

After 27 Years, Litigation Over the Monterey Agreement Comes to an End



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California

In 1994,

the Department of Water Resources entered into an agreement with State Water Project contractors called the "Monterey Agreement" in an effort to settle disputes over water allocations under long-term water supply contracts. Broadly, the Monterey Agreement modified formulas incorporated in the contracts for allocating water among SWP contractors, changed certain operations of SWP facilities and provided for the transfer of 20,000 acres of farmland for development of a water bank in Kern County. Opponents challenged the legal adequacy of the program EIR on the Agreement. The court of appeal in *Planning & Conservation League v. Department of*

Water Resources, 83 Cal.App.4th 892 (2000), found that the EIR violated CEQA because it had been prepared by two DWR contractors rather than DWR as lead agency, and continuation of a former contract provision relating to reduction in contractor entitlements in the event of a permanent water shortage should have been evaluated as a "no project" alternative. The court ordered DWR to prepare a new EIR but did not order that the Monterey Agreement, the contract amendments, or the land transfer be set aside, leaving it to the trial court to decide what further relief should be ordered. The case returned to the trial court, and after protracted negotiations, the parties entered into a settlement agreement which identified necessary contents of the EIR, allowed the SWP to continue operating as it had since the Monterey Agreement was adopted, and left the land transfer for the water bank in place. The terms of the settlement were incorporated in the trial court's writ of mandate. In response to the writ of mandate, DWR continued ongoing operations under the Monterey Agreement while it prepared a new EIR. The new EIR was certified in 2010 and was quickly followed by three new lawsuits challenging its adequacy. Ultimately, the trial court upheld the new EIR, except for its assessment of the impacts of Kern Water Bank operations. It ordered that the EIR be revised to reevaluate the water bank's impacts on groundwater and water quality but allowed the Kern Water Bank to continue its ongoing operations in the meantime. Following certification of the revised EIR, yet another lawsuit was filed, but the trial court found the revised EIR was legally adequate and fully complied with court's order. The court of appeal consolidated the appeals in the cases challenging the second and third EIRs. Central Delta Water Agency, an appellant in the challenge to the second EIR, claimed that because that EIR treated continuation of SWP operations under the Monterey Agreement as the proposed project, the second EIR was an improper retrospective assessment of an ongoing project's environmental impacts. The court disagreed, concluding the approach taken was consistent with the writ of mandate, which allowed the project to continue while the new EIR was prepared. The court also rejected an argument that the EIR should have included a "no project" alternative which would retain a prior contract provision that allowed DWR to refuse to deliver surplus water to contractors as necessary to avoid dependence on deliveries of surplus water. The court found that the EIR had done enough by analyzing four no project alternatives, including two that addressed this prior contract provision, and also separately analyzed its practical effect. In the case challenging the third EIR, appellant Center for Food Safety claimed, among other things, that the EIR failed to adequately address the water bank's contribution to an increase in the planting of permanent crops that would result from improved water supply reliability. The court disagreed, holding that the revised EIR's finding that the water bank's operations were not a primary cause of crop conversion in its service area was supported by substantial evidence, as was the EIR's analysis of the impact of crop conversion on regional and statewide water supplies. The court also rejected an argument that the trial court erred by issuing a limited remedy which allowed the water bank to continue operating while DWR revised the EIR. Noting the trial court's finding that invalidating the project approvals "would throw the entire SWP into complete disarray, smack in the middle of one of the most severe droughts on record," the court of appeal concluded the trial court had not abused its discretion under the remedial provisions of CEQA, by allowing project operations to continue while the EIR was being revised. The Monterey Agreement saga was finally concluded on January 5, 2022, when the California Supreme Court denied petitions seeking review of the court of appeal's decision.

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