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APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Sacramento)

STANFORD VINA RANCH
IRRIGATION COMPANY,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA et al.,

Defendants and Respondents.

C085762

(Super. Ct. No.
34201480001957
CUWMGDS)

(Filed Jun. 18, 2020)

APPEAL from a judgment of the Superior Court
of Sacramento County, Timothy M. Frawley, Judge.
Affirmed.

MINASIAN, MEITH, SOARES, SEXTON &
COOPER, Paul R. Minasian and Jackson A. Minasian
for Plaintiff and Appellant.

Anthony L. François and Jeremy Talcott for Pacific
Legal Foundation; DOWNEY BRAND, Kevin M. O'Brien,
David R.E. Aladjem, Samuel Bivins for Northern Cali-
fornia Water Association; O'LAUGHLIN & PARIS,
Tim O'Laughlin, Valerie C. Kincaid, and Ryan E. Stager
for San Joaquin Tributaries Authority as Amici Curiae
on behalf of Plaintiff and Appellant.

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Xavier Becerra, Attorney General, Robert W. Byrne, Senior Assistant Attorney General, Randy L. Barrow, Supervising Deputy Attorney General, Carolyn Nelson Rowan and William Jenkins, Deputy Attorneys General, for Defendants and Respondents.

Stanford Vina Ranch Irrigation Company (Stanford Vina) sued the State Water Resources Control Board (the Board), among other defendants, challenging the Board's issuance of certain temporary emergency regulations in 2014 and 2015, during the height of one of the most severe droughts in California's history. The challenged regulations established minimum flow requirements on three tributaries of the Sacramento River, including Deer Creek in Tehama County, in order to protect two threatened species of anadromous fish, Chinook salmon and steelhead trout, during their respective migratory cycles. Stanford Vina further challenged the Board's implementation of those regulations by issuing temporary curtailment orders limiting the company's diversion of water from Deer Creek for certain periods of time during those years in order to maintain the required minimum flow of water. Judgment was entered in favor of the Board and other defendants. Stanford Vina appeals.

We affirm. As we shall explain, the Board possesses broad authority to regulate the unreasonable use of water in this state by various means, including the adoption of regulations establishing minimum flow requirements protecting the migration of threatened fish species during drought conditions and declaring diversions of water unreasonable where such diversions

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would threaten to cause the flow of water in the creeks in question to drop below required levels. Adoption of such regulations is a quasi-legislative act that is reviewable by ordinary mandamus. Concluding the Board's adoption of the challenged regulations was not arbitrary, capricious, or lacking in evidentiary support, nor did the Board fail to follow required procedures, we cannot override the Board's determination as to reasonableness set forth in the regulations. We also reject Stanford Vina's assertion the Board was required to hold an evidentiary hearing before making this reasonableness determination. Contrary to Stanford Vina's arguments in this appeal, neither the due process guarantees of the federal and California Constitutions, nor article X, section 2 of the California Constitution¹ requires such a hearing prior to adoption of a regulation governing reasonable water use.

The Board's issuance of the challenged curtailment orders, a quasi-adjudicative act, is reviewable by administrative mandamus. However, as we explain, because Stanford Vina possessed no fundamental vested right to an unreasonable use of water from Deer Creek, our function is simply to determine whether the record is free from legal error and whether the Board's findings are supported by substantial evidence. As for the latter determination, the evidence is more than sufficient to support the Board's findings. As for the former, we reject Stanford Vina's assertion that the curtailment of water in this case amounted to a "taking"

¹ Undesignated article/section references are to the California Constitution.

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of Stanford Vina’s property rights requiring just compensation. Finally, we are also unpersuaded by each of the remaining arguments raised by Stanford Vina and the various amicus parties who submitted briefs on the company’s behalf.²

BACKGROUND

The Board’s Administrative Authority

We begin with a brief overview of the Board’s administrative authority in order to place the facts of this case in their proper context.

“The Board was created as the State Water Commission in 1913 to administer the appropriation of water for beneficial purposes. As originally created, the Board had the ‘limited role’ of granting use rights to water that was not being applied to beneficial purposes and was not otherwise appropriated. [Citation.] ‘[T]he function of the [Board] was restricted to determining if unappropriated water was available; if it was, and no competing appropriator submitted a claim, the grant of an appropriation was a ministerial act.’ [Citation.] The enactment of Article X, Section 2, [of the California constitution] however, ‘radically altered water law in

² We received amicus curiae briefing from San Joaquin Tributaries Authority, Pacific Legal Foundation, and Northern California Water Association. Having read and considered the arguments made therein, most of which echo arguments made by Stanford Vina in its briefing on appeal, we decline to specifically address the amicus parties’ arguments in this opinion. It will suffice to note none of those arguments has persuaded this court the judgment in this matter should be reversed.

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California and led to an expansion of the powers of the board.’ [Citation.]” (*Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1481 (*Light*).)

As we explain more fully later in this opinion, this constitutional provision limits the “right to water or to the use or flow of water in or from any natural stream or water course” in California “to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.” (Art. X, § 2.)

Following the enactment of this constitutional provision, “[t]hrough subsequent legislation and judicial decisions, ‘the function of the [Board] has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of waters.’ [Citation.]” (*Light, supra*, 226 Cal.App.4th at p. 1481.) The Board’s enabling statute “grants it the power to ‘exercise the adjudicatory and regulatory functions of the state in the field of water resources.’ [Citation.] In that role, the Board is granted ‘any powers . . . that may be necessary or convenient for the exercise of its duties authorized by law’ [citation], including the power to ‘make such reasonable rules and regulations as it may from time to time deem advisable. . . .’ [Citation.] Among its other functions, ‘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

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unreasonable method of diversion of water in this state.' [Citation.]" (*Light, supra*, 226 Cal.App.4th at pp. 1481-1482; Wat. Code, §§ 174, 186, 275, 1058.)³

Deer Creek Watershed

Deer Creek is a tributary of the Sacramento River originating near the summit of Butt Mountain in the Lassen National Forest. The creek runs generally in a southwesterly direction for about 60 miles, traversing dense forest before descending through a steep rock canyon into the Sacramento Valley, crossing the valley floor, and finally entering the Sacramento River near the town of Vina.

Two irrigation companies, Stanford Vina and Deer Creek Irrigation District, operate diversion dams and ditches for agricultural use between the canyon mouth and the Sacramento River. By virtue of a judicial decree, originally entered in 1923 and amended in 1926, Stanford Vina is entitled to use roughly 66 percent of the flow of Deer Creek.

Two species of anadromous fish, Chinook salmon and steelhead trout, make their way from the ocean to Deer Creek each year to spawn. Central Valley spring-run Chinook salmon enter Deer Creek from late-February through early-July and spend the summer in pools in the upper watershed before spawning in late-September. Central Valley fall-run Chinook salmon, as their name suggests, make their run during the fall,

³ Undesignated statutory references are to the Water Code.

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but do not travel into the upper watershed, instead spawning in the lower portions of the creek. Finally, California Central Valley steelhead trout also migrate upstream during the fall, but travel much farther up the creek and spawn in its upper reaches during the winter months.⁴

The spring-run salmon and steelhead trout noted above are listed as threatened species under the California Endangered Species Act (Fish & G. Code, § 2050 et seq.) and the federal Endangered Species Act (16 U.S.C. § 1531 et seq.). As the trial court noted in its statement of decision, the California Department of Fish and Wildlife (DFW) and two federal agencies, the United States Fish and Wildlife Service and the National Marine Fisheries Service (federal fisheries services), “have been studying the conditions in California waterways,” including Deer Creek, “and working to protect and restore anadromous (salmon and steelhead) fish populations” for many years. A 1993 report prepared by DFW estimated Deer Creek “could support sustainable populations of 4,000 spring-run and 6,500 fall-run . . . salmon” and “identified ‘inadequate flow’ for upstream passage as the ‘most significant problem’” preventing those numbers from being attained. Indeed, “in the decade prior to the report, it was estimated that only about 550 spring-run and 1,000 fall-run salmon annually spawned in the creek.” The report further “stated that ‘[f]lows necessary to

⁴ For ease of reference, we shall refer to the aforescribed fish as “spring-run salmon,” “fall-run salmon,” and “steelhead trout.”

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provide unimpaired migration for adult salmon and steelhead are unknown but have been estimated to be approximately 50 cfs [cubic feet per second].”

A 2009 watershed profile concluded Deer Creek has “**high** potential” for supporting viable populations of both spring-run salmon and steelhead trout because “[h]abitat used for holding and spawning is located at high elevations and habitat is considered to be high quality.” However, because of the water diversion structures operated by Stanford Vina and Deer Creek Irrigation District in the valley section of the creek, “[d]uring low flow periods, the existing water rights [of these companies] are sufficient to dewater the stream” to the point of blocking access to upper portions of the watershed for late-migrating spring-run salmon. Low water flows also negatively affect the outmigration of juvenile spring-run salmon and steelhead trout.

The Drought Emergency

California’s most recent drought, persisting from the end of 2011 to the beginning of 2017, “was especially severe, as it included the driest four-year period [fall of 2011 to fall of 2015] in California since record-keeping began in 1895, as well as the two warmest years [2014 and 2015] in state history.”⁵

⁵ (Szeptycki & Gray, *California’s Drought and the Environment: An Introduction* (2017) 23 Hastings No. 1, W.-N.W. J. Envtl. L. & Pol’y 51, internal fns. omitted; Hanak, Mount & Chappelle, *California’s Latest Drought* (July 2016) Public Policy Institute of

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In January 2014, Governor Brown declared a state of emergency due to the severe and persistent drought conditions. The Governor noted, among other urgent problems caused by the drought, “animals and plants that rely on California’s rivers, including many species in danger of extinction, will be threatened” by the “significantly reduced surface water flows” in the state’s river systems. Among other directives, the Governor ordered the Board to “put water right holders throughout the state on notice that they may be directed to cease or reduce water diversions based on water shortages” and “consider . . . diversion limitations” in order to “enable water to be conserved upstream later in the year to protect cold water pools for salmon and steelhead, maintain water supply, and improve water quality.” The Governor also suspended the application of the California Environmental Quality Act (CEQA) in order for the Department of Water Resources (DWR) and the Board to expeditiously act to mitigate the effects of the drought and further directed DFW to “evaluate and manage the changing impacts of drought on threatened and endangered species and species of special concern.”

In March 2014, Governor Brown signed urgency legislation, Senate Bill No. 104 (2013 – 2014 Reg. Sess.), enacting and amending various statutes in order to expedite drought relief. Uncodified section 1 of the bill states: “The Legislature finds and declares that California is experiencing an unprecedented dry

California [as of June 17, 2020], archived at <<https://perma.cc/98VG-D4RA>>.)

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period and shortage of water for its citizens, local governments, agriculture, environment, and other uses. The purpose of this act is to enact urgent legislation to appropriate funds and expedite administrative actions to increase water supply reliability consistent with the state's economic, health and safety, and resource protection laws." (Sen. Bill No. 104 (2013-2014 Reg. Sess.) § 1.)

Among other statutory amendments, Sen. Bill No. 104 (2013-2014 Reg. Sess.) amended section 1058.5 to provide, in relevant part: "This section applies to any emergency regulation adopted by the board for which the board makes both of the following findings: [¶] (1) The emergency regulation is adopted to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, to promote water recycling or water conservation, to require curtailment of diversions when water is not available under the diverter's priority of right. . . . [¶] (2) The emergency regulation is adopted in response to conditions which exist, or are threatened, in a critically dry year immediately preceded by two or more consecutive below normal, dry, or critically dry years or during a period for which the Governor has issued a proclamation of a state of emergency under the California Emergency Services Act . . . based on drought conditions." (§ 1058.5, subd. (a); Sen. Bill No. 104 (2013-2014 Reg. Sess.) § 10.)

In April 2014, Governor Brown declared a continued state of emergency. Among other directives, the Governor ordered DFW to "work with other state and

federal agencies and with landowners in priority watersheds to protect threatened and endangered species and species of special concern and maximize the beneficial uses of scarce water supplies, including employment of voluntary agreements to secure instream flows, relocation of members of those species, or through other measures.” The Governor again suspended application of CEQA to specified actions and further ordered the Board to “adopt and implement emergency regulations pursuant to . . . section 1058.5, *as it deems necessary to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water*, to promote water recycling or water conservation, *and to require curtailment of diversions* when water is not available under the diverter’s priority of right.” (Italics added.)

The Challenged Emergency Regulations and Curtailment Orders

In May 2014, the Board began the process of promulgating emergency regulations implementing in-stream flow requirements for Deer Creek and two other creeks in Tehama County, Mill and Antelope Creeks. The proposed flow requirements were in line with a memorandum submitted to the Board by one of the federal fisheries services noted above.⁶ Water

⁶ With respect to Deer Creek, the memorandum provided evidence supporting a minimum flow requirement of 50 cfs from April 1 through June 30 and October 1 through November 30 to protect adult salmon migration and the same minimum flow requirement from October 1 through March 30 to protect adult

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rights holders were notified of the proposed emergency regulations and their right to offer comments. Stanford Vina submitted a comment letter objecting to the proposed regulations and made an oral presentation at the May 20 Board meeting. The Board adopted the regulations the following day.

Section 877 of the 2014 emergency regulations began by providing: “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, except as provided under sections 878, 878.1 or 878.2.”⁷ [¶] (b) The Deputy Director for the Division of Water Rights (Deputy Director) may issue a curtailment order upon a determination that without curtailment of diversions flows are likely to be reduced below the drought emergency minimum flows specified in subdivision (c). Curtailment orders shall be effective the day after issuance. Except as provided in sections

steelhead migration. The memorandum also provided evidence supporting a minimum flow requirement of 20 cfs for juvenile fish outmigration from October 1 through June 30 and pulse flows in addition to the base flow of up to 50 cfs for 24 hours every two weeks from April 15 through June 30.

⁷ These regulatory sections provide for exceptions not applicable to the facts of this case. (See Cal. Code Regs., tit. 23, former §§ 878, 878.1, 878.2.)

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878, 878.1, and 878.2, where flows are sufficient to support some but not all diversions, curtailment orders shall be issued in order of priority. [¶] In determining which diversions should be subject to curtailment, the Deputy Director shall take into account the need to provide reasonable assurance that the actual drought emergency minimum flows will be met.” (Cal. Code Regs., tit. 23, former § 877, subds. (a) & (b).)

Subdivision (c) of this section then set forth the drought emergency minimum flows. That subdivision began: “The State Board has authority to ensure the protection and preservation of streams and to limit diversions to protect critical flows for species, including for state and federally threatened and endangered salmon and steelhead species. To prevent the waste and unreasonable use of water, the Deputy Director may issue curtailment orders as described in subdivision (b). The flows described in this subdivision may be less than otherwise desirable minimum flows for fisheries protection, but have been developed to ensure a bare minimum instream flows for migratory passage during the drought emergency, given the unprecedented nature of the current drought and the drought impacts to these fisheries.” (Cal. Code Regs., tit. 23, former § 877, subd. (c).)

With respect to Deer Creek, subdivision (c) set forth the following drought emergency minimum flows:

“(A) April 1 up to June 30, if Adult CV SR Salmon are present –

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“(i) Base Flows – 50 cfs or full flow without diversions, whichever is less.

“(ii) Pulse Flows – 100 cfs or full flow without diversions, whichever is less. Pulse flows may be required when Adult CV SR Salmon are observed between Vina Dam and the Sacramento River. When required, pulse flows are in lieu of, not in addition to, base flow requirements. The pulse flow will last a minimum of 24 hours to a maximum of 72 hours, and will be determined by the presence of fish observed and desired migration movements upstream. The duration will be determined by the Deputy Director in consultation with [DFW] or the National Marine Fisheries Service. . . .

“[¶] . . . [¶]

“(B) June 1 up to June 30, if Juvenile CV SR Salmon or Juvenile CCV Steelhead are present –

“(i) Pulse Flows – 100 cfs or full flow without diversions, whichever is less.

“Pulse flows may be required when juvenile CV SR Salmon or CCV Steelhead are observed in the lower reaches of Deer Creek. When required, pulse flows are in lieu of, not in addition to, base flow requirements. The pulse flow will last a minimum of 24 hours to a maximum of 48 hours, and will be determined by the presence of fish observed and desired migration movements downstream into the Sacramento River. The duration will be determined by the Deputy Director in

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consultation with [DFW] or the National Marine Fisheries Service. . . .

“[¶] . . . [¶]

“(C) October 1 – March 31, if Adult CCV Steelhead are present –

“(i) Base Flows – 50 cfs or full flow without diversions, whichever is less.

“(D) November 1 – June 30, if Juvenile CV SR Salmon or Juvenile CCV Steelhead are present and adult CV SR Salmon or Adult CCV Steelhead are not present –

“(i) Base Flows – 20 cfs or full flow without diversions, whichever is less.” (Cal. Code Regs., tit. 23, former § 877, subd. (c).)

Subdivision (c) also provided for suspension of a curtailment order: “[DFW] and/or the National Marine Fisheries Service may conduct field surveys and notify the Deputy Director when the pertinent migration periods have ended,” in which case “[t]he Deputy Director shall, no later than the next business day, suspend curtailment orders that are based on the need for a particular flow volume when presence of adult or juvenile CV SR Salmon and CCV Steelhead or hydrologic conditions no longer support the need for the required flows.” (Cal. Code Regs., tit. 23, former § 877, subd. (c)(E).)

On June 5, 2014, the Board issued a curtailment order for Deer Creek. After noting, among other things,

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that the flow below Stanford Vina Dam had reached 17.7 cfs, the order directed all water rights holders in the Deer Creek watershed to “immediately cease or reduce their diversions from Deer Creek to ensure the drought emergency minimum flows specified in section 877, subdivision (c)(2) are satisfied through June 30, 2014 or until the Deputy Director suspends the curtailment order. . . .”

On June 24, 2014, the Board notified all water rights holders the first curtailment order was suspended due to the absence of spring-run salmon and steelhead trout in Deer Creek.

On October 14, 2014, the Board issued a second curtailment order. This order was virtually identical to the first such order and required curtailment through February 28, 2015 or suspension of the order.

In March 2015, the Board readopted the emergency regulations implementing in-stream flow requirements for Deer Creek and the other creeks noted above. The 2015 emergency regulations were substantially the same as the 2014 emergency regulations, with “minor adjustments to the minimum flows and flow periods based on an assessment of [the 2014] implementation of the regulation[s].”

On April 17, 2015, the Board issued a third curtailment order. This order was also virtually identical to the first such order and required curtailment through June 30, 2015 or suspension of the order.

Finally, on October 22, 2015, the Board issued the fourth and final curtailment order challenged in this appeal. Again virtually identical to its predecessors, this order required curtailment through March 31, 2016 or suspension of the order.

The Present Lawsuit

The present lawsuit was filed in October 2014, after the second curtailment order was issued. An amended operative pleading was filed in May 2015, after the third curtailment order was issued. Stanford Vina, an irrigation company whose shareholders own agricultural land with riparian rights to the use of roughly 66 percent of Deer Creek's water, asserted causes of action for inverse condemnation and declaratory relief, claiming the Board's "emergency regulations and related curtailment orders" amounted to a taking of Stanford Vina's vested water rights for public "fishery enhancement purposes," and that such a taking may not occur without first "conduct[ing] evidentiary hearings examining alternative uses and the public interest and benefit from comparative uses of water . . . as required in any eminent domain action in regard to public necessity." Stanford Vina also sought writs of mandate and/or injunctive relief ordering the Board, among other things, to rescind the emergency regulations and related curtailment orders and refrain from "adopting further orders relating to unreasonable use of water which have the effect of prohibiting one use of water in order to benefit or enhance an alternative use of water, without first complying with

constitutional and statutory legal requirements of due process and reasonable compensation.”

The trial court ordered the writ of mandate/injunctive relief causes of action bifurcated from the inverse condemnation/declaratory relief causes of action. Thereafter, Stanford Vina filed an opening brief arguing: (1) the Board abused its discretion in adopting the “curtailment regulations” in 2014 and 2015 because these regulations amounted to a taking of Stanford Vina’s vested water rights without just compensation; (2) the Board violated Stanford Vina’s constitutional right to due process by failing to hold an evidentiary hearing prior to taking these water rights and by failing to provide the company with adequate notice; (3) the Board could not lawfully invoke the rule of reasonableness set forth in article X, section 2, to limit Stanford Vina’s water rights without first holding an evidentiary hearing; (4) the Board misapplied the rule of reasonableness; (5) the public trust doctrine does not apply to Stanford Vina’s water rights; (6) the challenged regulations and curtailment orders violated the rule of priority; (7) the Board ignored a binding judgment previously adjudicating Stanford Vina’s water rights; (8) the Board improperly amended the challenged 2014 regulations on the day of their adoption; and (9) the conditions existing in the Deer Creek watershed in 2014 and 2015 “did not constitute a true emergency.”

In opposition, the Board and other defendants (collectively, defendants) argued the Board possessed the authority to adopt the challenged emergency

regulations and issue the subsequent curtailment orders to “regulate the unreasonable use of water,” relying primarily on *Light, supra*, 226 Cal.App.4th 1463 and *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743 (*Forni*). Without setting forth defendants’ response to each argument advanced by Stanford Vina, we note they argued substantial evidence supported the Board’s findings that a drought emergency existed and “immediate action was needed to prevent waste and unreasonable use of water diverted from priority water bodies that provide habitat for threatened and endangered species such as salmon and steelhead.” Defendants further argued the Board did not violate Stanford Vina’s due process rights, nor did the emergency regulations and curtailment orders amount to a taking of property, because Stanford Vina did not have a vested right to the unreasonable use of water.

The trial court denied the writ relief requested by Stanford Vina. The trial court concluded the Board possessed quasi-legislative authority to adopt the challenged emergency regulations that “themselves determined diversions would be curtailed to meet minimum flow requirements,” without first holding an evidentiary hearing; although the curtailment orders appeared quasi-adjudicative in nature, they “simply notified affected water rights holders that the regulatory provisions were put into effect.” Rejecting Stanford Vina’s argument that the Board unlawfully declared certain diversions from Deer Creek to be unreasonable, the trial court explained: “Under the

unique circumstances present in this case-persistent and extreme drought conditions threatening to de-water high priority streams during critical migration periods for threatened and endangered fish species, and a lack of feasible alternatives to increase instream flows by other means-the [Board] rationally determined that allowing diversions to reduce flows below the minimum, ‘belly-scraping’ amounts necessary for fish migrations and survivability would be ‘unreasonable.’” The trial court also rejected Stanford Vina’s remaining arguments, including the takings argument advanced despite the bifurcation order, and ultimately entered judgment against Stanford Vina on all causes of action. This appeal followed.

DISCUSSION

I

Overview of California Water Law

We begin our discussion of Stanford Vina’s appellate contentions with a brief overview of California water law in order to provide a backdrop for those contentions.

“Ownership of California’s water is vested generally in the state’s residents, but individuals and entities can acquire ‘water rights,’ the right to divert water from its natural course for public or private use. [Citations.] California maintains a ‘dual system’ of water rights, which distinguishes between the rights of ‘riparian’ users, those who possess water rights by virtue of owning the land by or through which flowing water

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passes, and ‘appropriators,’ those who hold the right to divert such water for use on noncontiguous lands. [Citation.] For historical reasons, California further subdivides appropriators into those whose water rights were established before and after 1914. Post-1914 appropriators may possess water rights only through a permit or license issued by the Board, and their rights are circumscribed by the terms of the permit or license. Riparian users and pre-1914 appropriators need neither a permit nor other governmental authorization to exercise their water rights. [Citation.]” (*Light, supra*, 226 Cal.App.4th at pp. 1477-1478.)

“The differences between and among riparian users and appropriators become most pronounced when the available supply of water is inadequate to satisfy the needs of all those holding water rights. Under the ‘rule of priority,’ which governs diversion in such circumstances, the rights of riparian users are paramount. Although riparian users must curtail their use proportionately *among themselves* in times of shortage, they are entitled to satisfy their reasonable needs first, before appropriators can even begin to divert water. [Citation.] As a result, appropriators may be deprived of all use of water when the supply is short. In turn, senior appropriators-those who acquired their rights first in time-are entitled to satisfy their reasonable needs, up to their full appropriation, before more junior appropriators become entitled to any water. [Citation.]” (*Light, supra*, 226 Cal.App.4th at p. 1478.)

All water rights in California, both riparian and appropriative, are constrained by two limiting principles: (1) the rule of reasonableness; and (2) the public trust doctrine. (*Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19 Cal.App.5th 1176, 1184 (*Channelkeeper*).)

The rule of reasonableness, codified in the California Constitution since 1928, is “the overriding principle governing the use of water in California.” (*Forni, supra*, 54 Cal.App.3d at p. 750.) This rule limits “[t]he right to water or to the use or flow of water in or from any natural stream or water course in this State” to “such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.” (Art. X, § 2.) “[T]he reasonableness of any particular use depends largely on the circumstances. [Citation.] ‘What 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.’ [Citation.]” (*Light, supra*, 226 Cal.App.4th at p. 1479.) Moreover, as our Supreme Court explained in *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132 (*Joslin*), “what is a reasonable use of water depends on the circumstances of each case, [but] such an inquiry cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance.

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Paramount among these we see the ever increasing need for the conservation of water in this state, an inescapable reality of life quite apart from its express recognition in the 1928 amendment.” (*Id.* at p. 140.)

The second overarching principle limiting water rights in California is the public trust doctrine. “The doctrine finds its origin in the Roman law principle that [human]kind shares ownership in the sea, the seashore, the air, and (most importantly for our purposes) running water. [Citations.] The doctrine arrived in California via the English common law, and was often applied in cases involving public rights to navigation, commerce, and fishing in tideland areas, or on navigable lakes and streams. [Citation.] But in 1983 our Supreme Court held that the doctrine also protects navigable waters, such as Mono Lake, ‘from harm caused by diversion of nonnavigable tributaries.’ [Citation.] The State of California as trustee has a broad ‘duty . . . to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases.’ [Citation.] As a consequence, those ‘parties acquiring rights in trust property,’ such as water flowing in a stream, ‘generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust.’” (*Channelkeeper, supra*, 19 Cal.App.5th at pp. 1185-1186, quoting *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 437.)

II

Standard of Review

Before turning to the specific contentions raised in this appeal, we must first determine the appropriate standard of review.

Stanford Vina asserts an independent judgment standard of review applies under Code of Civil Procedure section 1094.5, the administrative mandamus statute. In general, where the administrative agency's decision is "quasi-adjudicative" in nature, "review . . . is by administrative mandamus (Code Civ. Proc., § 1094.5) under either the substantial evidence or the independent judgment standard." (*Dominey v. Dept. of Personnel Administration* (1988) 205 Cal.App.3d 729, 736 (*Dominey*)).) Whether the substantial evidence or independent judgment standard applies turns on whether or not the decision substantially affects a fundamental vested right. If so, "the trial court must not only examine the administrative record for errors of law, but also must exercise its independent judgment upon the evidence. However, when the administrative decision neither involves nor substantially affects such a right, the trial court must review the entire administrative record to determine whether the findings are supported by substantial evidence and if the agency committed any errors of law." (*Whaler's Village Club v. Cal. Coastal Com.* (1985) 173 Cal.App.3d 240, 251, fn. omitted; *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143.)

In contrast to quasi-adjudicative decisions, “[a]cts of an administrative agency that are quasi-legislative in nature, e.g., establishment of regulations to carry out a statutory policy or direction, are not reviewable by administrative mandamus.’ [Citation.]” (*City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1408.) “Review of quasi-legislative determinations is by ordinary mandamus (Code Civ. Proc., § 1085) under the arbitrary and capricious standard. . . .” (*Dominey, supra*, 205 Cal.App.3d at p. 736.)

“Whether an administrative action is quasi-legislative or quasi-adjudicative is a question of law.” (*Dominey, supra*, 205 Cal.App.3d at p. 737, fn. 4.) “Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts.’ [Citations.]” (*Id.* at pp. 736-737.) In determining the matter, we must consider “*only* the function performed” by the action in question. (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 275.)

Here, the Board adopted emergency regulations and then issued curtailment orders contemplated by those regulations. The regulations established minimum flow requirements on three creeks during certain time periods, when certain protected fish were present in the creeks during those time periods, and made any diversion of water from those creeks unreasonable per se under article X, section 2, where the diversion would cause or threaten to cause the flow of water to fall

below the minimum flow requirements. The regulations also authorized the Board to issue curtailment orders upon a determination that flows were likely to fall below the minimum flow requirements without curtailment. (Cal. Code Regs., tit. 23, former § 877, subds. (a) & (b).) We have no difficulty concluding the regulations formulated a rule to be applied to future cases, and were therefore legislative in nature. Thus, in determining whether or not the regulations were validly adopted, we “merely ask[] whether the [Board’s] action was arbitrary, capricious, or entirely lacking in evidentiary support, or whether the [Board] failed to follow the procedure and give the notices the law requires.” (*Kreeft v. City of Oakland* (1998) 68 Cal.App.4th 46, 53.) Of course, “[w]hether a particular regulation is within the scope of authority conferred by the Legislature on an administrative agency is a legal issue we review de novo.” (*Light, supra*, 226 Cal.App.4th at p. 1482.)

