

# \$3B Calif. Dam Project That Violated State Law At A Crossroad

By [Quinn Wilson](#) · 2023-05-26 16:50:44 -0400 · [Listen to article](#)

Activists and Native American tribal members breathed a sigh of relief after a California judge recently ruled a Bay Area water district violated the state's flagship environmental law while examining an environmentally sensitive region for a proposed reservoir expansion, leaving the nearly \$3 billion project's future in limbo.

Judge Theodore C. Zayner **ruled** May 18 that the [Santa Clara Valley Water District](#) violated the California Environmental Quality Act when it improperly claimed two exemptions and conducted disruptive investigatory work in an area near Pacheco Lake without proper impact reviews beforehand. The district will have to cease its operations, set aside its purported exemptions and conduct further environmental review under CEQA.

"It is the court's view and finding that these categorical exemptions cannot reasonably be construed to include within [the district's scope of the project] as described and presented to the court," Judge Zayner said in his order.

The water district has sought to expand the existing water capacity of the Pacheco Reservoir for years, from 5,500 acre-feet to up to 140,000 acre-feet, it said. In April 2022, the district filed a notice of exemption, arguing the project qualified for Class 4 and 6 exemptions under CEQA, according to an [amended petition](#) filed in August by advocacy group Stop the Pacheco Dam Project Coalition.

Class 4 exemptions apply to projects that would only make minor alterations to the land, while Class 6 status goes to projects that are collecting information without causing major disruptions to the environment, according to the judge's order.

Osha Meserve, an attorney with Soluri Meserve ALC who represents Stop the Pacheco Dam Project Coalition, told Law360 on Wednesday that the activist group has been opposed to the dam project as a whole. The coalition of plaintiffs includes the [Sierra Club](#) and the Amah Mutsun Tribal Band, an unrecognized tribe comprised of descendants of the indigenous people from the surrounding areas, which include San Juan Bautista, California, and Santa Cruz.

"We think [the dam project has been] indicative of the district's failure to be honest and

straightforward about the impacts of the activities it's carrying out," Meserve said in an interview.

The coalition is now waiting on the court clerk to sign off on its [proposed writ of mandate](#) filed Tuesday, to which the water district has already agreed to comply, Meserve said. The water district had already informed Meserve that it's demobilizing its equipment, she added.

The district has stated it is taking the order seriously, and is evaluating its next steps.

"Valley Water's staff and consultants will continue working on the Pacheco project's design, environmental assessment, and financial feasibility," the district said in a statement.

## **The Project**

The dam expansion project was first proposed in 2017 in an effort to increase the amount of water the district can store in its reservoirs to combat the effects of climate change, according to the district. The project was also expected to reduce flood risk along the adjacent Pacheco Creek and downstream Pajaro River by holding back peak flows, as well as create a new habitat for a threatened local species of trout.

The proposed site lies near the southeastern edge of Santa Clara County, west of the extensive San Luis Reservoir, and would take up the footprint of the much smaller reservoir that makes up Pacheco Lake, according to Meserve. The water district would bring water from the larger reservoir to the east to the updated Pacheco basin during wet years.

But the project would require the water district to purchase around 1,500 acres of land that includes working ranches and wildlife habitats through eminent domain, Meserve said.

The site of the proposed dam project is also seismically active, geologically technical and just "very crumbly" terrain, Meserve told Law360. Due to these factors, the estimated cost of the project has skyrocketed from initially being \$800 million to roughly \$2.89 billion.

"There's an economic feasibility issue as well," the activists' attorney said.

As a part of the water district's investigative process, it would need to conduct more than 200 geotechnical borings to determine the soil composition and other geological conditions at the

site. The digging would include creating as many as 57 test pits, each 10 to 20 feet long, three feet wide and 20 feet deep, according to the judge's May 18 order.

The land that would be flooded for the new reservoir is also home to various protected species, including golden and bald eagles, California red legged frogs, and tiger salamanders, the amended petition argued.

