

Claims Court Axes Calif. Regions' \$350M Drought Loss Bid

By **Nicole Rosenthal**

Law360 (June 8, 2022, 6:04 PM EDT) -- A California city and other districts lost their bid for over \$350 million in compensation for reduced water supply during a drought after the Court of Federal Claims ruled that the U.S. government was contractually obligated to prioritize water access to other communities.

Judge Armando O. Bonilla held that while the U.S. Department of the Interior's Bureau of Reclamation, which manages water resources, had a contractual obligation to Fresno and 17 irrigation districts in the San Joaquin Valley under the Friant Contract, the government had a greater preexisting obligation to provide substitute water to a group known as the Exchange Contractors.

"[The Bureau of] Reclamation was able to repurpose the water for the Friant Contractors and other ... purposes while, concomitantly, preserving the Exchange Contractors' reserved and superior rights," Judge Bonilla wrote in the Monday ruling. "Nonetheless, when faced with competing demands and scarce supply, as experienced in 2014, Reclamation must afford the Exchange Contractors superior entitlement to [Central Valley Project] water."

The Exchange Contractors maintain the area's reserved water rights following a purchase agreement with the government in 1939, whereas the Friant Contract was inked in 2010 to supply water diverted from the San Joaquin River to private parties who signed on to the contract in later years, according to the decision.

The San Joaquin River is the only source accessible to Friant Contractors' "often-parched land tracts," Judge Bonilla said.

However, the Exchange Contract clearly superseded any obligations that the Reclamation Bureau had to the Friant Contractors, Judge Bonilla said, pointing to the first sentence of Article 3(n) of the Friant Contract, which explicitly said that the rights of the Friant Contractors are subject to the terms of the Exchange Contract.

"In other words, at all times, the Exchange Contractors have a superior claim to ... water than do the Friant Contractors," Judge Bonilla said.

Therefore, the Reclamation Bureau justly cut off the Friant Contractors' water supply in 2014 during the drought that lasted for five years from 2012 to 2017, Judge Bonilla ruled.

In addition to the breach of contract claim, Fresno and the 17 irrigation districts had also claimed in their 2016 lawsuit that the Reclamation Bureau's decisions during the drought constituted a taking of their property in the form of water rights in violation of the Fifth Amendment.

However, the claims court dismissed the takings claims in 2020 for lack of standing, ruling that none of the irrigation districts possess a property interest in the water supplied to them by or through the bureau.

As a result of the water reallocation during the drought, municipalities and landowners lost a significant amount of annual crops and groundwater reserves and incurred millions of dollars in losses to buy emergency water supplies, according to Fresno's original complaint.

Fresno and the irrigation districts sought \$350 million in compensation, which totals the estimated water and water rights they say were lost in 2014, as well as interest and attorney fees.

"To be clear, a zero allocation for the Friant Contractors was harsh and, in the eyes of the Friant Contractors, patently unfair particularly since the Exchange Contractors received their maximum entitlement for the critical months of April through October," Judge Bonilla wrote. "Nonetheless, the parties' contractual arrangements and relative entitlement hierarchy do not compel a different result."

Judge Bonilla also found that the Reclamation Bureau didn't breach the contract due to an immunity clause included in the Friant Contract, which states that the government won't be held liable if there is a water shortage due to drought.

"The Friant Contract effectively immunizes the government from a breach of contract claim," Judge Bonilla wrote. "The court finds that the water allocation decisions and actions of the Contracting Officer in the face of a severe drought, coupled with Reclamation's legal obligations under the Exchange Contract, were not "arbitrary, capricious, or unreasonable."

Nancie G. Marzulla, counsel for Fresno and the irrigation districts, told Law360 that her clients are "shocked" at Judge Bonilla's decision.

"We made a plain-language argument based on the contract at issue, and the decision didn't really track the plain language of the contract. I think as a result, [the court] got itself confused and reached some erroneous conclusions," Marzulla said.

"If this decision is allowed to stand, it really puts our growers or water users in a real pickle because they've invested, and they have orchards and permanent crops in place," said Marzulla. "They must have access to a stable supply of water every year. They've invested heavily on the understanding that their contracts would be followed and enforced, and they sort of had the rug pulled out from underneath."

Representatives for the U.S. government did not immediately respond to a request for comment.

Fresno and its fellow plaintiffs are represented by Nancie G. Marzulla and Roger J. Marzulla of Marzulla Law LLC.

The U.S. is represented by Matthew J. Carhart of the U.S. Department of Justice.

The case is City of Fresno et al. v. U.S., case number 16-1276C, in the Court of Federal Claims.

--Editing by Andrew Cohen.