Issuance of the subsequent curtailment orders, however, required a determination by the Board that the flow of water in Deer Creek was likely to fall below the emergency minimum flow requirements, and curtailment was therefore necessary to prevent an unreasonable use of water. This amounted to a quasi-adjudicative application of the emergency regulations to the facts existing in Deer Creek at the time the curtailment orders were issued. Moreover, while administrative mandamus is ordinarily available only if the decision resulted from a “proceeding in which by law a hearing is required to be given,” (Code Civ. Proc.,

§ 1094.5, subd. (a)), and as we explain more fully later in the opinion, such a hearing was not required before the Board curtailed Stanford Vina’s diversion of water from Deer Creek, “[s]ection 1126, subdivision (c) states that, ‘[s]ection 1094.5 of the Code of Civil Procedure *shall* govern judicial proceedings under this section.’ (Italics added.) This language read in conjunction with section 1126, subdivision (a) [‘It is the intent of the Legislature that all issues relating to state water law decided by the board be reviewed in state courts. . . .’], indicates the Legislature’s intent that section 1094.5 govern judicial review of all [quasi-adjudicative decisions] relating to state water law. Nothing in subdivision (b) of section 1126 limits the type of proceeding subject to judicial review. We therefore conclude that judicial review is not limited to ‘proceedings in which by law a hearing is required.’ (Code. Civ. Proc., § 1094.5, subd. (a).)” (*Phelps v. State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 104-105.)

Accordingly, our review of the challenged curtailment orders is by administrative mandamus. Because, as we further explain, Stanford Vina possessed no fundamental vested right to an unreasonable use of water from Deer Creek, our function, “like that of the trial court, is to determine whether the record is free from legal error” and whether the Board’s findings are supported by substantial evidence. (*Merrill v. Dept. of Motor Vehicles* (1969) 71 Cal.2d 907, 916; *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 721.)

“Of course, questions of law are subject to de novo review. [Citations.] The proper interpretation of a statute [or regulation], and its application to undisputed facts, is a question of law. [Citation.]” (*State Water Resources Control Bd. Cases, supra*, 136 Cal.App.4th at p. 722.) However, “we must ‘adhere to the well-settled principle of affording “great weight” to “the contemporaneous administrative construction of [a statute] by those charged with its enforcement. . . .’” [Citations.] An administrative agency’s interpretation of its own regulation is shown even greater deference. [Citations.]” (*Hardesty v. Sacramento Metropolitan Air Quality Management Dist.* (2011) 202 Cal.App.4th 404, 417-418.)

III

Analysis

Stanford Vina’s appellate arguments, much like its arguments before the trial court, conflate the Board’s adoption of the emergency regulations and the subsequent issuance of curtailment orders. However, as we have explained, a different standard of review applies to each action. We shall therefore assess the validity of each action under the proper standard of review, addressing Stanford Vina’s specific arguments where we deem appropriate. For example, the company’s contention that constitutional guarantees of due process required the Board to hold an evidentiary hearing before making the challenged reasonableness determination, i.e., that any diversion of water from

Deer Creek that threatened to drop the flow of water below the emergency minimum flow requirements was per se unreasonable, shall be addressed in connection with our assessment of the validity of the challenged regulations because that is where the reasonableness determination was made. In contrast, Stanford Vina's argument that the Board's "curtailment actions" amounted to a taking of vested water rights without just compensation shall be addressed in connection with our assessment of the validity of the curtailment orders because, to the extent anything was "taken" from Stanford Vina, it was taken not when the regulations were adopted but when the Board applied the regulations to the facts existing in Deer Creek and ordered the temporary curtailment of diversions.

A.

Validity of the Challenged Regulations

"Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov. Code, § 11342.2.)

1. *Consistency with the Board's Grant of Authority*

Because the Board's rulemaking authority "is circumscribed by the substantive provisions of the law governing the agency," we must first determine whether the challenged emergency regulations are consistent with the Board's constitutional and legislative mandate. (*Henning v. Division of Occupational Saf. & Health* (1990) 219 Cal.App.3d 747, 757-758.) They are.

Article X, section 2, provides, in relevant part: "The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled."

As we have already explained, this constitutional provision sets forth “the overriding principle governing the use of water in California” (*Forni, supra*, 54 Cal.App.3d at p. 750), and its enactment in 1928 “‘radically altered water law in [this state] and led to an expansion of the powers of the [Board].’ [Citation.]” (*Light, supra*, 226 Cal.App.4th at p. 1481.) “Through subsequent legislation and judicial decisions, ‘the function of the [Board] has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of waters.’ [Citation.]” (*Ibid.*)

Consistent with article X, section 2, the Legislature added section 100 to the Water Code in 1943. This section provides: “It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.” (§ 100.)

In the same enactment, the Legislature amended section 275 to authorize the Board to “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.” (§ 275) The Water Code also “authorizes the Board, in carrying out its statutory duty to administer the state’s water resources, to ‘exercise the adjudicatory and regulatory functions of the state.’ (§ 174.) In that role, the Board is granted ‘any powers . . . that may be necessary or convenient for the exercise of its duties authorized by law’ (§ 186, subd. (a)), including the authority to ‘make such reasonable rules and regulations as it may from time to time deem advisable. . . .’ (§ 1058.)” (*Light, supra*, 226 Cal.App.4th at pp. 1484-1485.)

Moreover, and particularly relevant here, the Board possesses the statutory authority to adopt emergency regulations “in response to conditions which exist, or are threatened, in a critically dry year immediately preceded by two or more consecutive below normal, dry, or critically dry years or during a period for which the Governor has issued a proclamation of a state of emergency under the California Emergency Services Act . . . based on drought conditions” and where such regulations are “adopted to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, to promote water recycling or water conservation, [or] to require curtailment of diversions when water is not available under the diverter’s priority of right. . . .”

(§ 1058.5, subd. (a)(1)&(2); Sen. Bill No. 104 (2013-2014 Reg. Sess.) § 10.)

In *Light, supra*, 226 Cal.App.4th 1463, our colleagues at the First Appellate District upheld the Board’s regulatory authority to adopt a regulation designed to reduce diversions of water from a certain stream system for purposes of frost protection. (*Id.* at pp. 1472-1473.) The regulation was adopted to protect young salmon traveling through the stream system that were being fatally stranded when the water level abruptly dropped due to a number of vineyard operators simultaneously spraying large quantities of water on their crops during cold periods to protect the grapes from frost damage. (*Id.* at pp. 1473-1474.) Although the regulation did not itself regulate the diversion of water for purposes of frost protection, it created certain local programs to monitor the stream system and take “‘corrective actions’ to reduce a threat once detected.” (*Id.* at pp. 1475-1476.) The regulation also directed diverters to either implement such corrective actions “or cease diverting water for frost protection,” and declared any diversion of water in violation of the regulation to be “‘an unreasonable method of diversion and use and a violation of . . . section 100. . . .’” (*Id.* at p. 1476.)

Rejecting the trial court’s conclusion that the Board’s regulatory authority “was limited, at least as to riparian users, to pursuing enforcement actions in the courts against allegedly unreasonable users, rather than enacting regulations to preclude unreasonable use,” the appellate court first noted that “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.) The court then discussed two appellate decisions that, viewed together, compelled the conclusion the Board possessed the regulatory authority to enact the challenged regulation governing the reasonable use of water. (*Id.* at pp. 1483-1485.)

In *Forni, supra*, 54 Cal.App.3d 743, the same appellate court previously upheld a similar regulation declaring the direct diversion of water from a certain river for frost protection during the frost season “constituted an unreasonable method of use within the meaning of the Constitution and Water Code.” (*Id.* at p. 752.) The *Forni* court, however, construed this regulatory declaration as “no more than a policy statement which leaves the ultimate adjudication of reasonableness to the judiciary.” (*Ibid.*) Returning to *Light*, the court acknowledged the *Forni* court’s treatment of the issue “was not a ringing endorsement of the Board’s power to enact regulations governing the unreasonable use of water,” but explained, “to the extent *Forni*’s ruling was based on the implicit rationale that only the judiciary has the power to declare a particular water use unreasonable, we conclude *Forni* construed the Board’s authority too narrowly.” (*Light, supra*, 226 Cal.App.4th at p. 1483.)

This latter conclusion was based on a prior decision from this court, *California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585 (*California Trout*). There, the Legislature enacted a statute

“limit[ing] the amount of water that may be appropriated by diversion from a dam in the designated area by requiring that sufficient water first be released to sustain fish below the dam.” (*Id.* at p. 599.) We upheld the Legislature’s authority to enact such legislation, rejecting the argument that article X, section 2, required a judicial determination as to reasonableness of use. (*Id.* at pp. 622-625.) The proponent of the argument relied on language from *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673 (*Gin S. Chow*) indicating, “what is a useful and beneficial purpose and what is an unreasonable use is a judicial question depending upon the facts in each case.” (*Id.* at p. 706.) However, as we explained, the court in that case did not hold “the question of reasonableness invariably must be resolved ad hoc, adjudicatively. . . .” (*California Trout, supra*, at p. 624.) “All that the reasoning in *Gin S. Chow* connotes is that in the absence of an *a priori* rule a court may ascertain whether a use of water is unreasonable from the facts and circumstances of particular cases. Hence, it is often asserted that ‘[w]hat constitutes a reasonable use or method of diversion is ordinarily a question of fact.’ [Citation.] Actually, since what occurs is development of a standard of reasonableness on the facts of the case it should be described as a making of law for the particular case. [Citation.] The typical example of such a process is case-by-case determination of the standard of reasonable care in the law of tort. However, the fact that, ordinarily, the standard of reasonableness is fixed ad hoc does not impel the view that the Legislature has no power to fashion rules concerning reasonableness, e.g., by enacting

statutory safety obligations which become the basis of negligence per se.” (*Ibid.*, italics added.)

Again returning to *Light, supra*, 226 Cal.App.4th 1463, in upholding the Board’s regulatory authority to adopt the challenged regulation declaring diversions of water for purposes of frost protection to be per se unreasonable when done in contravention of the regulation, the First Appellate District concluded: “Given the Board’s statutory charge to ‘prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state’ (§ 275) and the recognized power of the Legislature to pass legislation regulating reasonable uses of water (*California Trout, supra*, 207 Cal.App.3d at pp. 624-625 . . .), the Board’s grant of authority to ‘exercise the . . . regulatory functions of the state’ (§ 174) necessarily includes the power to enact regulations governing the reasonable use of water.” (*Light, supra*, 226 Cal.App.4th at pp. 1484-1485.)

Similarly, here, the Board adopted regulations setting minimum flow requirements for three creeks during certain time periods, and when certain protected fish were present in the creeks, in order to enable those fish to survive their yearly migration through the creeks during severe drought conditions. Diversions that threatened to drop the flow of water below the minimum flow requirements were declared per se unreasonable and subject to curtailment by the Board. As in *Light, supra*, 226 Cal.App.4th 1463, we conclude the adoption of these regulations was within the Board’s regulatory authority as they furthered the Board’s

constitutional and statutory mandate to “prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.” (§ 275; art. X, § 2.) Also like *Light*, we reject Stanford Vina’s assertion the Board’s authority in this regard was limited by the fact the company manages riparian and pre-1914 water rights. “[T]he 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, italics added.)

Moreover, the challenged regulations were not ordinary regulations, but were emergency regulations adopted pursuant to the specific statutory authority set forth in section 1058.5, in response to an “unprecedented” drought emergency, requiring “urgent” legislative and administrative action. (Sen. Bill No. 104 (2013-2014 Reg. Sess.) § 1.) Stanford Vina does not dispute in this appeal that drought conditions existed triggering the Board’s emergency regulatory authority. Instead, the company argues neither section 1058.5 nor the Governor’s declaration of drought emergency gave the Board the authority to “take Stanford Vina’s water (without due process and compensation^[8]) to enhance public trust fishery interests, nor did they authorize the [Board] to redefine and expand the definitions of waste and unreasonable use to include serving

⁸ As stated previously, we address Stanford Vina’s “takings” claim in connection with our assessment of the validity of the curtailment orders.

public trust fishery resources as an acceptable regulatory goal.” We are not persuaded.

First, the assertion that the survival of protected species of fish is not an appropriate consideration in water use regulation is contradicted by the holding in *Light, supra*, 226 Cal.App.4th 1463. *Light* specifically considered fish survival. There, the challenged regulation limited diversions for frost protection because simultaneous diversions of water for that purpose by several vineyard operators abruptly reduced the water level in the stream system, thereby fatally stranding juvenile salmon. (*Light, supra*, 226 Cal.App.4th at p. 1472; see also *California Trout, supra*, 207 Cal.App.3d at p. 599 [challenged statute limited diversions from dams by requiring the release of sufficient water to sustain fish below the dam].) Here, the challenged emergency regulations limited diversions, with some exceptions, where such diversions would cause or threaten to cause the flow of water to drop below emergency minimum flow requirements established to allow protected salmon and steelhead to survive their migration through the stream system. In both cases, fish survival is an appropriate consideration in determining what is or is not an “unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.” (§ 275; see also § 1058.5, subd. (a)(1); art. X, § 2.)

Stanford Vina also argues the Board was required to hold an evidentiary hearing before making this reasonableness determination. Such a requirement, the company argues, flows both from the due process

guarantees of the federal and California constitutions and from article X, section 2, itself. These arguments are similar to those advanced and rejected in *California Trout*, *supra*, 207 Cal.App.3d 585. While we acknowledge that in the absence of a per se rule of unreasonableness, the determination of whether Stanford Vina's water use was reasonable or not would necessarily have been determined ad hoc, adjudicatively, this does not mean due process requires the Board to hold an evidentiary hearing before engaging in the *legislative* function of promulgating a regulation defining diversions of water under certain emergency circumstances to be per se unreasonable. Such a requirement would turn the regulatory process on its head. Nor did the Board violate article X, section 2 by failing to hold such a hearing. As we held in *California Trout*, the Legislature may, consistent with this constitutional provision, legislate per se rules of unreasonable use. (*California Trout*, *supra*, 207 Cal.App.3d at p. 624.) So too may the Board. (*Light*, *supra*, 226 Cal.App.4th at pp. 1484-1485.)

2. Reasonable Necessity

Turning to the second component of our review of the challenged regulations' validity, i.e., whether or not they are "reasonably necessary" (Gov. Code, § 11342.2), this determination "generally does implicate the agency's expertise" and "receives a much more deferential standard. . . ." (*Henning v. Division of Occupational Saf. & Health*, *supra*, 219 Cal.App.3d at p. 758.) "Ordinarily, absent a plain constitutional mandate, a

conflict in public policy between the view of the judiciary and the Legislature [or, as here, the Board] must be resolved in favor of the latter. [Citation.] Where various alternative policy views reasonably might be held whether the use of water is reasonable within the meaning of article X, section 2, the view enacted by the Legislature [or Board] is entitled to deference by the judiciary. An invitation to substitute the policy view of a court in this circumstance for a reasonable policy enacted in a statute [or regulation] is an invitation to return to the benighted days of substantive due process.” (*California Trout, supra*, 207 Cal.App.3d at pp. 624-625; *Light, supra*, 226 Cal.App.4th at p. 1485 [“the Board’s regulatory authority is coincident with that of the Legislature”].)

We conclude the Board’s determination that, as the trial court put it, “allowing diversions to reduce flows below the minimum, ‘belly-scraping’ amounts necessary for fish migrations and survivability would be ‘unreasonable,’” was not arbitrary, capricious, or entirely lacking in evidentiary support. Nor does Stanford Vina assert in this appeal that the Board failed to follow the procedure applicable to adoption of emergency regulations or give required notices. Indeed, the company submitted comments opposing adoption of the regulations and appeared at the public hearings held before the Board.

We therefore have no basis upon which to override the Board’s determination that the minimum flow requirements set forth in the challenged regulations were reasonably necessary to prevent an unreasonable

use of water within the meaning of article X, section 2, and any diversion that threatened to reduce the flow of water in the named creeks below the required minimum flows would constitute such an unreasonable use of water.⁹

B.

Validity of the Challenged Curtailment Orders

Having concluded the Board's adoption of the emergency regulations was valid, we must now determine whether or not the Board properly implemented those regulations by issuing the challenged curtailment orders. It did.

As we have already explained, our review of the curtailment orders is by administrative mandamus. We have also explained that whether the substantial evidence or independent judgment standard of review applies turns on whether or not the decision to curtail diversions from Deer Creek substantially affected a fundamental vested right possessed by Stanford Vina.

⁹ This conclusion makes it unnecessary for us to address Stanford Vina's additional argument that the Board abused its authority by unlawfully asserting the public trust doctrine. As the Court of Appeal explained in *Light*, the public trust doctrine exists "alongside the rule of reasonableness." (*Light, supra*, 226 Cal.App.4th at p. 1479.) Each doctrine independently limits the private use of water in this state. Having concluded the challenged regulations limiting diversions of water from Deer Creek were authorized by article X, section 2, we need not determine whether they would also have been authorized by the public trust doctrine.

(See *Whaler's Village Club v. Cal. Coastal Com.*, *supra*, 173 Cal.App.3d at p. 251.) We now explain why issuance of the challenged curtailment orders substantially affected no such right.

Stanford Vina claims the existence of a fundamental vested right to Deer Creek's water by virtue of the fact that it "manages its landowners' senior riparian and pre-1914 water rights to Deer Creek flows which are appurtenant to their lands." The Board does not dispute this fact. However, as our Supreme Court has explained, article X, section 2, declares: "Riparian rights attach to, *but to no more than* so much of the flow as may be required or used consistently with this section of the Constitution." (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 367, italics added.) "Such an interest consists in their right to the *reasonable* use of the flow of the water. Their riparian rights attach to no more of the flow of the stream than that which is required for such use. . . . There is now no provision of law which authorizes an unreasonable use or endows such use with the quality of a legally protectible interest merely because it may be fortuitously beneficial to the lands involved." (*Joslin*, *supra*, 67 Cal.2d at pp. 143-144.) We have already explained the Board's emergency regulations defining as unreasonable any diversion of water that threatened to drop the flow of Deer Creek below the emergency minimum flow requirements was a valid exercise of the Board's legislative authority to regulate the reasonable use of water. Thus, Stanford Vina possessed no vested right,

fundamental or otherwise, to divert water from Deer Creek in contravention of the emergency regulations.

We shall therefore apply the substantial evidence standard of review in assessing the validity of the challenged curtailment orders. Under this standard, we “must review the entire administrative record to determine whether the findings are supported by substantial evidence and if the agency committed any errors of law.” (*Whaler’s Village Club v. Cal. Coastal Com.*, *supra*, 173 Cal.App.3d at p. 251.)

Section 877 of the emergency regulations provided for issuance of a curtailment order, with certain exceptions not applicable here, where “diversions . . . would cause or threaten to cause flows to fall beneath the drought emergency minimum flows listed in subdivision (c). . . .” (Cal. Code Regs., tit. 23, former § 877.) Stanford Vina does not challenge the sufficiency of the evidence supporting the Board’s conclusion the curtailed diversions would have caused or threatened to cause the flow of water to fall below the emergency minimum flow requirements. Instead, as previously discussed, the company attacks the Board’s decision to adopt the emergency minimum flow requirements in the first place. Thus, Stanford Vina challenges the regulations, not the Board’s application of the regulations to the facts existing in Deer Creek at the time the curtailment orders were issued. We have already affirmed the Board’s adoption of the regulations. And we find no fault with the Board’s application of the regulations to the facts. Substantial evidence supports the Board’s conclusion the curtailed diversions would have caused

or threatened to cause the flow of water in Deer Creek to fall below the emergency minimum flow requirements.

Turning to the question of whether the Board committed any errors of law, Stanford Vina does not specifically point to any purported errors relating to the issuance of the curtailment orders themselves, perhaps as a consequence of treating adoption of the regulations and issuance of the curtailment orders as a single action.

However, we address Stanford Vina's argument that the "curtailment actions" amounted to a taking of vested water rights without just compensation as a challenge to the legality of the curtailment orders because any such taking occurred not when the regulations were adopted, but when those regulations were applied to curtail Stanford Vina's diversions of water from Deer Creek. This takings claim fails for the same reason we rejected Stanford Vina's argument regarding application of the independent judgment standard of review: Stanford Vina possessed no vested right to divert water from Deer Creek in contravention of the emergency regulations. As stated by our Supreme Court in *Gin S. Chow*: "There is a well recognized and established distinction between a 'taking' or 'damaging' for public use and the regulation of the use and enjoyment of a property right for the public benefit. The former falls within the realm of eminent domain, and the latter within the sphere of the police power. That the constitutional amendment now under consideration is a legitimate exercise of the police power of

the state cannot be questioned.” (*Gin S. Chow, supra*, 217 Cal. at p. 701.) “[S]ince there was and is no property right in an unreasonable use, there has been no taking or damaging of property by the deprivation of such use and, accordingly, the deprivation is not compensable.” (*Joslin, supra*, 67 Cal.2d at p. 145.)

Finally, we also reject Stanford Vina’s assertions the Board’s actions violated a prior judicial decree adjudicating the company’s water rights and also violated the rule of priority described earlier in this opinion. While we acknowledge Stanford Vina’s previously-adjudicated right to use roughly 66 percent of the flow of Deer Creek, this right is limited by the rule of reasonableness for the reasons discussed at length above. We agree with the trial court’s determination that although “[t]he decree is conclusive as to the rights of all existing claimants upon the stream system lawfully embraced in the determination” (§ 2773), it does not prevent the Board from adopting regulations and issuing curtailment orders to prevent an unreasonable use of water under article X, section 2. (See *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 358-360.)

Nor did the Board violate the rule of priority. Unlike *El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937 (*El Dorado Irrigation*), relied upon by Stanford Vina, the Board in this case did not subvert the rule of priority by imposing a condition on a senior appropriator that it did not also impose on more junior appropriators. (*Id.* at p. 969.) Here, the Board declared all diversions of water

from Deer Creek unreasonable during certain time periods, and when protected fish were present in the creek, where such diversions threatened to drop the flow of water below the minimum flow required to allow the fish to survive their migration through the creek. The Board then implemented this unreasonableness determination by curtailing all diversions that threatened to violate the minimum-flow requirements. Stanford Vina does not argue any water rights holders junior to it were not similarly restricted by curtailment orders, but instead argues the Board was not authorized to “elevat[e] public trust uses of water,” i.e., survival of threatened fish, “to a super-senior priority.” This argument is belied by our discussion of the rule of priority in *El Dorado Irrigation*: “Of course, the rule of priority is not absolute, nor is the Board without power to act contrary to that rule in appropriate circumstances. Sometimes, a competing principle or interest may justify the Board’s taking action inconsistent with a strict application of the rule of priority. [¶] For example, the California Constitution provides that all water use must be reasonable. [Citation.] ‘[T]he rule of reasonable use as enjoined by . . . the Constitution applies to all water rights enjoyed or asserted in this state. . . .’ [Citation.] Thus, ‘no one can have a protectible interest in the unreasonable use of water’ [citation], and when the rule of priority clashes with the rule against unreasonable use of water, the latter must prevail.” (*Id.* at pp. 965-966, fn. omitted.) For all of the reasons already expressed, the Board was well-within its authority to determine diversions that threatened to violate the emergency minimum flow requirements

constituted an unreasonable use of water. Stanford Vina's senior water rights did not exempt its diversions from curtailment.

DISPOSITION

The judgment is affirmed. Respondents State of California, State Water Resources Control Board, State Water Resources Control Board Members Felicia Marcus, Doreen D'Adamo, Frances Spivy-Weber, Steven Moore, and Tam Doduc are entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

/s/ Hoch
HOCH, J.

We concur:

/s/ Raye
RAYE, P.J.

/s/ Duarte
DUARTE, J.

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APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Sacramento)

STANFORD VINA RANCH
IRRIGATION COMPANY,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA et al.,

Defendants and Respondents.

C085762

(Super. Ct. No.
34201480001957
CUWMGDS)

ORDER MODIFY-
ING OPINION

[NO CHANGE
IN JUDGMENT]

(Filed Jul. 8, 2020)

THE COURT:

It is ordered that the published opinion filed herein on June 18, 2020, be modified as follows:

On page 34, the last sentence of the first full paragraph beginning with “We agree with the trial court’s determination” and immediately preceding the citation to *In re Waters of Long Valley Creek System* (1979) 25 Cal.3d 339 is deleted. The following sentence is inserted in its place:

We agree with the trial court's determination that although "the court's judgment settled questions of apportionment among the parties to the litigation," it does not prevent the Board from adopting regulations and issuing curtailment orders to prevent an unreasonable use of water under article X, section 2.

This modification does not change the judgment.

FOR THE COURT:

/s/ Raye
RAYE, P.J.

/s/ Duarte
DUARTE, J.

/s/ Hoch
HOCH, J.

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APPENDIX C

**IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT**

STANFORD VINA RANCH
IRRIGATION COMPANY,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA et al.,

Defendants and Respondents.

C085762
Sacramento County
No. 34201480001957CUWMGDS
(Filed Jul. 6, 2020)

BY THE COURT:

Appellant Stanford Vina Ranch Irrigation Com-
pany's petition for rehearing is denied.

/s/ Raye
RAYE, P.J.

APPENDIX D
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

STANFORD VINA RANCH
IRRIGATION COMPANY,
Plaintiff-Petitioner,

v.

STATE OF CALIFORNIA,
STATE WATER
RESOURCES CONTROL
BOARD; STATE WATER
RESOURCES CONTROL
BOARD MEMBERS FEUCIA
MARCUS, DOREEN
D'ADAMO, FRANCES
SPIVY-WEBER, STEVEN
MOORE, AND TAM DODUC,
AND DOES 1 through 20,
Defendants-Respondents.

Case Number:
34-2014-80001957

**AMENDED
STATEMENT
OF DECISION**

Hearing Held:
Date: March 24, 2017
Time: 10:00 a.m.
Dept.: 29
Judge:
Timothy M. Frawley

Plaintiff-Petitioner Stanford Vina Ranch irrigation Company (“Stanford Vina”) has filed a petition and complaint challenging certain emergency drought regulations adapted by Respondent-Defendant State Water Resources Control Board.

The emergency drought regulations establish “minimum in-stream flow requirements” on three tributaries of the Sacramento River: Deer Creek, Mill Creek, and Antelope Creek. The State Water Board established the minimum in-stream flows for the purpose of

protecting anadromous fish while they migrate through the creeks. The emergency regulations declare that any diversion of water from such creeks constitutes “waste and unreasonable use” if such diversions will reduce the flow of the creeks below the minimum in-stream flow requirements during periods of anadromous fish migrations, regardless of how the water otherwise would be used. The emergency regulations authorize the Water Board’s Deputy Director to issue “curtailment orders” to prohibit water rights holders from diverting water if their diversions would interfere with the established minimum in-stream flow requirements.

The State Water Board adopted the regulations in 2014 and implemented the regulations through a series of curtailment orders. The State Water Board then renewed the emergency regulations in 2015 and implemented the renewed regulations through another set of curtailment orders. By virtue of the emergency regulations and curtailment orders, certain entities, including Stanford Vina, were ordered to cease or reduce their diversions of water to meet the minimum in-stream flow requirements for the protection of anadromous fish.

Stanford Vina filed this petition/complaint to challenge the emergency regulations and curtailment orders. For the reasons described below, the court shall deny the petition/complaint.

Background Facts and Procedure

Stanford Vina is a nonprofit mutual water company located in Tehama County and serving approximately 5700 acres of irrigated lands. Stanford Vina owns conveyance and diversion structures connected to Deer Creek that have been in operation since the mid-1800s. Stanford Vina manages its landowners' senior riparian and pre-1914 water rights to Deer Creek water.

Deer Creek and the appurtenant lands managed by Stanford Vina are referred to as "Mexican Land Grant" lands.¹ This means they were conveyed into private ownership by Spanish or Mexican governments prior to California statehood. Under the Treaty of Guadalupe Hidalgo, which ended the Mexican-American War, the United States promised to honor existing Spanish and Mexican land grants. To comply with the Treaty, the United States adopted the California Land Act of 1851, requiring persons claiming right or title in Mexican Land Grant lands to present their claims for confirmation at a federal patent proceeding. Title to the Stanford Vina lands was confirmed by federal patent in 1862.

In 1923, the Tehama County Superior Court conducted a "water rights adjudication" for Deer Creek.² A water rights adjudication is a comprehensive process to identify and determine all of the water rights in a stream system. It is in the nature of an "accounting" of water

¹ Mexican Land Grant lands are sometimes referred to as "rancho" lands.

² The court decree was amended In 1926.

rights, binding on all parties to the adjudication. In general, a water rights adjudication includes all persons claiming a right to use water in a particular water system. It also may include parties seeking recognition of public trust interests in a stream.

In this case, the Tehama Superior Court conducted a water rights adjudication for persons claiming a right to use water in Deer Creek. There is no evidence that public trust interests were included in the adjudication. Under the court decree, Stanford Vina is entitled to use approximately 66% of the flow of Deer Creek. The water diverted from Deer Creek by Stanford Vina is primarily used for irrigated pasture, livestock stock-watering, grain, alfalfa, and row-crop production, vineyard, as well as prune, walnut, and almond orchards.

For many years, the California Department of Fish and Wildlife (formerly Department of Fish and Game) and the United States Fish and Wildlife Service and National Marine Fisheries Service (collectively, the “Fishery Agencies”) have been studying the conditions in California waterways and working to protect and restore anadromous (salmon and steelhead) fish populations. A 1993 report prepared by the Department of Fish and Wildlife, entitled “Restoring Central Valley Streams: A Plan for Action,” assessed the then-existing conditions and needs of Central Valley anadromous fish, and established priorities for taking action to restore and protect fish habitat and thereby enhance fish populations. (AR 759.)

