July 11, 2023

Courtney Tyler, Clerk to the Board

State Water Resources Control Board

1001 I Street, 24th Floor

Sacramento, CA 95814

SENT VIA EMAIL: commentletters@waterboards.ca.gov

**Subject: Comment Letter – Petition for Rulemaking to Set Minimum Flows on the Scott River**

Ms. Tyler and Members of the State Water Resources Control Board:

The Siskiyou County Board of Supervisors and the Siskiyou County Flood Control and Water Conservation District (acting as the Groundwater Sustainability Agency for the Scott Valley Basin) is writing to provide comments in opposition on the Petition for Rulemaking to Set Minimum Flows on the Scott River, which is set for an initial hearing by the State Water Board on August 15th. We appreciate the opportunity to comment on this matter, which we understand is of vital importance to the State Water Resources Control Board (State Board) and stakeholders throughout the Klamath Watershed. Our comments reflect both a legislative analysis of the petition and potential rulemaking as well as a technical analysis of the information provided in the petition.

**Legislative Analysis:**

**Agency Rule Making Cannot Be Used to Circumvent the Comprehensive Statutory and Judicial System From Which the Scott River Adjudication and Decree Was Developed and Is Regulated. Any “flaw” in the Scott River Decree is a Matter to Resolve with the Siskiyou Superior Court.**

The State Legislature has established a comprehensive statutory system for regulation of Scott River surface waters and interconnected groundwater, which authorizes the Siskiyou County Superior Court to adjudicate all rights to such water.  Acting pursuant to this statutory authority, the Siskiyou County Superior Court, based in part on the studies and interconnected groundwater maps prepared by the State Board, issued a decree in 1980 adjudicating all such rights. (Decree, Scott River Adjudication, No. 30662, Superior Court for Siskiyou County (Jan. 30, 1980) The decree established instream flow conditions for protection of public trust uses in the Scott River. Specifically, the Decree established “reserved high flows,” or “flushing flows,” for the “Scott River fishery resource” (Decree, ¶ 46, p. 13),  as well as flows for “instream use[s]” for “fish and wildlife”

within the Klamath National Forest (id., ¶ 45, p. 12);  flows for “instream use[s]” on tributaries for “fish” and other uses (id., ¶ 47, p. 14); flows for natural lakes for “fishery” and other uses (id., ¶ 48, p. 15); and flows for forest reserved lands for domestic, recreational, timber harvesting, wildlife, and other purposes (id., ¶ 49, p. 15).

The decree reserves jurisdiction for the Siskiyou County Superior Court to impose new instream flow conditions for protection of public trust uses, if existing instream flow conditions do not adequately protect such uses.  Since the Legislature has established a comprehensive system for regulation of Scott River surface waters and interconnected groundwater, which has resulted in a judicial decree establishing instream flow conditions to protect trust uses in the river, the Board is obligated to seek modification of the Decree—under the terms of the Decree itself—if the Board believes the Decree’s instream flow conditions are insufficient to protect public trust uses or if the State Board believes as Petitioners argue that the Interconnected Groundwater area depicted on the maps the Board prepared for the court is “too small and is unsupported by evidence”. (Petition for Rulemaking (“Pet.”), at p. 22.) The sufficiency of the Decree to achieve its own internal objective is a matter for the Siskiyou Superior Court, not agency rulemaking.[[1]](#footnote-1)

**Petitioner’s Characterization of the Public Trust Doctrine is in Error. The Public Trust Doctrine Requires the State to Consider Competing Uses and Does Not Dictate Precedence of One Use Over the Other Nor Mandate Petitioner’s Proposed Rulemaking.**

The Public Trust Doctrine is a mechanism by which the Board considers impacts and makes policy judgments to determine the appropriate balance between competing beneficial uses of water, it is not an inflexible mandate.  *In National Audubon Society v. Superior Court (1983) 33 Cal.3d 419*, the California Supreme Courtheld that the state has continuing authority to regulate water resources in order to protect the public interest, but that the state is not required to protect specific trust uses in doing so; rather, the Legislature may authorize water diversions that it deems to be in the public interest even though this may “unavoidably harm” trust uses in source streams.  (33 Cal.3d at 446; see also id. at 439 n. 1 (Legislature has right “to prefer one trust use over another”).)  In *State of* *California v. Superior Court* (2000) 78 Cal.App.4th 1019, 1031 n. 18, the Court of Appeal stated that *National Audubon* “explained how the interests served by the public trust must be considered—although not necessarily given precedence—when water usage is considered.”  In *Carstens v. California Coastal Comm’n* (1986) 182 Cal.App.3d 277, 289, the Court of Appeal—citing *National Audubon*, *Colberg* and *Boone*—explained that the public trust doctrine “does not prevent the state from preferring one trust use over another.”  Here, the Board may decide not to engage in rulemaking because the production of groundwater for drinking, bathing, cooking, livestock, and for growth of crops on parcels in the Scott Valley is within the public interest.

