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Friant Dam Holding Contracts: Not an Entitlement to Water Supply Under SB 610

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ARTICLE

FRIANT DAM HOLDING
CONTRACTS: NOT AN ENTITLEMENT
TO WATER SUPPLY UNDER SB 610

*BARRY EPSTEIN**

I. INTRODUCTION

Nearly ten years ago, California's Legislature enacted Senate Bill (SB) 610,¹ a new law requiring that any proposed large development project receiving local land use approvals be supported by a Water Supply Assessment demonstrating available water supply to meet the project's 20-year forecast water demand.² While some, perhaps most, proposed large development projects are within the service territory of large, public or private municipal water purveyors whose entitlement to the water they deliver is well-established (though not necessarily adequate or secure), developments outside the service territory of such water purveyors can require more scrutiny of the underlying water rights entitlement to the proposed water supply.

This article presents a single case study of one such proposed

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¹ S.B. 610, Ch. 643, 2001 Cal. Stat. 94 (amending CAL. PUB. RES. CODE § 21151.9; CAL. WATER CODE §§ 10631, 10656, 10910, 10911, 10912, 10915; repealing CAL. WATER CODE § 10913; adding and repealing CAL. WATER CODE § 10657).

² *Id.* at § 3.

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project, the River Ranch Estates development, which was to be built in a rural agricultural area of Madera County, northeast of Fresno. After reviewing the background of SB 610, the proposed development project, and the proposed source of water supply for the project, the tale of the challenge to the existence of the claimed water rights entitlements is told through the briefs of the parties to the lawsuit that ensued once Madera County approved the project.³

II. SB 610

A. IDENTIFICATION OF WATER SUPPLY REQUIRED FOR NEW DEVELOPMENTS

California's SB 610 went into effect in 2002.⁴ In enacting SB 610, the California Legislature found that the linkage between water supply and land use planning was "deficien[t]" and expressly set out to "strengthen the process pursuant to which local agencies determine the adequacy of existing and planned future water supplies to meet existing and planned future demands on those water supplies."⁵

Pursuant to SB 610, California law now requires that, before approving a "project,"⁶ a city or county must identify any "public water system"⁷ that may supply water for the project.⁸ SB 610 then requires the

³ The author represented the Petitioners in the case discussed in this article, but has undertaken here to present (without embracing) the positions of the various parties. The views expressed here are not necessarily those of the author or the Petitioners in the case.

⁴ S.B. 610, Ch. 643, 2001 Cal. Stat. 94.

⁵ *Id.* § 1(a)(9), (b).

⁶ SB 610 defines "project" to include "[a] proposed residential development of more than 500 dwelling units." CAL. WATER CODE § 10912(a)(1) (Westlaw 2010). A "project" also includes "[a] proposed shopping center or business establishment employing more than 1,000 persons or having more than 500,000 square feet of floor space," "[a] proposed commercial office building employing more than 1,000 persons or having more than 250,000 square feet of floor space," and various other types of facilities exceeding specified thresholds of size, occupancy or water demand. CAL. WATER CODE §10912(a)(2)-(7), (b) (Westlaw 2010).

SB 610's requirements are triggered by the need for compliance with the California Environmental Quality Act (CEQA). *See* CAL. PUB. RES. CODE § 21000 *et seq.* (Westlaw 2010). That is, SB 610 provides that "[w]henver a city or county determines that a project, as defined in Section 10912 of the Water Code, is subject to this division [i.e., is subject to CEQA], it shall comply with Part 2.10 (commencing with Section 10910) of Division 6 of the Water Code." CAL. PUB. RES. CODE § 21151.9 (Westlaw 2010). A corollary provision also was inserted into the Water Code by SB 610: "Any city or county that determines that a project, as defined in Section 10912, is subject to the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) under Section 21080 of the Public Resources Code shall comply with this part." CAL. WATER CODE § 10910(a) (Westlaw 2010).

⁷ "Public water system" is defined in CAL. WATER CODE § 10912(c) (Westlaw 2010).

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preparation of a “water supply assessment” that evaluates whether there are adequate and secure water supplies to meet the anticipated water demand for the project for a 20-year period.⁹ This water supply assessment must contain the following:

An identification of any existing water supply entitlements, water rights, or water service contracts relevant to the identified water supply for the proposed project, and a description of the quantities of water received in prior years by the public water system, or the city or county if either is required to comply with this part pursuant to subdivision (b), under the existing water supply entitlements, water rights, or water service contracts.¹⁰

Thus, a water supply assessment is required when there is a “project” within the meaning of SB 610 and when review is required for that project under the California Environmental Quality Act (CEQA).

B. SPECIFIC REQUIREMENTS REGARDING WATER ENTITLEMENTS

The legislature not only required that the proposed water supply be identified in the water supply assessment, but also that the claimed availability of that supply be “demonstrated.”¹¹ SB 610 contains an extensive list of mandatory requirements that a Water Supply Assessment must address to demonstrate the availability of the water supply upon which it relies:

(d)

(2) An identification of existing water supply entitlements, water rights, or water service contracts held by the public water system, or the city or county if either is required to comply with this part pursuant to subdivision (b), shall be demonstrated by providing information related to all of the following:

(A) Written contracts or other proof of entitlement to an identified water supply.

(B) Copies of a capital outlay program for financing the delivery of a water supply that has been adopted by the public water system.

⁸ CAL. WATER CODE § 10910(b) (Westlaw 2010).

⁹ CAL. WATER CODE § 10910(c)(3),(4) (Westlaw 2010).

¹⁰ CAL. WATER CODE § 10910(d)(1) (Westlaw 2010).

¹¹ CAL. WATER CODE § 10910(d)(2) (Westlaw 2010).

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(C) Federal, state, and local permits for construction of necessary infrastructure associated with delivering the water supply.

(D) Any necessary regulatory approvals that are required in order to be able to convey or deliver the water supply.

(e) If no water has been received in prior years by the public water system, or the city or county if either is required to comply with this part pursuant to subdivision (b), under the existing water supply entitlements, water rights, or water service contracts, the public water system, or the city or county if either is required to comply with this part pursuant to subdivision (b), shall also include in its water supply assessment pursuant to subdivision (c), an identification of the other public water systems or water service contract holders that receive a water supply or have existing water supply entitlements, water rights, or water service contracts, to the same source of water as the public water system, or the city or county if either is required to comply with this part pursuant to subdivision (b), has identified as a source of water supply within its water supply assessments.¹²

Additional requirements apply when the proposed water supply source is groundwater rather than surface water.¹³

III. RIVER RANCH ESTATES PROPOSED PROJECT

A. OVERVIEW OF PROJECT

The River Ranch Estates Project (“RRE Project” or “Project”) was a proposed residential, commercial, and institutional development on farmland and open space in Madera County, California, located near the San Joaquin River, approximately four miles northeast of the City of Fresno and approximately three quarters of a mile below Friant Dam.¹⁴ As described in the County’s Final Environmental Impact Report (“Final EIR”) for the RRE Project:

The River Ranch Estates development proposes to construct 1,646 dwellings in mixed densities on 548 acres (including streets), 20 acres

¹² CAL. WATER CODE § 10910(d)(2), (e) (Westlaw 2010).

¹³ See CAL. WATER CODE § 10910(f) (Westlaw 2010).

¹⁴ River Ranch Estates Final EIR, Madera County Planning Department (SCH # 96072055), Aug. 12, 2003, at 1-1, 3-2.

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of parks, an elementary school, fire stations, water and wastewater facilities, and approximately 92,500 square feet of commercial space.¹⁵

The Central Green Company and affiliated companies (collectively, “Central Green”) were the Project’s developers.¹⁶

The only proposed source of potable water supply for the Project was diversions by pumping from the San Joaquin River at a location near the Project site.¹⁷ The proposed water purveyor was the Central Green Mutual Water Company, a captive private water company controlled by the same developer.¹⁸

B. WATER SUPPLY ASSESSMENT

In connection with the proposed Project, the Central Green Mutual Water Company prepared and submitted to Madera County the Central Green Water Supply Assessment. As the assessment states:

The Central Green Mutual Water Company (the “Company”), as the proposed operator of the public water system for the Project, has assessed whether its total water supplies will meet the projected demands of the Project, as required by SB 610 (Water Code § 10190(b)).

In summary and as discussed in detail below, the Company’s Water Supply Assessment concludes that sufficient water supplies will exist to satisfy the projected 20-year Project demands during normal, single-dry, and multiple-dry years, in addition to existing and planned future uses, including agricultural and manufacturing uses.¹⁹

Section IV(B) of the 2002 Central Green Water Supply Assessment entitled “Water Rights” provides:

All existing water demands are met with fresh water delivered from the San Joaquin River under the Holding Contracts with the United States Bureau of Reclamation.

All of the land included in the Project is riparian to the San Joaquin

¹⁵ *Id.* at 1-1.

¹⁶ Central Green Portion of North Fork Village: A Portion of the Rio Mesa Area Plan, Water Supply Assessment (Water Code Section 10910 *et seq.*), for the County of Madera, December 2002 (Revised December 23, 2002) [hereinafter Central Green Water Supply Assessment], at 5.

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 2.