The 1993 report included a section devoted to Deer Creek. According to the report, Deer Creek could support sustainable populations of 4,000 spring-run and 6,500 fall-run chinook salmon. However, in the decade prior to the report, it was estimated that only about 550 spring-run and 1,000 fall-run salmon annually spawned in the Creek. The report identified “inadequate flow” for upstream passage as the “most significant problem” on Deer Creek. (AR 900.) The report noted that “[d]uring low flow periods, the fish ladder on [Stanford Vina’s] lower diversion dam does not pass fish.” (*Ibid.*) The report stated that “[f]lows necessary to provide unimpaired migration for adult salmon and steelhead are unknown but have been estimated to be approximately 50 cfs.” (*Ibid.*) The report made recommendations to improve habitat, which included restoring spawning gravel and, “through negotiations,” securing in-stream flows. (AR 901.)

The report included similar discussions and recommendations for other Tehama County creeks, including Mill and Antelope Creeks, both of which are located near Deer Creek. For Antelope Creek, the report noted that conditions in Antelope Creek have resulted in “Inadequate migration flows” in the fall and spring for all species of anadromous fish. The report noted that Antelope Creek flow is typically diverted from April through October. Average annual flows during this period historically are about 92 cfs, but the lower reach of the stream is “usually dry when . . . diversions are operating.” As a result, salmon are generally “unable to

enter the stream during the irrigation and diversion season.” (AR 869.)

To re-establish and increase salmon and steelhead in Antelope Creek, the report recommended that priority be given to “providing and maintaining adequate passage flows from October 1 through June 30” below the Edwards and Los Molinos Mutual Water Company diversion dam. (AR 869-70.) The report recommended several administrative actions to improve habitat, including (i) negotiating for additional in-stream flows, (ii) establishing a program to exchange surface water for groundwater, (iii) evaluating the benefit of drilling new wells to establish a water exchange program with private landowners, and (iv) considering administrative or legal remedies to increase stream flows. (*Ibid.*)

For Mill Creek, the report noted that annual spring-run salmon populations have averaged 390 fish and that the fall run has averaged about 2,200 fish. Anecdotal accounts estimated the annual steelhead population at a few hundred fish. The report noted that all anadromous fish populations in the stream had declined, and it pointed the finger at low stream flows, noting that “[i]n some years, water right holders may divert the entire flow or reduce the flow to such an extent that the creek becomes impassable.” (AR 910.) The report suggested that the key to restoring fish populations is obtaining “dependable flow” in the lower stream reaches. The report stated that “[a] negotiated agreement between the water users and DFG would be the preferable means of achieving this goal as it would

minimize conflicts between historic land uses and restoration of salmon and steelhead habitat.” (AR 910.)

Watershed profiles completed in or about 2009 updated the conditions in Deer, Mill, and Antelope Creeks. The 2009 profile of Deer Creek stated that the average base flow in the Creek ranged from 395 cfs, in early May to 96 cfs, by the time of spawning. (AR 3085.) However, the report noted that during low flow periods, the existing water rights are sufficient to dewater the stream. It further stated that “[l]ate spring and early summer diversions have resulted in flows low enough to block access for late-migrating adults.” (AR 3081.)

The 2009 profile of Mill Creek did not identify the average annual flows, but the report indicated that, during low flow periods, the existing water rights are sufficient to dewater the stream, and that late spring and early summer diversions have resulted in flows low enough to block access for late-migrating salmonids. (AR 3094.)

The 2009 profile for Antelope Creek indicated that in the wettest years, average flows in winter months range from 200 to 1,200 cfs. In the driest years, flows in winter average 50 cfs. In all but the wettest years, summer and early fall flows average from 20 cfs to 50 cfs. (AR 3104.) The profile noted that natural flow pattern is altered by diversions in the creek from spring through fall, and that unimpaired natural flows are often less than the combined water rights of the diverters, resulting in total dewatering of the creek during critical migration periods. (*Ibid.*)

The 2014 Curtailment Regulations

On January 17, 2014, Governor Brown issued a Proclamation of a State of Emergency related to the drought in California. Among other things, the Proclamation stated that California was experiencing record dry conditions; that extremely dry conditions have persisted since 2012; that the state's water supplies have dipped to alarming levels; and that the dry conditions and lack of precipitation imperil the safety of persons and property in California and threaten the animals and plants that rely on California's waterways. Among other things, the Proclamation orders the State Water Board to put water right holders on notice that they may be directed to cease or reduce water diversions based on water shortages. The Proclamation also suspended the application of CEQA for the Department of Water Resources and State Water Board to take specified actions to mitigate the effects of the drought. (AR 5936 *et seq.*)

In March 2014, the Legislature amended Water Code Section 1058.5, which governs the State Water Board's emergency regulatory authority. As amended, Section 1058.5 authorizes the Board to adopt emergency regulations to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, to promote water recycling or water conservation, and to require curtailment of diversions when water is not available under the diverter's priority of right. (Cal. Water Code § 1058.5.)

On April 25, 2014, Governor Brown issued a second Proclamation stating that additional expedited actions are needed to reduce the harmful impacts from the drought. Among other things, the Proclamation directs the Department of Fish and Wildlife to Implement monitoring of salmon in the Sacramento River and Its tributaries, and to implement projects for the benefit of fish and wildlife (through habitat restoration and water infrastructure projects) on property owned or managed by the Department of Fish and Wildlife or the Department of Water Resources. The Proclamation also directs DFW to work with state and federal agencies and landowners to protect threatened and endangered species and species of special concern and maximize the beneficial uses of scarce water supplies, including through employment of voluntary agreements to secure in-stream flows, relocation of members of those species, or through other measures. (AR 5938 *et seq.*)

The Proclamation directs the Water Board to adopt and implement emergency regulations pursuant to Water Code Section 1058.5, as deemed necessary to prevent the waste or unreasonable use of water. As before, the Governor's Proclamation suspended the application of CEQA, to the extent it otherwise would have applied, to allow the actions described in the Proclamation to take place as quickly as possible. (*Ibid.*)

In a memorandum dated May 7, 2014, the National Marine Fisheries Service (NMFS) recommended the State Water Board adopt minimum in-stream flows for Mill, Deer, and Antelope Creeks to address drought

impacts on ESA-listed fish species in these creeks. The memorandum recommended minimum in-stream flows of 50 cfs in Mill and Deer Creek and 35 cfs in Antelope Creek for the protection of adult salmon migration April 1 through June 30 and October 1 through November 30, and for the protection of steelhead migration October 1 through March 30. The memorandum also recommended minimum in-stream flows of 20 cfs in all three creeks for the protection of juvenile fish outmigration October 1 through June 30. The memorandum also recommended pulse flows of 100 cfs in Mill and Deer Creek and 70 cfs in Antelope Creek for the protection of adult spring-run salmon and steelhead during April 1 to June 30. (AR 8475.)

On May 13, 2014, pursuant to the authority granted to it by the Legislature and the Governor, the State Water Board initiated the process of promulgating regulations to establish minimum flow requirements on Deer, Mill, and Antelope Creeks for the purpose of protecting migrating anadromous fish. (AR 7710 *et seq.*) The proposed minimum flows were substantially the same as the recommendations of the NMFS.

On May 21, 2014, after receiving oral and written comments, the State Water Board adopted the regulations at a public meeting. (See former 23 C.C.R. §§ 877-879.2.) The regulations established “drought emergency minimum” flow levels in Mill, Deer, and Antelope Creeks, and specified that it is a “waste and unreasonable use” of water to continue diversions that cause or threaten to cause flows to fall beneath the drought emergency minimum flows. The regulations

authorized accompanying curtailment orders to implement the minimum in-stream flow requirements.

Once the regulations were finalized and approved by the Office of Administrative Law, the State Water Board implemented the regulations through curtailment orders. The Board implemented the regulations on Deer Creek through State Water Board Order WR 2014-0022-DWR. (AR 8777 *et seq.*) Through the curtailment order, the Board ordered Deer Creek water right holders to immediately cease or reduce their diversions from Deer Creek to ensure the drought emergency minimum flow requirements would be met.

On June 24, 2014, the Board issued a notice that the curtailment order for Deer Creek was suspended due to the lack of presence of juvenile or adult juvenile salmon or steelhead. (AR 8828-38.)

On October 14, 2014, the curtailment order was re-implemented by State Water Board Order WR 2014-0029-DWR. (AR 9561.) The order imposed flow requirements virtually identical to those in the original order except that it omitted the pulse flow requirement. The order stated that curtailment was necessary to meet drought emergency minimum flows through February 28, 2015.

Facing similar curtailment orders, most water right holders on Mill, Deer, and Antelope Creeks entered into agreements to voluntarily comply with the minimum flow requirements. Stanford Vina complied with the curtailment orders under protest and filed this action on October 22, 2014.

On December 22, 2014, in light of the continued lack of rain, the Governor issued Executive Order B-28-14, extending the CEQA suspension for issuance of drought emergency regulations through May 31, 2016 (among other actions).

The 2015 Curtailment Regulations

On March 12, 2015, the State Water Board initiated the process to re-establish (renew) the emergency regulations imposing minimum in-stream flow requirements on Mill, Deer, and Antelope Creeks. The 2015 emergency regulations had the same purpose as the 2014 emergency regulations. As before, the Board made a finding of emergency, identified evidence of a drought-related emergency, and identified evidence that established a need to prevent “waste and unreasonable use” of water and protect native chinook salmon and steelhead populations in light of the drought.

Once the 2015 emergency regulations were finalized and approved by the Office of Administrative Law, the Board implemented the regulations on Deer Creek through the issuance of State Water Board Order WR 2015-0019-DWR. (AR 11514.) The order imposed flow requirements virtually identical to those Imposed the year before in Order WR 2014-0022-DWR. As before, Stanford Vina was named as a party to the order, along with other riparian, pre-1914, and post-1914 appropriative rights holders.

Due to continuing drought conditions, on October 22, 2015, the State Water Board issued another curtailment order for Deer Creek (State Water Board Order WR 2015-0036-DWR), imposing flow requirements virtually identical to those in Order WR 2014-0029-DWR, to ensure drought emergency minimum flows would be satisfied from October 23, 2015, through March 31, 2016. (AR 11921.)

Due to increased rainfall and snow accumulations, the Board did not readopt the emergency regulations in 2016 or 2017. The 2015 emergency regulations expired by their terms on December 29, 2015.

In this writ proceeding, Stanford Vina challenges the emergency drought regulations adopted by the State Water Board. Stanford Vina's First Amended Verified Petition and Complaint alleges that promulgation of the emergency regulations and issuance of the curtailment orders prevented Stanford Vina from exercising the vested water rights it administers, leaving Stanford Vina landowners without water to irrigate their crops and livestock during critical irrigation periods in 2014 and 2015.

The petition/complaint includes five Causes of Action. The First Cause of Action seeks damages for inverse condemnation. The Second Cause of Action seeks a declaratory judgment that the Board's actions violated the law because the Board took water rights without due process of law or just compensation; improperly asserted a public trust interest in Mexican Land Grant

lands; and applied the public trust to modify Stanford Vina water rights without affording Stanford Vina an evidentiary due process hearing. The Third, Fourth, and Fifth Causes of Action seek a peremptory writ of mandate directing the Board to set aside the emergency regulations (and implementing curtailment orders), and enjoining the Board from adopting similar orders unless and until the Board complies with the requirements of due process, including notice and opportunity to respond at evidentiary hearings, and, where applicable, reasonable compensation for any taking of vested water rights.

Prior to the hearing on the merits, Defendants filed a motion to bifurcate and separately try the “writ” causes of action before any trial on the inverse condemnation and declaratory relief causes of action. The court granted the motion to bifurcate and separately try the writ claims.

Requests for Judicial Notice

Stanford Vina has filed a request for judicial notice of documents related to (i) its Mexican Land Grant claims, and (ii) historical efforts by federal and state agencies to obtain additional in-stream flows on Deer Creek. The Water Board objects to the request for judicial notice, arguing that the documents are not relevant, are extra-record evidence, and cannot be used to prove the truth of the matters asserted therein.

Although evidence outside the administrative record generally is not admissible to challenge a quasi-legislative regulation, the Court in *Western States Petroleum Association* acknowledged an exception when the evidence could not be produced at the administrative level in the exercise of reasonable diligence. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 575-76.) The Court also noted other potential exceptions to the general rule, such as when the evidence is relevant to (1) issues other than the validity of the agency's quasi-legislative decision, such as the petitioner's standing or affirmative defenses, (2) the accuracy of the administrative record, (3) procedural unfairness, or (4) agency misconduct. (*Id.* at p.575, fn.5.)

Here, given the "emergency" nature of the regulations, and the very limited opportunity of Stanford Vina to prepare for the "workshop" and to present comments and materials to the Board, the court refuses to deny the request for judicial notice on the grounds the materials are "extra-record" evidence. The court also does not find the documents to be "irrelevant."

The court agrees with the Board that the court cannot take judicial notice of the truth of hearsay statements of findings of fact asserted in the documents. However, the court may take judicial notice of the existence and content of *each* document and, if there is no genuine dispute about the document's authenticity, its legal effect. (See *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 194; *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th

App. 66

1106, 1117-18; *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375.)

The court grants the request for judicial notice.

Discussion

In this writ proceeding, Stanford Vina challenges the State Water Board's adoption of emergency drought regulations and issuance of curtailment orders limiting diversions from Deer Creek in 2014 and 2015. Stanford Vina contends the Board abused its discretion and acted contrary to law by (1) taking Stanford Vina's water, without just compensation; (2) depriving Stanford Vina of the use of its water without an evidentiary hearing; (3) providing insufficient notice of the proposed regulations; (4) unlawfully declaring that Stanford Vina's use of water for agricultural irrigation is "unreasonable;" (5) applying the public trust doctrine to Stanford Vina's water rights; (6) violating the water rights priority system; (7) ignoring the judicial water rights adjudication decree; (8) unlawfully exercising "emergency" powers to take Stanford Vina's water; and (9) unlawfully amending the emergency regulations without proper notice.

Mootness

The court takes judicial notice that Northern California experienced significant rainfall during the 2016 calendar year. Many communities in Northern California experienced their best rainfall totals in five years.

To date, rainfall totals in 2017 have been prodigious, and the northern Sierra Nevada is on pace for its all-time wettest “water year.”

The emergency regulations at issue in this case expired by their terms on December 29, 2015. Due to the increased rainfall and snow accumulations, the Board did not readopt similar emergency drought regulations in 2016 or 2017. It follows that Stanford Vina’s writ claims, seeking to compel the Water Board to set aside the emergency regulations and associated curtailment orders, are moot. (*Genser v. McElvy* (1969) 276 Cal.App.2d 709, 711; *Clementine v. Board of Civil Service Commis* (1941) 47 Cal.App.2d 112, 114.)

However, there are recognized discretionary exceptions to the mootness rule. Exceptions to the mootness rule exist when (1) the case presents an issue of broad public interest that is likely to recur; (2) there may be a recurrence of the controversy between the parties; or (3) a material question remains for the court’s determination. (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479-480.) In this case, at least two of those exceptions apply. The case presents an issue of broad public interest that is likely to recur and there is a substantial likelihood of recurrence of the same controversy between the parties. Accordingly, the court exercises its discretion to resolve the substantive issues properly raised by the petition.

Taking of Private Property Without Compensation

Many of Stanford Vina's arguments center on its claim that the emergency regulations constitute an unconstitutional taking of Stanford Vina's vested property rights in Deer Creek water. The Water Board argues that Stanford Vina's takings claim is not properly before the court due to the court's bifurcation order, which bifurcated the "writ" causes of action from the inverse condemnation causes of action.

Stanford Vina responds that, while it respects the court's bifurcation order, there is "overlap" between its inverse condemnation claim and the writ claims. In particular, Stanford Vina alleges that the Water Board abused its discretion and failed to proceed in the manner required by law by promulgating regulations that had the effect of taking Stanford Vina's water without just compensation.

The court agrees with the Water Board that the issue of whether the emergency regulations violated the Takings Clause is not before the court at this time. Nevertheless, the court recognizes that there is overlap between the writ and takings claims, notably on the issue of whether Stanford Vina has been deprived of a legally protected property interest. While the court discusses this issue below in the context of Stanford Vina's due process claims, the court's findings and conclusions also apply to Stanford Vina's takings claims.

Deprivation of Property without Due Process of Law

Both the state and federal Constitutions prohibit the government from depriving a person of property without due process of law. (*Kavanou v. Santo Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 771; see also Cal. Const., art. 1, §§ 7, 15; U.S. Const., 14th Amend., § 1.) Here, the Water Board exercised its authority to prevent “waste or unreasonable use” of water by enacting regulations establishing drought emergency minimum flows in Mill, Deer, and Antelope Creeks, and declaring unreasonable any diversion that would cause (or threaten to cause) flows to drop below the specified minimum. Stanford Vina argues that the Water Board violated its procedural due process rights by declaring its diversions and uses of water to be “unreasonable” and ordering them curtailed, without adequate notice or opportunity to be heard.

The first inquiry in any due process challenge is to determine whether the plaintiff has been deprived of a protected liberty or property interest. (*Today’s Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 214.) Only after finding a deprivation of a protected interest do courts look to see whether the State’s procedures comport with due process. (*ibid.*)

In this case, Stanford Vina argues that the Due Process Clause³ was violated because the Water Board’s

³ In light of the virtually identical language of the federal and state due process guarantees, and the substantial overlap in how they are interpreted, the court shall refer to the state and

emergency regulations deprived it of a vested property right to divert and use Deer Creek Water. Stanford Vina argues that the Board may not declare an existing use unreasonable without an evidentiary hearing at which the affected owner may appear and contest whether their particular uses of water are reasonable under the circumstances. Thus, Stanford Vina argues, the Water Board was required to hold an evidentiary hearing before curtailing Stanford Vina's diversions and use of Deer Creek water.

The Water Board disagrees. It argues that Stanford Vina's water rights are usufructuary and limited by the reasonable use and public trust doctrines, which prevent any party including Stanford Vina – from acquiring a vested right to use water in an unreasonable manner or in a manner that harms the public trust. (See *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 143-46 [there is no legally protectable property right in an unreasonable use of water], superseded by statute on unrelated grounds, as stated in *City of Emeryville v. Superior Court* (1991) 2 Cal.App.4th 21, 24.) Thus, the Water Board contends, Stanford Vina suffered no significant deprivation of property which would invoke a constitutional right to an evidentiary hearing.

Further, the Water Board argues that only governmental decisions which are adjudicative in nature are subject to the due process requirements of notice and

federal clauses collectively as the "Due Process Clause." (*Today's Fresh Start*, *supra*, 57 Cal.4th at p.212.)

opportunity for a hearing; quasi-legislative acts are not subject to such requirements. Because the emergency regulations are quasi-legislative in nature, the Water Board contends there was no constitutional requirement for an evidentiary hearing.

The Water Board is correct that Stanford Vina cannot acquire a protected right to use water in an unreasonable manner or in a manner that is harmful to the public trust. Although Stanford Vina may have a vested right to divert and use Deer Creek Water,⁴ this does not mean that Stanford Vina owns the water in the stream. In California, water rights are usufructuary rights (from latin, *ususfructus*), which means that the holder merely has a legal right to use and enjoy (*uses*) the fruits or profits (*fructus*) of the water.⁵ (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 100-101 [hereafter, the “*Racanelli Decision*”]; *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 302; *State of California v. Superior*

⁴ As such, they cannot be infringed by others or taken by governmental action without due process and just compensation. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 101; *State of California v. Superior Court (Underwriters at Lloyd’s of London, et al.)* (2000) 78 Cal.App.4th 1019, 1027; *Schimmel v. Martin* (1923) 190 Cal. 429, 432; see also *County of Siskiyou v. Superior Court* (2013) 217 Cal.App.4th 83, 94.)

⁵ The holder of a usufructuary right is known as a usufructuary. Usufructuary also is an adjective meaning of, or relating to, or of the nature of a usufruct. The word is sometimes spelled usufructory by courts, although nearly all major dictionaries spell the word usufructuary. (See <http://www.onelook.com/nweusufructuary8da>.) This court shall use the accepted spelling.

Court (Underwriters at Lloyd's of London, et al.) (2000) 78 Cal.App.4th 1019, 1025 (“*Lloyd's of London*”]; see also Cal. Wat. Code §§ 102, 1001.)

While the right to use water is a legally protectable interest,⁶ the right is limited and uncertain. (*People v. Morrison* (2002) 101 Cal.App.4th 349, 359.) Just as a real property owner does not have an unfettered right to develop property in any manner he or she sees fit, an owner of a water right may be similarly restricted by the State’s police power. (*Morrison, supra*, 101 Cal.App.4th at p.361.) Case law establishes that water rights are not exempt from reasonable regulation. (*ibid.*) Indeed, they have been the subject of pervasive regulation. (*Id.* at p.360.)

Among other things, all water rights – riparian and appropriative – are subject to the overriding constitutional limitation that water use must be reasonable.⁷ (*Racanelli Decision, supra*, 182 Cal.App.3d at p.105; Cal. Const., art. X, § 2.) This “rule of reasonable use” is

⁶ The right to use water has been described as a possessory right. (See *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 302.) It also is sometimes described as a right “appurtenant to” an interest in real property, or as possessing indicia of property rights, entitling the holder to judicial protection against infringement. (See, e.g., *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 104; *Schimmel v. Martin* (1923) 190 Cal. 429, 432; *Lux v. Noggin* (1886) 69 Cal. 255, 390, 391-392.)

⁷ Although it is not entirely clear whether pueblo rights are subject to the constitutional limitation of article X, section 2, the pueblo right itself is subject to the rule of reasonable use, so application of the constitutional amendment is unnecessary. (See *Los Angeles v. Glendale* (1943) 23 Cal.2d 68, 74.)

now the cardinal principle of California’s water law. (*Racanelli Decision, supra*, 182 Cal.App.3d at p.105; Cal. Wat. Code § 100.) Courts have construed this rule as a valid exercise of the police power to regulate the use and enjoyment of water for the public benefit. (*Racanelli Decision, supra*, 182 Cal.App.3d at p.106.) Due to the enactment of article X, § 2, “there can no longer be any property right in the unreasonable use of water.” (*Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1488 [quoting *in re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 354]; see also *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 753 [no compensable property right to the unreasonable use of water].)

In addition to the reasonable use doctrine, in *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, the California Supreme Court recognized another significant limitation on water rights: the “public trust.”⁸ (*Racanelli Decision, supra*, 182 Cal.App.3d at p.106.) In *National Audubon*, plaintiffs filed suit to enjoin the City of Los Angeles Department of Water and Power from exercising its long-standing appropriative right to divert water from non-navigable tributaries to Mono Lake. The water was being withdrawn to serve the city’s growing domestic, municipal, and industrial

⁸ The claim that the reasonable use doctrine itself was a taking of riparian rights was rejected in *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 700.01 (See *Cal. Trout v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 623.)

demands, but the diversions were having dramatic, deleterious effects on the lake, decreasing its surface level and increasing its salinity, endangering the organisms that inhabit the lake and the birds (particularly gulls) that depend on those organisms as a primary food source. As support for the injunction, the plaintiffs argued the city's diversions were violating the public trust by diverting most of the flow into the lake.

The trial court entered summary judgment against petitioners, concluding that the public trust doctrine offered no independent basis for challenging the city's diversions. On petition for review, the California Supreme Court granted a writ commanding the trial court to vacate its judgment. The Supreme Court held that the State's navigable waters are subject to a public trust and that the State, as trustee, has an affirmative duty to protect public trust uses "whenever feasible." (*National Audubon*, *supra*, 33 Cal.3d at p.446.)

The public trust doctrine imposes a duty of continuing supervision over the taking and use of that water even after the State has approved an appropriation. Indeed, the State has the power to reconsider allocation decisions even if past allocation decisions were made after consideration of the public trust. (*National Audubon*, *supra*, 33 Cal.3d at pp.446-47.)

In *National Audubon*, because the Water Board had failed to consider the public trust before granting the city's permit, the Court ordered the State to reconsider

the allocation of the waters of the Mono Basin. (*Ibid.*) The Court acknowledged that the State has the power to grant appropriations despite foreseeable harm to the public trust. However, the Court ruled that 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 p.447.) The Court held that no one may acquire a “vested right to appropriate water in a manner harmful to the interests protected by the public trust.” (*Id.* at p.445; see also *Racanelli Decision*, *supra*, 182 Cal.App.3d at pp.106, 149-50.)

The First Appellate District Court of Appeal made a similar ruling in *People ex rel. State Water Resources Control Bd. v. Forni*,

[T]here is a well recognized distinction between a “taking” or “damaging” for public use and the *regulation* of the use and enjoyment of a property right for the public benefit. The former falls within the realm of eminent domain, the latter within the sphere of the police power. (*People ex ref. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 753.)

It follows that, despite possessing indicia of property rights, water rights are not inviolable. They are subject to regulation under the police power of the state. Parties acquiring rights in trust properties hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust. (*National Audubon*, *supra*, 33 Cal.3d at p.437;

see also *id.* at p.440.) Thus, a water right holder cannot acquire a protected right to use water in an unreasonable manner or in a manner that is harmful to the public trust.

While the Water Board is correct that Stanford Vina cannot acquire a protected right to use water in an unreasonable manner or in a manner that is harmful to the public trust, this does not necessarily resolve the question of whether Stanford Vina was entitled to a due process hearing. There is a “chicken and egg” problem because it is the Water Board’s actions, challenged in this case, which ostensibly established Stanford Vina’s use was unreasonable and contrary to the public trust.

In essence, the Water Board argues that Stanford Vina was not deprived of a constitutionally protected interest because the Water Board determined Stanford Vina did not have a constitutionally protectable interest. Stanford Vina objects that the Water Board’s assertion of “unreasonable use” does not necessarily make it so. The Water Board cannot make a determination of unreasonable use without first affording Stanford Vina a due process hearing. In other words, even if Stanford Vina has no constitutionally protected right in an unreasonable use of water, it may have a right to a due process hearing to determine whether its use is, in fact, unreasonable.

Courts have reached similar conclusions in the context of abating public nuisances. (See *Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711.) In *Leppo*, the court

held a city was liable for destroying a dilapidated building under its power to abate a public nuisance without first affording the owner due process to contest whether the building was, in fact, a nuisance. The court ruled:

Although it is elementary that an owner of property has no constitutional right to maintain it as a public nuisance, it is equally elementary that he has a clear constitutional right to have it determined by due process whether in fact and law it is a nuisance. (*id.* at p.717.)

Likewise, in *Alta-Dena Dairy*, the Court of Appeal ruled that a county director of public health unlawfully ordered a dairy to discontinue its production of contaminated milk without first affording the dairy a due process hearing to contest the factual basis for the order. (*Alta-Dena Dairy v. County of San Diego* (1969) 271 Cal.App.2d 66, 77.)

The Water Board argues that different rules apply when the government acts in a legislative capacity. For example, the legislature may, when necessary, define a nuisance *per se* and authorize seizure and destruction without previous notice to the owner and an opportunity for a hearing. (See *Thain v. Palo Alto* (1962) 207 Cal.App.2d 173, 189-190.) Similarly, the Legislature may establish general standards governing the reasonable use of water, (*Cal. Trout, supra*, 207 Cal.App.3d at p.624.) And case law further establishes that if the Legislature has the power to enact general standards

governing reasonable use, the Water Board does too. (*Light, supra*, 226 Cal.App.4th at p.1484.)

The court does not disagree, but this raises a different issue, which is whether the Water Board's actions were quasi-legislative or quasi-adjudicative. Unlike governmental decisions which are adjudicative in nature, procedural due process does not guarantee a right to a hearing when a person's property interests are curtailed by a legislative or quasi-legislative act. (See *California Gilinettters Assn. v. Department of Fish & Game* (1995) 39 Cal.App.4th 1145, 1160; see also *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1188; *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612-614; *California Optometric Assn. v. Lackner* (1976) 60 Cal.App.3d 500, 505-506.) There is no constitutional requirement for any hearing or notice of hearing in a quasi-legislative proceeding.

In this case, the Water Board contends it acted in a quasi-legislative manner by promulgating the emergency regulations. And because it acted in a quasi-legislative manner, it contends there was no constitutional requirement for a due process hearing.

Stanford Vina contends the emergency regulations, despite being labeled "quasi-legislative," were, in fact, quasi-adjudicatory because they applied general principles of law – involving questions of "reasonable use" and "public trust" – to a relatively small group of named water right holders, based on specific factual circumstances. Stanford Vina also argues that

California law *requires* an adjudicative hearing when a specific diversion or use of water is declared “unreasonable.”

In determining whether the challenged regulations are quasi-legislative or quasi-adjudicatory, the court agrees with Stanford Vina that the regulations and curtailment orders should be evaluated collectively, as part of a single consolidated proceeding. The regulations themselves determined that diversions would be curtailed to meet minimum flow requirements. (See, e.g., AR 8687-700, 7710-12, 8471-91, 8439-42.) The curtailment orders simply notified affected water right holders that the regulatory provisions were put into effect.

