

California Third District Appellate Court Narrows the Ability of State Water Resources Control Board to Impose Term 91

By Cassie N. Aw-yang

El Dorado Irrigation District v. State Water Resources Control Board, 142 Cal.App.4th 937, filed Sept. 8, 2006

In a victory for local water and irrigation districts, the California Third District Appellate Court ruled that the State Water Resources Control Board ("Board") cannot undermine a local entity's priority water right to meet water quality requirements in the Sacramento-San Joaquin Delta. The Board abused its discretion by imposing "Term 91" requirements on El Dorado Irrigation District while failing to include such restrictions on junior appropriators.

Background

In 1927, the California Legislature passed the Feigenbaum Act, allowing for the state-filing of appropriative water rights. The purpose was to withdraw from filing by private parties any then unappropriated water rights necessary for a coordinated, state-wide water plan. The release or assignment of the appropriation was allowed when not in conflict with the statewide plan. When an application was filed, it received a priority date giving it priority over appropriative rights later granted. In 1927, the District applied for and obtained a right to appropriate water from the American and Consumnes Rivers.

Subsequently, the State commenced two water projects, the Central Valley Project (in 1937) and the State Water Project (in 1951). These projects transmit water from northern to southern California and require water rights acquired by assignment of state-filed applications. While providing benefits to the State, the projects deteriorated the Delta's water quality. In 1978, the Board created the Delta

Plan, establishing water quality standards for salinity control and protection of fish and wildlife in the Delta.

The Delta Plan requirements were difficult to meet without assistance from all appropriators in the Delta. Thus, in 1980 the Board adopted Term 91, a water right permit term prohibiting "permittees from diverting water when stored Project water is being released to meet Delta water quality standards." Term 91 was initially an interim measure applicable to permits with a priority date after August 16, 1978. Ultimately, however, the Board adopted Term 91 for the long-term and continued to include it in water rights permits.

In 1992, the District petitioned for a partial assignment of its state-filed application No. 5645. In 1996, the Board approved the petition and decided not to impose Term 91. The Board reasoned that it would be inequitable to impose Term 91 on the District because it had not imposed Term 91 on many permitted junior applications. The federal Bureau of Reclamation and State Water Contractors petitioned for reconsideration. The Board granted reconsideration and imposed Term 91 in the permit. The Board held that despite the District's priority right, they should curtail diversions when natural and abandoned flows are insufficient to meet Delta water quality objectives. At times, the need to meet the objectives trumped the priority right. Furthermore, the Board found that the priority right was irrelevant because when Term 91 would apply, the state of insufficient flows would also prevent the District from diverting.

The Third District's Ruling

The District appealed the Board's decision, and the Third District Appellate Court ruled in the District's favor. The court agreed that the Board abused its discretion when it included Term 91 in the District's permit without including the term in the permits of junior appropriators. The Board's action contravened the rule of priority without justification.

The court reiterated the importance of the priority right under California water law, opining that it should be the first concern of the court to recognize and protect the interests of those who have prior and paramount rights to the use of waters of a stream. The court declared that the rule of priority is important and necessary only when the natural or abandoned flows in a watercourse are insufficient to supply all demands being made upon the watercourse. Finally, the court recognized that the priority right applies to natural or abandoned flows, but not to waters previously stored or imported by the water projects and released for use downstream.

Applying these principles, the court rejected that the priority right would be irrelevant during Term 91 periods of water scarcity. The record revealed that 25 percent of the time during a Term 91 scarcity period, there would have been sufficient natural and abandoned flows available for the District. Yet, Term 91 would bar the District's diversions while junior appropriators could divert in spite of the District's prior right.

The court held that while significant competing interests may trump the rule of priority, no such interest exists here. A prior right



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may give where it would cause an unreasonable use of water, the public trust doctrine is implicated, or the use conflicts with statutory preferences for other uses. The court found the first two interests implicated, but further found that Delta objectives can be met without undermining the District's prior right. Either the water projects must release more flows, or the Board will have to impose Term 91 on junior appropriators.

The court determined that omitting Term 91 from the District's permit will not cause the misappropriation of stored water. Twenty-five percent of the time during Term 91 scarcity

conditions, there will be sufficient flows for the District. The remainder of the time, the rule of priority will prevent the District from taking stored water. By not imposing Term 91 restrictions on junior appropriators, the need to meet Delta water quality standards and protect stored water are undermined because the water that the District might bypass could be appropriated by junior users downstream.

Conclusions & Implications

The Board cannot impose Term 91 on users with senior appropriative rights without imposing such requirements first upon junior

appropriators or showing it is necessary to a significant competing interest. In the aftermath of this decision, water projects will have to release more water to meet Delta water quality objectives. It will also become more difficult for the Board to require other appropriators to share in meeting the objectives of the Delta Plan. Local water districts can rest assured that the seniority of their appropriative rights will be respected, unless contravention is absolutely necessary to meeting Delta water quality standards.