

# Salinas Valley Water Coalition



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**JANUARY 2001**

## **HAPPY NEW YEAR FROM YOUR CHAIRMAN**

Another year has past and a lot has happened in 2000. The one item that comes to mind on a positive note, is the completion of the financial audit of the Monterey County Water Resources Agency. This is the first time that assessments have been truly analyzed as to how those funds are accounted for and then spent, and recommendations were made as to how the Agency could be more efficient with **your** dollars. The State Water Resources Control Board held a hearing for the water rights permit for the additional water being stored in the Nacimiento Reservoir. On a negative note, excess reserve funds found during the MCWRA audit, have been severely depleted by litigation throughout the year with the Orradre et al lawsuit focusing on water rights, to the level that it may very well cost each and everyone of us dearly if it escalates to adjudication. [see article below]

For 2001, Salinas Valley Water Coalition will participate in an Ag Summit to determine what level the many agricultural organizations within the County can work together. To stay broadly informed while controlling costs through inter-cooperation could be beneficial, as long as it does not compromise the Coalition.

In closing, I would like to wish you a Happy New Year! May the season be one of adequate rain, good weather, healthy crops, and strong markets for you! ---Best Wishes, Ralph Riva, Chair

**THANK YOU FOR YOUR  
CONTINUED SUPPORT OF THE  
SALINAS VALLEY WATER  
COALITION!**

## **ORRADRE ET AL. v.**

## **RESOURCES AGENCY**

The trial of Orradre et al. vs Monterey County Water Resources Agency was held October 30<sup>th</sup> through November 2<sup>nd</sup>, and was heard by Judge Richard Silver. His decision on November 22<sup>nd</sup>, which is stated, in part, below:

**“In this action Plaintiffs’ challenge the validity of certain “standby” assessments imposed by the Agency for the year 1998-99.....After several pretrial motions three causes of action remained for trial:**

- a. **Fifth Cause of Action. ....In essence Plaintiffs’ contended that the Agency was required to establish that they were delivering a “new” water supply over and above their water rights.....At the hearing the court ruled that this cause of action would be considered only in so far as it alleged that the Agency failed to consider water rights; not the nature and extent of any alleged water rights held by plaintiffs. Notwithstanding what appeared to be the narrow limits alleged in this cause of action, the trial briefs and closing arguments expanded the contentions to include a more general allegation that the assessments were not proportional to the benefits received.**
- b. **Thirteenth Cause of Action. In this Cause of Action plaintiffs’ allege that the Agency has improperly allocated expenses between Zone 2 and Zone 2A.**
- c. **Eighteenth Cause of action. As originally pled this cause of action involved Texaco and an allegation that there was no evidence to support the different rate between industrial and irrigated agricultural. After the matter settled as to Texaco plaintiff sought leave to amend to add Trivintners. No actual amendment was ever filed. The Agency contends that the failure to file an amendment is fatal and that this Cause of action is not before the court.**

- d. In addition, plaintiffs allege a conflict of interest with a representative [Steve Collins] of the defendant invalidating the assessment.

**The Nature of this Proceeding and the Standard of Review.** A “standby charge” is a “special assessment”. Because a “special assessment” is a “quasi legislative action” the scope of review is very narrow. As first articulated in Dawson v Town of Los Altos Hills, 16 C. 3d 676 (1976) “(A) special assessment finally confirmed by a local legislative body in accordance with applicable law will not be set aside by the courts unless it clearly appears on the face of the record before that body, or from facts which may be judicially noticed, that the assessment as finally confirmed is not proportional to the benefits to be bestowed on the properties to be assessed or that no benefits will accrue to such properties.” .....Further, the legislative bodies determination of proportionality of benefits is also entitled to judicial deference under the same standard. In that context the courts have recognized that policy considerations inherent in a legislative process, compared with an adjudicatory process, means that “each individual assessment is not necessarily measured by the precise amount of ‘benefit’ flowing to the property owner affected. The assessment is usually based on the cost of the improvement, spread among the benefited property owners upon some equitable, non-discriminatory basis. The absences of an exact relationship between the assessment levied and the benefit received will not, however, invalidate the assessment, at least in the absence of fraud, mistake, or gross injustice.”.....As a result of the above it is clear that the “benefits” supporting the assessment determination need not be immediate or direct and may include long-term potential benefits that have a basis in fact within the record before the legislative body.

The assessment in this case arises from the “Monterey County Water Resource Agency Act”, section 52-12. It provides “(T)he agency...may fix...a water standby or availability charge for any lands to which water is made available by the agency, whether the water is actually used or not”. Therefore, this assessment, as defined by the legislature, is a fee assessed for the storage of water to be used when needed. It is not dependent on whether the water is actually used or not by any particular property owner within the assessment area. The benefit is having water available as needed. There are several more defined benefits that naturally flow from this benefit. They include the availability of water in the event of drought or other water shortages and the recharging of the underlying basin and the improvement of water quality by timed releases of the water. Certainly there are other indirect benefits that come from the storage of excess winter waters. Flood control is the most obvious. Others include such things as lower production costs and overall economic stabilization derived from a secure water source. However these are not the primary benefit as defined by the legislature and it is within the discretion of the legislative body to determine what, if any, impact such indirect benefits will have on the determination of assessments. All of the above benefits, whether direct or indirect, are contained and discussed in the administrative record.

