer the harms cited by BSID to different water users. And, in fact, at the time that BSID obtained a TRO preventing application of the Curtailment Order, it appears that this is exactly what happened. (Worth May 2022 Decl., pp. 3-4 [“[b]etween March 21, 2022, and April 6 and 7, 2022, flow in Big Springs Creek dropped by approximately 20 cfs”]; 13 [“BSID’s pumping is impacting surface water and stream flow in the Shasta River watershed, and ... senior water rights holders, such as Grenada Irrigation District and SRWA, are harmed as a result”].) The Regulation requires that curtailments adhere to the rule of priority except in enumerated circumstances not alleged here, and the curtailment orders appropriately implemented, the rule of priority.

The State Water Board included provisions in the Regulation that provide the opportunity for local cooperative solutions (LCSs) in lieu of curtailments as set forth in the Regulation. (Cal. Code Regs., tit. 23, §875, subd. (f).) LCSs must be approved by the State Water Board prior to implementation. LCSs may allow for solutions that deviate from the rule of priority if there is agreement between the water users in an area, in recognition that watershed groups may be in a better position to figure out more

creative ways to meet the flow requirements and community needs that are more effective or ease the uneven nature of applying the rules of priority. A successful tributary or watershed-wide LCS will necessarily involve participation of water right holders of varying seniority. State Water Board staff remains open to working on an LCS with BSID and other parties in the Shasta River and/or its tributaries.

The State Water Board finds that the challenged Curtailment Order and Addendum 9 were appropriate and proper. The Petition is denied because it fails on the merits, for the reasons explained above.

ORDER

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



Eileen Sobeck
Executive Director

March 16, 2023

Date