

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME : MAY 4, 2001 DEPT. NO : 17
JUDGE : ROLAND CANDEE CLERK : G. SYLVESTER
REPORTER : CAROL SWITZER #2112 BAILIFF : S. BUDROW

STATE WATER RESOURCES CONTROL BOARD CASES, PRESENT:
(COORDINATED SPECIAL PROCEEDING) SEE ATTACHED MAILING LIST

Case No.: JC4118

Nature of Proceedings: MOTIONS

The above-entitled cause came on this day for a hearing with counsel present as noted on the attached mailing list.

The following tentative rulings made by the Court on May 2, 2001, and discussed in this hearing on May 4, 2001, is hereby incorporated into this minute order.

Tentative Rulings-Motions to Dismiss

Real Party in Interest Gallo Glass Company's (Gallo Glass) motion to be dismissed without prejudice from coordinated cases SF309539 and 311502 is unopposed and is granted. Gallo Glass has demonstrated that it is not a proper party to these actions. Gallo Glass's motion addressed to case SF311499 is dropped from calendar. San Joaquin petitioners have filed a first amended petition that does not name Gallo Glass. Thus, the motion is moot.

Colusa parties' motion to be dismissed without prejudice as real parties in interest in this coordinated proceeding is unopposed and is granted. The Colusa parties are named in cases SF309539, 311502, 311499, 311507 and Alameda County case 825585-9. They are not proper parties to those actions.

Central Delta's motion to dismiss Joint Water Districts Board, San Juan Suburban Water District, and Upper Swanston Ranch, Inc. from this

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coordinated proceeding is unopposed and is granted. These parties have no interest in the subject matter of this action

Joseph Gallo Farms, Gallo Bear Creek Ranch and Gallo Cattle Company's motion for order dismissing them without prejudice from this coordinated proceeding is unopposed and is granted. These parties have no interest in the subject matter of this action.

Tentative Rulings-Demurrers

State Water Resources Control Board's requests for judicial notice of the revised water rights decision, the order on reconsideration, the Golden Gate petition for reconsideration, the notice of determination, and Sacramento Valley Water Users petition for reconsideration are granted.

(1) State Water Resources Control Board's (SWRCB) demurrer to the second and third (CEQA) causes of action of the Golden Audubon petition for failure to comply with the 30 day statute of limitations of Public Resources Code section 21167(c) is overruled. Section 21167(c) provides inter alia that any action or proceeding alleging that an environmental impact report does not comply with this division shall be commenced within thirty days from the date of the filing of the notice required by subdivision (a) of section 21108. Section 21108 provides that whenever a state agency, board or commission approves or determines to carry out a project that is subject to this division, it shall file a notice with the office of planning and research.

Respondent contends that the first and second causes of action are untimely because the required notice was filed on December 30, 1999 and the Golden Audubon complaint was filed on April 14, 2000. Petitioners argue that the statute of limitations was tolled pursuant to Water Code section 1126 during the time their motion for reconsideration was under review. In effect, they argue that the fact that the determination was under reconsideration meant that it was not final and the notice pursuant to Public Resources Code section 21108 was premature.

The parties have cited, and the court knows of, no case that deals with the relationship of Water Code section 1126 and Public Resources

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Code section 21167(c). In its reply, respondent cites a number of cases that stand for the proposition that CEQA statutes of limitations apply to CEQA actions where there is a conflict with a more general statute of limitations. (See e.g. *Committee for Progressive Gilroy v. State Water Resources Control Board* (1987) 192 Cal.App.3d. In *Gilroy*, the Court of Appeal, Third Appellate District applied the longer 180-day CEQA statute of limitations where there was a conflict with a shorter limitations period in Water Code section 13330. Using basic rules of statutory interpretation, the court reasoned that a general provision is controlled by one that is special. The court has no quarrel with this general proposition.

However, petitioners rely on a different analysis. Petitioners have cited *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th in support of their contention that the statute was tolled. In *County of Amador, supra*, the Third District Court of Appeal rejected a statute of limitations challenge. There the lawsuit was not filed within 35 days of the notice of exemption under CEQA. The court, however, determined that the notice was invalid because the project was never approved before the notice was issued.

The Court finds petitioners argument persuasive. Under the reasoning of *County of Amador*, the fact that respondent accepted for review, and revised, Water Right Decision 1641 means that it was not final at the time the notice of determination was filed. Thus the statute did not run and the Golden Audubon petition is not untimely. The fact that petitioners' petition for reconsideration did not specifically address a CEQA determination does not compel a different result.

The requests of San Joaquin River Group and East Bay Municipal Utility District for joinder in the demurrer are granted.

(2) Respondent SWRCB's demurrer to the Central Delta 1 petition because petitioners lack standing is overruled.

SWRCB relies on *Waste Management of Alameda County v. County of Alameda* (2000) 79 Cal.App.4th 1229 for its contention. The reliance is misplaced. *Waste Management* is distinguishable. There, the court

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determined that the plaintiff had no beneficial interest in the subject matter of the action. The court applied the two-prong beneficial interest test. The court examined whether the plaintiff would obtain some direct, substantial benefit from issuance of the writ or suffer some detriment from its denial. The court also examined whether the interest the plaintiff sought to advance was within the zone of interests to be protected or regulated by CEQA. In Waste Management the plaintiff asserted a beneficial interest "by complaining it was required to undertake the substantial expense of EIR review and mitigation" while its competitor Browning-Ferris was not. (Id at 1235) The injury identified was the extra costs it incurred and continuing competitive injury due to Browning-Ferris lower costs. (Ibid.) The court determined that this interest was "commercial and competitive." (Id. at 1234) The court further determined that CEQA is not a fair competition statutory scheme. Thus, Waste Management's commercial and competitive interests were not within the zone of interests CEQA was intended to preserve or protect.

