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STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
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Arnold Schwarzenegger, *Governor*

November 18, 2005

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County of San Bernardino
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Re: Public Works Case No. 2005-026
Tree Removal Project
County of San Bernardino Fire Department

Dear Messrs. Carroll, Reitz and Scolastico:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to California Code of Regulations, title 8, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the tree removal project ("Project") is not a public work and therefore is not subject to the payment of prevailing wages.[1]

Factual Summary

The Project is being undertaken by County of San Bernardino/San Bernardino County Consolidated Fire Department ("County Fire"), which is awarding contracts to qualified timber operators to cut down pre-designated trees located on private property in or around the San Bernardino mountains. The trees pose a fire risk because they are dead, dying or diseased as a result of drought or beetle infestation. County Fire will control, carry out and pay for the Project, using federal grant funds from the National Resources

[1] The Department received separate requests for a public works coverage determination from both the Southern California Labor/Management Operating Engineers Contract Compliance Committee and the County of San Bernardino/San Bernardino County Consolidated Fire Department. Because the two requests concern the same Project, they have been assigned the same above-referenced case number and are addressed as one in this determination.

Conservation Service ("NRCS"), a federal agency. County Fire expects the Project to take about two years, and not be repeated.

County Fire uses one of several versions of a standard contract to award the work. Each contract includes one of three scopes of work, depending upon whether the work is to be performed on residential yards ("Neighborhood Blocks"), on larger, wooded, undeveloped land ("Large Parcels") or on an emergency basis ("Emergency").

Under all three scopes of work, the Project requires the felling of pre-designated trees to a stump no more than eight inches in height, the chemical treating of the exposed stumps and the removal of the felled trees and debris from the property. In addition, the Large Parcel scope of work requires the contractor to perform the following provisional measures to ensure that the property is left in its original condition: (1) backblading (smoothing) skids trails created by the contractor when removing felled trees from the property; and (2) spreading wood chip mulch on exposed ground and making dirt mounds (waterbars) to prevent high-velocity rain run-off from eroding the soil.[2] Finally, the Large Parcel scope of work also provides that wood debris is to be recycled wherever possible and that waste products from vehicles and equipment be properly disposed of.

Analysis

A "public work" is defined by Labor Code section 1720(a)(1)[3]. In pertinent part, that statute provides, "'public works' means: … Construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds … ." The Project is being done under contract between County Fire and qualified timber operators. "Public funds" includes state, local and/or federal money. Cal. Code Regs., tit. 8, § 16000. The Project is therefore being paid for out of public funds, including federal funds from the NRCS. The only issue presented here is whether the Project involves a type of work enumerated in section 1720(a)(1).

First, Southern California Labor/Management Operating Engineers Contract Compliance Committee ("Operating Engineers") argues that the Project is alteration. "To 'alter' is merely to modify without changing into something else," and that term applies "to a changed condition of the surface or the below-surface." *Priest v. Housing Authority* (1969) 275 Cal.App.2d 751, 756. "Alter" as defined by

[2] The Neighborhood Blocks and Emergency scopes of work require these additional measures only when conditions dictate the need for such work.
[3] All statutory references herein are to the Labor Code, unless otherwise specified.

Webster's Third New International Dictionary (2002) at page 63 is "to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) without changing into something else." Thus, with regard to land, under these definitions to alter under section 1720(a)(1) is to modify a particular characteristic of the land.

The tree felling involved here is performed by cutting trees down to a stump that have been pre-designated as a fire risk. This work does not require digging into or disturbing the surface of the earth. Before the work is performed, the parcels on which the trees are located consisted of residential yards or larger, undeveloped wooded areas. After the work is performed, these parcels will not be noticeably different from before. They will continue to be residential yards or larger, undeveloped wooded areas. Under the facts of this case, the felling of individual dead, diseased or dying tress does not modify any particular characteristic of the land and therefore does not meet the definition of alteration within the meaning of section 1720(a)(1).