Although plaintiffs point to portions of the administrative record that suggest that not all of their lands may be “as” benefited as other lands within the areas of the zone, that is not the question before the court. As pointed out above, in a quasi-legislative determination, as is the case here, the determination of benefits and proportionality of assessment is primarily for the legislative body to determine. The court does not “reweigh” the evidence but only determines whether there is credible evidence to support the determination. In this case there is substantial evidence in the record to establish that plaintiffs’ lands are benefited and to support the proportional benefit determined by the Board in accordance with the relevant considerations referred to above. Further, as stated in City of Baldwin Park v Stoskus....”Of course, the amount of each individual assessment is not necessarily measured by the precise amount of ‘benefit’ flowing to the property owner affect.”

There is nothing in the legislation or law that defines the assessment as being for the “delivery” of “new” water. It is a “standby” assessment, not a fee for the delivery of “new” water. The issues before the court in City of Barstow v Mojave Water Agency..are entirely different then those at

issue herein. The Salinas Basin underlying these zones is an unadjudicated basin with correlative water rights. All zones are interconnected. There has been no independent court determination as to individual water rights or that any particular property owner or area is unreasonably using water. Under such circumstances there is no reason to consider individual water rights nor for the agency to conclude that any one area is the principal cause of seawater intrusion. The benefits described above flow to plaintiffs' lands irrespective of their water rights. Therefore it is not necessary, as argued by plaintiffs, for the Agency to conduct a water rights study or consider individual water rights.

In addition whether the plaintiffs' seek the[ir] own additional alternative solutions to drought protection is not a relevant consideration for this type of an assessment. If that were the case any property owner within the assessment area could effectively "opt" out of the assessment and undermine the legislative mandate. In addition drought protection is security for a future event the nature and extent of which is difficult to predict. To conclude that a particular property owner would not be benefited in the event of such a water shortage is speculative.

Zone 2 (Nacimiento Dam) lies completely within the boundary of Zone 2A (San Antonio Dam). Therefore some Zone 2A-property owners pay only Zone 2A expense while all Zone 2 property owners pay both assessments. MCWRA acknowledges that a portion of the Nacimiento expenses (Zone 2) are allocated to Zone 2A. The Agency justifies this on the assertion that the waters are commingled, some of the benefits are common, and it is an "accounting" function. section 12 provides that "(t)he water standby charge shall be sued for ongoing maintenance and operation of the zones of the agency upon which the charge is imposed..." There is no basis in fact or law to allocate all of the "common" expenses to Zone 2A. It is not up to this court to say what that allocation should be. That also is a quasi-legislative determination for the agency. The matter will be remanded to them for proper determination and allocation of these alleged common expenses.

With respect to the 18<sup>th</sup> Cause of action, there appears to have been some misunderstanding between the parties. Plaintiffs' assumed that the complaint was deemed amended, defendants reserved their rights, including demurrer, pending a formal amendment. Because of this confusion the court will sever this cause of action, deem the complain amended to include the additional plaintiff without prejudice to the defendants right to timely demur, and defer ruling until such time as it is at issue and may be more fully briefed based on the administrative record.

The evidence is insufficient to establish an inappropriate conflict of interest sufficient to legally invalidate the assessments.

In upholding the assessment of the Agency as it relates to the FIFTH Cause of Action, the court is not suggesting that that continued review of the determination of assessments as begun through the earlier settlement discussions is not warranted or appropriate. The additional information known to the Agency at this time suggests that propriety of such a review. What is clear to me is that the issue of water rights need not be a subject of that determination. Plaintiffs' fight should move to an appropriate legal forum."

**Richard M Silver, Judge of the Superior Court**

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The Salinas Valley Water Coalition participated in the litigation on a limited basis and **solely** to ensure that if the court decided to allow the plaintiffs' to pursue an adjudication of their water rights through this litigation, that the Coalition and its members would have the opportunity to same. Judge Silver did not allow an adjudication of water rights to take place through this litigation and kept the issues very narrow.

## **SALINAS VALLEY WATER PROJECT – aka BMP**

The Salinas Valley Water Project – formerly known as the BMP – has three primary objectives: 1) stopping seawater intrusion; 2) providing adequate water supplies to meet current and future (year 2030) needs; and 3) hydrologically balancing the groundwater basin in the Salinas Valley. At the last BMP Committee meeting, the Agency’s consultants informed Committee members that the “original” project (now known as ‘phase I’) would **not** stop seawater intrusion **and** meet the future needs as defined to the year 2030 --- wholly because of the increase in urban demand.

The Agency consultants recommended a ‘Modified Project: Phase II’ that would allow them to develop a project to meet the three objectives as stated above. They recommended that the Agency complete the “Original Project--Phase I”, monitor its success [for a period of 5 years] and if the project is successful at halting current and future seawater intrusion, then no further actions should be taken. However, if the Phase I is not successful at halting seawater intrusion, per the model, then they would proceed with implementing Phase II. Phase II would expand the delivery area.

The Committee agreed to have the consultants proceed with evaluating Phase I at a project level within the environmental review documents, and evaluate Phase II at a program level. If Phase II needs to be implemented in the future then a separate, new project level EIR/EIS

would have to be completed. The consultants also requested a 90 day extension to complete the environmental documents because of this ‘change’, which would mean the environmental document process would not be completed until February 26, 2002 --- the Committee very firmly informed the consultants they must have final approval of all documents by December 31, 2001.

Concerns with adding Phase II were expressed by the Coalition and others. While evaluating Phase II at a Program level is a good compromise, ‘phasing’ the two projects may imply one affects the other --- and this is difficult to accept when ‘we’ have no control over urban growth at any level. The Coalition believes the Phasing of the project(s) should be carefully monitored – especially the cost/benefit allocation portion --- and intends to do so. We will keep you informed.

### **CALENDAR**

- **January 22<sup>nd</sup> 1:00 pm – MCWRA BOD**

**Published by Salinas Valley Water Coalition, Nancy Isakson, Government Affairs Consultant**

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