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California Land Use & Development Law Report

Court Upholds EIR for Kern River Diversion and Storage Project

A California Court of Appeal held that the EIR for a public water authority's river diversion and water storage project adequately described the unadjudicated waters to be diverted and adequately analyzed impacts to water rights and groundwater supply. *Buena Vista Water Storage District v. Kern Water Bank Authority* 76 Cal. App. 5th 576 (2022).

Until 2010, the Kern River had been designated by the State Water Resources Control Board as a fully appropriated stream, and only those who held an appropriative water right could divert Kern River water. The State Board removed the fully appropriated designation after observing that, in certain wet years, unappropriated water in the form of excess flood flows remained in the Kern River. Shortly thereafter, the Kern Water Bank Authority applied to the State Board for a new appropriative right to divert and store 500,000 acre-feet per year (AFY) in wet years and prepared and certified an EIR for a corresponding water supply reliability project using existing infrastructure. The EIR's stated objectives were "to secure water rights to unappropriated Kern River Water to maximize use of Ken Water Bank Authority's existing capabilities," to "continue allowing Kern River water to be diverted . . . during times of excess Kern River flows for recharge and later recovery," and to

enhance "water supply reliability, particularly in dry years." The EIR acknowledged that, under observed hydrologic conditions, excess flood flows would be available for diversion in an estimated 18 percent of all years. The corresponding water rights permit application specified that Kern Water Bank Authority sought to divert only during years when water was available, and the State Board relied upon the Authority's EIR to approve the diversion permit.

The Buena Vista Water Storage District, a senior water rights holder in the Kern River, sought a writ of mandate to set aside the EIR and diversion permit.

The EIR Satisfied CEQA's Requirement for an Accurate, Stable and Finite Project Description Without Quantifying Adjudicated and Existing Appropriative Water Rights

The Court of Appeal found that the EIR satisfied CEQA's requirement that environmental analysis be based upon a clear, stable and finite project description. Although the EIR used multiple phrases and references to describe the hydrologic conditions under which diversions would occur, the court found its description of "flood flows," water that the Authority "has historically received," and "unappropriated water" to be internally consistent. The court also found no instability arising from the proposed 500,000 AFY limit, because CEQA allows for flexible parameters to describe a diversion that will occur during changing hydrologic conditions and subject to a finite maximum diversion.

For similar reasons, the Court of Appeal rejected the contention that CEQA required the EIR to "actually quantify the amount that [existing senior] water right holders" are entitled to, include "quantified measurements of water used by existing Kern River water rights holders," and "quantified measurements of the water those rights holders have the right to divert." Looking to CEQA Guidelines Section 15124, the Court of Appeal found that the EIR included the minimum requirements by identifying (a) the location and boundaries of the project, (b) a statement of its objectives, (c) a general description of the project's technical, economic, and environmental characteristics, and (d) a statement of the intended use of the EIR. None of these elements required the Authority to specifically quantify existing water rights in either the project description generally or the environmental setting descriptions in the EIR. The court found that such a requirement would be particularly onerous given that there had never been a stream-wide adjudication of the Kern River in which such rights had been officially quantified. In essence, the court found that where a project proponent seeks to divert and beneficially use unappropriated surface waters and that intention is reflected in an adequately finite and stable project description, CEQA does not require it to inventory existing appropriated water rights in the water source.

The EIR Adequately Evaluated Impacts on Water Supply

Last, the Court of Appeal ruled that the EIR's analysis of water supply impacts was supported by substantial evidence notwithstanding the failure to quantify existing water rights. The EIR had properly used historical measurements of actual diversions as the baseline against which to evaluate impacts on water supply and concluded based on evidence in the record that water for the project would be available about 18 percent of the time. The EIR's conclusion that no mitigation would be required because diversions would only occur surplus to existing proprietary rights was therefore supported by substantial evidence.

The court also found that the EIR adequately analyzed impacts associated with groundwater storage and recovery aspects of the project. Specifically, the court concluded that the EIR's less-than-significant impact finding was supported by substantial evidence because the EIR analyzed effects upon groundwater withdrawals compared to baseline conditions and concluded that there would be no increased withdrawals or lowering of the water table. The EIR specifically disclosed that maximum groundwater recovery volumes in dry years would not exceed the quantities of water diverted and banked in wet years during periods where surplus water was available for storage.

Authors

John Morris

Counsel
JohnMorris@perkinscoie.com 415.344.7071

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