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River and, as a result, has rights to the natural flow of river water that are senior and paramount to all appropriators, including the United States Bureau of Reclamation which constructed and owns Friant Dam. To avoid costly and protracted litigation with riparian water users downstream of Friant Dam, the Bureau of Reclamation entered into a series of “Contracts for Settlement of Certain Former Water Rights from the San Joaquin River.” These contracts are commonly called “Holding Contracts.” The Project sponsors have three Holding Contracts for the property included in the Project.

...

The Company’s legal counsel has opined that the Project sponsors’ water rights under California law, which are recognized in the Holding Contracts, are legally sufficient to supply water from the San Joaquin River for all domestic and irrigation uses contemplated by the Project. . . . A copy of the legal opinion is available upon request.²⁰

The Central Green Water Supply Assessment also states that “the Holding Contracts are intended to *satisfy* the Project sponsors’ *riparian rights*”²¹

IV. HOLDING CONTRACTS

A. FRIANT DAM

Friant Dam, one of the significant features of the Central Valley Project, stores water in Millerton Lake by impounding water from the San Joaquin River, one of California’s major rivers.²² Construction of the dam affected the holders of water rights in an approximately 60-mile stretch of the San Joaquin River below Friant Dam by impounding substantial quantities of river water that otherwise would have flowed in the river below the dam, and then diverting that water into canals for delivery to water users in a vast area of the San Joaquin Valley and beyond.²³ As noted by the U.S. Supreme Court:

All of the parties recognized the existence of water rights in the area and the necessity to *accommodate or extinguish* them. The

²⁰ *Id.* at 5-6 (emphasis added).

²¹ *Id.* at 5 (emphasis added).

²² See *Dugan v. Rank*, 372 U.S. 609, 612-14 (1963).

²³ *Id.* at 612-13.

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principal alternative, as shown by the reports of the United States Reclamation Bureau to the Congress and the subsequent appropriations of the Congress, was to purchase or pay for infringement of those rights. As early as 1939 the Government entered into negotiations ultimately culminating in the purchase of water rights or agreements for substitute diversions *or periodic releases of water from Friant Dam into the San Joaquin River*. As of 1952, the United States had entered into 215 contracts of this nature involving almost 12,000 acres, of which contracts *some 100 require the United States to maintain a live stream of water in the river*.²⁴

The contracts involving “periodic releases of water from Friant Dam” in order to “maintain a live stream,” as referenced by the Supreme Court, are commonly known as “Holding Contracts.” Two of these Holding Contracts were involved in the RRE Project water supply.

B. HOLDING CONTRACTS NOS. 3 AND 6

Holding Contract No. 3²⁵ begins with three historical Recitals, stating that the United States: (1) has constructed Friant Dam to store and divert a portion of the water from the San Joaquin River; (2) has purchased or otherwise acquired certain water rights to the water of the River; and (3) has changed the points of diversion and places of use of those water rights.²⁶ The contract then recites that the Contracting Owners owned certain described lands at the time the United States acquired those certain water rights and that “the United States desires to compensate the Contracting Owners of the land to which the certain water rights were appurtenant at the time of acquisition by the United States.”²⁷

Holding Contract No. 3 then provides for the payment of \$665.00 to the Contracting Owners.²⁸ In return, the “Contracting Owners acknowledge: (a) the right of the United States to control, operate, utilize and maintain Friant Dam . . . so as to interfere with direct and/or control the flow of the [San Joaquin] River (b) The rights of the United

²⁴ *Id.* at 613-14 (emphasis added; citations omitted).

²⁵ Contract for Settlement of Certain Former Water Rights from the San Joaquin River, Contract No. 14-06-200-3220A, January 23, 1967, between the United States of America and J. Robert and Emily V. Barnett, recorded in the Official Records of Madera County, California, Feb. 1, 1967, Book 979, p. 608. The Barnetts are referred to in the Holding Contract as the “Contracting Owners.”

²⁶ *Id.* at 609-10.

²⁷ *Id.* at 610.

²⁸ *Id.*

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States to use and/or divert . . . and change the place or places of use and/or change the point or points of diversion and/or the purpose or purposes of use of any of the water of the River (c) Payment provided for herein as full compensation for all claims of the Contracting Owners arising out of the operation of Friant Dam and the Contracting Owners hereby release the United States from all such claims.”²⁹

Three other provisions of Holding Contract No. 3 are of key interest:

PROVISION FOR LIVE STREAM

5. The Contracting Officer³⁰ will *permit water to pass by or through Friant Dam into the River*, which water, together with the accretions to the River from all sources whatsoever, will maintain a live stream in the River at the control point defined in Article 1 herein.³¹

. . . .

HOW OWNER MAY DIVERT WATER

7. The United States *does not and will not* so far as it and its successors and assigns are concerned, *object to* any reasonable beneficial use of the water of the River for irrigation and/or domestic purposes exclusively upon the land described in Exhibit “A”

. . . .

NO WATER OR WATER RIGHTS TO BE SOLD BY CONTRACTING OWNERS

11. The Contracting Owners shall not sell or attempt to sell or convey *any water or water rights or interest therein from any sources whatever, claimed to be parcel of or attached or appurtenant to or for use upon* the land described in Exhibit “A” or any part thereof, for use elsewhere or upon other land, and any such attempted sale or

²⁹ *Id.* at 612.

³⁰ Holding Contract No. 3 defines the “Contracting Officer” to mean “the Secretary of the United States Department of the Interior or his duly authorized representative.” *Id.* at 611.

³¹ The “control point” is defined to mean “a point in any channel of the River where a live stream, as hereinafter defined, is at any time flowing or would most likely flow where such channel intersects the most southerly boundary line of the said land extended easterly as indicated on Exhibit ‘A’.” *Id.* That is, in general terms, the “control point” is in the San Joaquin River at the downstream end of the Contracting Owners’ property.

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conveyance shall be void.³²

The provisions of Holding Contract No. 6³³ are similar to those of Holding Contract No. 3. Of note, the Recitals of Holding Contract No. 6 include the following:

4. WHEREAS, the Contracting Owners are the owners of certain land hereinafter particularly described, and *are the owners of certain rights to the use of water in or affected by or influenced by the water of the River*; and

5. WHEREAS, project operations at Friant Dam and such change or changes in the places of use and/or points of diversion or water, the right to the use of which is now owned or may hereafter be acquired by the United States, *will be injurious to the said land, the water rights in connection therewith and/or other property or rights of the Contracting Owners*.³⁴

The Contracting Owners under Holding Contract No. 6 received payment in the amount of \$506.00.³⁵ The contract also contains a similar “live stream” provision:

10. The United States recognizes that the Contracting Owners *have certain rights* to the use of water from, or influenced by, the River on or in connection with said land, either by appropriation, or by prescription, or as owners of land overlying an underground water supply whether from an underground stream or percolating water, or as owners of land riparian to the River, or otherwise, and *in full satisfaction of said water rights* however acquired, claimed, or enjoyed the United States *will permit water to pass by or through Friant Dam into the River* which water, together with accretions to the River from all sources whatsoever, will *maintain a live stream* in the River in the control point hereinafter defined.³⁶

Like Holding Contract No. 3, Holding Contract No. 6 also contains a provision stating that the United States will not object to any reasonable and beneficial use of San Joaquin River water “exclusively”

³² *Id.* at 613, 615 (emphasis added).

³³ Contract No. 127159, dated October 10, 1947, between the United States of America and Mary E. Leshner, recorded in the Official Records of Madera County, California, Aug. 23, 1948, Vol. 447, p. 49.

³⁴ *Id.* at 50 (emphasis added).

³⁵ *Id.*

³⁶ *Id.* (emphasis added).

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on the Contracting Owner's property for irrigation or domestic purposes and a provision prohibiting the Contracting Owner from selling or conveying any water or water rights connected to the property for use elsewhere.³⁷

V. COUNTY APPROVED PROJECT, CEQA AND WATER SUPPLY ASSESSMENT BASED ON HOLDING CONTRACTS

On May 11, 2004, the Board of Supervisors of Madera County approved the RRE Project.³⁸ In so doing, it certified an Environmental Impact Report for the Project³⁹ and approved the Central Green Water Supply Assessment prepared and submitted to the County by the Central Green Mutual Water Company.⁴⁰ In its approval Findings, the Board noted that:

The North Fork Village Logical Sub Area Infrastructure Master Plan and Design Guidelines, and Water Supply Assessment plan *to use the existing Holding Contracts to supply water to the proposed development. . . .* The project applicant has provided statements from a registered engineer that the *water is available through holding contracts* with the United States Bureau of Reclamation. Information in the public record is controversial as to interpretation of the holding contracts. However, the applicants' claim to water use are [*sic*] supported by evidence in the public record.⁴¹

The Board of Supervisors also discussed the Central Green Water Supply Assessment, and in particular, the evidence concerning the claimed water entitlement underlying the proposed source of water supply, at length in the Findings for its resolution approving the Water Supply Assessment:

Water Rights

According to the Water Supply Assessment prepared by the Central Green Mutual Water Company, all existing water demands are met with fresh water delivered from the San Joaquin River under the Holding Contracts with the United States Bureau of Reclamation.

³⁷ *Id.* at 51. The language is nearly identical to the corresponding paragraphs in Holding Contract No. 3.

³⁸ County of Madera, Cal., Resolution 2004-142, p. 4 (May 11, 2004).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 16-17 (emphasis added).

