Probate Examiner Recommendations: For further information regarding a probate matter listed below you may contact the Probate Document Examiner at **559-730-5000 ext #1353**; the Document Examiner (South County Justice Center) at **559-782-3700 ext #2342**. The Probate Calendar Clerk may be reached at **559-730-5000** Option 4, then Option 6.

Civil Tentative Rulings & Probate Examiner Recommendations

Current Tentative Rulings

The Tentative Rulings for *Tuesday, July 2, 2024*, are:

Re: Friant Water Authority vs. Eastern Tule Groundwater Sustainability Agency

Case No.: VCU306343

Date: June 25, 2024

Time: 8:30 A.M.

Dept. 2-The Honorable Bret D. Hillman

Motion: ETGSA's demurrer and motion to strike

Tentative Ruling: The demurrer is overruled; the motion to strike is denied.

Plaintiffs, the Friant Water Authority (FWA) and the Arvin-Edison Water Storage District (Arvin-Edison), sue the Eastern Tule Groundwater Sustainability Agency (ETGSA) for breach of a January 2021 settlement agreement and breach of the implied covenant of good faith and fair dealing. Relatedly, plaintiffs allege a cause of action for declaratory relief, seeking, in effect, a declaration that ETGSA is obligated to take actions that, plaintiffs allege, ETGSA is obligated to take under the agreement.

FWA and ETGSA are both public agencies, and their settlement agreement arose within a space of overlap in their respective authorities to address the issue of reduced conveyance capacity of the Friant-Kern Canal caused by land subsidence.

On its surface, the agreement principally provides for ETGSA to pay money to FWA in exchange for an FWA covenant not to sue, and, eventually, a release. This occurred in a space of overlap because FWA has authority with respect to operation, maintenance, repair, and replacement of the Canal and ETGSA has authority to address land subsidence incident to its responsibilities as a groundwater sustainability agency (GSA).

ETGSA promised to collect contractually described groundwater extraction penalties from landowners within its jurisdictional boundaries, and to pay over to FWA, 91% of those penalty moneys "on a rolling basis" (according to the provisions of the agreement bearing on the circumstances that all parties impliedly suggest obtain). As a GSA, ETGSA is empowered to impose penalties upon any "person who extracts groundwater in excess of the amount that person is authorized to extract under a rule, regulation, ordinance, or resolution adopted pursuant to [Water Code] Section 10725.2," in an amount "not to exceed five hundred dollars ($500) per acre-foot extracted in excess of the amount that person is authorized to extract." (Wat. Code, § 10732, subd. (a)(1).)

Plaintiffs' lawsuit is about ETGSA's alleged failure to collect penalties in the amount that it allegedly contractually agreed to collect. There are multiple theories that coalesce around two central contentions.

One is that ETGSA improperly inflated the amount of groundwater landowners could extract before becoming subject to penalties, also known as "Sustainable Yield." This was accomplished, according to plaintiffs, by ETGSA improperly allocating its landowners "Precipitation Credit."

Because average annual precipitation was a known "component" of ETGSA's determination of the amount of "Sustainable Yield" prior to the settlement, plaintiffs apparently mean to allege ETGSA improperly inflated the precipitation component of "Sustainable Yield" and, in so doing, effectively issued "free Precipitation Credit." Another component of the "Precipitation Credit" contentions is that ETGSA "subtracted" the alleged credit amount it issued in 2020 (referred to by plaintiffs as the "2020 Precipitation Credit Giveaway") from an amount allegedly "budgeted for its Penalty Program – i.e., the water from which … Penalties are to be imposed and the resulting funds collected and paid to FWA."

The other central contention is that ETGSA utilized an improper metric for determining allowable excess groundwater extraction (i.e., "transitional pumping") in 2021 and 2022 based on something other than "actual transitional water pumped over the next five years (2021-2026)," which, according to plaintiffs, ETGSA was contractually obligated to utilize. According to plaintiffs, this resulted in ETGSA under-collecting penalties.

Unrelated to penalties, plaintiffs allege ETGSA failed to "[c]reate a standing Land Subsidence Management and Monitoring Committee … and [to] include a[n] FWA representative on that committee … ."

Finally, presumably encapsulating all the above, plaintiffs allege ETGSA failed to "[t]ake commercially reasonable efforts to implement applicable management actions in a manner that will limit further subsidence impacts to the [Friant-Kern] Canal …"

ETGSA has demurred and moved to strike on the grounds that the plaintiffs' first amended complaint (FAC) is "a thinly disguised attempt (1) to direct how the ETGSA Board of Directors must carry out functions as a GSA under SGMA [the Sustainable Groundwater Management Act], and (2) to make ETGSA responsible to pay damages for land subsidence, all under the guise of contract claims." ETGSA further contends plaintiffs' claims are based on an erroneous construction of the settlement agreement.

