SUPERIOR COURT OF CALIFORNIA
COUNTY OF SISKIYOU
311 Fourth Street, Yreka, California 96097

DATE: December 24, 2012 **JUDICIAL OFFICER: Karen L. Dixon**
CLERK: J. Chilton/T. Zufelt

PETITIONER: Siskiyou County Farm Bureau
VS. **CASE NO. SC SC CV 11-00418**
RESPONDENT: California Department Of Fish and Game

NATURE OF PROCEEDINGS: Decision

Plaintiff filed its Complain for Declaratory Relief on March 25, 2011. Defendant ("DFG") filed its Answer on January 6, 2012. Trial was commenced on April 30, 2012 with the hearing of pre-trial motions. Trial continued on May 8th through May 11th, and June 25th through June 29th. The parties submitted closing briefs and the matter was submitted on September 28, 2012.

STATEMENT OF THE FACTS

Historical background

For centuries the stream and river systems within Siskiyou County have been prime spawning grounds for a variety of fish species including the coho salmon. Propagation of the salmon is greatly reliant on the continued viability of the Siskiyou County water systems. As an anadromous fish, the coho leaves the stream after attaining sufficient size and travels down the rivers to the Pacific where it lives much of its life until time to spawn. When ready to spawn, the coho reverses its travel up through the rivers to the stream where it hatched and spawns in those waters. The salmon's roe and fry require certain qualities of water depth, temperature and clarity to hatch and thrive.

The state has historically greatly benefited from the coho salmon, economically, recreationally, and aesthetically. Further, since the health of the coho and other fish are an important indicator of the health of the watercourses upon which they depend, the importance of the viability of the coho on the general environment in California cannot be understated.

Plaintiff's principals are members of the farming and ranching community in Siskiyou County. Many of the members represent families that have farmed and ranched in Siskiyou County for several generations. In some instances the member is farming property that his family has farmed for well over 100 years. The majority of the members operate single family businesses. The profit from that business is used for the direct support of the member's family and the maintenance of the property, animals, and crops.

Plaintiff's members have perfected rights to the use of water on their property, both riparian and by pre or post-1914 appropriation processes. Many of the members' water rights have been adjudicated in the Siskiyou County Court. They regularly exercise their water rights by diverting water through the use of pumps or headgates to ditches or other conduits and then onto their

property. Because the members have been using water as established by their water rights, there has been no requirement to overtly regulate their activity.

Fish and Game Code §§1600, et seq. was enacted in 1961. It was intended to protect the spawning grounds of the state's fisheries. Section 1602 [originally §1603] ("1602") made it unlawful for any person to substantially divert or obstruct the natural flow of a stream. Any person contemplating an activity that substantially diverted or obstructed the natural streamflow is required to give notice to the DFG prior to undertaking the activity. Upon receiving notice, the DFG was required to visit the site of the proposed activity and investigate to determine if the activity could adversely affect the fish and wildlife dependent upon that stream system. If so, the DFG and the rancher would enter into a Lake and Streambed Alteration Agreement ("LSAA") that would include terms intended to mitigate the adverse consequences. After the LSAA was negotiated and signed, the activity could commence so long as it was carried out consistent with the terms of mitigation.

Plaintiff's members followed the requirements of §1602 when they needed to undertake activities in the stream or affecting the streambed or bank such repairing or replacing irrigation. For instance, Plaintiff's witness Bruce Fiock testified that when he constructed a new irrigation facility, he was required to divert the natural flow of the Shasta River around the construction site and he did so by constructing a temporary bypass channel. He noticed the DFG prior to the commencement of construction and started construction after entering into a LSAA. Mr. Jim Morris testified that the Scott Valley Irrigation District obtained an LSAA prior to initiating construction near Young's Dam. The construction required the erection of a push-up dam to divert the flow of the river water around the construction site. Other testimony was presented that demonstrated that ranchers obtained LSAA's for such activities as the replacement of an irrigation headgate or pump, reinforcing a steam bank by grading it or plowing gravel or dirt onto it, or planting berry vines and other vegetation to strengthen a stream bank.

The DFG is charged with the duty of enforcing the provisions of the Fish and Game Code. In order to carry out its duties most efficiently the DFG has divided the state into separate regions. Region 1 is comprised of the nine northernmost California counties, including Siskiyou County. The DFG employs wardens and other staff in the area to carry out the duties of the department.

Plaintiff's members have a good relationship with area wardens and other members of DFG staff in Region 1. Wardens were frequently on rancher's properties and DFG staff was a very helpful resource in the planning of repair and replacement jobs and other stream-related activities. DFG staff was also helpful in finding DFG funding for stream-related improvement projects such as the replacement of headgates and dams, the dredging streambeds to remove accumulated silt, etc. DFG staff would also help supervise such projects.

Plaintiff's members were also involved in watershed-wide conservation activities such as replacing less effective fish screens with improved and undamaged screens, instituting planting programs to facilitate streambank stability and to provide shaded water areas for the benefit of fish fry. They were encouraged in these efforts by DFG staff who helped by providing project expertise and funding.

Although there was a great deal of interaction between the members and DFG staff, prior to 2005 Plaintiff's members were never informed by DFG staff that they must give notice to DFG before exercising their waters rights. This was so even though DFG staff was directly involved with many of the members' projects that facilitated the diversion of water for irrigation and stock watering.

Due to a number of factors, the coho's situation began to deteriorate. There is great dispute about the cause of the decline of the fish or if, in fact, fish numbers are declining. The dispute is not an issue in this case and will not be addressed further than acknowledging the fact of the dispute. In 2003 the coho was listed as a threatened species pursuant to the California Endangered Species Act ("CESA") (Fish and Game Code §2050, et seq.) and then listed as an endangered species in 2005.

The state has placed a high priority on protecting threatened and endangered species. It has placed much of the duty for the recovery efforts for those species on the DFG.
After the listing of the coho first, as a threatened species and then as endangered, the administration and staff of Region 1 began planning programs to protect the coho including more rigorous enforcement of §1602.

During the period between 1999 and 2008, Mark Stopher was the supervisor for the Lake and Streambed Alteration Program for Region 1. Part of his duties was to supervise the enforcement of §1602. After the coho was listed as an endangered species, Mr. Stopher developed enforcement criteria for §1602. Part of the criteria was to implement a directive to DFG staff to presume that any diversion of appropriated or unappropriated water, including riparian diversion is substantial and subject to notification under Fish and Game Code §1602(a) ("Stopher criteria"). The Stopher criteria was inconsistent with the historical enforcement of §1602 in Region 1 or in anywhere else in California. There was much discussion among DFG administration and staff regarding this directive and several of Mr. Stopher's staff questioned whether the new policy was a correct one. They were also concerned about the effect that it would have on the population to be regulated.

In 2005 enforcement efforts in Region 1 began. First DFG sent letters to water diverters within Siskiyou County. The letters informed the recipient about the notice requirements of §1602 in the case of a substantial diversion of the natural flow of a stream. It addition, it went on to inform the recipient of the following:

1. That the DFG considered agricultural diversions to be subject to §1602.
2. That there was no indication in DFG's file that the recipient had completed a LSAA.
3. That the recipient had two options, either to participate in a watershed-wide agreement through the Siskiyou Resource Conservation District ("SRCD") or obtain the agreement as an individual.
4. That if the recipient wanted to apply for an individual agreement, he must demonstrate compliance with all applicable code provisions, including the California Environmental Quality Act ("CEQA") (Public Resources Code §21000, et seq.).
5. That CESA forbids the unauthorized "taking" (i.e., killing or capturing) of a threatened or endangered species and that taking a coho might occur during the diversion of water for irrigation.

6. That a "taking" might result by the capturing or killing of coho fry while diverting water for irrigation or by the cumulative effect of water diversion in the watershed.
7. That the recipient would also be required to obtain an incidental take permit ("ITP") if his water diversion activities could result in the taking of a coho salmon. It was also inferred that an ITP would be required if the recipient's activity alone or in conjunction with other water diverts in the watershed led to dewatering the stream such that it resulted in the killing of coho.
8. That the recipient could obtain an ITP either individually or as part of a watershed wide permitting process. Regardless of his choice, he would have to meet all applicable CEQA requirements.

The first letter was followed up by two others, each increasingly insistent, including the threat of criminal sanctions for failure to comply.

Contemporaneous with the letters, DFG was training its staff regarding its policy and criteria for water diversions. Exhibit 27 is a copy of the manual used for staff training. The power point presentation for the training commences at the page Bate-marked DFG001119. At page DFG001120 the staff is introduced to the Stopher criteria. As noted in the first frame, DFG headquarters was still evaluating the criteria and the Office of General Council expressed reservations regarding the policy. The full policy is found on DFG0001125 of exhibit 27.

Following the sending of the first letter, DFG conducted several area meetings to give more information about the DFG's new enforcement policies to Siskiyou County water users. The users raised alarm about what they perceived as a new interpretation of §1602, indicating that the section was not intended to apply to the act of exercising a water right. The meetings were frequently heated and adversarial.

The parties came to an impasse. DFG has not sought enforcement of the Stopher criteria but has continued to maintain that the exercise of a water right is subject to regulation pursuant to §1602. Defendant asserts that the water diversions pursuant to water rights are subject to §1602 even though DFG did not choose to enforce the provisions prior to the coho being listed as endangered. Plaintiffs brought their suit for declaratory relief seeking clarification from the court.

