



PACIFIC LEGAL FOUNDATION

September 9, 2014

Honorable Chief Justice Tani Gorre Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102-4797

Re: Light v. State Water Resources Control Board, No. S220256

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pacific Legal Foundation, California Farm Bureau Federation, and California Cattlemen's Association respectfully submit this letter in support of the petitions for review filed by Russian River Water Users for the Environment, et al., and by Rudolph H. Light, et al.

Donor-supported Pacific Legal Foundation (PLF) is the oldest and largest public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. Thousands of individuals across the country support PLF, as do numerous organizations and associations nationwide. PLF is headquartered in Sacramento, California, and has offices in Washington, Florida, Hawaii, and the District of Columbia.

California Farm Bureau Federation is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout California, and to find solutions to the problems of the farm, the farm home, and the rural community. It is the state's largest farm organization, comprising 53 County Farm Bureaus and representing over 32,000 farm families and 74,000 individual members in 56 counties.

California Cattlemen's Association, the predominant organization of cattle grazers in California, is a mutual benefit corporation organized under California law as an "agricultural and horticultural, non-profit, cooperative association" to promote the interests of the industry. Its membership is open to any person or entity engaged in breeding, producing, maturing, or feeding cattle, or who leases land for cattle production. Many members own riparian water rights throughout California, and have an interest in the scope of the State Water Resources Control Board's (State Water Board or Board) authority to regulate their water rights.

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Pursuant to Rule of Court 8.500(g)(1), *amici curiae* respectfully ask the Court to grant the petitions for review, to resolve the conflict between *Light v. State Water Resources Control Board*, 226 Cal. App. 4th 1463 (2014), and *Young v. State Water Resources Control Board*, 219 Cal. App. 4th 397 (2013). *Amici curiae* also ask the Court to grant the petitions to resolve the important question of law whether the State Water Resources Control Board may use regulations, rather than adjudicatory hearings, to declare water uses unreasonable. Ct. R. 8.500(b)(1).

Argument

I

The Court should grant review to resolve the conflict between *Young* and *Light*.

A. Under *Young*, the State Water Board may not regulate the use of riparian water rights.

“No one disputes that the Water Board does not have jurisdiction to regulate riparian and pre-1914 appropriative rights.” *Young v. State Water Resources Control Board*, 219 Cal. App. 4th at 404 (citing *California Farm Bureau Federation v. State Water Resources Control Board*, 51 Cal. 4th 421, 429 (2011)). However, the State Water Board may make an adjudicatory threshold determination whether a diverter has a claimed riparian or pre-1914 water right, and determine the scope of that right. *Id.* at 400.

In *Young*, the State Water Board issued a cease and desist order pursuant to Water Code section 1831 to a water distribution corporation for alleged illegal diversion. *Id.* at 400. Customers of the distribution corporation filed suit against the State Water Board, advancing two claims. *Id.* First, they argued that the State Water Board had violated their due process rights to a hearing before depriving them of the use of water. *Id.*¹ Second, the customers argued that the State Water Board could not make an adjudicatory determination of whether they held riparian or pre-1914 appropriative water rights, but instead had to file an action to seek that determination from a court. *Id.*

The Third District Court of Appeal held that the State Water Board had the authority under its enforcement statutes, such as Water Code section 1831, to determine in the first instance whether a given diverter actually holds a riparian or pre-1914 water right. *Id.* at 400. *Young* harmonizes the immunity of riparian and pre-1914 water rights from State Water Board regulation, with the Board’s authority to prevent illegal diversions and unreasonable use. *Id.* at 406-07. Where the Board determines that a party has a riparian or pre-1914 water right, this concludes its jurisdiction over that

¹ A grant of reconsideration by the State Water Board mooted that claim. *Id.*

right. Conversely, the Board's adjudicatory determination that a party does not have such a right, or diverts in excess of it, establishes the Board's regulatory authority over that use. *Id.*

B. *Light* allows the State Water Board to regulate riparian water rights.

The decision below, *Light v. State Water Resources Control Board*, holds that the State Water Resources Control Board may declare the use of riparian and pre-1914 water rights unreasonable through a quasi-legislative rulemaking process as opposed to adjudicatory hearings. 226 Cal. App. 4th at 1473 (“[T]he Board may exercise its regulatory powers through the enactment of regulations, as well as through the pursuit of judicial and quasi-judicial proceedings.”); *see also id.* at 1482-87 (discussing the rationale for holding).

