

Served 10/29
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9 SUPERIOR COURT OF CALIFORNIA
10 COUNTY OF SAN BERNARDINO

13 CHINO BASIN MUNICIPAL WATER)
DISTRICT,)
14)
15 Plaintiff,)
16 v.)
17 CITY OF CHINO, et al.,)
18 Defendants.)

CASE NO. RCV 51010
Assigned For All Purposes to
The Honorable J. Michael Gunn
Department R-8

MONTE VISTA WATER DISTRICT
MEMORANDUM OF POINTS AND
AUTHORITIES REGARDING
APPLICATION OF THE CALIFORNIA
ENVIRONMENTAL QUALITY ACT TO
THE OPTIMUM BASIN
MANAGEMENT PLAN FOR THE
CHINO BASIN

Date: November 18, 1999
Time: 1:30 p.m.
Dept: R-8

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LAWYERS

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I.

CEQA IS A POTENT TOOL TO DELAY OR DEFEAT PUBLIC PROJECTS

Over ten years have transpired since Judge Turner's Order directing completion of an OBMP within a two year time period (*i.e.* by 1991). This court's Order directed completion of the OBMP by September 30, 1999. That deadline had to be extended to March, 2000. Now, if CEQA compliance is required before the Optimum Basin Management Program ("OBMP") can be put into place, the time before the OBMP will be approved and adopted by the court will be extended a minimum of one year, and most likely two to three years.

The provisions of the California Environmental Quality Act can be a potent tool for the delay or to defeat a public project:

Environmental protection laws such as CEQA provide a series of procedural hurdles to be overcome by an applicant proposing a project. These procedures are rich in opportunities for abuse by those opposing the project. (Pickerton, *Conflicting Statutes in No-Growth Environments: CEQA and the PSA* (1985) 4 UCLA J. Envtl. L. & Pol'y 173.)

The courts have recognized that CEQA can be a tool by opponents to defeat or delay a public project. The California Supreme Court and the courts of appeal have repeatedly warned that CEQA should not be "subverted into an instrument for the oppression and delay of social, economic or recreational development and advancement." (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 576; *see also City of Fremont v. San Francisco Bay Area Rapid Transit Dist.* (1995) 34 Cal.App.4th 1780, 1790; *Board of Supervisors of Riverside County v. Superior Court* (1994) 23 Cal.App.4th 830, 837.)

Monte Vista Water District strongly supports prompt completion of the OBMP for the Chino Basin. However, application of the CEQA process to the OBMP has great potential for further delay. If the court directs the OBMP to provide prohibitions and incentives, leaving commitment to implementation of physical projects to public agencies who wish to avail themselves of the Chino Basin groundwater resources, then CEQA compliance will follow in logical order.

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II.

**THE COURT CAN AVOID THE APPLICATION OF CEQA
TO THE OBMP PROCESS IF THE OBMP PROVIDES FOR MANAGEMENT GOALS
AND OBJECTIVES AND PROVIDES INCENTIVES FOR IMPLEMENTATION
THROUGH COURT SANCTIONED PROHIBITIONS AND ASSESSMENTS**

The court can take two very diverse paths concerning implementation of the OBMP. The path chosen by this court will likely determine whether the OBMP will be governed by CEQA.

One path would be for the court to issue orders and directives as part of the OBMP, identifying specific projects and locations for the projects, and identifying the specific public entity(ies) that would be the lead agency on the projects. If such orders and directives were based upon stipulation of the parties, there is little question that CEQA would apply to the OBMP. (Cal. Code of Regs., tit. 14 § 15352(a); *City of Vernon v. Board of Harbor Comrs.* (1998) 63 Cal.App.4th 677, 688 [“The agency commits to a definite course of action not simply by being a proponent or advocate of the project, but by agreeing to legally be bound to take that course of action.”]) Furthermore, even if the orders and directives were not based upon stipulation of the parties, the potential exists that an appellate court would find that the OBMP is governed by CEQA:

It is not clear what effect this exclusion [excluding state courts from CEQA] has on public agency action affecting the environment taken in response to a court order. One view is that an agency action carrying out a court order is an exempt ministerial activity. The agency is required to comply with the terms of the court order and does not have discretion to do otherwise. The opposing view is that, even though courts are exempt, they do not have authority to order relief that would excuse a public agency from complying with CEQA. No reported case has addressed this issue. (S. Kostka & M. Lischke, *Practice Under the California Environmental Quality Act* (1st ed. 8/99) §4.11, p. 143.)

