

## **Renewal of Interim Contracts For Delivery of Central Valley Project Water to Districts an Ongoing Project Exempt from CEQA**

In February 2012, the Westlands Water District and related water distribution districts entered into two-year interim renewal contracts with the U.S. Bureau of Reclamation relating to the Bureau's ongoing provision of Central Valley Project water to the Districts. The purpose of the interim contracts was to continue the existing terms for water delivery in advance of the Districts' anticipated execution of new, long-term renewal contracts, which were awaiting the Bureau of Reclamation's completion of environmental documentation necessary for execution of the long-term agreements.

The Districts approved the interim renewal contracts finding the renewals exempt from CEQA. The trial court agreed, ruling that the matters contemplated in the interim contracts were exempt under the statutory exemption for ongoing pre-CEQA projects and CEQA's categorical exemption for the continued operation of existing facilities. The court of appeals affirmed. [\*North Coast Rivers Alliance v. Westlands Water District, Fifth District, July 3, 2014 \(F067383\)\*](#).

Westlands Water District serves over 600,000 acres of farmland with Central Valley Project water. The CVP is a federal reclamation project built within the major watersheds of the Sacramento and San Joaquin river systems and the Delta. It was originally financed, constructed and operated under the terms of the Reclamation Act of 1902 and, later, under the Rivers and Harbors Act of 1937 and the Central Valley Project Improvement Act of 1992. Operated by the Bureau of Reclamation under water rights granted by the State Water Resources Control Board, the CVP is the nation's largest water reclamation project and California's largest water supplier. The CVP allocates CVP water to water districts that contract with it subject to a comprehensive scheme of environmental statutes and regulations, including the Improvement Act of 1992, the federal Endangered Species Act, and various state and federal regulations governing Delta water flow and water quality.

The original contract between the Bureau of Reclamation and Westlands was entered into in 1963 and was to remain in effect for 40 years. The Improvement Act of 1992 provides that the Bureau "shall" upon request, renew existing long-term water service contracts for a period of up to 25 years—but only after the Bureau first prepares a programmatic EIS that examines the effects of implementing the Act on the environment. Delays in the completion of the environmental documentation led the Bureau to enter into a series of interim two-year contracts with the Districts. In December 2011, the Districts approved the two-year interim renewal contracts at issue in this appeal.

In approving the interim contracts, the Districts found that the renewals were exempt from the requirements of CEQA for several reasons. The Districts found that the renewal contracts merely involved the ongoing receipt and delivery of water on same terms as the prior water service contracts—with no expansion of service and no construction of new facilities. They also found that, to the extent the contracts involved any changes, the changes related only to rates, dates and other minor administrative matters. The Districts made specific findings that the renewals were exempt from CEQA under the statutory exemptions for ongoing pre-CEQA projects and for rate-setting and the categorical exemption for ongoing operation of existing facilities in CEQA Guidelines § 15301.

Following approval of the interim renewal contracts, Petitioners filed suit alleging that no exemptions to CEQA were applicable and that the Districts were required to undertake CEQA review. Petitioners claimed that the water rights at issue would involve the diversion of a substantial volume of water from the Delta, thereby affecting water flows, water purity, and harming endangered fish species. They also alleged that the delivery of irrigation water to the lands served by the Districts would contribute to a further buildup of contamination of the soils and groundwater with salt, selenium and other pollutants.

The trial court rejected Petitioners' challenge, concluding the interim renewal contracts were exempt from CEQA. As to the rate-setting exemption, the court found the interim renewal contracts had the effect of setting rates between the Bureau and the Districts and, in all other respects, merely continued the existing water deliveries without change. The court also found the water deliveries were an ongoing project subject to the statutory exemption applicable to projects authorized before the adoption of CEQA. Finally, the court ruled that the existing facilities exemption applied, since the interim renewal contracts merely authorized continued water deliveries under the existing system and use of the existing distribution network.

The trial court also rejected Petitioners' claim that exceptions to the categorical exemption (relating to significant effects on environment caused by unusual circumstances or cumulative impacts) were applicable, concluding that the baseline for the interim renewal contracts was the environment that existed in December 2011—including all environmental damages that already existed at the time. Because the contracts did not increase or change the existing water deliveries, construct new facilities, or make other changes to existing environment, the exceptions to the exemption were not established.

The appellate court affirmed, engaging in an extended discussion of the standard of review, the applicable statutory and categorical exemptions, as well as exceptions to the exemptions and the standard to be applied with respect to the application of both. The court emphasized the difference between statutory and categorical exemptions, pointing out that statutory exemptions are absolute if the project fits within its terms. A categorical exemption, by contrast, is subject to exceptions that can defeat its use, including the exception that applies where there is a reasonable possibility the activity will have a significant effect on the environment due to unusual circumstances and the exception that applies where the cumulative impact of successive projects of the same type is significant.

The appellate court found that the statutory rate-setting exemption in Public Resources Code section 21080(d) did not apply, agreeing with the petitioners' argument that the interim renewal contracts did not identify any action that was being taken by the water districts that amounted to rate setting actions: they did not mention rates or say anything about adjusting, approving or establishing rates.

The court concluded, however, that the statutory exemption for ongoing projects approved prior to the date CEQA took effect applied. The court held that the applicability of the ongoing project exemption depends upon whether the challenged action is a normal, intrinsic part of the ongoing operation of a project approved prior to CEQA or is instead an expansion or modification of a pre-CEQA project. It concluded the exemption applied because the evidence in the record was sufficient to support a finding that the amount of water Westlands Water District is entitled to receive through its existing facilities each year can be traced back to the contractual commitments that were made prior to the CEQA's effective date, November 23, 1970.

The court of appeal also held that the categorical exemption for continued use of existing facilities applied and that there was no basis for finding any exception to the exemption. The court first found the exception based on a reasonable probability of significant effects due to unusual circumstances did not apply. The petitioners argued significant effects would result because the diversion of more than 1 million acre-feet of water from the Delta each year could adversely affect threatened fish populations and fragile habitat in the Delta and that use of the water for irrigation could add to the salt and selenium buildup in the soil and groundwater in the Westlands

Water District area. The court rejected this claim, determining that application of the correct environmental baseline to assess the project's impacts made it clear that petitioners had failed to show a reasonable possibility of a significant effect on the environment: The large volume of water distributed to the water districts and used for irrigation was clearly part of the existing environmental baseline for the district's ongoing operations and a potential for adverse *change* in the environment from these existing conditions was not shown; further, even if were assumed some change from the existing environmental baseline might occur, the record evidence was insufficient to show that the brief period involved in the interim renewal contracts – only two years – would potentially have a significant environmental effect.

The court also rejected the argument that the interim renewal contracts triggered the exception for "successive projects of the same type" which may result in significant cumulative impacts. Petitioners claimed the successive contract renewals create significant cumulative environmental damage over time, including salt and selenium buildup in the soil and groundwater, as well as harm to salmon, smelt and other endangered fish populations and their habitat in the Delta. The court concluded, however, that under the "unique statutory context" of the case, the short-term, interim renewal contracts did not amount to "successive projects of the same type" under the exception contained in the Guidelines.

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