



No on Prop. 98 – Hidden Agendas Scheme Threatens State's Water Quality and Supply

Virtually all experts agree that California is facing a very serious water crisis. In order to provide safe, clean drinking water to an increasing number of residents, to supply businesses and farms with an adequate water supply, and to preserve water resources and ecosystems, it is abundantly clear that the State of California and local water agencies will need new and varying water projects. However, Prop. 98 – dubbed the “Hidden Agendas Scheme” – threatens virtually all future public and private water projects up and down the state intended to preserve clean drinking water, protect existing water resources, and secure additional water supply. Here's how.

- Either intentionally or through negligence, Prop. 98 would make it illegal to use eminent domain to acquire land and water to develop public water projects.
- The initiative's proposed amendment to California Constitution Article 1, section 19(a) prohibits the taking of private property for "private use." Proposed section 19(b)(3)(ii) defines "private use" as including: **transfer of ownership, occupancy or use of private property or associated property rights to a public agency for the consumption of natural resources** or for the same or a substantially similar use as that made by the private owner; (Emphasis added.)
- Section 19(b)(3)(ii) expressly designates as a "private use" the transfer of property rights to a "public agency" for the "consumption of natural resources." Thus, it is clear that property transfers under eminent domain or threat of eminent domain to a public agency for the purpose of consumption of natural resources (i.e. – water) are prohibited.
- All elements of a public water project involve the "consumption of natural resources". Thus, Prop. 98 would eliminate a necessary tool and jeopardize a vast number of public and private water projects to develop new water delivery systems, enhance water supply, and protect drinking water quality, including:
 - × **Construction of projects to deliver water for domestic use, such as for drinking water, irrigation, commercial or industrial uses**
 - × **Right-of -way for pipelines (underground and above ground) and canals to deliver water to new homes and businesses**
 - × **Acquisition of new well-water sources**
 - × **Projects to conserve and protect the quality of our water resources and the species that rely on these water systems**
 - × **Water rights needed to convey water to farms and agriculture**
 - × **Acquisition of land for pumping sites**
 - × **Right-of-way for new canal around the Delta**
 - × **Acquisition of water rights**
 - × **Acquisition of land for reservoirs**

Paid for by Eminent Domain Reform Now - Protect Our Homes, a committee of homeowners, taxpayers, educators, business, labor, environmentalists, local government and public safety, League of California Cities (Non-Public Funds) and Californians for Neighborhood Protection, a sponsored committee of the CA League of Conservation Voters

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Property Rights Protection Act Could Stop Flow of Essential Water Projects

By - 10/15/2007

Los Angeles Business Journal Staff

By TIMOTHY QUINN

California faces a water crisis that threatens our economy and our environment. From record dry conditions to court-ordered cuts in water deliveries, our water system faces challenges that could affect water supplies in every region of the state in the near future.

Addressing this crisis will require thoughtful policy and the kind of comprehensive solution now being negotiated in a special legislative session on water. The last thing we need is a stealth ballot initiative that could block needed projects that are part of the solution.

That's why it is particularly alarming that a looming ballot initiative – ostensibly dealing with an issue unrelated to water – could literally derail efforts to build the infrastructure and other water projects we need to ensure an adequate supply of safe, clean drinking water.

On its face, the so-called California Property Owners and Farmland Protection Act prohibits government from taking or damaging private property for private use. However, the problem lies with how its proponents have defined "private use" in the fine print of the measure.

Rather than simply stop eminent domain for private development, the ballot initiative defines private use in such a way that could effectively make it illegal to use eminent domain to acquire land and water to develop public water projects. Proposed section 19(b) (3) (ii) defines "private use" as including:

"Transfer of ownership, occupancy or use of private property or associated property rights to a public agency for the consumption of natural resources..."

This single provision could jeopardize a great number of water infrastructure projects that we need, including:

- Acquisition of land for reservoirs, groundwater and surface water storage projects
- Construction of a new Delta conveyance system (More than 25 million Californians and 2.5 million acres of farmland receive water conveyed through the Delta)
- Right-of-way for pipelines and canals to deliver water to new homes and businesses

Proponents of the ballot initiative may claim this was not their intent, or that the language is being misconstrued. However, what matters to the courts (where the issue will ultimately be resolved if the measure passes) is the language in the initiative itself. And in this case, the language very clearly prohibits eminent domain "for the consumption of natural resources," for example, as in the acquisition of property that might be necessary to provide fill material for a necessary reservoir project.