... The Water Assessment Study indicates that; “the company’s legal counsel has opined that the project sponsors’ water rights under California law, which are recognized in the Holding Contracts, are legally sufficient to supply water from the San Joaquin River for all domestic and irrigation uses contemplated by the Project.

Several water districts and related agencies have questioned the use of holding contract water to serve the proposed development (see final EIR and planning commission background), recommending that additional legal opinions be sought. County Counsel has indicated that the legal and factual base for using river water come from the holding contracts, which allow use of the water for irrigation and or domestic purposes. No opinions or correspondence from affected agencies alter the terms of those contracts. The concern by some is that perhaps someone could challenge the contracts in the future. While this is correct, it was also stated that this is true of any right. If independent opinions were provided, it would remain true. Significantly, no one, not an irrigation district or any other commentator, has indicated that the contracts are not valid and binding.

....

During the EIR process there was substantial evidence presented relative to the project’s right to use water from the San Joaquin River for all project uses. The sources of that evidence include but are not limited to the following: The Rio Mesa Area Plan and the Rio Mesa Area Plan EIR, the Denslow Green opinion letters, the project’s water company legal opinion, the County staff’s report on the meeting with the Bureau of Reclamation and the water agencies, comments from John Renning (the Bureau of Reclamations person most knowledgeable on Central Green’s Holding Contracts), and the Holding Contracts themselves.

The items submitted and reviewed during the EIR process and additional evidence submitted during the Board Hearing by the applicant demonstrated to the Board’s satisfaction the project’s right to use water from the San Joaquin River for all the uses contemplated by the project.⁴²

This resolution, accompanied by two other resolutions and a rezoning ordinance,⁴³ constituted the final action by Madera County with respect to the Central Green Water Supply Assessment and the EIR for

⁴² *Id.* at 64-65 (emphasis added).

⁴³ County of Madera, Cal., Ordinance 525-580; County of Madera, Cal., Resolutions 2004-143, 2004-144.

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the RRE Project.

VI. LITIGATION CHALLENGE

Six separate lawsuits were filed in Madera County Superior Court challenging the County's approval of the Project. One suit – on which this article is focused – was filed jointly by the Madera County Farm Bureau, Chowchilla Water District, Dennis Meisner, Jr., and Madera Irrigation District (the "Petitioners" in the "MCFB Case").⁴⁴ The other five suits were brought by: (1) the State of California on behalf of the State Lands Commission; (2) the County of Fresno; (3) the City of Fresno; (4) the San Joaquin River Parkway and Conservation Trust; and (5) the Friant Water Authority.⁴⁵

A. OVERVIEW OF THE MCFB CASE – CEQA AND SB 610 CLAIMS

In the MCFB Case, the Petitioners challenged the County's approval of the Project on several grounds,⁴⁶ alleging violations of CEQA's procedural requirement of recirculation,⁴⁷ SB 610,⁴⁸ CEQA substantive requirements,⁴⁹ the State Planning and Zoning Law,⁵⁰ and the County Subdivision Ordinance and the Subdivision Map Act.⁵¹

⁴⁴ Madera County Farm Bureau v. County of Madera, No. MCV023548 (Cal. Super. Ct., County of Madera filed June 10, 2004).

⁴⁵ All six cases were transferred to the Stanislaus Superior Court. Thereafter, all six cases were consolidated for purposes of trial and were captioned under the designated Lead Case *County of Fresno v. County of Madera*, Stanislaus Superior Court Case No. 351003. Not all of the other cases challenged the *Central Green Water Supply Assessment*, see *supra* note 16, and the EIR's water supply analysis. Only *Madera County Farm Bureau v. County of Madera*, No. MCV023548 (Cal. Super. Ct., County of Madera filed June 10, 2004), proceeded to trial and decision on the merits.

⁴⁶ Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, Madera County Farm Bureau v. County of Madera, No. MCV023548 (Cal. Super. Ct., County of Madera filed June 10, 2004) [hereinafter *Petition*].

⁴⁷ *Id.* at 11-12. When "significant new information" is added to a draft EIR after it has been circulated for public comment, but prior to final certification, the revised draft EIR must be recirculated for further comment. CAL. PUB. RES. CODE § 21092.1 (Westlaw 2010).

⁴⁸ *Petition*, *supra* note 46, at 13-16.

⁴⁹ *Id.* at 17-22.

⁵⁰ *Id.* at 22-23; see also CAL. GOV'T CODE § 65000 et seq. (Westlaw 2010).

⁵¹ *Petition*, *supra* note 46, at 23-25; see also CAL. GOV'T CODE § 66410 et seq. (Westlaw 2010).

B. SB 610 VIOLATIONS IN RELYING UPON HOLDING CONTRACTS AS A BASIS OF ENTITLEMENT AND FAILURE TO DEMONSTRATE THAT THE PROJECT PROPERTY HAD RIPARIAN RIGHTS

The Petitioners challenged, among other things, the Central Green Water Supply Assessment's reliance upon Holding Contracts and riparian rights as bases of entitlement to the proposed source of water supply for the RRE Project.⁵² The Petition alleged:

52.The Water Supply Assessment relied upon and approved by the COUNTY relies solely upon water diverted from the San Joaquin River as the source of water supply to the RRE Project. The Water Supply Assessment asserts that the basis of the water entitlement to water diverted from the River arises from a riparian right.

53.The Water Supply Assessment relied upon and approved by the COUNTY fails to examine the alleged riparian claim or to support the existence of riparian rights for all lands in all portions of the RRE Project area. There is no evidence that all of the parcels comprising the RRE Project that are intended to be served with this water are riparian lands entitled to riparian water rights under California law. There is no evidence that the water proposed to be diverted under riparian claim constitutes natural flow of the San Joaquin River.

⁵² Petitioners also claimed that the *Central Green Water Supply Assessment*, see *supra* note 16, violated SB 610 in other ways, specifically that the assessment failed to include specific information required under SB 610 because:

It does not include a copy of a capital outlay program for financing the delivery of a water supply that has been adopted by the CENTRAL GREEN MUTUAL WATER COMPANY; it does not contain information demonstrating federal, state, and local permits for construction of necessary infrastructure associated with delivering the water supply; it does not contain information demonstrating any necessary regulatory approvals that are required in order to be able to convey or deliver the water supply; and it does not include an identification of the other public water systems or water service contract holders that receive a water supply or have existing water supply entitlements, water rights, or water service contracts, to the same source of water as is relied upon in the Water Supply Assessment. Petition, *supra* note 46, at 13, 14.

Petitioners went on to claim that the assessment relied upon use of Holding Contract water for disallowed purposes because:

The RRE Project requires the use of water diverted from the San Joaquin River for other purposes, including industrial, commercial and institutional uses, in addition to irrigation and domestic purposes. Use of River water pursuant to the Holding Contracts is not allowed for such other purposes. Accordingly, the Water Supply Assessment does not provide a basis for concluding that sufficient water is available from the San Joaquin River to provide the water supply needs of the RRE Project and is therefore inadequate. Petition, *supra* note 46, at 13, 14.

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There is no evidence that any of the land within the RRE Project has established a riparian right pursuant to California law.

54. The Water Supply Assessment relied upon and approved by the COUNTY relies on two contracts, known as “Holding Contract No. 3” and “Holding Contract No. 6,” between the BuRec and prior owners of property including some portion or all of the RRE Project area, to support its conclusions as to the availability of sufficient water from the San Joaquin River to be diverted for the RRE Project. Under these Holding Contracts, the BuRec agreed to release certain water from its Friant Dam project, located on the San Joaquin River upstream of the RRE Project property, and agreed that the BuRec “will not . . . object” to diversions pursuant to these Holding Contracts for certain purposes on certain lands under certain conditions.

....

57. The Holding Contracts do not and cannot grant a water right or modify California water rights law. Diversions of water from the San Joaquin River for use on the RRE Project property under the Holding Contracts must still meet all requirements of California riparian water rights law. To the extent that the Water Supply Assessment relies upon the Holding Contracts to demonstrate an entitlement to water diverted from the River for use on the RRE Project property independent of California riparian rights, the Water Supply Assessment is inadequate.

....

60. Accordingly, the Water Supply Assessment does not provide a basis for concluding that sufficient water is available from the San Joaquin River to provide the water supply needs of the RRE Project and is therefore inadequate.

61. In approving the inadequate Water Supply Assessment, the COUNTY violated its legal duty and prejudicially abused its discretion. Accordingly, the COUNTY’s approval of the Water Supply Assessment must be set aside and declared void.

62. The Adequate Water Supply Law [i.e., SB 610] required that the COUNTY independently determine whether projected water supplies will be sufficient to satisfy the demands of the RRE Project, in addition to existing and planned future uses, before making the Project Approvals. The COUNTY failed to make this determination. The COUNTY also failed to make a formal finding that adequate water

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was available to serve all lands within the RRE Project and to meet all uses of water required for the RRE Project. In making the Project Approvals without making these determinations and findings, the COUNTY violated its legal duty and prejudicially abused its discretion.

63. To the extent that the COUNTY made an informal determination and/or finding that adequate water was available to serve all lands within the RRE Project and to meet all uses of water required for the RRE Project, such determination and/or finding is not supported by substantial evidence in the record.