PARTY CONTENTIONS

Plaintiff contends as follows:
1. That §1602 is latently ambiguous in that the phrase "substantially divert the natural flow" is susceptible to more than one reasonable interpretation.
2. That the Legislature never intended or anticipated that §1602 would apply to the act of extracting water pursuant to a water right.
3. That contemporaneous and practical construction of §1602 and the longstanding implementation of that section are inconsistent with DFG's new interpretation.
4.That the DFG's new interpretation would have extraordinary consequences including fundamentally altering the administration of water rights in California, imposing significant new burdens and uncertainties on longtime water users, leading to takings and other litigation.
5. As a penal statute, §1602 should be construed leniently in favor of those subject to criminal

liability.
6. All of the words in §1602 describe streambed altering activities. Consequently the phrase "substantially divert the natural flow" should be construed to reflect that class of activities.
7. DFG's fiscal impact analysis did not consider impacts to farmer, ranchers, and other small businesses that use water, demonstrating that DFG did not construe §1602 to apply to extracting water pursuant to a water right in developing the analysis.

Defendant DFG contends as follows:
1. Water rights are subject to regulation because water is a public resource, owned by the State of California
2. The plain meaning of §1602 requires an entity to notify DFG of any substantial diversion, regardless of whether it involves a physical alteration or if an entity holds a water right.
3. The extrinsic evidence from trial establishes that Plaintiff's claim for declaratory relief must be denied.
4. "Takings" considerations do not play a role in the determination of whether §1602 is applicable to Plaintiff's members.
5. Courts construe statutes leniently in favor of those subject to criminal liability only when some doubt exists as to the legislative purpose.

Rather than repeat the evidence presented by each party during the multi-day trial, the court refers the reader to the description of the evidence presented in the Plaintiff's Closing Brief, the Defendant's Closing Brief, and the Plaintiff's Reply Brief, all filed timely herein and incorporates those recitations of the evidence herein.

I. BRIEF STATEMENT OF THE HISTORY OF CALIFORNIA WATER RIGHTS

The importance of water to the historic, economic, and cultural aspects of life in this state cannot be overemphasized. Early in the state's history with the boom of the mining industry, rights to water were determined by common law with first consideration to the holder of riparian rights, those rights that flow from the proximity of the owners land as directly adjacent to the watercourse. The rights were temporally prioritized on the basis of "first in time, first in right". Those claim holders furthest upstream had the primary right to the use of all water that he chose to use. In the late 1800's agriculture became an increasingly important economic activity that required the use of an abundance of water, often on land a distance away from the waterway. In 1870, a system of water appropriation was developed to address the needs of the agricultural user of water. The right to water based on the appropriation became the policy in California and water rights could be adjudicated based on the holder's demonstrated historic use.

In 1914, the state commenced a more structured system for water appropriation and enacted the Water Commission Act. It left intact those rights determined prior to 1914, but the Act did not address the issue of the right of a senior water rights holder to use as much of the water as he chose, without regard for waste or the needs of junior rights holders. The California Constitution was amended in 1928 at Article 14, section 3, to reflect the changing water policy of the state. The amendment abridged riparian and appropriated rights, even those determined prior to 1914. Riparian and appropriated rights were abridged to prohibit the waste of water. The new policy of the state was to conserve waters and to put the water to the highest possible use, requiring that

the use, method of use, and method of diversion be reasonable. *Sawyer v. Board of Supervisors of Napa County* (1930) 108 Cal.App. 446.

The 1976 amendment to the state constitution continued the policy at Section 2, Article X:

> "Sec. 2. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or waste course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not an shall not extend to the waste or unreasonable use of unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

The California Constitution clearly recognizes riparian and appropriated water rights but requires the holders of those rights to use the water reasonably and beneficially, utilizing reasonable methods of diversion. In Water Code §100 the Legislature also declared the State's policy regarding the *beneficial use of water.*

> "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonable required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water."

Throughout the Water Code the Legislature declares that certain uses of water are beneficial uses consistent with stated interests of the people of the state. Water Code §105 declares the state's general policy that the protection of the public interest in the development of the state's water resources is of vital concern to the people and declares that the state shall determine in what way the waters of the State should be developed for the greatest public benefit. Water Code §106

declares as "the established policy of the state that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." This is the only section in California's codes that sets a numeric priority on the uses of water. As the needs of the people of the state changed, the Legislature has enlarged the category of uses that are beneficial, for instance declaring in the California Wild and Scenic River Act (Public Resources Code §5093.50, et seq.) that the use of water to maintain the named river systems is the highest and most beneficial use of water in those waterways and "is a reasonable and beneficial use of water within the meaning of Section 2 of Article X of the California Constitution." Other code sections declare additional beneficial uses of water to recreation, preservation and enhancement of fish and wildlife resources (Water Code §1243; Fish and Game Code §§2050.), conservation (Public Resources Code §§5093.50. et seq.) and environmental quality concerns (Public Resources Code §§21000, et seq.)

II. A WATER RIGHT AS A PROPERTY RIGHT

A. Generally

Although the waters of the state are the property of the people of the state, the right to use that water, other than riparian rights, may only be acquired by appropriation in the manner provided by law. (Water Code §102.) "While the Water Code provides that all water within the State is the property of 'the people of the State,' ownership so created is ownership in a regulatory, supervisory sense, rather than in a possessory, proprietary sense." *State v. Superior Court of Riverside County* (2000) 78 Cal.App.4th 1019.

The statutory use of the water is the right held in relationship to the state's waters. Such right is the statutory use of the water is the right held in relationship to the state's waters. Such right is considered *usufructuary*, which means that the holder of the right does not own the water but only has the right of the use of water. The holder has the right to only take and use so much of the water that is reasonable and beneficial. "Water rights carry no specific property right in the corpus of the water itself." *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261.

Water Code §101 demonstrates the policy that the water appropriator has rights to waterflows subject only to those riparian or appropriative right holders with *preceding* rights. "Riparian rights in a stream or watercourse attach to, but to no more than so much of the flow thereof as may be required or used consistently with this and the next preceding section, for the purposes of which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided , however, that nothing in this or the next preceding section shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, *or of depriving any appropriator of water to which he is lawfully entitled."* (Emphasis added.)

B. Riparian Rights

The right to the use of the water in a stream or watercourse is a property right that is conferred by ownership of the land adjacent to or overlying the watercourse. The right "runs with the land". The riparian doctrine confers upon the owner of land contiguous to a watercourse the reasonable and beneficial use of that water on his land. *Nicoll v. Rudnick* (2008) 160 Cal.App.4th 550. This

right has been present in common law since the inception of the state. ("Right of private property in water course is corporeal right when it is derived from ownership of soil over which it passes." *Kirby v. Lindsay* (Cal.Dist. 1858) 2 Lab. 203); ("The owners of land by or through which a watercourse naturally and usually flows have a right of property in the waters of the stream." *Lux v. Haggin* (1886) 69 Cal. 255); ("The 'riparian right' is a vested property right entitled to the same protection as any other right, and inhering in and a part and parcel of abutting lands, rather than gained by use or lost by disuse, and entitles the owner, subject to the correlative rights of other riparian owners, to use the entire ordinary and natural flow of the stream for all lawful riparian uses and to have the natural flow come to the land undiminished save by lawful uses of upper riparian owners or others who have obtained a superior claim to the water." *Fall River Valley Irrigation Dist. v. Mt. Shasta Power Corp.* (1927) 202 Cal. 56.)

This *usufructuary* right inures to the benefit of riparian lands, but such rights are inseparably annexed to the soil and pass with a grant of the land. *City and County of San Francisco v. Alameda County* (1936) 5 Cal.2d 243.

C. Appropriated Rights

The Constitutional amendment that restricted riparian owners or overlying landowners to the reasonable and beneficial use of water against appropriators was adopted for the purpose of redefining water rights rather than for purpose of providing remedies for the invasion of such rights. *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132. The amendment recognized the importance of an appropriated water right to the welfare of the state and elevated it to the same status as that of the holder of a later riparian right. Priority to water as to all holders was set based on the temporal acquisition of the right.

The appropriation doctrine contemplates the diversion of water from the waterway to a distant piece of land and applies to any taking of water for other than riparian or overlying uses. An appropriative water right is a possessory real property interest incidental and appurtenant to the land which is serviced by the application of the appropriated water and is founded on and measured by the amount of water that is reasonably and beneficially used on the land. When the owner of an appropriative water right perfected his appropriation, he became entitled to the use of the quantity of water which he has historically appropriated at any place where he may choose to convey it, and for any reasonable, useful, and beneficial purpose to which he may choose to apply it. *Nicoll v. Rudnick* (2008) 160 Cal.App.4th 550

As a real property interest, an appropriative water right "runs with the land". "Under the general rule that rights and appurtenances that ordinarily pass with a conveyance of land pass to a purchaser on foreclosure, an appropriative water right is included in a sale under foreclosure even though not mentioned in the foreclosure proceedings." *Nicoll v. Rudnick* (2008) 160 Cal.App.4th 550

An appropriator of water from a stream who is first in time has first in right to the water from the stream which is the site of his appropriation and to the full extent of his appropriation. (See *Miller & Lux Incorporation v. Tulare Lake Basin Water Storage District* (1933) 219 Cal. 41

regarding superior right in time to use of water.) "An appropriative right is superior to all other water rights acquired after the appropriative right. Under the doctrine of appropriation as applied to waters of flowing streams, appropriator first in time is prior in right over others upon same stream." *State of Arizona v. State of California* (1936) 36 S.Ct. 848.

