That Dam Case (Again): Third District Upholds Oroville Hydropower Facilities Relicensing EIR Against Numerous CEQA Challenges

By Matthew C. Henderson and Arthur F. Coon on May 2, 2023

On April 7, 2023, the Third District Court of Appeal filed a lengthy published opinion – the latest installment in one of the longer ongoing CEQA battles in recent memory – affirming a judgment finding an EIR for the Federal relicensing of Oroville Dam and related hydropower facilities legally adequate. *County of Butte and County of Plumas, et al v. Dept. of Water Resources* (2023) ___ Cal.App.5th ___.

Factual and Procedural Background

This case's remarkably extensive litigation history has resulted in no fewer than four published decisions, three from the Third District and one from the California Supreme Court (aka "SCOCA"). (Of the three Third District opinions, only this case (*Butte IV*) is good authority, the other two having been abrogated by SCOCA's grants of review.)

The case has its origins in the operation of the Oroville Dam on the Feather River, which is part of the large statewide plumbing system with the prosaic name of State Water Project ("SWP"). The Federal Energy Regulatory Commission ("FERC") licenses such hydropower facilities and the original license had been issued in 1957 for a 50-year term. In the late 1990s, the Department of Water Resources ("DWR") began to prepare for the relicensing required by 2007. FERC allows relicensing to be undertaken by the state agency in a process involving consultation with interested parties and stakeholders in order to reach a "settlement agreement" consensus that can then be blessed by FERC at its conclusion; this is the process DWR followed. DWR's efforts in this regard took place from 2001 to 2006, involving "five federal agencies, five state agencies, seven local government entities, five Native American tribes, four local water agencies, and 13 nongovernmental organizations," with three years of hearings and two years of negotiations. More than 50 parties wound up signing a "settlement agreement" for operation of the dam that included two appendices intended to serve as the terms of the license.

DWR's activities weren't limited to the relicensing. It was also undertaking environmental review under CEQA by preparing an EIR for the project. (FERC was preparing its own environmental impact statement under NEPA at the same time.) Finally, in 2008, DWR approved the settlement agreement and certified the EIR.

Butte County, Plumas County and Plumas County Flood Control and Water Conservation District ("Counties") then filed two lawsuits (later consolidated) against the project. They alleged that the EIR did not adequately address climate change, failed to evaluate fiscal impacts to Butte County, failed to address impacts from mercury and bacteria in the water, wrongly assumed that the dam was currently operated in compliance with applicable water quality standards, and did not account for potential changes to the SWP that could affect dam operations.

The trial court rejected the Counties' claims, and they appealed. On December 20, 2018, the Third District issued its decision in *County of Butte v. Department of Water Resources* (2018) 30 Cal.App.5th 630 (*Butte I*). It, too, rejected the CEQA claims. But instead of addressing the substance of those claims as the trial court had done, it held that the application of CEQA to the relicensing of a dam under FERC's aegis was preempted by federal law pursuant to the Federal Power Act ("FPA," 16 U.S.C. § 791a et seq.). (That decision is discussed in this post.)

The defeated Counties then petitioned SCOCA for review. SCOCA granted the petition and ordered that the case be transferred back to the Third District "with directions to vacate its decision and reconsider the case in light of *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677."

The Third District did as instructed, and in another published opinion reached largely the same conclusion as it had in *Butte I*. See, *County of Butte v. Department of Water Resources* (2019) 39 Cal.App.5th 708 (*Butte II*). But on December 11, 2019, SCOCA again granted the Counties' petition for review. (Discussed in this post.) And on August 1, 2022, SCOCA issued its opinion in *County of Butte v. Department of Water Resources* (2022) 13 Cal.5th 612 (*Butte III*), holding that CEQA is ***not*** fully preempted under the FPA and remanding to the Third District for further review. (See this post.)

(There was yet more legal activity after *Butte III* was issued. See also this post addressing a letter sent to SCOCA from a number of leading CEQA practitioners requesting a modification to its opinion, and this one, addressing SCOCA's modification in response to the letter.)

So, the Third District gamely headed once more into the breach, this time tackling the Counties' CEQA claims head on. As noted, it issued its published opinion on April 7, 2023 (*Butte IV*), affirming the original trial court's judgment that DWR had not violated CEQA and that its EIR was legally adequate.

Holding and Analysis

The Third District's opinion in *Butte IV* is a thoroughgoing and straightforward examination of the Counties' CEQA claims which broke down into four categories: climate change, historical hydrological conditions, water quality and beneficial use, and changes to the SWP.

Climate Change-Related Dam Operation Impacts: Too Speculative

With respect to climate change, the EIR had concluded that changes to dam operation that would be occasioned by climate change were too uncertain to analyze. DWR had cited several studies and reports that concluded there would be a wide range of potential future scenarios wrought by climate change affecting conditions in the dam's drainage area, including some future scenarios with more precipitation

and some with less. Given the number of variables, the uncertainty of the best available modeling at the time of the EIR's preparation, and the highly divergent potential outcomes, DWR's EIR found it would be too speculative to analyze impacts of dam operation changes that climate change might cause.

