

Court of Appeal Upholds State Board's Broad Power to Regulate Riparian and Pre-1914 Appropriative Water Rights to Protect Threatened Fish

Key Points

- The Third Appellate District in *Stanford Vina Ranch Irrigation Co. v. State* found that the State Board could promulgate emergency drought regulations and issue curtailment orders necessary to protect threatened fish.
- While riparian and pre-1914 appropriative water right holders have the highest priority among water right claimants, the court held that those rights must yield to the State Board's broad authority to regulate reasonable uses of water under article X, section 2 of the California Constitution.
- The court affirmed the State Board's determination that diversions that reduced instream flows during certain periods of drought were per se unreasonable.
- Since water right holders do not have a right to an unreasonable use of water, the court held that the State Board's curtailment actions were not a "taking" of private property without just compensation.

In the midst of the recent drought, we [discussed before](#) how the First Appellate District's decision in *Light v. State Water Resources Control Board* may provide a legal pathway for the State Water Resources Control Board (State Board) to curtail riparian and pre-1914 appropriative water rights during a drought emergency. The State Board followed that pathway and, on June 18, 2020, the Third Appellate District confirmed in *Stanford Vina Ranch Irrigation Company v. State* that the State Board was within its power to regulate the reasonable use of the State's waters for the protection of threatened fish, even at the expense of senior water right holders.

Background on California Water Law

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

by Nathan A. Metcalf & Sean G. Herman



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.

Overlying these rights is the rule of reasonableness, or the reasonable use doctrine, which limits the right to use waters of the State to only that “reasonably required for the beneficial use to be served.” In turn, these rights do not extend to the waste or unreasonable use of water.

Deer Creek Diversions and the Recent Drought

Near the summit of Butt Mountain in Lassen National Forest lies the headwaters of Deer Creek, a tributary of the Sacramento River. Two fish—the spring-run Chinook salmon and steelhead trout—make their way from the ocean to Deer Creek each year to spawn. These fish are listed as threatened species under the California Endangered Species Act and federal Endangered Species Act. And during low flow periods, water diversions could dewater the stream and block late-migrating spring-run salmon’s access to the upper watershed. Two of Deer Creek’s diverters are Stanford Vina Ranch and Deer Creek Irrigation Districts also use Deer Creek, with Stanford Vina enjoying an adjudicated right to use 66% of the creek’s flow based on its senior riparian and pre-1914 water rights.

During the recent historic drought in 2014, Governor Brown declared a state of emergency and the State Board promulgated emergency regulations that addressed in-stream flow requirements for waters throughout the State, including Deer Creek. These emergency regulations made any diversion of water during certain time periods unreasonable per se, and authorized the State Board to issue curtailment orders (without a noticed hearing) to ensure adequate flows to protect the migratory passage of threatened and endangered fish.

Stanford Vina sued the State Board over the temporary emergency regulations, arguing that the emergency regulations and curtailment orders were unreasonable, violated due process requirements, and amounted to a taking of vested water rights without just compensation.

State Board May Curtail Priority Water Rights Uses

The court rejected Stanford Vina’s argument and, building on the *Light* decision, upheld the State Board’s determination that any diversion during certain periods of drought is a per se unreasonable use of water under article X, section 2 of the California Constitution. That determination, the court found, was within the State Board’s constitutional and statutory mandates to prevent waste and unreasonable uses of water, and constitutional due process did not require an evidentiary hearing. The court also reaffirmed that the State Board may consider fish survival when determining reasonable uses and diversions.

The court also determined that the rule of priority did not preclude the State Board from taking its curtailment actions. Since it imposed conditions on senior and junior appropriators alike, the State Board’s curtailment actions did not subvert a water right holder’s priority. That is, the State Board declared all diversions of water from Deer Creek unreasonable during certain time periods. And when the rule of priority clashes with the rule against an unreasonable use of water, “the latter must prevail.” So the State Board was within its authority to establish minimum flow requirements for Stanford Vina’s senior riparian and pre-1914 water rights, and enforce those requirements through curtailment orders.

Lastly, the court found that the State Board’s curtailment actions did not amount to a taking of private property without just compensation. The court found that Stanford Vina had no vested right to an

unreasonable use of water. A party like Stanford Vina may have senior adjudicated right to use water—here, 66% of Deer Creek—but those rights are limited by the rule of reasonableness.

Implications of *Stanford Vina* Going Forward

The *Stanford Vina* decision confirmed that the State Board's broad authority under the reasonable use doctrine to limit the use of all water rights during a time of drought to protect threatened fish species. In *Stanford Vina* the emergency regulations were based on specific statutory authority in response to an unprecedented drought emergency. So it appears that the reach of *Stanford Vina* may be cabined to some degree. Whether the State Board can take similar curtailment actions outside an emergency remains an issue for another day.

For more information, please contact:

Nathan A. Metcalf, Partner
415-995-5838
nmetcalf@hansonbridgett.com

Sean G. Herman, Associate
415-995-5899
SHerman@hansonbridgett.com