64. Accordingly, the Project Approvals must be set aside and declared void, the COUNTY must be prohibited from taking any further actions with respect to the Project Approvals until it has complied with the Adequate Water Supply Law, and the other Defendants and Respondents must be enjoined from undertaking any portion of the RRE Project until the COUNTY has fully complied with these legal requirements.⁵³

Once the Administrative Record was prepared and certain procedural issues were addressed, the MCFB Case proceeded to briefing on the merits, with Petitioners filing an Opening Brief⁵⁴ and a Reply Brief,⁵⁵ and the Respondent County and the Real Parties in Interest filing a joint Opposition Brief,⁵⁶ together with supporting documents accompanying those briefs.

C. PETITIONERS' POSITION

Petitioners' briefing challenged the water entitlement propositions of the Water Supply Assessment on two primary bases. First, Petitioners asserted that the Holding Contracts themselves were not water rights at all. To the extent that the County had believed that the Holding Contracts

⁵³ *Id.* at 13-16.

⁵⁴ Opening Brief of Madera County Farm Bureau, Chowchilla Water District, Dennis Meisner, Jr. and Madera Irrigation District in Support of Petition for Writ of Mandate and Complaint for Declaratory Relief and Injunctive Relief, *City of Fresno v. Madera County Bd. of Supervisors*, No. CV351003, (Cal. Super. Ct., County of Stanislaus filed Dec. 16, 2005) [hereinafter Opening Brief].

⁵⁵ Reply of Madera County Farm Bureau Et Al. to Joint Opposition to Petition for Writ of Mandate and Complaint for Declaratory Relief, *City of Fresno v. Madera County Bd. of Supervisors*, No. CV351003, (Cal. Super. Ct., County of Stanislaus filed Mar. 17, 2006) [hereinafter Reply Brief].

⁵⁶ Joint Opposition to Petition for Writ of Mandate & Complaint for Declaratory Relief, *City of Fresno v. Madera County Bd. of Supervisors*, No. CV351003, (Cal. Super. Ct., County of Stanislaus filed Jan. 10, 2006) [hereinafter Opposition Brief].

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themselves provided an entitlement to divert water from the San Joaquin River to the Project, that belief was simply incorrect. Second, Petitioners asserted that there was no evidence in the Administrative Record to support the proposition that all of the land on which the Project was to be built had riparian rights.

Section IV(B) of the 2002 *Water Supply Assessment* entitled “Water Rights” provides that “[a]ll of the land included in the Project is riparian to the San Joaquin River and, as a result, has rights to the natural flow of river water” and that the Holding Contracts “are intended to satisfy the Project sponsors’ riparian rights.” In fact, however, there is **no** evidence in the record to support the bald assertion that all of the RRE Project area has riparian rights. To the contrary, as shown below, documents in the Record demonstrate the absence of any analysis showing that all of the RRE Project area has riparian water rights:

. . . [I]t is important to note that the Holding Contracts do not create any water rights. Riparian water rights are creatures of state law, and the Holding Contracts – contracts between the landowners and the federal Bureau of Reclamation – do not *create* riparian rights (or any other water right), because the federal government has no authority to create or grant water rights, which are matters of state real property law. California Oregon Power Company v. Beaver Portland Cement Company (1935) 295 U.S. 142, 163-164; see, United States v. State Water Resources Control Bd. (1986) 182 Cal.App.3d 82, 106; Carpenter, Pacific Mut. Life Ins. Co. of Cal. v. City of Santa Monica (1944) 63 Cal.App.2d 772, 784-786. This proposition has been explicitly recognized by the U.S. Congress. See, e.g., 43 U.S.C. §383 (Reclamation Act of 1902); 43 U.S.C. §661 (Act of July 26, 1866).⁵⁷

In support of the argument that the Holding Contracts did not themselves provide a water right, the Petitioners referred to the express language of the two Holding Contracts upon which the Central Green Water Supply Assessment had relied:

In fact, the Holding Contracts do not even purport to create or even recognize water rights that the landowners may have. Rather, the Holding Contracts simply provide for the Reclamation Bureau to release a certain amount of water from Friant Dam into the San Joaquin River (“ . . . the United States will permit water to pass by or through Friant Dam into the River. . .”) and provide that “[t]he United

⁵⁷ Opening Brief, *supra* note 54, at 12. References to the Administrative Record or other compilations of authority as submitted to the trial court have been omitted from quotations throughout this article.

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States does not and will not . . . object to any reasonable beneficial use of the water of the River for irrigation and/or domestic purposes.” (See Holding Contract Nos. 3 and 6.)⁵⁸

The Petitioners also pointed to opinion letters by counsel for Central Green to support their position that Holding Contracts do not provide a water right:

Moreover, the limited role of the Holding Contracts has been explicitly recognized by water rights counsel for the Project Proponents:

[W]e recognize that the [Holding] Contracts do not ‘create a water right’ in the Contracting Owners under California Law. . . . This is not a ‘water right’ under California law, but it is a ‘contractual right to receive water’ . . .” *June 18, 1997 letter to Roger K. Patterson, Reclamation Bureau, from Denslow Green, Esq.*

The Holding Contracts . . . provide that in return for that damage, the United States has given the landowners a contractual right in perpetuity to all water to be released from Friant Dam that can be placed to beneficial use upon their lands. While **this is not a riparian, overlying or appropriative water right under California law**, it is a contractual right to receive water appurtenant to the lands recognized by both State and Federal law.” *June 13, 2003 Letter to Larry Freels, Central Green Company, from Denslow Green, Esq. [emphasis added].*

[T]he Holding Contracts commit the United States to forbear in perpetuity from objecting to any ‘reasonable beneficial use of water of the River’ by contracting landowners as long as the water is diverted only at specified points. . . . [The purpose of the ‘live stream’ requirement is] [t]o ensure the availability of water for the prior rights. . . . The Holding Contracts are, therefore, settlement agreements . . . [and] were designed to procure the relinquishment of any claim for additional compensation from the landowners as a result of the acquisition by the United States of all of the **unvalidated, unquantified and, potentially, uncertain, water rights of the downstream landowners.**” *May 22, 2003 letter to Larry L. Freels, Central Green Mutual Water*

⁵⁸ *Id.* at 13.

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*Company, from Warren P. Felger, Esq. [emphasis in original].*⁵⁹

As to the assertion that the Project lands had riparian rights, Petitioners began by pointing out that the Water Supply Assessment relied upon riparian rights as the only basis of California water rights:

The *2002 Water Supply Assessment* does not even purport to identify any potential water rights (such as appropriative water rights) other than alleged riparian rights to diverted San Joaquin River water to the RRE Project lands. Hence, the entire water supply analysis in the *2002 Water Supply Assessment* is based on the core **assumption** that all of the 793-acre RRE Project area (as well as in the larger 1,722-acre North Fork Village Logical Sub-Area) is riparian and has riparian water rights under California law. However, that assumption is unsupported (and unsupportable).⁶⁰

Petitioners argued that there was no evidence in the Administrative Record (including the Water Supply Assessment) to support that assertion. First, Petitioners described the essential elements of the riparian right – that the right “only attaches to natural flow,” only to land within the “watershed of the watercourse from which the water is taken,” only to land “contiguous to the watercourse,” only to the “smallest tract held under one title in the chain of title leading to the present owner,” and that water diverted under the riparian right cannot be seasonally stored.⁶¹ Petitioners argued that:

Although the *2002 Water Supply Assessment* asserts that “All of the land in the Project is riparian,” the document does not provide **any** information establishing that all of the RRE Project land is riparian. There is no showing that all of the parcels have “contiguity” to the River or that all parcels meet the “source of title” requirement. Similarly, there is no showing that any of the other, above-listed requirements for valid riparian rights exist, although under the law **all** of the requirements must be satisfied. The Administrative Record contains letters from attorneys representing the RRE Project developers in which RRE Project lands are referred to as “riparian” but these letters do not include facts, maps, law or analysis to support this otherwise bald claim. These passing references to the alleged “riparian” status of RRE Project lands are merely unsubstantiated characterizations without any evidentiary basis.

⁵⁹ *Id.* at 12-13.

⁶⁰ *Id.* at 13.

⁶¹ *Id.* at 14-15.

The absence of **any** evidence demonstrating that all of the RRE Project land is riparian means that there was also not **substantial** evidence upon which Madera County could adopt the assumption and conclusion in the *2002 Water Supply Assessment* that all of the land in the RRE Project area held riparian water rights. Without such substantial evidence upon which to rely, Madera County's approval here constituted an abuse of discretion.⁶²

Petitioners went on to argue that the Administrative Record actually underscored the lack of evidence that the Project land had riparian rights:

In fact, the Administrative Record not only lacks evidence that all of the RRE Project area has riparian rights but, instead, contains extensive evidence that expressly underscores the absence of any support for the bald assertion in the *2002 Water Supply Assessment*. Again, in the words of lawyers representing the RRE Project proponents:

The purpose of the Holding Contracts was to compensate for damage from Friant Dam to the "landowners' right to receive water for the riparian **and overlying rights**. . . . In negotiating the Holding Contracts it was recognized both by the United States and the landowners that the reduction in flows below Friant Dam would decrease the quantity of water entering into the groundwater aquifers from the River. For this reason **the area embraced in the Holding Contracts included not only land which was riparian to the River, but lands which had overlying water rights to the groundwater furnished by the River**. *June 13, 2003 letter to Larry Freels, Central Green Company, from Denslow Green, Esq. [emphasis added]*. (bold added.)

