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THIRD DISTRICT COURT OF APPEAL STRIKES DOWN MONTEREY AMENDMENT EIR, RESTORES PUBLIC ROLE IN STATE WATER PROJECT

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Overview

At the March 1996 CLE water law program organized by the publisher of this reporter, a half-practitioner-half-professor was asked to present his overview of California water law: past, present and to come. In the "to come" category, after listing the future of *Los Angeles v. San Fernando*'s footnote 61 in the then-pending superior court Mojave River Basin adjudication, and the expansion of county groundwater regulation, this writer then asked the question: "CEQA: Still Power to the People? (Testing the "Monterey Agreement" process in *Planning and Conservation League v. Department of Water Resources*)."

On 15 September the Third District Court of Appeal provided a resounding "yes" to that question. Sustaining every challenge of two environmental organizations and a minority state water project contractor, the appellate tribunal set aside the environmental impact report (EIR) prepared to justify the so-called Monterey Amendments to the 1960 State Water Project, which had been negotiated in secret in 1995 by the Department of Water Resources (DWR) and a handful of the most influential contractors. (*Planning and Conservation League v. Department of Water Resources* ["*PCL II*"], 83 Cal.App.4th 892, 2000 Daily J.D.A.R. 10331.)

The court ruled that a Santa Barbara County-based water agency, the Central Coast Water Authority (CCWA) had been wrongfully designated "lead agency" for preparation of the EIR; that the prepared EIR was fatally defective for failing to include implementation of pre-Monterey state water contract terms, and particularly the permanent shortage provisions of article 18(b), as part of the no-project alternative; and that (aside from their CEQA claims) the challengers had properly initiated a proceeding to question the substantive validity of the Monterey Amendments. The court *sua sponte* authorized an award of attorneys' fees, in an amount to be determined in superior court. The justices directed the superior court to set aside the EIR certification and make other orders appropriate under CEQA's remedial provisions.

In its treatment of CEQA, water resources planning, and validation procedure, this decision ranks as important as any from the California courts in this generation. *PCL II* will not only force a reshaping of the State Water Project with the public and environmental community at the table, but have expanding and ongoing influence for decades to come. Once again through judicial enforcement CEQA has given power to the people.

Background

The Monterey Amendments, negotiated in secret among DWR, Kern County Water Agency, the Metropolitan Water District, a few other contractors, and non-contractor CCWA, eliminated the priority for urban water users in time of temporary shortage (article 18(a)), and removed a requirement that if the project as envisioned in 1960 could not be completely built out, future entitlements to State Water Project supplies must be proportionately reduced to conform to available supplies (article 18(b). The secret negotiators had been motivated to avoid the enforcement of article 18(b), which would conform the State Water Project's hypothetical obligation to deliver 4.2 million acre feet annually, to as little as the actual present capability of the project, 2.0 to 2.5 million acre feet. The Monterey Amendments also transferred to the Kern County Water Agency substantial State lands in Kern County held by DWR as a State groundwater bank.

As part of the secretly-negotiated deal between DWR and the largest water contractors, DWR agreed to give up its responsibility to prepare the EIR for this massive restructuring of the State Water Project from that originally proposed by Governor Pat Brown and the Legislature and approved by the voters in 1960. When the EIR was prepared instead by CCWA (which lacked the taxing authority to qualify as a state water contractor under Water Code section 12937), that agency refused to assess the environmental benefits of *not* adopting the Monterey Amendments that is, the potentially beneficial impact of reducing claims to State Water Project supplies from the hypothetical 4.2 to the realistic 2.0 to 2.5 million acre foot maximum.

When the Monterey Amendments were formally adopted by DWR and its largest water-district contractors in late 1995, they were challenged in Sacramento Superior Court by the Planning and Conservation League (PCL), the Citizens Planning Association of Santa Barbara County (CPA), and one contractor objecting to Monterey, the Plumas County Flood Control and Water Conservation District. The superior court ruled in June 1996 that DWR erroneously abandoned its duty to prepare the EIR, but found the EIR prepared by CCWA to be legally adequate. After a detour to the California Supreme Court on the issue of time to appeal non-judgment orders in validation proceedings (*PCL v. DWR (I)* (1998) 17 Cal.4th 264), the Sacramento court of appeal reversed the superior court judgment in *PCL II.*

The Court of Appeal Decision

In its unanimous 53-page opinion (authored by Justice Vance Raye and joined by Justices Coleman Blease and Harry Hull), the court sustained every claim presented by the successful appellants. The court affirmed the superior court's conclusion that DWR as the only agency with statewide responsibility for the State Water Project could not abdicate its duty to prepare the EIR. The contracting parties were not free to select CCWA because of its asserted CEQA expertise. In the court's words: "While applauding the settlement success of the seven parties who negotiated the Monterey Amendment, defendants forget the 23 water contractors and the members of the public who were not invited to the table."

