MINASIAN, SPRUANCE,
MEITH, SOARES &
SEXTON, LLP
ATTORNEYS AT LAW
A Partnership Including Professional Corporations

1681 BIRD STREET
P.O. BOX 1679
OROVILLE, CALIFORNIA 95965-1679

PAUL R. MINASIAN, INC.
JEFFREY A. MEITH
M. ANTHONY SOARES
DAVID J. STEFFENSON
DUSTIN C. COOPER

WILLIAM H. SPRUANCE,
Of Counsel

MICHAEL V. SEXTON,
Of Counsel

TELEPHONE:
(530) 533-2885

FACSIMILE:
(530) 533-0197

October 10, 2007

To: ACWA Legislative Committee Districts

Re: ***California Property Owners and Farmland Protection Act – Eminent Domain Initiative***

Dear Ladies and Gentlemen,

This letter is to inform you of the voter initiative entitled the "California Property Owners and Farmland Protection Act" ("CPOFPA") and its potential impacts on the ability of governmental agencies to utilize the power of eminent domain. The initiative is sponsored by the Howard Jarvis Taxpayers' Association, the California Farm Bureau, and the California Alliance to Protect Property Rights. The CPOFPA is a direct response to recent court cases, including the 2005 Supreme Court case *Kelo v. The City of New London*, which have been interpreted by some to expand the power of eminent domain to seize private property for quasi-public purposes.

The CPOFPA would amend the constitution and have the potential to make it more difficult and expensive for local agencies to acquire property for water systems and facilities, and in some cases would prohibit the use of eminent domain for such acquisitions. There is debate among proponents and opponents regarding the breath of the potential affect, but all sides agree that, as written and proposed, it would prohibit the use of eminent domain to acquire water, water rights, materials required for construction of water facilities (e.g., rock, aggregate, etc.), or mitigation or buffer property required for a storage reservoir.

CPOFPA LANGUAGE

Current eminent domain law requires that agencies condemn property only for public purposes. The CPOFPA similarly states that "Private property may not be taken or damaged for private use." The controversy regarding this language arises from the definition given for "private use", which includes, "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..."

On its face, CPOFPA would prohibit, for instance, the condemnation of a private water company by a public water agency. The water service from the agency to the private company customers would be a same or substantially similar use. The initiative does not temper the restriction to allow condemnation where it would be in the best interests of the public. If CPOFPA passes, future acquisitions of private utility companies would necessarily be through negotiated sales only.

The above restriction, though severe, provides a clear demarcation line for both proponents and opponents of the measure. However, the definition of a private use as including transfer of ownership for "the consumption of natural resources" has generated much debate. All sides of this issue agree that the language would prohibit the acquisition of land in order to obtain its appurtenant water rights for consumptive purposes, to obtain timber or mineral rights, or other uses resulting in direct consumption of natural resources. The current debate centers on whether that restriction would prohibit the acquisition of property for the construction of reservoirs or other water storage or conveyance projects. The CPOFPA language is broad enough that it has the potential to be interpreted by courts as restricting the acquisition of property associated with, or which use is necessary for, the consumption of natural resources.

CPOFPA INTERPRETATIONS

ACWA was provided a copy of a legal analysis by Richard Martland of the law firm of Nielsen, Merksamer, Parrinello, Mueller & Naylor, which concludes that the CPOFPA language would likely restrict the acquisition of property for uses associated or related to the consumption of natural resources. Mr. Martland noted that previous California appellate cases indicate that the delivery of water for drinking water, irrigation, and commercial or industrial uses involve the consumption of water. He notes that there is nothing in the CPOFPA which restricts the interpretation of "for the consumption of natural resources." That opinion has kick started a debate within the water community regarding the CPOFPA language.

In response to this opinion, Howard Jarvis Tax Payers' Association issued a counter analysis from Stuart Somach of Somach, Simmons & Dunn. Mr. Somach focused on the language permitting a public agency to use the power of eminent domain for "public uses, such as roads, parks, and public facilities." He reasoned that public agencies must be able to take property to construct public facilities for that language to have any meaning. He concluded that the taking of property to construct a water storage or conveyance facility is only for the purpose of that construction and not the consumption of water.

I participated in an ACWA Legislative Committee teleconference on September 5th, in which committee members debated the above analysis and CPOFPA language. The Legislative Committee general consensus was that, regardless of the drafters' intent, if the language is ambiguous enough now that water attorneys' opinions differ on the potential interpretation,

nobody can predict what a judge will do with that language during an eminent domain proceeding several years from now. On that basis, the vast majority of Legislative Committee members are opposed to the CPOFPA as it is currently written. Our firm concurs with that position.

CONCLUSION/DISCUSSION

On September 28th, ACWA officially released a public notice that it is opposing the CPOFPA. ACWA has taken the position that it will oppose any initiative or measure which has the effect of limiting a water agency's right to make use of property acquired by eminent domain or that adds to the costs or burdens imposed on water agencies in the condemnation process.

We will keep you advised of the progress of the CPOFPA as it progresses through the initiative process, and of the efforts, by ACWA and others, to amend it or oppose it.

Please contact me if you have any questions or concerns.

Sincerely,

MINASIAN, SPRUANCE, MEITH, SOARES & SEXTON, LLP

By:
DAVID J. STEFFENSON

DJS:aw