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City of Barstow v. City of Adelanto, No. E035595, 2005 Cal. App. Unpub. LEXIS 11294 (Cal. Ct. App. Dec. 6, 2005)

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adequate description of the project's environmental setting. Second, the EIR failed to describe the Project's impacts on the discharge areas. Finally, the EIR lacked evidence to support its assertion that the Project would successfully divert stormwater ("first-flush") from the marina. The Court of Appeal of California, First Appellate District determined, however, that parties must first raise allegations of noncompliance with CEQA during the public comment period and that they must exhaust all administrative remedies before filing a lawsuit. This prerequisite enables public agencies to respond to factual issues or legal theories before its actions are subject to lawsuits. According to the evidence, the court found that Benicia Harbor failed to effectively raise any of the three allegations prior to the filing of the lawsuit.

In addition to finding that Benicia Harbor could not raise their allegations because they failed to exhaust administrative remedies, the court further held that even if Benicia Harbor's arguments were properly before the court for review, the allegations were unfounded as the EIR did not violate CEQA. The court extended their holding in order to review whether prejudicial abuse occurred. After assessing the process used by the City in developing the EIR and reviewing the City's responses to the concerns raised by the public during the comment period prior to the final EIR, the court found the EIR sufficient and not in violation of CEQA. Thus, the court affirmed the trial court's dismissal of Benicia Harbor's petition.

Maria E. Hohn

City of Barstow v. City of Adelanto, No. E035595, 2005 Cal. App. Unpub. LEXIS 11294 (Cal. Ct. App. Dec. 6, 2005) (holding California law requires that a party preserve legal water rights by maintaining reasonable beneficial use and receiving the benefit of a judgment by intervention requires that a party establish a water right under the judgment's terms).

The City of Barstow and the Southern California Water Company filed a complaint in the Superior Court of Riverside County alleging that upstream water users excessively impacted their water supply in the Mojave Basin Area. The Mojave Water Agency ("MWA") served an amended cross-complaint on all basin water producers who produced more than ten acre-feet per annum ("AFA") between 1986 and 1990. The Mojave Basin Adjudication Committee completed a comprehensive settlement providing a free production allowance ("FPA") to each producer served by MWA, equal to that producers' highest annual production during the five-year period. Under the settlement, all producers who produced less than ten AFA were minimal producers not made parties to the suit and limited to a FPA of ten AFA in the future. The trial court entered judgment according to the settlement and subsequently denied minimal producers Richard and Teresa Fortynone's

("Fortyunes") post-judgment motion to intervene. The Fortyunes appealed to the California Court of Appeals.

The court first stated that post-judgment intervention required that the requesting party establish a right under the judgment's terms to receive the judgment's benefits. Next, the court noted that establishing a right in this case required a showing of a legal right to produce water and a substantial reasonable beneficial use or a substantial investment in a reasonable beneficial use between 1986 and 1990. The Fortyunes conceded that they did not produce water for a reasonable beneficial use during that time, but contended that they should have a FPA based on their beneficial use during the 1970s. The court found the 1986-1990 period used in stipulating apportionment of water production among users in an over-drafted basin appropriate because it fairly allocated based on the usage on which users could show actual reliance. The court held that five years of beneficial use justifies prescriptive rights to water while lack of beneficial use for five years abandons prescriptive water rights in California. The Fortyunes did not beneficially use water for the five-year period between 1986 and 1990, therefore the court found that they abandoned their prescriptive water rights and could not establish a post-judgment intervention right.

The court affirmed the trial court order denying the Fortyunes's post-judgment intervention motion.

Jonathan P. Long

Aden v. City of Ontario, No. E036826, 2006 Cal. App. LEXIS 640 (Cal. Ct. App. Jan. 25, 2006) (holding that an amendment to a land development project does not need a supplemental Environmental Impact Report ("EIR") when the amended land development project does not include substantial changes to the water supply, among other environmental issues).

The city council of Ontario approved the Ontario International Center General Plan Amendment ("General Plan") in December 1980, which included an Environmental Impact Report ("EIR"). The General Plan covered a 1,540-acre area. On December 20, 1983, the Ontario city council adopted a specific plan, then known as the Parkcenter Specific Plan ("PS Plan"), within the General Plan area that included the 32 acres now planned for development by Meer Capital Partners ("Meer") and the approximately 5 1/2 acres covered by Scott G. Aden's strip mall. The PS Plan contemplated two land use categories: Urban Commercial and Garden Commercial. Aden's shopping center, known as Airport Square Shopping Center, was the only portion of the land within the PS Plan actually developed. The remaining land, approximately 32 acres, remained largely vacant since the adoption of the PS Plan. In August 2003, Meer applied for an amendment to the PS Plan to develop the 32 acres designated for high intensity