



# Western States Water

## Addressing Water Needs and Strategies for a Sustainable Future

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### **LITIGATION/WATER RIGHTS**

#### ***Stanford Vina Ranch v. California/Curtailment***

On June 18, the California Court of Appeal for the Third Appellate District Court in Sacramento issued a ruling in *Stanford Vina Ranch Irrigation Company v. California* (#C085762). The irrigation company sued the State Water Resources Control Board (SWRCB) for issuing temporary emergency regulations in 2014 and 2015 during drought, and for curtailing water use to protect threatened species of fish. The Court of Appeals affirmed the Superior Court's holding that the SWRCB "possesses broad authority to regulate unreasonable use of water in this state by various means, including the adoption of regulations establishing minimum flow requirements protecting the migration of threatened fish species during drought conditions and declaring diversions of water unreasonable where such diversions would threaten to cause the flow of water in the creeks in question to drop below required levels." The court held that the irrigation company "possessed no fundamental vested right to an unreasonable use of water..." and rejected the assertion that the curtailment was a taking that required just compensation.

The court described the evolution of SWRCB's duties over time to become a quasi-judicial and quasi-legislative body. The court also reviewed the Governor's drought emergency declarations and bills passed by the legislature during the drought giving SWRCB broad authority to curtail or limit diversions, including to protect fish and to prevent unreasonable use, "to require curtailment when water is not available under the diverter's priority of right..." SWRCB set minimum flows by regulation and determined that it was waste and unreasonable use to continue diversions that would cause flows to fall below those minimum levels.

The court also described California's complex history and dual system of riparian and appropriative water rights. "The differences between and among riparian users and appropriators become most pronounced when the available supply of water is inadequate to satisfy the needs of all those holding water rights. Under the 'rule of priority,' which governs diversion in such circumstances, the rights of riparian users are paramount. Although riparian users must curtail their use proportionately among themselves in times of shortage, they are entitled

to satisfy their reasonable needs first, before appropriators can even begin to divert water.... All water rights in California, both riparian and appropriative, are constrained by two limiting principles: (1) the rule of reasonableness; and (2) the public trust doctrine."

The irrigation company held riparian rights to the use of 66% of Deer Creek's water. Since the company had no vested rights to unreasonable use, there was no requirement for SWRCB to hold an evidentiary hearing. The agency "simply notified affected water rights holders that the regulatory provisions were put into effect."

This case had a notably different outcome from a water curtailment case decided in 2018 by the Superior Court of California, County of Santa Clara (#2015-1-cv-285182), which held that SWRCB did not have the authority to curtail pre-1914 appropriative rights. The curtailment notices in that case were held to deprive users of vested property rights without appropriate notice – hearing due process (see WSW #2286).

### **LITIGATION/WATER RESOURCES**

#### **Oklahoma**

On July 9, the Supreme Court ruled 5-4 that nearly three million acres in eastern Oklahoma, which includes most of Tulsa, is tribal reservation land of the Muscogee (Creek) tribe, and not under the jurisdiction of the State of Oklahoma (*McGirt v. Oklahoma*, No. 18-9526). The ruling concerned the case of Jimcy McGirt, a Native American who had been issued a life prison sentence in state courts for the sexual assault of a child on the contested lands. His appeal to the Supreme Court claimed that the State of Oklahoma did not have jurisdiction to prosecute him on the lands the crimes took place, and that he should instead be tried in a federal court. Justice Neil Gorsuch, along with Justices Ruth Bader Ginsberg, Stephen Breyer, Elena Kagan and Sonia Sotomayor, agreed with the appeal and reversed McGirt's sentence.

Gorsuch wrote: "Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word." The justices held that because Congress has not disestablished the Creek Reservation,

which they have the sole authority to do, it still remains and thus the land is under tribal jurisdiction subject to the Major Crimes Act (18 U.S.C. § 1153). Gorsuch held: “Under our Constitution, States have no authority to reduce federal reservations lying within their borders. Just imagine if they did. A State could encroach on the tribal boundaries or legal rights Congress provided, and, with enough time and patience, nullify the promises made in the name of the United States. That would be at odds with the Constitution, which entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the ‘supreme Law of the Land.’”

