



ENVIRONMENTAL LAW FOUNDATION

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BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

PETITION FOR EMERGENCY RULEMAKING TO SET MINIMUM FLOWS ON THE SCOTT RIVER

Pursuant to Cal. Const. art. 1, § 3
and Gov. Code § 11340.6

This summer presents as great a challenge as the Scott River has ever faced. Historic low precipitation and high temperatures coupled with increasing water extraction will result, again, in a disconnected, dry riverbed with potentially disastrous effects for protected fish populations. Compounding the challenge is the fact that the Scott basin is split in two by an out-of-date adjudication that allows unrestricted groundwater pumping in most of the valley. It is only June and the river is almost dry. The State Board must act and act fast.

At the same time, recent court decisions and administrative actions have confirmed that the State Board has the power to address these critically low flows without needing to go through the lengthy and expensive process of readjudicating the Scott River basin. First, the State Board has the power under its waste and unreasonable use authority, Water Code section 1058.5, and a drought proclamation to issue emergency regulations setting minimum instream flows for adjudicated rivers and declaring water use that reduces flows below those minimums to be per se unreasonable. (*Stanford Vina Ranch Irrigation Company v. State of California* (2020) 50 Cal.App.5th 976 (*Stanford Vina*)).) Second, the State Board has the authority and the duty to regulate groundwater extractions that affect public trust resources. (*Environmental Law Foundation v. State Water Resources Control Board* (2018) 16 Cal.App.5th 844, 858 (*ELF*)).) Meanwhile, the California Department of Fish and Wildlife (CDFW) has sent several letters to the State Board requesting the Board implement CDFW's 2017 interim stream flow criteria this season, and the Governor recently proclaimed a drought emergency that activates the State Board's powers under section 1058.5.

With all of this in place, the State Board now has everything it needs to issue emergency regulations that could, for the first time, set an enforceable minimum flow in the Scott River, applicable to all water users in the basin whose diversions or extractions affect flows on the Scott.

The Karuk Tribe (Tribe) and Environmental Law Foundation (ELF) now bring this Petition for Emergency Rulemaking to urge the State Board to use its authority and fulfill its duty by adopting an emergency regulation to protect flows in the Scott River

this summer.

Parties

The following parties petition the State Board:

The Karuk Tribe

Petitioner Karuk Tribe (the Tribe) is a federally recognized Indian Tribe with a population of approximately 3,700 enrolled members and 5,300 enrolled descendants. Its headquarters is located in Happy Camp, along the Klamath River and in the vicinity of the Salmon and Scott Rivers. The Karuk Tribe has lived in northern California since time immemorial.

The stated mission of the Karuk Tribe is to promote the general welfare of all Karuk people; establish equality and justice for the Tribe; restore and preserve Tribal traditions, customs, language, and ancestral rights; and secure for themselves and their descendants the power to exercise the inherent rights of self-governance. Among the many goals of the Tribe is the protection and restoration of native fish and wildlife species that the Tribe has depended upon for traditional cultural, religious, and subsistence uses. The fisheries, environmental and aesthetic assets, and the cultural values associated with them, are at the core of the interests the Tribe seeks to promote and protect. A long-term goal of the Karuk Tribe is to restore fisheries habitat by improving hydrologic function and water quality in the Klamath River and key tributaries. Since time immemorial, the Karuk People have relied on fish such as salmon, lamprey, mussels, steelhead, and sturgeon for survival. Over time the Tribe developed strategies to manage and enhance populations of these species through active management techniques, many of which are incorporated into religious and ceremonial practices.

The last several decades have seen a general trend of declining fish populations in the entire Klamath Basin, including the Scott River. The Scott River is one of the most important Klamath tributaries providing spawning and rearing habitat for Chinook salmon, steelhead trout, Pacific lamprey, and ESA-listed coho salmon. As such, the Karuk Tribe has an immediate and concrete interest in the mitigation of harms to and the long-term preservation of the fisheries and wildlife resources in the Scott.

Environmental Law Foundation

ELF is a California nonprofit organization founded on Earth Day in 1991 that has a longstanding interest in aiding the recovery of anadromous fish populations. ELF has been advocating for improved flows in the Scott River for more than ten years. As such, ELF has a direct interest in the State Board's failure to regulate flows in the Scott and in

the contents of any regulation.

Factual Background

It is undisputed that groundwater pumping and intensive agriculture have significantly impacted the Scott River. The Scott is one of the most important rivers on the Pacific Coast for threatened coho (Karuk: *achvuun*) and chinook salmon (Karuk: *àama*), as well as a host of other species, including steelhead, mussels, and Pacific lamprey. Scott's coho population has been recognized as a "core independent" population of the ESA-threatened Southern Oregon/Northern California Coast Evolutionarily Significant Unit. And it is also undisputed that populations of these species are in serious trouble.¹

Flows have been decreasing in the Scott, especially in dry years. Since 1980, coincident with rapidly intensifying agriculture, late summer flow in critically dry years has averaged 9.7 cubic feet per second (cfs).² This situation is in contrast with records from 1942-1980, prior to the Scott River adjudication, when critically dry years resulted in flows averaging 33.1 cfs.³ Indeed, since 1980, even in normal years flow has averaged only 22.4 cfs, as compared to 60.0 cfs from 1942-1980.⁴ Since the 1970s, the number of days when the Scott experiences flows below 15 cfs has increased dramatically.⁵

The story this data shows is clear: Historically, even in the driest years, there was enough water in the river to support fish survival. Now, due to increasing extractions, there isn't enough water for fish even in normal years.

¹ CDFW, Interim Instream Flow Criteria for the Protection of Fishery Resources in the Scott River Watershed, Siskiyou County (Feb. 6, 2017) pp. 8-13 (Flow Criteria). On May 3, 2021, CDFW transmitted a package containing four documents: (1) a letter from Charlton H. Bonham to Eileen Sobeck regarding the need for immediate action on the Scott River (CDFW Letter), (2) the Flow Criteria, (3) a memorandum from Tina Bartlett, CDFW with the subject Influence of Scott River in-stream flow on the distribution and migration timing of fall Chinook Salmon and Coho Salmon, dated May 3, 2021 (CDFW Flow Memo), and (4) CDFW's comments on the Scott Valley Groundwater Sustainability Plan (CDFW SGMA Comments). The entire package is attached hereto as Exhibit A.

² CDFW Flow Memo, *supra*, at p. 7-8.

³ CDFW Flow Memo, *supra*, at pp. 6-7.

⁴ *Id.* at pp. 7-8.

⁵ Flow Criteria, *supra*, at p. 7.

