



A Victory for Water Users in Siskiyou County

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Water users in Siskiyou County have avoided an additional hurdle to exercising their valid water rights, according to the Siskiyou County Superior Court. On December 24, 2012, Judge Karen L. Dixon held that the legislature did not intend section 1602 of the Fish and Game Code – which makes it unlawful for any person to "substantially divert or obstruct the natural flow of a stream" – to include diversion of water pursuant to a water right.

Background

In 2005, the Fish and Game Commission listed coho salmon (*Oncorynchus kisutch*) north of Punta Gorda as threatened and south of Punta Gorda as endangered under the California Endangered Species Act (CESA). Pursuant to the CESA, the state has placed a high priority on protecting threatened and endangered species, and a substantial portion of the recovery efforts for the species is placed on the Department of Fish and Wildlife (DFW), formerly the Department of Fish and Game. A number of populations (or evolutionarily significant units) of the coho salmon are also listed under the federal Endangered Species Act (FESA), including the populations that spawn in California streams both north and south of Punta Gorda.

After listing coho salmon under CESA, the DFW began planning programs to protect the species through more rigorous enforcement of its Lake and Streambed Alteration Program. The new enforcement criteria included a presumption that any diversion of appropriated or unappropriated water – including any riparian diversion – is substantial and subject to notification under section 1602.

The Parties' Contentions

Plaintiffs, various members of farming and ranching communities in Siskiyou County who have perfected both riparian and appropriative rights to the use of water on their property, brought suit against DFW seeking declaratory relief and clarification from the court regarding the new enforcement criteria by DFW. The Plaintiffs contended, in part, that the legislature never intended that section 1602 would apply to

extracting water pursuant to a water right.

DFW countered that it has the authority to require notice of any "substantial diversion" of water pursuant to the Fish and Game Code and, because the flows in the water systems in Siskiyou County are so low, any extraction of water pursuant to a water right by an agricultural user is substantial because it reduces stream flow "to a point that will not support the propagation of the endangered coho salmon."

Court's Discussion

The court held that DFW's interpretation of section 1602 is unlawful because it would give DFW authority to prohibit a water user from using its allotted water if DFW believes a species would be adversely affected, in effect making DFW a regulator of water rights.

The court explained the process for granting water rights:

1. The SWRCB works with DFW to review an applicant's grant of water.
2. DFW informs the SWRCB how a grant may impact fish and wildlife and recommends certain conditions that should be in place.
3. The SWRCB will then grant an application, subject to the recommended conditions.

The court rejected DFW's argument that the Legislature intended to bring the exercise of water rights within the scope of section 1602 when diversion has a substantial effect on fish and wildlife because that would fundamentally alter the administration of water rights. The court explained that DFW's interpretation of section 1602 would allow DFW to require notice and a Lake Streambed Alteration Agreement from an applicant who wishes to exercise his water rights already granted in an application, without taking into account other factors that are considered by the SWRCB in approving a grant in the first place. DFW's interpretation, the court reasoned, would thus make the duties of the SWRCB redundant and in effect preempts the SWRCB's exclusive authority in granting and regulating water rights.

Nossaman, LLP will be tracking this case to see if the DFW will appeal. You can subscribe for future E-Alerts, and other Nossaman news, [here](#).