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Stockton East Water Dist. v. United States, No. 0451L, 2007 WL 548819 (Fed. Cl. Feb. 20, 2007)

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have arose from considerable rainfall. The court held that non-point discharges were not subject to antidegradation review as they were not subject to federal regulation but were a matter for the states. In addition, the infrequency of precipitation in connection with the fact that the regulation prohibited all other discharges demonstrated that CAFO sources would have no more than a *de minimis* effect on water quality.

The court examined the EPA's approval of Kentucky's choice not to include impaired waters in its Tier II classification. The court held that case law recognized the use of a water body-specific approach, as over ninety percent of Kentucky waters received Tier II or III protection using this approach. The court also held that the EPA correctly examined the impact of a water body-specific approach and found it to be consistent with EPA requirements supporting water levels necessary to sustain fish, shellfish, and wildlife.

Waterways asked the court to assess the EPA's determination that the Kentucky regulations contained adequate implementation procedures. The court held that the EPA was correct in arguing that antidegradation regulations applied to discharges involving KPDES permit review and they provided permit applicant guidelines for the state to follow.

The court then considered the EPA's approval of Kentucky's KPDES permit implementation procedures, even though the procedures did not address CWA Section 401 water quality certifications. The EPA answered, and the court agreed, that this claim had no merit because a procedure to issue 401 certifications already existed in Kentucky.

The court held that the EPA did not act arbitrarily or capriciously when it approved the procedures providing administrative and judicial review under Kentucky's permitting process.

Kathleen Brady

UNITED STATES CLAIMS COURT

Stockton East Water Dist. v. United States, No. 04541L, 2007 WL 548819 (Fed. Cl. Feb. 20, 2007) (holding that (1) individual water users were not third-party beneficiaries of water allocation contracts between the Bureau of Reclamation and the irrigation districts; (2) the shortage provision in the contracts excused non-performance of water allocations; (3) conservative operation of the New Melones Dam was not unreasonable and did not breach the contract; (4) the alteration of the contractual obligations due to recent legislation was not a taking).

This case arose from a water allocation and distribution dispute in the Central Valley Basin ("Basin") of California regarding water from the New Melones Dam. The dam is part of a federal water conserva-

tion project serving the Basin called the Central Valley Project (“CVP”). The United States Bureau of Reclamation (“Reclamation”) is the designated federal administrative agency that manages the CVP. Reclamation answers to the governing State Water Control Board (“Water Board”), which possesses the power to issue appropriate water permits in California.

The history of the CVP is especially significant to this case. Territorial expansion into the western desert lands resulted in an unprecedented need for reclamation and irrigation. As a result, the Flood Control Acts of 1944 and 1962 granted the federal government the authority to form the CVP in order to improve management of water resources in the Basin. In 1962, Reclamation applied for permits from the California state government to construct the New Melones Dam, and later sought to expand the project in 1978. At that time, California imposed a number of requirements on Reclamation for the expansion, including: allocation of water for fish, wildlife, and habitat uses; the use of “firm commitments” regarding its domestic and agricultural water allocations; and priority of both seniority water rights and in-Basin usage. The “firm commitment” requirement led Reclamation to sign separate water allocation contracts in 1983 (“1983 Contracts”) with the Stockton East Water District (“Stockton East”) and the Central San Joaquin Water Conservation District (“Central”). Both Stockton East and Central function as irrigation districts to serve municipal, industrial and agricultural water needs in their respective areas, and are responsible for managing water facility operations.

Even before the 1983 Contracts, the Basin experienced increasing conflicts between the growing domestic and agricultural water needs of surrounding communities and the stability of river habitat. In addition, following the 1983 Contracts a number of federal and state legislative decisions substantially increased the over-commitment of the CVP. In 1993, the congressional Central Valley Project Improvement Act (“CVPIA”) went into effect. The CVPIA increased the amount of water releases for environmental purposes, and furthermore altered allocation priorities to give more weight to fishery, wildlife, and habitat needs. Then in 1987, the California Department of Fish and Game signed an agreement with Reclamation, which the Water Board approved, to implement in-stream flow schedules in order to protect the chinook salmon; the agreement in effect doubled the original commitment goals of the CVPIA. Finally, the 1998 Vernalis Adaptive Management Plan developed salinity standards for the section of the Vernalis River below the New Melones Dam. The Water Board subsequently approved the San Joaquin River Agreement, which required the CVP managing authorities to implement the salinity standards outlined in the Vernalis Adaptive Management Plan; this Agreement further increased the water commitments of the New Melones Reservoir.