Turning to the merits of the EIR, the core of the court's opinion rejected the EIR's failure to recognize the reality that without the Monterey Amendments' deletion of article 18(b), project "entitlements" could be reduced to conform to the actual amount of water annually available. Introducing its analysis, the court observed, "There is an aura of unreality surrounding the debate over article 18, subdivision (b)." The court not only condemned the failure of the environmental impact report to recognize reality that the State Water Project will not be built out as anticipated in 1960. ("The SWP, however, has never been completed and the state cannot deliver 4.23 maf of water annually. The entitlements represent nothing more than hopes, expectations, water futures, or as the parties refer to them, "paper water.") Of equal importance, the court connected this error to the greater risk of statewide land-use decisions based on the false expectation that the State Water Project will ultimately deliver 4.2 million acre feet annually; that land-use decisions would be based upon paper entitlements and not actual supplies.

In an accompanying footnote at this holding, the court wrote:

> Paper water always was an illusion. "Entitlements" is a misnomer, for contractors surely cannot be entitled to water nature refuses to provide or the body politic refuses to harvest, store and deliver. Paper water represents the unfulfilled dreams of those who, steeped in the water culture of the 1960s, created the expectation that 4.23 maf of water could be delivered by a SWP built to capacity. And yet those same dreamers had a vision. While hoping for a completed SWP, they incorporated the article 18, subdivision (b), mechanism to reduce entitlements to meet a humbler, leaner reality.

Concluding its substantive CEQA ruling, the court rejected defendants' excuse for failing to consider article 18(b) as part of the no-project condition ñ the avoidance of litigation among the contractors and DWR as an evasion of required environmental review:

> Neither the threat of litigation nor the debate over whether a permanent shortage exists is crucial to the environmental issues posed by CEQA. Quite simply, the question was not whether article 18, subdivision (b), was likely to be implemented in the near future, but what environmental consequences were reasonably foreseeable by retaining or eliminating article 18, subdivision (b)'s solution to a permanent water shortage.

With equal force the court also rejected the DWR/CCWA argument that they could reject article 18(b) as a project alternative. Alternatives are selected, the court noted, in an evaluation of their relationship to the objectives of the project. That is not what the public was asking for here whether article 18(b) would meet the objective of DWR and the contractors to avoid litigation. Instead, the court correctly observed, the public requested an objective assessment "of implementing the existing contractual mechanism for eliminating paper water"; consequently CEQA demanded that assessment.

Concluding with the observation that "perhaps the deficiencies in the EIR relate to the provincial experience of the lead agency," the court determined that "CCWA has undermined the most basic charge under CEQA to inform the decision maker."

Turning to the plaintiffs' non-CEQA claims, the court ruled that the plaintiffs had properly brought a "validation" action to challenge DWR's transfer of the Kern water bank property to local Kern County interests. Following the procedure of the validation statute (Code Civ. Proc., ßß 860-870) to challenge agency action (so-called "reverse validation," ß 863), plaintiffs named and served DWR as the defendant agency that took the invalid action in violation of the nonalienation mandate of Water Code section 11464. Plaintiffs did not name the Monterey contractors as separate defendants, instead securing summons by publication. (Even though plaintiffs did not name the individual contractors as defendants, it did provide them actual notice by mail.) Many of the contractors, under the leadership of Kern County Water Agency, and DWR itself, took the position that the contractors were indispensable parties; and, adopting a trend from non-validation land-use cases (e.g., *Sierra Club, Inc. v. California Coastal Comm.* (1979) 95 Cal.App.3d 495; *Save Our Bay, Inc. v. San Diego Unified Port Dist.* (1996) 42 Cal.App.4th 686), argued that the validation action be dismissed for failing to name and serve the contractors within the short (60-day) limitation period.

This issue had been raised at superior court in two forms: by DWR's motion for summary adjudication on the issue, and by the contractors' "special appearance" to make a "motion to quash" based on failure to name and serve them. In separate rulings the superior court ruled against plaintiffs in favor of both DWR and the contractors. Plaintiffs appealed both decisions at the same time, but 54 days after the granting of the motions to quash. In *PCL v. DWR (I)* the Supreme

Court held that the 30-day time for appeal of validation *judgments* also applies to appeal from validation *orders*, thus resulting in the dismissal of plaintiffs' appeal of the motion to quash. As a consequence, when the case returned to the court of appeal, the contractors had successfully removed themselves from the litigation, and DWR argued that their removal deprived the plaintiffs of their validation claim for lack of these assertedly indispensable parties.

