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First District Holds LA's Water Allocations To Agricultural Lessees Were Authorized Under Existing Leases And Did Not Constitute Or Implement A Separate "Project" Subject to CEQA Review

By Arthur F. Coon and Matt Henderson on August 2, 2022

The First District Court of Appeal filed on June 30, and later ordered published on July 26, 2022, its opinion in *County of Mono v. City of Los Angeles* (1st Dist. No. A162590) __ Cal.App.5th __. The case involves another round in the long-running controversies surrounding Los Angeles's efforts to secure water for its populace. As the City now owns substantial acreage in the Sierra Nevada from which it takes much of its water, it serves both as landlord and water user in that region. The overlap of those two roles gave rise to the *County of Mono* case, in which the County sought to use CEQA litigation as leverage over the City's water allocations to agricultural users who lease property from the City. The case holds that the City's water allocations to the City's agricultural lessees were authorized under its existing 2010 leases and thus did not constitute a new project subject to CEQA review before they could be lawfully implemented. The case provides guidance to practitioners on when and how CEQA applies to public contracts, and also regarding the appropriate contents of the administrative record in CEQA litigation challenging staff level actions implementing existing leases. Entitlement and litigation attorneys should accordingly both find it a useful case to review.

Factual and Procedural Background

The history of the City of Los Angeles's water dealings in eastern California is lengthy and complex, and is as much legend as fact at this point. Books have been written, movies have been made, and many lawsuits have been filed. Suffice it to say that via its efforts to secure the water vital for its existence in its semiarid setting, the City has become one of the largest landowners in the Owens Valley, including large parts of Mono County.

This uneasy history has led to many disputes over the years. In this era of wildfire and drought, there will no doubt be many more. But this most recent legal dustup arises in the context of the City's role as

lessor of some 6,100 acres of land it owns in the County. In 2010 the City executed leases with a number of agricultural lessees for pasturage, farming alfalfa, and other purposes. The leases included multiple and detailed provisions dealing with water for the properties. The City expressly retained all water rights for the properties, and disclaimed any obligation to provide for the properties except as it chose to do essentially in its sole discretion:

> "Lessee further acknowledges and agrees that pursuant to Section 220(3) of the City of Los Angeles City Charter, any supply of water to the leased premises by [City] is subject to the paramount right of [City] at any time to discontinue the same in whole or in part and to take or hold or distribute such water for the use of [City] and its inhabitants. Lessee further acknowledges and agrees that there shall be no claim upon [City] whatsoever because of any exercise of the rights acknowledged under this subsection."

The leases divided the acreage into "dry" lease and "irrigated" lease categories, stating that "water supplies to all land classified for leased irrigation (alfalfa and pasture) will be delivered in an amount not to exceed five (5) acre-feet per acre per irrigation season." But those deliveries are not guaranteed; the leases specifically state, "The water supply for a specific lease is highly dependent upon water availability and weather conditions; due to this, delivery of irrigation water may be reduced in dry years." The leases allowed for rent adjustments if City makes a "dry" finding reclassifying the property by type or acreage.

The leases had a term running from 2009 through 2013, with a holdover provision. The City originally found that the 2010 leases were CEQA-exempt under the Class 1 categorical exemption for the use of existing structures or facilities with no or negligible expansion of use and that determination was never challenged. From 2009 to 2018, City's water deliveries under the leases varied from 5.4 acre feet per acre (2011-12) to zero acre feet per acre (2015-16).

In 2018, the City submitted a new form of proposed lease to the lessees that provided only for "dry" leases. The new "dry" leases stated that the City would not provide any irrigation water, though it might direct its lessees to spread excess water on the premises based on its "operational needs." The City told the lessees that it was undertaking environmental review of the newly proposed "dry" leases and that their holdover status under the 2010 leases would remain in effect until the new leases took effect. The City also informed the lessees that the anticipated 2018 allocation would likely only amount to 0.71 acre feet per acre.

Over the course of the 2010 leases, Mono County had at various times lobbied the City to provide more irrigation water to the lessees who could receive it. In response to the proposed 2018 "dry" leases, the County sent several letters to the City objecting to the reduction or elimination of water deliveries to the lessees. The County also stated that the City's decision to reduce water deliveries as announced in 2018 was a new "project" that gave rise to environmental impacts, including adverse impacts to sage grouse and their habitat, and County filed suit accordingly.

The trial court ruled in favor of the County. It held that the proposed elimination of water deliveries in the 2018 "dry" leases, combined with the City's small allocation of 0.71 AF/acre of water in 2018, showed that the City impermissibly committed to and implemented a new project without required CEQA review. The City appealed and the Court of Appeal reversed.

