

LEGAL ALERTS | FEB 23, 2018

California Water Board Lacks Jurisdiction to Curtail Water Use by Senior Water Rights Holders

Court Decision on California Water Code Authority



The State Water Resources Control Board exceeded its jurisdictional authority under Water Code section 1052 when it issued curtailment notices to pre-1914 and riparian water rights holders, a Santa Clara County Superior Court judge

decided Wednesday. The decision addresses a number of consolidated legal challenges to Board actions taken within Central California watersheds during the State's recent and lengthy drought.

The court also concluded that the curtailment notices at issue violated the petitioners' due process rights because they were issued "without first providing water users with an opportunity to challenge the findings upon which they were based."

Under California law, a water right is a legal entitlement authorizing water to be diverted from a specific source and put to beneficial use. One who holds a water right does not own the water itself, but possesses the right to use it. In California, several types of water rights are recognized under the law, including pre-1914 appropriative rights, which are senior rights not subject to the Board's permitting jurisdiction.

The consolidated legal challenges arose as a result of water curtailment and enforcement actions taken by the Board in 2015 against senior rights holders. Between April and June of that year, the Board issued curtailment notices to water users in the Sacramento-San Joaquin River and Delta watersheds, including to pre-1914 senior appropriators. In particular, pre-1914 appropriative rights holders with a priority date of 1903 or later in both the Sacramento and San Joaquin rivers watersheds were told to "immediately stop diverting" water. Several agencies challenged the Board's jurisdiction to curtail their water rights, and the actions eventually were consolidated within the Santa Clara County

Related Practices

[Environmental Law & Natural Resources](#)

[Environmental Litigation](#)

[Water](#)

[Water Rights](#)

Related Industries

[Municipal](#)

[Special Districts](#)

Our Perspective

[Water](#)

Superior Court.

Meanwhile, the Board issued a draft cease and desist order against the West Side Irrigation District threatening fines of \$10,000 per day for non-compliance if an actual order were issued, and an administrative civil liability complaint to Byron-Bethany Irrigation District seeking more than \$1.5 million in penalties for a period involving alleged diversions in violation of the curtailment notice. These administrative enforcement proceedings became the subject of add-on cases to the consolidated court proceedings. The Board later dismissed both enforcement cases while maintaining the Board's authority to take enforcement action pursuant to the Water Code.

Superior Court Judge Brian C. Walsh ordered that the trial proceed in three phases. Phase 1, the subject of Wednesday's decision, addressed the petitioners' various requests for writ of mandate and one cause of action seeking declaratory relief.

The Board asserted that it has authority to take enforcement action against "illegal" diverters, even those claiming riparian or pre-1914 rights, under Water Code section 1052. This section of the Water Code provides that diversion, or use of water that is subject to Division 2 of the Water Code in a manner other than what Division 2 authorizes, is a "trespass" subject to civil liability imposed by the Board. Applying case law, the court disagreed, concluding that "neither the relevant cases nor the statute itself establish a broader enforcement jurisdiction over all 'illegal' diversions." The court in its discussion noted that "senior users' diversions are not 'authorized in' Division 2, but pre-date it."

The court stated in the decision, though, that "this does not mean that the Board is wholly without jurisdiction over these users," noting that the Board has been delegated other types of adjudicatory and enforcement powers over senior users. The court stated that it was expressing no opinion on the Board's jurisdiction or statutory authorization to curtail post-1914 water rights users.

The full decision in the *California Water Curtailment Cases* is available by [clicking here](#). If you have any questions about this decision or how it may impact your agency, please contact the authors of this Legal Alert listed to the right in the firm's [Environmental Law & Natural Resources](#) practice group, or your [BB&K attorney](#).

Please feel free to share this Legal Alert or subscribe by [clicking here](#). Follow us on Twitter [@bbklaw](#) or on Facebook [@BestBestKrieger](#).

Disclaimer: BB&K Legal Alerts are not intended as legal advice. Additional facts or future developments may affect subjects contained herein. Seek the advice of an attorney before acting or relying upon any information in this

communiqué.