**Economic Impacts Weigh Against the Petition and In Favor of Denying the Request for Rulemaking:  Petitioners Concede the Proposed Rulemaking Will Have Uncertain Environmental Benefits, While the Harm to Other Beneficial Users From the Rulemaking Is Certain**.

Petitioners argue that the “success of the emergency regulations has been mixed” (Pet., p. 28)  and while “there are some signs that curtailments had a positive effect” (Pet., p. 29), “[a] September rainstorm aided this process” (id.).  Thus, the value of the permanent regulation the Petitioners seek is uncertain. This uncertain value does not justify imposing significant economic and social harm on Siskiyou County citizens. The two major population centers in Scott Valley, Etna and Fort Jones, are classified as a Disadvantaged Community (DAC), and Severely Disadvantaged Community (SDAC) based on median household income compared to the State average, while the entirety of Scott Valley is located in a census tract categorized as DAC.[[2]](#footnote-2) The region that would be impacted by this proposed rulemaking contains rich soil ideal for crops such as barley, wheat, oats, hay and alfalfa.  These crops cannot be grown and harvested without water.  When curtailment orders are issued Scott Valley farmers suffer economic losses, impacting their livelihood and ability to provide for their families. Water uncertainty and the inability of farmers to receive water to irrigate their crops also harms the small businesses that support local farmers. Economic downturns have social impacts. It is well documented that economic hardship, including joblessness, results in the breakdown of traditional family arrangements, increases use of public assistance, and causes higher rates of crime and violence. E.g., Nichols, Mitchell, & Lindner, Consequences of Long-Term Unemployment, July 2013, The Urban Institute, at 11-12. Economic hardship can also induce behavioral changes that have important spillover effects on the community as a whole, including reducing investments in housing and other capital improvements. (*Id*. at 12.)  The speculative environmental benefit of engaging in this proposed rulemaking does not outweigh the concrete harm that will occur to other beneficial users of water in the Scott Valley if the emergency regulations are made permanent.

**The Beneficial Use of Surface and Groundwater in the Scott Valley Does not Constitute Waste and Unreasonable Use of Water and There is No Basis to Regulate it as Such.**

As a general matter, water diverters in the Scott Valley watershed are putting water to beneficial use for domestic, stock, and agricultural irrigation uses. Petitioners’ citation to *Light v. State Water Resources Control Board*, is not relevant here.  In *Light,* the Board was addressing the specific practice of using diverted water - not to irrigate nor to provide water for stock or homes- but, to create ice around vines in vineyards to protect grapes from exposure to dropping temperatures.  As the court noted, there “are alternative methods, such as wind machines, heaters, and cold air drains, that will work under certain circumstances to protect against frost damage”.  (*Light v. State Water Resources Control Bd*. (2014) 226 Cal. App. 4th 1463, 1475.)  No specific practice that could be considered to constitute waste or unreasonable use of water is at issue here, and thus there is no basis for the Board to declare exercise of water rights in the Scott Valley to be a waste or unreasonable use. If any specific practice is identified by the Board, then it should be specifically dealt with in a limited fashion, rather than through the broad regulation Petitioners seek.

**Technical Analysis:**

The petition as submitted contains a number of technical and factual errors, which are summarized below and included in more detail in Attachment 1.

Information provided in the petition stating that the Scott River “…goes dry in most summers. Even in the wettest years, flows today are less than in the driest years half a century ago” is vague and factually incorrect. In the three wettest years of the last 20 years, the water year’s lowest flows at the Fort Jones USGS stream gauge varied from 35 cfs to 54 cfs. In contrast, the lowest flows in dry years of a half-century and more ago, at a time of limited groundwater pumping, were measurably lower (below 30 cfs) [[3]](#footnote-3). Specifically:

* from August 9 to September 24, 1973, flows measured 22 cfs to 25 cfs;
* in September 1970, flows measured 29 cfs;
* in late July, late August, and late October 1968, flows measured 28-29 cfs;
* between August 25 and September 12, 1967, flows measured24-26 cfs;
* from September 8 to 17, 1959, flows measured 27-28 cfs;
* and in late July and from August 26 to September 17, 1955, flows measured 22-28 cfs.