III. PUBLIC TRUST DOCTRINE

Under the public trust doctrine, the state holds ownership of the state's navigable waterways as trustee for the people and the state has an affirmative duty to protect public trust uses whenever feasible when planning and allocating water resources. *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937. The protection of recreational and ecological values is among the purposes of the public trust. *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674. "The state, as trustee for the benefit of the people, has power to deal with its navigable waters in any manner consistent with the improvement of commercial intercourse, whether navigational or otherwise." *Colberg, Inc. v. State of California* ex rel. *Department of Public Works* (1967) 67 Cal.2d 408,419.

To protect the public's interest in the state's natural resources, the public trust doctrine requires that the state recognize the changing and growing needs of the public. As stated in *Marks v. Whitney* (1971) 6 Cal.3d 251when discussing the public trust as it applies to the state's tidelands, at pages 259-260,

> "The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. (Colberg,, Inc. v. State of California ex rel. Dept. Pub. Wks., 67 Cal.2d 408, 421-422 [62 Cal.Rptr. 401, 432 P.2d 3].) ... The power of the state to control, regulate and utilize its navigable waterways and the lands lying beneath them, when acting within the terms of the trust, is absolute (People v. California Fish Co., supra, p. 597), except as limited by the paramount supervisory power of the federal government over navigable waters (Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks., supra, 67 Cal.2d at pp. 416-422)."

As discussed above, the Legislature has declared a general policy in Water Code §105 that the protection of the public interest in the development of the state's water resources is of vital concern to the people and that the state shall determine in what way the state's waters should be developed for the greatest public benefit. Again, other code sections recognizing additional beneficial uses of water expand the extent of the public trust to recreation, preservation and enhancement of fish and wildlife resources (Water Code §1243; Fish and Game Code §§2050.), conservation (Public Resources Code §§5093.50. et seq.) and environmental quality concerns (Public Resources Code §§21000, et seq.).

In deciding the case of *National Audubon Society v. Superior Court of Alpine County, et al.* (1983) 33 Cal.3d 419, the state Supreme Court reviewed the decisions that recognized that the continued rights of the people in the navigable rivers of the state are paramount and controlling. In the cases of *People v. Gold Run D. & M. Co.* (1884) 66 Cal. 138 and *People v. Russ* (1901) 132 Ca. 102, the court held that the state holds the absolute right to all navigable waters and the soils under them as trustee of a public trust for the benefit of the people and the state cannot grant that right to an individual. The *Audubon* court expanded on the decisions, stating at pages

436-437 that if "the public trust doctrine extends to constrain *fills* which destroy navigation and other public trust uses in navigable waters, it should equally apply to constrain the *extraction* of water that destroys navigation and other public interests. Both actions result in the same damage to the public interest." The exercise of the protection of the public trust extends to those non-navigable tributaries of navigable waterways and the state, as administrator of the trust, continues to exercise its sovereign power and duty of supervision. *National Audubon Society v. Superior Court, supra*, at page 437.

The granting of water rights to the individual is consistent with the purposes of the public trust in that it supports the state's valuable agricultural economy, but the state's authority to supervise the use of the water granted in the right continues. The state has no power to convey the trust res to the individual free of the trust. "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them...than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trust connected with public property, or property of a special character, like lands under navigable waterways, they cannot be placed entirely beyond the direction and control of the State." *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, 453-454 [13 S.Ct. 110].

IV. THE RELATIONSHIP BETWEEN THE PUBLIC TRUST DOCTRINE AND THE CALIFORNIA WATER RIGHTS SYSTEM

The relationship between the California water rights system and the public trust doctrine was examined in *National Audubon Society v. Superior Court of Alpine County, supra*, (1983) 33 Cal.3d 419. In that case, an environmental organization sought a writ of mandate against the trial court after it decided that the public trust doctrine offered no independent basis for challenging the of the City of Los Angeles ("DWP") diversions of water from four of the five rivers and streams that fed Mono by Basin and filled Mono Lake. The water was diverted pursuant to the appropriative water rights held the DWP for domestic water use. The effects of the diversion dramatically reduced the water levels in Mono Lake which adversely impacted the wildlife dependent upon the lake. The plaintiffs argued that the trial court had authority to enjoin the continued diversions on the theory that the lake's shores, bed, and waters were protected under the public trust doctrine. The trial court denied plaintiff's relief and granted the defendant's motion for summary judgment. Plaintiffs directly petitioned the State Supreme Court for writ of mandate to review the decision. The writ was issued.

In considering the issues presented before it, the state Supreme Court recognized the tension between the state's public trust doctrine and the water rights system, noting a "clash of values" between preserving a "scenic and ecological treasure of national significance" and the City's need for water, its reliance on the Water Board's grant, and the substantial cost to the City if the diversions were curtailed.

The Supreme Court examined the competing interests at length and the effects of the competition

between water rights and the public trust doctrine. The Court noted that the two systems developed independently of each other. Each developed a comprehensive scheme of rules and principles and, if each applied the full extent of the scope of its respective system, it would occupy the field of allocation of water to the exclusion of the other resulting in an unbalanced structure. The Court sought to find an accommodation between the two systems, drawing upon the history of both systems and the body of judicial precedent. The Court reached these conclusions.

First, that the state as sovereign retains continuing supervisory control over its navigable water and the lands beneath those waters. In that role it prevents any party from acquiring vested rights to appropriate water in a manner harmful to the interests protected by the public trust. The state retains the power to reconsider allocation decisions, especially if the original decision failed to take into consideration the effect on the public trust interest.

Second, the Legislature has the power, either directly or through its departments and agencies, to grant usufructuary licenses that will permit an appropriator to take water from a stream for its own use. This is so even if the water is used at a distance from the source and the taking does not promote, and even unavoidably harms the public trust at the source stream. The population and the economy of the state depend upon the appropriation of vast amounts of water. The water of the state must be used efficiently and that may require diverting water from in-stream uses.

Third, the state has an affirmative duty to take the public trust into account when allocating water resources. It must protect that trust whenever feasible. A system for the appropriation of water rights that does not consider the public trust may cause unnecessary and unjustified harm to the trust interests. *National Audubon v. Superior Court of Alpine County, et al., supra,* 33 Cal. 445-448.

As applied to this case, although Plaintiffs' principals hold water rights, the state continues to hold supervisory authority over the exercise of those rights pursuant to the continuing interests of the public in the assets of the trust. The state is not bound by past allocation decisions which may be adverse or detrimental to the resources protected under the state's public trust. However, any reconsideration or exercise of supervisorial authority over Plaintiffs' water allocations must be accomplished by that agency or department imbued by the Legislature with the jurisdiction to exercise such authority.

Plaintiff asserts that the DFG's intended rule that it should be noticed pursuant to §1602 of each and every time an agricultural user plans to exercise his water rights is in excess of its authority and an interpretation that was not intended by the Legislature in enacting the section.

The DFG asserts that pursuant to Fish and Game Code §1600, et seq. it has the authority to require that it be noticed of any "substantial diversion" of water and that due to the low stream flows in the water systems in Siskiyou County, any extraction of water pursuant to the exercise of 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. The DFG is required to exercise its authority to protect the public interest in the fish and wildlife of the state, including regulation of the exercise of water rights to protect the spawning grounds for the preservation of the endangered Coho Salmon, uniquely lying within the streams and waterways in Siskiyou

County.

V. WHAT IS THE RELATIONSHIP BETWEEN THE DEPARTMENT OF WATER RESOURCES ACTING IN ITS CAPACITY AND THROUGH THE SWRCB AND THE DFG?

A. The Department of Water Resources and the State Water Resource Control Board

The Department of Water Resources ("DRW") was vested with "all powers, duties, purposes, responsibilities, and jurisdiction in matters pertaining to water" vested in its enumerated predecessors. The authority of the departments of Public Works, the Division of Water Resources of the Department of Public Works, the State Engineer, and the Water Project Authority of the State of California were consolidated in the Department of Water Resources. The intention of the Legislature was to more efficiently administrate and manage all issues dealing with the state's water. The duties of the DWR are accomplished through the two arms of the DWR, the California Water Commission and the State Water Resources Control Board. (WC §120)

The State Water Resources Control Board ("SWRCB") is vested with the powers, duties, purposes, responsibilities, and jurisdiction formerly vested in the various departments of Public Works, the Division of Water Resources of the Department of Public Works, the State Engineer, the State Water Quality Control Board in issues under which permits or licenses to appropriate water are issued, denied, or revoked or under which the functions of water pollution and quality control are exercised. (WC §179) In addition, the DWR has authority to investigate watercourses and the use of water, water conditions of surface and underground waters, collect records of diversion and water use, and supervise the distribution of water in accordance with agreements and court orders. (Water Code §226)

The SWRCB exercises the adjudicatory and regulatory functions of the state in the field of water resources. The Legislature intended to combine the water rights and the water pollution and water quality functions of state government regarding issues of water pollution and water quality, availability of unappropriated water when water appropriations are granted, waste discharge requirements or water quality objectives are established. (WC §174) It has the authority to hold any hearings and conduct any investigations in any part of the state necessary to carry out its vested power. (WC §225)

1. The SWRCB has exclusive authority to determine and grant appropriations of the state's unappropriated water.

Division 2, Part 2 of the Water Code is the state's comprehensive and exclusive scheme for the appropriation of water. Section 1225 states that "Except as provided in Article 2.5 (commencing with Section 1226) of this chapter, no right to appropriate or use water subject to appropriation shall be initiated or acquired except upon compliance with the provisions of this division."

As stated in *People v. Shirokow* (1980) 26 Cal.3d 301,309, "These declarations of policy together with the comprehensive regulatory scheme set forth in [Water Code] section 1200 et seq. demonstrate a legislative intent to vest in the board expansive powers to safeguard the scarce

water resources of the state."

