

## Legal Update- Delta Stewardship Council July Executive Meeting

Good morning ladies and gentlemen. There several pertinent cases that Mr. Stevens and I would like to draw to your attention at today's meeting.

### What are CVP contractors' CEQA obligations when entering into interim CVP renewal contracts?

First, you may recall that the Westlands Water District is the largest agricultural water district in the United States, and originally contracted with the CVP in 1963. Because most if not all water conveyed to Westlands by the CVP travels through the Delta, the Westlands Water District's relationship with the CVP is an important consideration in effectuating the Delta Plan's coequal goal of enhancing statewide water reliability.

We would like to draw your attention to the recent State Court of Appeals decision for the Fifth Appellate District in North Coast Rivers Alliance et. al. v. Westlands Water District et. al. You may remember this case involved Westlands entering into two-year, interim renewal contracts with the Bureau of Reclamation. The interim contracts were meant to extend the expiring long-term contracts enough to provide the Bureau sufficient time to properly craft the environmental documents required for the new 25-year long-term contracts. Westlands determined that the interim agreements were exempt from CEQA, and therefore did not conduct any environmental review beyond a basic Environmental Assessment.

The CVPIA provides that the Bureau shall renew existing long-term water contracts only after first completing a programmatic environmental impact statement examining the long-term contract's effects on the environment. The Petitioners, however, contend that the interim renewal contracts also require a full environmental review.

The primary issue in this case is whether the interim contract renewals are exempt from CEQA.

CEQA applies only to discretionary government actions that are defined as "projects," meaning the whole of the action has the potential for resulting in either a direct physical change or a reasonably foreseeable indirect physical change in the environment.

This case specifically discusses Statutory and Categorical exemptions to CEQA.

### Statutory

Statutory exemptions are created by the Legislature and are absolute; meaning they always apply as long as the project in question fits within certain parameters.

The applicable statutory exemption claimed by Westlands in this case is the "Pre-CEQA Ongoing Project exemption." The CEQA guidelines recognize a statutory exemption for a project approved prior to CEQA's effective date of November 23, 1970 that is still "being carried out"

by the public agency. The court held that this exemption applies in this case, as substantial evidence in the record shows that the District's right to receive roughly one million acre feet of water per year through CVP facilities in the interim agreements was no different from the "ongoing project" of the original pre-CEQA water agreement.

### Categorical

Categorical exemptions are certain classes of projects exempted by regulation from CEQA because they have been determined not to have a significant effect on the environment.

The Categorical exemption discussed in this case involves the continued use of existing facilities at the same level of use. A categorical exemption is recognized for "the operation, repair, or maintenance of existing public or private structures, facilities, mechanical equipment, or topographical features, involving a negligible or no expansion of use beyond that existing at the time of the lead agency's determination. Here, the court noted that the interim contracts were a two-year continuation without any changes to the structure or operation of existing CVP water facilities. Therefore, the court determined that the continued use Categorical exemption would apply in this case.

It is interesting to note that this is the second "contract renewal" case in the last several months in California. The Federal Ninth Circuit Court of Appeals held in Natural Resources Defense Council v. Jewell that in renewing 40-year settlement water contracts, the Bureau was required to engage in Federal Endangered Species Act consultation because it retained "some discretion" whether or not to renew the contract itself, and if it did so, to shape the financial structure and other terms in a way favorable to the Delta Smelt.

However, there are some differences between Jewell and the Westlands case at hand. First, the cases played out in different arenas, with Jewell being heard in the Federal Ninth Circuit Court of Appeals and Westlands being litigated in the State Court of Appeals for the Fifth Appellate District. The cases also involved different bodies of law. Jewell involved the Federal Endangered Species Act while Westlands featured CEQA, a state law of California. In the end though, it appears that the reasoning of the Westlands court boiled down simply to what was practical. Since the new impending long term contracts would be subject to a full environmental review anyway, it would be impractical (at least at this point) to require a full review for each artificially short interim renewal agreement.

## **UPDATES:**

Mr. Stevens and I also have a couple updates for cases we have presented in the past:

### United States Eastern District Judge Lawrence O'Neill denies Plaintiff's preliminary injunctions regarding Delta Water Transfers

At last month's meeting, I reported on the case of Aqualliance and California Sportfishing Protection Alliance v. United States Bureau of Reclamation. As you may recall, the case involved the Plaintiffs alleging that the Bureau failed to consider new information and issue a Supplemental Environmental Assessment and/or a full EIS regarding a proposed water transfer through the Delta to buyers in the San Luis & Delta-Mendota Water Authority.