Stanford Vina objected to the emergency regulations and the curtailment orders and requested an evidentiary hearing to contest, among other things, whether the mandated minimum flows would prevent significant harm to fishery resources, the amount and timing of water necessary to prevent significant harm to fishery resources, and the relative weight of the potential harm to fishery resources when balanced against competing agricultural interests. In particular, Stanford Vina argued that only a very small number of fish may benefit from the regulations; that the fish could be adequately protected with much less than 50 cfs; that the minimum flow requirements were imposed too soon and for too long; that the mandatory flows may do more harm than good; and that the regulations will have a devastating impact on agricultural interests

that is grossly out of proportion to the regulation's environmental benefits.

The Water Board acknowledged Stanford Vina's request for an evidentiary hearing and conceded its own "preference for undertaking adjudicative water right proceedings to assign responsibility for meeting in-stream flows." (AR 8442.) However, citing "the need for prompt action," the Water Board concluded that "the vehicle of adopting emergency regulations to identify a minimum flow requirement . . . is an appropriate approach in these limited circumstances. . . ." (*Ibid.*)

Based on the evidence, the emergency regulations and the curtailment orders are properly treated as one consolidated action. Thus, the question is whether the Water Board violated constitutional due process principles by refusing to hold an evidentiary hearing prior to adopting the regulations that curtailed Stanford Vina's right to divert water from Deer Creek.

The answer to this question turns on whether the emergency regulations and curtailment orders – collectively defined by Stanford Vina as the "Curtailment Regulations" – are a quasi-adjudicative or quasi-legislative act.

The classification of administrative action as quasi-legislative or quasi-adjudicative contemplates the "function performed." (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 275.) Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a

specific set of existing facts. (*Ibid*; see also *Strumsky v. San Diego County Employees Ret. Assn* (1974) 11 Cal.3d 28, 34, fn. 2.)

Legislative decisions involve the adoption of broad, generally applicable rules of conduct based upon considerations of public policy, while adjudicatory decisions determine the rights of an individual under existing laws, based upon specific facts peculiar to the individual case. (See *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 613; *Joint Council of Interns & Residents v. Bd. of Supervisors* (1989) 210 Cal.App.3d 1202, 1209; *McKlnny v. Board of Trustees* (1982) 31 Cal.3d 79, 98-99.) One determines what the law is, and what the rights of the parties are, with reference to transactions already had, and the other prescribes what the law shall be in future cases arising under it. (*East Bay Municipal Utility Dist. v. Department of Public Works* (1934) 1 Cal.2d 476, 479-480.)

In sum, a decision is considered quasi-legislative if it involves the formulation of a broad, generally-applicable rule to be applied in the future. A decision is considered quasiadjudicatory if It involves the application of an existing rule to specific facts peculiar to an individual case.

The Water Board's regulations could be construed as involving both quasi-legislative and quasiadjudicatory functions. On one hand, the regulations could be characterized as quasiadjudicatory because they applied general *principles* of "reasonable use" and "public trust" to specific waterways, and established specific

minimum flow requirements for a relatively small number of water right holders.⁹ On the other hand, the regulations are quasi-legislative because they involved the formulation of a fundamental rule, based on considerations of public policy, to be applied in the future to all water right holders on the affected creeks.

On balance, the court is persuaded that adoption of the regulations was a quasi-legislative act. The regulations involve the formulation of a fundamental rule or policy governing use of water in the creeks during unique and extreme drought conditions. The Water Board adopted a rule that mandates sufficient minimum flows remain in the streams to ensure passage of threatened and endangered salmonid species during critical migration periods, and thereby (hopefully) preserve the survival of the species. The enactment of the regulations was a quasi-legislative act because it involved the adoption of a general, policy-based rule, to be applied in the future to all landowners within the area.

In reaching this conclusion, the court draws guidance from *Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1488. In *Light*, as here, the Water Board adopted a regulation to protect young salmon from low water levels caused by diversions of water for frost protection of crops in the Russian River

⁹ In its Opposition Brief, the Water Board concedes that Issuance of the curtailment orders may involve quasi-adjudicative decision-making. (Opposition, p.22; see also *El Dorado Irrig. Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 960.)

stream system. The problem addressed by the regulation was the sudden and abrupt drop in stream levels that occurs when a large number of users (primarily vineyards) simultaneously activate sprinklers to prevent crop frost damage. While using water to prevent crop frost damage is a beneficial use, and individually harmless, the Board concluded that when a large number of users draw water at the same time it has the potential to inflict long-lasting damage on the fragile salmon population.

To address this problem, the Board adopted a quasi-legislative regulation declaring any frost protection diversion unreasonable unless it conforms to a locally-developed water demand management program (WDMP), which must be approved by the Board. In effect, the regulation requires water right holders to curtail diversions of water from the stream system for frost protection under circumstances when water is scarce.

Plaintiff water users filed an action seeking to invalidate the regulation, arguing that the Board lacked authority to enact broad rules governing the reasonable (unreasonable) use of water. The First Appellate District upheld the validity of the regulation. In so doing, it rejected the argument that the Board lacks power to adopt general rules governing the reasonable use of water to protect the public trust. (*Light, supra*, 226 Cal.App.4th at pp.1479-85.)

The emergency regulations at issue here are similar to the regulation at issue in *Light* in that they seek to

protect public trust fishery resources from low water levels caused by (otherwise reasonable and beneficial) diversions of water. The primary difference between *Light* and this case is that the regulation in *Light* did not directly regulate (curtail) any diversions of water, delegating this task to the governing bodies of the WDMPs. Here, the Board's emergency regulations expressly require water right holders to reduce their curtailments to meet the minimum flow requirements. Nevertheless, the effect of the regulations is the same: to require water right holders to curtail diversions to meet minimum flow requirements deemed necessary to protect public trust fishery resources.

If the regulation at issue in *Light* did not require a quasi-adjudicative hearing, the court sees no reason why the emergency regulations at issue here should require one. Thus, treating the emergency regulations and curtailment orders as a single, consolidated proceeding does not alter the court's conclusion that the Board's actions were quasi-legislative, and therefore not subject to procedural due process requirements.

The court also draws support from land use cases. In *McKinny v. Board of Trustees*, the court held that development of a school district desegregation plan is a quasi-legislative function because it affects the community within the District's boundaries in a generalized manner. (*McKinny v. Board of Trustees* (1982) 31 Cal.3d 79, 98.) In *Santa Ma Tustin Community Hospital v. Board of Supervisors*, the court held that the county board of supervisors was engaged in a quasi-legislative function when it designated, as part of its

paramedic program, five acute care hospitals as “trauma centers.” (*Santa Ana Tustin Community Hospital v. Board of Supervisors* (1982) 127 Cal.App.3d 644, 646.) Similarly, courts have concluded that a decision on a zoning/rezoning application is a legislative act because it involves the adoption of a rule to be applied to all landowners within the area. (See *Toso v. City of Santa Barbara* (1980) 101 Cal.App.3d 934, 942; *Ensign Bickford Realty Corp. v. City Council* (1977) 68 Cal.App.3d 467, 473.)

The regulations do not cease to be quasi-Legislative because a relatively small number of landowners are affected by them. It is the nature of the agency’s action which controls, not the number of individuals affected by it. (See *Karlson v. Camarillo* (1980) 100 Cal.App.3d 789, 799.) Case law is rife with examples of quasi-legislative actions that are relatively narrow in application and effect. For example, courts hold that a public entity’s award of a contract, and all of the acts leading up to the award, are legislative in character, because the letting of contracts necessarily requires an exercise of discretion guided by considerations of the public welfare. (*Mike Moore’s 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303; *Marshall v. Pasadena Unified School Dist.* (2004) 119 Cal.App.4th 1241, 1253; *Joint Council of Interns & Residents v. Bd. of Supervisors* (1989) 210 Cal.App.3d 1202, 1205.)

An act also does not cease to be legislative merely because public officials are required to exercise some discretion. In *East Bay Municipal Utility Dist. v.*

Department of Public Works, the court held that issuing a conditional permit to use water is a quasi-legislative act. (*East Bay Municipal Utility Dist. v. Department of Public Works* (1934) 1 Cal.2d. 476, 479-81.) In so ruling, the court rejected the argument that the Department was exercising a judicial function because it exercised Judgment and discretion in the performance of its duties. (*id* at. p.479.)

The Second District Court of Appeal reached a similar conclusion in *Joint Council of Interns & Residents v. Board of Supervisors*, which held that awarding a contract to hire county physicians was a quasi-legislative act. The Court ruled that an act does not cease to be legislative merely because public officials are required to “exercise their judgment,” noting that the judgment exercised by the members of the city council was not a “determination of the rights of an individual under existing laws,” but a conclusion or opinion formed in the exercise of the discretionary power . . . upon a consideration of the public welfare. . . .” (*Joint Council of Interns & Residents, supra*, 210 Cal.App.3d at p.1211.)

Like a zoning decision or school desegregation plan, the Water Board’s action in adopting the emergency regulations is a policy-based decision that adopts a rule to be applied to all diverters within the affected community. The emergency regulations establish emergency minimum flows necessary to maintain fish passage in the streams during critical migration periods, and establish that any diversion that would reduce the flow of the streams below the minimum flows is contrary to the “public trust” and, therefore,

“unreasonable?” The regulations do not cease to be quasi-legislative because only a limited number of streams and diverters are impacted by them, nor do they cease to be quasi-legislative because the Board exercised some judgment in determining the minimum flows necessary to ensure successful fish migration. Because the Water Board acted in a quasi-legislative manner, there was no constitutional requirement for a due process hearing.¹⁰

The court finds no merit in Stanford Vina’s argument that a reasonable use determination always requires an adjudicative hearing. While reasonable use is “ordinarily a question of fact,” case law establishes that the Legislature has the authority to enact general legislative standards governing the reasonable use of water, in the same way that the Legislature may, by statute, define a standard of care for negligence actions. (*Cal. Trout, supra*, 207 Cal.App.3d at p.624.) The Water

¹⁰ Even if procedural due process requirements applied, the court is not persuaded that Stanford Vina would be entitled to a full evidentiary hearing. Due process is flexible and calls for such procedural protections as the particular situation demands, depending on the relative weights of the competing government and private interests. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 334-35, 348-49.) The requirement of prior notice and hearing is subject to exceptions where summary action is necessary in the public interest. (See *Pollack v. Department of Motor Vehicles* (1985) 38 Cal.3d 367, 380; *Goldberg v. Kelly* (1970) 397 US. 254, 263; see also *Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711, 718; *Bergeron v. Department of Health Services* (1999) 71 Cal.App.4th 17, 27; *Leslie’s Pool Mart v. Department of Food & Agriculture* (1990) 223 Cal.App.3d 1524, 1531-32.)

Board has similar regulatory authority. (*Light, supra*, 226 Cal.App.4th at p.1484.)

The court also rejects Stanford Vina's argument that it did not receive due process because it did not get sufficient advance notice of the proposed regulations. The Water Board's notices – 5 business days for the 2014 regulations and 7 business days for the 2015 regulations – satisfied the timing requirements of Government Code section 11346.1(a)(2).¹¹

The Reasonableness of Stanford Vina's Water Uses

Stanford Vina alleges that the Water Board unlawfully declared Stanford Vina's diversions and uses of Deer Creek water to be "unreasonable." Stanford Vina argues that this was an abuse of discretion because (1) the reasonable use doctrine does not authorize the Board to consider public trust values, (2) agricultural irrigation is a reasonable beneficial use, and the reasonable use doctrine does not permit the Water Board to favor one beneficial use over another for policy reasons, and (3) the Board declared Stanford Vina's diversions and uses to be unreasonable in order to take its water without compensation.

The Water Board defends use of the reasonable use doctrine to protect public trust uses. It argues that the reasonableness of a use depends on the totality of the

¹¹ Although the parties did not raise the Issue, the court questions whether 23 C.C.R. § 767 applied, which would have required seven days' notice.

circumstances, including the competing beneficial uses of the water and the State's interest in protecting the water's function as natural habitat for fish and wildlife resources. (See Cal. Wat. Code § 1243.) The court agrees. (See *Center for Biological Diversity, supra*, 166 Cal.App.4th at p.1369; see also *National Audubon, supra*, 33 Cal.3d at p.443 (all uses of water, including public trust uses, must conform to the standard of reasonableness); *in re Water of Hallett Creek Stream Sys.* (1988) 44 Cal.3d 448, 472, fn.16.)

It matters not whether agricultural irrigation *ordinarily* is a reasonable and beneficial use. As the court noted in *Light*:

What 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 p.1479, quoting *Tulare Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 567.)

Under the unique circumstances present in this case – persistent and extreme drought conditions threatening to dewater high priority streams during critical migration periods for threatened and endangered fish species, and a lack of feasible alternatives to increase in-stream flows by other means – the Water Board rationally determined that allowing diversions to reduce flows below the minimum, “belly-scraping” amounts

necessary for fish migration and survivability would be “unreasonable.”¹²

Stanford Vina argues that the Water Board cannot declare a beneficial use of water to be unreasonable to protect a public trust interest to which it ascribes a higher priority. The court does not agree. The Board has been granted broad authority to control water use and exercise regulatory functions in the field of water resources. (*Light, supra*, 226 Cal.App.4th at pp.1481-82.) Among its other functions, the Board is empowered and directed to “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.” (*Ibid*; see also Cal. Wat. Code § 275.) This authority includes protection of the environment by means of the public trust. (*Light, supra*, 226 Cal.App.4th at p.1485.)

The public trust is “more than an affirmation of state power to use public property for public purposes.” (See *National Audubon, supra*, 33 Cal.3d at p.441.) It is an affirmative *duty* to preserve and protect the public’s interest in common natural resources. (*Center for*

¹² A distinction can and should be made between the minimum base flows necessary for passage and the pulse flows Implemented to aid migration and provide the “necessary cues” for fish to move. While the court does not find the mandated pulse flows to be “arbitrary or capricious,” this is because Stanford Vina failed to adequately brief or argue this point. Had Stanford Vina done so, the court well may have reached a different conclusion, as it is unclear whether pulse flows are “necessary” or merely “helpful” to fish migration.

Biological Diversity, supra, 166 Cal.App.4th at p.1363; see also Cal. Fish & G. Code §§ 711.7, 1600.) The Water Board unquestionably possesses legal authority to exercise its police powers to protect fish as public trust resources. (See, e.g., *Cal. Trout, supra*, 207 Cal.App.3d 585; see also *Racanelli Decision, supra*, 182 Cal.App.3d 82.)

Because the emergency regulations are quasi-legislative acts, the court's review of the emergency regulations is limited. In reviewing the legality of a quasi-legislative regulation, the judicial function is limited to determining whether the regulations are (1) "within the scope of the authority conferred" and (2) "reasonably necessary to effectuate the purpose of the statute." Both of these issues come to the court freighted with a strong presumption of regularity. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11.)

When a regulation is challenged on the ground that it is not reasonably necessary to effectuate the purpose of the statute, the court's review is confined to whether the rule is arbitrary, capricious, or without rational basis, and whether substantial evidence supports the agency's determination that the rule is reasonably necessary. (*Light, supra*, 226 Cal.App.4th at p.1495.) In determining whether an agency's decision is supported by substantial evidence, the court resolves all conflicts in favor of the agency, indulging all legitimate and reasonable inferences from the record. When two or more inferences can be reasonably deduced from the facts,

the reviewing court has no power to substitute its deductions for those of the agency. (*Ibid.*)

In light of the extreme pressures on threatened and endangered salmonids during the drought, and the lack of alternative water supplies, the Water Board reasonably determined that diverting flows below the minimum amount needed for migration of salmonids would be “unreasonable.” This was not arbitrary or capricious, and so it was not unlawful.

Stanford Vina’s argument that the Board declared its diversions and uses to be unreasonable in order to take its water without compensation fails for lack of proof. The court will not ascribe a nefarious intent to the Board’s actions based merely on evidence that other agencies previously had endeavored to negotiate agreements for minimum in-stream flows.

Application of the Public Trust Doctrine to Mexican Land Grant Lands

Stanford Vina argues that the Water Board abused its discretion by applying the public trust doctrine to Stanford Vina and Deer Creek water rights. Relying on *Summa Corp. v. California State Lands Commission* (1984) 466 U.S. 198, Stanford Vina argues that the public trust doctrine does not apply to former Mexican Land Grant lands and waters annexed under the Treaty of Guadalupe Hidalgo, unless the State of California expressly reserved public trust interests at the federal patent proceeding. Stanford Vina argues that Deer Creek and the Stanford Vina lands are former

Mexican Land Grant lands, confirmed by patent in 1862, and that there is no evidence that the State expressly reserved public trust interests at the patent proceeding. Accordingly, Stanford Vina contends the public trust doctrine does not apply to Stanford Vina and Deer Creek water rights.

And even if the public trust doctrine applies, Stanford Vina contends the Water Board failed to conduct the required balancing, or pay the required compensation, when it “re-appropriated” Stanford Vina’s water for in-stream public trust purposes.

The Water Board contends that Stanford Vina has failed to show the public trust doctrine does not apply to Stanford Vina and Deer Creek water rights. The court agrees. First, the evidence offered by Stanford Vina fails to establish an unbroken chain of title leading back to a Mexican Land Grant. It also fails to establish the State did not reserve a public trust interest at the patent proceeding. (As a general matter, the documents submitted to the court are largely unreadable. Beyond that problem, Stanford Vina has failed to “connect the dots” between its arguments and the documents presented.)

Second, even if Stanford Vina could establish an unbroken chain of title, Stanford Vina’s reliance on *Summa* is misplaced. *Summa* concerns a particular application of the public trust doctrine, in the context of tidal lands.

In *Summa*, the city of Los Angeles brought suit against the fee owner of the Ballona Lagoon, a narrow body of

water connected to Marina del Rey, a manmade harbor, claiming that the lots underlying a lagoon were tidelands subject to a public trust easement. The city wanted to dredge the lagoon and construct improvements in the lagoon without exercising its power of eminent domain. At issue in the case was whether the city could assert a public trust easement in land which was part of a Mexican land grant, patented by the United States government pursuant to the Land Act of 1851.

The trial court ruled in favor of the city, finding that the lagoon was subject to a public trust easement. The Supreme Court of California affirmed the ruling of the trial court, but the United States Supreme Court reversed. The United States Supreme Court held that the public trust easement only exists over lands to which California acquired title by virtue of its sovereignty upon admission to the Union. Under the Land Act of 1851, California did not acquire title to lands which were the subject of a prior Mexican land grant, unless the State expressly reserved public trust interests at the federal patent proceedings. Having failed to do so, California could not assert a public trust easement over the property. (*Summa Corp.*, *supra*, 466 U.S. 198, 209; see also *City of LA. v. Venice Peninsula Properties* (1988) 205 Cal.App.3d 1522, 1526 [on remand].)

Stanford Vina relies on *Summa* for the proposition that the public trust does not apply to waters overlying Mexican Land Grant lands unless the State expressly reserved such interests at the patent proceedings. However, what *Summa* actually held is that the State acquires no public trust easement in *lands* to which

title was confirmed under the Land Act of 1851, unless such interest was asserted in the patent proceedings. (*Summa Corp.*, *supra*, 466 U.S. at p.209; *City of L.A. v. Venice Peninsula Properties* (1988) 205 Cal.App.3d 1522, 1529.)

Underlying Stanford Vina's argument is its mistaken assumption that the public trust doctrine is limited to tidal and navigable bodies of water. The doctrine is not so limited. (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1360.) In *National Audubon*, the California Supreme Court held that the public trust applies to certain natural resources that are not "owned" by the State of California in the same sense as tidelands and the beds of navigable waterways. (*National Audubon*, *supra*, 33 Cal.3d 435-37; see also *People v. Sweetser* (1977) 72 Cal.App.3d 278, 283.)

Whatever its historical derivation, it has long been recognized that the public trust doctrine extends beyond the right to use tidal and submerged lands and inland navigable waterways for traditional public trust uses (navigation, commerce, fishing). In *People v. Truckee Lumber Co.*, the court found that a public trust fishery interest sufficient to enjoin a lumber company from polluting the Truckee River, even though the river was not navigable. In rejecting the argument that the public trust applies only to navigable waters, the California Supreme Court ruled:

The dominion of the state for the purposes of protecting its sovereign rights In the fish

within its waters, and their preservation for the common enjoyment of its citizens, is not confined . . . [to] navigable or otherwise public waters. It extends to all waters within the state, public or private, wherein these animals are habited or accustomed to resort for spawning or other purposes, and through which they have freedom of passage to and from the public fishing grounds of the state. To the extent that waters are the common passageway for fish, although flowing over lands entirely subject to private ownership, they are deemed for such purposes public waters, and subject to all laws of the state regulating the right of fishery. (*People v. Truckee Lumber Co.* (1897) 116 Cal. 397, 400-401.)

This language in *People v. Truckee Lumber* is cited with approval in *California Trout*, *Golden Feather*, and *Center for Biological Diversity*. (*Cal. Trout*, *supra*, 207 Cal.App.3d at pp.629-30; *Golden Feather*, *supra*, 209 Cal.App.3d at p.1286; *Center for Biological Diversity*, *supra*, 166 Cal.App.4th at p.1363.)

In *Center for Biological Diversity*, the Court of Appeal explicitly recognized that the public trust doctrine “is not just a set of rules about tidelands.” (*Id.* at p.1360.) Fish and wildlife resources also are protected by the public trust. (*Id.* at pp.1361, 1363; see also *Betchart v. Department of Fish & Game* (1984) 158 Cal.App.3d 1104, 1106.) And the State’s responsibility to preserve and protect the public’s interest in fish and wildlife resources is not confined to tidelands and navigable waters. It extends to all state waters, public or private.

(*Truckee Lumber Co.*, *supra*, 116 Cal. at pp.400-01; see also *Cal. Trout*, *supra*, 207 Cal.App.3d at p.630.)

In *California Trout*, the Third Appellate District Court of Appeal recognized that “[t]he consequences of characterizing an interest of the state as a trust interest are not uniform.” (*Ibid.*) The fact that there is a public fishery interest in a non-navigable stream does not mean that all of the public trust consequences applicable to navigable waters also apply to the non-navigable stream. (*Ibid.*)

The Court used similar language in *Golden Feather*, stating:

In the final analysis the public trust doctrine cannot be divorced from the particular circumstances involved. In short, the circumstances which will warrant application of the term “public trust” and the consequences of characterizing an interest of the state as a trust interest are not uniform. Where it is necessary to protect public trust interests the state may have power over properties which are not themselves within the public trust, but this does not mean that such properties are deemed to be added to the public trust, nor that all incidents of the public trust are applicable to such properties. In all cases, the application of the public trust doctrine depends upon the interest for which protection is sought and the manner in which that interest is to be protected. (*Golden Feather*, *supra*, 209 Cal.App.3d at pp.1285-1286 [citations omitted].)

Thus, case law establishes that a variety of public trust interests extend beyond the navigable waters and the lands lying beneath them. (*Center for Biological Diversity, supra*, 166 Cal.App.4th at pp.1361, 1363.) Where public trust interests are involved, the state has broad powers to protect those interests, even if the affected properties are not themselves within the public trust. (*Golden Feather, supra*, 209 Cal.App.3d at p.1286.)

Summa represents an exception to the traditional application of the public trust to tidal and submerged lands. It is based on the notion that any public interest claimed in the tidelands was forfeited by the State's failure to assert it during the federal patent proceedings.

In this case, both the public trust interest sought to be protected, and the manner in which it is to be protected, are different than *Summa*. The Water Board did not seek to assert a public right to swim, bathe, fish, hunt, or travel on Deer Creek. Nor did the Water Board assert a navigational, commercial, or recreational easement, or any other interest, in the submerged bed of the creek. Rather, the Water Board has asserted a public trust interest in the fish within the creek and, as necessary, the waters within which the fish live and migrate for reproduction.

Given the nature of the public trust interest at stake, it makes no difference whether the State reserved a public trust easement in the Stanford Vina lands. Failure to do so may prevent the State from asserting certain public trust interests relating to title of the

submerged lands covered by the Mexican Land Grants, but it does not prevent the State from asserting public trust interests in the fish within the creek. The Supreme Court's decision in *Summa Corp.* simply does not apply here.

The court also rejects, for lack of evidence, Stanford Vina's claim that the Water Board failed to take into account the competing beneficial uses served by Deer Creek water. The Board simply concluded that the needs of the fish prevail over the competing other uses. Although the Board also could have reached a contrary conclusion, the court does not find that the Board's decision was an abuse of discretion.

Stanford Vina's claim that the State nevertheless is required to pay "just compensation" for curtailing Stanford Vina's water use is a reiteration of its "takings" claim, which, as discussed above, is not before the court at this time.

Violation of the Water Rights Priority System

Stanford Vina argues that the emergency regulations are unlawful because they violate the water rights priority system by elevating public trust uses of water to a super-senior priority, ahead of all competing beneficial uses. Stanford Vina contends that the Water Board does not have authority to restructure California water law to grant public trust interests a super-senior priority.

Stanford Vina argues that the Board further violated the water rights priority system by curtailing all diversions necessary to ensure the minimum in-stream flows would be met, without accounting for the relative priorities of the water rights holders. Stanford Vina argues that, to the extent curtailment of water diversions was necessary to meet minimum in-stream flows, the Water Board was required to curtail water rights in the order of their respective priorities. Neither claim has merit under California's rule of priority.

California operates under a "dual" or hybrid system of water rights, which recognizes both riparian and appropriation rights.¹³ The riparian right confers upon the owner of land the right to divert water flowing by his land for reasonable and beneficial use upon his land. Riparians have no rights to a specific amount of water. Rather, they enjoy, as an incident of common ownership with other riparians, a correlative share of the natural flow. (*Racanelli Decision, supra*, 182 Cal.App.3d at pp.101, 104.) In times of shortage, all riparians must reduce their usage proportionately. (*id.* at p.101.)

An appropriative water right is founded on and measured by the amount of water that is used for a reasonable and beneficial purpose. It applies to any diversion of water for other than riparian or overlying uses.

¹³ In addition to riparian and appropriative rights, the State recognizes "pueblo" rights of communities which succeeded to public water rights granted to pueblos (communities or towns) by the Spanish and Mexican governments. (*Olmstead v. Son Diego* (1932) 124 CalApp. 14, 16.)

(*National Audubon*, *supra*, 33 Cal.3d at p.441,) Unlike riparians, appropriators need not own land contiguous to the watercourse and may divert water for use on noncontiguous lands. (*Racanelli Decision*, *supra*, 182 Cal.App.3d at pp.101-02; *Siskiyou County Farm Bureau v. Department of Fish & Wildlife* (2015) 237 Cal.App.4th 411, 423.)

Initially, appropriation rights were acquired by the actual diversion and use (i.e., appropriation) of the water. (*id.* at pp.752-53; *Racanelli Decision*, *supra*, 182 Cal.App.3d at p.102.) Later, they were acquired by the posting and recordation of notice. (*Murrison*, *supra*, 101 Cal.App.4th at p.359.) Beginning in 1914, by statute, the California Legislature established a permit system, which has become the exclusive means of acquiring appropriative rights. (*Racanelli Decision*, *supra*, 182 Cal.App.3d at p.102.)

Under the permit scheme, a prospective appropriator must apply to the Water Board for a permit authorizing the diversion and use of a specified quantity of water. If an appropriative water right permit is issued, the permit holder has the right to take and use the water according to the terms of the permit.¹⁴ (*ibid.*)

Appropriative rights acquired prior to 1914 were “grandfathered” into the statutory scheme, without

¹⁴ After the water has been put to beneficial use, the permittee may apply for a license confirming the right. If the license holder violates any terms or conditions of the license, or fails to apply the water to a beneficial purpose, the Board may revoke the license.

any requirement to apply for a permit. These rights are commonly referred to as “pre-1914 rights.” (*Murrison, supra*, 101 Cal.App.4th at p.359 fn.6.) The Water Board has no permitting or licensing authority over pre-1914 rights, but it does have the authority to prevent illegal diversions and to prevent waste or unreasonable use of water by holders of pre-1914 water rights. (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 429.)

In general, the appropriation doctrine is premised on the rule of “first In time, first in right.” Under the prior appropriation doctrine, a person who diverts or appropriates water from a watercourse and puts it to a reasonable and beneficial use acquires a right to that use which is superior to the rights of later appropriators. The senior appropriator is entitled to fulfill its needs before a junior appropriator is entitled to use any water. (*Racanelli Decision, supra*, 182 Cal.App.3d at pp.101-02.)

However, appropriation rights are subordinate to riparian rights. Thus, in times of shortage, riparians are entitled to fulfill their needs before appropriators are entitled to any water use. (*ibid.*) And because a riparian right extends to future reasonable beneficial uses of water, an expanded riparian use has the potential to preempt an inferior appropriative right where the supply of water originally was sufficient to satisfy both uses. (See *Pleasant Valley Canal Co. v. Borrer* (1998) 61 Cal.App.4th 742, 777; *cf. In re Waters of Long Volley Creek Stream Sys.* (1979) 25 Cal.3d 339, 359.)

Thus, under California’s “rule of priority,” the rights of riparian users are paramount. Riparians *are* entitled to satisfy their reasonable needs first, before appropriators can divert any water. As between appropriators, the rule of priority is “first in time, first in right.’ Subject to the terms and conditions of any permit/license, senior appropriators are entitled to satisfy their reasonable needs, up to their full appropriation, before more junior appropriators are entitled to any water. (*Light, supra*, 226 Cal.App.4th at p.1478.)