In *PCL II* the court of appeal debunked DWR's "indispensable party" theory, noting that the very purpose of the validation statute was to provide a judgment good against the world by published and not individual summons; and that here the contractors had both published and actual notice. While the plaintiffs could not now acquire *in personam* jurisdiction over the contractors, that did not matter because the validation proceeding yielded *in rem* jurisdiction over the Monterey Amendments and Kern Water Bank transfer contract. A final validation judgment would not be subject to collateral attack, whether or not contractors elected to participate in the *in rem* proceeding. The court summarized that "it is incongruous to conclude, as defendants do here, that the voluntary absence of interested persons, with both constructive and actual notice of the proceedings, would compel dismissal of the proceedings." Summary adjudication in favor of DWR is to be vacated, and plaintiffs' validation action to proceed.

In its disposition paragraph, the court initially ordered that approval of the environmental impact report be vacated; that a new and legally-adequate EIR be prepared by DWR; and that the superior court make further orders as appropriate under Public Resources Code section 21168.9, subdivision (a), fix the amount of attorney's fee award, and retain jurisdiction until compliance is obtained. In response to requests from both appellants and the Santa Barbara County Board of Supervisors (the actual state water contractor and land-use agency in that jurisdiction), the court on 16 October made clear that while it was not itself enjoining the Monterey project activities, the superior court is authorized to make injunctive orders consistent with the Court's opinion.

Immediate Consequences for the State Water Project

Assuming that any petitions for Supreme Court review are denied (notably, neither DWR nor CCWA petitioned the court of appeal for rehearing) [review was denied; see endnote], the superior court will immediately face the task of defining the scope of relief flowing from the pervasive flaws in the EIR. The plaintiffs will argue that the Monterey Amendments and Kern Water Bank transfer contracts be set aside, because of the court of appeal's conclusion that the initial decisions to enter these contracts was made in gross ignorance of environmental consequences; because the restructuring of the state water project must proceed with the 1960 contracts, and not Monterey, as the baseline default condition; and because defendants brought whatever prejudice will flow on to themselves by assuming the risk of declaring the contracts effective one week before final

judgment in the superior court, removing the stay-pending-litigation provision in each Monterey Amendment. The defendants will likely argue that there is no adverse environmental consequence to maintaining the status quo since 1996, and much reliance has been built on the Monterey program. Once the superior court makes the remedy determination, the parties could well find themselves back in the court of appeal on a petition for extraordinary writ.

The possibility remains, however, and this writer earnestly promotes it that DWR will take initiative to respond constructively to both the letter of the court of appeal's mandate and the court's underlying concerns about both process and the State's water future. DWR and the contractors have much to gain by not forcing the plaintiffs to pursue their validation proceeding as a substitute for effective CEQA compliance. CALFED and its predecessor Bay-Delta Accord offer the procedural example; ironically the latter proceeded with urban, agricultural, and environmental interests at an open table, at the very moment the Monterey negotiators were doing their exclusive work in secret. Neither Governor Davis nor DWR Director Hannigan can ignore the editorial praise that the court earned from urban and rural commentators statewide. One hopes that the first substantial legacy of *PCL II* will be the liberation of DWR from the contractors' overreaching influence and restoration of the department to the prominence it needed to create the state water project 40 years ago. A collaboration among DWR, the contractors, other water agencies, the environmental community, and consumers and other stakeholders with professional facilitation and funding of the public interest participation could lead to a true consensus "preferred alternative" on which the DWR EIR can then be prepared.

In the interim, the prevailing parties in *PCL II* pledged to the appeals court and to the defendants that they would respond constructively and fairly to requests for flexibility in rolling back the Monterey provisions. Responsible water transfers those backed by "wet water" and those whose environmental consequences are acceptable will not be frustrated. (At superior court the plaintiffs waived any objections to the wheeling of federal water to the Mojave Water Agency through state facilities, for example; and in the court of appeal that agency made clear that it didn't need Monterey to maintain its now-effective transfer from fellow contractor Kern County Water Agency.) In sum, the parade of horrors should be stopped before the cynics can assemble it, and all stakeholders should be assured that the environmental and minority-contractor community, realizing how close they came to being shut out entirely, will participate by example worthy of the opportunity that the court of appeal has now given them.

The PCL *Decision in Legal Context*

In the three principal fields it addressed - CEQA, water resources and land-use planning, and validation practice - the court's decision should have enduring influence.

