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Protect Our Water v. County of Stanislaus, No. F042089, 2003 Cal. App. LEXIS 11470 (Cal. Ct. App. Dec. 8, 2003)

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Haddad v. City Council of Monterey, No. H025805, 2004 Cal. App. Unpub. LEXIS 4651 (Cal. Ct. App. May 13, 2004) (holding the city council's decision not to pursue pueblo water rights was neither arbitrary nor capricious, nor lacking in evidentiary support).

Lou Haddad ("Haddad") urged the City of Monterey ("City") to hold hearings to address whether the City should pursue "pueblo water rights" ("PWR"). At the public hearing, the City Attorney recommended the City not pursue costly and time-consuming PWR litigation. The City Council of Monterey ("Council") subsequently voted not to pursue PWR. The majority based their vote on the unlikely success, the cost, and the inappropriateness of pitting the City against other jurisdictions through PWR claims. Haddad filed a writ of mandate in California State Court claiming the Council abused its discretion. The trial court denied the petition. On appeal, Haddad asserted that the trial court erred in denying his petition because (1) the City had a duty to pursue PWR; (2) Haddad had a valid declaratory relief action; and (3) Haddad had standing to pursue PWR on his own behalf.

The Court of Appeal of California for the Sixth Appellate District stated the separation of powers doctrine precluded the court from compelling the Council to make a particular legislative action. Thus, the court found it could only review an arbitrary and capricious Council decision, or a Council policy choice entirely lacking in evidentiary support, and could not look into the wisdom or reasonableness of that Council choice. The court found that the Council did not act arbitrarily or capriciously, nor did the Council's action entirely lack evidentiary support. The court based this determination on the evidence before the Council on the likely success and cost of a PWR claim, as well as the potential for alienating neighbor jurisdictions. The court further stated that attacking an administrative order with an action for declaratory relief was not permissible, and thus dismissed that issue. The court also dismissed Haddad's standing issue to pursue the City's PWR on his own behalf since Haddad's original petition did not raise the issue. Therefore, the court affirmed the district court's judgment to deny Haddad's petition.

D.M. Shohet

Protect Our Water v. County of Stanislaus, No. F042089, 2003 Cal. App. LEXIS 11470 (Cal. Ct. App. Dec. 8, 2003) (holding the California Environmental Quality Act required a party seeking approval of an "addendum" to a previously certified environmental impact report to comply with the statutory procedures, including determining whether the addendum constituted a substantial change within the meaning of the statute).

Protect Our Water and others (collectively "POW") appealed a Stanislaus County Superior Court ruling that granted the Diablo Grande Limited Partnership's motion for summary judgment and denied POW's motion for writ of mandamus. In a 1996 proceeding, the Court of Appeals of California, Fifth Appellate District, held the Environmental Impact Report ("EIR") for the Diablo Grande Specific Plan ("Specific Plan") that proposed a 29,500-acre destination resort and residential community ("Project") in southwest Stanislaus County ("County") was inadequate. After that decision, the County drafted the Diablo Grande Water Resources Plan ("Water Resources Plan") and prepared a supplemental EIR ("SEIR") for the Project. POW then challenged the SEIR and the superior court ruled the SEIR was deficient. The appellate court modified the superior court's ruling and ordered the superior court to issue a modified judgment voiding both the EIR and the SEIR. The appellate court also stated that the County needed to prepare an SEIR consistent with the ruling and the County could recertify a portion of the Project, provided the preparation of the SEIR occurred prior to the partial recertification.

On December 7, 1999, while the appeal was pending, the County set aside and voided its recertification of the Diablo Grande EIR and SEIR. The County then recertified the Specific Plan EIR as supplemented by the Water Resources Plan SEIR. On December 11, 2001, the County approved an addendum to the Specific Plan EIR ("Addendum") and granted a request to add Kern County Water Agency as an additional water supply option on the Specific Plan EIR. POW filed a petition for writ of mandate on January 10, 2002, asking the superior court to order the County to set aside and void its approvals of the Project including the Addendum. The superior court denied POW's petition and POW appealed.

POW argued: (1) the approval of the Addendum violated the superior court's modified judgment issued July 6, 2001; and (2) the Addendum violated the California Environmental Quality Act ("CEQA"). The court determined the approval of the Addendum did not violate the superior court's modified judgment because, under the CEQA, a subsequent approval of a change to an approved project without adequate environmental review of the change does not void the prior approval of the project. Additionally, the court reviewed the California Public Resources Code ("Code") and noted the Code required major revisions of an EIR when a party proposed substantial changes for a project. The court stated the change from one water source to another might constitute a substantial change in the Project warranting major revisions to the EIR. The court then referred to the Code in order to distinguish EIR and SEIR in this case. The main difference is an EIR was required whenever a project could result in a significant environmental effect and an SEIR only explored the environmental ramifications of a substantial change not considered in the original EIR. The

court viewed the Addendum as an SEIR and ruled that, in adopting the Addendum, the County should have determined whether substantial changes to the Project existed or had occurred.

Thus, the court reversed the holding of the superior court and directed the superior court to issue a writ of mandate ordering the County to rescind its approval of the Addendum to the EIR. The court also specified that its holding only applied to the manner in which the County approved that particular Addendum, not whether an Addendum might be appropriate for the post-certification change from one water source to another.

David W. Hall

Rincon Del Diablo Mun. Water Dist. v. San Diego County Water Auth., No. D042529, 2004 Cal. App. Unpub. LEXIS 6839 (Cal. Ct. App. July 21, 2004) (affirming the superior court's ruling granting summary judgment and holding the capital portion of the San Diego Water Authority's transportation rate is not a capacity charge and even if the transportation rate qualified as a capacity charge, the charge does not exceed the estimated reasonable cost of providing service).

The San Diego County Water Authority ("SDCWA") provides water service, delivering water via an aqueduct system to member agencies. The SDCWA adopted Ordinance No. 2002-03 ("Ordinance") on June 27, 2002, which unbundled their flat fee water rate into multiple categories, one being a transportation rate based on every acre-foot of water consumed. Revenue from the transportation rate is deposited in the SDCWA's general fund and may be used to fund capital costs. Nonetheless, Government Code section 66013 defines a capacity charge as a fee for new or existing facilities benefiting the person charged and provides that capacity charges shall not exceed the estimated reasonable cost of providing the service. Five water districts located in the northeastern section of San Diego County ("Northern Districts") brought suit in the Superior Court of San Diego County to invalidate the transportation rate portion of the SDCWA's Ordinance under Government Code section 66013. The Superior Court granted summary judgment in favor of the SCDWA.

The Northern Districts asserted on appeal that the capital portion of the transportation rate ("capital portion") is a capacity charge under section 66013. Relying on the California Supreme Court's decision in *San Marcos Water District v. San Marcos Unified School District*, the Northern Districts argued that a fee for capital improvements based on anticipated water service constituted a special assessment under a "look to the purpose test." Additionally, the Northern Districts claimed the capital portion violates the reasonableness requirement of section 66013, because it unfairly reflects the cost of service provided.