In exercising its powers, the SWRCB is required to consider the effects of the granting of a water permit on other natural resources resting in the public trust. "Thus, the function of the Water Board has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of waters. This change necessarily affects the board's responsibility with respect to the public trust. The board of limited powers of 1913 had neither the power nor duty to consider interests protected by the public trust; the present board, in undertaking planning and allocation of water resources, is required by statute to take those interest into account." *National Audubon Society v. Superior Court of Alpine County, et al., supra,* 33 Cal.3d 444.

It is noteworthy for purposes of this case that the court review the scheme devised by the Legislature for the consideration of the public interest in the conservation and preservation of its natural resources in relation to the use and appropriation of water.

Water Code §1243 requires the SWRCB to take into account the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources. To accomplish this, the SWRCB is required to notify the DFG of any permit to appropriate water. Upon notification, the DFG is to investigate the stream system in question and must recommend the amount of water that is required for the preservation and enhancement of fish resources and report its findings to the SWRB. It should be noted that the Legislature has specifically declared that the section "shall not be construed to affect riparian rights."

Water Code §1243.5 requires the SWRCB to take into account the amount needed to remain in the stream for protection of beneficial uses if it is in the public interest to do so. Again, it should be noted that the Legislature has specifically declared that the section "shall not be construed to affect riparian rights." In addition, in acting on applications, the board "shall consider streamflow requirements proposed for fish and wildlife purposes pursuant to Sections 10001 and 10002 of the Public Resources Code."(Water Code §1257.5)

The SWRCB is required to allow the appropriation of water for beneficial purposes and under "such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated." To accomplish this, the board "shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water." (Water Code §§1253 & 1254.) In addition, it must keep in mind the state goal of "providing a decent home and suitable living environment for every Californian." (Water Code §1259.)

The board is required to consider the relative benefit from all beneficial uses of the water sought to be appropriated "including, but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan..." After consideration of these other beneficial uses, the board may require terms and conditions in the exercise of a grant to appropriate water that will protect those other interests in the water to

be appropriated. (Water Code §1257.)

2. The powers of the SWRCB extend to a grant of adjudicatory authority

The SWRCB may determine if the use of an established water right continues to be reasonable, taking into consideration the changing needs of the public interest in all of the state's natural resources. Water Code §275 requires the DWR and the SWRCB to take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in the state. [See also *Imperial Irrigation District v. State Water Resources Control Board* (1990) 225 Cal.App.3d 548; (The SWRCB has the responsibility to investigate waste or unreasonable use of water and the adjudication of unresolved issues of waste.) and *People* ex rel. *State Water Resources Control Board v. Forni* (1976) 54 Cal.App.3d 743 (The SWRCB has statutory authority to bring an action to test the reasonableness of a riparian owner's water use.)]

Division 2, Chapter 3commencing with §2500 holds the provisions for statutory adjudications of water rights. Section 2501 states that "The board may determine, in the proceedings provided for in this chapter, all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right." The Code Commission Notes demonstrate that these 1935 amendments were enacted to expand the scope of statutory adjudications to include all classes of water rights rather than only rights based upon appropriation.

The adjudicatory power includes that of investigation of the stream system in question, to include the diversion of water, all of the beneficial uses being made of the water, and the water supply available for those uses. (Water Code §2250.) The final order of the board is filed with the clerk of the court. Interested persons may file a notice of exceptions to the order with the court. The court may then order additional investigations, order that the state be joined as a party and hold a hearing at which time it may take additional evidence and issue a decree determining the rights of the parties involved in the proceeding. (Water Code §§2750, et seq.) The court has the authority to enforce a physical solution to divide the available water between competing interests all with right to use of the water. *City of Lodi v. East Bay Municipal Utility District* (1936) 7 Cal.2d 316.

In addition, the state Supreme Court in the case of *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, examined the authority of the Legislature to delegate to the SWRCB the authority to limit a water right.

> "Article X, section 2, acknowledges that in California a riparian landowner has historically possessed a common law right to the future use of water in a stream system. The provision does so by declaring that "The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served ..." and that "Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses ...." (Cal. Const., art. X, § 2, italics added.)

As the above language also discloses, however, riparian rights are limited by the concept of reasonable and beneficial use. Moreover, they must not be exercised in a manner that is inconsistent with constitutional policy provisions that are to govern interpretations of water rights in California. In light of these policies and of the constitutional intent to limit unduly expansive interpretations of water rights that would contravene them, *it becomes clear that article X, section 2, enables the Legislature to exercise broad authority in defining and otherwise limiting future riparian rights, and to delegate this authority to the Board."* (Page 351; Emphasis added.)

The SWRCB's authority continues to allow recourse to prevent waste or other non-beneficial use of water. As stated in *National Audubon Society v. Superior Court of Alpine County, et al. supra,* 33 Cal.3d 447, "Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs."

The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust."

B. The Department of Fish and Game

The Department of Fish and Game ("DFG") is established as a Department of the Resources Agency. (Fish and Game Code §700, et seq.) The powers and authority of the DFG are myriad, including the administration and enforcement of the Fish and Game Code, the adoption of regulations for such administration and enforcement, provide co-ordination and assistance to the SWRCB and DWR, The Department of Forestry and Fire Protection, and the Department of Public Resources. (i.e., Fish and Game Code §703; Public Resources Code §§10000, et seq. and 21000, et seq.)

In addition, the DFG has the authority to expend funds for biological research and field investigation pertaining to the conservation, propagation, protection, and perpetuation of birds, mammals, reptiles, and fish. It has the authority to license the taking of game animals, to enter into agreements with other persons and entities for the management and operation of rearing facilities for salmon and steelhead fish. (Fish and Game Code §§1000 et seq. and 1050, et seq.) The DFG must also recommend criteria for determining if a species is endangered or threatened. (Fish and Game Code §2071.5.)

The DFG must also be consulted by any state lead agency to ensure that any action authorized, funded, or carried out by the state lead agency is not likely to jeopardize the continued existence of any endangered or threatened species. The DFG must issue a written finding based on its determination of whether such jeopardy or taking exists and, if there is such jeopardy, must make a determination of what reasonable and prudent alternatives would conserve the species so jeopardized. (Fish and Game Code §§2090 and 2091.)

1. The DFG has the authority to enforce the provisions of Fish and Game Code §1600, et seq.

As discussed above, the Legislature has authorized the DFG to administrate and enforce the provisions of the Fish and Game Code.

Fish and Game Code §1600 states that the "Legislature finds and declares that the protection and conservation of the fish and wildlife resources of this state are of utmost public interest. Fish and wildlife are the property of the people and provide a major contribution to the economy of the state, as well as providing a significant part of the people's food supply; therefore their conservation is a proper responsibility of the state. This chapter is enacted to provide conservation for these resources."

Section 1602 is the subject of the focus of this case. At subdivision (a) it states that "An entity may not substantially divert or obstruct the natural low 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 round pavement where it may pass into any river, stream, or lake, unless all of the following occur:..." ("Entity" is defined at §1601(d) to include any person.) The statute goes on to describe a process of providing comprehensive written notification of the activity to the DFG that includes a determination by the DFG that the notification is complete, the payment of applicable fees pursuant to §1609, and a written determination by the DFG whether the activity will or will not substantially adversely affect an existing fish or wildlife resource, and whether the entity must enter an agreement with the DFG that include measures that are intended to protect otherwise adversely affected fish and wildlife. Subdivision (c) states that it is unlawful for any person to violate the chapter.

Section 1603 requires the DFG to determine whether the noticed activity will substantially affect an existing fish and wildlife resource. If so, the DFG is to draft an agreement that will specifically describe the resource to be protected and the measures to protect that resource. If no mutual agreement is reached between DFG and the person, the person may request that a panel of arbitrators be appointed to resolve the disagreement. The section describes and specific method of appointment of each of the three arbitrators and their qualifications. The decision of the arbitrators is binding.

Section 1604 allows a person affected by the decision to petition the court for confirmation, correction, or vacation of the decision pursuant to Code of Civil Procedure commencing with §1285.

This section was initially enacted in 1965 in response to concern that the activities of mining and gravel industries in the state were having and adverse effect on anadromous fish and wildlife.

VI. Is Fish and Game Code §1602 ambiguous as applied to the facts of this case?

The primary rule of statutory interpretation is that a statute must be interpreted so as to effectuate the probable intent of the Legislature. Generally, the court first looks to the words of the statute, giving them their ordinary plain meaning. "Initially, a statute must be interpreted so as to

effectuate the probable intent of the Legislature and when the words of a statute are clear and unambiguous, there is no need for statutory construction or to resort to extrinsic evidence to determine the legislative purpose". *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632-633; *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.

"In construing the meaning of this language, we are mindful that the goal of statutory construction is ascertainment of legislative intent so that the purpose of the law may be effectuated, and that we should construe a statute in the context of the entire statutory system of which it is a part, in order to achieve harmony among the parts. *(People ex rel. Younger v. Superior Court* (1976) 16 Cal.3d 30, 40 [127 Cal.Rptr. 122, 544 P.2d 1322], and cases there cited.)" *People v. Shirokow* (1980) 26 Cal.3d 301, 306-307.

A. Looking to the Fish and Game Code to determine the purpose of the statute

Section §1600 et seq. is part of Fish and Game Code Division 2, Part 6, describing Fish and Wildlife Protection and Conservation. The section is preceded by Part 5, Fish and Game Management, and is followed by Part 7, Conservation of Aquatic Resources. The placement of Part 6 is not particularly helpful in considering the Legislative intent in enacting the legislation. Its purpose is to protect and conserve fish and wildlife. It stands alone in this purpose in Division 2. Therefore, the court will broaden its scope and look to Division 3.