Ultimately, Reclamation reduced the water allocations delineated in the 1983 Contracts to meet other increasing demands on the system and a lawsuit ensued. Multiple parties joined in the suit against Reclamation, including signatories Stockton East and Central. While the City of Stockton, the County of San Joaquin and California Water Services ("United Contractors") were originally parties in the claim, the court later limited the suit to only the Stockton East and Central irrigation districts. Since the United Contractors merely benefited from the 1983 Contracts incidentally or indirectly, they did not have sufficient third-party beneficiary status to support a claim. The court found that the contractual benefits outlined in the 1983 Contracts could only extend to parties organized under state law, such as the irrigation districts, and not individual water users.

Stockton East and Central ("Contracting Parties") originally filed the lawsuit in United States District Court in the Eastern District of California alleging a breach of contract and regulatory taking for failure to provide water in accordance with the 1983 Contracts. The district court transferred the case to the United States Court of Federal Claims, which denied Reclamation's motion to dismiss but granted partial summary judgment in favor of the Reclamation. At trial, the court conducted a review of 16 different lawsuits and regulations related to the suit filed by the Contracting Parties. The net findings established that the CVP contracts were not immune from subsequently enacted statutes, and furthermore, that Reclamation had broad discretion to determine allocation of water rights in the valley. Ultimately, three main issues developed. Since the court found that the United Contractors were not third-party beneficiaries under the 1983 Contracts, the remaining relevant issues were limited to whether Reclamation breached the contracts and whether the re-allocation of water constituted a taking.

The court first addressed the controlling law for the 1983 Contracts and found that state law controlled the claim. The Reclamation Act of 1902 explicitly states that the Act shall not interfere with state laws relating the control, appropriation, use or distribution of water. In addition, the 1983 Contracts expressly acknowledged the authority of state law regarding water use. Since no Congressional mandate had displaced the state's power to make decisions, the court determined that Reclamation must comply with all state-imposed requirements as determined by the Water Board.

A number of questions emerged with regards to the breach of contract claim, including whether Reclamation: 1) could make reductions from the water schedule; 2) could distribute less water than the minimum requirements outlined in the Build-Up Schedule; 3) made unreasonable operational decisions regarding allocation. First, the court ruled that Reclamation was not liable for reductions to the water schedule as long as its finding of a water shortage was reasonable. The

Contracting Parties claimed that between 1993 and 2004 they did not receive all of the water that they needed and had scheduled. The 1983 Contracts provided that the Contracting Parties must submit a schedule of water needs for the upcoming year, and that Reclamation had a contractual duty to fulfill the scheduled amount of water. In addition, even in years when the Contracting Parties failed to submit a timely schedule, they were still entitled to receive their water allocations because they substantially complied with the contract by paying for the water and by constructing multi-million dollar water facilities. On review of the record, the court found that the 1983 Contracts obligated Reclamation to make deliveries to Stockton East from 1994-96 and in 1998, and to Central in 1995, and therefore it violated the contract on its face for non-performance.

However, the 1983 Contracts also included a clause that protected Reclamation from liability in the case of reductions, such as the event of a drought or other shortage beyond Reclamation's control. The court determined that Reclamation had reduced allocations in 1994 due to drought and in the years following due to a continued dry forecast and diminished supply in the New Melones Reservoir. Furthermore, the reduction of water designated for irrigation was necessary in order to balance the environmental use needs dictated by the CVPIA. Had Reclamation been unreasonable, arbitrary or capricious in reducing water to the Contracting Parties, the contract would not have excused it from liability. Because the court did not find any evidence that Reclamation was unreasonable in reducing these water allocations, the court excused its non-performance under Article 12(d).

Second, the court decided that Reclamation was not liable for failing to allocate the minimum amount of water in the Build-Up Schedule. The Build-Up Schedule created an annual minimum purchase and supply schedule that Reclamation was to use in the event it could not provide the scheduled amount of water requested by the irrigation districts. Reclamation violated Article 3 of the 1983 Contracts when it failed to meet even these minimum standards during drought years. However, since the court found that Article 12(d) also applied to the Build-Up Schedule, this likewise excused Reclamation from non-performance.

