Department 29
Superior Court of California
County of Sacramento
720 Ninth Street
Timothy M. Frawley, Judge
Frank Temmerman, Clerk

Hearing Held: Thursday, November 18, 2010, 1:30 p.m.

CENTRAL DELTA WATER AGENCY, et al. **v.** **CALIFORNIA DEPARTMENT OF WATER RESOURCES, KERN COUNTY WATER AGENCY,** **ALAMEDA COUNTY FLOOD CONTROL & WATER CONSERVATION DISTRICT ZONE 7, et al.**	**Case Number: 34-2010-80000561**

Proceedings: Demurrers and Motion to Strike First Amended Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief

On November 17, 2010, the Court issued a tentative ruling in the above-entitled proceeding On November 18, 2010, at 1:30 p.m., the matter came on for hearing. The matter was argued and submitted. Having taken the matter under submission, the Court affirms its tentative ruling, with modifications, as set forth below:

RULING AFTER HEARING

1 Tentative Ruling on Demurrers

Respondents/Defendants Kern County Water Agency (KCWA) California Department of Water Resources (DWR) and Real Parties in Interest, Dudley Ridge Water District, Kern Water Bank Authority, Oak Flat Water District, Paramount Farming Company LLC, Roll International Corporation, Semitropic Water Storage District, Tejon-Castaic Water District, Tejon Ranch Company, Westside Mutual Water Company, and Wheeler Ridge-Maricopa Water Storage District demur to the second and third causes of action of the First Amended

Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief (the "First Amended Complaint") [1]

In addition, the following Real Parties in Interest have joined in KCWA's demurrer, or filed separate demurrers, and joined KCWA's memorandum of points and authorities. Solano County Water Agency, Tulare Lake Basin Water Storage District, County of Kings, Napa County Flood Control and Water Conservation District, City of Yuba City, San Gorgonio Pass Water Agency, Antelope Valley-East Kern Water Agency, Crestline-Lake Arrowhead Water Agency, Desert Water Agency, Ventura County Watershed Protection District, Palmdale Water District, Alameda County Flood Control and Water Conservation District (Zone 7), County of Butte, Santa Barbara County Flood Control and Water Conservation District, Central Coast Water Authority, Metropolitan District of Southern California, Coachella Valley Water Agency, Castaic Lake Water District, Littlerock Creek Irrigation District, and San Gabriel Valley Municipal Water District.

In reviewing the sufficiency of a complaint against a general demurrer, the Court is guided by long-settled rules. The Court treats the demurrer as admitting the truth of all factual material allegations properly pleaded in the complaint, regardless of possible difficulties of proof. However, a general demurrer does not admit contentions, deductions, or conclusions of fact or law alleged in the complaint. (*Blank v. Kirwan* (1985) 39 Cal 3d 311, 318.)

In this case, the First Amended Complaint challenges the alleged approval by DWR of the so-called "Monterey Plus Amendments" project (FAC ¶1) According to Petitioners, the components of the Monterey Plus Amendments Project (the "Project") include the original "Monterey Agreement" (or "Monterey Amendments") that described a series of amendments to be made to the State Water Project ("SWP") long-term water contracts, *plus* the additional terms and conditions that resulted from the Settlement Agreement reached between the parties in *Planning and Conservation League v Department of Water Resources* (2000) 83 Cal.App 4th 892. (FAC ¶¶1, 81-83, 89, 94-96, 145-153; see also Opposition, p.3.)

Petitioners allege that the Monterey Plus Amendments would, if allowed to become permanent, eliminate and/or alter key provisions of the long-term water supply contracts for the delivery of water under the State Water Project by, among other things, (1) removing the "urban preference" that ensures urban users more water in times of drought; (2) removing the principal safeguard against "paper water" allocations, (3) removing provisions preventing reliance on "surplus water" to build permanent economies; (4) expanding the opportunity of local water contractors to transfer and sell water that would otherwise be restricted to agricultural use; (5) restructuring SWP financing in a manner that will deprive the State of millions of dollars, and (6) unlawfully transferring the Kern

[1] Kern County Water Agency's demurrer also includes a motion to dismiss on the same grounds

Fan Element of the Kern Water Bank to a privately-controlled joint powers authority. (FAC ¶5.)