Division 3, Part 1.5 commences with §2050, The California Endangered Species Act ("CESA"). The purpose of CESA is to protect and conserve fish and wildlife, consistent with the purpose of §1600 et seq. This court therefore refers to CESA for assistance in determining a statutory system that is consistent with the apparent purpose of Fish and Game Code §§1600, et seq.

Fish and Game Code §2051 states the Legislative findings and declarations:

> "The Legislature hereby finds and declares all of the following:
>
> (a) Certain species of fish, wildlife, and plants have been rendered extinct as a consequence of man's activities, untempered by adequate concern and conservation.
>
> b) Other species of fish, wildlife, and plants are in danger of, or threatened with, extinction because their habitats are threatened with destruction, adverse modification, or severe curtailment, or because of overexploitation, disease, predation, or other factors.
>
> (c) These species of fish, wildlife, and plants are of ecological, educational, historical, recreational, esthetic, economic, and scientific value to the people of this state, and the conservation, protection, and enhancement of these species and their habitat is of statewide concern.

F&GC §2052 states the Legislative intent and state policy regarding endangered species.

"The legislature finds and declares that it is the policy of the state to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat and that it is the intent of the Legislature, consistent with conserving the species, to acquire lands for habitat for these species.

Fish and Game Code §2055 states:

"The Legislature further finds and declares that it is the policy of this state that all state agencies, boards, and commissions shall seek to conserve endangered species and threatened species and shall utilize their authority in furtherance of the purposes of this chapter."

In considering §1600 et seq. in the context of the entire system of preservation and conservation of fish and wildlife enacted in the Fish and Game Code, it is clear that the Legislative intent was to use the part as a means of enforcement in specific situations to protect fish and wildlife.

B. Defining the term "substantially divert"

In looking to the plain meaning of the words "substantially divert" as found in §1602, the court notes that the words are not defined within the context of §1600, et seq. or anywhere else in the Fish and Game Code. The court must look elsewhere to determine the meaning of the term.

1. Defining the word "divert"

WC §5100(c) defines "diversion" for purposes of filing required statements of water diversion and use. "'Diversion' means taking water by gravity or pumping from a surface stream or subterranean stream flowing through a known and definite channel, or other body of surface water, into a canal, pipeline, or other conduit, and includes impoundment of water in a reservoir." This definition also seems to be the historical meaning of the term used in cases through the years.

The case of *Jurupa Ditch Co. v. County of San Bernardino* (1967) 256 Cal.App.2d 35 is helpful in considering the term "diversion" in the context of agricultural water use. In *Jurupa*, Plaintiff was pumping water from the Santa Ana River and then into a ditch for the purpose of agricultural irrigation pursuant to a valid water appropriation permit. Since an appropriative right to take water is a fee simple interest in real property, it is subject to taxation. The issue in the *Jurupa* was where the point of diversion of the water was for purposes of determining which of two counties had taxing authority. Of interest to the case at bar is the discussion regarding the extraction of water and the labeling of such extraction as a "diversion". At page 41, the reviewing court states,

> "Even assuming, and we have no basis on the record, lower owners might have a right to enjoin plaintiff from taking more than 300 inches, *it does not follow that extracting of the water and putting it in a ditch for taking would not constitute a diversion.*
>
> *Water flowing in a stream belongs to no one. Water is not owned until it is taken in a*

receptacle by the hand of man, or through works of man transferring water from the stream into some facility such as a pond, ditch, flume or pipeline." (Emphasis added.)

The court looks also to Water Code §1706 in defining the word. That section contemplates the change of a point of diversion of water pursuant to an appropriation granted by a method other than the Water Commission Act or the code, i.e., a riparian right or a right acquired prior to 1914. In describing the use of water by virtue of that appropriation, the statute characterizes the point of extraction of water from a stream as "*the point of diversion*". Cases annotating this code section deal with issues involving the use of water for agricultural purposes. (See *Barnes v. Hussa* (2006) 136 Cal.App.4th 1358 and *Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742.)

The word "diversion" is a derivative of the word "divert". Guided by the definition of "diversion" in Water Codes §5100(c), this court finds that the word "divert" means to take water by gravity or pumping from a surface stream or subterranean stream flowing through a known and definite channel, or other body of surface water, into a canal, pipeline, or other conduit, and includes impoundment of water in a reservoir.

2. Defining the word "substantially" or "substantial":

The reviewing court in the case Atchison, *etc. Ry. Co. v. Kings Co. Water Dist.* (1956) 47 Cal.2d 140, had the task of defining the term "substantially". It stated at page 144, "'Substantially' means 'in a substantial manner; really, solidly; competently.' (Words and Phrases, perm. ed., vol. 40, p. 504.) Webster's New International Dictionary, second edition, defines the word 'substantial,' in part, as follows: '... material; ... not seeming or imaginary; ... real; true; ... important; essential; ... having good substance; strong; stout; solid; firm.'"
See also the case of *In re Scroggins* (1951) 103 Cal. App.2d 281, 283, quoting the case of *Fuhrman v. American National B. & L. Assn.* 126 Cal.App. 202, 211. "...The word "substantial" is a relative term, the meaning of which is to be gauged by all the circumstances surrounding the transaction in reference to which the expression has been used. It imports a considerable amount of value in opposition to that which is inconsequential or small."

In 1973, California's Attorney General reviewed the issue of whether §1602 (now §1601) is applicable to a person diverting water from a stream by means of a pump. In examining that question, the attorney general looked to the question of what constitutes a "substantial diversion". (56 Ops.Cal.Atty.Gen. 360.) At pages 364-365, the attorney general opined that the section would apply to any method of diversion.

In speaking to the meaning of the term "substantial", the attorney general considered whether the diversion would have a detrimental effect on fish and wildlife. Using the effect of the action on fish as the standard to determine if a diversion is substantial, the attorney general suggested that a pump diversion that was capable of dewatering a stream or that could result in detriment to fishlife in the stream because of flow reduction would constitute a substantial diversion of the natural flow and thus come within the purview of §1602. *The attorney general went on to say that a general rule defining a "substantial diversion" could not be laid down because of the innumerable factual variations present for each pump diversion.* (56 Ops.Cal.Atty.Gen. 360, 364-365.)

As noted in the case of *People v. Weaver* (1983) 147 Cal.App.3d Supp. 23, at page 33, the reviewing court considered these same suggestions of the Attorney General. The court wondered at the fact that the Legislature had yet addressed the problem raised by the Attorney General despite "clear admonitions found in published opinions by our Supreme Court". The *Weaver* court itself did not address the issue because it was not pertinent to the outcome of the case. Ultimately, having considered the words of the Attorney General, the *Weaver* court nonetheless acknowledged

> "That there are grounds for valid difference of opinion as to what constitutes a substantial diversion of the natural flow of stream. This same issue troubled the Attorney General a decade ago, and apart from the problem of quantifying what is meant by a substantial diversion, we wonder how this particular prohibition may affect farmers who exercise riparian rights and who might be wholly unaware of this law. We suggest that this subject merits reconsideration by the Legislature." (Page 38.)

(As an aside, this court instantly felt a kinship with the *Weaver* court in its frustration at the inaction of the Legislature. The *Weaver* court noted at page 33 in the recitation of the words of Justice Traynor, "Recurringly, legislators abstain from any action, moving ingeniously their wonders not to perform. When they abdicate responsibility for clarifying controversial language of their own states, in effect they relegate the task to the courts. ..."(Traynor, *The Limits of Judicial Creativity* (1978) 29 Hastings L. J. 1025, 1029). This court notes that despite additional controversy regarding the issue of diversions since the *Weaver* decision, the Legislature has still failed to take any action to clarify the issue.)

Out of necessity and with great trepidation, this court finds that for purposes of Fish and Game Code §1602, the term "substantially divert" is defined as taking an amount of water that is considerable, taking into account the surrounding circumstances, and that the taking of water is accomplished by gravity or pumping from a surface stream or subterranean stream flowing through a known and definite channel or other body of surface water, into a canal, pipeline, or other conduit, and includes impoundment of water in a reservoir.

Under the plain meaning rule, the act of diverting water pursuant to a water right is within the scope of §1602 if the diversion would substantially adversely affect the fish and wildlife dependent upon the stream system. However, the definition would require that each diversion be examined on a case-by-case basis, something that was not contemplated in the watershed-wide declaration advanced by the DFG. Therefore, the plain language interpretation does not completely address the issue of ambiguity.

Defendant's argument would have the court stop at this point. It argues that holding that the Legislature intended to bring the exercise of water rights within the scope of the statute if such a diversion has a substantial effect on fish and wildlife. Defendant argues that such interpretation is consistent with the public trust doctrine that requires that an agency exercise its authority so as to preserve and conserve the state's natural resources for the benefit of the people.

Plaintiff argues that such a literal interpretation would result in an absurd consequence in that it would fundamentally alter the administration of water rights in California by disrupting the

carefully crafted statutory scheme initiated by the Legislature. Plaintiff further argues that the interpretation would add significant new burdens and uncertainties to existing water users and that it would lead to takings and other the propagation of litigation to clarify DFG's jurisdiction and authority.

"To determine the Legislature's intent, the court looks first to the words of the statute. (Citations omitted.) However, the legislative purpose will not be 'sacrificed to a literal construction of any part of the act.' (Citations omitted.) The language of a statute "'should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.'..." *Brown v. Superior Court of Alameda County* (1984) 37 Cal.3d 477, 485.