Ambiguous language

Analysis by three separate committees of the Association of California Water Agencies all came to the same conclusion: The ballot initiative contains language that is sufficiently ambiguous to derail needed water projects around the state. That's why the association of water agencies' board of directors recently voted overwhelmingly to oppose the measure, even before its qualification.

The Legislature and governor are to be commended for their efforts to address our water crisis. Unfortunately, this measure cuts at the heart of those bipartisan efforts. Without new water storage projects and other infrastructure improvements, California will not have the water system it needs to support our economy, our environment, businesses or residents.

It is unfortunate that the proponents overreached or misstepped. But they have. This measure is at odds with ensuring a reliable water system for California, and should be opposed by those who care about our economy and our environment.

Timothy Quinn is the executive director of the Association of California Water Agencies.



Fresh produce from our families to yours.

November 13, 2007

Doug Mosebar
President
California Farm Bureau Federation
2300 River Plaza Dr.
Sacramento, CA 95833

Dear Doug,

It is with much regret that I must inform you that Western Growers is opposed to the California Property Owners and Farmland Protection Act (CPOFPA), a proposed ballot initiative co-sponsored by Farm Bureau.

In recent weeks, many of us have had conversations with you and other Farm Bureau leaders regarding the concern that a provision of the initiative might present an avenue for environmental organizations to block future development of surface water storage and conveyance through litigation.

As you know, the initiative states, "Private property may not be taken or damaged for private use," and then in pertinent part defines "private use" as follows:

- (3) "Private use" means:
(ii) **transfer of ownership, occupancy or use of private property or associated property rights to a public agency for the consumption of natural resources** or for the same or a substantially similar use as that made by the private owner;
(emphasis added)¹

Virtually any major state surface water storage or conveyance project must involve the taking of some private property for pumps, pipes, canals and other infrastructure necessary to effectuate the operation of a major dam or conveyance system. The obvious question is whether this provision would block public agencies from acquiring such property for development and/or operation of water storage or conveyance projects.

We have read and considered the competing legal analyses from counsel retained by Farm Bureau (Somach analysis) and counsel retained by the initiative opponents (Martland analysis). The question is not whether one is right and the other wrong. The question is whether the Martland analysis is *plausible*. We believe it is, which means we are left with an open question that can only be resolved by the courts, assuming voters approved the initiative in June, 2008. This is an unacceptable risk.

The Association of California Water Agencies shares our view that the Martland analysis is at least plausible and that the open question created will be answered by the courts:

"Depending upon how broadly consumption of natural resources is interpreted, acquisition of land for groundwater, groundwater

¹ California Property Owners and Farmland Protection Act (initiative #07-0015), Article 1, Section 19 (3)(b)(ii).

storage, surface water, surface water storage, rock quarries, mines and more may be prohibited by the initiative.

...
"There is no way to know how a court will rule, but the fact that the provisions can be open to such broad interpretation is cause for alarm." (Emphasis added.)²

In fact, one environmental organization has already indicated its intent to consider litigation on this very point should the initiative be passed by the voters.³

Eminent domain reform is a legitimate issue, but enactment of a comprehensive surface water storage and conveyance bond measure is of paramount importance to California agriculture. The water supply crisis is doing real economic damage to thousands of California farmers and ranchers right now, and the damage will be much worse next year and in the years to follow.

A coalition of agriculture, business and labor organizations that includes both Western Growers and Farm Bureau has provided critical financial resources to support a fact-finding and research effort exploring the viability of a statewide bond initiative on water storage and conveyance. Even as we work together with Governor Schwarzenegger and Senator Cogdill to produce a legislative solution on water, this coalition effort must go forward and may well result in formation of a campaign committee to qualify a water storage and conveyance bond measure for the November, 2008 ballot. We are all hopeful we will secure voter approval of a water infrastructure bond, whether it comes from the Legislature or is qualified as an initiative. It would be truly tragic if we were to succeed, only to have these voter-approved water projects blocked because an eminent domain initiative created a litigation opening for environmental organizations.

