Photo credit: George Rose

Today a California appellate court in San Francisco heard arguments in a case that is likely to affect how broadly–or narrowly–California’s State Water Resources Control Board can apply the state’s most powerful water law.

The case, *Light v. California State Water Resources Control Board*, involves a challenge by wine grape growers in the Russian River watershed of Northern California to a SWRCB rule limiting growers’ ability to divert water from the Russian River in order to spray their vineyards for frost protection purposes. The Board adopted its “Frost Protection Regulation” in 2008, following complaints from federal wildlife officials that the grape growers‘ water diversions during cold spells resulted in rapid lowering of Russian River water levels and the resulting death of migrating salmon in the river. (Federal biologists estimate that the growers’ 2008 diversions resulted in the deaths of 25,000 salmon, several species of which are threatened with extinction.)

The Board expressly relied on Article X, section 2 of the California Constitution in issuing and enforcing the regulatory limits on Russian River water diverted for frost protection purposes. Enacted in 1928, Article X, section 2 proscribes the “waste or unreasonable use” of California’s water resources. The Board cited this constitutional provision as authority to apply its Frost Protection Ordinance to almost *all* diverters of water from the Russian River and its tributaries, as well as to hydrologically connected groundwater.

The vineyard owners sued the Board, claiming that the Frost Control Regulation was overbroad and reflected an unduly expansive construction of the Board’s authority to proscribe waste and unreasonable use of water under Article X, section 2. The trial court agreed and invalidated the Regulation. The Board’s appeal followed.

On appeal, the scope of the Board’s authority under the waste and unreasonable use

doctrine to constrain private parties' water diversions will be directly at issue. And that question takes on even more importance today than it had when the *Light* litigation was originally filed in 2011. That's because California's current, severe drought brings into even sharper focus the tension between private water rights and the Board's power to limit water users' diversions in the face of actual or anticipated environmental harm.

The importance of the *Light* litigation is underscored by separate reports–published in today's Sacramento Bee–that California water officials are poised to impose specific cutbacks on so-called "post-1914" appropriative water rights holders to address the state's current drought conditions. California's arcane and confusing water rights system requires post-1914 "appropriators" of water from state waterways to obtain permits from the State Water Resources Control Board. Those permitted water rights are subject to modification by the Board in response to droughts and other exigencies. Meanwhile, parties who perfected their appropriative water rights before 1914, along with "riparian" landowners diverting from a stream or lake adjacent to their property and most landowners who pump groundwater underlying their property, can divert water without obtaining a Board-issued water permit. That means that in times of drought like today, Board officials can only exercise *permit* jurisdiction to impose limits on diversions over a mere fraction of those water rights holders who divert and consume the state's finite water supplies.

That's what makes the waste and reasonable use doctrine codified in Article X, section 2 of the California Constitution so important: according to the Board–and the better legal view–the doctrine applies broadly to *all* of the state's water supplies and can serve to limit diversions of water by *all* categories of water rights claimants. Stated differently, the reasonable use doctrine is an overarching limit on the private use of California's water resources, and the ultimate legal authority possessed by the Board with respect to all water users in the state.

The *Light* plaintiffs, by contrast, argue that Article X, section 2 does not apply to riparian or pre-1914 appropriative water rights and, additionally, that the Board can only make waste and reasonable use determinations in individualized, formal and time-consuming administrative hearings, rather than through broadly applied regulations like the Frost Protection Ordinance.

In sum, the *Light* case is shaping up as a major test of the State Water Resources Control Board's authority under Article X, section 2 to limit the exercise of private water rights in California, when the Board believes such action is needed to preserve threatened or endangered species, to respond to severe water shortages triggered by major droughts, or to address other exigencies and emergencies. Should the growers' unduly circumscribed

interpretation of the Board’s Article X, section 2 powers prevail, California water officials’ ability to take effective action to allocate scarce water resources among competing users, wildlife species and natural ecosystems will be most severely compromised.