Water right priority has long been a “central principle” in California water law. (*El Dorado frit. Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 961.) In general, “[e]very effort . . . must be made to respect and enforce the rule of priority.” (*Id.* at p.966.) However, case law establishes that the rule of priority is not absolute; a competing principle or interest may justify the Water Board taking action inconsistent with a strict application of the rule of priority. (*Id.* at p.955.)

The reasonable use doctrine and public trust doctrine are two examples of principles that may compete against the rule of priority. In *El Dorado Irrigation District*, the Third Appellate District Court of Appeal ruled that when the rule of priority clashes with the rule against unreasonable use of water or the public trust, the rule of priority must yield. (*Id.* at p.966.)

Nevertheless, before the Board subverts the rule of priority, the Board first must make “every effort” to enforce the rule of priority “if possible.” (*Id.* at pp.966-67,

970-71.) In other words, In such circumstances the subversion of a water right priority is justified only if enforcing that priority will in fact lead to the unreasonable use of water or result in harm to values protected by the public trust.” (*Id.* at p.967.)

In *El Dorado*, the Court considered whether the Water Board’s decision to include a term in a senior appropriator’s permit, requiring the appropriator to curtail its diversions to meet water quality objectives, violated the rule of priority because the Board did not impose the same term on junior appropriators. The Court held that subversion of the senior appropriator’s priority was not justified by the Board’s interest in protecting Delta water quality. While the Board has a legitimate interest in requiring the senior appropriator to “contribute” toward the improvement of water quality, this did not justify the Board including the term in the senior appropriator’s permit without including the same term in the licenses and permits of more junior appropriators. (*id.* at p.972.)

In *Light v. State Water Resources Control Bd.* (2014) 226 Cal.AppAth 1463, the plaintiffs argued that the Board violated the rule of priority by adopting a regulation that “redefined” an existing beneficial use (use of water to prevent frost damage to crops) as “unreasonable,” to protect another beneficial use to which the Board ascribed a higher priority (maintaining stream levels to avoid salmonid deaths). The First Appellate District Court of Appeal held that the Board’s regulation did not on Its face violate the rule of priority. The Court held that the Water Board has authority to

allocate water in a manner inconsistent with the rule of priority when doing so is necessary to prevent an unreasonable use of water or a use of water that is harmful to the public trust's¹⁵ (*Light, supra*, 226 Cal.App.4th at pp.1489-90.)

The same court reached a similar conclusion in the *Racanelli Decision* (*United States v. State Water Resources Control Board*). In that case, the plaintiffs sought to invalidate a water quality plan establishing new water quality standards for the protection of fish and wildlife, and an accompanying water rights decision modifying permits to compel operators to meet the new standards. The Court upheld the Board's actions, concluding that the Board has the power to modify permits to protect the public interest and give a higher priority to "a more preferred beneficial use even though later in time." (*Racanelli Decision, supra*, 182 Cal.App.3d at p.132 [citing *East Bay M. U. Dist. v. Dept. of P. Wks.* (1934) 1 Cal.2d 476].)

¹⁵ In reaching its holding, the Court noted that the regulation did not declare any specific diversion of water unreasonable; the regulation delegated to "water demand management programs" ("WDMPs") the task of managing and reducing frost protection diversions to prevent salmonid strandings. Although the regulation requires WDMPs to respect the rule of priority, the court acknowledged the possibility that Implementation of the regulation may result in priority rule violations. However, the Court found such concerns "premature" until "specific regulatory measures" are put into effect by the WDMPs. (*Light, supra*, 226 Cal.App.4th at p.1490.)

Established case law makes clear that the Board has the authority to deviate from the rule of priority to protect public trust interests. Implementation of the minimum in-stream flows in this case may require deviation from the rule of priority. Upstream diverters – which, in this case, hold senior water rights – must curtail their diversions to allow sufficient water to pass to meet the minimum in-stream flows. Downstream diverters – holding more junior water rights – may be allowed to divert water. However, this is necessary to meet the minimum in-stream flows which the Board imposed to protect the public trust. Thus, the emergency regulations are not unlawful because they “elevate” the public trust above Stanford Vina’s competing agricultural irrigation uses.

Under the emergency regulations, the Water Board purportedly would curtail diverters in the order of priority, as necessary to meet minimum flow requirements. It is certainly possible that, in implementing the emergency regulations through curtailment orders, the Board could violate the rule of priority by failing to curtail water rights in the order of their respective priorities, where it is possible to do so. However, the court is unable to reach any conclusions on this issue based on the record presently before the court.

Violation of the Judicial Water Rights Decree

Stanford Vina argues that the Tehama County Superior Court Judgment adjudicated all of the water rights

on Deer Creek and that the emergency regulations unlawfully ignored and contradicted the court's Judgment. Citing Water Code section 2773, Stanford Vina argues that the Tehama County court's decree is conclusive as to the rights of all existing claimants upon the stream system, and cannot be changed except by another court order.

The Water Board argues, persuasively, that while the court's judgment settled questions of apportionment among the parties to the litigation, it does not bind or preclude the Board from exercising jurisdiction to prevent illegal diversions, unreasonable use of water, or harm to the public trust. (See *California Farm Bureau, supra*, 51 Cal.4th at p.429; *National Audubon, supra*, 33 Cal.3d at p.447; see also *In re Waters of Long Valley Creek Stream Sys.* (1979) 25 Cal.3d 339, 359-360.)

Further, as the Water Board points out, the 1923 consent decree predated the adoption of Article X, section 2, establishing the "reasonable use" doctrine, which is applicable to all water rights. Under that constitutional provision, no one can obtain a vested right to an unreasonable use of water.

Unlawful Exercise of "Emergency" Powers under Water Code Section 1058.5

Stanford Vina argues that the emergency regulations were not lawful exercises of emergency authority because the conditions in Deer Creek did not constitute a "true emergency." As support, Stanford Vina cites to

California's Administrative Procedures Act (APA),¹⁶ which prohibits a finding of emergency based only upon "expediency, convenience, best interest, general public need, or speculation." (Cal. Gov. Code § 11346.1.) The APA also provides that if the situation identified in a finding of emergency existed and was known by the agency in sufficient time to have been addressed through nonemergency regulations, the finding of emergency "shall include facts explaining the failure to address the situation through nonemergency regulations." (*Ibid.*) Stanford Vina argues that no such findings were made by the Water Board.

Stanford Vina also cites case law defining an emergency for purposes of the requirement to pay "Just compensation" for a taking of private property. Such cases define an emergency as an "unforeseen situation" of "grave character and serious moment," presenting an Imminent and substantial threat to public health or safety," and "calling for immediate action. (*Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal.App.4th 1670, 1681; see also *Odell Bros. v. County of Monterey* (1998) 63 Cal.App.4th 778, 789; *Rose v. City of Coalinga* (1987) 190 Cal.App.3d 1627, 1634.)

In addition, Stanford Vina points to the Legislature's definition of emergency for purposes of the Emergency

¹⁶ The Administrative Procedures Act provides that a regulation may be declared invalid for a substantial failure to comply with the procedural requirements of the act, including, in the case of an emergency regulation, that the facts recited in a finding of emergency do not constitute an emergency within the provisions of Section 11346.1. (Cal. Gov. Code § 11350.)

Services Act: “Emergency’ means a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.” (Cal. Gov. Code § 11342.545.)

Stanford Vina contends that the Water Board cannot reasonably argue that there was a true “emergency” since drought is a regular occurrence in California, the dry conditions in Deer Creek were foreseeable, there was no imminent and substantial threat to public health or safety, and there was sufficient time to address the conditions in Deer Creek through nonemergency regulations, especially for the 2015 regulations. Stanford Vina also argues that the Board’s actions were a pretext for implementing a long-term plan to increase in-stream flows.

The court finds no unlawful exercise of emergency powers. Although Stanford Vina focuses on the emergency authority of the APA, the water board acted under the emergency authority of California Water Code section 1058.5. That section authorizes the board to adopt emergency regulation to, among other things, prevent “waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion.” (Cal. Wat. Code § 1058(a)(1).) Under Section 1058.5, an emergency regulation may be adopted in response to conditions which exist, or are threatened to exist, in a “critically dry year immediately preceded by two or more consecutive below normal, dry, or critically dry years,” or “during a period for which the Governor has issued a proclamation of a state of emergency under

the California Emergency Services Act . . . based on drought conditions.” (Cal. Wat. Code § 1058.5(A)(2).)

Here, because California was in the third year of a severe drought, the Governor issued a proclamation of the state of emergency under the California Emergency Services Act based on drought conditions. The Board properly relied on the Governor’s proclamation as authority to enact the emergency regulations to prevent the “waste and unreasonable use of water” in priority water bodies for threatened and endangered anadromous fish species.

While Stanford Vina may not agree that the conditions in the state rose to the level of an “emergency” under the California Emergency Services Act, it was the Governor, not the Water Board, who declared an “emergency” under the Act. Stanford Vina did not challenge the Governor’s proclamation, and the Board had no independent duty to determine whether it was correct.

In any event, the evidence in the record is sufficient to establish that, when the emergency regulations were enacted, California was in the midst of its third consecutive dry year, which, by itself, authorizes the Board to act.

When the Board proceeds under Section 1058.5, it is somewhat unclear whether the Board is required to make the findings of emergency typically required by

section 11346.1 of the APA.¹⁷ Section 1058.5 is clear that any findings of emergency adopted by the Board are not subject to review by the Office of Administrative Law. (Cal. Wat. Code § 1058.5(b).)

In this case, whether required by the APA or not, the Board made a specific Finding of Emergency for the regulations. (See AR 7729-55, 8471-81, 10535-46.) The Board's findings documented the extreme drought conditions and the need for an emergency regulation to maintain minimum stream flows for anadromous fish during critical migration periods. The Board's findings are supported by substantial evidence.¹⁸

Stanford Vina argues Water Code section 1058.5 only authorizes emergency regulations to prevent waste or unreasonable use, not for the purpose of protecting public trust fishery resources. Stanford Vina argues

¹⁷ While the court would tend to agree that a finding of emergency was required, it is not clear whether the APA's definition of 'emergence' applies.

¹⁸ The court acknowledges that the Board had sufficient time between the adoption of the 2014 and 2015 emergency regulations to address the problem through nonemergency regulations. However, it was not clear until early 2015 whether the drought would persist through 2015. The Fishery Agencies formally requested the 2015 regulations on February 2, 2015, and the emergency regulations were adopted one month later, in March. The court expresses no opinion on whether similar regulations would be justified under the Board's "emergency" authority, in light of the Board's acknowledgement, in 2014, that such measures are likely to be required in the future. If the Board knows that minimum instream flow requirements will be necessary during "drought conditions," it would seem prudent for the Board to adopt those requirements now, rather than wait for the "emergency" conditions.

that diversion and use of water for agricultural irrigation is not waste or an unreasonable use of water, even if public trust fishery resources would benefit from leaving the water in-stream. However, as described above, in light of the unique circumstances present here, it was not an abuse of discretion for the Water Board to conclude that diversions which would reduce flows below the minimum, “belly-scraping” amount needed for fish are “unreasonable.”

Unlawful Amendment of the Regulations on the Day of Adoption

Government Code section 11346.1(a)(2) states that an agency adopting an emergency regulation must give a notice of the specific language proposed to be adopted at least five working days before submitting the emergency regulation to the Office of Administrative Law. Stanford Vina argues that the Water Board violated this statute by amending the language of the proposed regulations on the day they were adopted, without giving the required the five days’ notice. The court is not persuaded.

As an initial matter, the court notes that the requirement to provide notice of changes to regulatory language ordinarily does not apply when the changes are either (1) nonsubstantial or grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. (Cal. Gov. Code § 11346.8.) Stanford Vina has

failed to show that the changes at issue here were “substantial” or not “sufficiently related” to trigger the re-notice requirements under Section 11346.8.¹⁹

In any event, Section 11346.1 of the APA, governing emergency regulations, provides that the adoption, amendment, or repeal of an emergency regulation is not subject to any provision of Article 5 or 6 of the APA except for Sections 11346.1, 11349.5, and 11349.6. (Cal. Gov. Code § 11346.1(a)(1).) Although Section 11346.1, subdivision (a)(2) requires an agency to provide at least five business days’ notice of the “specific language proposed to be adopted,” subdivision (0)(3) provides that an agency is not required to provide the notice required by paragraph (2) if the emergency situation poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest. Stanford Vina has failed to address this provision in any manner. For these reasons, the court rejects the claim that the Board unlawfully amended the regulations in violation of the APA.

¹⁹ Although Stanford Vina cites numerous pages of the record – AR 8340-48, 8394-97, 8402-15, 8417.19, 8457518, 8685-700, 8751-34, 10272-73, 10499-620 – Stanford Vina falls to articulate what the precise changes were and explain why they were “significant.” This by itself is grounds to deny the claim, as a reviewing court is not required to consider points not adequately argued or supported with citation to authority. The court has no duty to construct an argument on a petitioner’s behalf.

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Disposition

Stanford Vina's writ claims (and the related requests for declaratory relief) are DENIED. This ruling shall serve as the court's statement of decision with regard to such claims. Counsel for the State Water Board is directed to prepare a formal interlocutory judgment on the bifurcated claims; submit it to opposing counsel for approval as to form; and thereafter submit it to the court for signature and entry of judgment in accordance with Rule of Court 3.1312.

Dated: August 2, 2017 /s/ Timothy M. Frawley
Timothy M. Frawley
Superior Court Judge
County of Sacramento

[SEAL]

**[CERTIFICATE OF SERVICE
BY MAILING OMITTED]**

APPENDIX E

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**IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA**

IN AND FOR THE COUNTY OF SACRAMENTO

STANFORD VINA RANCH	)	CASE NO.
IRRIGATION COMPANY,	)	34-2014-80001957
Plaintiff-Petitioner,	)	[proposed]
v.	)	JUDGMENT
STATE OF CALIFORNIA,	)	Hearing Date:
STATE WATER	)	March 24, 2017
RESOURCES CONTROL	)	Time: 10:00 a.m.
BOARD, STATE WATER	)	Department: 29
RESOURCES CONTROL	)	Judge: Hon Timothy
BOARD MEMBERS	)	M. Frawley
FELICIA MARCUS,	)	(Filed Sep. 6, 2017)
)	

DOREEN D'ADAMO,)
FRANCES SPIVY-WEBER,)
STEVEN MOORE, AND)
TAM DODUC; and DOES 1)
THROUGH 20,)
Defendants-Respondents)

The Court does hereby enter Judgment in favor of Defendants-Respondents STATE OF CALIFORNIA, STATE WATER RESOURCES CONTROL BOARD, STATE WATER RESOURCES CONTROL BOARD MEMBERS FELICIA MARCUS, DOREEN D'ADAMO, FRANCES SPIVY-WEBER, STEVEN MOORE, AND TAM DODUC; and DOES 1 THROUGH 20, and against Plaintiff-Petitioner STANFORD VINA RANCH IRRIGATION COMPANY on all Causes of Action. This Judgment is entered on all Causes of Action despite the Bifurcation of proceedings, because the Court's findings in the Amended Statement of Decision preclude Stanford Vina Ranch Irrigation Company from prevailing on any of the Causes of Action presented in the First Amended Complaint, and therefore all of Stanford Vina Ranch Irrigation Company's claims are hereby denied.

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The Defendants-Respondents are awarded their costs.

Dated: Sept. 6, 2017

By /s/ Timothy M. Frawley
TIMOTHY M. FRAWLEY
Judge of the Superior Court

APPROVED AS TO FORM:

Dated: ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA:

By: _____

CAROLYN NELSON ROWAN
Attorneys for Defendants-Respondents
STATE OF CALIFORNIA,
STATE WATER RESOURCES
CONTROL BOARD, STATE WATER
RESOURCES CONTROL BOARD
MEMBERS FELICIA MARCUS,
DOREEN D'ADAMO, FRANCES
SPIVY-WEBER, STEVEN MOORE,
AND TAM DODUC; and DOES I
THROUGH 20

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APPENDIX F

Court of Appeal, Third Appellate District –
No. C085762

S263378

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Sept. 23, 2020)

STANFORD VINA RANCH IRRIGATION COMPANY,
Plaintiff and Appellant,

v.

STATE OF CALIFORNIA et al.,
Defendants and Respondents.

The petition for review is denied.

The requests for an order directing depublication
of the opinion are denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX G

Cal. Const. Art. 10, § 2

§ 2. Conservation of water resources; restriction on riparian rights

Sec. 2. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled.

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This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

APPENDIX H

CORRECTED VERSION
CERTIFICATION DATE INCORRECT

**STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2014-0023**

TO ADOPT EMERGENCY REGULATIONS FOR
CURTAILMENT OF DIVERSIONS DUE TO
INSUFFICIENT FLOW FOR SPECIFIC FISHERIES

* * *

5. The National Marine Fisheries Service, in conversation with Department of Fish and Wildlife and United States Fish and Wildlife Service, has identified the Sacramento River tributaries Mill, Deer and Antelope creeks as priority watersheds for sustaining the CV SR Salmon and the CCV Steelhead. These streams contain migration, spawning, and rearing habitat for some of the last remaining naturally-produced populations of threatened CV SR Salmon and the CCV Steelhead. The National Marine Fisheries Service has identified minimum flows in Mill, Deer and Antelope creeks below which significant harm to the species would occur. These flows establish a minimum flow needed for passage of migrating fish to and from spawning and rearing grounds in the watersheds above major diversions in the lower watersheds;
6. The importance of Deer, Mill, and Antelope creeks to the survival and recovery of salmon and steelhead in the Northern California's Central Valley is significant. Of the 19

independent spring-run Chinook salmon populations that historically occurred in the Central Valley, the Deer, Mill, and Antelope creek populations are among the last of a small group of naturally-produced populations. Mill and Deer creeks are identified in the National Marine Fisheries' Services' Draft Central Valley Salmon and Steelhead Recovery Plan as Core 1 populations for CV SR Salmon and CCV Steelhead. Antelope Creek is a Core 1 population for CCV Steelhead and a Core 2 population for CV SR Salmon. Preserving and restoring Core 1 populations is the foundation of the recovery strategy because Core 1 populations are considered to have the greatest potential to support independent viable populations. Core 2 populations are assumed to have the potential to meet the moderate risk of extinction criteria and protecting these populations is also a priority of the recovery plan;

7. These three streams are unique in the Central Valley because they support naturally-produced populations of CV SR Salmon and CCV Steelhead, yet have no upstream water storage facilities that can be managed to buffer the effects of drought on stream flow and water temperature requirements for these fish species. Instead, all of the water management facilities and water use occur on downstream reaches near the confluence with the Sacramento River, and their careful management is needed this year to ensure CV SR Salmon and CCV Steelhead are able to successfully migrate upstream to spawning

habitat and downstream to the Sacramento River;

8. The State Water Resources Control Board (State Water Board) has a duty to protect, where feasible, the state's public trust resources, including fisheries. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.);
9. The State Water Board also has the authority under article X, section 2 of the California Constitution and Water Code section 100 to prevent the waste or unreasonable use, unreasonable method of use, or the unreasonable method of diversion of all waters of the State. Water Code section 275 directs the State Water Board to "take all appropriate proceedings or actions before executive, legislative, or judicial agencies . . . " to enforce the constitutional and statutory prohibition against waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, commonly referred to as the reasonable use doctrine. The reasonable use doctrine applies to the diversion and use of both surface water and groundwater, and it applies irrespective of the type of water right held by the diverter or user. (*Peabody v. Vallejo* (1935) 2 Cal.2d 351.) What constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes. (*Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 194.);

10. The State Water Board has determined, based on the best available information that certain minimum flows are necessary in the identified watersheds, below which levels serious harm and endangerment to the species may occur. The State Water Board recognizes that these drought emergency minimum flows do not represent optimal passage conditions for CV SR Salmon and CCV Steelhead. The State Water Board has identified the need for these drought emergency minimum flows during this drought period due to the lack of developed alternative water supplies to meet these emergency water supply conditions. Application of the reasonable use doctrine under these circumstances requires particularized consideration of the benefits of diverting water for current uses from the identified water bodies and the potential for harm to the protected species from such diversions under the current drought conditions. Having considered the available information, the Board finds that, during the current drought conditions, curtailment of diversions that would cause flows in these creeks to drop below these minimum passage levels is necessary to prevent the waste, unreasonable use, unreasonable method of use or unreasonable method of diversion, of water. This finding is narrowly targeted only to diversions of water, under the current extraordinary drought conditions, needed to afford minimal protection to migrating CV SR Salmon and CCV Steelhead, and should not be construed as a finding

concerning the reasonableness of these diversions in general;

* * *

13. The regulation would provide that diversions from Mill, Deer and Antelope creeks are unreasonable if those diversions would cause flows to drop below the specified minimums. Under the regulation, such diversions would be curtailed as appropriate to maintain those minimum flows, with the exception of diversions necessary for minimum health and safety needs. Diversions for minimum health and safety needs may not be curtailed, notwithstanding a lower seniority than other, curtailed rights. The diversion or use of water in violation of this regulation would be an unreasonable diversion or use and a violation of Water Code section 100;

14. On May 13 and 14, 2014, the State Water Board issued public notice that the State Water Board would consider the adoption of the regulation at the Board's regularly-scheduled May 20, 2014 public meeting, in accordance with applicable State laws and regulations. The State Water Board also distributed for public review and comment a Finding of Emergency that complies with State laws and regulations;

* * *

18. As discussed above, the State Water Board is adopting emergency regulations because of the emergency drought conditions, the need for prompt action, and the unique attributes

of these three tributaries. The vehicle of adopting emergency regulations to identify a minimum flow requirement for fisheries protection and health and safety requirements is an appropriate approach in these limited circumstances, but this approach is not the Board's preferred alternative to identify, balance, and implement instream flow requirements. The Board reaffirms its preference for undertaking adjudicative water right proceedings to assign responsibility for meeting instream flows;

19. Pursuant to Water Code section 7, the State Water Board is authorized to delegate authority to the Executive Director and to the Division of Water Rights Deputy Director. The State Water Board has delegated authority to the Executive Director and to the Division of Water Rights Deputy Director; and

THEREFORE BE IT RESOLVED THAT:

1. The State Water Resources Control Board adopts Title 23, Division 3, Chapter 2, Article 24, Sections 877 through 879.2 as appended to this resolution as an emergency regulation;
2. The State Water Board staff submit the regulation to the Office of Administrative Law (OAL) for final approval;
3. If, during the approval process, State Water Board staff, the State Water Board, or OAL determines that minor corrections to the language of the regulation or supporting documentation are needed for clarity or

consistency, the State Water Board Executive Director or designee may make such changes; and

4. The State Water Board delegates to the Division Deputy Director the authority to act on requests for approvals pursuant to the regulation.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 21, 2014.

AYE: Chair Felicia Marcus
Vice Chair Frances Spivy-Weber
Board Member Tam M. Doduc
Board Member Steven Moore
Board Member Dorene D'Adamo

NAY: None

ABSENT: None

ABSTAIN: None

/s/ Jeanine Townsend

Jeanine Townsend
Clerk to the Board

In Title 23, Division 3, Chapter 2, add Article 24, Sections 877 through 879.2 to read:

Article 24. Curtailment of Diversions Based on Insufficient Flow to Meet All Needs

§ 875 [reserved]

§ 876 [reserved]

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

The State Water Resources Control Board has determined that it is a waste and unreasonable use under Article X, section 2 of the California Constitution 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, except as provided under sections 878, 878.1 or 878.2.
- (b) The Deputy Director for the Division of Water Rights (Deputy Director) may issue a curtailment order upon a determination that without curtailment of diversions flows are likely to be reduced below the drought emergency minimum flows specified in subdivision (c). Curtailment orders shall be effective the day

after issuance. Except as provided in sections 878, 878.1, and 878.2, where flows are sufficient to support some but not all diversions, curtailment orders shall be issued in order of priority.

In determining which diversions should be subject to curtailment, the Deputy Director shall take into account the need to provide reasonable assurance that the actual drought emergency minimum flows will be met.

* * *

- (c) The State Board has authority to ensure the protection and preservation of streams and to limit diversions to protect critical flows for species, including for state and federally threatened and endangered salmon and steelhead species. To prevent the waste and unreasonable use of water, the Deputy Director may issue curtailment orders as described in subdivision (b). The flows described in this subdivision may be less than otherwise desirable minimum flows for fisheries protection, but have been developed to ensure a bare minimum instream flows for migratory passage during the drought emergency, given the unprecedented nature of the current drought and the drought impacts to these fisheries.

This section shall only go into effect if the Executive Director determines that any agreements in any applicable watersheds entered into by diverters, National Marine Fisheries Service and California Department of Fish and Wildlife either do not cover substantially

all of the water diverted in the watershed or that the agreements are no longer in effect.

- (1) Mill Creek. Mill Creek enters the Sacramento River at Army Corps of Engineers river mile 230 from the east near Los Molinos and approximately one mile north of the town of Tehama. All water right holders in the Mill Creek watershed are subject to curtailment pursuant to subdivision (b) and responsible to meet the drought emergency minimum flows identified in this subdivision. For purposes of this article, the following flows are the drought emergency minimum flows necessary for migratory passage of state and federally listed Central Valley spring-run Chinook salmon (CV SR Salmon) and federally listed California Central Valley steelhead (CCV Steelhead) through the Sacramento Valley floor stream reaches in Mill Creek:
 - (A) April 1 up to June 30, if Adult CV SR Salmon are present -
 - (i) Base Flows – 50 cfs or full flow without diversions, whichever is less.
 - (ii) Pulse Flows – 100 cfs or full flow without diversions, whichever is less. Pulse flows may be required when Adult CV SR Salmon are observed between Ward dam and the Sacramento River. When required, pulse flows are in lieu of,

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not in addition to, base flow requirements. The pulse flow will last a minimum of 24 hours to a maximum of 72 hours, and will be determined based on the presence of fish observed and desired migration movements upstream.

* * *

(B) June 1 up to June 30, if Juvenile CV SR Salmon or Juvenile CCV Steelhead are present –

- (i) Pulse Flows – 100 cfs or full in-flow without diversions, whichever is less. Pulse flows may be required when juvenile CV SR Salmon or CCV Steelhead are observed in the lower reaches of Mill Creek. When required, pulse flows are in lieu of, not in addition to, base flow requirements. The pulse flow will last a minimum of 24 hours to a maximum of 48 hours, and will be determined by the presence of fish observed and desired migration movements downstream into the Sacramento River.

* * *

- (2) Deer Creek. Deer Creek enters the Sacramento River at Army Corps of Engineers river mile 220 from the east approximately 1 mile west of the town of Vina. All water right holders in the

Deer Creek watershed are subject to curtailment pursuant to subdivision (b) and responsible to meet the drought emergency minimum flows identified in this subdivision. For purposes of this article, the following flows are the drought emergency minimum flows necessary for migratory passage of state and federally listed CV SR Salmon and federally listed CCV Steelhead through the Sacramento Valley floor stream reaches in Deer Creek:

- (A) April 1 up to June 30, if Adult CV SR Salmon are present –
 - (i) Base Flows – 50 cfs or full flow without diversions, whichever is less.
 - (ii) Pulse Flows – 100 cfs or full flow without diversions, whichever is less. Pulse flows may be required when Adult CV SR Salmon are observed between Vina Dam and the Sacramento River. When required, pulse flows are in lieu of, not in addition to, base flow requirements. The pulse flow will last a minimum of 24 hours to a maximum of 72 hours, and will be determined by the presence of fish observed and desired migration movements upstream. The duration will be determined by

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the Deputy Director in consultation with California Department of Fish and Wildlife or the National Marine Fisheries Services.

* * *

(B) June 1 up to June 30, if Juvenile CV SR Salmon or Juvenile CCV Steelhead are present –

- (i) Pulse Flows – 100 cfs or full flow without diversions, whichever is less. Pulse flows may be required when juvenile CV SR Salmon or CCV Steelhead are observed in the lower reaches of Deer Creek. When required, pulse flows are in lieu of, not in addition to, base flow requirements. The pulse flow will last a minimum of 24 hours to a maximum of 48 hours, and will be determined by the presence of fish observed and desired migration movements downstream into the Sacramento River. The duration will be determined by the Deputy Director in consultation with California Department of Fish and Wildlife or the National Marine Fisheries Service.

* * *

- (C) October 1- March 31, if Adult CCV Steelhead are present – (i) Base Flows – 50 cfs or full flow without diversions, whichever is less.
- (D) November 1 – June 30, if Juvenile CV SR Salmon or Juvenile CCV Steelhead are present and adult CV SR Salmon or Adult CCV Steelhead are not present (i) Base Flows – 20 cfs or full flow without diversions, whichever is less.
- (E) The California Department of Fish and Wildlife and/or the National Marine Fisheries Service may conduct field surveys and notify the Deputy Director when the pertinent migration periods have ended. The Deputy Director shall, no later than the next business day, suspend curtailment orders that are based on the need for a particular flow volume when presence of adult or juvenile CV SR Salmon and CCV Steelhead or hydrologic conditions no longer support the need for the required flows.
- (F) The California Department of Fish and Wildlife and/or the National Marine Fisheries Service may conduct field surveys and notify the Deputy Director that the pertinent migration periods have not yet begun. The Deputy Director may choose not to issue curtailment orders for

purposes of meeting the drought emergency minimum flows identified in this subdivision if these agencies have not determined that fish are present and in need of the identified flows.