Additional problems may also result from the court using the OBMP to issue orders and directives identifying specific projects and locations for projects, as an appellate court would likely treat these orders and directives as mandatory injunctions. (*Davenport v. Blue Cross of*

1 *Calif.* (1997) 52 Cal.App.4th 435, 448 [“An injunction is prohibitory if it requires a person to
2 refrain from a particular act and mandatory if it compels performance of an affirmative act that
3 changes the position of the parties.”]) These types of injunctions are only permitted in extreme
4 cases and subject to very strict review on appeal. (*Teachers Ins. & Annuity Ass’n v. Furlotti*
5 (1999) 70 Cal.App.4th 1487, 1493 [“The granting of a mandatory injunction pending trial is not
6 permitted except in extreme cases where the right thereto is clearly established.”])

7 The second path the court could take is to issue orders and directives prohibiting certain
8 activities by the parties and to provide for proper economic incentives through OBMP. For
9 example, a court order implementing the OBMP could provide that no party may pump water
10 from the basin unless the party pays an assessment to defray the costs of a wet water recharge.
11 As another example, a court order implementing the OBMP could provide that no party may
12 pump water from the basin until it pays its share of a desalting plant to be built.¹ Along this path,
13 the OBMP would contain no commitment by any party to any specific project and no mandatory
14 injunction by the court.

15 Further, there would be no CEQA implications by such orders and directives, as none of
16 the parties have legally committed to proceeding with a project. (*See e.g., Kaufman & Broad-*
17 *South Bay, Inc. v. Morgan Hill Unified School Dist.* (1992) 9 Cal.App.4th 464 [Formation of
18 community facilities district to provide funding for district activities not a project, because agency
19 not committed to definite course of action relating to expenditure of funds].) When one or more
20 of the parties decided to commit to a public works project, and, thereby, avoid the prohibitions
21 and reap the financial benefits under the OBMP, those parties would then be required to comply
22 with CEQA. (*City of Vernon, supra*, at 688.)

23 The advantage to avoiding CEQA compliance at this junction is to hasten the completion
24 of the OBMP at or near the schedule previously set forth by the court. Requiring CEQA
25 compliance would likely delay completion of the OBMP by years. Additionally, this course of
26 action avoids the risk of a premature CEQA process, but ensures CEQA compliance at the time a

27 ¹ These are meant as only very crude examples.
28

1 commitment to a project is made by a party. Furthermore, avoiding CEQA compliance now will
2 save the all of the parties money, as under the above alternative, the party who will incur the
3 expense of compliance with CEQA is the party who decides the incentives under the OBMP
4 outweigh the costs of compliance with CEQA. Finally, the above described orders are clearly
5 prohibitory and more likely to withstand appellate scrutiny if the court cannot obtain the
6 stipulation of all the parties. (See *Davenport, supra*, at 448.)

7 **III.**

8 **A COURT ORDER ADOPTING THE OBMP DOES NOT TRIGGER THE**
9 **NEED TO COMPLY WITH CEQA; THE CEQA PROCESS SHOULD BE**
10 **DEFERRED UNTIL AN IDENTIFIABLE PROJECT COMMITS A PUBLIC**
11 **AGENCY TO A COURSE OF ACTION, WHEREBY MEANINGFUL**
12 **ENVIRONMENTAL ANALYSIS CAN THEN BE PERFORMED**

13 **A. CEQA Does Not Apply to Court Orders**

14 CEQA only applies to *governmental action*,² and a court order adopting the OBMP or
15 even ordering the implementation of the OBMP is not an action by a governmental agency. An
16 activity is exempt from CEQA review if: (1) the activity does not involve the exercise of
17 discretionary powers by a public agency; (2) the activity does not result in a direct or reasonable
18 foreseeable indirect physical change in the environment; or (3) the activity is not a project as
19 defined in Section 15378.³ CEQA Guidelines § 15060(c).