We have a once-in-a-generation opportunity to secure surface water storage and conveyance projects that are the literal lifeline for our industry and we must not see it jeopardized by events within our control. Accordingly, the Board of Directors of Western Growers voted this week to oppose the CPOFPA. The Board also voted to oppose the eminent domain measure sponsored by the League of California Cities ("Homeowners Protection Act," initiative #07-0018) because it fails to protect farmland from being taken through eminent domain for another private party.

We regret that we have been confronted with this situation and hope that with your leadership we can move forward together to address the most pressing needs of California agriculture.

Yours truly,



Thomas A. Nassif
President and CEO

C: Members of Western Growers

² Association of California Water Agencies, State Legislative Outreach Advisory, 8/24/07.

³ "Environmental groups may use Jarvis initiative to block water projects," article by Malcolm MacLachlan, *Capitol Weekly*, 9/27/07.



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Governor worries over bid to limit land seizures

By Kevin Yamamura - Bee Capitol Bureau

Published 12:00 am PDT Wednesday, August 22, 2007

A proposed initiative limiting how governments seize private property has drawn concerns from Gov. Arnold Schwarzenegger and a Republican state senator that it could block construction of dams and a Delta canal.

A legal analysis issued this week by Richard Martland, a former state attorney general official, argues that the eminent domain initiative would prevent government from taking private land "for the consumption of natural resources," including water storage. Martland wrote the analysis for initiative opponents, including environmentalists and local governments.

The initiative is backed by the Howard Jarvis Taxpayers Association and the California Farm Bureau Federation after a U.S. Supreme Court decision in 2005 allowed cities to transfer property from one private owner to another for redevelopment, enraging property rights groups.

Jon Coupal, president of the Howard Jarvis group, charged Tuesday that the Martland analysis was flawed because Coupal believes the initiative does not restrict large public works projects. Proponents have circulated petitions since June and plan to collect the necessary 694,354 signatures without changing the initiative language, he said.

Though the analysis was written for opponents, some state leaders, including one who backed an unsuccessful eminent domain change last year, say the initiative's wording raises eyebrows and demands further legal interpretation.

"As I read it, there's certainly reason for concern for what it means for the future of water projects in California, especially as it pertains to new water storage," said state Sen. Dave Cogdill, R-Modesto, who backed an eminent domain initiative last year. "We'll continue to monitor it, and hopefully we can find some resolution here."

Cogdill carried legislation this year for Schwarzenegger that included a \$5.9 billion bond for new water storage and conservation. The governor and legislative Republicans have made water storage one of their top priorities this year.

The Republican governor spent Tuesday in Los Angeles with U.S. Sen. Dianne Feinstein, D-Calif., at a meeting they convened to explore ways to improve the Sacramento-San Joaquin Delta and California's water system.

Schwarzenegger Communications Director Adam Mendelsohn said, "We are very concerned about this issue and are analyzing the language carefully." He added that anything that would undermine the state's ability to build new water storage would be "a major problem."

John Gamper, director of taxation and land use for the California Farm Bureau Federation, said the initiative is narrowly tailored to restrict government seizure of natural resources derived from a particular plot of land, not public water storage projects such as dams or a canal.

He added that the Farm Bureau, whose members clamor for new water storage in California, would never have drafted an initiative that undermines dams. He said the Martland analysis was "tortured logic."

"Public facilities are clearly exempt and are clearly not included," Gamper said. "That's a public use. We're talking about the transfer of private property for private use."

The dispute hinges on a clause in the initiative that defines "private use" as the transfer of property "to a public agency for the consumption of natural resources or for the same or a substantially similar use as that made by the private owner." Such "private use" property transfers would face new restrictions.

Proponents say that clause pertains only to instances where governments would seize private dams or land that contains resources such as natural gas reserves. But Martland said the clause is so broad that it would hamper public purchases of land for construction of new water storage.

"We don't know if this is an effort to intentionally sabotage the development of new water or whether this is the mother of all drafting errors," said Steve Merksamer, for whose firm Martland wrote the analysis. "But we do know that, as drafted, this is the dagger in the heart of new water projects."

Merksamer said backers would have to resubmit their initiative and recollect signatures if they want to avoid damaging future water projects.

In 2005, the U.S. Supreme Court ruled that cities could seize property for redevelopment after a challenge arose over a Connecticut town's plan to build an entertainment district along a waterfront.