- (3) Antelope Creek. Antelope Creek enters the Sacramento River at Army Corps of Engineers river mile 235 from the east approximately nine miles southeast of the town of Red Bluff. All water right holders in the Antelope Creek watershed are subject to curtailment pursuant to subdivision (b) and responsible to meet the drought emergency minimum flows identified in this subdivision. For purposes of this article, the following flows are the drought emergency minimum flows necessary for migratory passage of state and federally listed CV SR Salmon and federally listed CCV Steelhead through the Sacramento Valley floor stream reaches in Antelope Creek:

- (A) April 1 up to June 30, if Adult CV SR Salmon are present –

- (i) Base Flows – 35 cfs or full flow without diversions, whichever is less.
 - (ii) Pulse Flows – 70 cfs or full flow without diversions, whichever is less.

Pulse flows may be required when Adult CV SR Salmon are observed between the Edwards/Los Molinos Mutual diversion dam and the Sacramento River. When required, pulse flows are in lieu of, not in addition to, base flow requirements. The pulse flow will last a minimum of 24 hours to a maximum of 72 hours, and will be determined by the presence of fish observed and desired migration movements upstream. The duration will be determined by the Deputy Director in consultation with California Department of Fish and Wildlife and/or the National Marine Fisheries Service.

* * *

- (B) June 1 up to June 30, if Juvenile CV SR Salmon or Juvenile CCV Steelhead are present –
 - (i) Pulse Flows – 70 cfs or full flow without diversions, whichever is less. Pulse flows may be required when juvenile CV SR Salmon or CCV Steelhead are observed in the lower reaches of Antelope Creek. When required, pulse flows are in lieu of, not in addition to, base flow requirements. The pulse flow will last a minimum of 24 hours to a maximum

of 48 hours, and will be determined by the presence of fish observed and desired migration movements downstream into the Sacramento River. The duration will be determined by the Deputy Director in consultation with California Department of Fish and Wildlife or the National Marine Fisheries Service.

* * *

- (4) The drought emergency minimum flows identified in subdivision (c)(1) through (c)(3) shall extend through the confluences with the Sacramento River. Compliance with the drought emergency minimum flows will be determined by the Deputy Director, measured at the most downstream gauge available. The Deputy Director may require additional compliance points as needed.
- (d) (1) Initial curtailment orders will be mailed to each water right holder or the agent of record on file with the Division of Water Rights. The water right holder or agent of record is responsible for immediately providing notice of the order(s) to all diverters exercising the water right.
- (2) Within 7 days of the effective date of this regulation, the State Board will establish an email distribution list that water right holders may join to receive drought notices and updates regarding

curtailments. Notice provided by email or by posting on the State Board's drought web page shall be sufficient for all purposes related to drought notices and updates regarding curtailments.

* * *

§ 878.2. Local cooperative solutions

If the National Marine Fisheries Service and the California Department of Fish and Wildlife enter into an agreement with a diverter, or diverters, that the Service or Department determines provides watershed-wide protection for the fishery that is comparable to or greater than that provided by this article, the diverter or diverters may request approval from the Deputy Director to implement the agreement in place of State Board-issued curtailment orders under this article. The Deputy Director shall approve the request so long as other users of water will not be injured.

The Deputy Director's approval may be subject to any conditions, including reporting requirements, that the Deputy Director determines to be appropriate. If the Deputy Director does not act on a request within one week of receipt, the request will be deemed approved.

Other local cooperative solutions may also be proposed to the Deputy Director as an alternative means of reducing water use to preserve drought emergency minimum flows. Requests to implement voluntary agreements to coordinate diversions or share water in place of State Board-issued curtailment orders under this article may be submitted to the Deputy Director

at any time. The Deputy Director may approve a request, or approve it subject to any conditions including reporting requirements that the Deputy Director determines to be appropriate, if the Deputy Director determines:

- (a) the continued diversion is reasonable;
- (b) that other users of water will not be injured; and
- (c) that the relevant minimum flows identified in this article will be met.

* * *

§ 879. Reporting

- (a) All water users or water right holders issued a curtailment order under this article are required within five days to submit under penalty of perjury a certification of the following actions taken in response to the curtailment order, certifying, as applicable, that:
 - (1) Diversion under the water right identified has been curtailed;
 - (2) Continued use is under other water rights not subject to curtailment, specifically identifying those other rights, including the basis of right and quantity of diversion;
 - (3) Diversions continue only to the extent that they are direct diversions for hydropower;
 - (4) A petition has been filed as authorized under section 878.1, that the diversion will be authorized if the petition is approved, that the subject water right authorizes the diversion

in the absence of a curtailment order, and that diversion and use will comply with the conditions for approval of the petition, except that approval by other authorities may still be pending;

- (5) A certification has been filed as authorized under section 878, subdivision (b) or section 878.1, subdivision (b)(1), that the subject water right authorizes the diversion in the absence of a curtailment order; or
- (6) The only continued water use is for instream purposes.

* * *

§ 879.1. Conditions of permits, licenses and registrations

Compliance with this article, including any conditions of approval of a petition under this article, shall constitute a condition of all water right permits, licenses, certificates and registrations.

§ 879.2 Compliance and Enforcement

Diversion or use in violation of this article constitutes an unauthorized diversion or use. A diverter must comply with a curtailment order issued under any section of this article, including any conditions of approval of a petition under this article and any water right condition under this article, notwithstanding receipt of more than one curtailment order based on more than one section or water right condition. To the extent of any

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conflict between the requirements of applicable orders or conditions of approval, the diverter must comply with the requirements that are most stringent. Violations of this article shall be subject to any applicable penalties pursuant to Water Code sections 1052, 1831, 1845 and 1846.

APPENDIX I
STATE WATER RESOURCES
CONTROL BOARD
RESOLUTION NO. 2015-0014

TO UPDATE AND READOPT A DROUGHT-
RELATED EMERGENCY REGULATION FOR
CURTAILMENT OF DIVERSIONS DUE TO
INSUFFICIENT FLOW FOR SPECIFIC FISHERIES

WHEREAS:

* * *

3. On May 21, 2014, the State Water Board adopted an emergency regulation for curtailment of diversions due to insufficient flow for specific fisheries for Mill, Deer and Antelope Creeks. The emergency regulation became effective on June 2, 2014 and expired on February 28, 2015 (effective for 270 days);

* * *

6. The National Marine Fisheries Service, in consultation with the California Department of Fish and Wildlife and the United States Fish and Wildlife Service, has identified the Sacramento River tributaries Deer, Mill, and Antelope Creeks as priority watersheds for sustaining the CV SR Salmon and the CCV Steelhead. These streams contain migration, spawning, and rearing habitat for some of the last remaining naturally-produced populations of threatened CV SR Salmon and the CCV Steelhead. The National Marine Fisheries Service has identified minimum flows in Mill, Deer and Antelope Creeks below which significant harm to the

species would occur. These flows establish a minimum flow needed for passage of migrating fish to and from spawning and rearing grounds in the watersheds above major diversions in the lower watersheds;

7. The importance of Deer, Mill, and Antelope Creeks to the survival and recovery of salmon and steelhead in the Northern California's Central Valley is significant. Of the 19 independent CV SR Salmon populations that historically occurred, the populations in Deer, Mill, and Antelope Creeks are among the last of a small group of naturally-produced populations. Mill and Deer Creeks are identified in the National Marine Fisheries Services' Final Central Valley Salmon and Steelhead Recovery Plan as Core 1 populations for CV SR Salmon and CCV Steelhead. Antelope Creek is a Core 1 population for CCV Steelhead and a Core 2 population for CV SR Salmon. Preserving and restoring Core 1 populations is the foundation of the recovery strategy because Core 1 populations are considered to have the greatest potential to support independent viable populations. Core 2 populations are assumed to have the potential to meet the moderate risk of extinction criteria and protecting these populations is also a priority of the recovery plan;
8. These three streams are unique in the Central Valley because they support naturally-produced populations of CV SR Salmon and CCV Steelhead, yet have no upstream water storage facilities that can be managed to buffer the effects of drought on stream flow and water temperature requirements for these fish species. Instead, all of the water management facilities and water use occur on

downstream reaches near the confluence with the Sacramento River, and their careful management is needed this year to ensure CV SR Salmon and CCV Steelhead are able to successfully migrate upstream to spawning habitat and downstream to the Sacramento River;

9. The State Water Resources Control Board (State Water Board) has a duty to protect, where feasible, the state's public trust resources, including fisheries, to the extent reasonable. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.);
10. The State Water Board also has the authority under article X, section 2 of the California Constitution and Water Code section 100 to prevent the waste or unreasonable use, unreasonable method of use, or the unreasonable method of diversion of all waters of the State. Water Code section 275 directs the State Water Board to "take all appropriate proceedings or actions before executive, legislative, or judicial agencies . . ." to enforce the constitutional and statutory prohibition against waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, commonly referred to as the reasonable use doctrine. The reasonable use doctrine applies to the diversion and use of both surface water and groundwater, and it applies irrespective of the type of water right held by the diverter or user. (*Peabody v. Vallejo* (1935) 2 Cal.2d 351.) What constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes. (*Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 194.);

11. The State Water Board has determined, based on the best available information that certain minimum flows are necessary in the identified watersheds, below which levels serious harm and endangerment to the species may occur. The State Water Board recognizes that these drought emergency minimum flows do not represent optimal passage conditions for CV SR Salmon and CCV Steelhead. The State Water Board has identified the need for these drought emergency minimum flows during this drought period due to the lack of developed alternative water supplies to meet these emergency water supply conditions. Application of the reasonable use doctrine under these circumstances requires particularized consideration of the benefits of diverting water for current uses from the identified water bodies and the potential for harm to the protected species from such diversions under the current drought conditions. Having considered the available information, the State Water Board finds that, during the current drought conditions, curtailment of diversions that would cause flows in these creeks to drop below these minimum passage levels is necessary to prevent the waste, unreasonable use, unreasonable method of use and unreasonable method of diversion, of water. This finding is narrowly targeted only to diversions of water, under the current extraordinary drought conditions, needed to afford minimal protection to migrating CV SR Salmon and CCV Steelhead, and should not be construed as a finding concerning the reasonableness of these diversions in general;

* * *

14. Drought emergency minimum instream flow requirements were required under California Code of Regulations, title 23, section 877 in Deer Creek from June 2 through June 30, 2014 and October 1, 2014 through February 28, 2015. A curtailment order was issued to water right holders in Deer Creek on June 5, 2014, for the period of June 5 through June 24, 2014 to provide for the required minimum flows for CV SR Salmon and CCV Steelhead. Gauge data shows that the minimum flows were not met in Deer Creek until June 11, 2014. Fish passage data provided by the California Department of Fish and Wildlife suggests the instream flows in Deer Creek during this time period were inadequate and did not provide for successful fish passage. Mill Creek and Deer Creek are similar watersheds. If the required instream flows had been provided, fish passage in Deer Creek during this time period would likely have been similar to that in Mill Creek (i.e., it would of provided adequate passage). A curtailment order was issued to water right holders in Deer Creek on October 14, 2014, which required water right holders to provide for the required instream flows for CV SR Salmon and CCV Steelhead from October 15, 2014 through February 28, 2015. These flows were met, and fish passage data provided by the California Department of Fish and Wildlife suggests the instream flows provided in Deer Creek from October 15, 2014 through February 28, 2015 provided for successful fish passage;
15. The drought emergency minimum flow requirements in the 2015 drought-related emergency regulation for curtailment of diversions due to insufficient flow for specific fisheries are similar to those adopted

in 2014, with clarifications and edits to the regulation and minor adjustments to the minimum flows and flow periods based on an assessment of last year's implementation of the regulation. In summary, the 2015 minimum flow requirements on Mill and Deer Creeks remain unchanged, and the 2015 minimum baseflow requirements for juvenile Spring-run Chinook salmon and steelhead decreased in Antelope Creek. Except in one case, the flow periods required under the 2015 regulation are shorter than the flow periods required in the 2014 regulation. The one case when the flow period was extended, rather than shortened, in the 2015 regulation is for the initiation of the juvenile Spring-run Chinook and steelhead minimum baseflow in Mill and Deer Creeks, which would begin on October 15, rather than November 1;

16. The regulation would provide that diversions from Mill, Deer and Antelope Creeks are unreasonable if those diversions would cause flows to drop below the specified minimums. Under the regulation, such diversions would be curtailed as appropriate to maintain those minimum flows, with the exception of diversions necessary for minimum health and safety needs. Diversions for minimum health and safety needs may not be curtailed, notwithstanding a lower seniority than other, curtailed rights. The diversion or use of water in violation of this regulation would be an unreasonable diversion or use and a violation of Water Code section 100;

* * *

19. On March 6, 2015, the State Water Board provided public notice, including a copy of the proposed regulation, that the State Water Board would consider adoption of the regulation at the Board's regularly scheduled March 17, 2015 public meeting. On March 13, 2015, the State Water Board also distributed for public review and comment a Notice of Proposed Rulemaking and Emergency Regulation Digest that comply with State laws and regulations;
 20. The State Water Board proposes to adopt the emergency regulation in accordance with title 2, division 3, chapter 3.5 of the Government Code (commencing with section 11340). The State Water Board has the authority to adopt emergency regulations pursuant to Water Code section 1058.5, as it deems necessary to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, to promote water recycling or water conservation, and to require curtailment of diversions when water is not available under the diverter's priority of right;
- * * *
22. As discussed above, the State Water Board is adopting this emergency regulation because of the emergency drought conditions, the need for prompt action, and the unique attributes of these three tributaries. The vehicle of adopting an emergency regulation to identify a minimum flow requirement for fisheries protection and health and safety needs is an appropriate approach in these limited circumstances; and

23. Pursuant to Water Code section 7, the State Water Board is authorized to delegate authority to the Executive Director and to the Deputy Director. The State Water Board has delegated authority to the Executive Director and to the Deputy Director.

THEREFORE BE IT RESOLVED THAT:

1. The State Water Board adopts Title 23, Division 3, Chapter 2, Article 24, Sections 877; 878; 878.1, subdivisions (b) and (c); 878.2; 879, subdivisions (a) and (b); 879.1 and 879.2, as appended to this resolution as an emergency regulation;
2. State Water Board staff shall submit the regulation to the Office of Administrative Law (OAL) for final approval;
3. If, during the approval process, State Water Board staff, the State Water Board, or OAL determines that minor corrections to the language of the regulation or supporting documentation are needed for clarity or consistency, the State Water Board Executive Director or designee may make such changes; and
4. The State Water Board delegates to the Deputy Director the authority to act on requests for approvals pursuant to the regulation.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting

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of the State Water Resources Control Board held on March 17, 2015.

AYE: Chair Felicia Marcus
Vice Chair Frances Spivy-Weber
Board Member Tam M. Doduc
Board Member Steven Moore

NAY: Board Member Dorene D'Adamo

ABSENT: None

ABSTAIN: None

/s/ Jeanine Townsend

Jeanine Townsend
Clerk to the Board

**Curtailment of Diversions due to
Insufficient Flow for Specific Fisheries
Emergency Regulation Digest**

In Title 23, Division 3, Chapter 2, Article 24, add Sections 877, 878, 878.1, subdivisions (b) through (f); 878.2; 879, subdivisions (a) and (b); 879.1 and 879.2 to read:

**Article 24. Curtailment of Diversions Based
on Insufficient Flow to Meet All Needs**

§ 876 [reserved]

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

The State Water Resources Control Board (State Board) has determined that it is a waste and

unreasonable use under Article X, section 2 of the California Constitution 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, except as provided under sections 878, 878.1 or 878.2.

(b) The Deputy Director for the Division of Water Rights (Deputy Director) may issue a curtailment order upon a determination that without curtailment of diversions flows are likely to be reduced below the drought emergency minimum flows specified in subdivision (c). Curtailment orders shall be effective the day after issuance. Except as provided in sections 878, 878.1, and 878.2, where flows are sufficient to support some but not all diversions, curtailment orders shall be issued in order of priority.

In determining which diversions should be subject to curtailment, the Deputy Director shall take into account the need to provide reasonable assurance that the actual drought emergency minimum flows will be met.

If maintaining the flows described in subdivision (c) would require curtailment of uses described in section 878.1, then the Executive Director may decide whether or not those

diversions should be allowed to continue based on the most current information available regarding fish populations, health and safety needs and the alternatives available to protect both public health and safety and threatened or endangered fish.

- (c) The State Board has authority to ensure the protection and preservation of streams and to limit diversions to protect critical flows for species, including for state and federally threatened and endangered salmon and steelhead species. To prevent the waste and unreasonable use of water, the Deputy Director may issue curtailment orders as described in subdivision (b). The flows described in this subdivision may be less than otherwise desirable minimum flows for fisheries protection, but have been developed to ensure bare minimum instream flows for migratory passage during the drought emergency, given the unprecedented nature of the current drought and the drought impacts to these fisheries.

This section shall only go into effect if the Executive Director determines that any agreements in any applicable watersheds entered into by diverters, National Marine Fisheries Service and California Department of Fish and Wildlife either do not cover substantially all of the water diverted in the watershed or that the agreements are no longer in effect.

- (1) Mill Creek. Mill Creek enters the Sacramento River at Army Corps of Engineers river mile 230 from the east near Los Molinos and

approximately one mile north of the town of Tehama. All water right holders in the Mill Creek watershed are subject to curtailment pursuant to subdivision (b) and responsible to meet the drought emergency minimum flows identified in this subdivision. For purposes of this article, the following flows are the drought emergency minimum flows necessary for migratory passage of state and federally listed Central Valley spring-run Chinook salmon (CV SR salmon) and federally listed California Central Valley steelhead (CCV steelhead) through the Sacramento Valley floor stream reaches in Mill Creek:

(A) April 1 up to June 15, if Adult CV SR Salmon are present –

(i) Base Flows – 50 cubic feet per second (cfs) or full flow without diversions, whichever is less. (ii) Pulse Flows – 100 cfs or full flow without diversions, whichever is less.

* * *

(B) June 1 up to June 15, if Juvenile CV SR Salmon or Juvenile CCV Steelhead are present –

(i) Pulse Flows – 100 cfs or full inflow without diversions, whichever is less.

* * *

(2) Deer Creek. Deer Creek enters the Sacramento River at Army Corps of Engineers river mile 220 from the east approximately one

mile west of the town of Vina. All water right holders in the Deer Creek watershed are subject to curtailment pursuant to subdivision (b) and responsible to meet the drought emergency minimum flows identified in this subdivision. For purposes of this article, the following flows are the drought emergency minimum flows necessary for migratory passage of state and federally listed CV SR salmon and federally listed CCV steelhead through the Sacramento Valley floor stream reaches in Deer Creek:

(A) April 1 up to June 15, if Adult CV SR Salmon are present –

- (i) Base Flows – 50 cfs or full flow without diversions, whichever is less.
- (ii) Pulse Flows – 100 cfs or full flow without diversions, whichever is less. A flow ramp down period at the end of a pulse flow may be included if requested by California Department of Fish and Wildlife or National Marine Fisheries Service. Pulse flows may be required when adult CV SR salmon are observed between Vina Dam and the Sacramento River. When required, pulse flows are in lieu of, not in addition to, base flow requirements. Pulse flows will last a minimum of 24 hours to a maximum of 72 hours, and will be determined based on the presence of fish observed and desired migration movements upstream. Pulse flow duration will be determined by the Deputy

Director in consultation with California Department of Fish and Wildlife or the National Marine Fisheries Services.

* * *

(B) June 1 up to June 15, if Juvenile CV SR Salmon or Juvenile CCV Steelhead are present –

(i) Pulse Flows – 100 cfs or full flow without diversions, whichever is less. A flow ramp down period at the end of a pulse flow may be included if requested by California Department of Fish and Wildlife or National Marine Fisheries Service. Pulse flows may be required when juvenile CV SR salmon or CCV steelhead are observed in the lower reaches of Deer Creek. When required, pulse flows are in lieu of, not in addition to, base flow requirements. Pulse flows will last a minimum of 24 hours to a maximum of 48 hours, and will be determined based on the presence of fish observed and desired migration movements downstream into the Sacramento River. Pulse flow duration will be determined by the Deputy Director in consultation with California Department of Fish and Wildlife or the National Marine Fisheries Service.

* * *

(3) Antelope Creek. Antelope Creek enters the Sacramento River at Army Corps of Engineers river mile 235 from the east approximately nine miles southeast of the town of Red Bluff. All water right holders in the Antelope Creek watershed are subject to curtailment pursuant to subdivision (b) and responsible to meet the drought emergency minimum flows identified in this subdivision. For purposes of this article, the following flows are the drought emergency minimum flows necessary for migratory passage of state and federally listed CV SR salmon and federally listed CCV steelhead through the Sacramento Valley floor stream reaches in Antelope Creek:

(A) April 1 up to May 15, if Adult CV SR Salmon are present –

(i) Base Flows – 35 cfs or full flow without diversions, whichever is less.

(ii) Pulse Flows – 70 cfs or full flow without diversions, whichever is less. A flow ramp down period at the end of a pulse flow may be included if requested by California Department of Fish and Wildlife or National Marine Fisheries Service. Pulse flows may be required when adult CV SR salmon are observed between the Edwards/Los Molinos Mutual diversion dam and the Sacramento River. When required, pulse flows are in lieu of, not in addition to, base flow requirements. Pulse flows will last a minimum of 24

hours to a maximum of 72 hours, and will be determined based on the presence of fish observed and desired migration movements upstream. Pulse flow duration will be determined by the Deputy Director in consultation with California Department of Fish and Wildlife or the National Marine Fisheries Service.

* * *

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art., X § 2; Sections 100, 100.5, 104, 105, 275, 1058.5, Water Code; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419; *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463.

* * *

§ 879.1. Conditions of permits, licenses and registrations

Compliance with this article, including any conditions of approval of a petition under this article, shall constitute a condition of all water right permits, licenses, certificates and registrations.

Authority: Sections 1058, 1058.5, Water Code

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

§ 879.2. Compliance and Enforcement

Diversion or use in violation of this article constitutes an unauthorized diversion or use. A diverter must comply with a curtailment order issued under any section of this article, including any conditions of approval of a petition under this article and any water right condition under this article, notwithstanding receipt of more than one curtailment order based on more than one section or water right condition. To the extent of any conflict between the requirements of applicable orders or conditions of approval, the diverter must comply with the requirements that are most stringent. Violations of this article shall be subject to any applicable penalties pursuant to Water Code sections 1052, 1831, 1845 and 1846.

Authority: Sections 1058, 1058.5, Water Code

Reference: Sections 1052, 1055, 1058.5, 1825, 1831, Water Code; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.

APPENDIX J

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL
PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS
ORDER WR 2014-0022-DWR

CURTAILMENT ORDER

In the Matter of Diversion of Water from

**DEER CREEK TRIBUTARY
TO THE SACRAMENTO RIVER
IN
TEHAMA COUNTY**

* * *

4. On November 27, 1923 the Superior Court of Tehama County entered a judgment (Adjudication) granting 100% of the flow in Deer Creek (as measured at USGS gauge 11383500) to the predecessors in interest of the Stanford Vina Ranch Irrigation Company (approximately 65%) and Deer Creek Irrigation District (approximately 35%). The Adjudication designated that the average amount of water naturally flowing in Deer Creek, during the irrigation season, as 150 second feet or 6000 miner's inches and allocated 100% of that flow as previously provided. At times when the natural flow in Deer Creek is less than, or more than, 150 second feet or 6000 miner's inches,

then the Adjudication diminishes, or augments the flow allocations proportionally. (Adjudication, Articles XI and XIII, pp. 10, 11.) Stanford Vina Ranch Irrigation Company's points of diversion are downstream of the point of diversion for Deer Creek Irrigation District. (Adjudication, Articles XI and XIII, pp. 10, 11.) The Adjudication was amended in 1926 to grant approximately 66 percent of the Deer Creek flows below USGS gauge 11383500 to Stanford Vina Ranch Irrigation Company, 33 percent of the Deer Creek flows to Deer Creek Irrigation District and 1 percent to Sheep Camp Ditch for stock watering.

5. Attachment A attached hereto is a summary of available water rights data on Deer Creek that was assembled from the State Water Board's electronic water rights information management system (eWRIMS) and Report Management System (RMS) queries.
6. On May 21, 2014, the State Water Board adopted emergency regulations for Curtailment of Diversions due to Insufficient Flow for Specific Fisheries (California Code of Regulations, title 23, sections 877 through 879.2¹) (Regulations). The Regulations were reviewed by the Office of Administrative Law and went into effect on June 2, 2014. The Regulations establish drought emergency minimum flow requirements for the protection of specific runs of federal- and state-listed anadromous fish in Mill Creek, Deer Creek and Antelope Creek. The Regulations provide that diversions

¹ All further section references are to California Code of Regulations, title 23 unless otherwise indicated.

from Mill, Deer and Antelope creeks are unreasonable if those diversions will cause flows to drop below the specified minimum flows. Under the Regulations, diversions will be curtailed as appropriate to maintain those minimum flows, with the exception of diversions necessary for minimum health and safety needs. The diversion or use of water in violation of the Regulations is an unreasonable diversion or use and a violation of Water Code section 100.

7. Pursuant to section 877, the State Water Board has determined that it is a waste and unreasonable use under Article X, section 2 of the California Constitution to continue diversions that would cause or threaten to cause flows to fall beneath the drought emergency minimum flows provide in subdivision (c) of section 877, except as provided for minimum health and safety needs in accordance with section 878.1.

* * *

10. Pursuant to section 877, subdivision (b), the Deputy Director for the Division of Water Rights has delegated authority to issue a curtailment order upon a determination that without curtailment of diversions flows are likely to be reduced below the drought emergency minimum flows specified in section 877, subdivision (c).

* * *

FINDINGS:

1. Section 877, subdivision (c)(2) of title 23 of the California Code of Regulations establishes drought emergency minimum flows for Deer Creek under

certain conditions. Those minimum flows went into effect upon determination by the Executive Director on June 4, 2014 that voluntary agreements in the Deer Creek Watershed do not cover substantially all of the water diverted in the watershed.

2. The conditions under which the drought emergency minimum flows identified in section 877, subdivision (c) apply are now in effect and threatened species, such as Adult and juvenile CV SR salmon and juvenile CCV steelhead are present at this time.
3. The Deputy Director for the Division of Water Rights has determined that without curtailment of diversions from Deer Creek the flows in Deer Creek have been, and are likely to continue to be reduced below the drought emergency minimum flows specified in section 877 subdivision (c)(2).

* * *

IT IS HEREBY ORDERED:

1. All water rights holders in the Deer Creek watershed, including but not limited to those identified in Attachment A, are subject to curtailment pursuant to California Code of Regulations, title 23, sections 877 through 879.2² and shall immediately cease or reduce their diversions from Deer Creek to ensure the drought emergency minimum flows specified in section 877, subdivision (c)(2) are satisfied through June 30, 2014 or until the Deputy

² All further section references are to California Code of Regulations, title 23 unless otherwise indicated.

Director suspends the curtailment order under section 877, subdivision (c)(2)(E), as follows:

- (A) All post-1914 appropriative rights holders, in addition to being curtailed under the Notice of Unavailability of Water and Immediate Curtailment issued by the State Water Board on May 27, 2014, are curtailed under this order except as provided in sections 878 (non-consumptive uses), 878.1 (minimum health and safety needs, and 878.2 (local co-operative solutions).
- (B) All diverters on Deer Creek shall bypass 50 cfs or full natural flow without diversion, whichever is less, in order to obtain/maintain base flows for adult CV SR salmon migration. Flows in excess of the 50 cfs base flow can be taken in accordance with priority and basis of right, except for those post-1914 appropriative right holders referenced in paragraph 1(A), above.
- (C) Upon notification to the Deputy Director from the California Department of Fish and Wildlife and/or the National Marine Fisheries Service that adult CV SR salmon migration has ended but that juvenile CV SR salmon or Juvenile CCV steelhead are present, base flow requirements will be reduced to 20 cfs pursuant to section 877, subdivision (c)(2)(D). At that time all diverters on Deer Creek shall bypass 20 cfs or full natural flow without diversion, whichever is less, in order to maintain base flows for juvenile CV SR salmon or juvenile CCV steelhead migration. Flows in excess

of the 20 cfs base flow can be diverted by water rights holders in accordance with priority and basis of right, except for those post-1914 appropriative right holders referenced in paragraph 1(A), above.

- (D) When a pulse flow is required under section 877, subdivision (c)(2)(A)(ii) or (c)(2)(B)(i), all diverters on Deer Creek are curtailed and must cease diverting to ensure that the pulse flow of 100 cfs or full flow without diversions, whichever is less, is bypassed at their point of diversion. If full natural flows exceed 100 cfs at a time when pulse flows are required, then flows in excess of 100 cfs can be diverted by water right holders in accordance with water right priority and basis of right, except for those post-1914 appropriative right holders referenced in paragraph 1(A), above.
- 3. This curtailment order shall be effective beginning on June 6, 2014.
 - 4. In accordance with section 877 subdivision (d), water rights holders or agents of record who receive this order are responsible for immediately providing notice of this order to all diverters exercising a water right on Deer Creek. Stanford Vina Ranch Irrigation Company and Deer Creek Irrigation District are responsible for immediately providing notice of this curtailment order to all water rights holders to which they provide water under the curtailed water rights.
 - 5. All water users or water right holders receiving this order are required, within five days of issuance of this order, to submit under penalty of

perjury a certification in accordance with section 879. Post-1914 water rights holder that have recently filed a certification in response to receiving the Notice of Unavailability of Water and Immediate Curtailment issued by the State Water Board on May 27, 2014 do not need to file an additional certification.

