

A Sacramento judge has thrown a wrench into the California State Water Resources Control Board's efforts to impose water cutbacks on several of the state's senior water rights holders. In a July 10th order, Superior Court Judge Shelleyanne Chang ruled that the Water Board's administrative process, designed to implement drought-based water reductions, violates the due process rights of several water and irrigation districts to whom the Board issued cutback orders. Judge Chang issued a temporary restraining order barring the Board from enforcing its administrative directives.

Since California Governor Jerry Brown issued his drought declaration in January, the Water Board has been on the front lines of state efforts to reduce state water use. As California's drought extends into its fourth consecutive year, the Board has imposed a variety of water use restrictions, on an increasing number of the state's water rights holders—including some water rights claimants who've never before been subjected to such curtailments. Things came to a head in May and June, when the Board's Executive Director issued so-called "Curtailment Letters" to a number of the state's "senior" water rights holders—i.e., those asserting water rights based on claims originating before 1914, the year California first created a formal water rights permit system.

Several California water districts who claim such senior water rights responded to the Curtailment Letters by suing the Board in state court. They've alleged that the Board's unprecedented directives to them are illegal on several grounds. Several of the districts' legal arguments—including claims that the Board lacks *any* jurisdiction over pre-1914 California water rights, and that the Board's Curtailment letters triggered an unconstitutional taking of their private property rights—seem attenuated. But their strongest argument is that the Board has violated the districts' due process rights—i.e., that state regulators cannot undertake such administrative efforts to reduce the districts' water diversions without giving them an opportunity to convince the Board that those reductions shouldn't be imposed.

It is this latter theory that Judge Chang embraced in her recent decision, and the basis of her order enjoining the Board's administrative enforcement efforts against the districts. The Board attempted to avoid this result by arguing that the Curtailment Letters were merely "informative," rather than coercive. The judge unsurprisingly rejected this defense, seizing on the Letters' explicit language requiring the districts to "immediately stop diverting water" and to sign a certification that "confirms your cessation of diversion..."

The court's decision and injunction are bad news for the Board, and for statewide efforts to enforce water reductions necessitated by California's unprecedented drought conditions.

While the Board has issued a variety of regulatory orders and pronouncements in recent months designed to curb aggregate state water use, these are the first lawsuits brought by state water users to test the limits of Board authority to order cutbacks in the face of the current drought. Friday's court action will require the Board, its staff and legal counsel to go back to the drawing board when it comes to imposing water cutbacks on the districts that have sued. (Judge Chang's brief order is noticeably silent as to precisely *what type* of "pre-deprivation hearing" the districts are entitled to under constitutional Due Process guarantees.) But last week's decision raises doubts as to the Board's authority to impose similar cutbacks on *all* senior water rights holders throughout California. Even more broadly, this legal setback for the Board is likely to embolden an array of water rights claimants up and down the state to challenge the Board's myriad water conservation mandates in court.

Forcing the Board to undertake thousands of fact-specific, formal administrative hearings would likely swamp the Board's limited staff and fiscal resources. More importantly, it would defer—and quite possibly prevent altogether—the Board from taking the regulatory steps necessary to respond effectively to California's terrible drought and resulting water shortages. It will be interesting to see if the Board, represented by California Attorney General Kamala Harris, seeks an expedited appeal of last Friday's trial court ruling.

Alternatively, Governor Brown could invoke his emergency powers to respond to a disaster (i.e., the drought); under that legal authority, the Governor is allowed to dispense with certain, otherwise-applicable procedural requirements. Finally, perhaps the Board and its lawyers will be able to find some way to comply with Judge Chang's order without bringing state regulators' conservation efforts to a screeching halt.

For now, however, last Friday's court order is bad news for not only the Board, but for all Californians who worry about the drought's increasing, deleterious effects on the state's people, economy and environment.