The Howard Jarvis group last year backed a California initiative, Proposition 90, to curtail governments' ability to seize property for use by another private owner. It also required governments to compensate private property owners, a provision critics said would result in reimbursement claims for losses associated with environmental laws.

Schwarzenegger did not announce his opposition to Proposition 90 until the final week of his re-election campaign. The initiative lost with 47.6 percent of the vote.

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August 20, 2007

TO: Eminent Domain Reform Now – Protect Our Homes Committee

FROM: Richard D. Martland

RE: California Property Owners and Farmland Protection Act
07-0015

You have asked whether the California Property Owners and Farmland Protection Act initiative would prohibit the use of eminent domain to construct public water projects. It is our opinion the initiative would prohibit the use of eminent domain to construct or expand projects for the storage and delivery of water for irrigation, domestic, commercial and industrial purposes.

ANALYSIS

The initiative's proposed amendment to California Constitution Article 1, section 19(a) prohibits the taking of private property for "private use." Proposed section 19(b)(3)(ii) defines "private use" as including:

transfer of ownership, occupancy or use of private property or associated property rights to a public agency for the consumption of natural resources *or* for the same or a substantially similar use as that made by the private owner; (Emphasis added.)

The two clauses in subsection (b)(3)(ii) involve two distinct situations: 1) acquisition of private property for consumption of natural resources, and 2) acquisition of private property for the same or similar purpose it is currently used. The issue is whether the first clause precludes the use of eminent domain for the development of public projects for the delivery of water for irrigation, domestic, commercial and industrial purposes.

Proposed section 19(b)(2) of the initiative defines "public use" as including "public facilities." Thus, taking property under eminent domain for "public facilities" would be permissible under the initiative. However, section 19(b)(3)(ii) expressly designates as a "private use" the transfer of property rights to a "public agency" for the "consumption of natural resources." Thus, it is clear that property transfers under eminent domain or threat of eminent domain to a public agency for that limited purpose are not to be treated as a "public use" under 19(b)(2) and are therefore prohibited.

There can be little doubt that water is considered a "natural resource." (*Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 701-02 – “The conservation of other natural resources is of importance, but the conservation of the waters of the state is of transcendent importance”; See also *Meridian, Ltd. v. City and County of San Francisco* (1939) 13 Cal.2d 424, 445; *Cadiz Land Company, Inc. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 92, 95; *County of Imperial v. Superior Court* (June 2007) 3d Dist.Ct.App. C048494, 2007 DJDAR 8843.) And, there can be little doubt that the construction of projects to deliver water for domestic use, such as drinking water, irrigation, commercial or industrial uses reasonably involve the consumption of water. (*Deetz v. Carter* (1965) 2323 Cal.App.2d 851, 854 - domestic use of water includes "consumption for the sustenance of human beings, for household convenience, and the care of livestock.”)

In our opinion, all elements of a public water project involve the "consumption of natural resources." Acquisition of land for reservoir and pumping sites, borrow areas, right-of-way for pipelines and canals, and in some cases acquisition of riparian water rights, are all incidental actions necessary to development of a water project.

Some reservoirs are located on streams (Oroville, Shasta, Folsom) and some are located off-stream (Del Valle, Diamond Valley).¹ The issue is whether the prohibition in section 19(b)(3)(ii) to the transfer of property to a public agency for

¹ Del Valle and Diamond Valley are artificial reservoirs served by pipelines from distant water sources.

the consumption of natural resources encompasses transfers of property for all features of a public water project or only those features located directly on or immediately adjacent to the water source. In our opinion, nothing in the broad phrase "consumption of natural resources" reasonably suggests that the intent of the phrase is to limit the prohibition on transfers of property through eminent domain or under the threat of eminent domain to only specific features of a water delivery project. Whether a reservoir is sited on-stream or off-stream, its purpose is to provide for consumption of water. Similarly, pumping plants, pipelines and canals necessary to transfer water from its source to reservoirs and then to the point of use are all integral features necessary to enable the ultimate consumption of water.

CONCLUSION

It is our opinion that irrespective of the size of a public water project or whether the project involves the creation of a new project or extension of an existing project, if the ultimate purpose is to provide water for domestic use, such as drinking water irrigation, commercial or industrial purposes, the use of eminent domain to acquire the land necessary to construct any feature of the project would be prohibited under proposed section 19(b)(3)(ii).