And these low flows lead to disconnections and drying up of the riverbed itself.⁶ Dewatering of the mainstem Scott is becoming common in dry and even normal years. This has devastating impacts for coho, which need to rear for 18 months in cold water before migrating.⁷ And the river has been disconnected during the mid-October chinook run, preventing dispersal of chinook to their preferred spawning grounds in the mainstem Scott Valley and its tributaries, including Etna, French, Miners, Kelsey, Kidder, Mill, Patterson, Shackleford and Sugar Creeks.⁸



The above image shows a portion of the Scott Valley between Fort Jones and Etna on October 4, 2020, during the worst Chinook migration season to date and just before the near cohort failure of Coho. Despite the fact that the mainstem Scott is dry, agricultural fields are dark green with crops.⁹

⁶ CDFW Letter, *supra*, at p. 2; CDFW Flow Criteria, *supra*, at p. 6; D. Tolley, L. Foglia & T. Harter, *Sensitivity Analysis and Calibration of an Integrated Hydrologic Model in an Irrigated Agricultural Basin With a Groundwater-Dependent Ecosystem* (2018) 55 *Water Resources Research* 7876, 7888 (Tolley Sensitivity Analysis), <https://agupubs.onlinelibrary.wiley.com/doi/epdf/10.1029/2018WR024209>, accessed June 15, 2021, attached as Exhibit B. The graphic on page 7888 of this document shows the lengthy disconnections that occur upstream of Shackleford Creek in dry and normal years.

⁷ CDFW Flow Criteria, *supra*, at pp. 11-12.

⁸ CDFW Flow Criteria, *supra*, at p. 11; CDFW Flow Memo, *supra*, at pp. 17-18.

⁹ The European Space Agency, Sentinel-2, Scott Valley, Calif. (Oct. 4, 2020), https://apps.sentinel-hub.com/eo-browser/?zoom=15&lat=41.5018&lng=-22.85255&themeId=DEFAULT-THEME&visualizationUrl=https%3A%2F%2Fservices.sentinel-hub.com%2Fogc%2Fwms%2Fbd86bcc0-f318-402b-a145-015f85b9427e&datasetId=S2L2A&fromTime=2020-10-04T00%3A00%3A00.000Z&toTime=2020-10-04T23%3A59%3A59.999Z&layerId=1_TRUE_COLOR.

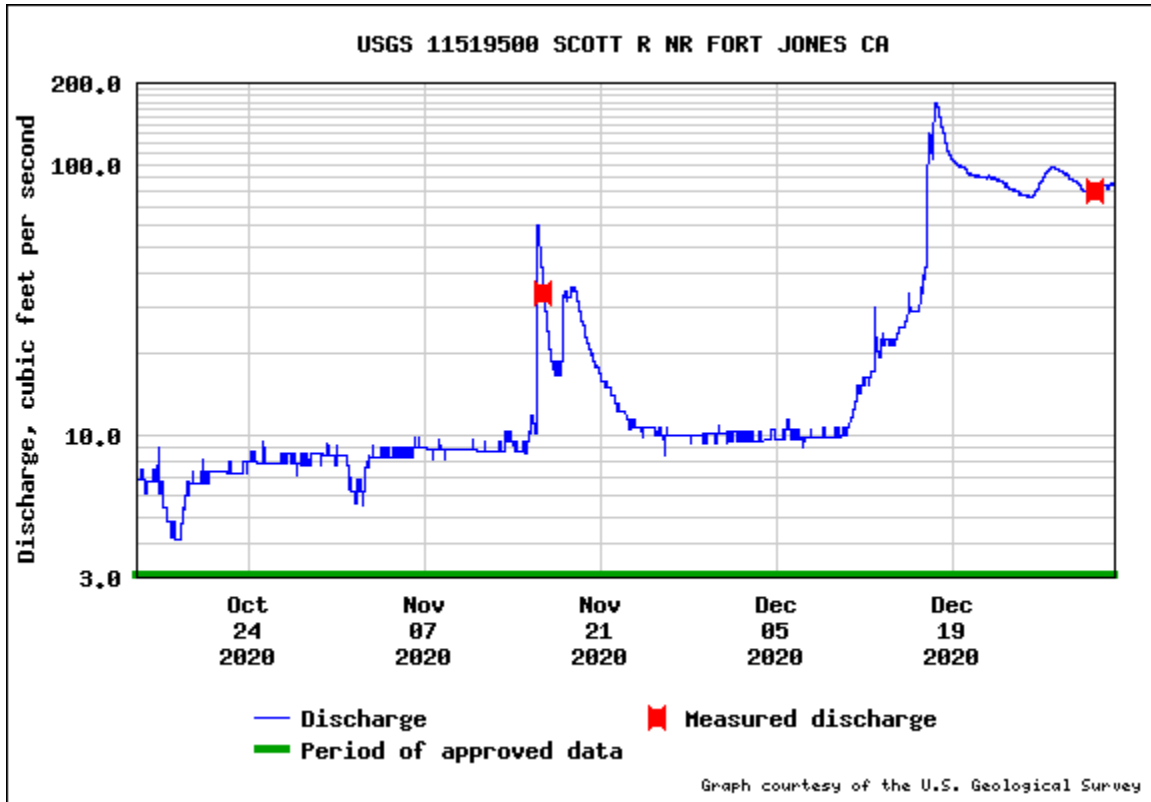
As a result, populations are in danger of collapse due to lack of flows. Spring-run chinook were extirpated prior to the 1970s and fall-run chinook populations have suffered greatly in recent years, declining from over 10,000 adults as recently as 2014 to several hundred in 2020.¹⁰ And while the Scott's chinook population has shown resilience in the past, bouncing back from severe depletions in 1983, 1991, and 2004-05, no such rebound has occurred since 2015.¹¹ The failure of the population to rebound during the wet years in 2017-19 shows that the population is losing its former resilience due the stress of consistent low flows.

And while certain of the three brood years of Coho have shown signs of recovery, the population remains listed as threatened and last year's low flows were close to the last straw for one cohort.¹² A brief recap of the situation on the Scott in the fall of 2020 demonstrates the impacts that low flows have on salmon population and the urgent need for emergency action this summer.

¹⁰ CDFW Flow Memo, *supra*, at p. 9. The California Fish and Game Commission voted on June 16, 2021 to list Upper Klamath-Trinity river spring chinook salmon under the California Endangered Species Act. (Kimberley Wear, North Coast Journal, Klamath Spring Chinook Receive New State Protections (June 20, 2021) available at <https://www.northcoastjournal.com/NewsBlog/archives/2021/06/20/klamath-spring-chinook-receive-new-state-protections>, accessed June 21, 2021).

