

CALIFORNIA'S THIRD DISTRICT COURT OF APPEAL AFFIRMS STATE WATER BOARD'S AUTHORITY TO REGULATE UNREASONABLE USE OF WATER DURING SEVERE DROUGHT

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On June 18, 2020, in *Stanford Vina Ranch Irrigation Company v. State of California et al.*, the Third District Court of Appeal affirmed the California State Water Resources Control Board's ("State Water Board" or "Board") authority to regulate what it considers "unreasonable use of water" through emergency regulations setting forth minimum instream flow requirements that protect endangered and threatened fish in times of severe drought.- The Court also affirmed the Board's use of curtailment orders to implement the emergency regulations without any evidentiary hearing with regard to impacted water users, and in doing so, rejected the appellant's assertion that the curtailment of water in this case amounted to a "taking" of private property rights requiring just compensation.- The Court's decision was certified for publication.

Background

The plaintiff/appellant Stanford Vina Ranch Irrigation Company ("Stanford Vina") operates diversion dams and ditches for agricultural use on Deer Creek along with Deer Creek Irrigation District who was not a party in the litigation.- The Creek is a tributary of the Sacramento River originating near the summit of Butt Mountain in the Lassen National Forest.- By virtue of a judicial decree, originally entered in 1923 and amended in 1926, Stanford Vina is entitled to use 66 percent of the flow of Deer Creek.- Stanford Vina holds both riparian and pre-1914 appropriative water rights.

At issue in the case are two species of anadromous fish, Chinook salmon (fall run and spring run) and steelhead trout, that migrate from the Pacific Ocean to Deer Creek to spawn. -The spring run Chinook salmon and steelhead trout are listed as a threatened species under the California Endangered Species Act and the federal Endangered Species Act.- The Court highlighted that federal and state agencies that regulate marine fisheries have found that "Deer Creek has 'high potential' for supporting viable populations of both spring-run salmon and steelhead trout because 'habitat used for holding and spawning is located at high elevations and habitat is considered to be high quality.'"

The water diversion structures operated by Stanford Vina on Deer Creek were alleged to have the potential to dewater the Creek during low flow periods ("the existing water rights ... are sufficient to dewater the stream to the point of locking access to upper portions of the watershed for late-migrating spring-run salmon- Low water flows also negatively affect the outmigration of juvenile spring-run salmon and steelhead trout.")- At issue in this case was Stanford Vina's diversion of water for frost control on its vineyards.

California's most recent drought persisted from the end of 2011 to the beginning of 2017.- The Court highlighted that this drought "was especially severe, as it included the driest four-year period [fall of 2011 to fall of 2015] in California since recordkeeping began in 1895, as well as the two warmest years [2014 and 2015] in state history."

In January 2014, Governor Brown declared “a state of emergency due to the severe and persistent drought conditions.”- In March 2014, Governor Brown signed into law urgency legislation that enacted and amended various statutes in order to expedite drought relief.- This legislation included authority for the State Water Board to adopt emergency regulations “to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water ... and to require curtailment of diversions when water is not available under the diverter’s priority of right”

The Governor further directed the Department of Fish and Wildlife (DFW) to “evaluate and manage the changing impacts of drought on threatened and endangered species and species of special concern.”- The Governor also suspended the application of the California Environmental Quality Act (CEQA) in order for the Board and DFW to “expeditiously act to mitigate the effects of the drought.”

In May 2014, the State Water Board began the process of promulgating emergency regulations that set forth instream flow requirements for Deer Creek and two other creeks in Tehama County.- The proposed flow requirements were in line with a memorandum submitted to the Board by the National Marine Fisheries Service (NMFS) (50 cfs from April 1 to June 30 and October 1 through November 30 for adult salmon; similar cfs for steelhead; -20 cfs for juvenile fish outmigration from October 1 through June 30 and certain enumerated pulse flows.) The regulations provided that continued diversions that would cause or threaten to cause flows to fall beneath drought emergency instream flows would constitute per se waste and unreasonable use in violation of Article X, section 2 of California’s Constitution.-

Water rights holders were notified of the proposed emergency regulations and the right to offer comments.- Stanford Vina submitted a comment letter objecting to the proposed regulations and made an oral presentation at the May 20, 2014 Board meeting.- The Board adopted the regulation the following day.- The Board then issued a series of curtailment orders that implemented the regulation which directed all water rights holders in the Deer Creek watershed to immediately cease or reduce their diversions from Deer Creek to ensure the drought emergency minimum flows were met.

Stanford Vina filed suit against the State Water Board in October 2014 asserting causes of action for inverse condemnation and declaratory relief, claiming the Board’s “emergency regulations and related curtailment orders” were unlawful and if upheld amounted to a taking of Stanford Vina’s vested water rights for public “fishery enhancement purposes,” without due process (e.g., an evidentiary hearing) and just compensation.- The State Water Board argued that it had authority to adopt the challenged regulations and issue curtailment orders to regulate the unreasonable use of water, and that the regulations and orders did not constitute a taking or violate any due process rights because Stanford Vina had no vested right to the unreasonable diversion or use of water.