## **The Site's Cultural History**

The indigenous residents of the site's surrounding area have inhabited the lands for roughly 15,000 to 20,000 years, according to Valentin Lopez, chair of the Amah Mutsun Tribal Band. The area known as Pacheco Pass, which connects the sprawling interior San Joaquin Valley and the coastal San Juan Valley, served as an indigenous trail and trade route for centuries, he said.

"This Pacheco Pass area is an east-west corridor, traveling from the [Sierra Nevada Mountains] to the coast," Lopez told Law360. "When we'd hold ceremonies [in the pass], tribes would come as far from Yosemite."

When the tribal band first heard about the project, it opposed it immediately, sending an opposition letter to the district and passing a tribal resolution, the tribe's chair said. But after it was clear the district was still going to go forward with archaeological surveys, tribal members requested to be present as Native American monitors to preserve their cultural history.

Throughout the surveys, tribal members identified as many as 44 archaeological sites at the project location, which included bedrock mortars, a large ceremonial dance pit, house pits and rock art, Lopez said.

When Judge Zayner made his ruling, Lopez said, the tribe was very happy with the decision, mostly because it further legitimized CEQA.

"We made sure that we kept the land sacred," he said.

## **The Path Forward**

Whether the district would appeal the decision is a mystery, according to Meserve. However, based on the judge's statutory interpretation of the ruling, she thinks this makes an appeal less

likely. When asked for comment on a possible appeal, the district did not address it in its statement.

To mitigate the desire to increase the reservoir, Meserve suggested the district could consider just increasing the existing dam's height. Or perhaps the recent wetter winters and significant cost increases with the project will have the district consider other options and locations, she said.

"People get simplistic about" building new dams, Meserve said. "But there's a reason that the existing dam sites have already been built where they were."

Lopez said the water district already loses a lot of water because of its old pipes, and it could try to just update the piping system to mitigate the issue. But the tribe's chair spoke cautiously about the possibility the district could soon have a legal path to complete the project with the ever-evolving nature of CEQA.

"There's a lot of pressure to streamline the approval process for development" in California, Lopez said. "A lot of those efforts include bypassing CEQA laws, so our tribe is watching that very carefully."

On May 19, California Gov. Gavin Newsom introduced a bill package including steps to expedite the legal processes surrounding infrastructure projects, such as water-related work. The optics of the governor potentially bypassing the traditional legislative process to add new CEQA reforms on the books has garnered pushback from environmentalists.

"The magnitude of these policies are massive and moving them through the budget process, which is exclusive and opaque, does not offer public forum and transparency," California Environmental Voters, a climate advocacy group, said May 19 in a statement.

While Meserve doesn't believe these particular CEQA reforms will have a direct impact on the Pacheco Pass dam project, she is well aware of the shifting winds regarding CEQA in California. She underscored that the reform efforts will likely hold some political weight because labor unions are behind them.

Newsom has openly called for CEQA reform this year, [in particular](#) after a student housing project was halted in Berkeley, after a state appeals panel said the University of California didn't properly assess noise impacts in its environmental review. Various other pieces of

legislation have been introduced regarding CEQA this legislative session, including one bill aiming to undo the noise ruling.

Meserve views the reform efforts a little more cynically, seeing it as developers who are tired of having to comply with the law, she said.

"If you can't comply with the law, then I guess you just change it," Meserve said.

The coalition is represented by Osha R. Meserve, Patrick M. Soluri and James C. Crowder of Soluri Meserve ALC.

The water district is represented in-house by J. Carlos Orellana and Rita S. Chan, and by Nicole H. Gordon and Margaret M. Sohagi of [The Sohagi Law Group PLC](#).

This case is Stop the Pacheco Dam Project Coalition et al., v. The Santa Clara Valley Water District et al., case number 22CV399384, in the Superior Court of the State of California, County of Santa Clara.

--Editing by Covey Son.

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