As a CEQA action, *PCL v. DWR* was commenced when the statute's efficacy was openly at issue; recall the question with which this writer concluded his 1996 CLE presentation. Then, consider the respect that this opinion now shows the environmental law. *PCL II* can be seen as signaling the passage of CEQA into the ranks of fully mature statutes that frame our modern legal culture, comparable for example to the securities acts or antitrust laws. The environmental impact report, often the target of cynical criticism and humor, is no longer simply the "heart" of CEQA; in *PCL II* it becomes the "heart and soul."

In its propounding of the "no project alternative" requirement, the court breathes both reality and force into this chapter of an environmental analysis. The court reminds us that "no project" does not mean "no action"; it is not realistic to assume that if an environmentally-damaging project is being proposed to meet a valid need, but doesn't get approved, the government is going to stop in its tracks and fail to employ existing mechanisms to solve the problem more modestly. No longer can project proponents define their purposes so as to reject "low build" or "no build" solutions as infeasible alternatives; now the comparison of damaging to low-impact solutions will be forced under the rubric of a rigorously-defined "no project alternative."

In natural resources administration, *PCL II* will mark the end of paper dreams and the restoration of reality to water and land-use planning assumptions. As many editorials proclaimed in response to the decision, it's about time someone in authority spoke the unspeakable truth that the State Water Project has practically reached its limit. Managers from the heights of CALFED to the most modest local water district cannot avoid this message.

In the often vexing but unavoidable confluence of water and land use planning, *PCL II* has crowned the developing jurisprudence of the Legislature and the courts to enable sustainable development governed by the realities of water availability. Beginning with S.B. 901 (1995) and *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, and progressing through *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, and the superior court decision on Newhall Ranch, both branches of government have collaborated to tighten and rationalize the linkage between water and development. Now the justices have taken those precepts to the biggest project of all, where the stakes and consequences are unavoidably of statewide dimension. *PCL II* not only spares communities from unsustainable development; in the end it spares the watersheds and Delta from destructive demands backed by a population created on false expectations.

Finally, *PCL II*'s validation holding cannot be overlooked; indeed, that is the "sleeper" issue in the case. By unambiguously dispatching the "indispensable

party" canard from validation jurisprudence, the court has facilitated that procedure for both agencies in direct validation and the public in reverse validation. (DWR wins by losing on this claim, knowing that in its future validation actions it need not name and serve all its contractors.) One consequence of *PCL II* will be the greater attractiveness of validation to plaintiffs (such as those in *Sierra Club* and *Save Our Bay*) who have suffered draconian dismissals for overlooking a real party in interest in a petition for writ of administrative mandamus, by finding themselves unable to add the subsequently-determined-indispensable party who more than likely was fully aware of the litigation all along. The appeal of validation must be tempered, however, with recognition that not all, and probably not most, governmental actions to be challenged fall in the class of those that can be addressed through validation proceedings.

PCL II *in Historical Context*

Within our generation a handful of decisions from the California courts of appeal have immensely shaped the law of water and the environment, and all but one have emanated from the Third District. Among these stand *County of Inyo v. Yorty (I)* (1973) 32 Cal.App.3d 395; *County of Inyo v. City of Los Angeles (III)* (1977) 71 Cal.App.3d 185; *California Trout v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585; *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166; and the First District's *United States v. State Water Resources Control Boa*rd (1986) 182 Cal.App.3d 82. For reasons summarized in this essay, *PCL II* will likely emerge as influential as any of these, perhaps even more so because it marks the most significant pronouncement on the State Water Project since its inception, and the connection of that project to land use statewide.

Finally, the opinion will stand on the sheer craftsmanship, elegance, and force of its writing. To the passages quoted above should be added a series of three-word sentences: "CEQA compels process." "Shortage precipitates conflict." - that evoke the style of Justice Cardozo. More important than the style is the substance; and in grafting overdue reality onto the largest state water project in the nation, the court of appeal justices honor the teaching of their great Eastern exemplar: "We are not to close our eyes as judges to what we must perceive as men." (*People v. Knapp* (1920) 230 N.Y. 48, 63.) By its pragmatic and realistic assessment of the State Water Project through the lens of CEQA the court of appeal provokes an historic restructuring of that project, and empowers a competent but historically disenfranchised public.

On 13 December 2000 the California Supreme Court unanimously denied review petitions filed by DWR and CCWA, and two separate petitions for certiorari filed by Kern County Water Agency, Metropolitan Water District, and Alameda County FC&WCD; and Wheeler Ridge-Maricopa Water Storage District and Cappello Farms.