



Court of Appeal Decision Extends Lake & Streambed Alteration Program to Water Diversions

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In a decision that will have ripple effects on water diversions throughout California, the Court of Appeal held that section 1602 of the Fish and Game Code requires notification to the Department of Fish and Wildlife (Department), which frequently triggers regulatory review and the imposition of requirements to protect fish and wildlife resources, if an entity plans to 'substantially divert' water from a lake or stream, irrespective of whether such diversion is made in accordance with an appropriation of water by the State Water Resources Control Board.

The Department administers the Lake and Streambed Alteration Program under sections 1600-1616 of the Fish and Game Code, whereby any party that engages in certain categories of activities within regulated waters must provide written notice to the Department. When it enacted the Program, the legislature explained in Fish and Game Code section 1600 that its purpose is to provide conservation for the state's fish and wildlife resources. In *Siskiyou County Farm Bureau v. Department of Fish and Wildlife*, the Court of Appeal held that Fish and Game Code section 1602 "unambiguously requires notification to the Department if an entity plans to 'substantially divert' water." In so doing, the Court reversed the trial court.

Section 1602 of the California Fish and Game Code requires any party that may "substantially divert or obstruct the natural flow of, or substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake, or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake" to provide written notice to the Department and comply with other requirements intended to further the purposes of the Lake and Streambed Alteration Program. After a lengthy analysis of section 1602 that included extensive statutory construction based on extrinsic evidence, the trial court held that "the legislature did not intend to include

the act of diverting water pursuant to a water right within the regulatory scope of § 1602."

The Court of Appeal noted that the trial court's reasoning hinged on ambiguity in the statute. It rejected this reasoning, holding that there is no such ambiguity and concluding that the legislature said what it meant and meant what it said. In other words, the court adopted a plain meaning interpretation of the statute. Importantly, the court noted that the notification requirement in section 1602 does not encroach on any entity's water rights or on the powers and duties of the State Water Resources Control Board. In its decision, the court relied on the argument advanced by the State Water Board in an amicus brief that its functions and the Department's under section 1602 are complimentary.

Finally, whereas the trial court took heed of plaintiffs' contention that the Department had not during the first 40 years of implementation of the Lake and Streambed Alteration Program regulated water diversions pursuant to a valid water right, the Court of Appeal opined that the evidence on this point was conflicting and, in any event, that past non-enforcement did not affect its interpretation of the statutory language. While it will be some time before we can assess the full impact of the decision, it is likely that the Department – already pressed for resources to carryout its statutory obligations – will see an influx of both notices from diverters that trigger review and requests from third parties to initiate enforcement actions against diverters that have not provided requisite notice.