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# Sweeping Six-Case Win For Water District Helps Secure Orange County's Water Supply

BB&K Partner Michelle Ouellette Authors a Summary of Recent Appellate Victory for *Orange County Lawyer Magazine*

**By Michelle Ouellette**

*California and water: the two always have been, [and] always will be, inextricably linked. No resource is as vital to California's urban centers, agriculture, industry, recreation, scenic beauty, and environmental preservation as its liquid gold.*

~ Ramon Llamas & Emilio Custodio, *Intensive Use of Groundwater: Challenges and Opportunities* 1, 280 (2003).

In early May, the Fourth District Court of Appeal took an important step toward helping to secure Orange County's water supply. It issued several opinions in response to challenges to a proposed public-private partnership project that seeks to pump groundwater, which would otherwise evaporate, from an aquifer in the Mojave Desert to agencies throughout Southern California. The victory for the Santa Margarita Water District (the District) was the result of years of hard work, consultation, and cooperation among various private and public entities and interests throughout the environmental review process, which resulted in the approval of a beneficial public project (the Project) that will serve Southern California citizens for decades to come.

## Project Background

Cadiz Inc. is a private corporation that owns approximately 34,000 acres of land in the Cadiz and Fenner valleys in eastern San Bernardino County. Despite the location in the heart of the desert, underlying the land is a vast groundwater basin that holds an estimated 17-to-34 million acre-feet of fresh groundwater. Within this closed basin system, groundwater percolates from higher elevations and eventually flows to Bristol and Cadiz dry lakes. Once the fresh groundwater reaches the dry lakes, it evaporates—first mixing with the highly saline groundwater zone under the dry lakes so that the water is no longer fresh, suitable, or available to support freshwater beneficial uses.

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In the interest of preventing the waste of a beneficial water source, Santa Margarita Water District worked in collaboration with Cadiz to develop a creative, comprehensive, and long-term groundwater management program for the basin. Under the groundwater conservation and recovery component of the Project, an annual average of 50,000 acre-feet of groundwater would be pumped from the basin over a fifty-year period. The water would then be transported via a forty-three-mile underground water conveyance pipeline to the Colorado River Aqueduct, where it would be transported to the District and other participating agencies.

### **Environmental Review and Project Approval**

In March 2011, the District posted a notice informing the public that a draft Environmental Impact Report would be prepared under the California Environmental Quality Act. In June 2011, San Bernardino County, Cadiz and the District executed a Memorandum of Understanding that provided that the District would act as the designated lead agency for purposes of completing the Environmental Impact Report (EIR). The District and its legal counsel (Best Best & Krieger LLP), worked to produce an EIR that analyzed the Project's potential environmental impacts, while also ensuring that the EIR was legally defensible in all respects. On July 31, 2012, the District certified the final EIR and approved the Project.

### **The Lawsuits and Successful Defense in the Trial Court**

Shortly after the District approved the Project, numerous lawsuits were filed challenging the Project.<sup>[1]</sup> The Center for Biological Diversity, the San Bernardino Valley Audubon Society, the Sierra Club and the National Parks Conservation Association, among other groups, filed several petitions for writ of mandate, challenging the Project under CEQA as well as compliance with county requirements. Some of the arguments that were raised by these groups included:

1. the District was improperly designated as the lead agency for the Project;
2. the EIR's project description was inaccurate and misleading;
3. the EIR was misleading because it did not provide an accurate duration for pumping; and
4. the Project would pump more water from the aquifer than contemplated by the EIR.

A private party, Delaware Tetra Technologies, Inc., also filed legal challenges against the Project. Delaware Tetra operates brine-mining facilities at the dry lakes, producing calcium chloride brine and sodium chloride salt. Delaware Tetra filed several petitions for writ of mandate challenging, among other actions, the District and the County of San Bernardino's execution of the MOU

designating the District as lead agency, the adequacy of the EIR, and whether the county followed applicable county requirements.

The trial court ultimately denied all of the petitions and ruled for the District, the county and Cadiz on all causes of action. The petitioners appealed the trial court's rulings.