6. In accordance with section 879.2, diversion or use in violation of this curtailment order constitutes an unauthorized diversion or use. Violations of this order shall be subject to further enforcement and any applicable penalties pursuant to Water Code sections 1052, 1831, 1845 and 1846. To the extent of any conflict between the requirements of this curtailment order and any other applicable orders or conditions of approval, the diverter must comply with the requirements that are most stringent.

* * *

STATE WATER RESOURCES CONTROL BOARD

Sincerely,

/s/ Barbara Evoy
Barbara Evoy, Deputy Director
Division of Water Rights

Dated: JUN 05 2014

Attachment A

Riparian Rights and Federal Filings

Application ID	License ID	Status	Primary Owner	Face Value	Reported Use (AF)	Report Date	Season	Year of First Use	Beneficial Use	Acres Irrigated
F003439S		Claimed	U S LASSEN NATL FOREST	0	NR		year-round		D,FP,R	
F003440S		Claimed	U S LASSEN NATL FOREST	0	NR				D,FP,R	
S001308		Claimed	SIERRA PACIFIC INDUSTRIES	0	0.06	2010	year-round	1900	DA	
S001309		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1900	DA	
S001310		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1900	DA	
S001311		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1900	DA	
S001312		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1900	DA	
S001313		Claimed	SIERRA PACIFIC INDUSTRIES	0	1.36	2011	year-round	1900	DA	
S001314		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1900	DA	
S007869		Claimed	JOSEPH A BENATAR	0	60	2010	year-round	1893	I,D,O	40
S008305		Claimed	CALIF DEPT OF FORESTRY & FIRE PROTECTION	0	NR		May-Nov		D	
S010775	pre-1914	Claimed	Grant Leininger	0	56	2010	year-round	1893	I,S	192
S012359		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1945	FP	
S012360		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1945	FP	
S012361		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1945	FP	
S012374		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1945	FP	
S012375		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1945	FP	
S012376		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1945	FP	
S012377		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1945	FP	
S012396		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1945	FP	
S013587		Claimed	DIAMOND LANDS CORPORATION	0	0	2010	April-Nov	1900	FP	
S013594		Claimed	DIAMOND LANDS CORPORATION	0	0	2010	April-Nov	1900	FP	
S013595		Claimed	DIAMOND LANDS CORPORATION	0	1.93	2010	year-round	1905	DA	
S013596		Claimed	DIAMOND LANDS CORPORATION	0	0	2010	April-Nov	1900	FP	
S013597		Claimed	DIAMOND LANDS CORPORATION	0	0	2010	April-Nov	1900	DA	
S013598		Claimed	DIAMOND LANDS CORPORATION	0	0	2010	April-Nov	1900	DA	
S013599		Claimed	DIAMOND LANDS CORPORATION	0	0	2010	April-Nov	1900	FP	
S013600		Claimed	DIAMOND LANDS CORPORATION	0	0	2010	April-Nov	1900	DA	
S013601		Claimed	DIAMOND LANDS CORPORATION	0	0	2010	April-Nov	1900	FP	
S013602		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	April-Nov	1900	DA	
S013603		Claimed	DIAMOND LANDS CORPORATION	0	0	2010	April-Nov	1900	DA	
S016163		Claimed	U S LASSEN NATL FOREST	4,300	4440	2011	year-round	1905	RAH	
S016808		Claimed	SIERRA PACIFIC INDUSTRIES	0.95	0	2010			DA	
S018670		Claimed	Rumiano Farms	0	NR				D	
S019663		Claimed	SIERRA PACIFIC INDUSTRIES	0.92	0	2010			FP	
S023166		Claimed	Rumiano Farms	0	NR				O	

Adjudicated pre-1914 Appropriative Rights

Application ID	License ID	Status	Primary Owner	Face Value	Reported Use (AF)	Report Date	Season	Year of First Use	Beneficial Use	Acres Irrigated
S000729		Claimed	STANFORD VINA RANCH IRRIGATION CO	0	17066	2011	04/01-10/31	1900	I,S	5700
S000730		Claimed	STANFORD VINA RANCH IRRIGATION CO	0	1264	2011	04/01-10/31	1900	I,S	5700
S000731		Claimed	DEER CREEK IRRIGATION DISTRICT	0	20400	2010	year-round	1923	I,S	1900

Post-1914 Appropriative Rights

Application ID	License ID	Status	Primary Owner	Face Value	Reported Use (AF)	Report Date	Season	Filing Date	Beneficial Use	Acres Irrigated
A001041	485	Licensed	STANFORD VINA RANCH IRRIGATION CO	4,582	17066*	2011	05/01-10/01	8/5/1918	I,S	5700
A008469	2385	Licensed	U S LASSEN NATL FOREST	1	0.55	2010	06/61-10/15	10/11/1935	R	
A012096	4976	Licensed	KEN C WILLIS	2,172	NR		year-round	9/19/1947	D,P	
A015933	5462	Licensed	DEER CREEK LODGE INC	2,896	48	2012	year-round	6/29/1954	P	
A016224	6088	Licensed	JOSEPH JAMES TREMARI	0.8	2.41	2012	04/01-12/31	1/31/1955	D	
A016223	5702	Licensed	THOMAS T DENNEY	0.1	0.1	2010	year-round	1/31/1955	D	
A016238	7247	Licensed	WALTER ALBERT	2.6	1.96	2010	year-round	2/15/1955	D	
A018477	7356	Licensed	DOROTHY ANNE TREMARI	1.7	2.41	2010	04/01-12/31	1/19/1959	D	
A020250	9007	Licensed	DEER CREEK LODGE INC	9	0.29	2010	year-round	6/6/1961	D	
C003886	3886	Certified	EDWIN L GAULT	0	NR		11/01-5/01	8/8/1985	S	
C005299	5299	Certified	RICHARD D SUMMERS	1.5	NR		year-round	1/5/1988	S	

*Reported use under A001041 is a duplication of the use reported under S000729

- I= Irrigation

S= Stockwatering

RAH= Riparian and Aquatic Habitat

D= Domestic

O= Other
- DA= Dust Abatement

FP= Fire Protection

R= Recreational

P= Power

APPENDIX K

**STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL
PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS
ORDER WR 2014-0031-DWR**

CURTAILMENT ORDER

In the Matter of Diversion of Water from

**DEER CREEK TRIBUTARY TO THE
SACRAMENTO RIVER
IN
TEHAMA COUNTY**

* * *

6. On May 21, 2014, the State Water Board adopted emergency regulations for Curtailment of Diversions due to Insufficient Flow for Specific Fisheries (California Code of Regulations, title 23, sections 877 through 879.2¹) (Regulations). The Regulations were reviewed by the Office of Administrative Law and went into effect on June 2, 2014. The Regulations establish drought emergency minimum flow requirements for the protection of specific runs of federal- and state-listed anadromous fish in Mill Creek, Deer Creek and

¹ All further section references are to California Code of Regulations, title 23 unless otherwise indicated.

Antelope Creek. The Regulations provide that diversions from Mill, Deer and Antelope creeks are unreasonable if those diversions will cause flows to drop below the specified minimum flows. Under the Regulations, diversions will be curtailed as appropriate to maintain those minimum flows, with the exception of diversions necessary for minimum health and safety needs. The diversion or use of water in violation of the Regulations is an unreasonable diversion or use and a violation of Water Code section 100.

7. Pursuant to section 877, the State Water Board has determined that it is a waste and unreasonable use under Article X, section 2 of the California Constitution to continue diversions that would cause or threaten to cause flows to fall beneath the drought emergency minimum flows provide in subdivision (c) of section 877, except as provided for minimum health and safety needs in accordance with section 878.1.

* * *

FINDINGS:

1. Section 877, subdivision (c)(2) of title 23 of the California Code of Regulations establishes drought emergency minimum flows for Deer Creek under certain conditions. Those minimum flows went into effect upon determination by the Executive Director on June 4, 2014 that voluntary agreements in the Deer Creek Watershed do not cover substantially all of the water diverted in the watershed.

2. In a memo dated October 10, 2014, the California Department Fish and Wildlife informed the State Water Board that adult CCV steelhead are present and currently migrating in the Sacramento River in the vicinity of Deer Creek. The conditions under which the drought emergency minimum flows identified in section 877, subdivision (c) apply and are now in effect. Threatened species, such as Adult CCV steelhead are present at this time. Additionally, juvenile CV salmon and CCV steelhead are potentially present based on historic life stage emigration timing and based on historic life stage migration timing, adult CV SR salmon are anticipated to be present as early as February.
3. The Deputy Director for the Division of Water Rights has determined that without curtailment of diversions from Deer Creek the flows in Deer Creek have been, and are likely to continue to be, reduced below the drought emergency minimum flows specified in section 877 subdivision (c)(2).

IT IS HEREBY ORDERED:

1. All water rights holders in the Deer Creek watershed, including but not limited to those identified in Attachment A, are subject to curtailment pursuant to California Code of Regulations, title 23, sections 877 through 879.2² and shall immediately cease or reduce their diversions from Deer Creek to ensure the drought emergency minimum flows specified in section 877, subdivision (c)(2) are satisfied through February 28, 2015, or until the

² All further section references are to California Code of Regulations, title 23 unless otherwise indicated.

App. 171

Deputy Director suspends the curtailment order under section 877, subdivision (c)(2)(E), as follows:

- (A) All post-1914 appropriative rights holders, in addition to being curtailed under the Notice of Unavailability of Water and Immediate Curtailment issued by the State Water Board on May 27, 2014, are also curtailed under this order except as provided in sections 878 (non-consumptive uses), 878.1 (minimum health and safety needs, and 878.2 (local co-operative solutions). Curtailment under the notice and this order must be complied with and considered separately.
- (B) All diverters on Deer Creek shall bypass 50 cfs or full natural flow without diversion, whichever is less, in order to obtain/maintain base flows for adult CCV steelhead migration. Flows in excess of the 50 cfs base flow can be taken in accordance with priority and basis of right, except for those post-1914 appropriative right holders referenced in paragraph 1(A), above.
- (C) Upon notification to the Deputy Director from the California Department of Fish and Wildlife and/or the National Marine Fisheries Service that adult CCV steelhead migration has ended but that juvenile CV SR salmon or juvenile CCV steelhead are present, base flow requirements will be reduced to 20 cfs pursuant to section 877, subdivision (c)(2)(D). At that time, the Deputy Director will inform all diverters on Deer Creek that bypass conditions are reduced from 50 cfs to 20 cfs, or full

natural flow, whichever is less. This reduced flow without diversions, is necessary to maintain base flows for juvenile CV SR salmon or juvenile CCV steelhead migration. Flows in excess of the 20 cfs base flow can be diverted by water rights holders in accordance with priority and basis of right, except for those post-1914 appropriative right holders referenced in paragraph 1(A), above.

2. This curtailment order shall be effective beginning on October 15, 2014 at 5:00 pm.

* * *

7. In accordance with section 879.2, diversion or use in violation of this curtailment order constitutes an unauthorized diversion or use. Violations of this order shall be subject to further enforcement and any applicable penalties pursuant to Water Code sections 1052, 1831, 1845 and 1846. To the extent of any conflict between the requirements of this curtailment order and any other applicable orders or conditions of approval, the diverter must comply with the requirements that are most stringent.

* * *

STATE WATER RESOURCES CONTROL BOARD

/s/ Barbara Evoy
Barbara Evoy, Deputy Director
Division of Water Rights

Dated: OCT 14 2014

Attachment A

Riparian Rights and Federal Filings

Application ID	License ID	Status	Primary Owner	Face Value	Reported Use (AF)	Report Date	Season	Year of First Use	Beneficial Use	Acres Irrigated
F003439S		Claimed	U S LASSEN NATL FOREST	0	NR		year-round		D,FP,R	
F003440S		Claimed	U S LASSEN NATL FOREST	0	NR				D,FP,R	
S001308		Claimed	SIERRA PACIFIC INDUSTRIES	0	0.06	2010	year-round	1900	DA	
S001309		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1900	DA	
S001310		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1900	DA	
S001311		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1900	DA	
S001312		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1900	DA	
S001313		Claimed	SIERRA PACIFIC INDUSTRIES	0	1.36	2011	year-round	1900	DA	
S001314		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1900	DA	
S007869	pre-1914	Claimed	JOSEPH A BENATAR	0	60	2010	year-round	1893	I,D,O	40
S010775		Claimed	Grant Leininger	0	56	2010	year-round	1893	I,S	192
S012359		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1945	FP	
S012360		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1945	FP	
S012361		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1945	FP	
S012374		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1945	FP	
S012375		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1945	FP	
S012376		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1945	FP	
S012377		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1945	FP	
S012396		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	year-round	1945	FP	
S013587		Claimed	DIAMOND LANDS CORPORATION	0	0	2010	April-Nov	1900	FP	
S013594		Claimed	DIAMOND LANDS CORPORATION	0	0	2010	April-Nov	1900	FP	
S013595		Claimed	DIAMOND LANDS CORPORATION	0	1.93	2010	year-round	1905	DA	
S013596		Claimed	DIAMOND LANDS CORPORATION	0	0	2010	April-Nov	1900	FP	
S013597		Claimed	DIAMOND LANDS CORPORATION	0	0	2010	April-Nov	1900	DA	
S013598		Claimed	DIAMOND LANDS CORPORATION	0	0	2010	April-Nov	1900	DA	
S013599		Claimed	DIAMOND LANDS CORPORATION	0	0	2010	April-Nov	1900	FP	
S013600		Claimed	DIAMOND LANDS CORPORATION	0	0	2010	April-Nov	1900	DA	
S013601		Claimed	DIAMOND LANDS CORPORATION	0	0	2010	April-Nov	1900	FP	
S013602		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	2010	April-Nov	1900	DA	
S013603		Claimed	DIAMOND LANDS CORPORATION	0	0	2010	April-Nov	1900	DA	
S016163		Claimed	U S LASSEN NATL FOREST	4,300	4440	2011	year-round	1905	RAH	
S016808		Claimed	SIERRA PACIFIC INDUSTRIES	0.95	0	2010			DA	
S018670		Claimed	Rumiano Farms	0	NR				D	
S019663		Claimed	SIERRA PACIFIC INDUSTRIES	0,92	0	2010			FP	
S023166		Claimed	Rumiano Farms	0	NR				O	

Adjudicated pre-1914 Appropriative Rights

Application ID	License ID	Status	Primary Owner	Face Value	Reported Use (AF)	Report Date	Season	Year of First Use	Beneficial Use	Acres Irrigated
S000729		Claimed	STANFORD VINA RANCH IRRIGATION CO	0	17066	2011	04/01-10/31	1900	I,S	5700
S000730		Claimed	STANFORD VINA RANCH IRRIGATION CO	0	1264	2011	04/01-10/31	1900	I,S	5700
S000731		Claimed	DEER CREEK IRRIGATION DISTRICT	0	20400	2010	year-round	1923	I,S	1900

Post-1914 Appropriative Rights

Application ID	License ID	Status	Primary Owner	Face Value	Reported Use (AF)	Report Date	Season	Filing Date	Beneficial Use	Acres Irrigated
A001041	485	Licensed	STANFORD VINA RANCH IRRIGATION CO	4,582	17066*	2011	05/01-10/01	8/5/1918	I,S	5700
A008469	2385	Licensed	U S LASSEN NATL FOREST	1	0.55	2010	06/61-10/15	10/11/1935	R	
A012096	4976	Licensed	KEN C WILLIS	2,172	NR		year-round	9/19/1947	D,P	
A015933	5462	Licensed	DEER CREEK LODGE INC	2,896	48	2012	year-round	6/29/1954	P	
A016224	6088	Licensed	JOSEPH JAMES TREMARI	0.8	2.41	2012	04/01-12/31	1/31/1955	D	
A016223	5702	Licensed	THOMAS T DENNEY	0.1	0.1	2010	year-round	1/31/1955	D	
A016238	7247	Licensed	WALTER ALBERT	2.6	1.96	2010	year-round	2/15/1955	D	
A018477	7356	Licensed	DOROTHY ANNE TREMARI	1.7	2.41	2010	04/01-12/31	1/19/1959	D	
A020250	9007	Licensed	DEER CREEK LODGE INC	9	0.29	2010	year-round	6/6/1961	D	
C003886	3886	Certified	EDWIN L GAULT	0	NR		11/01-5/01	8/8/1985	S	
C005299	5299	Certified	RICHARD D SUMMERS	1.5	NR		year-round	1/5/1988	S	

*Reported use under A001041 is a duplication of the use reported under S000729

- I= Irrigation

S= Stockwatering

RAH= Riparian and Aquatic Habitat

D= Domestic

O= Other
- DA= Dust Abatement

FP= Fire Protection

R= Recreational

P= Power

APPENDIX L

**STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL
PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS
ORDER WR 2015-0019-DWR**

CURTAILMENT ORDER

In the Matter of Diversion of Water from

**DEER CREEK TRIBUTARY TO THE
SACRAMENTO RIVER
IN
TEHAMA COUNTY**

* * *

5. On March 17, 2015, the State Water Board adopted an emergency regulation for Curtailment of Diversions due to Insufficient Flow for Specific Fisheries for Mill, Deer, and Antelope Creeks (California Code of Regulations, title 23, sections 877 through 879.2¹) (Regulation). The Office of Administrative Law reviewed and approved the Regulation. The Regulation is effective March 30, 2015 to December 29, 2015. The Regulation establishes drought emergency minimum flow requirements for the protection of specific runs of federal- and

¹ All further section references are to California Code of Regulations, title 23, unless otherwise indicated.

state-listed anadromous fish in Mill Creek, Deer Creek, and Antelope Creek. The Regulation provides that diversions from Mill Creek, Deer Creek, and Antelope Creek are unreasonable if those diversions will cause flows to drop below specified minimum flows. Under the Regulation, diversions will be curtailed as appropriate to maintain those minimum flows, with the exception of diversions necessary for minimum health and safety needs. The diversion or use of water in violation of the Regulation is an unreasonable diversion or use and a violation of Water Code section 100.

6. Pursuant to section 877, the State Water Board has determined that it is a waste and unreasonable use under Article X, section 2 of the California Constitution to continue diversions that would cause or threaten to cause flows to fall beneath the drought emergency minimum flows provided in subdivision (c) of section 877, except as provided for minimum health and safety needs in accordance with section 878.1.

* * *

FINDINGS:

1. Section 877, subdivision (c)(2) of title 23 of the California Code of Regulations establishes drought emergency minimum flows for Deer Creek under certain conditions.
2. The conditions under which the drought emergency minimum flows identified in section 877, subdivision (c) apply are now in effect, and threatened species, such as adult and juvenile CV SR

salmon and juvenile CCV steelhead are present at this time.

3. The Deputy Director for the Division of Water Rights has determined that without curtailment of diversions from Deer Creek, the flows in Deer Creek have been, and are likely to continue to be, reduced below the drought emergency minimum flows specified in section 877 subdivision (c)(2).

IT IS HEREBY ORDERED:

1. All water rights holders in the Deer Creek watershed, including but not limited to those identified in Attachment A, are subject to curtailment pursuant to California Code of Regulations, title 23, sections 877 through 879.2 and shall immediately cease or reduce their diversions from Deer Creek to ensure the drought emergency minimum flows specified in section 877, subdivision (c)(2) are satisfied through June 30, 2015 or until the Deputy Director suspends the Curtailment Order under section 877, subdivision (c)(2)(E), as follows:
 - (A) All post-1914 appropriative rights holders are curtailed under this Order except as provided in sections 878 (non-consumptive uses), 878.1 (minimum health and safety needs), and 878.2 (local co-operative solutions), and upon approval of the Deputy Director for the Division of Water Rights.
 - (B) All diverters on Deer Creek shall bypass 50 cfs or full natural flow without diversion, whichever is less, in order to obtain/maintain base flows for adult CV SR salmon migration. Flows in excess of the 50 cfs base flow can be

taken in accordance with priority and basis of right, except for those post-1914 appropriative right holders referenced in paragraph 1(A), above. The base flows for adult CV SR salmon migration shall be satisfied through June 15, 2015 unless the Deputy Director suspends the Curtailment Order or the Deputy Director receives notification from the California Department of Fish and Wildlife and/or the National Marine Fisheries Service that adult CV SR salmon migration has ended.

- (C) Upon notification to the Deputy Director from the California Department of Fish and Wildlife and/or the National Marine Fisheries Service that adult CV SR salmon migration has ended but that juvenile CV SR salmon or juvenile CVV steelhead are present, base flow requirements will be reduced to 20 cfs pursuant to section 877, subdivision (c)(2)(D). At that time, all diverters on Deer Creek shall bypass 20 cfs or full natural flow without diversion, whichever is less, in order to maintain base flows for juvenile CV SR salmon or juvenile CCV steelhead migration. Flows in excess of the 20 cfs base flow can be diverted by water rights holders in accordance with priority and basis of right, except for those post-1914 appropriative right holders referenced in paragraph 1(A) above.
- (D) When a pulse flow is required under section 877, subdivision (c)(2)(A)(ii) or (c)(2)(B)(i), all diverters on Deer Creek are curtailed and must cease diverting to ensure that the pulse flow of 100 cfs or full flow without diversions,

whichever is less, is bypassed at their point of diversion. If full natural flows exceed 100 cfs at a time when pulse flow is required, then flows in excess of 100 cfs can be diverted by water right holders in accordance with water right priority and basis of right, except for those post-1914 appropriative right holders referenced in paragraph 1(A) above.

2. This Curtailment Order shall be effective beginning on April 18, 2015.
3. In accordance with section 877 subdivision (d), water rights holders or agents of record who receive this Order are responsible for immediately providing notice of this Order to all diverters exercising a water right on Deer Creek. Stanford Vina Ranch Irrigation Company and Deer Creek Irrigation District are responsible for immediately providing notice of this curtailment order to all water rights holders to which they provide water under the curtailed water rights.
4. All water users or water right holders receiving this Order are required, within five (5) days of issuance of this Order, to submit under penalty of perjury a certification in accordance with section 879.
5. In accordance with section 879.2, diversion or use in violation of this Curtailment Order constitutes an unauthorized diversion or use. Violations of this Order shall be subject to further enforcement and any applicable penalties pursuant to Water Code sections 1052, 1831, 1845, and 1846. To the extent of any conflict between the requirements of this Curtailment Order and any other applicable

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Orders, notices of curtailment or conditions of approval, the diverter must comply with the requirements that are most stringent.

* * *

STATE WATER RESOURCES CONTROL BOARD

/s/ Barbara Evoy
Barbara Evoy, Deputy Director
Division of Water Rights

Dated: April 17, 2015

ATTACHMENT A
ORDER WR 2015-0019-DWR

DEER CREEK WATER RIGHTS
eWRIMS Application Search Results: 2/20/2015

Riparian Rights and Federal Filings

Application ID	License ID	Status	Primary Owner	Face Value	2010-2014 Average Reported Demand (acre-ft)	Season	Year of First Use	Beneficial Use	Acres Irrigated
F003439S		Claimed	U S LASSEN NATL FOREST	0	NR	year-round		D,FP,R	
F003440S		Claimed	U S LASSEN NATL FOREST	0	NR			D,FP,R	
S001308		Claimed	SIERRA PACIFIC INDUSTRIES	0	0.03	year-round	1900	DA	
S001309		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1900	DA	
S001310		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1900	DA	
S001311		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1900	DA	
S001312		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1900	DA	
S001313		Claimed	SIERRA PACIFIC INDUSTRIES	0	0.68	year-round	1900	DA	
S001314		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1900	DA	
S007869		Claimed	JOSEPH A BENATAR	0	60	year-round	1893	I,D,O	40
S010775	pre-1914	Claimed	Grant Leininger	0	56	year-round	1893	I,S	192
S012359		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1945	FP	
S012360		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1945	FP	
S012361		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1945	FP	
S012374		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1945	FP	
S012375		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1945	FP	
S012376		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1945	FP	
S012377		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1945	FP	
S012396		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1945	FP	
S013587		Claimed	DIAMOND LANDS CORPORATION	0	0.00	April-Nov	1900	FP	
S013594		Claimed	DIAMOND LANDS CORPORATION	0	0	April-Nov	1900	FP	
S013595		Claimed	DIAMOND LANDS CORPORATION	0	0.6905	year-round	1905	DA	
S013596		Claimed	DIAMOND LANDS CORPORATION	0	0.0460	April-Nov	1900	FP	
S013597		Claimed	DIAMOND LANDS CORPORATION	0	0.0460	April-Nov	1900	DA	
S013598		Claimed	DIAMOND LANDS CORPORATION	0	0.0000	April-Nov	1900	DA	
S013599		Claimed	DIAMOND LANDS CORPORATION	0	0.0767	April-Nov	1900	FP	
S013600		Claimed	DIAMOND LANDS CORPORATION	0	0	April-Nov	1900	DA	
S013601		Claimed	DIAMOND LANDS CORPORATION	0	0	April-Nov	1900	FP	
S013602		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	April-Nov	1900	DA	
S013603		Claimed	DIAMOND LANDS CORPORATION	0	0	April-Nov	1900	DA	

S016163		Claimed	U S LASSEN NATL FOREST	4,300	4044	year-round	1905	RAH	
S016808		Claimed	SIERRA PACIFIC INDUSTRIES	0.95	0			DA	
S018670		Claimed	Rumiano Farms	0	NR			D	
S019663		Claimed	SIERRA PACIFIC INDUSTRIES	0,92	0			FP	
S023166		Claimed	Rumiano Farms	0	NR			O	

Adjudicated pre-1914 Appropriative Rights

Application ID	License ID	Status	Primary Owner	Face Value	2010-2014 Average Reported Demand (acre-ft)	Season	Year of First Use	Beneficial Use	Acres Irrigated
S000729		Claimed	STANFORD VINA RANCH IRRIGATION CO	0	16779	04/01-10/31	1900	I,S	5700
S000730		Claimed	STANFORD VINA RANCH IRRIGATION CO	0	900	04/01-10/31	1900	I,S	5700
S000731		Claimed	DEER CREEK IRRIGATION DISTRICT	0	11201	year-round	1923	I,S	1900

Post-1914 Appropriative Rights

Application ID	License ID	Status	Primary Owner	Face Value	2010-2014 Average Reported Demand (acre-ft)	Season	Filing Date	Beneficial Use	Acres Irrigated
A001041	485	Licensed	STANFORD VINA RANCH IRRIGATION CO	4,582	17066*	05/01-10/01	8/5/1918	I,S	5700
A008469	2385	Licensed	U S LASSEN NATL FOREST	1	0.55	06/61-10/15	10/11/1935	R	
A012096	4976	Licensed	KEN C WILLIS	2,172	NR	year-round	9/19/1947	D,P	
A015933	5462	Licensed	DEER CREEK LODGE INC	2,896	48	year-round	6/29/1954	P	
A016224	6088	Licensed	JOSEPH JAMES TREMARI	0.8	2.41	04/01-12/31	1/31/1955	D	
A016223	5702	Licensed	THOMAS T DENNEY	0.1	0.1	year-round	1/31/1955	D	
A016238	7247	Licensed	WALTER ALBERT	2.6	1.96	year-round	2/15/1955	D	
A018477	7356	Licensed	DOROTHY ANNE TREMARI	1.7	2.41	04/01-12/31	1/19/1959	D	
A020250	9007	Licensed	DEER CREEK LODGE INC	9	0.29	year-round	6/6/1961	D	
C003886	3886	Certified	EDWIN L GAULT	0	NR	11/01-5/01	8/8/1985	S	
C005299	5299	Certified	RICHARD D SUMMERS	1.5	NR	year-round	1/5/1988	S	

- I= Irrigation
- S= Stockwatering
- RAH= Riparian and Aquatic Habitat
- D= Domestic
- O= Other
- DA= Dust Abatement
- FP= Fire Protection
- R= Recreational
- P= Power

APPENDIX M

**STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL
PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS
ORDER WR 2015-0036-DWR**

CURTAILMENT ORDER

In the Matter of Diversion of Water from

**DEER CREEK TRIBUTARY TO THE
SACRAMENTO RIVER
IN
TEHAMA COUNTY**

* * *

5. On March 17, 2015, the State Water Board adopted an emergency regulation for Curtailment of Diversions due to Insufficient Flow for Specific Fisheries for Mill, Deer, and Antelope Creeks (California Code of Regulations, title 23, sections 877 through 879.2¹) (Regulation). The Office of Administrative Law reviewed and approved the Regulation on March 30, 2015. The Regulation is effective March 30, 2015 to December 29, 2015. The Regulation establishes drought emergency minimum flow requirements for the protection of specific

¹ All further section references are to California Code of Regulations, title 23, unless otherwise indicated.

runs of federal-and state-listed anadromous fish in Mill Creek, Deer Creek, and Antelope Creek. The Regulation provides that diversions from Mill Creek, Deer Creek, and Antelope Creek are unreasonable if those diversions will cause flows to drop below specified minimum flows. Under the Regulation, diversions will be curtailed as appropriate to maintain those minimum flows, with the exception of diversions necessary for minimum health and safety needs. The diversion or use of water in violation of the Regulation is an unreasonable diversion or use and a violation of Water Code section 100.

