

State Water Resources Control Board May Weigh the Use of Water for Public Purposes Against Commercial Use by Riparian Users and Early Appropriators in Determining Reasonableness of Commercial Use

A court of appeal, for the first time, has upheld the State Water Resources Control Board's authority to restrict valid pre-1914 and riparian water rights on the ground that their exercise has become an unreasonable use of water under current circumstances.

While it has long been accepted that California law requires that water be put to a use that is both beneficial and reasonable, what constitutes an "unreasonable use of water" has received little attention. This opinion, in finding the use in question to be unreasonable, is significant both for the principles it relies on and its articulation of the sideboards of the "reasonable use" requirement. *Light v. State Water Resources Control Board*, 173 Cal.Rptr.3d 200 (2014).

In April 2008, a particularly cold month during a dry year, young salmon were found stranded along the banks of the Russian River. Federal scientists concluded that the deaths were caused by the abrupt declines in water level due to diversions of water that was sprayed on vineyards and orchards to prevent frost damage. The salmon are classified as threatened or endangered under the Federal Endangered Species Act.

Following a series of hearings and the preparation of an environmental impact report, the State Water Resources Control Board adopted a regulation -- Regulation 862 -- that will likely require the reduction in diversion of water for frost protection under certain circumstances. Regulation 862 delegated the task of formulating regulations governing water use programs to local bodies comprised of diverting growers. The regulation declares that any water use inconsistent with the programs promulgated (and later approved by the Board) is unreasonable and prohibited.

The plaintiff growers successfully challenged the regulation in the trial court, contending that because the Board lacks regulatory authority to limit diversions by riparian users and pre-1914 appropriators it has no authority to regulate their use of water.

The court of appeal reversed, holding that although the Board has no authority to require such users to obtain a permit to divert water, it has the power to prevent riparian users and pre-1914 appropriators (and anyone else) from using water in an unreasonable manner. "We conclude that, in regulating the unreasonable use of water, the Board can weigh the use of water for certain public purposes, notably the protection of wildlife, against commercial use of water by riparian users and early appropriators."

Under California's dual system of water rights and rule of priority, ownership of the water is vested in the People, but the right to divert water from its natural course for public or private use can be acquired. Riparian users have water rights through their ownership of riparian land. Riparian users have never been required to obtain a permit, because their water right emanates from the riparian character of their land. Appropriators are those who hold a right to divert for use on non-riparian lands. Appropriators who established their rights prior to California's adoption of a regulatory system for appropriation in 1914 are not required to obtain a permit or

license.

California's rules of priority require that riparian users must curtail their use proportionately amongst themselves in times of shortage and that appropriative rights are determined by first-in-time, first-in-right. California Constitutional Amendment Article X, section 2 (adopted in 1928) provides that water use "shall be reasonably required for the beneficial use to be served." The provision applies to both riparian users and appropriators.

The appellate court in *Light* emphasized that "reasonableness" is now the overriding principle governing the use of water in California. It acknowledged, however, that the California courts have never defined what constitutes an unreasonable use of water. The court concluded that what is a reasonable and beneficial use at one time may not be at another and that a determination of reasonableness depends upon the circumstances. In other words, what may be a reasonable use at one time may – because of changed conditions – be waste at a later time and be unreasonable:

"Although, as we have said, what is a reasonable use of water depends on the circumstances of each case, such inquiry cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance. Paramount among these we see the ever increasing need for conservation of water in this state, and inescapable reality of life quite apart from its express recognition in Article X, section 2."

The court also pointed out that the public trust is a second potential limit on private uses of water. The public trust, which has been extended in geographic terms from navigable waters to include non-navigable tributaries, has amongst its purposes the preservation of water's function as a natural habitat. Consequently, the Board, in issuing licenses that will permit an appropriator to take water has an affirmative duty to take the public trust into account and to protect public trust uses where feasible. The Board has been given statutory powers to make reasonable rules and regulations to control and condition water use and to prevent unreasonable or wasteful use of water.

In *Light*, the plaintiffs challenged Regulation 862 contending that:

- The Board lacks authority to enact regulations on unreasonable use of water
- The Board lacks authority to limit water use by riparian and pre-1914 appropriators
- The regulation improperly violates the rules of priority

The trial court ruled favorably for the plaintiffs on all counts. But the appellate court reversed.

The court of appeal found that Regulation 862 – which provides in part that "a diversion of water that is harmful to salmonids is an unreasonable use of water if the diversion can't be managed to avoid harm" – was valid and within the Board's authority. It also held that the regulation applied to riparian users as well as pre-1914 appropriators. The court concluded that while the Board cannot require pre-1914 appropriators and riparians to obtain a permit, that does not mean that the Board cannot prevent such users from diverting water for a use the Board determines to be unreasonable. In that regard, the Board has authority to determine what has become an unreasonable use and prohibit such use. The court held that the "vested rights" doctrine does not prevent the Board from redefining existing beneficial uses as unreasonable.

Consequently, the extent of a particular users' vested right to use water may change. "A riparian users' vested water rights extend only to reasonable beneficial water use, which is determined at the time of use." The court held that the Board has ultimate authority to allocate water in a manner inconsistent with a rule of priority when to do so is necessary to prevent the unreasonable use of water. According to the court, that power is buttressed by the State's obligation under the public trust doctrine that applies to all water rights.

The court stressed that the legislature has declared that the use of water for recreation and the preservation and enhancement of fish and wildlife resources is a beneficial use of water. It has thus recognized that the welfare of wildlife is a beneficial use on a par with the type of commercial uses that have traditionally been recognized as beneficial. Consequently, balancing the use of water for frost protection against the use for salmon habitat is the application of a fundamental policy decision within the power of the Board.

The court ultimately concluded that in regulating the unreasonable use of water, the Board can weigh the use of water for certain public purposes (notably the protection of wildlife habitat) against commercial use of water by riparian users and early appropriators and prohibit the use of water for frost control under the circumstances that were before it..

The court does not suggest that at the time the riparian and pre-1914 users began diverting water for frost protection that use was neither beneficial nor reasonable. In fact, it is clear that it was. As a result, the court's decision is, in effect, a determination of unreasonableness, based upon current circumstances.

The opinion does not include any discussion of whether the relative priority of existing uses should be considered when terminating diversions determined to be unreasonable. For example, should post-1914 diversions for frost protection be terminated prior to limiting riparian and pre-1914 diversions? This is the process the State Board has followed in its recent adoption of emergency regulations limiting water diversions in certain watersheds due to lack of adequate water. It is also reflected in the emergency regulations adopted on July 2, 2014, which establish a streamlined process for the Board to use in curtailing diversions by post-1914 water rights holders. The July 2 regulations do not extend that curtailment process to riparian and pre-1914 diverters.

The opinion endorses the proposition that the Board has broad authority to determine reasonableness at any time and, based upon changed circumstances, may declare well established uses unreasonable and, therefore, waste and impermissible. It also suggests that the Board's determination of priority between two otherwise reasonable uses can result in the termination of one without the implication of a taking.

The Plaintiffs in *Light* filed a petition for rehearing. The court, on July 11, 2014, denied the petition, but amended its opinion in response to the argument made by Light that Regulation 862 had the effect of immediately banning frost protection during the relevant period of time. The court's amended opinion adds a footnote that acknowledges that Light's reading of Regulation 862 may be correct, if read literally. However, it then opines that if the regulation is construed with its accompanying resolution, the regulation can be interpreted to mean that the curtailment of diversions for frost protection would only take place after the local body charged with developing regulations mandated by the Board had completed its task—which the court determined would take more than two years.

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