[T]he riparian right extends only to the smallest tract under one title in the chain of title leading to the present owner. . . . Diverted water must, however, be used only on riparian land. . . .

⁶² *Id.* at 15-16. The opening brief states that:

There may be good reason why the Central Green Water Supply Assessment did not include the type of detailed analysis of the riparian rights upon which a water supply assessment properly would be based: A review of the original Land Patents for the parcels encompassing the RRE Project area would have clearly shown that slightly over one-half of the RRE Project area cannot possibly have riparian rights because the original Patents were never contiguous to the San Joaquin River, so that the "source of title" requirement is not met. *Id.* at 16 n.2.

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Many of the parties entering into Holding Contracts were claimants to a variety of water rights, not just riparian water rights. . . . [N]one of the water rights of any party entering into a Holding Contract was adjudicated during the District Court trial in *Rank v. United States* or thereafter in any appellate court. . . .” *May 22, 2003 letter to Larry L. Freels, Central Green Mutual Water Company, from Warren P. Felger, Esq.* (bold added.)

[The Bureau of Reclamation’s position] made it clear that not only had riparian rights been partially taken, but that underground supplies had been damaged and that the landholding described in the contract consisted of both riparian and overlying land. The contract does not describe the landowner’s water right which was damaged as being riparian, indeed the contract covers any rights the landowner has to divert water from the river and any right the landowner has to divert water from the underground. . . . The contract does not describe the land in Exhibit ‘A’ as being riparian, it described it as land to which the ‘United States acquired certain water rights appurtenant thereto.’ These rights would include riparian, appropriative, prescriptive or overlying groundwater rights which were supplied from the river.” *June 21, 1995 letter to James Turner, Esq., Bureau of Reclamation, from Denslow Green, Esq.* (bold in original, underscore added.)

As defined in California, riparian land is land within the watershed which touches the water course. . . . What is determinative in the **investigation of contiguity** is the nature of the original tract.” *December 23, 1983 letter to Burke Giles, Bureau of Reclamation, from Jeffrey G. Boswell, Esq.* (bold added.)

The above comments, all made by partisan attorneys for the RRE Project proponents, confirm that the mere fact that land is subject to a Holding Contract is **not** evidence that the land has riparian rights. Yet the Record, at most, suggests that the entire RRE Project area is covered by Holding Contracts; the Record is completely devoid of the “investigation of contiguity” that the Project proponents’ own attorneys acknowledge is necessary even to meet one of the five tests needed to demonstrate riparian rights.

Indeed, even the *2002 Water Supply Assessment* acknowledges that “the Holding Contracts are intended to **satisfy** the Project sponsors’ riparian rights.” (A.R. 004663; bold added). Following this analysis, to be able to lawfully divert and use water released from Friant Dam pursuant to the Reclamation Holdings Contracts, a potential downstream diverter must first have a pre-existing riparian water right

under California water law.

Finally, the Court should also take note of the United States Supreme Court's holding in Dugan v. Rank (1963) 372 U.S. 609 (NCA, Ex. K). It was this case, which was brought to resolve San Joaquin River water claims concerning Friant Dam, that provided the legal impetus and backdrop for the Holding Contracts. In Dugan v. Rank, the United States Supreme Court held: "[I]t is appropriate that we make clear that we do not in any way pass upon or indicate any view regarding the validity of respondents' water right claim." *Id.* at 626.

Madera County's approval of the 2002 *Water Supply Assessment* was premised entirely on the unsupported (and unsupportable) assumption that all of the RRE Project area has riparian water rights, but the Assessment itself did not provide **any** evidence or information to support this claim. Madera County's approval of the 2002 *Water Supply Assessment* in the absence of such information constituted an abuse of discretion.⁶³

D. RESPONDENT COUNTY'S AND REAL PARTIES' ARGUMENTS

In their Opposition Brief, Madera County and the Real Parties (Central Green and the Central Green Mutual Water Company) argued strenuously that the Central Green Water Supply Assessment's water-supply entitlement analysis was adequate. As seen from their briefing, quoted below, the County and Real Parties maintained that: (1) the Holding Contracts *do* provide a water entitlement; and (2) apart from the Holding Contracts, no separate water right is necessary for Central Green to divert water from the San Joaquin River, so that the lack of evidence that the Project lands had riparian rights was "irrelevant."⁶⁴

The [Water Supply Assessment] and the environmental documents also explain that the Project's water demands will be met through water delivery under federal water contracts (*i.e.*, the "Holding Contracts") held by Central Green – Holding Contracts Nos. 3 and 6 – which *permit the use of San Joaquin River water* for Project purposes. The Holding Contracts originated in the late 1940s, shortly after the completion of Friant Dam, and were negotiated between the U.S. Bureau of Reclamation (the "Bureau") and landowners along the San Joaquin River. As explained by the United States Supreme Court:

⁶³ *Id.* at 16-17.

⁶⁴ Opposition Brief, *supra* note 56, at 10-13, 17.

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From the very beginning it was recognized that the operation of Friant Dam and its facilities would entail a taking of water rights below the dam. Indeed, it was obvious from the expressed purpose of the construction of the dam – to store and divert to other areas the waters of the San Joaquin – and the intention of the Government to purchase water rights along the river.

(*Dugan v. Rank* (1963) 372 U.S. 609, 623.) The Holding Contracts are therefore essentially settlement agreements between the Bureau and the water users downstream of Friant Dam, which were designed to allow the United States to avoid expensive and protracted litigation concerning the adjudication and valuation of the water rights of downstream water users, regardless of whether the users' underlying water rights were riparian, appropriative, or otherwise recognized under California law.

Each Holding Contract, including the Holding Contracts at issue here, provide that (i) landowners have certain rights to the waters of the San Joaquin River; (ii) in recognition of those rights, the United States will permit diversions from the River for “any reasonable beneficial use of the water of the River for irrigation and/or domestic purposes” on the property subject to the contract; and (iii) to ensure an adequate supply, the United States will release sufficient water stored behind Friant Dam to maintain a flow of 5 cfs at Gravelly Ford (which is downstream of the Project site). The United States' obligations to release water under the Holding Contracts are avoidable only in the event of an “Act of God” or other events beyond the control of the United States.

. . . As a part of the negotiations surrounding the Holding Contracts, the United States Bureau of Reclamation released a document in question and answer format explaining the effects of the Holding Contracts:

Question 2. Will this settlement of water rights protect the individual owner's riparian right against the United States?

Answer. The lands for which the settlements are to be made have been to some extent injured by the operations of Friant Dam. These lands, for the most part, are either riparian to the San Joaquin River or overlie underground waters which are fed by percolation from the river. Where these lands are now being irrigated, it is being done either from the river or from an underground water supply fed from the river. . . .

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The proposed settlements are for the purpose of compensating the owners of these lands for the invasion of their rights and to assure them that sufficient water will pass the dam to maintain a live stream below the dam between Friant, and Gravelly Ford and to permit the continued reasonable and beneficial use of water on these lands.

The Friant to Gravelly Ford contracts with the United States are the best assurances of a water right that the landowners can obtain anywhere.

Thus, through the Holding Contracts, the landowners essentially “gained a perpetual contract right for all of the water they can put to beneficial use on their land, a right which has become appurtenant to their land.” ([June 13, 2003 Opinion Letter of Denslow Green] [citing *Nebraska v. Wyoming* (1945) 325 U.S. 589].)

. . . .

Additionally, because Central Green *is entitled to utilize water from the San Joaquin River as an independent contractual right under the Holding Contracts*, Petitioners’ characterization of Central Green’s underlying water rights as “riparian,” “overlying,” or otherwise is *entirely irrelevant*.

. . . .

The Bureau’s obligation to provide water for the Project exists regardless of whether Central Green has underlying “riparian” rights (or any other water rights, for that matter). This obligation extends not only to Central Green’s current agricultural operations, but also to residential subdivisions.

In sum, the WSA and the administrative record include substantial evidence that Real Parties have the right to procure water sufficient for the Project under the Holding Contracts. Accordingly, this evidence demonstrates that the Project will not have significant effects on water supply because it is not materially affecting the distribution or use of water.⁶⁵

The County and Real Parties reiterated this argument later in their

⁶⁵ *Id.* (some emphasis added).

Opposition Brief as well, stating that:

[C]haracterization of Central Green's underlying water rights is entirely irrelevant, as reiterated by the U.S. Bureau of Reclamation, due to the Bureau's contractual obligations under the Holding Contracts. In other words, because Central Green is *entitled to utilize water from the San Joaquin River as an independent contractual right under the Holding Contracts*, the characterization of Central Green's underlying water rights as 'riparian,' 'overlying,' or otherwise is entirely irrelevant.⁶⁶

In making their arguments, the County and Real Parties did not discuss the viability of their position that the federal Holding Contracts provide a contractual water right recognized as a matter of California water rights law.⁶⁷ Nor did they discuss the caselaw Petitioners had cited to the effect that water rights are a matter of state law (and, therefore, cannot be created by a federal contract). They did, however, extensively rely on federal government staff statements interpreting the meaning of the Holding Contracts to support their position:

These rights were reaffirmed most recently in the January 21, 2004, deposition of John Renning, the U.S. Bureau of Reclamation's Person Most Knowledgeable on, *inter alia*, Holding Contracts Nos. 3, 6.:

Q. And the Bureau, rather than litigating the water rights issue,

⁶⁶ *Id.* at 30-31 (emphasis added).