20 By definition, a court ordered OBMP is not an activity involving the exercise of
21 discretionary powers by a public agency. The San Bernardino County Superior Court and the
22 appointed watermaster are judicial entities, separated from the legislative power under the
23 California Constitution, Article III, Section 3. CEQA Guidelines, section 15379 states: “Public

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25 ²CEQA applies to governmental actions which may involve activities directly undertaken by a governmental
26 agency, activities financed in whole or in part by governmental agency, or private activities which require
approval from a governmental agency. California Code of Regulations, Title 14, Article 1 (CEQA Guidelines,
§ 15002(b)).

27 ³ Only an activity undertaken, supported, or authorized by a public agency is considered to be a “project.”
28 Pub. Res. Code § 21065.

1 agency includes a state agency, board, or commission and any local or regional agency, as defined
 2 in these guidelines. It does not include the courts of the state. (Cal. Code of Reg., tit. 14
 3 §15379 (emphasis added). Simply, the court is not a public agency, and its decisions are not
 4 subject to the CEQA review process.

5 **B. The OBMP Is Not a “Project” That Triggers the CEQA Process by Committing a**
 6 **Public Agency to a Definite Course of Action**

7 CEQA’s application is predicated on an identifiable “project.” An activity that is not a
 8 “project” is not subject to CEQA. (Cal. Code of Regs., tit. 14 § 15060(c)(3).) A “project” has
 9 two essential elements. First, it is an activity that may cause a direct (or reasonably foreseeable
 10 indirect) physical environmental change. Second, it is an activity directly undertaken by a public
 11 agency, an activity supported in whole or in part by a public agency or an activity involving the
 12 issuance by a public agency of some form of entitlement or permit. (Pub. Resources Code §
 13 21065; Cal. Code of Regs., tit. 14 § 15378.)

14 CEQA does not apply until the time a public agency proposes to “approve” a project.
 15 (Cal. Code of Regs., tit. 14, § 15378(c).) Importantly, governmental “approval” is defined as a
 16 public agency decision that commits the agency to a definite course of action in regard to a
 17 project intended to be carried out by any person. (Cal. Code of Regs., tit. 14 § 15352(a).)

18 CEQA review cannot begin before a “project” is identified because meaningful
 19 environmental analysis of project alternatives cannot be conducted until a public agency commits
 20 to a definite course of action. *Rio Vista Farm Bureau Center v. County of Solana* (1992) 5
 21 Cal.App.4th 351, 372; *McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1143 [An
 22 accurate project description is necessary for an intelligent evaluation of the potential
 23 environmental effects of a proposed activity]; *Pala Band of Mission Indians v. County of San*
 24 *Diego* (1998) 68 Cal.App.4th 556, 576 [designation of potential waste disposal sites as
 25 “tentatively reserved” in waste management plan does not trigger duty to prepare an EIR, as no
 26 commitment to development exists]. CEQA review, however, is required before commitment by
 27 an agency to a course of action so that the review does not become a “post-hoc rationalization.”
 28

1 (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 81; *Bozung v. Local Agency Formation*
2 *Com.* (1975) 13 Cal.3d 263, 283-284; *Sundstrom v. County of Mendocino* (1988) 202
3 Cal.App.3d 296, 306.)

4 In *Stand Tall on Principles v. Shasta Union High Sch. Dist.* (1991) 235 Cal.App.3d 772,
5 the court held that a resolution selecting a preferred site for a new school did not commit a public
6 agency to a definite course of action. Because the future decision to acquire the site would be
7 subject to CEQA review, the resolution to select a preferred site was not a “project” subject to
8 CEQA review. *Stand Tall* 235 Cal.App.3d at 107, 110.

9 In *Rio Vista, supra*, the court upheld a decision to dismiss the plaintiff’s action challenging
10 a County’s adoption of a hazardous waste management plan. The court stated:

11 The flaw in [plaintiff’s] argument is that the Plan makes no commitment to future
12 facilities other than furnishing siting criteria and designating generally acceptable
13 locations. While the Plan suggests that new facilities may be needed by the
14 County, no siting decisions are made; the Plan does not even determine that future
15 facilities will ever be built. *Rio Vista Farm Bureau Center v. County of Solana*
(1992) 5 Cal.App.4th 351, 370.

