LEGAL UPDATE

Below are summaries of cases that we are monitoring, with a discussion of their relevance to the Delta.

1) *West Side Irrigation Dist., et al. v. State Water Resources Control Bd.*
Byron-Bethany Irrigation Dist., et al. v. State Water Resources Control Bd.

On July 10, 2015, Sacramento Superior Court Judge Chang issued a temporary restraining order against the State Water Board, enjoining it from enforcing coercive curtailment notices against the petitioning water districts without first engaging in due process/pre-deprivation hearings. Less than a week later, the State Water Board issued revised curtailment notices that removed the coercive language in favor of informational language. On August 3, 2015, Judge Chang approved the revised notices, denied the districts' request for a preliminary injunction, and allowed the State Water Board's administrative curtailment process to continue.

The districts' challenges to the State Water Board's authority to curtail senior (i.e., pre-1914) water have been consolidated in Santa Clara County Superior Court. In the meantime, the State Water Board has issued penalties or cease and desist orders against two of the litigating districts for allegedly diverting water after receiving the warning that, due to the drought, no water was available under their relatively senior rights. The Byron-Bethany Irrigation District, hit with a $1.5 million fine from the Water Board will have an administrative hearing to challenge its fine on October 28, 2015, at the State Water Board. West Side Irrigation District's administrative hearing at the State Water Board regarding its Cease and Desist Order is scheduled for November 12, 2015. Earlier this month, both districts filed motions with the Santa Clara court to stay the Water Board's administrative hearings. The court held a hearing on the stay requests on September 22, 2015. Its ruling is expected on Friday, September 25, 2015.

We will monitor and update the Council as warranted on administrative and litigation developments on these Delta curtailment cases.

2) *Firebaugh Canal Water Dist., et al. v. U.S.; Westlands Water Dist. v. U.S.*

Background

In the 1940s, landowners on the west side of the San Joaquin Valley, which is south of the Delta, petitioned to form a water district in order to facilitate delivery of Central Valley Project (CVP) water to their farmlands. In 1952 the Fresno County Board of Supervisors formed the Westlands Water District. Today, at 600,000 acres, Westlands is the largest agricultural water district in the United States.

In 1963, Westlands entered into a water service contact with the Department of the Interior Bureau of Reclamation and a subsequent construction repayment contract in 1965.

Litigation

In 2000, the Ninth Circuit Courts of Appeals held that federal law requires the Department of Interior to provide drainage to a portion of Westlands (roughly 42,000 acres). The United States District Court for the Eastern District of California subsequently ordered the Department of Interior to

"…without delay provide drainage to the San Luis Unit pursuant to the statutory duty imposed by federal law."

On January 12, 2012, Westlands filed a breach of contract action in the United States Court of Federal Claims alleging that the United States' failure to provide drainage service to Westlands' service area constituted a breach of Westlands' water services and repayment contracts. Since 2013 the United States and Westlands have been in settlement negotiations to resolve the drainage and repayment issues.

Settlement

Westlands and the Interior Department executed a settlement agreement on September 15, 2015, with the following key provisions:

(1) The federal government is relieved of its obligation to provide irrigation drainage for Westlands' farms. Westlands will assume responsibility for providing the drainage.

(2) The federal government will transfer title of federal water infrastructure in the District (including pipes, canals and pumping plants) and the real property associated with that infrastructure to Westlands.

(3) Westlands will help the federal government arrange settlement with farmers who have sued the government for failure to provide drainage.

(4) The federal government will convert the 1963 water services contract into a new repayment contract with Westlands to supply 895,000 acre feet/year from the CVP, subject to:

    a. Westlands' existing priority rights vis-à-vis other contractors; and
    b. any allocation restrictions placed on the Interior Department under federal law (including the Endangered Species Act), State Water Board requirements, or lessened availability due to drought or hydrologic variability.

(5) Westlands will retire at least 100,000 acres of farmland.

(6) In return, the federal government will forgive Westlands' roughly $375 million debt related to CVP capital costs.

Procedural Next Steps

Before the case can be dismissed and the settlement agreement implemented, the settlement agreement must be approved by Congress by January 15, 2017. If that (deadline agreed to by the parties in the settlement agreement) is not met, either party has the right to void the agreement unless the parties agree to an extension. As a result, the agreement contains proposed bill language. According to the provisions of the settlement agreement, either party can void the settlement agreement if the legislation adopted by Congress materially differs from the language agreed to in the settlement agreement.

In concert with our legislative office, we will monitor legislative progress as Congress studies the content and implications of the settlement agreement and holds public hearings.