¹¹ *Ibid.*

¹² Coho keep a fairly rigid three-year cycle of spawning, rearing for 18 months in fresh water, migration, and return. Thus the Scott coho population can be divided into three cohorts, or brood years, each of which return to spawn every three years. (Flow Criteria, *supra*, at p. 12.) Brood year 1 was devastated by the 2013-14 drought year, when its run was reduced from 2,644 fish in 2013 to 250 in 2016; only 365 returned in 2019. Brood year 3 increased from 80 fish in 2009 to 727 in 2018. (*Ibid.*)



USGS Flow Data at Fort Jones, October 15-December 31 2020.¹³

In late fall 2020, following a dry year, flows in the Scott were extremely low: less than 10 cfs by late October. Chinook, which typically migrate during a narrow period in mid-to-late October, experienced one of the worst migration returns on record.¹⁴ And by November, more than 1,600 coho from a strong Brood Year 2 return—increased more than tenfold since 2008—were waiting for sufficient flow to migrate to their historic spawning grounds upstream.¹⁵ Flows were so low—less than 10 cfs—that the Scott’s lower canyon was disconnected from the spawning areas in the Scott Valley and the tributaries. The returning fish were forced to wait until a rain event from November 17 to 19 filled the river sufficiently to allow passage above the fish counting station below Fort Jones. But this storm did not end the story: the river averaged only 11.3 cfs from November 20 to December 12 and remained disconnected beyond Shackelford Creek—

¹³ Available at https://nwis.waterdata.usgs.gov/nwisweb/graph?agency_cd=USGS&site_no=11519500&parm_cd=00060&begin_date=2020-10-15&end_date=2020-12-31&format=gif, accessed June 8, 2021.

¹⁴ CDFW Flow Memo, *supra*, at p. 9.

¹⁵ *Ibid.*

only a few miles into the valley.¹⁶ Thus the returning coho were forced to wait for another month, until December 16 to 31, for sufficient rainfall to restore connections to the traditional spawning grounds in the mainstem Scott and its tributaries.¹⁷ We still must await the results of next year's migration to know whether this cohort was able to successfully spawn and rear under such stressful conditions and thus avoid total cohort failure.¹⁸

Agricultural Water Use in the Scott Valley

Low flows in the Scott are not the result of weather alone. The decline in Scott flows is largely attributable to the increase in intensity in agricultural use over the past half-century. Scott flows have declined much more than in other rivers with similar watershed characteristics but which lack intensive agriculture.¹⁹ And irrigation withdrawals increased 115% between 1953 and 2001 while irrigated land area increased by 89% during the same period.²⁰ This finding is consistent with a groundwater modeling study that found that the impact of increased pumping (leaving aside surface diversions) between the 1980s and 2000 is responsible for a decrease in 16 cfs of Scott baseflows.²¹

Currently, agriculture uses approximately 69,000 acre feet (AF) in the Scott, of which 26,000 AF comes from surface water diversions and 42,000 AF comes from groundwater pumping.²² And this use has increased recently, with an estimated use of 68,000 AF in 2018 and 2019 compared to an estimated 61,500 AF from 2015 to 2017.²³ Groundwater levels in monitoring wells declined between 3.4 and 7.6 feet between 2019

¹⁶ CDFW Flow Memo, *supra*, at p. 18.

¹⁷ *Ibid.* at p. 18.

¹⁸ The CDFW letter warns that cohort failure may have already occurred. (CDFW Letter, *supra*, at p. 2.)

¹⁹ Robert W. Van Kirk & Seth W. Naman, *Relative Effects of Climate and Water Use on Base-Flow Trends in the Lower Klamath Basin* (2008) 44 J. Am. Water Resources Assn. 1035, 1045-46, attached as Exhibit C. This study concluded that 61% of the decline in Scott late-summer baseflows was attributable to increased agricultural withdrawals.

²⁰ *Id.* at p. 1046.

²¹ SS Papadopoulos & Associates Inc., *Groundwater Conditions in Scott Valley, California* (2012) p. 32 (Papadopoulos Report), attached as Exhibit D.

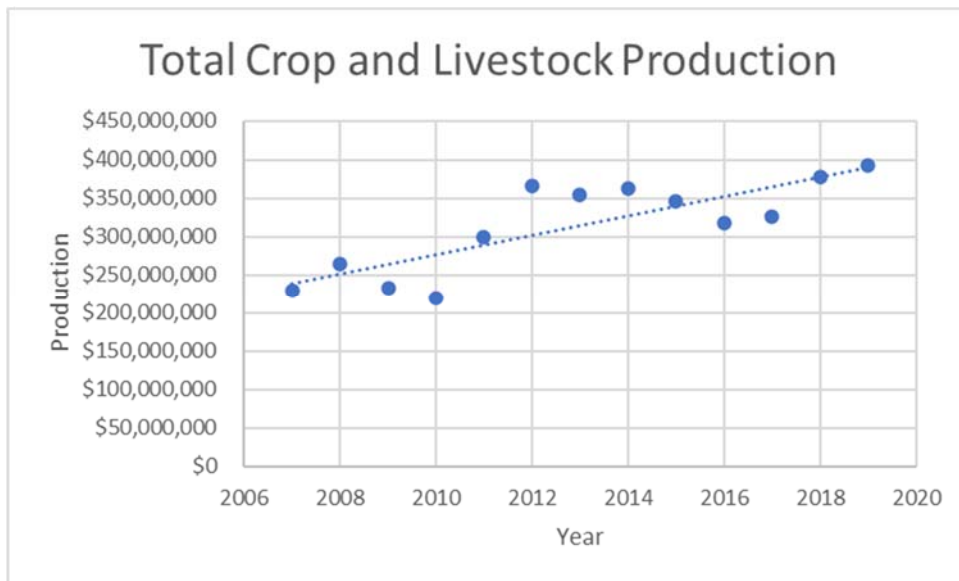
²² Department of Water Resources, *Adjudicated Basins Annual Reporting System* (2021), *Scott River Stream System Annual Report, 10/01/2019–9/30/2020* (Scott River Adjudication Annual Report), attached as Exhibit E. The remaining 1,000 AF is for domestic use.

²³ *Ibid.*

and 2020.²⁴

Dry years such as 2020 and 2021 lead to a vicious cycle: Less rain means sunnier skies and warmer weather, which increases crop evapotranspiration and water needs. But with less surface water available, pumping increases.²⁵

At the same time, agricultural revenues in Siskiyou County have grown steadily.



Source.²⁶

Previous Efforts to Address Flow Issues in the Scott Have Been Unsuccessful

The first major attempt to provide flows in the Scott was the statutory adjudication that was entered in the Siskiyou Superior Court in 1980. The Scott River Decree reserves 30 cfs to the U.S. Forest Service in September, with higher amounts in

²⁴ *Ibid.*

²⁵ Tolley Sensitivity Analysis, *supra*, 55 Water Resources Research at pp. 7894-95.