This court agrees with Defendant that an agency is required to exercise its authority so as to preserve and conserve the state's natural resources for the benefit of the people. However in the context of water use, the public trust it is only one of several factors that must be weighed in addressing the issue. However, as Plaintiff has pointed out a literal interpretation would result in an absurd consequence. Such is the situation in this case. While a diversion may be substantial so that it has an adverse impact on fish and wildlife, under the statutory scheme and history of water rights, that is only one factor to be considered. In this case, that has been the only factor considered by DFG in taking a literal interpretation of the statute.

C. Does interpreting the statutes by the plain meaning of the words effectuate the intent of the Legislature?

Although a court will turn first to the plain meaning of the words in interpreting a statute, a court is not prohibited from determining whether a literal interpretation of the statute comports with the intent of the Legislature when it enacted the legislation. The meaning of a statute must be harmonized with other provisions relating to the same subject matter and the words must be construed in context. "Moreover, every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect" *Brown v. Superior Court of Alameda County* (1984) 37 Cal.3d 477, 484. An interpretation that makes the words of a statute meaningless or superfluous must be avoided and if there are alternative interpretations, the one leading to the more reasonable result must be followed. *Lungren v. Deukmejian* (1988) 45 Ca.3d 727,735.

The court's query is then, will interpreting the statute by the plain meaning of the words used and thus extending the scope of the statute to include the exercise of a water right lead to unintended consequences and/or absurd results?

1. The preemption of SWRCB's authority to manage, administer and adjudicate water rights

The practical result of DFG's interpretation of §1602 would be to give the department authority to regulate a water right. If DFG's interpretation is correct, DFG would have the authority to prohibit a water user from extracting any part of his water allotment if DFG believes a species would be adversely affected by the activity. In this way DFG would act as a regulator of water rights. This is not an unlikely scenario in Siskiyou County.

Under our present statutory scheme, the SWRCB vets each application for an appropriation permit. Part of that process includes consideration a great many factors, including the effects of the grant on the fish and wildlife in the subject stream system. The DFG has an important part in the SWRCB's process in that it is required to investigate the effects of granting the permit on the fish and wildlife in the subject stream system and make a recommendation to the SWRCB regarding the permit application. The SWRCB is required to take DFG's recommendation into consideration.

A very possible scenario would be as follows: Applicant applies for a grant of water. SWRCB notices DFG and requests a recommendation. DFG complies and informs SWRCB that the grant would impact fish and wildlife and that certain conditions should be set for the exercise of the grant. SWRCB grants the application subject to the conditions recommended by DFG. Applicant later wishes to exercise his water right. He is informed by DFG that he must notice the department and obtain a LSAA before diverting water. Applicant complies. DFG is concerned that the cumulative effect of water diversion from the stream system will adversely affect the fish in the stream. DFG drafts an LSAA that drastically reduces the amount of water that Applicant may divert to an amount that is less than half of the amount of his water grant. Applicant is unable to support his crops and livestock on the ration left to him.
In the scenario described above, the DFG's consideration would focus solely on the effects that the diversion would have on the fish and wildlife in the subject stream. The DFG is not required to balance all factors considered by the SWRCB, including economic factors, in considering whether the new water right may be exercised. In fact, the DFG's duties are to protect the fish and wildlife which necessarily skews the department's perspective in favor of fish and wildlife. Under this scenario Applicant's exercise of his water rights is at odds with the goals of the department.

The practical effects interpreting the statute as urged by the DFG is that it would make the duties of the SWRCB superfluous. Conceivably, after having considered all factors, a water right granted by the SWRCB could be nullified by the later regulation of the DFG. The DFG would be pre-empting the SWRCB's exclusive authority in granting and regulating water rights. The DFG would assume de facto authority to administer and manage water rights.

2. The unauthorized appropriation of a minimum in-stream flow

An additional consequence of DFG's interpretation is that DFG is guaranteed the appropriation of a minimum in-stream flow for the preservation of fish and wildlife, contrary to law.

In the case of *Fullerton v. State Water Resources Control Board* (1979) 90 Ca.3d 590 the appellate court was petitioned for writ of mandate to compel the State Water Resources Control Board is issue a permit for the "in-stream" appropriation of water to provide minimum flow guarantees during low months to protect the state's interests in the fish resources of the Mattole River. The court held that the right to appropriative water is a possessory right that entitles the owner to be protected in the quiet enjoyment of the use of water against a subsequent public land appropriator of the same water. The right requires that the holder exercise some physical control over the water to be appropriated in so as to possess and divert the water for the intended use.

The present scheme for the appropriation of water does not contemplate or allow the granting of in-stream appropriative rights for piscatorial purposes. The reviewing court held that the legal recognition of in-stream appropriation rights could mean a substantial loss in the amount of water available for irrigation, domestic, municipal and all of the other uses that the SWRCB must balance in the public interest and it would eliminate piscatorial purposes from the balancing processes prescribed by the Legislature.

In addition, such a grant could tie the SWRCB's hands as to future uses and the water appropriated by the DFG would be unavailable for other yet unforeseen and overriding uses.

> "We recognize that, as the Department urges, the present protest procedure may be inadequate to protect the public fish and wildlife resources of this state. The recent drought, of which we may take judicial notice, is only an example of the many constantly changing and unpredictable conditions in the context of which the competing beneficial uses of water must be balanced. However sympathetic we may be to the views of the Department and the fact that fish are not only a recreational resource but an important food and agricultural resource, we hold that the matter should be left to the Legislature." *Fullerton v. State Water Resources Control Board*, supra, at pages 604-605.

In the case of *California Trout, Inc. v. State Water Resources Control Board* (1979) 90 Cal.App.3d 816 follows the rationale of the *Fullerton* court. The *California Trout* court held that an application for the appropriation of water by a private party for the exclusive public use of protecting fish and wildlife cannot be granted because there is no mechanism for the physical control over the water to be used as required by the Water Code. The court emphasized that the interests of fish and fisheries in the waters of the state were considered and protected. At pages 820-821 the court states:

> "Since it may be thought by some that the statutory and case law appropriation of waters in this state have somehow callously overlooked the interests of fish and fisheries in the watercourses of the state, we deem it appropriate to point out that there are protections afforded to such interests by existing law, working in conjunction with the law of appropriation of water. Thus, the Legislature has provided in sections 1243 and 1243.5 of the Water Code that (a) the board must notify the Department of Fish and Game of all applications to appropriate water; (b) the department must recommend the amounts of water required for preservation of fish and wildlife resources; (c) the board must take into account such amounts. Moreover, in Water Code section 1257 the board is directed to consider the preservation and enhancement of fish and wildlife in acting upon any application to appropriate water.

The Legislature was aware of the rulings in the cases discussed above and similar decisions by the SWRCB at the time of the 2003 amendment to §1600. It could have either amended the appropriation rules to allow rights for in-stream flows, or it could have fashioned an exemption within the §1600 statutory framework to allow the DFG to enforce the section in a fashion that provided a minimum stream flow within the water systems. It did neither. Clearly, DFG may not be granted an appropriation to maintain an in-stream flow for the protection of fish and wildlife. Neither may the DFG attain a de facto appropriation of water for the same purposes

through the regulation of water rights.

3. DFG would be allowed to prioritize the order of beneficial uses of water

Defendant argues that agricultural diverters do not have a right to divert water or use water in a manner that unreasonably interferes with the state's property right in its fishery resources. The argument is correct as stated because a water user is constitutionally and statutorily prohibited from using water in an unreasonable manner. It also violates the state's policy of beneficial use of water. But the argument goes too far in that it presumes that the use of water consistent with a water right is per se unreasonable if it adversely impacts fish and wildlife.

DFG's interpretation pits one reasonable and beneficial use of water, the use of water for irrigation, against another reasonable and beneficial use of water, the use of water to preserve and conserve fish and wildlife. DFG presumes that of the two beneficial uses, only that used to benefit fish and wildlife promotes the public trust and it therefore holds a higher status than the use for irrigation. DFG is mistaken.

First, the interpretation promoted by DFG imbues the department with the authority to weigh competing beneficial interests in administering and managing a water right. That authority rests solely with the SWRCB. The SWRCB must consider competing beneficial uses of water as one of several criteria in making a water appropriation grant. The interpretation offered by the DFG uses the protection of fish and wildlife as the only criteria to determine the terms of a water right. In addition, since DFG's primary duty is to protect fish and wildlife, the DFG's interpretation weighs heavily in favor of preservation and conservation. Therefore the use of water to accomplish that end necessarily holds a higher priority in the eyes of DFG than other uses, including agricultural use.

Second, the interpretation incorrectly presumes that the highest beneficial use of water is for the preservation of fish and wildlife. This is contrary to the Legislative declarations found in Water Code §106 which states that the first highest and best use of water is for domestic purposes and the second is for agricultural purposes. The use of water for conservation and preservation has been declared as a beneficial use of water but it has not been given a priority as a higher use, as has agricultural use. In fact, the Legislature has exercised its authority to set preservation and conservation as the highest priority only in designated water systems when it enacting the Wild and Scenic Rivers Act, Public Resources Code §§ 5093.50 et seq. In Public Resources Code §5093.50 it is stated,

> "It is the policy of the State of California that certain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. *The Legislature declares that such use of these rivers is the highest and most beneficial use and is a reasonable and beneficial use of water within the meaning of Section 2 of Article X of the California Constitution.* It is the purpose of this chapter to create a California Wild and Scenic Rivers System to be administered in accordance with the provisions of this chapter." (Emphasis added.)

Clearly, if the Legislature intends that a specific water use be given priority over other uses, it

will state so plainly.