While not in direct relation to water resources issues, this ruling could affect water resources in Oklahoma and elsewhere in the West. As Chief Justice John Roberts wrote in his dissent, “Across this vast area, the State’s ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out. On top of that, the Court has profoundly destabilized the governance of eastern Oklahoma. The decision today creates significant uncertainty for the State’s continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law.”

In their response filing, Oklahoma raised concerns with the civil implications of a ruling in favor of McGirt. They stated: “Enshrining eastern Oklahoma as a reservation also would trigger federal obligations for...natural resources, 25 U.S.C. § 162a(d)(8)...,” among many other federal obligations, and argued “...civil implications have their own retroactivity problems: from tribal members seeking millions in tax refunds, to non-members facing enormous penalties if state-issued environmental permits were suddenly invalid.”

A similar case, *Sharp v. Murphy* (No. 17-1107), was also decided with this opinion. The court heard arguments for this case in 2018, but decided not to make a ruling during that term. The States of Nebraska, Kansas, Utah, Montana, South Dakota, Texas, Wyoming, along with Maine, Louisiana, and Michigan filed an amicus brief in support of the retention of Oklahoma’s jurisdiction over the lands, stating that “questions of civil jurisdiction run the gamut: from taxing and zoning laws, to health and environmental regulations.” It is unclear what the ultimate consequences of the decisions will be for water resources.

## **WATER RESOURCES** **Washington/State Legislation**

During the 2020 Legislative Session, the Washington State Legislature passed several water-related bills. A significant bill was HB 1622, originally proposed by the Department of Ecology. It outlines a new framework for

building long-term drought resiliency while allowing the State to better respond to drought emergencies. During drought emergencies, the bill helps to improve interagency cooperation and the flow of money from the legislature to the department, and expands the types of projects that can be funded during declared emergencies. It also authorizes the use of a “drought advisory warning” to improve communication of building drought conditions that will help water users prepare for potential shortages. The bill also creates a 50% cost-share grant program that allows the state to help fund water projects that will build drought resiliency prior to an emergency drought declaration. Finally, the bill authorizes a pilot program to explore the use of long-term water right leases negotiated ahead of time, last up to four years, and would only be activated if a drought were to occur during that time period.

The legislature also authorized the creation of the Washington Soil Health Initiative (SB 6306). The goals of the initiative are to improve: (1) agricultural viability and farm profitability by helping farmers implement good soil health practices; (2) the nutrition of food by improving nutrition within the soil; and (3) environmental function by reducing soil erosion, runoff and leaching thereby improving water quality and soil health. The bill is based on cooperative efforts and outlines the roles of the Washington Soil Health Advisory Committee, tasked to promote the implementation of the initiative, Washington State University extension program, the Washington Department of Agriculture and the Washington State Conservation Commission. This includes research, creation of tools, including a statewide soil health monitoring program and database, education, technical assistance, and the creation of a “soil health roadmap” to guide efforts and investments.

The State also passed bills to: (1) prohibit housing associations from restricting drought-tolerant landscaping (HB 1165); (2) prohibit discharges into waters of the state caused by motorized or gravity siphon mining without the necessary permit (HB 1261); (3) provide funding for the Chehalis Basin flood damage reduction and habitat restoration projects (HB 1154); (4) designate pumped storage projects along the Columbia River that utilize a statutory water right as projects of statewide significance (HB 2819); and (5) require conservation district sponsored fish habitat enhancement or restoration projects to be approved in order to receive the necessary permit (HB 1187).

## **MEETINGS** **Western States Water Council - Summer Meetings**

Due to COVID-19, the WSWC Summer (193<sup>rd</sup>) Meetings will be held virtually on July 22. Advanced registration is required to join the meeting via webinar. See: <https://www.westernstateswater.org/events/wswc-summer-2020-193rd-meetings/>.

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**The WESTERN STATES WATER COUNCIL is an organization of representatives appointed by the Governors of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.**