⁶⁷ In various places in the quoted text, the County and Real Parties used different language to describe the basis of the claimed water entitlement. They discussed the Holding Contracts as providing "water *delivery* under federal water contracts," asserted that the Holding Contracts "*permit the use of San Joaquin River water for Project purposes*" and were "a perpetual contract right for all of the water they can put to beneficial use on their land," asserted that they hold "an independent contractual right under the Holding Contracts" and that they are "*entitled to utilize water from the San Joaquin River as an independent contractual right under the Holding Contracts*," described "[t]he Bureau's obligation *to provide water for the Project*," and argued "that Real Parties have the *right to procure water sufficient for the Project under the Holding Contracts*." Opposition Brief, *supra* note 56, at 10-13, 17 (some emphasis added).

Apart from the question of whether the Holding Contract represents a water entitlement regardless of California water law, the County and Real Parties also did not explain how the operative language in the Holding Contracts – that the Bureau "will permit water to pass by or through Friant Dam into the River," "will maintain a live stream in the River at the control point," and "will . . . not . . . object to any reasonable beneficial use of the water of the River . . . upon the [Holding Contractor's] land" – creates a contractual right *to delivery of water* to the Holding Contractor's land. See *supra* nn. 31, 32. Petitioners contended that the language of the Holding Contracts does not even purport to contain a promise by the Bureau to deliver water to the Holding Contractor's land, instead, only containing a promise by the Bureau to release water into the river that could be diverted and to not object to such diversions. Opening Brief, *supra* note 54, at 13.

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chose to enter into the contracts and provide water to these properties. Correct?

A. The Bureau agreed to provide water from the San Joaquin River.

Q. And the Bureau allowed these holding contract owners to take that water?

A. We said that we would not object to them taking that water.

Q. Who else could object?

A. There could be other water rights holders, to the extent that there were any on the San Joaquin River, that could object to that.

Q. [D]id the Bureau contemplate who those other water rights holders could be?

A. I said there could be, I don't know of any.

Q. Is what you're saying is that while there could theoretically be folks that might be able to complain about the water diverted by the holding contract owners, you're not aware of any that have that ability?

A. Parties that would complain on the basis of injury to their rights to divert from the San Joaquin River.

Q. Right, and you're not aware of any. Correct?

A. I don't think so.

Q. You don't think they exist?

A. I don't think that there is anyone who is a right holder on the San Joaquin River that would be in a position to object to the exercise of a holding contractor's water rights.

[Quoting testimony of John Renning, Regional Water Rights Officer, U.S. Bureau of Reclamation]

. . . . For example, one of Real Parties' predecessor owners sent a November 18, 1966, letter to the Bureau requesting information regarding her water rights under Holding Contract No. 6:

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This is a request for some information on my riparian rights on the San Joaquin River known as Holding No. 6.

According to Schedule A, under a contract with the Bureau dated October 10, 1947, I have rights on 415 acres. Could you furnish a map showing the boundaries of the water rights?

In response, the Bureau found that the issue of whether the properties had water rights separate from the Holding Contracts was irrelevant because the Bureau was legally obligated to deliver water so long as it was being used for “beneficial” purposes:

Our Fresno Office has forwarded your November 18, 1966 letter to us and asked us to supply you with the information you requested.

Since the contract specifically provides for: (1) U.S. recognition of your rights to any reasonable and beneficial use of water on the lands described in Schedule A of the contract and outlined on the attached drawing, and (2) the U.S. to provide sufficient flow in the San Joaquin River adjacent to your land to meet these beneficial use requirements, plus the maintenance of a live stream, *there does not appear to be any need for a determination of whether your rights to use water on the land described in Schedule A are appropriative, prescriptive, riparian, or otherwise.*

[Letter from E.F. Sullivan, Assistant Regional Director, U.S. Bureau of Reclamation] [emphasis added].) The foregoing demonstrates that the Bureau is legally bound to provide water under the Holding Contracts for beneficial uses, irrespective of whether the subject properties have underlying “riparian” (or any other) rights. (*Id.*)

This position was recently reaffirmed by the Bureau itself during Mr. Renning’s deposition, wherein he testified concerning the Bureau’s response to the November 18, 1966, letter:

Q. Do you agree with that statement and is that a correct statement of the Bureau’s position on these contracts?

A. The only comment that I might have on that particular statement is that I’m not sure that our contract specifically recognizes rights, but it certainly says that we will not object to the use of water under whatever rights the contractor has.

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Q. But the letter also says you didn't need to identify what your rights are?

A. Yes, that's correct.

Q. It doesn't make any difference?

A. Right, *it's like a moot point*.

[Quoting testimony of John Renning, Regional Water Rights Officer, U.S. Bureau of Reclamation] [emphasis added].)⁶⁸

E. PETITIONERS' REPLY

The Petitioners' Reply Brief set out to counter the County and Real Parties' Joint Opposition Brief:

Before turning to the legal authority that makes plain that Madera County et al.'s argument here is wrong, and before highlighting the ways in which Madera County et al. have mischaracterized the statements by regional Bureau of Reclamation staff, the Farming Petitioners ask the Court to first take note of what the Opposition Brief did not contest. The Opposition Brief did not present any arguments or allegations suggesting that the EIR, the 2002 Water Supply Assessment or the administrative record contained any evidence showing that all of the RRE Project lands have riparian rights to water, or that the all of the RRE Project lands have any other water rights (such as appropriative rights to San Joaquin River water) recognized under California law. As such, Madera County et al. appears to have conceded that no such evidence was in fact provided. Thus, if Madera County et al.'s claim (that the RRE Project lands need not have any California water rights to divert water from the San Joaquin River for the RRE Project) is flawed, then all of the water supply analysis that underlies the EIR and *2002 Water Supply Assessment* for the RRE Project is also flawed.⁶⁹

The Petitioners then attacked the Reply Brief's primary argument head-on:

⁶⁸ Opposition Brief, *supra* note 56, at 12-14.

⁶⁹ Reply Brief, *supra* note 55, at 14-15.

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In terms of the law, it is well settled – and long settled – that Bureau of Reclamation water contracts do not by themselves create any right to divert or use water. The rights of diversion and use are created under state water law. Rather, the Holding Contracts are merely obligations by the federal government to *release* certain quantities of water (into rivers) that are being *held* in federally operated reservoirs (such as Friant Dam). The most recent reaffirmation of this principle was provided by the United States Court of Claims in Klamath Irrigation District v. United States (“Klamath Irrigation”) (2005) 67 Fed.Cl. 504. In Klamath Irrigation, the Court expressly rejected the claim that Reclamation Bureau contracts establish a party’s entitlement to divert and use water when there is no underlying water right under state law:

“To begin with, there is the statutory language. On its face, section 8 [of the federal Reclamation Act] requires the Secretary [of the Interior Department], in carrying out his responsibilities under the Reclamation Act, to ‘proceed in conformity with’ **state laws** relating to the “control, appropriation, use, or distribution of water.’ It is beyond peradventure that, rather than authorizing the Secretary to acquire his water rights independent of state law, this sections treats the Secretary as an appropriator under the states’ appropriation laws, requiring him to obtain his water rights in the same manner as others. Nothing in this language suggests that third parties, including irrigators, could obtain title to appropriative water rights at Bureau projects **other than through state law**. Indeed, while the Reclamation Act indicates that the right to the use of certain water ‘shall be appurtenant to the land irrigated,’ this language refers only to water ‘acquired under the provisions of this Act,’ which ‘provisions’ **require the claimant to obtain those rights in accordance with state law**. Accordingly, **the Reclamation Act does not, as plaintiffs intimate, independently define who owns interests in the water of Bureau projects. . . . To the contrary, that question is controlled by state law. . . .**” *Id.* at 516-517 (bold added).

In Klamath Irrigation, the Court explained that its holding here is firmly rooted in previous United States Supreme Court decisions and the express language of the federal Reclamation Act:

“ . . . the Supreme Court, in California⁷⁰, supra, concluded that

⁷⁰ Reference here is to Justice Rehnquist’s majority opinion in *California v. United States*, 438 U.S. 645 (1978).

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‘the Act [federal Reclamation Act] clearly provided that state water law would control in the appropriation and later distribution of the water.’ 438 U.S. at 664, 98 S.Ct. 2985. Writing on behalf of the majority, then Justice, now Chief Justice, Rehnquist emphasized that ‘[f]rom the legislative history of the Reclamation Act of 1902, it is clear that state law was expected to control in two important respects.’ *Id.* at 665, 98 S.Ct. 2985. ‘First,’ he noted, ‘the Secretary would have to appropriate, purchase or condemn necessary water rights in strict conformity with state law.’ *Id.* Repudiating *dicta* in earlier cases, Justice Rehnquist then dismissed the notion that state law control over the appropriation of water was a mere technicality, in the process making short shrift of the argument that ‘§8 [of the federal Reclamation Act] merely require[s] the Secretary of Interior to file a notice of his intent to appropriate but to thereafter ignore the substantive provisions of state law.’ Instead, he found that the legislative history made it ‘abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law.’ *Id.* at 675, 98 S.Ct. 2985; *see also Nebraska v. Wyoming*, 295 U.S. 40, 42-42, 55 S.Ct. 568, 79 L.Ed. 1289 (1935). ‘Second,’ Justice Rehnquist continued, ‘**once the waters were released from the Dam, their distribution to individual landowners would again be controlled by state law.**’ *California*, 438 U.S. at 667, 98 S.Ct. 2985.