### **The Court of Appeal's Review and the District's Victory**

On May 10, the court of appeal affirmed the trial court's rulings and denied all of the petitions in a series of partially published and unpublished decisions. In evaluating the claims, the court of appeal considered whether the designation of the District, versus the County of San Bernardino, as lead agency for the Project violated CEQA. Under CEQA, the "lead agency" for a project is usually the "public agency which has the principal responsibility for carrying out or approving a project." Pub. Res. Code § 21067; Cal. Code Regs., tit. 14, § 15051(a), (b). Here, the environmental groups and Delaware Tetra argued that the County of San Bernardino should be the lead agency for the Project, in part because the groundwater would be pumped from the county.

Rejecting this argument, the court of appeal considered State CEQA Guideline section 15051, the guideline that governs the designation of lead agency under CEQA, and held that where an agency is contemplating partnering with a private entity, "the agency that will serve as lead agency for purposes of the environmental review . . . may be (1) the public agency that is part of the public/private partnership, or (2) the public agency with the greatest responsibility for supervising or approving the project as a whole." *Center for Biological Diversity v. County of San Bernardino*, 247 Cal. App. 4th 326, 340 (2016).

Therefore, the District "was correctly designated as the lead agency for the Project under either prong of this test." *Id.* The court reached this conclusion based on the District's involvement in the cooperative partnership with Cadiz in implementing, overseeing, and carrying out the Project. In particular, the court emphasized the District's day-to-day responsibilities for managing, operating, and maintaining the Project, as well as its obligation to obtain financing for the costs of operation.

In addition, the court held that the parties had appropriately designated the District as lead agency by agreement. Where two or more public agencies will be involved with a project and each has a "substantial claim" to serve as lead agency, CEQA provides that the parties "may by agreement designate an agency as the lead agency." Cal. Code Regs., tit. 14, § 15051(d). Here, the parties had entered into an MOU that designated the District as lead agency, which the court found appropriate given the District's substantial authority over the Project "as a whole." *Center for Biological Diversity*, 247 Cal. App. 4th at

343-44. As a result, the court held that the District had appropriately been designated as lead agency. The court also found that the EIR fully complied with CEQA. *Id.*

With regard to Delaware Tetra's claims regarding the approval of the MOU, the primary claim related to whether the District and the county should have completed environmental review before approving the MOU. Resolving this issue turned on whether the approval of the MOU constituted a "project" under CEQA. A "project" within the meaning of CEQA is a discretionary activity by a public agency "which may cause either a direct physical change . . . or a reasonably foreseeable indirect physical change in the environment" Pub. Res. Code § 21065. As the impetus for several other necessary governmental approvals, Delaware Tetra argued that the MOU was a "core component" of the Project for which CEQA review was required. *Delaware Tetra Technologies, Inc. v. County of San Bernardino*, 247 Cal. App. 4th 352, 362 (2016).

The court of appeal disagreed, finding in part that the MOU expressly reserved "all discretionary authority to approve, deny, or condition the [Project]" pending the completion of environmental review. *Id.* Thus, environmental review prior to MOU approval would have been premature.

Finally, in related cases, the court of appeal found that the county had complied with its requirements prior to taking action on the Project.

## **Conclusion**

As public agencies continue to search for drought resilient water supplies, this case represents a major victory for both the District and the citizens of Orange County. In addition, it provides an excellent example of how public and private entities may coordinate to ensure that public infrastructure projects are successfully navigated throughout the regulatory and litigation processes to completion.

## **ENDNOTE**

[1] *Center for Biological Diversity et al. v. County of San Bernardino et al.*, Orange County Superior Court Case no. 30-2012-00612947; *Center for Biological Diversity et al. v. County of San Bernardino et al.*, Orange County Superior Court Case no. 30-2012-00633936; *Delaware Tetra Techs., Inc. v. Santa Margarita Water District et al.*, Orange County Superior Court Case no. 30-2012-00636391; *Delaware Tetra Techs., Inc. v. County of San Bernardino et al.*, Orange County Superior Court Case no. 30-2012-00594355; *Delaware Tetra Techs., Inc. v. County of San Bernardino et al.*, Orange County Superior Court Case no. 30-2012-0056715; *Delaware Tetra Techs., Inc. v. County of San Bernardino et al.*, Orange County Superior Court Case no. 30-2013-00635215.

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