Here SWRCB asserts that the Central Delta petitioners have failed to establish that they have a beneficial interest in the claims asserted because they are competitors for valuable water resources and they have nothing more than commercial interests in agricultural production. The assertion fails. The instant case is factually distinguishable.

In ruling on a demurrer, the court considers the pleadings and matters of which judicial notice may properly be taken. Here, at a minimum, the petition asserts interests in protection of the quantity and quality of water supply that affects agriculture, recreation and wildlife. Petitioners are public agencies, reclamation districts and owners and occupiers of irrigated farmland in an area affected by the challenged decision. These are not the types of interest identified as "commercial and competitive" by the Waste Management court. The asserted interests are clearly within the zone of interest of CEQA. (See e.g. Public Resources Code section 21001.) The allegations are sufficient to withstand demurrer.

The court notes for the record that it is not persuaded by respondent's arguments regarding beneficial interest made for the first time in the reply.

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The determination that the allegations are sufficient to establish a beneficial interest is dispositive of the issue of standing. The court does not reach the additional issues raised by the parties.

(3) The Court rules as follows on the demurrers to the Anderson First Amended Complaint.

The demurrer to the second cause of action (CCP 1094.5 writ of mandate) on the ground of lack of standing to assert CEQA claims is overruled. The allegations are sufficient to withstand demurrer.

The demurrers to the third, fourth and fifth causes of action (declaratory relief) on the ground that they seek improper relief are sustained with leave to amend. Petitioners are correct that a request for declaratory relief and administrative mandate are not necessarily incompatible. (*Vedanta Society of Southern California v. California Quartet* (2000) 84 Cal.App.4th 517) Declaratory relief is proper where a challenge to the validity of a statute or a constitutional issue is raised. The three causes of action appear to make a challenge to CEQA and its retroactive application. However, they also incorporate challenges to the decision itself that require reference to the administrative record. Much of the relief sought is properly addressed in the mandate proceedings. Leave to amend is granted allow petitioners to properly allege a cause of action pursuant to *Verdanta, supra*, and the cases cited therein.

The demurrers to the sixth and seventh (Inverse Condemnation) and tenth causes of action for failure to state a cause of action are sustained without leave to amend. These claims are not yet ripe. The allegations do not demonstrate a present deprivation of water. There has been no taking. (See e.g. *Hensler v. City of Glendale* (1994) 8 Cal.4th 1)

The Court notes that this determination does not bar such a claim as and when it may arise. The Court also notes that it does not reach factual issues on demurrer.

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The demurrers to the eighth (tortious interference with contract) and ninth (intentional interference with prospective economic advantage) causes of action for failure to state a cause of action are sustained. Plaintiffs have failed to plead any statutory duty. Moreover, the claims are barred by the statutory immunity of Government Code section 818.4. (See *Walter H. Leimert Co. v. California Coastal Commission* (1983) 149 Cal.App.3d 222) The opposition fails to identify any viable means to cure the defects. The demurrers to the eighth and ninth causes of action are sustained without leave to amend.

The demurrers to the tenth, eleventh, twelfth and thirteenth (42 USC 1983) causes of action are sustained. Respondent is not a person against whom section 1983 civil rights claims may be brought. (*Will v. Michigan Department of State Police* (1989) 491 U.S. 58)

The request for leave to amend to attempt to state claims under the state constitution is granted.

The requests for joinder of petitioner Westlands Water in the opposition is granted.

The Court made the following rulings on Motions to Dismiss:

Real Party in Interest Gallo Glass Company's motion to be dismissed without prejudice from coordinated cases SF309539 and 311502 was unopposed and granted.

Colusa parties' motion to dismiss without prejudice as real parties in interest in this coordinated proceeding was unopposed and granted.

Central Delta's motion to dismiss Joint Water Districts Board, San Juan Suburban Water District, and Upper Swanston Ranch, Inc. from this coordinated proceeding was unopposed and granted.

Joseph Gallo Farms, Gallo Bear Creek Ranch and Gallo Cattle Company's motion for order dismissing them without prejudice from this coordinated proceeding was unopposed and granted.

The Court having taken matters under submission rules as follows:

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(1) The tentative ruling on the demurrer to the Golden Audubon petition is affirmed as modified below.

The paragraph commencing "The Court finds petitioners' argument persuasive" and ending "does not compel a different result is deleted and replaced as follows.

The Court finds petitioner's arguments persuasive. SWRCB issued the revised decision 1641 in March. That decision superceded the December decision. The revised decision obviously could not have been final before it was issued. Thus, the statute did not run and the petition is not untimely. The fact that these petitioners' request for reconsideration did not specifically address a CEQA determination does not compel a different result.

The Court notes that this ruling relates only to the specific facts on the record properly before it at the pleading stage. It is not intended to determine the issue of finality of SWRCB decisions as a matter of law in any circumstances other than under the unique facts of this case..

The tentative rulings are otherwise confirmed. Where leave to amend is granted the amended petition shall be filed and served on or before May 14, 2001.

The Court adjourned proceedings on the motions and submitted matters.

See Rulings After Status Conference for further dates agreed upon by all counsel.

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