16 The court further stated: “CEQA requires consideration of the potential environmental
17 effects of the project actually approved by the public agency, not some hypothetical project.
18 Where future development is unspecified and uncertain, no purpose can be served by requiring an
19 EIR to engage in sheer speculation as to future environmental consequences.” *Rio Vista Farm*
20 *Bureau Center v. County of Solana* (1992) 5 Cal.App.4th 351, 372; citing *Kings County Farm*
Bureau v. City of Hanford (1990) 221 Cal.App.3d 692, 738.

21 The sine qua non of CEQA’s application is an identifiable “project.” The court’s adoption
22 of the OBMP, however, is not a governmental activity, and the OBMP does not commit any
23 public agency to a definite course of action. Therefore, an identifiable project does not exist.
24 Accordingly, the CEQA process must be deferred to a time when meaningful environmental
25 analysis can be performed. Present undertaking of environmental review of the OBMP would
26 involve speculation and conjecture and would frustrate the purpose of CEQA.

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The above is also consistent with CEQA's exemption for feasibility and planning studies:

A project involving only feasibility or planning studies for possible future actions which the agency, board, or commission has not approved, adopted, or funded does not require the preparation of an EIR or negative declaration but does require consideration of environmental factors. (Cal. Code of Regs., tit. 14 § 15262.)

The OBMP is nothing more (and should be nothing more) than a feasibility and planning study. It should not contain commitment, approval, adoption or funding by any party to any future action. Rather, the OBMP should provide general goals and objectives for proper management of yield and water quality of the Chino Basin. It should not commit any public agency to any course of action and it should not subject any particular Basin locations to environmental change. Rather, the OBMP should provide for management goals and objectives and provide incentives for implementation through court sanctioned prohibitions and assessments. Any future projects undertaken directly or indirectly by a public agency to avail itself of the incentives in the OBMP, will be properly subject to a future CEQA review process.

IV.

**THE COURT HAS THE OBLIGATION TO EXPEDITE
CREATION, APPROVAL AND ADOPTION OF THE OBMP**

In both Judge Turner's 1989 Order and the in this court's 1997 Order, it was clearly recognized that the creation of an OBMP was critical to effective management of the Basin. Once this fact was accepted by the court, the Judgment mandates that the court exercise its broad equitable powers to ensure that an OBMP is created, approved and adopted in an expeditious fashion. (See Judgement, ¶¶ 39-40.) Such a mandate is consistent with Article X, Section 2 of the California Constitution:

Since the adoption of the 1928 Constitutional Amendment, it is not only within the power but is also the **duty** of the trial court to admit evidence relating to possible physical solutions, and if none is satisfactory to it to suggest on its own motion such physical solution. [Citation omitted] **The court possesses the power to enforce such solution regardless of whether the parties agree.** (*City of Lodi. East Bay Municipal Utility District* (1936) 7 Cal.2d 309, 341 [Emphasis added].)

It, therefore, follows, given the court's previous findings regarding the need for an


1 It, therefore, follows, given the court's previous findings regarding the need for an
2 OBMP, that the court, under the Judgment and under Article X, Section 2, has the duty to issue
3 orders that avoid undue delay in the OBMP process. This would include orders that legally avoid
4 the delay of CEQA compliance at this juncture. This can be done by drafting the OBMP with the
5 following constraints:

- 6 1. The OBMP should provide goals and objectives for management of the Chino
7 Basin;
- 8 2. The OBMP should avoid commitment to any specific projects or specific location
9 of projects; and
- 10 3. The OBMP should specify prohibitions and financial incentives for the projects
11 needed to achieve the goals and objectives.

12 With the above constraints, the OBMP will not be a document in which the court is
13 ordering a specific project to be done, or a document in which any party is committing to a
14 specific project. This will avoid the need for CEQA compliance before the court may approve
15 and adopt the OBMP and will leave CEQA compliance to the party who subsequently commits to
16 a particular project.