Light allows the Board to ignore *Young* and directly regulate riparian and pre-1914 uses.² To do so, the State Water Board need merely declare a riparian use unreasonable unless its owner submits to regulation. *See Light*, 226 Cal. App. 4th at 1482 (stating the Board's premise that use of riparian rights in ways that harm fish is unreasonable if diversions can be “managed to avoid the harm”) (citing State Water Resources Control Board, Notice of Preparation and Public Scoping Meeting Memo. (Oct. 27, 2010) p. 2); *see also id.* at 1486 (“Whether it is also a reasonable use, the Board has determined, depends upon whether ‘the diversion can be managed to avoid the harm’ to salmonids.”). The First District Court of Appeal concedes in *Light* that “in many, or perhaps most circumstances, diversion for frost protection purposes from the Russian River stream system is biologically harmless.” *Id.* Nonetheless, the court of appeal concludes, “[e]fficient regulation of the state's water resources in these circumstances demands that the Board have the authority to enact tailored regulations.” *Id.* at 1487 (footnote omitted). *Light* goes so far as to declare that the State Water Board had not yet found any particular riparian diversion unreasonable, only those carried out in the future without compliance with Regulation 862. *Id.* at 1489. Stripped to its essence, *Light* authorizes the State Water Board's direct regulation of riparian water rights without any determination that the property owners' uses or actions are unreasonable.

Light gives short shrift to the immunity of riparian and pre-1914 water rights from State Water Board regulation by collapsing it into a mere exemption from permitting. “While such users cannot be required to obtain permits as a condition of exercising their right to divert, that does not mean their use of California's waters is free from Board regulation.” *Id.* at 1487. *Light* also dispenses with the immunity of riparian and pre-1914 rights from State Water Board permitting with the circular

² *Light* does not cite *Young*, although *amicus curiae* Northern California Water Association cited *Young* to the court of appeal. Amicus Brief of Northern California Water Association, Oct. 3, 2013, at 9.

argument that if Regulation 862 amounts to a permit, than the State Water Board would have no legal way to regulate such rights. *Id.*

Courts will be unable to square *Light*'s broad grant of regulatory authority over riparian water rights to the State Water Board with *Young*'s stark rejection of such authority once the Water Board determines that a diversion takes place under riparian rights. The Court should grant the petitions to resolve this conflict.

II

The Court should grant review to resolve whether the State Water Board may use regulations, rather than adjudicatory hearings, to declare water uses unreasonable.

Young allows the State Water Board to determine the existence of riparian rights using a quasi-judicial adjudicative process, but restricts the Board's authority over those rights once it determines that they are riparian. 219 Cal. App. 4th at 400, 406-07. *Light* on the other hand holds that the State Water Board may directly regulate riparian uses through quasi-legislative rulemaking. 226 Cal. App. 4th at 1487. The nature of an agency proceeding as either quasi-judicial or quasi-legislative has significant consequences for those whose property is controlled thereby, including whether due process rights attach. This Court, rather than the courts of appeal, should determine the important legal question of whether the State Water Board may determine whether any given water use is unreasonable through a quasi-legislative rulemaking in which the water right holders have no due process protections.