²⁶ Data from: Siskiyou County Dept. of Agric., Siskiyou County 2019 Annual Crop & Livestock Report, <https://www.co.siskiyou.ca.us/agriculture/page/crop-report>; Siskiyou County Dept. of Agric., Siskiyou County 2014 Annual Crop & Livestock Report, <https://www.co.siskiyou.ca.us/agriculture/page/crop-report>; Siskiyou County Dept. of Agric., Siskiyou County 2016 Annual Crop & Livestock Report, <https://www.co.siskiyou.ca.us/agriculture/page/crop-report>; Siskiyou County Dept. of Agric., Siskiyou County 2010 Annual Crop & Livestock Report, https://ucanr.edu/sites/farm_management/files/132257.pdf.

other months, for “minimum subsistence-level fishery conditions including spawning, egg incubation, rearing, downstream migration, and summer survival of anadromous fish, and can be experienced only in critically dry years without resulting in depletion of the fishery resource.”²⁷ It additionally reserves 32 cfs in September for environmental flows, but at a lower priority right. As discussed above, the 30 cfs flow has not been satisfied even in recent normal precipitation years.

But the Scott River adjudication has a major flaw: it regulates certain, but not all, groundwater extractions in the Scott Valley. Following the Legislature’s declaration that groundwater in the Scott Valley should be adjudicated as being connected to the Scott River (Water Code section 2500.5), the court included some, but not all, of the groundwater in the Scott Valley.²⁸ A map included in the adjudication delineates a zone near the river where the court declared the groundwater to be “interconnected.”²⁹ This has led to a situation where claimants listed in Schedule C of the adjudication are governed by the adjudication, but those with land outside the adjudicated zone may drill groundwater wells and pump groundwater with almost no oversight.

The zone established by the court is too small and is unsupported by evidence. The report that formed the basis of the adjudication’s line demarcating the “interconnected” zone was not based on streamflow calculations nor did it consider the cumulative depletion impact from pumping over many years.³⁰ Rather, it relied only on inferences based on the relative permeability of the sediments in the Scott Valley.³¹ Indeed, the report acknowledged that it lacked the information to draw a bright line between “ground water obviously not interconnected” and “ground water freely and completely interconnected.”³² And according to a technical memorandum using the Scott Valley Groundwater Model, pumping outside the adjudicated zone has a clear and

²⁷ Siskiyou County Superior Court, Decree No. 30662, Scott River Stream System (1980) p. 12, ¶ 45 (Scott River Decree), attached as Exhibit F.

²⁸ Scott River Decree, *supra*, ¶¶ 1, 4, 20.

²⁹ Scott River Adjudication Map, attached as Exhibit G.

³⁰ State Water Resources Control Board, Report on the Hydrogeologic Conditions of Scott Valley Siskiyou County, California (1975) (1975 Hydrogeologic Report), attached as Exhibit H; see also Deborah L. Hathaway, Memorandum, Stream Depletion Impacts Associated with Pumping from within or beyond the “Interconnected Groundwater” Area as Defined in the 1980 Scott Valley Adjudication (Aug. 27, 2012) pp. 1-2 (Hathaway Memo), attached as Exhibit I.

³¹ 1975 Hydrogeologic Report, *supra*, at p. iii, 5-18; Hathaway Memo, *supra*, at p. 2 (the 1975 Hydrogeologic Report “does not support a conclusion that pumping from beyond the zone would not result in a stream depletion impact within the same irrigation season or in future years”).

³² 1975 Hydrogeologic Report, *supra*, at p. iii.

measurable impact on Scott River flows, impacts which have accumulated over time.³³

In 2005, the North Coast Regional Water Quality Control Board adopted a TMDL for temperature and sediment.³⁴ However, this program did not address flows, and attempted to remedy impairments to temperature solely by improving shade.³⁵ As discussed above, any improvements in shade have not resulted in improvements in salmonid populations.

In 2017, CDFW established an interim instream flow criteria for the Scott, with minimum late-summer flows of 62 cfs (or the river's natural flow) along with higher amounts in other months.³⁶ But neither the State Board nor the Regional Board has taken any action to implement this flow criteria through a Basin Plan amendment, a regulation under their waste and unreasonable use authority, or any other regulatory tool. On June 15, 2021, CDFW sent a second letter to the State Board again urging immediate action and setting out proposed "drought emergency minimum flow recommendations" intended to preserve salmonid survival during the current drought.³⁷

In 2014-16 and again in 2020, facing a dry year, the State Board issued Notices of Unavailability to junior water rights holders.³⁸ Yet in none of those years were flows sufficient to meet the USFS flow right of 30 cfs or emergency CDFW flow recommendation of 33 cfs during late summer.³⁹ One reason these notices were unsuccessful is that they did not address extractions of interconnected groundwater. Because groundwater is closely connected to Scott River flows, even ending surface water diversions will not allow flows to recover if groundwater extraction both within and outside the adjudicated zone is not addressed.⁴⁰

³³ Hathaway Memo, *supra*, at p. 4.

³⁴ North Coast Regional Water Quality Control Board, Staff Report for the Action Plan for the Scott River Watershed Sediment and Temperature TMDLs (2005), https://www.waterboards.ca.gov/northcoast/water_issues/programs/tmdls/scott_river/staff_report/, accessed June 16, 2021.

³⁵ *Id.* at p. xviii.

³⁶ CDFW Flow Criteria, *supra*, at pp. 25-26.

³⁷ Tina Bartlett, CDFW, letter to Eileen Sobeck, SWRCB, June 15, 2021, at p. 1, (June 15 CDFW Letter) attached as Exhibit J.

³⁸ State Water Resources Control Board, Notice of Unavailability of Water, attached as Exhibit K.

³⁹ CDFW Flow Memo, *supra*, at p. 5.

⁴⁰ See Hathaway Memo, *supra*, at pp. 1-4.

Current Conditions

The Scott River watershed has experienced one of the driest years on record in 2020-21. The Fort Jones rainfall station has received only 10.30 inches of precipitation this water year, 53% of average.⁴¹ This follows a similarly dry 2019-20, when 10.08 (47% of average) fell.⁴² Both of these recent years had lower precipitation than the worst year of the last drought, 2013-14, when 12.06 inches (57% of average) fell.⁴³

And the flows in the Scott are plummeting to catastrophically low levels. As of June 30, the USGS gage at Fort Jones reported 14.6 cfs, much less than the historic 25th percentile flow of 208 cfs and below the USFS right for late June of 100 cfs. This is down from over 100 cfs just three weeks ago. On the same date in 2020, flows were over 200 cfs, and yet the river still experienced critically low flows and disconnections later in the summer and fall.⁴⁴ There is absolutely no doubt that, absent action by the Board, the river will dry up yet again this summer if it has not already.

