

Mount Shasta Herald

News

Attorneys argue Nestlé lawsuit

By Deborra Clayton
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The lawsuit brought by McCloud Concerned Citizens against the McCloud Community Services District and the district board members who negotiated and approved the water sale contract with Nestle was heard in Superior Court last Thursday by Judge Roger Kosel.

MCC's attorney Donald Mooney presented the case for a Petition for Writ of Mandate, the action requested by the group to "vacate and set aside the approval and execution" of the contract agreement.

Mooney said the signing of the Nestle contract constituted a project and approval of a project under the California Environmental Quality Act and therefore required an environmental review before it was executed.

Under CEQA guidelines, according to Mooney, a project exists if the actions taken under the agreement will produce changes to the physical environment; if there are potential significant environmental impacts associated with actions taken under the agreement; and, if making the agreement constitutes a discretionary act, one in which a choice is involved as to what is done or agreed to, by a public agency.

Attorney Robert Scoular represented the Community Services District, its board members and Nestle Waters North America, listed on the suit as the real party in interest.

Scoular held that the signing of the Nestle contract was not in itself a project, nor the approval of a project, as defined by CEQA, because the term "project" in that context pertains to "the whole of an action."

"In this case the whole action is directly conditional on CEQA. There can be no action impacting the environment before CEQA compliance," he said.

Mooney contended that one of the cases he cited, *Stand Tall on Principles v. Shasta Union School District* (1991), demonstrates that CEQA projects are also defined by the abdication of future discretionary acts under agreement terms.

In the Stand Tall case, he said, a school board pursuing acquisition of a new school site passed a resolution selecting a preferred site and authorizing its purchase, contingent on CEQA compliance.

Mooney said that, in Stand Tall, the court found that passing the resolution did not commit the high school district to a course of action, did not eliminate its future discretionary actions and so was not an "approval" requiring CEQA compliance beforehand.

"In this case, MCSD has no way out of the contract if the CEQA document doesn't work out," Mooney argued. "And it is unclear what discretionary action the district still has."

He said the contract between Nestle and the district wrongly "contractually obligates the district, regulates conduct and defines the relationship between the parties" before CEQA compliance.

He stated this constituted a prejudicial, or unfair, abuse of discretion on the district's part under CEQA guidelines.

Scoular disagreed. He cited the ruling in the Stand Tall case as an example demonstrating that agreements expressly contingent on CEQA compliance can be made before the environmental review takes place.

"Nestle's option to purchase water is completely contingent on CEQA compliance. There will be no action without the licenses and permits Siskiyou County and other agencies will issue after that compliance and after all legal challenges with standing are settled," Scoular said.

He further stated the Stand Tall ruling showed that where an agency is not bound to an action until CEQA compliance is achieved, the signing of such an agreement does not constitute "approval" of a project under CEQA.

Mooney contended that a project's environmental review must be done at the "earliest possible time" in order to fully inform the relevant agency and the public and provide information about alternatives and feasible mitigations to a proposed project.

"In this case the District has essentially allowed Nestle to tie its hand for future CEQA compliance," he argued.

Mooney said mitigations or alternatives may no longer be legal options for the District, as they could be construed as a breach of contract.

Scoular responded that, "The proposed Nestle project was not sufficiently developed to permit meaningful environmental assessment at the time the contract was signed."

He said because of the timing of the environmental review in this case, "challenges to the final EIR can be based on the actual facts of the actual project."

Additionally, Scoular asserted that the timing of an environmental review is flexible and subject to a public agency's discretion under CEQA law.

Mooney stressed his contention that MCSD had abdicated on its future discretionary actions by signing a legally binding contract with no option to cancel.

He suggested the district has turned over development of the EIR to Nestle and given them sole control over the environmental documents while being contractually bound to accept whatever environmental documents Nestle ultimately presents.

Scoular disputed this claim.

"It is inaccurate to say that Nestle 'controls' the EIR. The county, as the lead agency, is preparing the EIR," he said. "There is no causal link between this contract and the issuance of the permits and licenses needed."

He also held that there is, in fact, "no case or controversy" about the matters raised in the lawsuit.

"What the court wants is CEQA compliance and there will be," Scoular told the judge, reminding him that in fact the EIR process is currently underway.

Judge Kosel said he would study the cited cases carefully, "take the matter into submission and issue a ruling as quickly as possible."