The petitioner’s state on page 35 that “The unreasonableness of the harms to the Scott is highlighted by the flow records over the last half century. Before the 1970’s, the Scott routinely experienced late summer flows in excess of the CDFW recommendations of 62 cfs [in] September. In fact, flows dropped below CDFW-recommended levels on only a few occasions, and rarely in other that dry or very dry years.” This information is an interpretive misrepresentation. According to Table 1 and Figures 1 and 2 of the petition, monthly mean flows exceeded California Department of Fish and Wildlife (CDFW) Minimum Interim Stream Flow Recommendations in approximately one-third of the thirty years 1942 – 1971. In 2021 and 2022, the State Board issued curtailments based on daily average flows, not based on monthly average flows. Daily average flows at the Fort Jones USGS flow gage dropped below the CDFW Recommendation for extended periods of time in each of the 30 years of “unimpaired” flow 1942-1971 and dropped to 62 cfs or lower in all but 6 years, that is, in 80% of the 30 years between 1942 and 1971.

When considering flows in Scott River, it is critical to consider how precipitation has changed from the 1970’s moving forward, including changes in frequency, intensity, and total precipitation received. In addition, the Flood District’s Groundwater Sustainability Plan (GSP) for the Scott Valley Basin clearly demonstrates that even if all agriculture were to be removed from the Valley, current precipitation trends would make it impossible to reach flows as most recently recommended to the State Board by the CDFW, as illustrated in Appendix 4A Management Scenario Results of the Scott Valley Groundwater Sustainability Plan[[4]](#footnote-4). In addition, scenarios as described in the Scott Valley GSP demonstrate that flows during the critical fall flow regime will not meet the CDFW Minimum Interim Stream Flow Recommendation in over 75% of water years, even under the extreme scenario of no irrigation and a nearly desert like landscape with limited evapotranspiration and void of native groundwater-dependent ecosystems (e.g., riparian vegetation, bunch-grasses, clover, wetlands).

Page 20 of the petition includes claims that agriculture use has “… increased recently, with an estimated use of 68,000 AF in 2018 and 2019 compared to an estimated average use of 61,500 AF per year from 2015 to 2017.”, the increase in agricultural pumping reported since 2019, relative to earlier years, does not reflect a change in groundwater pumping, rather it reflects updated outputs from the soil water budget module of the Scott Valley Integrated Hydrologic Model. As is explained in the Adjudicated Basin reports, the lower value of the range estimates for water use that was provided for those years changed due to an update of the model. Unfortunately, the California Department of Water Resources (DWR) website does not allow for back-correction of earlier year reports when model estimates are updated (including estimates for prior years), at least not currently (see Appendix 1).

The petitioners claim on page 5 that “The State Board must, therefore, protect the Scott permanently. It must adopt, under its statutory, public trust, and waste and unreasonable use authority and other authorities, a permanent regulation setting minimum flows in the Scott that, informed by yearly hydrology and the needs of these crucial species, will allow survival and recovery of Coho and Chinook”. Any consideration of minimum flow standards in the Scott River would require a thorough and transparent biological study. Minimum flows as prescribed by the recent emergency curtailment orders are not calibrated to the Scott Valley and the needed for measures for flow and temperature at different locations within the Valley.

In April 2023, DWR approved the Groundwater Sustainability Plan for the Scott Valley Basin. The GSP includes a number of sustainability goals which are only achievable through implementation of the GSP. For example, the GSP has set a metric to reverse groundwater depletion through the implementation of several projects in the Valley, many of which irrigators have agreed to support and/or participate in. The GSP’s sustainable management criteria for interconnected surface water reflect an unprecedented, unparalleled, and significant effort at reversing stream depletion that was defined as being already an undesirable result in 2015. Among all of the state’s GSPs, the Scott Valley GSP is the only plan that goes beyond simply maintaining conditions during the baseline period (in most GSPs a period from the 1990s to 2015), and that explicitly sets minimum thresholds that will reverse streamflow depletion that existed during the 1991-2018 baseline period and therefore will measurably improve streamflow condition.

**Conclusion:**

The health and viability of the Scott River system, and the entire Klamath Watershed, is of vital importance to Siskiyou County, as it is for all stakeholders, who depend on it. We are dedicated to working with the State Board and stakeholders to continue to implement projects and actions to ensure that the Scott River system remain a dependable resource. Below are brief examples of just a fraction of the good work occurring throughout the Watershed.

