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Cal. Earth Corps v. Cal. State Lands Comm'n, no. CO41603, 2005 Cal. App. LEXIS 627 (Cal. App. Apr. 21, 2005)

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CEQA. CEQA required the City to prepare an EIR if the cumulative impacts would be significant and if the project's incremental effect would be considerable when viewed in connection with the effects of past projects, current projects, and probable future projects. The court found the Districts had indirectly studied potential cumulative impacts by looking at ongoing and proposed development plans. The court found that these studies determined the assignments would have no significant cumulative impacts, and therefore, the Districts did not need to prepare an EIR to consider cumulative impacts. In addition, the court said the mere presence of other projects in the area, which might cause significant cumulative impacts, was not evidence that the assignments' impacts would be cumulatively considerable.

The Sierra Club also argued the Districts failed to analyze whether assigning water rights to the City would cause the City to grow beyond the growth approved in the general plan. However, the court found no evidence to support this contention because the City's initial study clearly states the City would assign the water only to those areas already subject to the general plan. The court also sharply rebuked the Sierra Club for using CEQA to cause delays.

Finally, the Sierra Club argued the Districts failed to consider the possibility of drought because both Districts received water from the Bureau of Reclamation, which could not guarantee full allotment of water rights during drought years. Therefore, the possibility existed during drought years that the Bureau of Reclamation would cut back the water supply to the Districts, and consequently to the City. However, the court noted that the City's initial study acknowledged the Bureau would cut back deliveries. In fact, the previous environmental analysis addressed the very situation about which the Sierra Club complained.

Thus, the court held that under the CEQA, the irrigation districts could separately assign water rights to the City without performing a joint EIR.

Kathryn Lane Garner

Cal. Earth Corps v. Cal. State Lands Comm'n, No. CO41603, 2005 Cal. App. LEXIS 627 (Cal. App. Apr. 21, 2005) (holding that the California State Lands Commission's exchange of land held by the public trust doctrine to allow the city developer to construct a retail complex violated the California Public Resources Code because the exchange did not enhance the configuration of the shoreline as required by the statute).

California Earth Corps ("Earth Corps") appealed a judgment that denied its petition challenging the validity of a land exchange agreement ("Exchange") between the California State Lands Commission ("Commission") and the City of Long Beach ("City").

The Commission exchanged three acres of protected tidelands owned through the public trust doctrine out of the public trust and to the City's real party in interest, Developers Diversified Realty ("Diversified Realty"). The City's development plan included construction of a large multi-use retail complex on the site. The City had previously covered the three acres in question with dirt and asphalt over 45 years ago and a main arterial road separated the acreage from the nearby tidelands.

The Exchange would transfer the land out of the public trust to Diversified Realty in exchange for other tidelands property as mandated by the California Public Resources Code section 6307 ("section 6307"). The public trust doctrine gives the state ownership of all of the navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the citizens. The exchanged-for property consisted of three separate parcels along the Los Angeles River totaling 10 acres.

The Earth Corps subsequently filed a petition for a writ of mandate in the Superior Court of Sacramento County, claiming the Commission's approval of the Exchange violated section 6307, the California Constitution, and was not statutorily exempt from the California Environmental Quality Act ("CEQA") as relied on by the Commission. The district court denied Earth Corps' petition. The court held that the Earth Corps failed to show the Commission's actions were either arbitrary or capricious, and found that the Exchange would improve access and use to the shoreline and water.

On appeal, in addition to the three claims raised in their petition, Earth Corps argued that the district court erred in using an arbitrary and capricious standard of review, and the appropriate standard was an independent judgment standard of review.

Upon review of the district court's decision, the California Court of Appeals found that (1) a highly deferential, arbitrary and capricious standard of review was appropriate, and (2) in granting the exchange, the Commission lacked evidentiary support required by section 6307.

The court first evaluated the appropriate standard of review. The court found that the Earth Corps' request for an independent judgment standard of review would have applied only if an administrative agency acting in a quasi-judicial capacity had made a factual determination. However, in approving the exchange, the Commission was an administrative agency, acting in a quasi-legislative capacity and therefore the lower court appropriately applied the arbitrary and capricious standard in its decision.

Second, the court determined that the language of the section 6307 only permitted land exchange for situations that create improvements for the public good, and which specifically "enhance the configuration of the shoreline for the improvement of the water and upland." The Commission argued that the Exchange allowed for a rear-

rangement of the tidelands, but the court found that a simple rearrangement of two parcels of land was not analogous to the statutorily required "enhancement of the shoreline."

The court, in adopting Earth Corps' argument, found that the requirement of enhancing the configuration of the shoreline required a specific change to the physical geography of the area or the construction of an improvement to the shoreline. The court held that the Exchange neither changed the physical geography nor added improvement to the shoreline. Therefore, the Commission's finding that the Exchange enhanced the configuration of the shoreline lacked evidentiary support, and in the absence of such evidence, the court found that the Commission erred in finding the exchange met the criteria required by the section 6307. Because the Commission did not meet the statutory conditions, the Commission lacked the legislative power to facilitate the exchange of the parcels.

The court reversed the district court's decision and granted Earth Corp's petition for writ of mandate.

Brandon Saxon

COLORADO

Ready Mixed Concrete Co. v. Farmers Reservoir & Irrigation Co., 115 P.3d 638 (Colo. 2005) (holding that the plain language of the 1918 decree and referee's report demonstrated that the ditch water right was for tributary South Platte Basin water, not developed water, and return flows from the decreed irrigation use belonged to the river system for use by other appropriators).

Ready Mixed Concrete filed an application to quantify and change its McCanne Ditch water right for use in augmentation. The McCanne ditch collects water from percolating springs, drainage and seepage water gathered along the first three miles of its course. Ready Mixed Concrete's 1918 decree recognizes an appropriation date of March 16, 1892, a rate of flow of 4.0 cubic feet per second for irrigation use on 300 acres, not to exceed 900 acre-feet of water annually. The decree requires the water remaining after irrigation to be returned to the South Platte River system directly or by percolation through the soil. The 1918 McCanne Ditch decree was for irrigation use of seepage waters. Ready Mixed Concrete filed the change application to store water under the McCanne ditch priority in a newly excavated gravel pit and release it to the South Platte River to replace evaporation depletions injurious to other rights from gravel pits the company operates.

Ready Mixed Concrete, by a motion for summary judgment, claimed entitlement under the 1918 decree to 900 acre-feet of fully consumable "developed water" for its use by augmentation or replacement, free of the river's call. Several parties, including Farmers Reser-