. . . .

California thus authoritatively teaches that defining the **property rights as to the water in question is a matter of state, not federal law.**” *Id.* at 518-519 (bold added).

In *Nebraska v. Wyoming* (1936) 295 U.S. 40, the United States Supreme Court held: “The Reclamation Act of the United States authorized the construction of reservoirs in Wyoming for the storage of water to be used for irrigation . . . Reservoirs of large capacity have accordingly been constructed and operated by the United States, **but solely under and subject to the irrigation and appropriation laws of Wyoming.** . . .” *Id.* at 42 (bold added).

In the case of the RRE Project, the above decisions make clear that the Holding Contracts did not (and could not) grant the owners of RRE Project lands any rights of diversion or use because the Bureau

of Reclamation had no such rights of diversion or use to grant.⁷¹

The Petitioners' Reply Brief also directly addressed the County and Real Parties' use of statements from Bureau of Reclamation staff:

Madera County et al. rely on a letter from E.F. Sullivan, Assistant Regional Director at the Bureau of Reclamation, in which Mr. Sullivan states that “. . . *there does not appear to any need for a determination of whether your rights to use water on land described in Schedule A are appropriate, prescriptive, riparian, or otherwise.*” (Italics . . . and bold in quote in Opposition Brief, p. 14:8-9; citing to AR 6:001355-56, in which no such italics or bold are used). Mr. Sullivan is absolutely correct – there is indeed no need for the Bureau of Reclamation to make any determination about the nature of RRE Project land water rights, since these are matters of California water law and the only obligation of the Bureau of Reclamation under the Holding Contracts is to release water from Friant Dam. Sullivan's statement lends no support whatsoever to Madera County et al.'s claim that RRE Project landowners do not need a valid state water right to divert and use water from the San Joaquin River.

Madera County et al.'s Opposition Brief then seeks reliance on a January 6, 1997 letter in which a Reclamation Bureau Regional Director that states that “Reclamation will not object to” the use of the holding contract water for the RRE Project. Opposition Brief, p. 15:10-11. It is wholly irrelevant, however, that Reclamation plans not to object since the question of whether or not all of the RRE Project lands are entitled to divert and use San Joaquin River water is a matter of California water rights.

Finally, Madera County et al. makes much of the excerpts it provided to the Board of Supervisors from the deposition of regional Reclamation staff person John Renning. At his deposition, Renning was asked by the RRE Project developers' attorney: “Based on your knowledge of the development proposed for the Central Green project and your knowledge of the holding contracts that Central Green maintains, isn't it true that the Bureau has no objection to the use of the holding contract for water for Central Green's developed as proposed?” Opposition Brief, p. 16: 20-22. John Renning responds: “I think that the way you posed the question. I think that it's perhaps an overstatement, but certainly the language in the [holding] contract is that **we will not object** to use of water that's contemplated in your question.” Opposition Brief, p. 16: 23-25 (bold added). Renning's answer offers no support for the claim that the RRE Project landowners have an entitlement to divert and use water from the San

⁷¹ Reply Brief, *supra* note 55, at 15-16.

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Joaquin River. Rather, Renning's answer simply confirms that the question of diversion and use of water released by the Bureau from Friant Dam under a Holding Contract has nothing to do with the Reclamation Bureau because the propriety of that diversion is a matter of state law.⁷²

F. ORAL ARGUMENT

The trial on the merits was held over two days on April 6 and 7, 2006.⁷³ In oral argument, the parties amplified the discussion in the briefing. Petitioners discussed evidence from the Administrative Record, particularly focusing on correspondence from Bureau of Reclamation staff and lawyers for Central Green:

Here's a letter to the Bureau of Reclamation, Roger Patterson, from Denslow Green, again, the attorney who has been writing most of the letters we've looked at so far. And he states while we recognize that the contracts do not, quote, "create a water right," end quote, in the contracting owners under California law. And then he goes on to explain the contracts impose on the United States the obligation to deliver. And then he again says this is a not a water right under California law.

This is another portion of the letter from Mr. Felger [attorney for Central Green Mutual Water Company] here to Larry Freels [General Partner of Central Green Company] in which he's pointing out none of the holding contracts identifies the specific rights held by downstream landowners. ["All of the holding contracts committed the United States to forbear in perpetuity from objecting to any reasonable use of water by the river . . . by contracting landowners as long as water is diverted only at specified points.[" And he goes on to confirm that the purpose was to ensure the availability of water for the prior rights.

. . . .

There is also an earlier memo from the Madera County Planning Director . . . in which he reports on a meeting which he initiated at the request of the Planning Commission with the Bureau of Reclamation

It states Mr. Turner – this is from the Bureau. ["Mr. Turner

⁷² *Id.* at 18-19 (footnote omitted).

⁷³ Because the case was heard primarily as a writ-of-*mandamus* case, the trial consisted of oral argument and presentation of evidence from the Administrative Record in the case. There were no live witnesses.

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pointed out that the language in the contract was the U.S.B.R. [Bureau of Reclamation], quote, ‘would not object,’ end quote. The contract did not create any rights under California water law, but was a settlement contract to allow irrigation and domestic use[] . . . on lands described in the exhibits attached to those contracts. Whatever underlying water rights existed were those established under California law.[“]

Then I want to look at one more letter. This is a letter from the Bureau of Reclamation back in 1984 to a landowner. In fact, it is to the predecessor owner to the current property. . . .

In this contract – this is a letter from the Bureau. [“]However, you should recognize that the water rights settlement contract did not grant Mrs. Leshner a water right. The nature and scope of the water rights appurtenant to holding Number 6 must be determined by the State Water Resources Control Board and/or the courts. In other words, even though the United States will not object to use of water from the San Joaquin River on all of the lands described in the contract, other water rights holders may object to use on the portion of the holding without a valid water right.[“]⁷⁴

Petitioners’ oral argument also highlighted that the County and Real Parties had changed their position mid-way through the approval process, initially claiming that the Project lands had riparian rights but later taking the position that the existence of water rights was irrelevant:

And you may recall . . . that we looked at the Final E.I.R. and saw at one place the County is saying well, this has water supply because of the land has riparian rights, but in another [place] in response to comment, the County is saying actually riparian rights don’t matter at all. It’s all because of the holding contracts.

. . . .

. . . There is, as I pointed out in the CEQA context, there is no evidence let alone substantial evidence, that the River Ranch Estate project area has – all had riparian rights. Actually, there is no evidence that any of the project area has riparian rights. But here’s what the water supply assessment says, quote, “All of the land included in the project is riparian to the San Joaquin River.”

. . . .

⁷⁴ Transcript of Hearing on Petition for Writ of Mandate, Madera County Farm Bureau v. Madera County Bd. of Supervisors, No. CV351003, at 49-51 (Cal. Super. Ct., County of Stanislaus heard Apr. 6, 2006).

It's unclear, at least to me, whether the water supply assessment is also somewhere taking the position that the holding contracts somehow create water rights independent of riparian rights to the land. We know that the E.I.R. took that position and in other places took the position that no it was a riparian rights question. But to the extent that that argument is being put forward here, I would point out to the Court we've just looked at one of the holding contracts. The holding contracts do not purport to create California water rights In fact, the water supply assessment itself . . . confirms that the holding contracts are intended to satisfy the project sponsors' riparian rights. There's no suggestion there at least that the water supply assessment is taking the position that the holding contracts create water rights in some way. That does seem to be the position that the County is now taking. It appears to be the position that they're taking in their opposition brief, for example. They've completely abandoned this riparian theory on which the E.I.R. was based and now seem to be arguing that holding contracts provide the only basis of right that is necessary for the entire River Ranch Estates area.

. . . [T]he best that the County can say [is] that they took two inconsistent positions in the E.I.R. Taking the position now that it's only the holding contracts is somewhat of an after the case explanation because they need to have some explanation to support the conclusion that they reached. But . . . there is no legal basis for the ability of the holding contracts to create water rights independent of state water law. So even if the holding contracts have on their face purported to create California water rights, they can't The Bureau of Reclamation does not have the power to create California water rights. It's a matter of state law.

So not only do the holding contracts not purport to create a water right or to grant a water right by saying ["we will release water and we will not object."] That's all they say. But they couldn't, in any case.⁷⁵

One of the Real Parties' counsel served as the primary representative of the County and the Real Parties at the hearing, first addressing the history that preceded the Holding Contracts:

[The Bureau] went to each of these [landowners downstream of Friant Dam] and they negotiated a deal with them. And they said look, we don't know what you have. We don't care. We are going to describe the lands that we're going to let you put water out of the river and we're going to give you a contract that's going to say we're

⁷⁵ *Id.* at 49, 62-65.

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settling your rights and we're going to let you use the water from the river on all of those lands. And since we're going to own all the water of the river, then you're going to have the right to take it and nobody else is going to be able to do anything about it.

One of the things that happened is . . . that after the federal government acquired all of the rights they could, . . . the federal government applied to the state for everything left. They apply in this Water Decision Number D.935 is the State of California saying we're going to give you, the federal government, basically everything we have left, which is whatever remains as appropriative rights because the state – there's correct statements about water rights being determined under state law, but once those rights are given to the federal government it controls them as a matter of contract. The holding contracts don't give you a water right. They give you a contract to the water.