Separation of powers issues

ETGSA raises compelling arguments that the FAC, at least as far as it concerns ETGSA's penalty collection, runs into significant separation of powers issues.

Indeed, ETGSA has no power to collect any penalties except as has been conferred on it by law (*Friends of Kings River v. County of Fresno* (2014) 232 Cal.App.4th 105, 117 [181 Cal.Rptr.3d 250] and the power conscripted by the parties in their agreement for ETGSA to satisfy its collection obligations is a power under Water Code section 10732 that does not, on its face, authorize collection of penalties to meet contractual obligations.

That said, the manner in which ETGSA is alleged to have "improperly" issued "Precipitation Credit" and failed to determine "transitional pumping" "based on actual transitional water pumped over the next five years (2021-2026)," and the related separation of powers implications, are not matters the court finds appropriate to resolve definitively at the pleading stage, prior to further development of the evidence, if any, supporting plaintiffs' contentions. It is not clearly evident to court, from ETGSA discussion of relevant authority, that it is immunized from contract claims arising from alleged impropriety in its manner of collecting penalties in the circumstances presented in the FAC.

Construction of the agreement

The court finds further development of the evidence is required before it can determine, as a matter of law, that the agreement is not reasonably susceptible to the plaintiffs' interpretation in the FAC. (See *Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 909 [187 Cal.Rptr.3d 452].)

The parties' disputes appear to significantly concern the determination of "transitional pumping."

The court gathers, from parties' respective pleadings and matters of which it may take judicial notice, that the components of this determination are historical annual averages of all of the following: groundwater extraction, "Native Sustainable Yield" (defined in ETGSA's rules and regulations), and precipitation.

The court additionally surmises that "transitional pumping," for any given year, would be determined by subtracting the "Native Sustainable Yield" and precipitation historical annual averages from the historical annual average of groundwater extraction, and then multiplying the result by a percentage, applicable to that year, according to a predefined "ramp down" schedule in ETGSA's groundwater sustainability plan.

The court cannot determine, however, precisely the parties' respective contentions as to how the penalty payment terms of the agreement interface with the above-described components of the "transitional pumping" determination.

A key provision at issue is section 1.B of the agreement, which states: "ETGSA shall set a penalty amount to collect Tier 1 penalty money [i.e., penalties for allowed "transitional pumping"] not received in year 2020 based on actual transitional water pumped over the next five years (2021-2026), thus increasing the amount of penalties expected to be received by ETGSA in the earlier years of the transitional pumping penalty program."

Neither side of the dispute makes a particularly compelling argument for how section 1.B of the agreement should be interpreted. That said, accepting the allegations of the FAC as true, plaintiffs ultimately allege, with respect to water years 2022 and 2023, ETGSA "failed to apply the methodology required under Section 1.B of the Agreement, which requires the amount to be set based on 'actual transitional water pumped.' "

While the court cannot discern what it means to set "a penalty amount … based on actual transitional water pumped over the next five years (2021-2026)," either "to collect [penalties] not received in year 2020" or to set penalties in any other year (i.e., 2022 and 2023), ETGSA's pleadings do not suggest a basis for concluding that the allegation ETGSA's failed to apply the "methodology" set forth in section 1.B is not supported by a reasonable construction of the agreement.

Rather than explain what reasonable construction of the provision the court should ascribe to it, ETGSA merely contends that because FWA acknowledged, in another section 1.C, "that the initial penalties set [in October 2020] are consistent with this Agreement and reflect ETGSA's agreement to collect penalties not collected in year 2020 based on actual transitional water pumped over the next five years (2021-2026)," that FWA necessarily conceded, in the agreement, "that ETGSA correctly set penalties in the manner contemplated by the Agreement for 2021."

ETGSA's contention has a ring of persuasiveness to it, but, ultimately, the court cannot find plaintiffs' allegations are inconsistent with a reasonable construction of the agreement if it cannot determine how section 1.B actually affects the manner in which "transitional pumping" is determined.

The court surmises that "under the hood" specifics concerning the determination of the constituent historical annual average components of "transitional pumping" indicated above are at the heart of the parties' disputes concerning ETGSA's applied "methodology" in determining penalties, and, accordingly, further development of the evidence is necessary before the court can ascertain a reasonable construction of the provisions of the agreement at issue and whether plaintiffs' contentions are consistent with such construction.

Similarly, the court finds that further development of such evidence is necessary before it can properly consider the potential implication of separation of powers concerns.

The "Land Subsidence Management and Monitoring Committee"

The court does not find that ETGSA's submission of judicially noticeable information supports striking the allegation that it failed "to create a standing Land Subsidence Management and Monitoring Committee to recommend additional management actions to limit further subsidence and include a FWA representative on that committee."