CDFW transmitted its Flow Criteria to the State Board on May 3, 2021 along with an urgent call to action; it then followed up on June 15 with an even more urgent request that the State Board act “immediately”.⁴⁵ One of CDFW’s recommendations was to develop “and achieve, this season, minimum flows necessary to maintain connectivity to support fish migration, spawning, and rearing in the Scott River and its west-side tributaries.”⁴⁶ This Petition urges the State Board to do exactly that.

Legal and Regulatory Background

The State Board’s authority to issue emergency drought regulations on the Scott has been confirmed by a long line of statutes and court decisions.

⁴¹ California Nevada River Forecast Center, Monthly Precipitation Summary Water Year 2021, https://www.cnrfc.noaa.gov/monthly_precip.php, accessed June 30, 2021.

⁴² California Nevada River Forecast Center, Monthly Precipitation Summary Water Year 2020, https://www.cnrfc.noaa.gov/monthly_precip_2020.php, accessed June 8, 2021.

⁴³ California Nevada River Forecast Center, Monthly Precipitation Summary Water Year 2014, https://www.cnrfc.noaa.gov/monthly_precip_2014.php, accessed June 8, 2021.

⁴⁴ USGS data available at https://nwis.waterdata.usgs.gov/ca/nwis/uv?cb_00060=on&format=gif&site_no=11519500&period=&begin_date=2021-05-01&end_date=2021-06-30. See Scott River Decree at p. 12, ¶ 45.

⁴⁵ CDFW Letter, *supra*, at p. 6; June 15 CDFW Letter at p. 4.

⁴⁶ *Ibid.*

Petitions for Emergency Rulemaking

This Petition is brought under the Petition Clause of the First Amendment to the U.S. Constitution and article I, section 3 of the California Constitution, both of which permit citizens to petition the government for redress of grievances. The California Administrative Procedures Act sets out the specific procedures for a petition for rulemaking: any “interested person may petition a state agency requesting adoption” of a regulation. (Gov. Code § 13340.6.) Upon receipt of such a request, the agency has 30 days to either schedule the matter for a hearing or deny the petition in writing, with reasons given for any such denial. (Gov. Code § 11340.7, subs. (a), (d).)

For the reasons laid out in this Petition, the State Board should use the procedure in Government Code section 11346.1 to adopt an emergency regulation governing flows in the Scott. A state of emergency currently exists regarding flows in the Scott, as evidenced by the Governor’s proclamation and the extensive documentation submitted with this Petition.

Although the State Board has 30 days to respond to this Petition, we urge faster action.

The State Board’s Waste and Unreasonable Use Authority

The Constitution prohibits the “waste or unreasonable use or unreasonable method of use of water.” (Cal. Const., art. X, § 2.) And the Board “shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.” (Wat. Code § 275.)

Courts have repeatedly upheld the State Board’s authority to directly regulate water extraction that results in insufficient flows. (E.g., *Stanford Vina*, *supra*, 50 Cal.App.5th 976; *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463.) And extractions of groundwater may be restricted to prevent waste and unreasonable use. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240-42.)

Stanford Vina provides not only an illustration of the State Board’s authority to adopt emergency measures regulating pre-1914 and riparian water rights but also a model for quick regulatory action. During the 2012-16 drought, the State Board issued emergency regulations to protect flows in Deer, Mill, and Antelope Creeks, all Sacramento tributaries with vulnerable salmonid populations.

The regulations were issued under authority of Water Code section 1058.5, which was enacted during the drought. The new statute provides that the State Board, during

multiyear droughts or after a drought proclamation by the Governor, may adopt regulations to “prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, . . . [or] to require curtailment of diversions when water is not available under the diverter's priority of right.” (Wat. Code § 1058.5, subd. (a)(1).)

The Deer Creek emergency regulations, issued in May 2014, provided that:

The [Board] has determined that it is a waste and unreasonable use under Article X, section 2 . . . to continue diversions that would cause or threaten to cause flows to fall beneath the drought emergency minimum flows listed in subdivision (c), except as provided in section 878.1. [¶] (a) For the protection of threatened and endangered fish, no water shall be diverted from the streams listed below during the effective period of a curtailment order under this article.

(*Stanford Vina, supra*, 50 Cal.App.5th at 989.) The regulations provided for a minimum flow regime based on a CDFW flow recommendation. (*Ibid.*) Shortly after adoption of the emergency regulations, the Board issued a curtailment order requiring all water rights holders to “immediately cease or reduce their diversions from Deer Creek to ensure the drought emergency minimum flows...” (*Id.* at 991.) The Board issued three subsequent curtailment orders throughout 2014 and 2015.

One of the large diverters filed a lawsuit against the Board in October 2014 alleging numerous statutory and constitutional claims against the State Board. In 2020, the Court of Appeal found that the State Board’s actions were valid. The Court found that the regulations were within the State Board’s regulatory authority under Water Code sections 275 and 1058.5 and article X, section 2 of the Constitution. (*Stanford Vina, supra*, at 1002-03.) It further found that the Board could issue regulations to curtail not only post-1914 appropriators, but riparian diverters and pre-1914 appropriators. (*Ibid.*) Further, and relevant to the Scott, the Court held that the State Board could issue emergency regulations setting emergency flows even on streams subject to an adjudication. (*Id.* at 1007.) And the Court held that the Board did not need to hold an evidentiary hearing before issuing the curtailment orders. (*Id.* at 1003-04.)

After *Stanford Vina*, therefore, there is no doubt that the State Board has the power to (1) issue emergency regulations setting minimum flows during a drought; (2) immediately issue curtailment orders against all surface water users, including those within an adjudication; and (3) do so quickly and without holding an evidentiary hearing pertaining to each water right user.

The State Board's Public Trust Authority and Duty

The State Board has the authority and the duty to protect public trust uses in California's navigable waters. Almost forty years ago, the Supreme Court held that the public trust doctrine "imposes a duty of continuing supervision over the taking and use of . . . appropriated water." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 447.) The State Board must "consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests." (*Id.* at 426.) And in exercising its continuing supervision, "the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs." (*Id.* at 447.) The court recognized that failing to consider and mitigate impacts to public trust values "may result in needless destruction" of those resources. (*Id.* at 426.)

Public trust uses include fisheries, navigation, and commerce, but are not limited to that "traditional triad" and can evolve over time "in tandem with the changing public perception of the values and uses of waterways," and can include "habitat for birds and marine life" and as subjects of study as well as for their scenic value as open space. (*National Audubon, supra*, 33 Cal.3d at 434-35.)