Third, the court held that Reclamation was reasonable in its operational decision-making regarding the allocations, and therefore did not violate the contract. While Article 9(a) required Reclamation to "use all reasonable means to guard against a condition of shortage in the quantity of water available," Congress also granted the CVP considerable discretion in determining how to meet its obligations because it recognized the difficulty of meeting water demands in an over-committed region. The Contracting Parties made a number of arguments to show that Reclamation's operations were unreasonable, but the court rejected all of these arguments. Even though computer mod-

eling maintained the argument that Reclamation could have delivered the full allocations and still avoided shortfalls, the model did not take into account other real-time considerations such as seasonal water needs. Furthermore, Reclamation had developed a carry-over storage policy for the New Melones Reservoir so that the CVP would have sufficient water in the event of a catastrophe or severe drought, and this carry-over was also not included in the model. While Reclamation's conservative approach to operating the Reservoir may have resulted in reduced allocations to the Contracting Parties, the court did not find that its decisions were unreasonable.

The court also rejected the Contracting Parties' argument that Reclamation unreasonably failed to develop water release alternatives under Article 9(a) in light of the CVP's over-commitment. The CVPIA and various mandates following the 1983 Contracts required Reclamation to release water into the Vernalis River in order to meet salinity goals and to protect fishery habitat. Reclamation allocated this water exclusively from the New Melones Reservoir instead of other CVP water resources, even though it knew these releases would result in regular shortages for Stockton East and Central. Nonetheless, Reclamation successfully argued that the proximity of the Reservoir to the Vernalis River made it the most logical and cost-effective choice for water releases into the Vernalis. The Contracting Parties also argued that Reclamation should have implemented a water recirculation process in order to reduce salinity, instead of relying solely on water releases. Conversely, Reclamation presented evidence that a recirculation process would have resulted in higher operating costs to all users, and may have resulted in adverse environmental impacts on the system such as effects on salmon spawning and the release of additional contaminants into the waterway. Consequently, the court found that Reclamation's decisions to use water from the New Melones Reservoir for environmental water releases and to not implement a water recirculation process did not violate Article 9(a).

Finally, as none of Reclamation's activities effectively breached the 1983 Contract, the court considered whether the reduction of water constituted a taking under the Fifth Amendment. The Contracting Parties asserted that the CVPIA's impact on water allocation constituted a regulatory taking because of its impact on the 1983 Contracts, but the court rejected this argument. First, claims based on contractual rights or obligations usually give rise to a breach claim, which the Contracting Parties had already asserted, and not a takings claim. In addition, the court found that Reclamation was merely acting in a commercial capacity by implementing the 1983 Contracts, rather than in the sovereign capacity necessary to give rise to a taking.

In conclusion, the court found that Reclamation did not breach 1983 Contracts according to their terms, and that the water reductions did not constitute a taking. For the reasons above, the court granted

summary judgment in favor of Reclamation because the Contracting Parties failed to meet their burden of proof.

Sarah A. Quinn

STATE COURTS

CALIFORNIA

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 150 P.3d 709 (Cal. 2007) (holding that an environmental impact report for a large development project need not show that the project has definite long term water supplies, but that while the report adequately analyzed the near-term groundwater supply, it failed to do so in regard to the long-term surface water supply and the potential impact on salmon migration).

Vineyard Area Citizens for Responsible Growth, Inc. (“Group”) filed a petition for a writ of mandate challenging the County of Sacramento’s (“County”) approval of a community development plan. Group claimed that the approval violated the California Environmental Quality Act (“CEQA”). The Superior Court, Sacramento County, denied the petition after a bench trial. On appeal, the California Court of Appeal affirmed, finding that the discussion of water supply in the environmental impact report (“EIR”) met the requirements of CEQA, because its conclusions did not rely on “speculative or illusory sources” and substantial evidence illustrated that the effect of the proposed groundwater extraction would be insignificant. The Supreme Court of California granted Group’s petition for review, reversed and remanded. The court reviewed the administrative record for legal error and the County’s factual findings using the substantial evidence standard. On review the court addressed two issues. First, the court addressed the adequacy of the final EIR in regard to its identification and evaluation of future water sources for the development project. Second, the court determined whether the County’s findings regarding the potential impacts on migratory salmon, which the County first disclosed in the final EIR, should have been open to public comment.

Group contended that the final EIR was deficient because it failed to assure that the actual water sources would meet the project’s demand. Therefore, the final EIR failed to disclose all the possible environmental impacts that would result from the project. Further, when such a failure occurs, it is impossible to evaluate all available mitigation measures. The question presented to the court concerned how much uncertainty is allowable in an EIR under CEQA in regard to water supplies for a land use plan. The court first acknowledged that neither CEQA nor its guidelines address this issue specifically. On a general level, the court notes that CEQA guidelines assert that an agency must use its best efforts to find all available information and “disclose all that