Third, assuming that there is an argument that both uses have equal priority and are equally reasonable and beneficial, it is up to the Legislature to prioritize one over the other, not the DFG. The DFG has not been authorized by any act of the Legislature to make such determination. To say that §1602 gives such authority is circular logic and does not resolve the question.

4. Reliance on California Endangered Species Act

The DFG may rely on Fish and Game Code §2052.1, part of the Endangered Species Act, in supporting its assertion that it is authorized to require an LSAA for the diversion of water for agricultural use since the purpose of §1600, et seq. is to preserve fish and wildlife. That statute states "The legislature further finds and declares that if any provision of this chapter requires a person to provide mitigation measures or alternatives to address a particular impact on a candidate species, threatened species, or endangered species, the measures or alternatives required shall be roughly proportional in extent to any impact on those species that is caused by that person. Where various measures or alternatives are available to meet this obligation, the measures or alternatives required shall maintain the person's objectives to the greatest extent possible consistent with this section. All required measures or alternatives shall be capable of successful implementation. This section governs the full extent of mitigation measures or alternative that may be imposed on a person pursuant to this chapter. This section shall not affect the state's obligation set forth in Section 2052."

The DFG may assert that by analogy the statute sets the perimeters for requiring an LSAA to divert water from an impacted stream. However, even if DFG was correct, the section would require the DFG to consider each diversion on a case-by-case basis rather than applying the statute to all agricultural users in a particular watershed, as does the Stopher criteria. The DFG would first have to determine if the particular diversion has an impact on a species, and if so, what is the impact that is attributable to a particular user; second, what measures or alternatives are necessary to address the impact that a particular user has on a species; third, keeping the user's objectives in mind, what alternatives or measures are available; fourth, is the measure or objective capable of successful implementation.

The last consideration would require answering not only the question of whether the user could implement the measure or alternative but whether the objectives of the user could still be met after such implementation. Clearly, the LSAA's mitigation terms could require that the water right remain largely unexercised for a season or portion of a season. The objective of the rights holder is to extract adequate water and timely irrigate his crops and water his animals. That objective could not be attained. Many small family farms would not survive the loss. If the user is unable to implement the mitigation measures or alternatives and still meet the objective of managing and operating his farmland to affect a profit sufficient to support his family, the mitigation measures are not capable of successful implementation and may not be imposed.

D. Does interpreting the statutes by the plain meaning rule interfere with the constitutional rights of another and if so, is such interference authorized by the Legislature?

The case of *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 349 is instructive. In that case, the state Supreme Court reviewed the issue of whether the Legislature's delegation to the SWRCB the authority to adjudicate matters concerning the issue of whether a riparian owner's unquantified prospective claim for water may constitute an unreasonable use. If so, should it be quantified, subordinated to existing uses, or eliminated entirely?

The case involved an upper riparian holder of rights who exercised those rights to irrigate 89 acres of land. In an action before the SWRCB to determine the respective rights of all users on the Long Valley Creek water system, that owner filed a claim for rights sufficient to irrigate an additional 2884 acres. The SWRCB rejected the claim for the additional acreage and thereby determined that the most reasonable and beneficial use of the systems' waters would be met by extinguishing the owner's future right to the use of the water. The owner filed an exception in the trial court. The trial court upheld the SWRCB's decision and the owner appealed.

The state Supreme Court found at pages 348-349 that the Legislature clearly intended to delegate broad adjudicatory powers to the SWRCB to *define and otherwise limit the scope* of a riparian owner's right to future use of water. However, the Legislature did not demonstrate an intention to authorize the Board to *eliminate* the owner's riparian right to the future use of water. Such a decision by the SWRCB would be judicially invalid. At page 348, the state Supreme Court clearly stated that it was not finding that the Legislature was restrained from defining or otherwise limiting the scope of such right or delegating to the SWRCB the authority to do so, but the Legislation had not done so in the case before the court.

In reaching its decision, the Supreme Court considered the statutory construction of Water Code § 2501 to determine the intent of the Legislature. At pages 348-350 the court states:

> "In delimiting the scope of this authority, however, we must also consider another well-established principle of statutory construction: that is, if "'the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution' [Citations.]'" It follows from this principle that in cases in which a statute is readily susceptible of an interpretation that will render unnecessary the resolution of a substantial constitutional issue, courts should presume the Legislature intended the statute to be construed in a fashion that would avoid the issue and consequently the risk of judicial invalidation, unless a contrary intention is clearly expressed."

See also the case of *United States v. Gerlach Live Stock Co.* (1950) 70 S.Ct. 955; 339 U.S. 725; 94 L.Ed. 1231. In that case riparian owners sought compensation for the loss of irrigation waters. The Supreme Court held that the use of water for irrigation purposes was reasonable within the context of the state Constitution, therefore the use was a property interest that was

compensable.

In the present case Plaintiffs have real property rights in the use of water. Interpreting §1602 as urged by Defendants would grant the DFG authority to adversely affect the implementation and use of that right. Although the use of water is not unfettered and may be regulated, there is no demonstration that the Legislature authorized the DFG to regulate a water right. As in the *Long Valley Creek* case, this would raise serious constitutional questions and create substantial risk of judicial invalidation.

E. Reviewing the Legislative history to determine Legislative intent in enacting §1602.

The court considers the historical events leading to the enactment of §1600 as discussed by the *Weaver* court. The court incorporates a portion of the recitation of California history here for the purposes of providing a background to the discussion of the Legislative proceedings that led to the enactment of the statues.

> "Turning our attention to the immediate origins of section 1603 or the Fish and Game Code, it appears over the years, the Legislature, concerned with the decline in the fish population, enacted a number of laws including those, 1) prohibiting persons from depositing any substance or material deleterious to fish where it could pass into the waters of the state (Fish & G. Code § 5650, subd. (f), see also *People v. Truckee Lumber Co.* (1897) 116 Cal. 397 [48 P. 374] [sawdust and waste polluted stream and killed fish]), 2) prohibiting mining operations in the Trinity and Klammath game district for four months each year, except when mining debris could not pass into the waters, (Fish & G. Code § 58000, 3) making it unlawful to construct or maintain devices in certain streams which impeded the passing of fish up and down the stream (Fish & G. Code § 5901), 4) authorizing the Fish and Game Commission to require the owner of any new or enlarged dam to install and maintain fishways (Fish & G. Code §§ 5933 and 5935), and, 5) allowing access to waters impounded by a dam to fishermen during the on season (Fish & G. Code § 5943; *State of California v. San Luis Obispo Sportsman's Assn.* (1978) 22 Cal.3d 440 [149 Cal.Rptr. 482, 584 P.2d 1088], see also, 53 Ops.Cal.Atty.Gen. 332, 340-343 (1970) [discussing the fact that proposed damming of streams created serious problems for anadromous and resident species such as salmon, steelhead and trout]).
>
> Despite these efforts, siltation caused by the removal and washing of aggregate seriously affected anadromous fish, such as salmon and steelhead, by preventing spawning and suffocating eggs and fry. Aggregate operations had rendered certain portions of the Tuolumne River useless for spawning and placed the American River in jeopardy. See Report of Senate Permanent Fact Finding Committee on Natural Resources, Aggregate Removal From Streambeds, section 1, pages 13, 17, 18, 2 Appendix to Journal of the Senate (1961 Reg. Sess. Vol.)(quoted in 56 Ops.Cal.Atty.Gen. 360, 362, 364 (1973))." *People v. Weaver* (1983) 147 Cal.App.3d Supp. 23, page 31.

1. The 1961 legislation

Plaintiff presented evidence of the focus and intent of the Legislature in enacting Fish and Game Code §1600, et seq. This court reviewed Exhibits 68 and 72, compilations of documents testified to by Plaintiff's witness, Carolina Rose. The documents support Ms. Rose's testimony that the focus of the Legislature in enacting Senate Bill 376 was to minimize the effects of aggregate mining on the spawning beds in the state's rivers.

Exhibit 68, pages 43 through 74 contain the Progress Report to the Legislature by the Senate Permanent Fact Finding Committee on Natural Resources complete with Exhibit 1. The first paragraph of the Summary of Conclusions and Recommendations at exhibit page 52, states that "The bill was designed to provide some control over aggregate operations which use the beds of rivers and streams as their material supply source." The third paragraph explains that it was the general concern of the committee members and that of the sportsmen and commercial fishing interests affected "but also of the gravel industry in general over the possibility of salmon populations being in jeopardy." The document is replete with references to the aggregate mining industry and the effects of that uncontrolled industry on salmon spawning beds. The committee recommended that the legislation be enacted.

At exhibit page 52, at the last paragraph continuing onto page 53, the committee emphasizes a "very basic issue" that must be kept in mind in enacting the legislation. "However, the committee emphasizes that one must not lose sight of yet another very basic issue: the right of private enterprise to exist and, as in this case, the necessity for the product of this enterprise to be available for the benefit of even a larger segment of our population, which includes the beneficiaries of a sustained fishery. For the benefit of all, aggregate is needed for dams, waterways, national security construction, roads and schools, to name a few." This indicates to t this court that the Legislature took the economic impact of the proposed legislation into consideration in enacting the legislation. It seems reasonable to presume that the Legislature would also have taken the economic impact of the statute on the state's farmers and ranchers if it had been the intention to require that population to comply with the provisions of the statutes in order to use water to irrigate their crops.

At paragraph number 2(d) of exhibit pages 53 to 54, the recommendation of the committee suggested that the legislation include a provision that would require "any person in business involving mining from either public or private waters *or using the beds of any river or stream for any purpose* to so notify the department before starting such operation and would require such person to refrain from operating until the department, within a specified period of time, provides the operator with recommendations." (Emphasis added.) These sections again demonstrate that the primary focus of the Legislature was on mining and other activities that physically altered the flow or streambed.