A. Whether the State Water Board has this power is an important question of law under the Due Process Clause.

This Court has consistently explained the distinction between quasi-legislative and quasi-adjudicative agency actions: Adjudicatory actions determine facts particular to an individual case, while legislative actions set broad, generally applicable rules of conduct on the basis of general public policy. *Horn v. County of Ventura*, 24 Cal. 3d 605, 613 (1979); *San Diego Bldg. Contractors Ass'n v. City Council*, 13 Cal. 3d 205, 212-13 (1974). Constitutional due process protections, generally inapplicable in quasi-legislative actions, do apply to quasi-adjudicatory actions. *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 244-45 (1973) (railroad company has no due process claim to challenge quasi-legislative rulemaking); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (no due process right to challenge a quasi-legislative increase in all property tax assessments in the City of Denver); *Nasha L.L.C. v. City of Los Angeles*, 125 Cal. App. 4th 470, 482 (2004) (citing *Beck Dev. Co. v. S. Pac. Transp. Co.*, 44 Cal. App. 4th 1160, 1188 (1996)).

But, “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law[.]” U.S. Const. amend. V. “Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). “When protected interests are implicated, the right to some kind of prior hearing is paramount.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70 & n.7 (1972). “A protected property interest is present where an individual has a reasonable expectation of entitlement deriving from existing rules or understandings that stem from an independent source such as state law.” *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994) (internal quotations omitted) (quoting *Roth*, 408 U.S. at 577). A riparian or pre-1914 water right owner has a vested property right in the reasonable use of that right. *Imperial Irrigation District v. State Water Resources Control Board*, 225 Cal. App. 3d 548, 563-64 (1990).

These Due Process authorities, combined with a riparian or pre-1914 water right owner’s vested property interest in the reasonable use of the right, cast serious questions on whether the State Water Board can determine whether a given use is reasonable unless it does so in a quasi-judicial adjudicatory proceeding that respects the right holders’ due process rights.

Young holds that the State Water Board may determine the existence of a riparian water right, but only does so in the context of a quasi-adjudicatory proceeding replete with due process protections. *Light*, on the other hand, allows a global reasonable use determination through quasi-legislative rulemaking with no due process protections. Given these conflicting decisions, the State Water Board’s decision how to proceed results either in affording due process protections to riparian right holders, or denying them, regardless of the nature of the property. A vested property owner’s due process rights in a given proceeding should not depend on the agency’s whim in deciding whether to treat the matter as rulemaking instead of an adjudicatory hearing. The Court should grant review to resolve this important question of law.

B. Whether the State Water Board has this power is an important question of law because the State Water Board is using it to regulate other vested water rights.

It is important for this Court to resolve the question whether the State Water Board may control the use of riparian and pre-1914 water rights through quasi-legislative rulemaking, because the Board continues to assert that authority. In May of 2014, the State Water Board adopted regulations to curtail the exercise of riparian and pre-1914 water rights on Mill, Deer, and Antelope Creeks in

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Tehama County. Cal Code Regs., tit. 23, §§ 877-879.2;³ State Water Resources Control Board Resolution No. 2014-0023, May 21, 2104.⁴

These regulations bear several similarities to Section 862, which *Light* upheld. They were developed and adopted at the prompting of the National Marine Fisheries Service for the protection of salmonid fisheries. Section 877(a); Resolution ¶ 5, p. 1-2. They were adopted as regulations instead of through a quasi-judicial hearing process. Section 877. They determine an entire class of water diversions to be unreasonable based on their impact on fisheries. Section 877(a); Resolution ¶ 10, p. 2-3. They subject riparian and pre-1914 water rights to third party regulation. Section 878.2; Resolution ¶¶ 16-17, p. 4. They authorize the disregard of the priority system. Section 878.1(b). They grant broad discretion to the State Water Board's deputy director to approve diversions outside the priority system without affording any due process protections to those with senior water rights. Section 878.1(d).

The State Water Board will clearly continue using quasi-legislative, regulatory means to regulate riparian and pre-1914 water rights, particularly given the seriousness of the current drought and the resource conflicts that it is creating. This Court should grant the petitions in order to resolve the important legal question of whether the State Water Board may use its asserted rulemaking power to regulate water rights.