The trial court concluded that the State Water Board possessed quasi-legislative authority to adopt the challenged emergency regulations.- The lower court also rejected Stanford Vina’s argument that the Board unlawfully declared certain diversions from Deer Creek to be unreasonable without first holding an evidentiary hearing.- The court explained: “Under the unique circumstances present in this case – persistent and extreme drought conditions threatening to dewater high priority streams during critical migration periods for threatened and endangered fish species, and a lack of feasible alternatives to increase in-stream flows by other means – the [Board] rationally determined that allowing diversions to reduce flows below the minimum, ‘belly-scraping’ amounts necessary for fish migrations and survivability would be ‘unreasonable.’”

The trial court also rejected Stanford Vina’s takings argument and rule of priority argument, and ultimately entered judgment against Stanford Vina on all causes of action.- Stanford Vina appealed.

The Appeal

The Third DCA affirmed the trial court’s ruling on all grounds in an opinion issued June 18, 2020 (certified for publication.)- On the issue of whether the emergency regulations were valid, the Court found that the State Water Board “possesses broad authority to regulate the unreasonable use of water in this state by various means, including the adoption of regulations establishing minimum flow requirements

protecting the migration of threatened fish species during drought conditions and declaring diversions of water unreasonable where such diversions would threaten to cause the flow of water in the creeks in question to drop below required levels.”- -The regulations at issue were thus deemed valid.

The Court then rejected Stanford Vina’s assertion that the Board was required to hold an evidentiary hearing before making a “reasonableness determination” as to plaintiff’s use of water.- “Contrary to Stanford Vina’s arguments in this appeal, neither the due process guarantees of the federal and California Constitutions, nor article X, section 2 of the California Constitution requires such a hearing prior to adoption of a regulation governing reasonable water use.”

The Court also rejected Stanford Vina’s argument that the curtailment orders amounted to a taking of vested water rights without just compensation.- “This takings claim fails ... [because] Stanford Vina possessed no vested right to divert water from Deer Creek in contravention of the emergency regulations.”- The Court instead characterized the Board’s action as one of police power.- “As stated by our Supreme Court in *Gin S. Chow*: There is a well-recognized and established distinction between a “taking” or “damaging” for public use and the regulation of the use and enjoyment of a property right for the public benefit.- The former falls within the realm of eminent domain, and the latter within the sphere of the police power.- That the constitutional amendment now under consideration is a legitimate exercise of the police power of the state cannot be questioned.”- The Court concluded: “Since there was and is no property right in an unreasonable use, there has been no taking or damaging of property by the deprivation of such use and, accordingly, the deprivation is not compensable.”-

The Court further found that the State Water Board did not violate the sacrosanct California “rule of priority.”- The Court stated that the Board “did not subvert the rule of priority by imposing a condition on a senior appropriator that it did not impose on more junior appropriators.”- The Court stated that “[h]ere, the Board declared all diversions of water from Deer Creek unreasonable during certain time periods, and when protected fish were present

in the creek, where such diversions threatened to drop the flow of water below the minimum flow required to allow the fish to survive their migration through the creek.- The Board then implemented this unreasonableness determination by curtailing all diversions that threatened to violate the minimum-flow requirements.- Stanford Vina does not argue that any water rights holders junior to it were not similarly restricted by curtailment orders . . .”

Conclusion

This opinion by the California Third District Court of Appeal affirms the State Water Board’s authority to regulate unreasonable use of water in the context of severe, multi-year drought conditions which the Court recognized was unprecedented in California since recordkeeping began in 1895.- The Governor had also suspended CEQA with regard to the emergency regulations and curtailment orders at issue and thus there was no environmental review conducted at all (i.e., no alternatives analysis, no impacts analysis, no mitigation analysis).- So it is clear – irrespective of the Board’s decision – that without any evidentiary hearing on the reasonableness issue, or CEQA review, the Board lacked complete and important information when establishing regulations and issuing curtailment orders in this case.- In the future, one can only hope that the Board does not become emboldened by this ruling but rather understands the importance of and benefits from informed decision making that is provided by the CEQA process.– Accordingly, even in a situation where CEQA review was again suspended in an extreme drought situation, the Board would still engage in some level of environmental review, perhaps expedited, in order for the Board to be in a position to make fully informed decisions that would be less likely to lead to litigation.- This would also hold true for the lack of due process in this case.- Rather than unilaterally decide what is a reasonable or unreasonable use of water in the absence of any evidentiary hearing, the Board would provide for some level of meaningful fact gathering and analysis where the water rights holder has the opportunity to present evidence (including expert testimony) on the reasonableness of his or her use of the water at issue.- Again, such a hearing could be expedited depending on the circumstances, but at least the affected citizen would be assured that the State Water Board’s ultimate decision was made with the benefit of more complete

information, and the decision-making process would align with the goals of CEQA and the spirit of our state and federal Constitutional due process protections.

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