Petitioners' second and third causes of action, styled as a reverse validation action and petition for writ of mandate, respectively, seek to set aside DWR's approval of the Project and the associated transfer of the Kern Fan Element of the Kern Water Bank to KCWA.

Movants contend that because Petitioners' second cause of action is a reverse validation action seeking to invalidate the Monterey Amendments and the associated transfer of the Kern Fan Element to KCWA, the cause of action is barred by the 60-day statute of limitations applicable to reverse validation actions.

Likewise, Movants contend, the third cause of action is merely a disguised reverse validation action that repeats the allegations made in the second cause of action. Thus, Movants assert the third cause of action also is barred by the 60-day statute of limitations applicable to reverse validation actions.

Requests for Judicial Notice

The Court grants the requests for judicial notice of Exhibits 1-10, 13, 16-19, and 20-22, but, except for the judicial findings in Exhibits 6, 8, and 19, the Court does not take judicial notice of the truth of the statements made in those documents. The requests for judicial notice of Exhibits 11, 12, 14, and 15, are denied as irrelevant (See footnote 3)

Discussion

Where the Validation Statute (C.C P. § 860) applies, it imposes a short 60-day limitation period on anyone who would seek to challenge the validity of the public agency's action Code of Civil Procedure sections 860 and 863 permit a public agency or any interested person 60 days to bring a validation action "upon the existence" of any matter which under any other law is authorized to be determined pursuant to the validation statutes Government Code sections 53511 and 17700 authorize validation proceedings to test the validity of state bonds, warrants, contracts, obligations, or evidences of indebtedness. (See Cal Gov. Code §§ 17700, 53511, see also *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, *California Commerce Casino v. Schwarzenegger* (2007) 146 C A.4th 1406.) Thus, an action to challenge the validity of a state "contract" must be commenced upon or within 60 days after its "existence."

A contract is deemed to be "in existence" upon its authorization. (C.C.P § 864) Therefore, the critical dispute in this case is when the Monterey Amendments

were "authorized" and hence came into "existence" for purposes of triggering the 60-day statute of limitations under the Validation Statute [2]

Movants contend that the First Amended Complaint admits that the relevant contracts at issue were approved and executed in 1995, and implemented in 1996. Accordingly, Movants argue the contracts came into "existence" in 1995, or, in any event, no later than 1996, and therefore, Petitioners' validation action is not timely.

Petitioners, on the other hand, contend that DWR's authorization of the Monterey Amendments was set aside as a result of the *Planning and Conservation League* litigation Petitioners assert that the trial court's "Initial Implementing Order" only authorized the Monterey Amendments on an "interim basis," pending a new environmental review. Petitioners allege that the "Monterey Amendments" were not *finally* authorized until DWR certified its Final EIR and issued its Notice of Determination for the project on May 5, 2010, and, therefore, the validation action is timely. At the very least, Petitioners argue there is a dispute of fact as to when the Monterey Amendments were authorized, which is sufficient to defeat the demurrers

The Court is compelled to agree with Petitioners While the Court may take judicial notice that the Court of Appeal in *Planning and Conservation League* did not set aside DWR's authorization of the Monterey Amendments, there is a factual dispute whether the Settlement Agreement and the related Interim Implementation Order set aside *final* authorization of the Monterey Amendments pending a new environmental review. (See FAC ¶¶96-98; see also Settlement Agreement [Request for Judicial Notice, Exh.5], p.9.)

Because a general demurrer tests the pleading alone, and not the evidence or other extrinsic matters, a demurrer is not the appropriate procedure for determining the truth of disputed facts or what inferences should be drawn when competing inferences are possible. Further, a hearing on a demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable. (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374, see *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 605; see also *C R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App 4th 1094, 1104 [general rule is that the truthfulness and interpretation of a document's contents are disputable].)