The Large Parcel scope of work also includes work undertaken to minimize the Project's impact on the environment and to mitigate the risk of future soil erosion that might result from the tree felling. Specifically, this work includes backblading skids trails, spreading mulch and creating dirt mounds. These are provisional measures that will help preserve the land in its original, non-eroded condition. After this work is completed, the affected parcels will still be large, undeveloped wooded areas. Like the tree felling, this work does not modify any particular characteristic of the land and therefore does not meet the definition of alteration within the meaning of section 1720(a)(1).

Operating Engineers' argument that this work is alteration under *Priest v. Housing Authority of* Oxnard (1969) 275 Cal.App.2d 751 is rejected. The work found to be alteration in *Priest* was the removal of pipe from underneath the surface of the land and rough grading of the surface of the land in order to clear the land of a burned down wartime housing development and make it suitable for farming. The facts here are distinguishable in that the tree removal work does not modify the land. PW Case No. 2001-066, *Excavation Work at Willow Lake Water Treatment Facility* (March 29, 2002), also cited by Operating Engineers, is likewise distinguishable. *Willow Lake* found work of excavation, clearing and grading of land - including the removal of existing structures - to be alteration because it was done in preparation for construction. Unlike in *Willow Lake*, the parties here are not removing all the physical features from a piece of land in preparation for construction and thereby modifying it.

Operating Engineers also analogizes the work in this Project to the work in PW Case No. 2000-036, *Carlson Property Site Lead Affected Soil Removal and Disposal Project* (May 31, 2000), which was found to be alteration. Like *Priest* and *Willow Lake*, *Carlson* is also factually distinguishable. The scope of work in *Carlson* was similar to that in *Willow Lake*: the excavation and removal of concrete, lead-contaminated soil and a tree, along with grading, hydroseeding and installation of an impermeable membrane and temporary shoring. The Project here, by contrast, does not modify the landscape, as did the work in *Carlson*.

In sum, because this Project does not involve alteration, it does not meet the type of work element of section 1720(a)(1) and therefore is not a public work. Because this Project is not a public work, it is unnecessary to analyze the applicability of section 1720.3 or section 1772 with regard to the hauling away and recycling of the wood debris.

Operating Engineers advances several alternative arguments in favor of coverage. It argues that the Project is "maintenance" pursuant to section 1771. California Code of Regulations, title 8, section 16000, which sets forth the definition of maintenance, limits coverage of maintenance to work performed on a publicly owned or publicly operated facility. The work here is being performed on private property, not on a *publicly* owned or operated facility. In addition, this work will be performed one time only, so it is not of a routine, recurring or usual nature. Therefore, the Project is not maintenance for purposes of section 1771.

Operating Engineers also argues that the Project is "demolition" under *Priest v. Housing Authority of the City of Oxnard*, *supra*, 275 Cal.App.2d 751. In that case, the Court held that demolition involves tearing up and removing those things that were previously constructed. The trees at issue here are not "constructed." Therefore, their removal does not constitute demolition.

Operating Engineers further argues that the Project is "repair" because the removal of dead and diseased trees is "necessary to maintain the forests in a safe manner," relying on PW Case No. 2001-060, 2001-2002 *Levee Maintenance Project, Natali Levee Rehabilitation Project, San Joaquin County Reclamation District No. 684* (July 1, 2000). To repair is, essentially, to fix something that is broken.[4] The purpose of the Project is to prevent forest

[4] See, e.g., *Piledrivers' Local Union v. City of Santa Monica* (1984) 151 Cal.App.3d 509, 513, which states, "'To repair means to mend an old thing'."

fires, not to repair or rehabilitate a structure that is broken, as was the case in *Natali Levee*.

Finally, Operating Engineers contends that contractors performing similar work for Southern California Edison and California Department of Transportation are receiving prevailing wages. These projects are not before the Director, and necessarily will involve different facts, circumstances and applicable law. The payment of prevailing wages on other projects does not determine whether prevailing wages must be paid on this one; each project must be examined on a case-by-case basis.

County Fire contends that the Project is not covered because the tree removal work is being performed entirely on private property. As noted in PW Case No. 2000-036, *Carlson Property Site Lead Affected Soil Removal and Disposal Project* (May 31, 2000), "whether a project is a public work … is not determined by whether the work is performed on private or public land."

For the foregoing reasons, under the facts of this case, the Project is not a public work and therefore does not require the payment of prevailing wages.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

John M. Rea
Acting Director