

REGULATORY DEVELOPMENTS

UPDATE ON THE STATE WATER RESOURCES CONTROL BOARD HEARINGS THAT COULD AFFECT RIPARIAN AND PRE-1914 RIGHTS IN THE DELTA

The State Water Resources Control Board (SWRCB) continues with its public hearings to determine whether to adopt cease and desist orders (CDOs) against various Sacramento-San Joaquin Delta (Delta) water users. The SWRCB conducted public hearings on four (4) proposed CDOs directed at property owners on Roberts and Union Islands within the Delta in May, June, and July, 2010. Several of these parties filed a "Writ of Prohibition and Complaint for Declaratory Relief" against the SWRCB in Sacramento County Superior Court April 22, 2010 asking the court to prohibit the initial hearings scheduled for May, 2010 from going forward. The Court declined to stay the SWRCB hearings. See, a summary of that lawsuit at *20 Cal. Water L. & Pol'y Rptr.* 270 (June 2010).

Background

The growing concern over the health of the Delta has been well publicized in recent years. No one knows what the total diversions in the Delta are, but there is general agreement that tremendous demands are being placed on its water supply by those with contractual rights, those with riparian and/or pre-1914 rights, those with SWRCB permits and licenses and by requirements to support water quality objectives, fish passage and habitat requirements. In July, 2008, the SWRCB adopted a "Strategic Work Plan for Activities within the San Francisco Bay/Sacramento-San Joaquin Delta Estuary" (work plan). Among other things, the work plan discussed SWRCB's duty to vigorously enforce water rights in the Delta by preventing unauthorized diversions of water, violations of water right permits and licenses, and violations of the prohibition against waste or unreasonable use of water. The work plan calls for the SWRCB to investigate the basis of water rights of existing diverters within the Delta.

The SWRCB staff began investigating water diversions in the Delta using U.S. Geological Survey maps, aerial photography, and San Joaquin County Asses-

sor's maps to determine the location of irrigated agricultural land; staff also reviewed SWRCB records for permits, licenses, reports of water diversions or other basis of rights for water diversions for the parcels that were apparently under cultivation. In February 2009, the SWRCB began sending letters to property owners on Roberts and Union Islands within the Delta requesting that property owners provide the SWRCB with evidence of their right to divert water. Some property owners responded, while others did not. Based upon the responses, the SWRCB staff made a determination of whether various parcels have riparian rights or pre-1914 rights. Draft CDOs were sent to owners of property that the staff determined had not shown sufficient evidence of riparian or pre-1914 water rights but who were irrigating various crops on their property.

The CDO Hearings

The SWRCB website lists nine pending CDOs. The hearings on five of them have been indefinitely postponed. Hearings on three of the nine CDOs were completed in July 2010 and the fourth CDO is scheduled for additional hearing on August 4, 2010.

Each draft CDO generally recites the steps taken by the SWRCB Staff to determine whether the parcel(s) in question have riparian rights based upon parcel maps and aerial photographs that, according to the staff, do not demonstrate continuity to a surface stream. The draft CDOs also cite a lack of documentation supporting initiation and continuous use of water under a pre-1914 claim of right. The draft CDOs estimate water usage for the parcels in question by using the 1980 California Department of Water Resources publication "Crop Water Use in California" and multiplying the water use of specific crops by the number of acres of property to determine the approximate annual consumptive water use for each parcel. The draft CDOs also note that acceptable evidence to support a basis of right would include, but not be limited to, a chain of title supporting ripar-

ian status for the parcel; evidence that supports an existing or implied preservation of the riparian right established prior to severance of the parcel from the stream or other riparian parcels; evidence that verifies the first year of irrigation on the parcel prior to 1914 and documents subsequent continuous use of water; or statements that provide an alternative valid basis of right for diversions of water to the parcel.

If the property owner cannot submit sufficient evidence to establish a riparian or pre-1914 right, the draft CDO orders the property owner to submit a plan within 90 days that shows how and when it will permanently remove the diversion work serving the parcel.

The SWRCB website contains exhibits for the four matters that have been set for hearing. Perusal of the evidence index and some of the filed testimony and exhibits demonstrate that all parties, including the SWRCB prosecution team, the property owners, and the intervening parties (Modesto Irrigation District, State Water Contractors, and San Luis & Delta-Mendota Water Authority) have submitted extensive written testimony of expert witnesses who have opined on whether the parcels are riparian based upon chains of title, historical records, aerial photographs, and their expert opinions, as well as documents and testimony regarding pre-1914 rights based upon diversion and continuous use. See, http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/currentprojects.shtml

Conclusion and Implications

It seems unclear what evidentiary standards the SWRCB may use in reaching its decisions on the

CDOs. Under traditional rules of evidence, the prosecution team would bear the burden of proving by a preponderance of the evidence that the riparian and/or pre-1914 rights claimed by the parcel owners are not supported by the evidence. The language of the draft CDOs seems to place the burden on the water user. It is possible that the SWRCB has indefinitely postponed hearings on the remaining cases so that it can establish a uniform procedure in the four initial cases that will be followed in later cases. These hearings may also clarify the quantum and sophistication of evidence necessary to establish riparian and/or pre-1914 rights, at least when the SWRCB is the adjudicatory body. These hearings will contribute to the current attempts to quantify the amount of water actually diverted in the Delta.

Undoubtedly if the SWRCB rules that the parcels have no riparian and/or pre-1914 rights, the named Delta water users will seek redress in the still-pending suit filed in Sacramento County Superior Court. The SWRCB's own publications that explain water rights in California clearly state that the SWRCB does not have the authority to determine the validity of vested rights other than appropriative rights initiated December 19, 1914 or later. (See, e.g., State Water Resources Control Board Information Pertaining to Water Rights in California—1990, at pp. 7-8, at www.swrcb.ca.gov/waterrights/publications/forms/forms/docs/app_generalinfo.pdf). Nevertheless, the SWRCB has in a number of its water rights orders determined that insufficient evidence was proffered to show that riparian and/or pre-1914 water rights were established by the party claiming them. (J. Driscoll, D. Osias)