The Third District upheld the EIR on this point. It cited CEQA Guidelines § 15145, which reads: "If, after a thorough investigation, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact." While the Counties cited a number of studies that discussed climate change modeling and predictions, including quantification, the Court noted that these same studies and reports also acknowledged the substantial uncertainty in this area and "divergent and equiprobable projections." The Counties did not address this aspect of their cited sources, thus failing to lay out the evidence favorable to DWR's position. This earned them a rebuke from the Court, which cited to *South County Citizens for Smart Growth v. County of Nevada* (2013) 221 Cal.App.4th 316, 330 and observed that such a failure can itself justify rejecting a CEQA argument challenging an EIR on appeal.

The Counties also cited supposed climate change analyses in other DWR EIRs, but those EIRs themselves were not part of the record, only referred to in internal DWR emails. The Court had little trouble rejecting this evidence, which it noted was also ambivalent about the predictability of climate-change related impacts to the dam's operation. Similarly, federal case law the Counties cited either dealt with projects where climate change impacts had not been analyzed at all, had been addressed without adequate explanation, or, as in *Turtle Island Restoration Network v. U.S. Dept. of Commerce* (9th Cir. 2017) 878 F.3d 725, had been held too speculative to analyze. Finally, the Counties cited *Voices for Rural Living v. El Dorado Irrigation Dist.* (2012) 209 Cal.App.4th 1096 to claim that climate change impacts could be studied. But, as the Court pointed out, that case involved a CEQA exemption, not an EIR, and the agency in the case had wholly ignored climate change, which DWR had not done. Given the deferential standard for review of an EIR, the Court concluded that none of the Counties' claims alleging inadequate analysis of climate change impacts had merit.

The Court took pains to note that its conclusion on the adequacy of the EIR's climate change analysis was limited to the record and what information DWR had access to when it prepared its EIR circa 2008, writing:

> None of this, however, is to say that DWR could reach this same conclusion today. As our Supreme Court has explained in a similar context, CEQA requires public agencies to ensure their analyses "stay in step with evolving scientific knowledge and state regulatory schemes." (*Cleveland National Forest Foundation*, *supra*, 3 Cal.5th at p. 504.) And so an agency's approach that is legally adequate at one point in time may not "necessarily be sufficient going forward." (*Ibid*.) But here, considering the information available at the time of the EIR in 2008, we find DWR reasonably concluded that the potential impacts were too speculative to warrant further evaluation. (See *Marin Mun. Water Dist. v. KG Land California Corp.* (1991) 235 Cal.App.3d 1652, 1662 [when the nature of future changes are "nonspecific and uncertain, an EIR need not engage in 'sheer speculation' as to future environmental consequences"]; cf. *Turtle Island Restoration Network v. U.S. Dept. of Commerce* (9th Cir. 2017) 878 F.3d 725, 740 (*Turtle Island*) [rejecting challenge to a federal agency's finding "that climate change effects could not be 'reliably quantified' nor 'qualitatively described or predicted' by the agency at the time"].) (Footnote omitted.)

Thus, the Court's upholding of limited review in this case due to the "speculative" nature of the impacts may itself be of limited utility to preparers and defenders of future EIRs if better data and modeling are available.

The Court Rejects Counties' Modeling Data Claims

The Counties' next argument was to the effect that DWR's modeling had been inadequate as it had not included an appropriate range of data reflecting both historic high (1907) and low (1977) annual flow levels. While certain portions of the EIR and internal DWR emails did suggest omission of this information, other portions made it clear that DWR had relied on a 73 year data set from 1922 to 1994, which encompassed the 1977 data. Moreover, while the data did not include 1907, DWR's inflow range for its modeling went up to 10 million acre feet, which exceeded the historic high 1907 flow. Moreover, neither the County nor any other commenter had raised this issue in the administrative proceedings leading up to the certification of the EIR, so it had not been exhausted. This claim was thus doomed on its merits as well as jurisdictionally barred.

Fiscal Impacts: No Evidence of Impacts to the Actual Environment

The Counties also argued that there would be fiscal impacts to Butte County from increased demand for public services. The court swiftly batted this argument down with a citation to CEQA Guidelines §§ 15064(e) and 15131(a), both of which make clear that economic and social impacts from a project are not effects on the environment within the purview of CEQA. The Counties tried to cobble together a connection to actual physical impacts from the alleged fiscal impacts, but the Court found those efforts wanting, as the Counties had not actually identified any such physical impacts, let alone evidence in the record to support their existence.

The Court Rejects Counties' Contamination and Water Quality Claims

The Court then turned to the Counties' claim that the dam could expose people to increased mercury levels from contaminated fish, as the dam creates sportfishing opportunities on the Feather River. The EIR noted, however, that mercury exposure was an existing risk from prior mining and development in the area. It also noted that there is no evidence of any health effects from the consumption of game fish in the State of California. The Court found this sufficient, drily noting: "Although the EIR would have been even more thorough had DWR surveyed all those who fish in the project area, learned of their diets, and quantified the amount of mercury in their diets, the Counties have not shown that this step was necessary in this case."