**The Bipartisan Infrastructure Law Funding and Efforts by the Tri-Counties**

Siskiyou County, along with Modoc County and Klamath County, Oregon (Tri-Counties) have taken great strides to help resolve long-standing conflict throughout the entire Klamath Watershed. In 2021, the Klamath Watershed was handed a rare opportunity in the form of $162 million through the Bipartisan Infrastructure Law, 117-58. One of the extraordinary pieces of the funding is that it did not require an end date by which the funds shall be expended. This allows us to take the time needed to leverage the funding in a way that brings Klamath Watershed communities together in collaboration and expends funds in a manner that provides long-term resolution to the Watershed. To ensure the best possible outcomes for the Klamath Watershed, the Tri-Counties have proposed the development of an advisory committee. This committee will consist of governmental voting representatives from local counties and tribal communities. The committee's primary purpose will be to establish a robust review process that evaluates the projects and facilitates the appropriate dispersal of funding to ensure cohesive and quantifiable results, and brings together the Watersheds communities.

**Scott Valley GSP**

Implementation of the Scott Valley GSP has already started through a variety of projects, which are being monitored through data collection to determine their success. Recently, acting as the GSA for the Scott Valley Basin, we submitted applications to the Department of Water Resources and we have been tentatively awarded approximately $14 million for implementation of the GSPs in Scott, Shasta, and Butte Valley.

**CDFW Funding for the Scott Valley**

In April 2023, CDFW awarded the Siskiyou County Flood Control and Water Conservation District, specifically its Sustainable Groundwater Management Act program (SGMA), $1 Million to address threats to water resources and make progress towards the goals of the Scott Valley Groundwater Sustainability Plan. Through this grant, staff and technical consultants will continue the groundwater recharge project developed by Scott Valley Irrigation District (SVID) where the primary intention of the project is to evaluate ditch water potential for groundwater recharge and streamflow augmentation. Monitoring data and the Scott Valley Integrated Hydrologic Model (SVIHM) will be used to evaluate ditch water infiltration at different locations, times, and conditions to develop strategies to optimize groundwater recharge and support instream flows.

**Memorandum of Agreement between the Yurok Tribe, CalTrout and Farmers Ditch Company**

Lastly, in June The Yurok Tribe, CalTrout and Farmers Ditch Company signed an agreement to promote a future where salmon populations and family farms both flourish in the Scott River Valley. According to a June 20th press release from the Yurok Tribe, “The primary objectives of the partnership are to restore salmon habitat and improve on-farm water use efficiency. According to the Memorandum of Understanding (MOU), the unconventional group of stakeholders agreed to pursue collaborative projects “that provide landscape-scale benefits for fish and wildlife and farms.””

It is important to outline just a few of the many proactive actions carried out by stakeholders to demonstrate their willingness to work together in their commitment to fostering a resilient and thriving Klamath Watershed. We implore the State Board to bolster these efforts, and take this opportunity to build upon the collaborative work. We truly believe that to achieve long-term sustainability we will all be required to work hard from a local level to make decisions and implement actions that are based on trustworthy science that fully considers all communities and industries.

We appreciate the opportunity to comment on this manner and we look forward to working with the State Board and all stakeholders and Tribes in the future. If you have any questions or would like to discuss this further, please contact Elizabeth Nielsen, Deputy County Administrator at enielsen@co.siskiyou.ca.us or (530) 842-8012. This letter was approved by the Siskiyou County Board of Supervisors on July 11, 2023, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Sincerely,

Ed Valenzuela

Chair, Board of Supervisors

cc: Senator Brian Dahle

 Assemblymember Megan Dahle

 Rural County Representative of California (RCRC)

 California State Association of Counties (CSAC)

 Shaw Yoder Antwih Schmelzer & Lange

 Director Charlton “Chuck” Bonham, CDFW

1. It would appear that under a Public Trust analysis, as to adjudicated water rights, the State Board would have to determine that it is not “feasible” for the Board to fulfill its public trust duties through circumvention of the statutory stream adjudication procedures; rather any public trust duties must be fulfilled through its role in the statutorily defined adjudication process. [↑](#footnote-ref-1)
2. https://gis.water.ca.gov/app/dacs/ [↑](#footnote-ref-2)
3. <https://waterdata.usgs.gov/nwis/inventory/?site_no=11519500> [↑](#footnote-ref-3)
4. Available: <https://www.co.siskiyou.ca.us/naturalresources/page/scott-valley-final-gsp> [↑](#footnote-ref-4)