The *National Audubon* case concerned non-navigable tributaries to Mono Lake, which, like the Scott River, is a navigable water. (*National Audubon, supra*, 33 Cal.3d at 437.) In 2018, the Court of Appeal confirmed that the public trust doctrine places the same duties and grants the same authority to the State Board when groundwater extractions affect public trust uses in navigable waters. (*ELF, supra*, 16 Cal.App.5th at 858.) Further, the court held that this duty is not subsumed or extinguished by the enactment of SGMA in 2014. (*Id.* at 863.)

The Governor's Drought Proclamation

On May 10, 2021, Governor Newsom issued a drought proclamation that provided, in part, that:

5. To ensure protection of water needed for health, safety, and the environment in the Klamath River and Sacramento-San Joaquin Delta Watershed Counties, the **Water Board shall consider emergency regulations to curtail water diversions when water**

is not available at water right holders' priority of right or to protect releases of stored water^[47]

6. To ensure critical instream flows for species protection in the Klamath River and Sacramento-San Joaquin Delta Watersheds, the Water Board and Department of Fish and Wildlife shall evaluate the minimum instream flows and other actions needed to protect salmon, steelhead, and other native fishes in critical streams systems in the State and work with water users and other parties on voluntary measures to implement those actions. To the extent voluntary actions are not sufficient, **the Water Board, in coordination with the Department of Fish and Wildlife, shall consider emergency regulations to establish minimum drought instream flows.**

The Proclamation also suspended CEQA review for any action taken pursuant to these provisions.⁴⁸

The State Board Should Issue Emergency Regulations

Given the State's authority, the crisis in the Scott, and the importance of the Scott to the greater Klamath ecosystem, and the Tribe's way of life, the State Board should issue emergency regulations establishing a minimum flow. The State Board now has everything it needs: its waste and unreasonable use authority was confirmed by *Stanford Vina. ELF* confirmed the Board's public trust authority over groundwater extraction. CDFW has provided the science. And the Governor has provided additional legal authority through his drought proclamation. The ongoing dewatering of the Scott is unreasonable and it has been unlawfully permitted to continue without required consideration of the public trust. Previous efforts have proved insufficient: the State Board must act and must act now.

Continuing Intensive Water Extractions While the River Goes Dry Are Unreasonable

At the heart of the State Board's public trust and waste and unreasonable use authorities is the idea of reasonableness as the "overriding feature of California water law." (*National Audubon, supra*, 33 Cal.3rd at 443.) Reasonableness is situational: what

⁴⁷ Executive Department, State of California, "Proclamation of A State of Emergency" (May 10, 2021), at p. 2 (boldface added), attached as Exhibit L. The Scott is in the Klamath watershed and Siskiyou County is listed in the Proclamation as a "Klamath Watershed County." (*Id.* at p. 1.)

⁴⁸ *Id.* at ¶ 11.

“may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.” (*Light, supra*, 226 Cal.App.4th at 1479.)

The State Board has repeatedly found that water extractions for agricultural uses that dewater rivers to the point of making those rivers inhospitable for aquatic life is unreasonable, regardless of the particular use that extracted water is put to. And the courts have supported the State Board in such findings. In *Light*, the Board enacted regulations to restrict vineyards’ simultaneous water withdrawals for frost mitigation which resulted in fish kills in the Russian River.⁴⁹ (*Light, supra*, 226 Cal.App.4th at 1473-76.) The State Board additionally adopted emergency regulations governing flows in the Russian River in June 2021.⁵⁰

And as discussed above, the State Board determined that extractions from Deer Creek during the last drought were “per se” unreasonable if they dropped the river below specified minimum flows. (*Stanford Vina, supra*, 50 Cal.App.5th at 996.)

The State Board should make the same finding here. Decades of data show that since the advent of intensive agriculture, too little water remains in the Scott to support healthy fish populations. And current rules do not sufficiently protect instream flows. The Notices of Unavailability sent to junior rights holders were insufficient in the 2012-2016 drought, and they were insufficient last year. There is little reason to expect that they will be sufficient this year.

Meanwhile, water extractions continue to increase and agricultural production continues to intensify.⁵¹ It is unreasonable for growers to pursue a third, or even fourth cutting of alfalfa in a critically dry year when the riverbed is empty of water. It is unreasonable for pastures to be ankle-deep in water while the salmon bake in disconnected pools. And it is unreasonable for the irrigation season and excessive stockwatering to continue into the chinook migration period when flows are most necessary for survival of the species.

Like in Deer Creek and the Russian River, the State Board should find that when

⁴⁹ The specific regulation in *Light* relies on a coalition of vineyards to manage the withdrawal restrictions. It stands as an example of the creative solutions industry can develop when the State Board establishes a clear regulatory mandate to avoid unreasonable use of water.

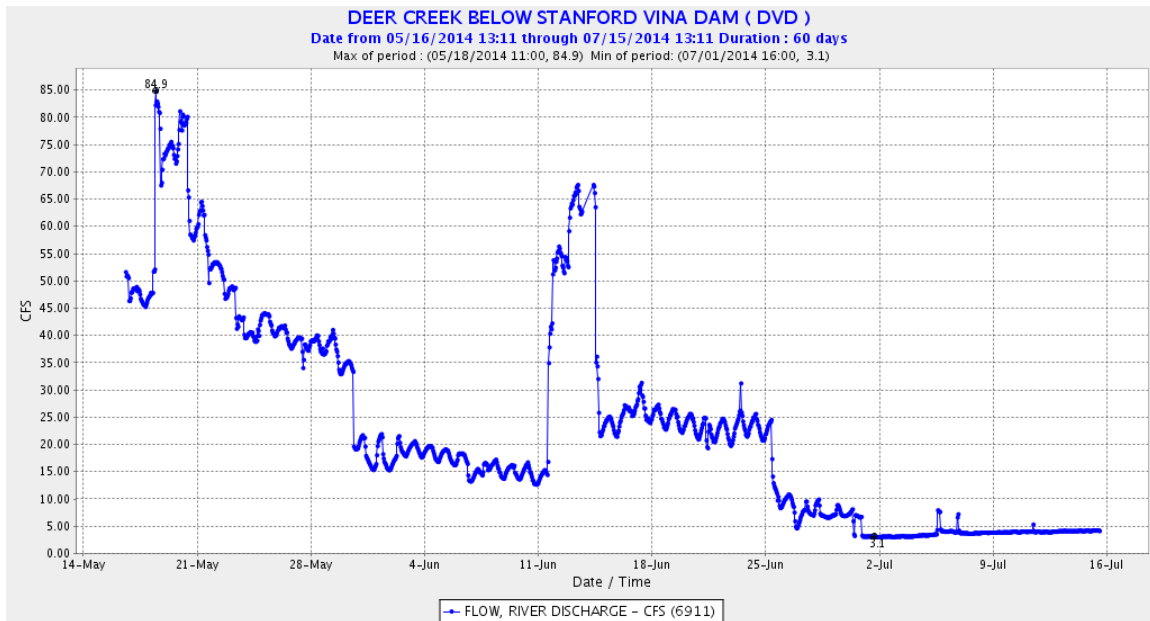
⁵⁰ State Water Resources Control Board, Worsening Drought Conditions Prompt Emergency Action in Russian River Watershed (June 15, 2021), available at https://www.waterboards.ca.gov/press_room/press_releases/2021/pr06152021_russian_river_curtailments.pdf, accessed June 17, 2021.