The Counties went on to argue that the EIR did not evaluate impacts from bacterial contamination from human and wildlife fecal waste. But the EIR did evaluate these impacts, and while the bacteria levels may occasionally rise above the limits set forth in state draft guidelines for freshwater beaches, those exceedances were rendered less than significant because the dam project included monitoring, educational, and notification measures. The Court also quickly dispatched a potpourri of other arguments relating to bacteria, finding them equally unconvincing.

The Counties' next line of argumentation fared no better. They attacked the EIR's treatment of water quality and beneficial use, claiming without apparent elaboration that the project goal of continuing to provide hydropower was improper because it failed to address how dam operations might change in the future. The Court noted that without adequate legal or factual support it could simply disregard this argument under appellate practice as well as CEQA. The Counties then argued that the EIR's use of qualifiers such as "generally" and "reasonably" to describe the dam's operation and compliance with legal standards and plans violated CEQA, but again the Court disagreed. It noted that overall the EIR made clear that the dam had to comply with the operative water quality plan. Similarly, the Counties' claim that the EIR failed to identify exceedances of water quality standards for certain metals was unsupported by

the record, as was their assertion that beneficial uses may be impacted by the dam through raised water temperatures. The Court then dispensed with an assortment of arguments the Counties advanced relating to the no-project alternative analysis, responses to comments, increased demand for water, compliance with water quality standards, and mitigation measures; it summarily dealt with each, noting that they were premised on mere assertions without support in the record, or upon mischaracterizations of the record.

Future Changes to the SWP

The final portion of the opinion with respect to substantive CEQA analysis dealt with the Counties' allegations that the EIR failed to analyze impacts from changes to the SWP. The first of these alleged that biological opinions as to certain fish species could require changes to SWP operations. But due to litigation, the opinions were not final or operative at the time the EIR was certified. Additionally, the measures set forth in the biological opinions relating to dam operations were minor. Thus, the Court concluded that the EIR's treatment of the opinions was adequate given that DWR could not predict what they would look like in their ultimate form and had addressed those measures it could reasonably believe they would impose. Likewise, the Court derided the Counties' argument that term "normal operation" of the dam as used in the EIR was undefined and could cause future controversy, noting again that the Counties had failed to elaborate on the argument or support it with legal authority. The Counties' last argument on the SWP was that the EIR should have evaluated impacts from changes to SWP water deliveries. DWR had noted in its responses to comments that changes to the SWP were outside the scope of the EIR, and that it could not predict how SWP operations might change in the future. The Court found this analysis adequate and that the Counties had not accurately summarized DWR's position.

The Court Affirms the Trial Court's Approval of the Record Preparation Costs

Finally, the losing Counties also complained that they had had to pay too much for the preparation of the administrative record needed to prosecute their action. The total cost was over $675,000 for over 327,000 pages of record, and the Counties complained that the trial court had abused its discretion in allowing this cost. But as the Court noted, this was not an average CEQA case or record, and the average per-page cost of $2.06 was reasonable given that *River Valley Preservation v. Metro. Transit* (1995) 37 Cal.App.4th 154 had approved administrative record preparation costs per page of $2.55. The Counties further attacked DWR for including documents that were also on FERC's official docket for the relicensing, as well as for having a DWR staffer contact 200 individuals to see if they had documents for the record; the Court found neither argument persuasive. The Counties then argued that DWR had to have had the record already prepared under CEQA Guidelines § 15094(b)(9), which requires the lead agency to notify the public within five days of approval "where a copy of the final EIR and the record of project approval may be examined." The Court rejected this argument because section 15094 only requires the agency to keep record materials and generally advise the public where they may be located, not assemble them into an actual administrative record. Likewise, the Court rejected as "undeveloped" the Counties' argument that DWR, in calculating record preparation costs, improperly relied on its accounting system, which takes into account payroll, benefits, and overhead. The Counties' claim that DWR improperly included litigation defense and consultant work in its record preparation costs was also belied by DWR's declarations submitted in support of its costs to prepare the record. Finally, the Court rejected the Counties' argument that the cost should have been disallowed because it was simply too high as simply another conclusory assertion unsupported by authority.

Conclusion and Implications

There is nothing of earthshaking legal significance in *Butte IV*. It addresses numerous issues and arguments raised by the Counties, and it generally rejects them as being raised in rather cursory fashion and without proper presentation. The case is notable, however, for its overall tone and approach to the Counties' arguments, as the Counties are repeatedly rebuked for making unsupported claims. The Court never calls them frivolous, but its language (some of which is quoted above) sends an unmistakable message that it did not find the merits of the lawsuit's claims at all compelling. The Court's treatment of speculative future impacts and record preparation costs are probably the most noteworthy aspects of *Butte IV* from a legal perspective, but the fact that it is the fourth opinion issued in the case is in and of itself notable. Given the nature of the opinion, the "in-the-weeds" nature of the claims it addresses, and the fact that SCOCA has already weighed in twice on this litigation, it seems an unlikely candidate for further SCOCA review, but in CEQA litigation one never knows.

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