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[2] One also could question whether the Monterey Amendments are "contracts" subject to validation under the Validation Statute The Third Appellate District Court of Appeal assumed so in *Planning and Conservation League*, but subsequent appellate decisions call this assumption into serious question (See *California Commerce Casino, Inc v Schwarzenegger* (2007) 146 Cal App 4th 1406, 1424-1425 [contracts subject to validation under Government Code section 17700 are those in the nature of, or directly related to, state agency bonds, warrants, or other evidences of indebtedness], see also *Ontario v Superior Court of San Bernardino County* (1970) 2 Cal 3d 335, 343-344 [reaching similar conclusion regarding Government Code section 53511])

Movants insist that the Settlement Agreement and the related Interim Implementation Order "clearly" and "unambiguously" set aside only the certification of the 1995 EIR. The Court does not agree.

In the Court's view, the Settlement Agreement and Interim Implementation Order are susceptible of two different interpretations. On one hand, the Order does not explicitly set aside the approval of the Monterey Amendments, supporting Movants' interpretation that the Order had no effect on the validity of the Monterey Amendments

On the other hand, the Order required the preparation of a new EIR for the project. This suggests that the trial court implicitly set aside the approval of the project, since it would defeat the purposes of CEQA to require environmental review to be performed after project approval (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 130 [purpose of EIR is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made]; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal 3d 553, 564 [same]; see also *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 394 [at a minimum an EIR must be performed before a project is approved, because if post-approval environmental review were allowed, EIR's would likely become nothing more than post hoc rationalizations to support action already taken].)

Further, the Order authorizes the administration and operation of the SWP to be conducted, on an interim basis, pursuant to the Monterey Amendments. Such an affirmative grant of authorization would be unnecessary if, as Movants contend, the Order "clearly" had no effect on the validity of the Monterey Amendments.

Ultimately, Movants' interpretation of the Order may prove correct, but the proper interpretation of the Interim Implementation Order is in dispute and competing inferences are possible. Therefore, the demurrers are overruled.[3]

2. Tentative Ruling on Motion to Strike

Real Parties in Interest Central Coast Water Authority, the Metropolitan Water District of Southern California, and Coachella Valley Water District have moved to strike certain allegations of the first cause of action on the grounds the allegations concern the alleged economic effects of the project, which are not relevant under CEQA.

Petitioners contend they do not allege economic effects were omitted from the EIR for the project Rather, they allege the EIR fails to disclose economic factors

[3] The demurrers based on failure to name KCWA as a defendant is overruled based on Petitioners' admission, and the Court's conclusion, that the First Amended Complaint does not seek to invalidate the second part of the two-part transfer of the Kern Fan Element of the Kern Water Bank (from KCWA to Kern Water Bank Authority)

that are related to physical impacts on the environment and required for an accurate project description

The adequacy of the EIR is a matter to be determined at the hearing on the merits. The Court is unable at this time to conclude whether the challenged allegations are irrelevant, false, or otherwise improper Accordingly, the Court shall defer ruling on the motion to strike until the hearing on the merits

Counsel for Petitioners is directed to prepare a formal order consistent with this ruling; submit it to opposing counsel for approval as to form, and thereafter submit it to the Court.

The clerk shall file notice of this ruling in all pending cases and serve a copy of the notice on the Petitioners. Petitioners shall serve a copy of this ruling on all other parties listed in the notice of related cases

SO ORDERED.

Date: Nov 30, 2010

Timothy M. Frawley
Judge of the Superior Court of California
County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4)

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled ruling in notice envelopes addressed to each of the parties or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

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I, the undersigned Deputy Clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: November 30, 2010

Superior Court of California
County of Sacramento

By. Frank Temmerman, Deputy Clerk

Central Delta Water Agency et al v Dept of Water Resources et al
Sacramento Superior Court Case No 34-2010-80000561
Coordination Case No 4641