6. Pursuant to section 877, the State Water Board has determined that it is a waste and unreasonable use under Article X, section 2 of the California Constitution to continue diversions that would cause or threaten to cause flows to fall beneath the drought emergency minimum flows provided in subdivision (c) of section 877, except as provided for minimum health and safety needs in accordance with section 878.1.

* * *

11. On October 9, 2015, the CDFW submitted a memorandum to the Deputy Director confirming the presence of adult CCV steelhead in the Upper Sacramento River Basin, and the presence of juvenile CV SR salmon and juvenile CCV steelhead in Deer and Antelope Creeks. The memorandum also confirms that current agricultural diversions on Deer and Antelope Creeks have resulted in dewatering of stream sections in the lower reaches of these creeks between the confluence with the Sacramento River and diversion dams.

The conditions created by reduced flows from diversions in Deer Creek prohibit adult CCV steelhead currently migrating in the Sacramento River from entering Deer Creek and gaining access to spawning habitat upstream of diversion dams. Juvenile CV SR salmon and juvenile CCV steelhead are prevented from reaching the Sacramento River. The memorandum notes that historical data and trapping data show that steelhead migration begins in July and peaks in late September and early October. Pursuant to section 877, subdivision (a), for the protection of threatened and endangered fish and due to the ongoing drought and environmental conditions, the CDFW and NMFS request that the State Water Board curtail Deer Creek diversions no later than 8:00 AM on October 23, 2015.

* * *

16. On November 27, 1923 the Superior Court of Tehama County entered a judgment (Adjudication) granting 100 percent of the flow in Deer Creek (as measured at United States Geological Survey [USGS] gauge 11383500) to the predecessors in interest of the Stanford Vina Ranch Irrigation Company (approximately 65 percent) and Deer Creek Irrigation District (approximately 35 percent). The Adjudication designated that the average amount of water naturally flowing in Deer Creek, during the irrigation season, as 150 second feet or 6,000 miner's inches and allocated 100 percent of that flow as previously provided. At times when the natural flow in Deer Creek is less than, or more than, 150 second feet or 6,000 miner's inches, then the Adjudication diminishes, or

augments the flow allocations proportionally. (Adjudication, Articles XI and XIII, pp. 10, 11.) Stanford Vina Ranch Irrigation Company's points of diversion are downstream of the point of diversion for Deer Creek Irrigation District. (Adjudication, Articles XI and XIII, pp. 10, 11.) The Adjudication was amended in 1926 to grant approximately 66 percent of the Deer Creek flows below USGS gauge 11383500 to Stanford Vina Ranch Irrigation Company, 33 percent of the Deer Creek flows to Deer Creek Irrigation District and one percent of the Deer Creek flows to Sheep Camp Ditch for stock watering.

* * *

FINDINGS

1. Section 877, subdivision (c)(2) of title 23 of the California Code of Regulations establishes drought emergency minimum flows for Deer Creek under certain conditions.
2. The conditions under which the drought emergency minimum flows identified in section 877, subdivision (c) apply are now in effect and threatened species, such as adult and juvenile CCV steelhead and juvenile CV SR salmon, are present at this time.
3. The Deputy Director has determined that without curtailment of diversions from Deer Creek the flows in Deer Creek have been, and are likely to continue to be, reduced below the drought emergency minimum flows specified in section 877 subdivision (c)(2).

IT IS HEREBY ORDERED

1. All water rights holders in the Deer Creek watershed, including but not limited to those identified in Attachment A, are subject to curtailment pursuant to California Code of Regulations, title 23, sections 877 through 879.2 and shall immediately cease or reduce their diversions from Deer Creek to ensure the drought emergency minimum flows specified in section 877, subdivision (c)(2) are satisfied no later than 8:00 AM on October 23, 2015 through March 31, 2016 or until the Deputy Director suspends the Curtailment Order under section 877, subdivision (c)(2)(E), as follows:
 - (A) All post-1914 appropriative rights holders are curtailed under this Order except as provided in sections 878 (non-consumptive uses), 878.1 (minimum health and safety needs), and 878.2 (local cooperative solutions).
 - (B) All diverters on Deer Creek shall bypass 50 cfs or full natural flow without diversion, whichever is less, in order to obtain/maintain base flows for adult CCV steelhead salmon migration. Flows in excess of the 50 cfs base flow can be taken in accordance with priority and basis of right, except for those post-1914 appropriative right holders referenced in paragraph 1(A), above. The base flows for adult CCV steelhead migration shall be satisfied through March 31, 2016 unless the Deputy Director suspends the Curtailment Order or the Deputy Director receives notification from the CDFW or NMFS that adult CCV steelhead migration has ended.

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* * *

2. This Order shall be effective beginning on October 23, 2015 at 8:00 AM.
3. In accordance with section 877 subdivision (d), water rights holders or agents of record who receive this Order are responsible for immediately providing notice of this Order to all diverters exercising a water right on Deer Creek. Stanford Vina Ranch Irrigation Company and Deer Creek Irrigation District are responsible for immediately providing notice of this Order to all water rights holders to which they provide water under the curtailed water rights.
4. All water users or water right holders receiving this Order are required, within five days of issuance of this Order, to submit under penalty of perjury a certification in accordance with section 879.
5. In accordance with section 879.2, diversion or use in violation of this Order constitutes an unauthorized diversion or use. Violations of this Order shall be subject to further enforcement and any applicable penalties pursuant to Water Code sections 1052, 1831, 1845 and 1846, To the extent of any conflict between the requirements of this Order and any other applicable orders, notices of curtailment or conditions of approval, the diverter must comply with the requirements that are most stringent

* * *

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STATE WATER RESOURCES CONTROL BOARD

/s/ Barbara Evoy
Barbara Evoy, Deputy Director
Division of Water Rights

Dated: October 22, 2015

ATTACHMENT A
ORDER WR 2015-0036-DWR

DEER CREEK WATER RIGHTS
eWRIMS Application Search Results: 2/20/2015

Riparian Rights and Federal Filings

Application ID	License ID	Status	Primary Owner	Face Value	2010-2014 Average Reported Demand (acre-ft)	Season	Year of First Use	Beneficial Use	Acres Irrigated
F003439S		Claimed	U S LASSEN NATL FOREST	0	NR	year-round		D,FP,R	
F003440S		Claimed	U S LASSEN NATL FOREST	0	NR			D,FP,R	
S001308		Claimed	SIERRA PACIFIC INDUSTRIES	0	0.03	year-round	1900	DA	
S001309		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1900	DA	
S001310		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1900	DA	
S001311		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1900	DA	
S001312		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1900	DA	
S001313		Claimed	SIERRA PACIFIC INDUSTRIES	0	0.68	year-round	1900	DA	
S001314		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1900	DA	
S007869		Claimed	JOSEPH A BENATAR	0	60	year-round	1893	I,D,O	40
S010775	pre-1914	Claimed	Grant Leininger	0	56	year-round	1893	I,S	192
S012359		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1945	FP	
S012360		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1945	FP	
S012361		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1945	FP	
S012374		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1945	FP	
S012375		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1945	FP	
S012376		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1945	FP	
S012377		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1945	FP	
S012396		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	year-round	1945	FP	
S013587		Claimed	DIAMOND LANDS CORPORATION	0	0.00	April-Nov	1900	FP	
S013594		Claimed	DIAMOND LANDS CORPORATION	0	0	April-Nov	1900	FP	
S013595		Claimed	DIAMOND LANDS CORPORATION	0	0.6905	year-round	1905	DA	
S013596		Claimed	DIAMOND LANDS CORPORATION	0	0.0460	April-Nov	1900	FP	
S013597		Claimed	DIAMOND LANDS CORPORATION	0	0.0460	April-Nov	1900	DA	
S013598		Claimed	DIAMOND LANDS CORPORATION	0	0.0000	April-Nov	1900	DA	
S013599		Claimed	DIAMOND LANDS CORPORATION	0	0.0767	April-Nov	1900	FP	
S013600		Claimed	DIAMOND LANDS CORPORATION	0	0	April-Nov	1900	DA	
S013601		Claimed	DIAMOND LANDS CORPORATION	0	0	April-Nov	1900	FP	
S013602		Claimed	SIERRA PACIFIC INDUSTRIES	0	0	April-Nov	1900	DA	
S013603		Claimed	DIAMOND LANDS CORPORATION	0	0	April-Nov	1900	DA	

S016163		Claimed	U S LASSEN NATL FOREST	4,300	4044	year-round	1905	RAH	
S016808		Claimed	SIERRA PACIFIC INDUSTRIES	0.95	0			DA	
S018670		Claimed	Rumiano Farms	0	NR			D	
S019663		Claimed	SIERRA PACIFIC INDUSTRIES	0,92	0			FP	
S023166		Claimed	Rumiano Farms	0	NR			O	

Adjudicated pre-1914 Appropriative Rights

Application ID	License ID	Status	Primary Owner	Face Value	2010-2014 Average Reported Demand (acre-ft)	Season	Year of First Use	Beneficial Use	Acres Irrigated
S000729		Claimed	STANFORD VINA RANCH IRRIGATION CO	0	16779	04/01-10/31	1900	I,S	5700
S000730		Claimed	STANFORD VINA RANCH IRRIGATION CO	0	900	04/01-10/31	1900	I,S	5700
S000731		Claimed	DEER CREEK IRRIGATION DISTRICT	0	11201	year-round	1923	I,S	1900

Post-1914 Appropriative Rights

Application ID	License ID	Status	Primary Owner	Face Value	2010-2014 Average Reported Demand (acre-ft)	Season	Filing Date	Beneficial Use	Acres Irrigated
A001041	485	Licensed	STANFORD VINA RANCH IRRIGATION CO	4,582	17066*	05/01-10/01	8/5/1918	I,S	5700
A008469	2385	Licensed	U S LASSEN NATL FOREST	1	0.55	06/61-10/15	10/11/1935	R	
A012096	4976	Licensed	KEN C WILLIS	2,172	NR	year-round	9/19/1947	D,P	
A015933	5462	Licensed	DEER CREEK LODGE INC	2,896	48	year-round	6/29/1954	P	
A016224	6088	Licensed	JOSEPH JAMES TREMARI	0.8	2.41	04/01-12/31	1/31/1955	D	
A016223	5702	Licensed	THOMAS T DENNEY	0.1	0.1	year-round	1/31/1955	D	
A016238	7247	Licensed	WALTER ALBERT	2.6	1.96	year-round	2/15/1955	D	
A018477	7356	Licensed	DOROTHY ANNE TREMARI	1.7	2.41	04/01-12/31	1/19/1959	D	
A020250	9007	Licensed	DEER CREEK LODGE INC	9	0.29	year-round	6/6/1961	D	
C003886	3886	Certified	EDWIN L GAULT	0	NR	11/01-5/01	8/8/1985	S	
C005299	5299	Certified	RICHARD D SUMMERS	1.5	NR	year-round	1/5/1988	S	

- I= Irrigation
- S= Stockwatering
- RAH= Riparian and Aquatic Habitat
- D= Domestic
- O= Other
- DA= Dust Abatement
- FP= Fire Protection
- R= Recreational
- P= Power

APPENDIX N

**Court Reporter Transcript of
SWRCB Workshop, May 20, 2014**

**Administrative Record Bates Nos. 008249, 8253,
8255, Transcript pages 11:16-12:6, 26:24-28:17,
33:5-14 [Emphasis Added]**

* * *

[Dan Shultz, SWRCB Manager for Public Trust Section of Division of Water Rights]

Currently, for the State Water Board to take an enforcement action in absence of the regulation, curtailment would be based solely upon protecting senior water rights. Illegal diversion may be investigated and charged separately and *water right holders may request a full evidentiary hearing* on issues that include availability of water under the water right holder's priority, and the administrative decision is then subject to review in the Superior Court system. *As such, enforcement in the absence of a regulation is cumbersome* in that it is less likely to be effective in time to protect anadromous salmonids. *In the current situation, time is of the essence.* The curtailment in the absence of the regulation would also not address minimum flows needed for protection of the threatened anadromous salmonids.

* * *

MR. O'LAUGHLIN: Well, no. This is Tim O'Laughlin, representing Deer Creek Irrigation District. So I'm going to be standing up periodically during this presentation, and probably others, and making certain comments and statements and then sitting down because we're going to make a record.

So, my first comment or statement is since this is a quasi-adjudicatory process, my client's water rights are at risk. And since you are doing a waste and unreasonable use determination on their water rights, according to due process we would like to cross-examine this witness before we move to the other witnesses.

[SWRCB] MEMBER DUDOC: I would like to hear from counsel. I don't believe this is a quasi-adjudicatory process.

[SWRCB] VICE CHAIR SPIVY-WEBER: I don't think it is either.

[SWRCB Counsel] MR. LAUFFER: Michael Lauffer, Chief Counsel to the board. I'm not Jonathan Bishop, chief deputy.

The process Mr. O'Laughlin is referring to is of course the board's customary process where we have conducted adjudicative proceedings in order to establish and allocate flow requirements in an entity or person's water rights.

However, it is not unprecedented for the board to use waste and unreasonable use authority through a quasi-legislative proceeding and we have made the determination here that it is appropriate, given the circumstances outlined in the resolution that's been prepared for the board for today, to use a quasi-legislative process. *As part of that quasi-legislative process, there is not an opportunity for cross-examination.* Certainly, as Mr. O'Laughlin and others go through and they have questions, either for staff or for the board that they would like the board to have staff respond to, that would be helpful in identifying the issues. And certainly I think for the board members in terms of making their determinations, they would like to hear a lot of those questions answered.

This is an exigent circumstance where, in order to provide a timely and appropriate mechanism, the board is – or board staff is proposing that the board proceed through this quasi-legislative process.

* * *

[SWRCB Counsel] MR. LAUFFER: Certainly. And I understand that Mr. O'Laughlin is making his record and his clients have a significant interest that he's interested in preserving for them. And obviously this isn't a quasi – Mr. O'Laughlin's arguments notwithstanding, *this is not a quasi-judicial proceeding. We're styling this as a quasi-legislative proceeding. That*

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*means that the board has considerable flexibility in
terms of how it structures this.*

* * *

APPENDIX O

**Administrative Record Bates
Nos. 007815-007816 [Emphasis Added].**

**Propose Rulemaking Package for May 20, 2014
SWRCB Board Meeting**

* * *

Description and Effect of Proposed Regulation

The proposed emergency adoption of Article 24 will set drought emergency minimum flows necessary to maintain fish passage in three priority tributaries for protection of threatened CVSRCS and CCV Steelhead. Under the proposed regulations, the State Water Board would curtail diverters in these watersheds in the order of priority as necessary to maintain a reasonable assurance of meeting the minimally protective flows, and the needs of senior users. *The requirement to curtail when water above drought emergency minimum flows is unavailable would constitute both a regulatory requirement and a condition of all permits and licenses in the affected watersheds.* The proposed regulation also establishes procedures for important exceptions to priority-based curtailments in order to protect public health and safety.

Proposed Emergency Regulation Section 877

Proposed Section 877 would establish drought emergency minimum flow levels in Deer Creek, Mill Creek and Antelope Creek to allow for migratory passage of adult and juvenile CV SRCS and CCV Steelhead. The

description and rationale for the flows is detailed below.

The State Water Board recognizes that the drought emergency minimum flows described below do not represent optimal passage conditions for Chinook salmon and steelhead under these drought conditions and these minimum passage flows will result in stressful passage conditions for salmonids. *The State Water Board has identified the need for these drought emergency minimum flows during this drought period due to the lack of developed alternative water supplies to meet the emergency water supply conditions that exist during this drought period. All water users should take measures this year and in future years to develop alternative water supplies, since it is likely more protective and appropriate minimum flows for similar future drought conditions will be established in the future.*

* * *

APPENDIX P

**Court Reporter Transcript of
SWRCB Workshop, May 20, 2014**

**Administrative Record Bates No. 008285-8286,
Reporter Transcript pages 156:25 – 157:11 [Em-
phasis Added]**

[SWRCB] MEMBER D'ADAMO: Okay. So the way I view this – and I'm surprised that nobody brought this up today – *I really think that this waste and unreasonable uses is sort of a back door to reconfiguring the priority of water rights* because in effect, if you look at the curtailment charts that we keep seeing, the supply and demand curve, the most senior would be fish flows. They'd be more senior than riparian would just be, you know, fish flows, riparian, 1914, et cetera. So, it would be another layer that would go on top of the existing curtailment charts that you would otherwise have for those watersheds.

* * *

APPENDIX Q

**Administrative Record Bates
No. 008082-008083 [Emphasis Added]**

**NOTICE OF PROPOSED EMERGENCY RULE-
MAKING Curtailment of Diversions due to
Insufficient Flow for Specific Fisheries Addition
of Article 24, Sections 877 through 879.2,
to Division 3 of Title 23 of the
California Code of Regulations**

* * *

On May 20, 2014, the State Water Board will consider a proposed resolution adding new article 24 to title 23, division 3, chapter 2 of the California Code of Regulations. In general, the emergency regulations would provide the State Water Board with a more streamlined process to curtail diversions of water *to prevent unreasonable diversion or use of water such that appropriate minimum amounts of water are available for: (1) public trust needs* for minimum flows for migration of state- and federally-listed anadromous fish in Mill Creek, Deer Creek and Antelope Creek, (2) senior water rights, and (3) minimum health and safety needs. Under the emergency regulations, the State Water Board would curtail water diversions on a water right priority basis except when water is needed for basic municipal and domestic health and safety needs, or other critical health and safety needs as determined on a case-by-case basis . . .

APPENDIX R

July 21, 2017, Hon. Timothy Frawley, Judge of the
Superior Court of California, County of Sacramento.

*Stanford Vina Ranch Irrigation Company v. State of
California, et al.*

Reporters Transcript page 47:15-20

* * *

THE COURT: This case does manage to exploit in a way that, I think, is somewhat unique in my experience, the difference between quasi legislative and quasi adjudicative. I think I've heard enough argument on the point, and I hope you understand that the Court has wrestled with it quite a bit, but I'll hear your next argument, Mr. Minasian.

* * *

APPENDIX S

**Administrative Record Bates No. 008052-008081
[Notices of Regulations]**

**NOTICE OF PROPOSED EMERGENCY RULE-
MAKING FOR CURTAILMENT OF DIVERSIONS
DUE TO INSUFFICIENT FLOWS FOR SPECIFIC
FISHERIES**

[Twenty-Nine (29) total water right holders from Mill,
Deer, and Antelope Creeks who were notified and tar-
geted by the regulations]

* * *

CANDACE OWENS
13815 TRINITY AVE
RED BLUFF, CA 96080

* * *

CALIF DEPT OF
TRANSPORTATION
C/O CONTRACT
MANAGER
1490 GEORGE DR
REDDING, CA 96003

* * *

CRANE MILLS
PO BOX 318
CORNING, CA 96021

* * *

DEER CREEK LODGE
INC
C/O NORMAN
BATEMAN
ROUTE 5, BOX 4000
MILL CREEK, CA 96061

* * *

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DIAMOND LANDS
CORPORATION
PO BOX 496014
REDDING, CA 96049

* * *

LOS MOLINOS
MUTUAL WATER CO
PO BOX 211
LOS MOLINOS, CA
96055

* * *

MILL CREEK/LASSEN
MUTUAL WATER
COMPANY
C/O TERRY NEHER
40286 TAMARACK WAY
MILL CREEK, CA 96061

* * *

RUMIANO FARMS
5485 HWY 99E
VINA, CA 96092

* * *

STANFORD VINA RANCH THE NATURE
IRRIGATION CO CONSERVANCY
PO BOX 248
VINA, CA 96092 11010 FOOTHILL BLVD
LOS MOLINOS, CA

* * *

96055

* * *

U S LASSEN NATL
FOREST
2550 RIVERSIDE DR
SUSANVILLE, CA 96130

* * *

UPPER SWANSTON
RANCH INC
C/O WAGNER AND
BONSIGNORE, CCE
2151 RIVER PLAZA DR.
STE 100
SACRAMENTO, CA
95833

* * *

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KEN WILLIS
C/O FIRE MOUNTAIN
LODGE
PO BOX 1128
CHESTER, CA 96020

* * *

JOSEPH TREMARI
5775 BLOOMFIELD RD
PETALUMA, CA 94952

* * *

DOROTHY TREMARI
5775 BLOOMFIELD RD
PETALUMA, CA 94952

* * *

RICHARD SUMMERS
PO BOX 145
VINA, CA 96092

* * *

GRANT LEININGER
PO BOX 82
VINA, CA 96092

* * *

DAN MULHOLLAND
12005 FOOTHILL RD
RED BLUFF, CA 96080

* * *

THOMAS DENNEY
44305 STATE HIGHWAY
36 E # 36
MILL CREEK, CA 96061

* * *

WALTER ALBERT
PO BOX 305
CHESTER, CA 96020

* * *

EDWIN GAULT
PO BOX 36
LOS MOLINOS, CA
96055

* * *

JOSEPH BENATAR
1445 HONOR OAK LN
YUBA CITY, CA 95993

* * *

DOUGLAS REED
12005 FOOTHILL RD
RED BLUFF, CA 96080

* * *

JEROME OLIVER
25179 68TH AVE
LOS MOLINOS, CA
96055

* * *

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JOHN REIS
2140 SHARON RD
MENLO PARK, CA 94025

* * *

RICHARD O'SULLIVAN
17750 TRAMWAY RD
PAYNES CREEK, CA
96075

* * *

CANDACE OWENS
13815 TRINITY AVE
RED BLUFF, CA 96080

* * *

ROBERT MELEEN
84 BOSTON AVE
SAN JOSE, CA 95128

* * *

W EDWARDS
13038 HWY 99E
RED BLUFF, CA 96080

* * *

PETER SEWARD
2485 NOTRE DAME
BLVD STE 370-F
CHICO, CA 95928

* * *

APPENDIX T

**Administrative Record Bates
Nos. 002843-002859 [Emphasis Added]**

**MEMORANDUM OF AGREEMENT BETWEEN
THE STATE OF CALIFORNIA DEPARTMENT
OF FISH & GAME, DEPARTMENT OF
WATER RESOURCES, AND DEER CREEK
IRRIGATION DISTRICT FOR
CONSTRUCTION, OPERATION,
MAINTENANCE AND MONITORING
OF A FLOW ENHANCEMENT PROGRAM
ON DEER CREEK IN TEHAMA COUNTY**

This Memorandum of Agreement (“Agreement”), made this ____ day of ____ 2007, is between the Department of Fish and Game (DFG) and the Department of Water Resources (DWR) (collectively “the State”), and the Deer Creek Irrigation District (DCID).

RECITALS

The State and DCID (collectively “the Parties”) recognize the need for a long-term solution to fish transportation issues in Deer Creek. In furtherance of that mutual goal, the proposed Deer Creek Flow Enhancement Program (“Program”) is intended to augment fish transportation flows in Deer Creek . . .

* * *

A. Under the proposed Program, Program Wells (as defined in § I.1) will be installed and operated to provide DCID with a supplemental agricultural water

supply in an amount equal to the quantity of surface water diversions which DCID may forego in order to provide fish transportation flows.

B. This Agreement may be amended to include additional water supplies from efficiency improvements to DCID's distribution system or new water management techniques if it can be demonstrated that such improvements or techniques will allow DCID to forego additional surface water diversions in order to provide increased fish transportation flows under the proposed Program . . .

* * *

E. In accordance with the initial cost planning and permitting estimates (set out in Appendix A, attached), *the proposed Program will operate from April 1 through June 30 and October 15 through November 15 when the Deer Creek flow, as measured below the Stanford Vina Diversion Dam, is equal to or less than 50 cfs, or upon mutual consent of DCID, DFG, and DWR.* Program operations carried out pursuant to this Agreement will change from Year-to year, but will be within the projected range of initial planning and permitting estimates. Program operations will be implemented in flow capacity intervals which are practical for monitoring and approximately equal to the increased capacity associated with individual Program Well capacity and/or capacity intervals associated with water savings due to application of AgWUE measures. As such, Base Flow contribution by DCID may result in Deer

Creek flow greater than 50 cfs, as measured below the Stanford Vina Diversion Dam . . .

* * *

- 1.0 *DWR, as administrator of this Agreement, will pay all reasonable costs associated with the construction and operation, and maintenance Program wells in accordance with both the budget as set forth in Appendix A and the terms set forth in Section 9.0 no payment . . .*

* * *

- 1.3 DWR, with DFG concurrent, will pay to obtain access easements for installation and operation of Program Wells and related facilities, including any necessary leases of wells.

* * *

APPENDIX U

Administrative Record Bates Nos. 000900-000901

1993 Central Valley Action Plan, California Department of Fish and Wildlife [Emphasis Added]

* * *

Except for the lack of stream flows on the valley floor below the agricultural diversions, fish habitat throughout the drainage is generally of good quality. Water right holders on Deer Creek have recently expressed interest in cooperating with the DFG to develop alternative water sources and to provide fishery flows. Water users are concerned about the depleted status of the spring-run chinook salmon and are willing to work towards mutually acceptable solutions to restore the fishery. *Flows necessary to provide unimpaired migration for adult salmon and steelhead are unknown but have been estimated to be approximately 50 cfs.* Inadequate flow for upstream passage is the most significant problem on Deer Creek. During low flow periods, the fish ladder on the lower diversion dam does not pass fish. The water right permit for this diversion does not require adequate bypass flows to provide for fish passage.

* * *

APPENDIX V

Administrative Record Bates Nos. 002700-002720 [Emphasis Added]

Agreement for the Implementation of a Long-Term Cooperative Management Plan for Mill Creek [2007]

This Agreement (“Agreement”) is made and entered this ____ day of _____, 2007, by and between Los Molinos Mutual Water Company (“Los Molinos”), Department of Water Resources (DWR), Department of Fish and Game (‘DFG’), and Mill Creek Conservancy (“Conservancy”), collectively referred to as the “Parties” and individually referred to generally as “Party.”

I. BACKGROUND

A. The Parties desire to form a managing body (“Management Committee”) for the implementation of a long-term cooperative management plan for Mill Creek, a tributary of the Sacramento River in Tehama County, in a joint effort to provide Spring Flows (May 1 through June 15) and Fall Flows (October 15 through November 30) for the spring and fall run Chinook salmon (*Oncorhynchus tshawytscha*) (collectively “Chinook Flows”) while maintaining and not adversely affecting the use of the water of Mill Creek to supply irrigation water pursuant to the water rights of the water users on Mill Creek (“Irrigation Water”).

B. *Since 1990, the Parties have augmented the Mill Creek flows through water leases, groundwater*

exchange programs, and operational changes to facilities on Mill Creek These efforts have proven beneficial for the Chinook salmon, and the Parties desire to create a long-term management structure for the restoration efforts and ensure that those efforts continue into the future.

* * *

APPENDIX W

**Administrative Record Bates
Nos. 003100-003102 [Emphasis Added]**

**CENTRAL VALLEY SALMON AND
STEELHEAD RECOVERY PLAN WATERSHED
PROFILES, OCTOBER 2009**

* * *

Antelope Creek Watershed Profile

Watershed/Ecosystem Restoration

Relatively few restoration actions are needed to restore watershed and ecosystem function for the purpose of supporting the freshwater life history stages of CV spring-run Chinook salmon and CV steelhead in Antelope Creek. With the exception of Public Draft Recovery Plan . . .

* * *

Key Actions that would help support persistent dependent populations

- Restore instream flows during upstream and downstream migration periods. *Develop water exchange agreements provide alternative water supplies to Edwards Ranch and Los Molinos Mutual Water Company in exchange for instream fish flows*
- Restore connectivity of the migration corridor during upstream and downstream migration periods

* * *

APPENDIX X

Administrative Record Bates Nos. 006872

MEMO: Minimum Protection Flows for Listed Salmonids during the 2014 California Drought for Mill, Deer and Antelope creeks in the California Central Valley

TO: California State Water Resources Control Board
FROM: Gretchen Umlauf, Fisheries Biologist, NOAA's National Marine Fisheries Service, Central Valley Office

THROUGH: Howard Brown, Sacramento River Basin Branch Chief NOAA's National Marine Fisheries Service, Central Valley Office

DATE: May 7, 2014

* * *

NMFS and CDFW have provide minimum flow recommendation to the SWRCB on Mill, Deer, and Antelope Creeks, along with the supplemental references in an email to your office on May 7, 2014. These flow recommendations were provided for developing emergency regulations.

* * *

APPENDIX Y

Administrative Record Bates No. 7808

**Propose Rulemaking Package for May 20, 2014
SWRCB Board Meeting**

* * *

**Need for Emergency Protective Flows in Mill
Creek, Deer Creek and Antelope Creek**

In this particular case, application of the reasonable use and public trust doctrines requires particularized consideration of the benefits of diverting water for current uses from the identified water bodies and the potential for harm to the protected species from such diversions under the current drought conditions.

* * *

In a memorandum dated May 7, 2014, the National Marine Fisheries Service (NMFS) recommended that the State Water Board use regulatory authority to establish minimum instream flows in Mill, Deer, and Antelope Creeks to address drought impact on ESA-listed fish species in these creeks (Attachment 11).

* * *