17 Dated: October 27, 1999

McCORMICK, KIDMAN & BEHRENS, LLP
ARTHUR G. KIDMAN
DAVID D. BOYER

20 By: 
21 Arthur G. Kidman
22 Attorneys for Defendant
23 MONTE VISTA WATER DISTRICT

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1 **PROOF OF SERVICE**

2 I am employed in the County of Orange, State of California. I am over the age of 18 and
3 not a party to the within action; my business address is: 695 Town Center Drive, Suite 1400,
Costa Mesa, CA 92626.

4 On **October 28, 1999**, I served the foregoing document described as: **MONTE VISTA**
5 **WATER DISTRICT MEMORANDUM OF POINTS AND AUTHORITIES REGARDING**
6 **APPLICATION OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT TO THE**
7 **OPTIMUM BASIN MANAGEMENT PLAN FOR THE CHINO BASIN** on the interested
parties on the attached service list as follows:

8 by causing a true copy thereof, enclosed in a sealed envelope, addressed as stated below:


9 X 1ST CLASS MAIL I am "readily familiar" with the firm's practice of collection and
10 processing correspondence for mailing. Under that practice it would be deposited with
11 the U.S. Postal Service on that same day with postage thereon fully prepaid at Costa
12 Mesa, California in the ordinary course of business. I am aware that on motion of the
party served, service is presumed invalid if postal cancellation date or postage meter date
is more than one day after date of deposit for mailing in affidavit.

13 — EXPRESS MAIL I am readily familiar with the firm's practice of collection and
14 processing pleadings, discovery and documents for Express Mail service and I personally
15 performed the acts described herein. I deposited the aforementioned document(s) and
16 envelope(s) with Express Mail postage fully prepaid in a mailbox, mail chute or like
facility regularly maintained by the United States Postal Service for receipt of Express
Mail at Riverside, California on the aforementioned case.

17 — CERTIFIED MAIL I am "readily familiar" with the firm's practice of collection and
18 processing correspondence for mailing. Under that practice it would be deposited with
19 the U.S. Postal Service on that same day with postage thereon fully prepaid at Costa
20 Mesa, California in the ordinary course of business. I am aware that on motion of the
party served, service is presumed invalid if postal cancellation date or postage meter date
is more than one day after date of deposit for mailing in affidavit.

21 I declare under penalty of perjury under the laws of the State of California that the above is true
22 and correct.

23 Executed on **October 28, 1999** at Costa Mesa, California.

24 
25 _____
26 Victoria A. Robinson

26 C:\OFFICE\WPWIN\WPDOCS\MONTE\CEQA3.BRF

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CHINO BASIN MUNICIPAL WATER DISTRICT V. CITY OF CHINO et al.
CASE NO. RCV 51010

PROOF OF SERVICE

I, Genia van Schaik:

1. I am over the age of 18 and not a party to this action. My business address is Chino Basin Watermaster, 8632 Archibald Avenue, Suite 109, Rancho Cucamonga, California 91730.

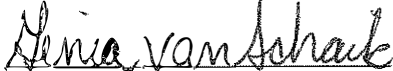
2. On today's date, I served the documents identified below by placing a true and correct copy of same in sealed envelopes addressed to each of the addresses shown on the attached mailing list #1.

**MONTE VISTA WATER DISTRICT MEMORANDUM OF POINTS AND
AUTHORITIES REGARDING APPLICATION OF THE CALIFORNIA
ENVIRONMENTAL QUALITY ACT TO THE OPTIMUM BASIN
MANAGEMENT PLAN FOR THE CHINO BASIN**

3. I then placed said envelopes for collection, processing and mailing by Chino Basin Watermaster personnel with the United States Postal Service on today's date, following Chino Basin Watermaster's ordinary business practices. Pursuant to these practices, with which I am familiar, such sealed, addressed envelopes are deposited in the ordinary course of business with the United States Postal Service on the same date they are collected and processed, with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 29, 1999, at Rancho Cucamonga, California.


Genia van Schaik

AAA AA
MAILING LIST 1
UPDATED 08/30/99

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