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California water law issues, 2010

We are all pleased that rainfall for the 2009-2010 winter season was normal. The hills are greener, and the rivers are flowing. Our cars get washed, the lawns are watered, and the crops are flourishing. We can relax about the use of water in our businesses and homes ... or so it seems to many who do not understand the water dilemmas facing California every day, even in Northern California where the water seems plentiful.

In fact, our region, and the state as a whole, faces water shortages that have never been dealt with, or even considered, by Californians previously. A growing population and business base, an expanding agricultural industry, and the needs of nature's biological constituents all require more water. The constant is that people, industry, and nature continue to demand increasing amounts of water, while the resource remains finite and variable at the same time.

Business people throughout Northern California need to understand these issues and plan appropriately. This article attempts to explain in layman's terms just a few of the factors contributing to the water conflicts and water laws affecting Californians.

BIOLOGICAL REQUIREMENTS

Throughout California water use is continuing to infringe on fish and wildlife. This triggers analyses under the Endangered Species Act of 1973 (7 U.S.C. § 136, 16 U.S.C. § 1531 et seq.) ("ESA"). The ESA is one of the

environmental laws passed by Congress in the 1970s. It was signed into law by President Nixon on December 28, 1973, with the express purpose of protecting critically imperiled species from extinction as a "consequence of economic growth and development untempered by adequate concern and conservation."

The ESA requires an analysis of how various human activities may affect threatened species, and the law provides for either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service ("NMFS") to address such issues. Projects throughout California have triggered such analyses, and the use and management of Russian River water has been studied extensively. This study resulted in a 2008 Biological Opinion by NMFS reporting on the pertinent science.

In a report in excess of 330 pages, it was concluded that coho and steelhead salmon would be adversely affected through the next 15 years by continuing the status quo of operations within the Russian River watershed. Accordingly, even with the normal year of rainfall, the Biological Opinion mandates restrictions on water use. Moreover, restrictions will continue and certainly increase as the population and business increases.

CONSERVATION

Water conservation has been a theme in Northern California for some time now, and this will not change. In the past year business park owners have been ordered by the State Water Board

to reduce landscape water use significantly. The Sonoma Business Park Coalition is working judiciously with the State Board and the Sonoma County Water Agency to comply with conservation mandates, but efforts to avoid expensive retrofits or re-landscaping only delay the inevitable.

Policymakers continue to determine how best to compel water conservation without resorting to strict mandates or regulatory enforcement. While normal rainfall provides some relief, future drought years are certain to impact Northern California greatly. Accordingly, this is only the beginning; in coming years recycled water will become increasingly valuable for non-potable uses, and water conservation will be ordered increasingly. Businesses should plan accordingly.

STATEMENTS OF WATER DIVERSIONS

An initial step in dealing with water issues and developing water policy is understanding better the extent of the resource. That is, how much water is available to us? How much water flows through the entire water system within the state: our lakes, streams, wetlands, and groundwater? The State is just now beginning to understand the extent of the water system. Even now groundwater is unregulated and unmonitored, while even the use of water from waterways remains only partially defined.

To address this lack of data, the State Board has mandated that as of July 1, 2010, all diversions of water from defined waterways must be reported

monthly. Estimates will no longer be adequate, and in many instances gauges, flow meters, or other monitoring devices may be required to accurately report water diversions. Again, reporting requirements may be expensive and time consuming, but significant penalties can be assessed against riparian diverters who do not comply with reporting requirements.

WATERSHED ALLOCATION

As water becomes scarcer within particular watersheds, and as competing demands conflict over available water, the allocation of water rights within a particular watershed becomes essential. Water right owners within many watersheds now seek to define the amount of available water and allocate the resource among those with established water rights. This process is difficult even to the extent of establishing what water is available to diverters, much less negotiating over competing water rights. Nevertheless, this process will prove extremely valuable in establishing a clearer understanding of how water use will be used most efficiently within a watershed. In planning for the future, business owners or property owners who rely on water must undertake such efforts to better understand the complexity of the issues and their own legal rights.

REAL COST OF WATER

These procedures are all intended to better understand a most valuable and finite resource and determine how to manage it. Essentially, by addressing these issues for the first time the State and business leaders are attempting to define, even approximately, the real cost of water. As difficult as it may be, the real cost of water considers the cost of moving water throughout the state, as well as the value of water to extremely divergent interests such as urban centers, agricultural communities, fishing communities, manufacturing industries, and the tourist industry.

To date, the public perception has been that water will be available for us all to use. That perception is changing, as the value of water becomes better understood and competing interests vie for stable and increasing water rights.

CENTRAL VALLEY WATER USE V. DELTA

All of which leads in conclusion to the controversy that may define water rights in California for the years and decades to come. Last fall the legislature passed a series of laws intended to reorganize the State water system, particularly regarding the use of Delta water. The legislation was the result of a lot of hard work by members of both political parties as well as divergent political groups, but it requires voter approval of an \$11.1 billion water bond. The legislation also allows too much power in too few hands, without providing definitive rules to be used in moving California water policy forward.

This water bond is set to be on November's ballot, but just last month Governor Schwarzenegger urged that the vote be postponed. Citing the economic recession, the governor wants the

vote delayed for at least one year. Realistically, I believe the governor recognizes the legislation is flawed, with unnecessary projects that smack of pork, and far too expensive. Legislators are considering the delay and will be wise to follow the governor's suggestion.

While it is difficult to throw away so much hard work by so many interests, the legislation needs to be reconsidered. The voters are unlikely to approve such an expensive plan without a cleaner, more definitive vision of how water is to be managed and used in the future.

PRESSING ISSUES

This article barely touches on what is an extremely complicated set of water concerns in California. The issues are extremely contentious, difficult, and involve considerable expense. While government and business leaders seem to understand the importance of proper use and management of water, the resolutions to competing interests are extremely difficult. It is critical that business people stay abreast of the issues, understand how the availability and cost of water will affect them, and, of course, plan accordingly. ■



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