

Focus: *Light et al. v. The State Water Resources Control Board* (Case No. SCUJ CVG 11 59127).

This is a case out of the Superior Court of Mendocino County. The decision was entered on September 26, 2012. It is a trial court decision and therefore does not have precedence. However, it is important because it appears to invalidate the SWRCB's ability to issue blanket provisions on water users for unreasonable use.

How are these issues relevant to the Delta Plan?

We recognize that since this case comes to us from Mendocino County that it is outside of the Council's jurisdiction. However, because of its potential implications regarding the Board, public trust and the reasonable use doctrine, it is important to keep this case on our radar.

Water Code Section 85023: The longstanding constitutional principle of *reasonable use and the public trust doctrine* shall be the foundation of state water management policy and are particularly important and applicable to the Delta.

Article X Section 2: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to *the beneficial use to the fullest extent of which they are capable*, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the *reasonable and beneficial use thereof in the interest of the people and for the public welfare.*"

Background: In September 2011 the State Water Resources Control Board adopted Section 862, Title 23 of the CA Administrative Code which applies solely to water diversions used for frost protection purposes by grape and pear growers. Frost protection is defined as a beneficial use under Title 23, Section 662.3 of the California Code of Regulations. However, Section 862 declares hundreds of these vested water rights subject to a condition precedent that all water users be approved for diversion by a Board approved "water demand management program" (hereafter WDMP). If a water rights holder does not comply with this WDMP, their diversion for frost protection will be considered an "unreasonable method of diversion."

The Regulation was adopted in response to concerns of salmonid fish strandings in the Russian River. The concerns arose after two stranding incidents in the Spring of 2008. Upon investigation, the Board found that the strandings were a result of diversions from

the river for frost protection uses that decreased the flow of the waters to a perilous degree. Flow reduction resulted in a total of thirty-one documented juvenile salmonid strandings that spring.

Plaintiffs filed this proceeding, attacking the constitutionality of the new Regulation, alleging that the SWRCB exceeded their jurisdiction in adopting Section 862, alleging that the SWRCB exceeded their jurisdiction in adopting Section 862.

**September 26: Light et al. v. The CA State Water Resources Control Bd., et al.,**

**Issue: Whether the Board was acting within its constitutional authority when it enacted Section 862 declaring the use of water for frost protection to be *per se* unreasonable for all water users. *Petitions by Russian River Water Users for the Environment, Redwood Ranch and Vineyards, L.P., and individuals seeking an order from the Superior Court declaring invalid Section 862 of Title 23 of the California Code of Regulations.***

**Held: The Court granted Plaintiffs' Writ of Mandate and declared Section 862 invalid.**

**Five Specific Findings of Relevance to the Council:**

1. In using their regulatory power to define or otherwise limit the scope of prospective and existing riparian rights, the Board was utilizing authority that lies exclusively with the Legislature.
2. Even in an adjudicatory proceeding, Article X, Section 2 places tight constitutional limits on the SWRCB – they cannot issue a blanket decision limiting the rights of riparians throughout a particular water system without considering their individual reasonable needs, existing use, purpose, and specific plans for prospective use.
3. The Public Trust Doctrine and the principle of protecting the public trust does not expand the authority of the SWRCB to enact broad regulations such as Section 862.
4. Whether or not a specific use or method of use is unreasonable is a factual inquiry and must be made on a case by case basis as to the individual user

5. Each riparian's use is unique. Facts such as place of diversion, volume, time of use, effect on the stream stage, and relationship to fish habitat must be considered before declaring the use of water by a riparian to be unreasonable.

**Implications:** This is an ambitious decision and difficult to decipher. The decision appears to prohibit or significantly restrict the Board from issuing blanket provisions on all water users for an unreasonable use. Unfortunately, the convoluted conclusions made by the trial court don't leave us with any clear definition of the Board's authority. But it is apparent that there are loose ends that need to be reconciled regarding the Board's authority under the Reasonable and Beneficial Use and Public Trust Doctrines.

It is unclear what the Board will do from here, but we will continue to monitor this case.