Plaintiffs' opposition supports that its allegation cannot be deemed false, as a matter of law, based on ETGSA's own judicially noticed submissions. Plaintiffs note that ETGSA's submission suggests there was a "Monitoring" committee formed, and a separate "unidentified 'ad hoc' " "Management" committee on which no FWA representative has been appointed to serve.

The court is additionally not persuaded that ETGSA is immunized from contract claims arising from its express contractual promises with respect to the subsidence committee by virtue of its separation of powers arguments. The authorities cited by ETGSA do not support that it cannot be held to its contractual promise to form a committee it had determined to form and to hire an FWA representative as a member.

Motion to strike Paragraph 18.b of the FAC, at page 7, lines 6-7

The discussion above covers the matters at issue in the motion to strike (which are generally the same issues raised on demurrer), except for one.

ETGSA moves to strike a bolded heading to subpart b of paragraph 18 of the FAC, which reads: "**Implement a Groundwater Accounting Action and Transitional Pumping Penalty Program that Generates, at Minimum, $220,000,000 in Penalty Revenues:**" Here, plaintiffs introduce a series of allegations concerning the interplay of the ETGSA's penalty collection functions and the penalty provisions of the agreement.

The court agrees that the heading language presents as a misleading citation to section 1.A of the Agreement, which states in full as follows: "ETGSA shall approve and maintain a volumetric penalty amount per acre foot consumed on transitional pumping as defined in the ETGSA GSP in an amount that will achieve, at minimum, the collection of $220,000,000.00 (two hundred million dollars and zero cents), *if the anticipated transitional pumping of 1,034,553 acre-feet actually occurs*." (Emphasis.)

Plaintiffs, in their opposition, strategically dodge ETGSA's' central contention, which is that it did not unconditionally commit contractually to collect a minimum of $220,000,000.00 in "penalty revenues."

Plaintiffs dodging of the issue is facilitated by the agreement's inclusion of a penalty *collection* provision at section 1.A (which provides for *collection* of a *minimum* of *$220,000,000.00* in penalties, "if the anticipated transitional pumping of 1,034,553 acre-feet actually occurs"), and a penalty *payment* provision at section 3.A, which, as pertinent under the circumstances here, states: "… ETGSA shall *pay* up to a *maximum* of two hundred million dollars *($200,000,000.00*) of penalty monies to FWA on a rolling basis." (Italics.)

Plaintiffs essentially dodge the contention that they falsely allege the agreement requires an unconditional *collection* of a minimum of $220,000,000 by plucking ETGSA's mention of section 3.A to assert that ETGSA falsely argues the FAC "alleges that FWA is 'guarantee[d]' $200 million in penalties from the pumping of overdraft water." Plaintiffs then follow with another deceptive partial citation to section 1.A (though they correctly identify it as a separately stated contractual obligation), again omitting the limiting condition: "… if the anticipated transitional pumping of 1,034,553 acre-feet actually occurs."

The court can and does find that section 1.A of the agreement does not state an unconditional obligation to collect a minimum of $220,000,000.00 in penalties, as a reasonable construction of the provision necessarily requires reading "if the anticipated transitional pumping of 1,034,553 acre-feet actually occurs" as a limiting condition.

The court cannot, however, discern that the FAC expressly asserts—though it clearly suggests by its partial citation of section 1.A—that the agreement provides an unconditional minimum for the collection of penalties in section 1.A, merely because the heading portion of paragraph 18.b of the FAC appears to be a selectively omissive citation of section 1.A.

Accordingly, the court denies the motion to strike as to the challenged portion of the complaint, but expressly finds that section 1.A of the agreement does not state an obligation to collect an unconditional minimum of $220,000,000.00 and is, obviously, subject to the following limiting condition: "… if the anticipated transitional pumping of 1,034,553 acre-feet actually occurs."

Conclusion

Based on the foregoing, the court does not find that the FAC fails to state valid causes of action as a matter of law or that the challenged portions of the complaint should be stricken in the alternative. Accordingly, the court overrules the demurrer and denies the motion to strike.

If no one requests oral argument, under Code of Civil Procedure section 1019.5(a) and California Rules of Court, rule 3.1312(a), no further written order is necessary. The minute order adopting this tentative ruling will become the order of the court and service by the clerk will constitute notice of the order.

Re: Jane DOE 1 R.W. vs. Visalia Unified School District

Case No.: VCU294247

Date: July 2, 2024

Time: 8:30 A.M.

Dept. 2-The Honorable Bret D. Hillman

Motion: Defendant's Motion to Stay

Tentative Ruling: To deny the motion

Facts