⁵¹ Scott Adjudication Annual Report, *supra*; Papadopoulos Report, *supra*, at p. 32.

extractions are sufficient to drop flows below a quantified minimum flow, those extractions are unreasonable and are subject to curtailment.

*An Emergency Regulation Is Likely to
Succeed in Restoring Flows This Year*

The Deer Creek regulations were successful in preventing catastrophically low flows in 2014. The State Board issued its first curtailment order on June 5, 2014. (*Stanford Vina, supra*, 50 Cal.App.5th at 991.) The order was suspended on June 24, 2015.

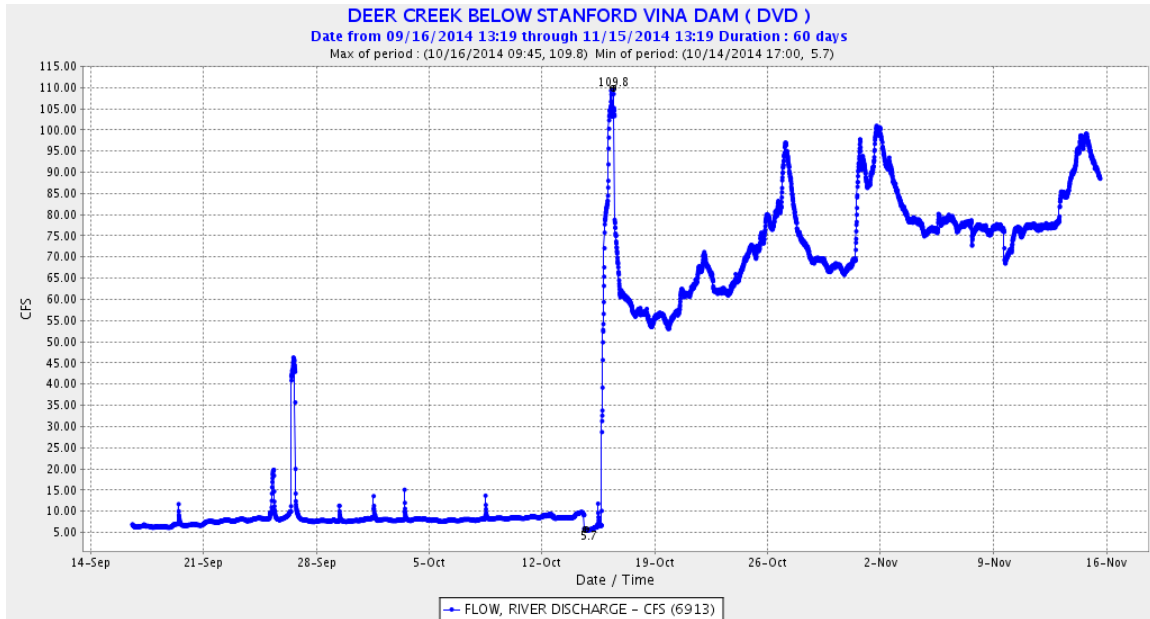


This graphic shows the flow in Deer Creek below the Stanford Vina Dam from May 14 to July 15, 2014. Within a week of the implementation of the curtailment order, flows rose from below 15 cfs to over 20 cfs, including a pulse flow event.⁵² And within a day of the suspension of the order, flows dropped below 5 cfs. This shows that when diversions stopped, flows rose immediately. And when the order was suspended, diversions presumably resumed and consumed substantially all of the river's flow.

The pattern repeated in later that year, as the State Board issued a second

⁵² Plot generated by the California Data Exchange Center website, available at https://cdec.water.ca.gov/jspplot/jspPlotServlet.jsp?sensor_no=6913&end=07%2F15%2F2014+13%3A19&geom=huge&interval=60&cookies=cdec01, accessed June 9, 2021.

curtailment order on October 15. (*Stanford Vina, supra*, 50 Cal.5th at 991.)



Within a day of the second order, flows jumped from below 10 cfs to over 55 cfs.⁵³ The orders were effective in significantly increasing flows during one of the driest periods in California’s history.

There is no reason to expect that the result in the Scott would be different. An emergency regulation and curtailment order will improve flows in the river, and quickly. Although flows are dropping, the fact that the river is still flowing demonstrates that it is not too late, although it will be within weeks. Immediate curtailment could restore the situation before 1980s, when the river still experienced flows averaging over 30 cfs even in the driest years.⁵⁴ This level of flow would satisfy the latest emergency minimum flows recommended by CDFW.⁵⁵

And while the Scott River currently lacks watermaster service, the Board has other tools available to monitor compliance. Free, high quality satellite imagery is

⁵³ Plot generated by the California Data Exchange Center website, available at https://cdec.water.ca.gov/jspplot/jspPlotServlet.jsp?sensor_no=6913&end=11%2F15%2F2014+13%3A19&geom=huge&interval=60&cookies=cdec01, accessed June 9, 2021. No significant precipitation was recorded in the area during October of 2014.

⁵⁴ CDFW Flow Memo, *supra*, at pp. 6-7.

⁵⁵ June 15 CDFW Letter, *supra*, at p. 2.

available that can tell Board staff whether disconnections are occurring in the Scott and its tributaries. And the same technology can be used to determine whether irrigation ditches are running full and whether groundwater-dependent fields are being irrigated.

*The Adjudication Is No Barrier to
an Emergency Regulation*

The fact that the Scott River has been adjudicated in no way prevents the Board from implementing an emergency regulation setting a minimum flow. *Stanford Vina* specifically addressed this issue, holding that an adjudicated water right does not grant its holder a right to waste water or use it unreasonably. (*Stanford Vina*, *supra*. 50 Cal.App.5th at 1007-08.)