Reliance on Extra-record Evidence

The first issue the Court of Appeal addressed was the trial court's handling of extra-record evidence. The trial court had issued a tentative ruling on the County's petition. After that tentative ruling was issued, but

prior to the merits hearing, the City submitted a declaration as to water diversions to the leased properties in 2019 (6.6 acre feet/acre) and 2020 (3 acre feet/acre). The trial court ultimately ruled that the declaration could not be added to the administrative record for purposes of deciding the merits, but relied on it when calculating the baseline for purposes of the remedy.

The Court of Appeal ruled that the declaration was admissible extra-record evidence. The City's reduced water allocation in 2018 was not legislative or judicial in nature, but "informal or ministerial administrative action", i.e., a lower-level staff decision. Under these circumstances, extra-record evidence is appropriate. The declaration was also relevant to the issues raised in the petition.

The one obstacle to the City's claim as to the declaration was its timeliness. The City was on notice as to the centrality of the 2018 water allocation to the County's claims at the time it filed its opposition brief. Thus, the trial court could have properly excluded the declaration altogether as untimely. However, it did not do so, and instead considered and relied on the declaration in crafting its remedy; therefore, for reasons of fairness and because the County had been given the opportunity to fully respond to the declaration, the First District determined that there was no prejudice in considering the declaration on appeal, and explicitly stated that it would do so.

The New Allocations

Turning to the case's merits, the Court addressed "the core question": whether the City's reduced or eliminated water allocations in 2018 were part of the existing leases, or part of a new policy connected to the proposed but not yet entered 2018 "dry" leases and thus a new and separate "project" requiring CEQA review. Because the material facts were undisputed, the Court treated this as a question of law.

In evaluating this issue the Court essentially undertook a contractual analysis to evaluate whether the City was entitled to reduce its allocations under the 2010 leases. Reviewing the lease language quoted above, the Court concluded that the City was in fact so entitled. The leases stated that "any supply of water to the leased premises by [the City] is subject to the paramount rights of [the City] at any time to discontinue the same in whole or in part and to take or hold or distribute such water for the use of [the City] and its inhabitants. Lessee further acknowledges and agrees that there shall be no claim upon [the City] whatsoever because of any exercise of the rights acknowledged under this subsection."

Based on that provision, the Court concluded that the reduced 2018 allocation was based on a continuation and implementation of the 2010 leases, and not part of a new project. While a total elimination of water allocations (as under the new leases proposed in 2018) would be new and distinct from the 2010 lease policy, the Court accepted the City's representation that such was not being implemented under the existing leases and that they were not being de facto converted into "dry" leases. The Court also reviewed the history of allocations under the 2010 leases and concluded that the low 2018 allocation was, contrary to Mono County's claims, consistent with that history. Finally, the Court concluded that the temporal relationship between the reduced 2018 allocation and the proposed dry leases did not establish the creation or implementation of a new policy or support the County's "new project" theory, given that significantly increased allocations were actually delivered in 2019 and 2020.

Statute of Limitations

Having concluded that the decreased 2018 allocation was not part of a new policy or project to which the City had committed, the Court's remaining analysis was brief and to the point. It observed that the 2010 leases that authorized the City's complained-of allocations (i.e., allocations that reduced irrigation

lessees' allocations to increase deliveries to City's inhabitants) were approved in 2010, and that the County's lawsuit eight years later was time-barred to the extent it constituted a challenge to those 2010 Leases. Citing *Van de Kamps Coalition v. Board of Trustees of Los Angeles Community College Dist.* (2012) 206 Cal.App.4th 1036, the Court observed that later decisions made under the 2010 leases did not trigger anew the running of the statute of limitations. Thus, the petition was improperly granted, and the Court reversed.

Conclusion and Implications

While not a groundbreaking decision, the *County of Mono* case does provide useful guideposts for CEQA practitioners on several points. First, it sets forth an example of when extra-record evidence is admissible, which is not an infrequently arising issue in the context of CEQA litigation. Second, and more importantly, its contract-based analysis highlights a critical distinction – between project *approval* and project *implementation* – that governs how CEQA claims will be analyzed in the context of projects arising from government agreements including leases.

Questions? Please contact Arthur F. Coon and Matt Henderson of Miller Starr Regalia. Miller Starr Regalia has had a well-established reputation as a leading real estate law firm for more than fifty years. For nearly all that time, the firm also has written Miller & Starr, California Real Estate 4th, a 12-volume treatise on California real estate law. "The Book" is the most widely used and judicially recognized real estate treatise in California and is cited by practicing attorneys and courts throughout the state. The firm has expertise in all real property matters, including full-service litigation and dispute resolution services, transactions, acquisitions, dispositions, leasing, financing, common interest development, construction, management, eminent domain and inverse condemnation, title insurance, environmental law and land use. For more information, visit www.msrlegal.com.