. . . .

. . . The difference in opinion is . . . that the federal government having all the water of the river allows us to take it out.

. . . .

I want to just briefly touch on the testimony of John Renning because he was produced as the Bureau of Reclamation person most knowledgeable regarding the holding contracts. Mr. Renning testified . . . he was unaware of anybody who could object to the water being taken for beneficial uses under the holding contracts . . . What's clear is that the Bureau knew about our development . . . They never objected to the development. They're the ones providing the water and they're not even here.

. . . .

. . . [The Petitioners] know that we have a [holding] contract. And if the Bureau has water rights, we've got the right to the water. And the Bureau's the only one that can object and they don't, and they haven't and they won't.

. . . .

[The Petitioners'] basis of argument in the reply [brief] is this assertion that the Klammoth [sic] and California cases somehow matter. And I will tell the Court, the Court reads the cases you'll clearly understand those cases do not matter. They do not stand for

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the proposition that the Bueay of Reclamation doesn't have the right to let us have the water in contract for that water out of the river. What . . . they stand for is the very general proposition . . . that water law is determined by state law, but if the federal government acquired all of it then it sells is back under contract.⁷⁶

Central Green Mutual Water Company counsel also discussed the history of the Holding Contracts and continued to put forward the position that the Holding Contracts are contracts for delivery of water by the Bureau:

After Friant Dam was constructed, there were downstream landowners that were quite concerned that the historical flow of the river would impair their rights, whether they be riparian or appropriative rights, to the recharge capability to the underlying aquifer and they sued the federal government It went up to the Supreme Court.

. . . .

So after the Supreme Court rendered its decision, the Bureau of Reclamation resumed entering into holding contracts. There were settlement contracts. They did not want to determine what was the scope of the taking, let alone the compensation issues, let alone engage in further litigation. So they said in these holding contracts, which are only nine pages long, that whatever rights you have we recognize that we interfered with it and we provide you with a replacement source of water from the project. That source of the water emanates from our, that is, the Bureau of Reclamation's appropriative rights granted by the State Board.

So the issue of whether or not a landowner can today demonstrate whether it has a riparian right, appropriative right it is a nonissue when it comes to the efficacy of the holding contracts.

. . . .

. . . [W]hat is clear is that once the United States obtains all of the water for the Friant project it has the sole prerogative of determining with whom and on what terms it wants to contract.⁷⁷

In reply oral argument, Petitioners responded to County and Real Parties'

⁷⁶ *Id.* at 91-93, 99, 102-03.

⁷⁷ *Id.* at 153-55.

oral presentation:

The Petitioners also maintained, of course, that the water supply assessment fails to support the bald assertion that the River Ranch Estate lands all have riparian rights. The County now seems to have conceded that the various statements in the water supply assessment and those statements in the F.E.I.R. that, quote, “all the River Ranch Estate project area has riparian rights,” unquote, is not correct.

In fact, . . . it’s now being described in oral argument . . . as, quote, “a red herring.” This is truly amazing to me. The fact that the F.E.I.R. reports that the basis of right is riparian rights, the water supply assessment only reports that the basis of right is riparian rights, and now we’re told that that’s a red herring. I find that incredible. How could that be a red herring when that is the sole basis for the right claimed in the water supply assessment and is the primary basis, although there’s some confusion . . . in the Final E.I.R. where it dances back and forth between these two different theories. It’s a red herring. If it’s wrong, so be it. Petitioners think it probably is wrong but that completely then invalidates the water supply assessment in the E.I.R. because that’s what they say is the basis of supply.

We also spent a significant amount of time arguing about whether the holding contracts themselves somehow create water rights. And what the County seems to be contending is that the holding contracts provide a water entitlement to the River Ranch Estates project property because there’s Bureau of Reclamation appropriative water rights that are being supplied to the landowners and that the Bureau is contracting through the holding contracts just like it contracts with water districts like [Madera Irrigation District] or [Chowchilla Water District] in water service contracts.

Now, there’s a number of problems with that argument. First, I know I’m beating a dead horse here but the Final E.I.R. reports in a number of places that the water supply is based on riparian rights, not based on holding contracts, whatever that means. So at best the water supply assessment is completely wrong in its assertion on the basis of right because it only asserts riparian rights and the E.I.R. takes inconsistent positions.

There’s also the question of the State Water Resources Control Board Decision 935 In Decision 935 what the Water Resources Control Board actually says is that the . . . water that the Bureau is letting pass through Friant Dam for holding contracts is not part of the Bureau’s water rights

In fact, what Decision 935 says is that under the Bureau’s application case for water rights which this decision awarded for the San Joaquin River, quote, “Certain water rights from Friant Dam to Gravelly Ford are to be satisfied by releases from [the dam].” Note,

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quote, “certain water rights,” end quote.

That means existing rights that already exist in that region of the river. And note that those existing rights . . . are to be, quote, “satisfied by releases.” That is not anything like saying that the Bureau will be delivering water that it appropriates under the newly granted water rights license to those certain water rights holders.

[Real Parties’ counsel] also argued that under Decision 935 the United States acquired, quote, “all,” end quote, remaining water rights to the San Joaquin River in that decision

What this decision did is it granted appropriative rights to the Bureau of a specific amount under permits that it approved. There is nothing in this opinion that says all of the rights to the San Joaquin River are being appropriated under this decision. In fact, the decision specifically denied the Bureau’s request for additional water rights, including rights . . . for appropriation below Friant Dam in this decision.

And it also held in this decision that the releases from Friant Dam to satisfy the downstream holding contract owners, quote, would not be considered a claim against the 6500 cubic feet per second, that is, the amount being awarded to the Bureau and need not be included in the permits. So the notion that the water being released from the dam is appropriated water under a Bureau . . . [a]ppropriative water right that is then being delivered to holding contract owners is not at all supported by Decision 935. It’s inconsistent with what that decision says.

. . . [Real Parties’ counsel] characterized the holding contracts as basically the Bureau of Reclamation saying we will give you this right. That was his characterization of what these holding contracts say. And I suggest that just defies the plain reading of the contract language. There is no language of giving or granting rights. The plain language of the agreement doesn’t purport to be an obligation on the Bureau to supply water appropriated by it under its water rights to the landowners. Instead, what the agreement says is the Bureau will let water pass through the dam in order to maintain a 5 c.f.s. minimum flow rate at a particular point and the Bureau will not object to people taking that water out of the river if it is used in particular places

. . . .

Now, the County then moved into another argument quoting a Bureau official in a deposition who said he was unaware of anyone who would object to the use of water on the River Ranch Estates project lands. I think we’re getting at the heart of Central Green’s position with respect to their water rights. But I want to point out that that position is neither of the positions that were put forward by the

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County for either the E.I.R. or the water supply assessment.

In fact, Central Green's admission is really an admission that they don't have water rights and they're proposing illegal diversions but because there is really nobody to object they can get away with this. That's what their argument really is.

First, this notion that no one will or can object . . . is not the basis for the reasoning in the water supply assessment or in the E.I.R. It's yet a third theory that's popping up for the first time. Secondly, it's not correct. As the Attorney General pointed out in their comment letters [to the County, in the Administrative Record] the State Water Board has jurisdiction over all diversions and has authority to prevent unlicensed diversions.

And, third, [there] very well maybe injured persons from proposed illegal diversions here⁷⁸

G. TRIAL COURT RULING

On June 29, 2006, the trial court's 11-page decision was filed. With respect to the Holding Contract and related water rights issues, the court concluded that the Water Supply Assessment did violate SB610 for the following reasons: (1) there is insufficient evidence that riparian rights are involved; (2) there is a clear distinction between "diversion" rights and "delivery" rights; and (3) respondents failed to establish by substantial evidence that reclamation Holding Contracts provide diversion rights independent of state water rights.⁷⁹

Further, with respect to CEQA, the court concluded that "The [Central Green Water Supply Assessment] included in the Final EIR is legally inadequate for the reasons outlined in the preceding heading of this decision."⁸⁰

After supplemental briefing on the question of the appropriate remedies, the court ultimately issued a Peremptory Writ of Mandamus directing Madera County "to set aside and void in their entirety the Project Approvals . . . pertaining to the proposed River Ranch Estates Project."⁸¹

The trial court's decision was not appealed.

⁷⁸ *Id.* at 168-74.

⁷⁹ Decision on Petition for Writ of Mandate, Madera County Farm Bureau v. Madera County Bd. of Supervisors, No. CV350927, at 9 (Cal. Super. Ct., County of Stanislaus June 26, 2006).

⁸⁰ *Id.* at 10.

⁸¹ Peremptory Writ of Mandamus, City of Fresno v. Madera County Bd. of Supervisors, No. 351003, at 1 (Cal. Super. Ct., County of Stanislaus Nov. 6, 2006).

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VII. CONCLUSION

The River Ranch Estates case did not ultimately adjudicate the meaning of the Holding Contracts because such a determination is not required under the standard of review for the challenge to Madera County's approvals in a writ of mandate proceeding. That determination likely will be heard another day. Particularly in light of the trial court's decision, however, one can at least conclude that there is a very substantial question as to whether federal Holding Contracts can be relied upon to establish an entitlement to water for purposes of a Water Supply Assessment under SB 610.