Moreover, the decree itself limits extraction to reasonable use. Paragraph 15 states that nothing in the decree permits a claimant the “right to waste water, or to divert from the Scott River stream system at any time a quantity of water in excess of an amount reasonably necessary for his beneficial use under a reasonable method of use and a reasonable method of diversion, nor to permit him to exercise his right in such a manner as to unreasonably impair the quality of the natural flow.”⁵⁶ Paragraph 20 limits groundwater extraction from the interconnected zone to that amount “reasonably required” to irrigate acreage listed in Schedule C.⁵⁷ And Paragraph 63 limits all claimants to the amount of water “reasonably necessary for, and actually applied to, reasonable beneficial use, under and by reasonable methods of diversion and use.”⁵⁸

Because the decree itself incorporates the principle of reasonableness, the State Board has the authority to issue an emergency regulation limiting flow.

The Emergency Regulation Must Restrict Groundwater Extraction

Groundwater extraction in Scott Valley is almost twice the amount of surface water diversion.⁵⁹ The valley is home to over 150 irrigation wells, many of which were drilled since the 1980 decree.⁶⁰ And groundwater levels are closely connected to surface

⁵⁶ Scott River Decree, *supra*, at p. 5, ¶ 15.

⁵⁷ *Id.* at p. 6, ¶ 20.

⁵⁸ *Id.* at p. 23, ¶ 63.

⁵⁹ Scott River Adjudication Annual Report, *supra*.

⁶⁰ Tolley Sensitivity Analysis, *supra*, 55 Water Resources Research at p. 7901. Compare map on page 7901 with the well locations identified in the Scott Adjudication Decree Map.

water flows.⁶¹ Any regulation designed to preserve flows in the Scott must, therefore, address groundwater extraction.

Unfortunately, the Notices of Unavailability that the Board sent to junior water rights holders this spring do not reflect this dynamic. The press release announcing the Notices of Unavailability, in fact, directs junior rights holders to “find alternative sources such as groundwater.”⁶²

As discussed above, the State Board has both public trust and waste and unreasonable use authority to regulate groundwater extractions. (*ELF, supra*, 26 Cal.App.5th at 859-860; *City of Barstow, supra*, 23 Cal.4th at 1240.). And under the public trust doctrine, it has the “affirmative duty” to “act on behalf of the people to protect their interest in navigable water.” (*ELF, supra*, 26 Cal.App.5th at 857.) The State Board must, therefore, either act to protect the public trust resources in the Scott River or explain why this is the “rare case” where the “abandonment of that right is consistent with the purposes of the trust.” (*Ibid.*)

Mindful that the Board has, to Petitioners’ knowledge, never exercised its public trust authority over groundwater, Petitioners suggest that there is sufficient evidence supporting a simple method of curtailing groundwater pumping. Wells closer to the river have a more immediate effect on streamflow than wells at a greater distance from the river.⁶³ Therefore, well pumping should be curtailed in order of each well’s distance from the river. This would be consistent with a fair, evidence-based approach to curtailments that analogizes to surface water curtailments that go in order of priority of right.

*The Board Should Use the CDFW Interim Flow
Recommendation as a Minimum Flow Standard*

When issuing the emergency regulation, the State Board should rely on the flow numbers proposed by CDFW in the 2017 Flow Criteria. These represent the best available synthesis of the science and present a number that is likely to be protective of salmonid populations.

The USFS reserved right in the Decree is likely too low. The Decree describes those flows as the “minimum subsistence-level fishery conditions including spawning,

⁶¹ Hathaway Memo, *supra*.

⁶² State Board, Media Release, Extremely Dry Conditions Prompt Restrictions For Some Water Right Holders On The Scott River (June 1 2021), p. 2, available at https://www.waterboards.ca.gov/press_room/press_releases/2021/pr06012021_scott_river_notice_of_water_unavailability.pdf, accessed June 10, 2021.

⁶³ Hathaway Memo, *supra*, at pp. 3, 6-7.

egg incubation, rearing, downstream migration, and summer survival of anadromous fish, and can be experienced only in critically dry years without resulting in depletion of the fishery resource.”⁶⁴

The 2017 CDFW flow rates are based on the latest science and hydrology and are approximately twice the flows required by the Decree; CDFW’s late-summer flow minimum is 62 cfs as compared to the Decree’s 30 cfs.⁶⁵ In addition, the CDFW numbers make clear that when water is insufficient to meet the recommended number, the full natural flow of the river should be provided.⁶⁶

The Flow Memo makes clear the benefit of providing the full natural flow even if the full amount is not present. In the dry years of 2012, 2015 and 2016, flows of 22-37 cfs during the peak chinook migration period in mid-October were sufficient to distribute fish past the counting station and up into more favorable spawning territory, leading to better results.⁶⁷ But in even dryer periods of 2015, 2018, and 2020, when flows were below 20 cfs, chinook largely failed to reach the valley, with poor spawning results.⁶⁸

Further, the CDFW makes clear the importance of protecting not only summer flows for coho rearing, but also sufficient mid-October flows for chinook migration and November flows for coho migration. The regulation could be targeted to provide pulse flows during migration periods based on CDFW monitoring.⁶⁹

The State Board should also consider the minimum emergency flows contained in the June 15 CDFW Letter as an alternative flow requirement.⁷⁰ While these flows are not designed to promote long term species health and recovery, they will certainly be better than nothing. CDFW’s records show that flows below 30 cfs are strongly associated with disastrous outcomes for coho and chinook.⁷¹

The State Board should carefully consider this evidence and select a flow standard

⁶⁴ Scott River Decree, *supra*, at p. 12, ¶ 45.

⁶⁵ Scott River Decree, *supra*, at p. 12, ¶ 45; CDFW Flow Criteria, *supra*, p. 26.

⁶⁶ CDFW Flow Criteria, *supra*, at pp. 25-26.

⁶⁷ CDFW Flow Memo, *supra*, at p. 15.

⁶⁸ *Id.* at p. 17.

⁶⁹ The Decree provides for an end to the irrigation season on October 15, but stockwatering can continue into the fall. (Scott River Decree, *supra*, at p. 8, ¶ 26.).

⁷⁰ CDFW June 15 Letter, *supra*, at p. 2.

⁷¹ CDFW Flow Memo, *supra*, at pp. 9-18.

that will protect salmonids. Inaction will lead to disaster.

Conclusion

For the foregoing reasons, the undersigned respectfully petition the State Board to adopt an emergency regulation protecting flows in the Scott River.

Sincerely,



Russell "Buster" Atteberry
Chairman
Karuk Tribe

Date: 7-1-2021



Nathaniel Kane
Executive Director
Environmental Law Foundation

Date: 7/1/2021

Attorneys for the Karuk Tribe,
Environmental Law Foundation