

Sour Grapes: A Potential Prelude to Water Rights Curtailment

In the recent decision *Light v. State Water Resources Control Board* (June 17, 2014) ("Light"), the First Appellate District may have provided the legal pathway for the State Water Resources Control Board ("State Board") to curtail Riparian and Pre-1914 Water Rights in reaction to the drought emergency.

Drought, Water Shortages and Curtailment.

When Governor Edmund G. Brown Jr. proclaimed a drought state of emergency on January 17, 2014, the State Board provided notice that water right holders are likely to face curtailment. The State Board has adopted emergency curtailments regulation on Sacramento River tributaries, and on May 27, 2014 issued a curtailment notice on the Sacramento and San Joaquin River watersheds for post-1914 appropriate rights. Perhaps foreshadowing future events, the notice states that "If current conditions persist, the State Water Board may curtail some pre-1914 and riparian water rights in the near future."

In California's dual system of water rights, riparian and pre-1914 rights are considered more valuable, afforded greater protection in shortages, and are less regulated by the State Board than post-1914 appropriative rights. Riparian water rights are based on ownership of land adjacent to a water body. Appropriative rights provide the right to divert water for use on noncontiguous lands. The State Board has no permit authority over riparian and pre-1914 water rights. Under the "rule of priority," which governs diversion when water supply is limited, riparian users are entitled to satisfy their reasonable needs first, and share supplies when limited. Riparian users can deprive appropriators of all use of water. Senior appropriators—those who acquired their rights first in time—are entitled to satisfy their reasonable needs before more junior appropriators become entitled to any water.

Does *Light* Illuminate the Path to Riparian and Pre-1914 Water Right Curtailment?

For the reasons stated above, many consider riparian and pre-1914 water rights beyond the regulatory power of the State Board. So how could the State Board curtail these rights as a result of the drought emergency? The *Light* case shows not only the possibility, but the potential legal reasoning for such

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curtailment. In *Light*, a group of grape growers challenged the State Board's authority to adopt a regulation that requires a reduction in riparian and pre-1914 appropriators diversion of water. The regulation was a reaction to the sudden decrease of flow in the Russian River that occurs as a result of the simultaneous spraying of water for frost protection by the area grape growers, resulting in the stranding of salmon, an endangered species.

After a successful challenge at the trial court, on appeal the plaintiffs argued (1) the State Board lacks the authority to enact regulations governing the unreasonable use of water, (2) the State Board lacks the authority to limit the use of water by riparian and pre-1914 appropriators, and (3) the regulation improperly violates the rule of priority. The appellate court disagreed with the trial court and the plaintiffs, concluding that in regulating the unreasonable use of water, the State Board can weigh the use of water for certain public purposes, notably the protection of wildlife habitat, against the commercial use of water by riparian users and early appropriators.

The court supports its position based on two historical concepts of Californian water law. First, the rule of reasonableness, which requires reasonable beneficial use the state's waters. (Cal. Const., art. X, § 2.) The court found that the State Board is charged with acting to prevent unreasonable and wasteful uses of water, regardless of the claim, including riparian and pre-1914 water rights. Although water use to prevent crop frost damage is a beneficial use, under the circumstances of damaging the salmon population, the court upheld the State Board's authority to enact tailored regulation restricting diversion. Likewise, even though these water rights are exemption from State Board permitting authority, the court found that a user's vested right to use water extends only to reasonable beneficial water use determined at the time of use.

Second, the Court relied on the "Public Trust Doctrine," which considers a balancing of a number of public trust interests in allocating water resources, including the protection of habitat for wildlife. Plaintiffs argued that the State Board violated the rule of priority by prohibiting the senior water right holders beneficial use of water and assigning a higher priority to other beneficial uses. The court acknowledged that this is correct, so long as the only water uses involved are those governed by common law and statutory water rights. However, the court reasoned that this case involves more than traditional water rights, and the State Board did not violate the rule of priority by regulating the allocation of water between the beneficial public trust use of maintaining stream levels to avoid salmon deaths and the beneficial use of diversion for frost protection by water rights holders.

Conclusion

In regulating riparian and pre-1914 water rights, the *Light* court determined the reasonableness of the water diversion based on the particular circumstances at the time of diversion, while looking at other competing public trust uses. As in *Light*, the current drought emergency has caused competition for scarce water resources, including stream flows and habitat protection. The State Board has warned about curtailment of riparian and pre-1914 water rights as a result of the drought, and is currently scheduled to consider a proposed resolution for curtailment of diversions to protect senior water rights at its July 1, 2014 meeting. If this and other potential future curtailment by the State Board implicates riparian and pre-1914 water rights, *Light* will likely be used to support such a determination.

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