



Fixing Finances: The Department of Water Resources Seeks Validation of Bonds to Fund the California WaterFix Project

07.28.2017

The California Department of Water Resources (DWR) filed a validation action on July 21, 2017, in the Sacramento County Superior Court, seeking to confirm the validity of bonds it has authorized to finance the planning and capital costs of the California WaterFix Project (the WaterFix, or the Project), as well as the resolutions adopted to approve the issuance of those bonds.

The WaterFix is a large-scale infrastructure project proposed by DWR to implement the goals of the Delta Reform Act, adopted by the California Legislature in 2009. The Project is intended to address long-standing environmental and operational issues associated with the delivery of State Water Project (SWP) and Central Valley Project (CVP) water through the Sacramento-San Joaquin River Delta (Delta) to the SWP and CVP pumping plants in the south Delta. The Project includes a new point of diversion for the SWP and CVP on the Sacramento River for water diversion through two tunnels that will be constructed beneath the Delta for delivery to state and federal water contractors south of the Delta. After more than a decade of study, DWR has moved forward with actions to implement the WaterFix. The federal wildlife agencies (U.S. Fish and Wildlife Service, National Marine Fisheries Service) also issued biological opinions regarding the WaterFix, pursuant to the federal Endangered Species Act. Several environmental groups have filed litigation in federal court challenging the biological opinions. The State Water Resources Control Board (State Board) has conducted lengthy adjudicatory hearings regarding the WaterFix. The State Board proceedings are anticipated to extend into 2018. The lead federal agency regarding the WaterFix, the U.S. Bureau of Reclamation, has not taken any action on the Project.

DWR adopted resolutions on July 21, 2017 approving the issuance of revenue bonds to begin funding planning and preconstruction expenses and capital costs of the Project, the same day it also issued its

Notice of Determination under the California Environmental Quality Act to move forward with the WaterFix. According to these resolutions, the California WaterFix Revenue Bonds would raise \$8.8 billion of the total \$16 billion estimated cost of the Project.

Public agencies may bring a validation action in superior court under section 860 of the Code of Civil Procedure, but since the statute does not specify what sort of agency actions are subject to validation, an agency must be able to point to other legal authority that permits the specific action or matter to be subject to a validation proceeding. In this instance, DWR is relying on Government Code section 17700, which permits validation actions to determine the validity of bonds, warrants, contracts, and other obligations, and is asking the court to confirm that state law authorizes DWR to issue multiple series of revenue bonds to finance the capital costs of the WaterFix and planning and preconstruction costs and to pledge WaterFix revenues to secure payment on the bonds.

Validation actions are quasi in rem proceedings, meaning they are actions directed toward property, as opposed to a particular person or entity. Judgments issued by a court in a validation action are enforceable against all persons whether or not they appeared as a party in the lawsuit. The validation complaint filed by DWR states that DWR is not seeking to validate DWR's compliance with statutory and regulatory requirements applicable to the construction of the WaterFix. The apparent intent of this statement is to exclude from the validation action the adjudication of anticipated environmental challenges to the WaterFix under the California Environmental Quality Act, the National Environmental Policy Act, and other state and federal environmental laws. Nevertheless, the court's decision with regard to the validity of the bonds will have important implications for the WaterFix's financial security through the next stages, as well as the pace of progress as DWR and other involved agencies continue to move forward with the Project.