

State Water Board Exceeded its Authority by Curtailing Diversions by Pre-1914 Water Rights Holders Based on a Lack of Water

The Sixth District Court of Appeals recently upheld a trial court judgment finding that the State Water Resources Control Board (“SWRCB”) exceeded its authority in 2015 by ordering “junior” pre-1914 water rights holders to stop diverting water because available flows were needed for more-senior pre-1914 water rights.

The ruling stemmed from the SWRCB’s issuance, in 2015, of curtailment notices to diverters with valid pre-1914 rights. The notices stated that diversions must stop immediately, or the diverters would be subject to administrative enforcement under Water Code section 1052(a), which provides that “[t]he diversion or use of water subject to this division other than as authorized in this division is a trespass.”

Pre-1914 water rights holders in the Sacramento-San Joaquin Delta challenged the notices in court on grounds that the SWRCB had exceeded its authority under section 1052. In 2018, the trial court determined that the SWRCB lacked authority under Water Code section 1052 to order the curtailments because the phrase “water subject to this division” in section 1052 does not include water diverted under a valid pre-1914 water right.

The Sixth District upheld the trial court’s decision after independently reviewing the SWRCB’s authority under Water Code section 1052. The Court found that section 1052 did not give the SWRCB the power to curtail pre-1914 rights based “a generalized theory of insufficient water to satisfy the priority rules,” while preserving the SWRCB’s authority to act against pre-1914 rights holders that exceeded the scope of their specific right or had diverted under rights found to be invalid. The Court also clarified that the SWRCB still retained the power to regulate pre-1914 rights under the public trust doctrine, emergency regulations under Water Code section 1058.5, or any other appropriate authority.

Pending the outcome of a possible appeal to the Supreme Court, the Court’s decision prevents the SWRCB from issuing curtailment orders to groups of pre-1914 water rights holders based a “generalized theory of insufficient water to satisfy the priority rules.”

A copy of the Sixth District’s opinion is available here.

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