On July 11, Judge O'Neill denied the Plaintiffs' motion for a preliminary injunction against the proposed transfer. In a nutshell Judge O'Neill determined that the United States Fish and Wildlife Agency appropriately incorporated and relied upon the 2008 Biological Opinion indicating that adverse effects to the Smelt from the pumping would be minimal, even in a dry year.

Judge O'Neill also concluded that an agency does not need to supplement an EIS every time new information becomes available because to do so would render decision-making chaotic and unmanageable, as the agency would always be waiting and accounting for new information.

### The California Supreme Court has decided to review the Third Appellate District's March 2014 ruling in *Property Reserve, Inc. v. Department of Water Resources*.

The California Supreme Court will consider whether the State will have to formally condemn certain Delta properties to conduct tests for the upcoming BDCP tunnel projects, as opposed to gaining temporary entry permission under precondemnation procedures.

In affirming the trial court's decision regarding the geological testing and reversing its decision on the environmental tests, the Court of Appeals held that both testing programs constitute a taking and the State must fully condemn the affected properties to conduct the studies.

## **Geological and Environmental Studies**

The two main issues the California Supreme Court will consider involving the environmental and geological tests are: 1). Whether the testing activities constitute a taking, and 2). If so, whether the entry statutes provide a proceeding for a direct condemnation that affords affected landowners all of their constitutional rights against the State's taking?

The Court of Appeals first concluded that the geological activities constitute a takings per se because cement columns leftover from the testing would be an intentional, permanent, and physical occupation by the government. Regarding the environmental studies, after considering factors such as the character, time required, and economic impact of the studies, and the degree to which the studies will invade the landowners' interests, the court concluded that the environmental studies constitute a temporary taking.

The Court of Appeals also concluded that because the precondemnation entry statutes do not provide for a condemnation in which the affected landowner can receive a jury determination of just compensation, the statutes are unconstitutional under California law.

Whether the Public Trust Doctrine applies to Groundwater that supports surface waterways?

We would also like to draw your attention to a recent Sacramento County Superior Court decision involving the public trust doctrine, which according to the Delta Plan, helps form the foundation of California's water management policy. In Environmental Law Foundation v. State Water Resources Control Board, Judge Sumner concluded that the public trust doctrine protects navigable waterways from harm caused by groundwater extraction, and that the County, as a subdivision of the State, is required to consider the public trust when issuing well drilling permits.

Here, the Scott River in Siskiyou County is a navigable waterway used for boating and fishing. However, as a result of pumping nearby groundwater that is "interconnected" with the surface waters of the Scott River, the River is often "dewatered" during portions of summer and fall, injuring the river's fish populations and boating opportunities.

In concluding that the public trust doctrine protects navigable waterways from harm caused by groundwater extraction, Judge Sumner noted that even though the facts alleged here involving groundwater extraction are different from those in the landmark public trust doctrine decision of National Audubon Society (which involved the diversion of surface tributaries), the result is essentially the same. In both cases the extraction and/or diversion decreased the flow of the navigable waters, thereby harming public trust interests. Judge Sumner found that if groundwater pumping impairs the public's right to use a navigable waterway for trust purposes, there is no sound reason in law or policy why the public trust doctrine should not apply. Furthermore, Judge Sumner found that as a subdivision of the state, the county shares responsibility for administering the public trust and has an affirmative duty to consider the public trust when issuing permits to appropriate groundwater.

It should be noted that these conclusions do not dispose of the case, but simply allow the case to continue beyond the proceeding stage. The Petitioners must still prove their allegations with more specificity to prevail on the merits.

The Ninth Circuit has denied Petitioner's request for an en banc rehearing regarding the consolidated Delta Smelt cases

Finally, as you may recall on March 13 of this year the Ninth Circuit overturned a lower court decision as a panel (2-1) and ruled that a 2008 Biological Opinion issued by the US Fish and Wildlife Service correctly determined that the Central Valley and State Water Projects jeopardized the continued existence of the Delta Smelt and its habitat. The March 13<sup>th</sup> Ninth Circuit opinion was authored by Judge Jay Bybee, who was nominated for the Ninth Circuit by President George W. Bush in 2002. The Petitioners, including the California Department of Water Resources and the San Luis & Delta-Mendota Water Authority, requested an en banc rehearing, claiming the Ninth Circuit's ruling resulted in less flexibility and fewer options for water capture and deliveries, especially during the current drought.

On July 23 the Ninth Circuit denied the petitioners request for a rehearing. However, the Petitioners may still appeal to the United States Supreme Court if they so desire.

Thank you very much and I apologize if we took up too much of the Council's time.