Significantly, a section entitled "Legislation Desired – Public Streambeds and Private Agencies commences at exhibit page 64. The committee discusses its concerns that the legislation clearly delineate that spawning areas in state-owned streambeds are to be managed by the Department of Fish and Game. Commencing at the second sentence of the first paragraph, the committee states "Legislation must be also worded so as not to pre-empt the responsibilities of the State Lands Commission or other agencies with related proprietary authority..." The only full paragraph on exhibit page 65 continues to address the concern by stating "No public agency should be so

constituted or so empowered to work at cross purposes to another public agency." If the legislation was intended to include the diversion of water for agricultural use, it surely would have included a provision delineating the division of authority between the Department of Water, or its predecessor, and the DFG in regulating water rights. There was no such reference made.

Exhibit pages 73-74 is a report from the Office of Legislative Council to Senator Williams. The letter was a response to the Senator's query of whether legislation similar to that enacted by the states of Alaska and Washington could be enacted in California. The analysis includes a summary of the Alaska law that requires "any person or agency desiring to construct any hydraulic project *or use any equipment that would use, divert,* obstruct, pollute or change the natural flow or level of any river, lake or stream or *that would use any of the waters* of the State or the materials from any river, lake or stream bed, to notify the state's Commissioner of Fish and Game". (Emphasis added.) The analysis states that the Washington law is generally similar to the Alaska law.

The Alaska and Washington statutes included language that required notice if there was a "use" of the flow or water. This greatly broadens to scope of the statute to add *water use* as an additional focus of the legislation rather than focusing primarily on the water within the stream. This broader scope includes the use of water for agricultural purposes. It is noteworthy that the California statute did not include this broader language even though it had the language before it for consideration. Had the Legislature desired to enact a broad legislation that would include the use of water, it would have done so and it would have done so explicitly. The Alaska and Washington laws would have been instructive in doing so.

a. The broader focus of the bill included provisions for mandatory screening of diversions and conduits.

Exhibit 68 contains the transcript of the Senate Fact Finding Committee hearings held on November 16, 1961 at pages 76 through 162. The testimony presented was primarily concerned with the screening of agricultural water diversions. The hearing concerned that portion of SB376 that became Fish and Game Code §1505. The topic was the proposed legislation's requirement that water conduits and diversions be screened to protect fish fry. This requirement specifically included diversions and conduits used for agricultural irrigation. Plaintiff suggests that it is significant that the bill included both a section to screen agricultural diversions (now §1505) and a section to protect salmon spawning areas (§1600). The court agrees. Throughout the process of enacting the bill, it was apparent to the Legislature that agricultural diversions were affecting salmon adversely but the Legislature chose not to incorporate specific language in the bill to clearly bring agricultural diversions into the purview of §1600. This again speaks to Plaintiff's assertion that §1600 was intended to address the issues of the effects of gravel mining.

2. The 2003 legislation

This court also looked to Exhibit 72. This exhibit documents the legislative history of Senate Bill 418, the 2003 bill amending §1600. Bill analysis from various state departments summarize the bill as combining existing statutes, streamlining the permitting process and imposing time

constraints, and raising the $2,400 cap on the cost of obtaining a Lake Streambed Alteration Agreement, thereby requiring the applicant to bear a greater share of the costs that is more consistent with the actual cost incurred by the DFG in reviewing proposed agreements. In addition the bill defined terms used in the statutes. The focus of the Legislature in amending §1600 was to streamline the section and make it more efficient for those being regulated as well as for the DFG and the state.

The court noted that in the portion of the bill that defined terms used in the chapter, the term "entity" is defined to mean "any person, state or local governmental agency, or public utility *that is subject to this chapter*." (Emphasis added.) The definition implies that not all persons are subject to the chapter, i.e., not all water diverters are subject to the chapter. This provides support for Plaintiff's argument that historically only those agriculture users of water were required to notice the DFG is they planned an activity that made physical changes to the bed, bank, or stream such as the repair or replacement of a headgate, conduit, or dam repair, replacing fish screens, reinforcing or re-vegetating a bank, etc. The DFG's lack of enforcement of the statute for diversion of water for agricultural use pursuant to a water right supports this argument. Historically the section was rarely used to enforce the diversion of water for agricultural use and it occurred primarily when the diversion was not legally permitted. In contrast, agricultural users regularly noticed the DFG when they were diverting water or substantially altering the flow of the stream for such repair and maintenance purposes.

The court reviewed the materials presented as "Senate Republican Policy Office Materials" commencing at exhibit page 266. The court notes that the Summary of Proposed Changes to the Streambed Alteration Agreement Program authored by the DFG and dated March 20, 2003, (Page 268) summarizes the purpose of the bill and explains that one purpose would be to combine §§1601 and 1603 into a new §1602 "to make the notification and agreement process uniform as to all applicants..." This language is significant because it infers that the private person exercising his water right would potentially be subject to the same notice, application, and environmental reviews that would be imposed on a governmental entity or a utility. However the impact of such a provision would disproportionally affect the private person. The intention of the Legislature, that all persons in a like circumstance be treated similarly, appears to be contrary to that outcome. Again, since the Legislature has indicated a sensitivity about the effects of the legislation on the livelihood of those regulated, it seems reasonable to presume that there would have been some discussion of the economic effect on the private agricultural user in being included in the same class as public entities and utility companies.

Exhibit page 312 is a letter to the chairman of the Assembly Water, Parks, & Wildlife Committee, bill author Senator Sher, authored by the Vice President of the California Cattlemen's Association, in support of SB 418. The second paragraph describes the concerns that farmers and rancher had with the effects of the original statute on their ability to obtain permits to perform routine equipment repair and repair of storm damaged irrigation systems and crossings. It is notable that the author was concerned about the efficiency of the then-current statutory system in securing a LSAA to make timely repairs to damaged equipment. Clearly, the author and her principals understood that agreements were required for such repairs. It seems reasonable to presume that if agreements for the diversion of water for irrigation were required, they would have been subject to similar delays, yet there is no mention that agricultural users

were experiencing delays in being able to exercise their water rights. Surely the author would have addressed the impact of an untimely permitting process on crop irrigation and stock watering if agreements were, in fact, necessary for such activity.

Exhibit page 356 is a letter dated August 22, 2003, to the chairman of the Assembly Appropriations Committee from the California Farm Bureau Federation. The letter was copied to Senator Sher. Paragraph 2 of the letter demonstrates the Federation's support of the bill. Stating at the second sentence, "Our members have had extreme challenges in the past, getting agreements issued in a timely manner for routine agricultural purposes." Similarly, had the Federation's constituents been required to give notice and apply for LSAA's for irrigation, there would have been an outcry that the process adversely affected the certainty that is necessary to profitably pursue any agricultural activity.

The court finds that the Legislature did not intend to include the use of water diverted pursuant to a water right for an agricultural purpose within the scope of the statute. Such inclusion would have an economic impact on the water rights holder that is disproportional to others within the scope of the statute. The economic impact would reasonably be severe to the point that it would jeopardize the continued existence of the small agricultural water rights holder. Further, requiring the water holder to wait until he received a signed agreement from DFG would create great uncertainty in the holder's ability to exercise that right in a manner consistent with the immediate needs of his crop and livestock. In addition, including the act of diverting water consistent with a water right would allow the DFG to regulate a water right by imposing terms for the use of the water that are inconsistent with the water grant, pre-empting the exclusive authority of the SWRCB to regulate and adjudicate water rights. Surely the Legislature did not intend such outcomes. The effect on the agricultural industry in California could be devastating and, in turn, the resultant loss to the state economy would be disastrous.

In conclusion, the court finds as follows:

1. That there is a latent ambiguity within Fish and Game Code §1602 in that the plain meaning of the statute makes it is susceptible to two reasonable interpretations, the first favoring inclusion of the diversion of water pursuant to a water right and the second favoring exclusion of the diversion of water pursuant to a water right.

2. That the ambiguity can be resolved by reviewing the legislative schemes for the granting of water rights and for conservation and preservation of the state's natural resources and the statutes Legislative history.

3. That the Legislature did not intend to include the act of diverting water pursuant to a water right to be within the regulatory scope of §1602.

The Judgment of the court is as follows:

1. Plaintiff's prayer for relief is granted. The court finds that Fish and Game Code §1602 does not require notification of the act of extracting water pursuant to a valid water right where there

is no alteration to the bed, bank, or stream.

2. The Defendant Department of Fish and Game is enjoined from bringing enforcement action against agricultural water diverters for failing to notify the department of the diverter's intention to exercise his water right absent alteration to the bed, bank, or stream.

3. Plaintiff's shall recover its cost of suit and attorney's fees.

Dated: DEC 24 2012

KAREN L. DIXON, Judge of the Superior Court

Copies to:
Darrin Mercier, 409 W. Center St, Yreka, CA 96097
Deborah L. Barnes, DAG, Department of Justice, 1300 I Street, Suite 125, Sacramento, CA 95814

CERTIFICATION OF MAILING

I, Larry D. Gobelman, Clerk of the above-entitled Court, certify under penalty of perjury that I am legally competent and not a party to this action; and that on the date indicated below I served a copy of this document on each of the persons listed above by sealing it in an envelope addressed as shown, with prepaid postage thereon, and then placing the envelope in the area of the Clerk's office that is designated for the pickup of mail to be deposited on the same day with the U.S. Postal Service at Yreka, California. The date shown below is also the date of this certification.

Date: DEC 24 2012

MARY FRANCES McHUGH

By: D. Wilson Deputy Clerk