



# Court Decision Limits State Water Resources Control Board's Authority Over Pre-1914 Appropriative Rights

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On September 12, 2022, the Court of Appeal for the Sixth District issued its opinion in the *California Water Curtailment Cases*, No. 1-15-CV285182 (2022). The court held that the State Water Resources Control Board (State Water Board) did not have the authority to curtail water usage for pre-1914 appropriative rights on the basis that there will not be enough water to fulfill all of those rights.

The case arose out of the State Water Board's 2015 curtailment orders for the Sacramento-San Joaquin River Delta, which were issued based on significant water shortages due to the severe drought. Those orders informed the holders of post-1903/pre-1914 appropriative rights that there was insufficient water to meet their rights and that they must immediately stop diverting. Several of the holders of those post-1903/pre-1914 appropriative rights, largely irrigation districts and water districts, sued the State Water Board after receiving these curtailment orders, challenging the State Water Board's ability to limit diversions based on pre-1914 rights.

The reason that pre-1914 appropriative rights are treated differently from post-1914 rights in California traces back to the 1913 Water Commission Act (which went into effect in 1914). The differences, some of which are detailed in the court's opinion, include the fact that only post-1914 appropriative rights require a permit from the State Water Board and the State Water Board's lesser authority over pre-1914 rights.

The central issue in the case was the proper interpretation of California Water Code section 1052, subdivision (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." The Court of Appeal analyzed the history of pre- and post-1914 water rights in California, the language of section 1052 (a), the statutory scheme, legislative history, and past court decisions. The court agreed with the State Water Board that "subject to this division" applied to "[t]he

diversion or use of water,” as opposed to the petitioners’ claim that it applied just to “water.” Despite that, the court ultimately held for the petitioners based on the requirement that the diversion be “authorized in this division.” The court reasoned that no pre-1914 rights are “authorized” in the relevant “division” (Division 2) of the Water Code. Accordingly, the State Water Board could not use its authority under Section 1052(a) to curtail pre-1914 appropriative rights based on insufficient water to service pre-1914 users’ priorities of right.

### **What the Court’s Opinion Does and Does Not Do**

The opinion limits the State Water Board’s authority over pre-1914 appropriative rights. As seen by the statement the agency posted after the court issued its opinion, the court’s limitation is substantive and the agency is unhappy with the opinion because it removed a tool from the State Water Board’s toolbox in terms of how it can respond to droughts.

Despite that, as the Court of Appeal noted, the State Water Board does retain other tools to address drought. The court noted that its ruling does not affect the agency’s ability to adopt emergency regulations or utilize the public trust doctrine or “other appropriate authority” to limit pre-1914 diversions. It also noted that the State Water Board still retains the authority to determine whether a pre-1914 right is valid or whether pre-1914 right holder is exceeding its authorized usage under that right. The State Water Board’s post-opinion statement echoes the court’s language about the authority the agency still retains.

### **Practical Impact of the Opinion**

The practical impact of the opinion is yet to be seen, although with the severity of the current drought, the State Water Board has once again started limiting pre-1914 appropriative rights. As the opinion (and the agency itself) points out, the State Water Board still has authority over pre-1914 appropriative rights in a variety of ways. Despite that, this opinion does remove one of those types of authority, and it is likely that the agency chose the curtailment orders over its alternative options for a reason.

The opinion may lead to legislative action, especially given that the court expressly states that whether the State Water Board’s limited authority over pre-1914 rights “represents sound policy in a time of increasing water scarcity is a question for the Legislature.”

Similarly, the State Water Board may push to regain the authority it lost because of the opinion. The previous drought led to the legislature passing the Sustainable Groundwater Management Act, changing how groundwater extractions work in the state for the foreseeable future. We will have to see if this drought leads to any other big long-term changes in California water.

Nossaman will continue to monitor and report on any notable updates.