

New Ruling: CDFW Notification Required For Water Diversions That Don't Alter Streambed

On June 5, 2015 the Third Appellate District determined that all diversions of water, even if there is no disturbance of a streambed or bank (e.g. pumping), require notification to the California Department of Fish and Wildlife (CDFW) under Fish and Game Code section 1602, subdivision (a).

Section 1602, subdivision (a) provides:

"An entity may not substantially divert or obstruct the natural flow... or use any material from the bed, channel, or bank of, any river, stream, or lake, or deposit or dispose of debris, waste, or other material... where it may pass into any river, stream, or lake, unless [it notifies the CDFW and other requirements.]"

Such notification can necessitate a Lake and Streambed Alteration Agreement and potential mitigation measures imposed by the CDFW.

In the case *Siskiyou County Farm Bureau v. Department of Fish and Wildlife*, the Farm Bureau successfully argued at the trial level that section 1602 excludes activities that take water without disturbing the streambed or bank. Specifically, it would exclude agricultural pumping of water. The Court of Appeal disagreed, finding CDFW's interpretation correct; the most natural reading of the term "divert" as used in section 1602 embraces diversions of water without alteration of or damage to the streambed. (*Siskiyou County Farm Bureau v. Department of Fish and Wildlife* C.D.O.S. 5632, No. C073735 (June 4, 2015).)

The Court of Appeal found that the term divert or diversion as used in California water law has always applied to the taking of water from a stream or river, and not merely blocking or altering the course of the stream or river. The court also determined that the Legislature is aware of the potentially broad meaning of divert or diversion, and when it wants to specify a particular form of diversion, it does so. Even though the legislative history indicates that gravel extraction deemed harmful to anadromous fish motivated the adoption of section 1602, it does not mean there is a requirement that such diversion be linked to gravel extraction, or streambed alteration. Likewise, even though the CDFW has not previously enforced section 1602 absent streambed alteration, it does not mean the statute precludes it from doing so.

by Nathan A. Metcalf



The court found that past practices, no matter how long-standing, do not change current reality. Specifically, the severe drought, which is further damaging fish habitat, must be considered in determining what is a reasonable use of the water.

The Court of Appeal also found that applying section 1602 to water pumping by agricultural users does not impair their vested water rights. The court determined that a water right, including pre-1914 rights, are not exempt from reasonable regulation, and requiring compliance with mitigation measures or halting water usage would not be a taking, but a proper exercise of regulatory police powers. Finally, the court applying section 1602 to pumping operations would not delegate to the CDFW the authority to adjudicate water rights and prioritize beneficial uses contrary to the State Water Resources Control Board (State Board) powers. The State Board, appearing via amicus briefing, argued that section 1602 can assist the State Board in carrying out its responsibilities to protect public trust resources.

Those diverting water through a diversion structure should already have notified CDFW of their diversion. However, many diverters in California would be surprised to learn that they are required to provide notice to the CDFW of their historical diversions. The *Siskiyou County Farm Bureau* case indicates that those diverting without a structure (e.g. by pumping or gravity fed pipes) are also required to notify CDFW of their diversion. How CDFW will enforce this notification requirement is not clear. However, enforcing section 1602 in this manner indicates the court's increasing willingness to regulate water rights based on the Constitutional reasonable use requirement and the public trust doctrine, especially in times of drought.

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