C. Whether the State Water Board has this power is an important question of law because of the severity of the current drought.

All Californians need clearly established procedural and substantive rules governing the state's actions as it administers water rights, allocates unappropriated water, and addresses the multiple conflicting demands of the state's people and environment. The severity of the ongoing drought creates an urgent need for such clarity.

The United States Geological Survey reports that 2013 was the driest calendar year in 119 years of recorded California history.⁵ The California Department of Water Resources reported on May 1 of this year that the Sierra snowpack was at only 18% of average for that date, and that the state's largest reservoirs have dwindled to half of their storage capacity. As a result, the Department only

³ Subsequent section references are to Title 23 of the California Code of Regulations.

⁴ Available at http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2014/rs2014_0023_corrected_with%20regs.pdf.

⁵ USGS website: <http://ca.water.usgs.gov/data/drought/index.html>.

allocated five percent (5%) of the water ordered by State Water Project customers, the lowest in the 54 year history of the Project.⁶ Reflecting on these grim current conditions, the Department forecasts that “[t]he drought has no end in sight.”⁷

Governor Brown declared a drought emergency on January 17, 2014, due to the combination of low rainfall, river levels, snowpack, and reservoir storage, as well as declining groundwater levels. His declaration notes that extremely dry conditions have persisted since 2012 and may continue beyond this year.⁸ This ongoing drought has imposed staggering costs on California industries. The University of California at Davis reported that 2014 is the third driest year on record, that the drought is statistically likely to continue into 2015, and that the drought has resulted in the loss of one-third of surface water supplies statewide and the worst absolute reduction in water availability ever experienced by agriculture in California. This water shortage has had a \$2.2 billion statewide economic cost to agriculture. Richard Howitt, et al., *Economic Analysis of the 2014 Drought for California Agriculture*, UC Davis Center for Watershed Sciences, July 23, 2014, Executive Summary, pp. ii-iv.⁹

Not surprisingly, the drought has seized the attention of the public. The Public Policy Institute of California reports that for the first time in the history of its annual poll of attitudes about the environment, water supply and drought outpace air pollution as the most important environmental issue in California. Statewide, 54% of all adults and 61% of likely voters consider that the water supply is a big problem. Majorities of adults in every region (except Los Angeles) agree. Mark Baldassare, et al., *Californians and the Environment*, Public Policy Institute of California, July 2014, at 21.¹⁰

The severity of the current drought will force the State Water Board to make increasingly difficult decisions related to the use of existing water rights. The Court should grant review in this case to

⁶ Press Release, Dep’t of Water Res., *Year’s Final Snow Survey Comes up Dry* (May 1, 2014), available at <http://www.water.ca.gov/news/newsreleases/2014/050114.pdf>.

⁷ Department of Water Resources website: <http://www.water.ca.gov/waterconditions/waterconditions.cfm>.

⁸ Governor Jerry Brown, January 17 drought emergency declaration, available at <http://gov.ca.gov/news.php?id=18368>.

⁹ Available at https://watershed.ucdavis.edu/files/biblio/DroughtReport_23July2014_0.pdf.

¹⁰ Available at <http://www.ppic.org/main/publication.asp?i=1110>.

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resolve the question whether, and the extent to which, the Board may continue to make those decisions using quasi-legislative rulemaking processes which deny due process protections to riparian and pre-1914 water rights holders.

Conclusion

The Court should grant the petitions for review.

Sincerely,

A handwritten signature in blue ink that reads "A. L. François" with a stylized flourish at the end.

ANTHONY L. FRANÇOIS
Attorney

cc: See attached Declaration of Service

DECLARATION OF SERVICE BY MAIL

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On September 9, 2014, true copies of AMICUS CURIAE LETTER BRIEF IN SUPPORT OF PETITIONS FOR REVIEW were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 9th day of September, 2014, at Sacramento, California.


TAWNDA ELLING