

DEPARTMENT OF INDUSTRIAL RELATIONS

**Christine Baker, Director**

Office of the Director

1515 Clay Street, 17<sup>th</sup> Floor

Oakland, CA 94612

Tel: (510) 286-7087 Fax: (510) 622-3265



January 25, 2016

Arthur J. Wylene  
Office of County Counsel  
County of Tehama  
727 Oak Street  
Red Bluff, CA 96080

Re: Public Works Case No. 2015-017  
C&R Ranch Habitat Improvement Project  
Tehama County

Dear Mr. Wylene:

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 Labor Code section 1773.5<sup>1</sup> and 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 C&R Ranch Habitat Improvement project (Project) is a public work subject to California prevailing wage requirements and is not excepted from such a finding pursuant to Fish and Game Code (Fish & G.) section 1501.5.

### **Facts**

On February 13, 2015, the California Wildlife Conservation Board (WCB), the Resource Conservation District of Tehama County (RCD) and C&R Ranch (C&R) entered into a Grant Agreement (Agreement). The Agreement provides funding for habitat restoration work to be carried out on property owned by C&R and involves watershed improvements, enhancements to water distribution systems, fencing, and the planting of flora. WCB agreed to fund the Project through the provision of a grant to RCD not to exceed \$270,000.00.

RCD requested a coverage determination (Request for Determination) and contends that the Project is exempt from prevailing wage requirements under Fish & G. Code section 1501.5 because: (1) C&R is not a party to the Agreement, therefore the Agreement is a contract between two public agencies; and (2) *arguendo*, even if C&R were a party to the Agreement, Fish & G. Code section 1501.5, does not require that a contract be exclusively between public entities, Indian tribes, and/or nonprofit organizations in order for the contract to be excepted from generally applicable provisions of the Code relating to public works and prevailing wage determinations.

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise indicated.

### Discussion

Section 1771 generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a)(1) defines “public works” as “[c]onstruction, alteration, demolition, installation, or repair work done under contract, and paid for in whole or in part out of public funds . . . .”

It is undisputed that the Project involves construction done under contract and paid for in whole or in part out of public funds in the form of “a grant from the California Department of Fish and Wildlife... through the California Wildlife Conservation Board.” (May 15, 2015, Letter Request from Contractor Compliance & Monitoring, Inc., on behalf of RCD, p. 1.) RCD contends, however, that despite the \$270,000 WCB grant, the work to be performed pursuant to the Agreement is excepted from the relevant prevailing wage requirements by application of Fish & G. Code section 1501.5.

Fish & G. Code section 1501.5 specifies the categories of contracts for which the Department of Fish and Game may provide funding, and which are intended to be excepted from prevailing wage laws; and specifies a subcategory of contracts which are excluded from the exceptions to prevailing wage laws. Pursuant to Fish & G. Code section 1501.5, subdivision (d)(6), the following are contracts that are specifically excepted from exclusion, and, as such, are subject to prevailing wage requirements:

(6) Any contract, except contracts with public agencies, nonprofit organizations, or Indian tribes that exceed fifty thousand dollars (\$50,000) in cost, excluding the cost for gravel, for fish and wildlife habitat preservation, restoration, and enhancement for any one of the following:

- (A) Fish screens, weirs, and ladders.
- (B) Drainage or other watershed improvements.
- (C) Gravel and rock removal or placement.
- (D) Irrigation and water distribution systems.
- (E) Earthwork and grading.
- (F) Fencing.
- (G) Planting trees or other habitat vegetation.
- (H) Construction of temporary storage buildings.

(Fish & G. Code § 1501.5, subd. (d)(6).)

#### **A. C&R, a Private Entity, is a Signatory and a Party to the Agreement.**

RCD argues that C&R is not a party to the Agreement and, therefore, the Project must be excepted from a public works determination under Fish and Game Code section 1501.5 because the Agreement is a contract exclusively between WCB and RCD, two public entities. On its face, however, the Agreement does not qualify for the exception from public works in Fish & G. Code section 1501.5, subdivision (c) because C&R, a private entity, is signatory to the Agreement which

is in excess of \$50,000.00 in cost and is intended to achieve fish and wildlife habitat preservation, restoration, and enhancement for watershed improvements, fencing, and the planting of vegetation.

Regarding RCD's contentions, there is no dispute that the Agreement is a contract. A document entitled "California Wildlife Conservation Board Grant Agreement Between State of California, Wildlife Conservation Board and Tehama County Resource Conservation District and C&R Ranch for C&R Ranch Habitat Improvement; Tehama County, California" was executed by: (1) John P. Donnelly on behalf of WCB (on January 13, 2015); (2) Vicky Dawley on behalf of RCD (on November 17, 2014); and Roy Ekland on behalf of C&R (on November 17, 2014). RCD maintains, however, that C&R is not a party to the Agreement.

California law defines a contract as "an agreement to do or not to do a certain thing." (Civ. Code, § 1549.) "Under California law, in order to form a valid and enforceable contract, it is essential that there be: (1) parties capable of contracting; (2) their consent; (3) a lawful object; and, (4) a sufficient consideration." (*Netbula, LLC v. BindView Dev. Corp.*, (N.D.Cal. 2007) 516 F.Supp.2d 1137, 1155; citing Civ. Code, § 1550.) "Consideration is a benefit conferred or agreed to be conferred upon the promisor or prejudice suffered or agreed to be suffered 'as an inducement' to the promisor." (*Conservatorship of O'Connor* (1996) 48 Cal.App.4th 1076, 1102; citing Civ. Code, § 1605.) Once entered into, a contract gives rise to an obligation or legal duty, enforceable in an action at law. (Civ. Code, §§ 1427, 1428.; See 1 Witkin, Summary 10th (2005) Contracts, § 1, pp. 58-59.)

C&R is a signatory to the Agreement, which facially constitutes a contract, the subject of which is the achievement of a lawful purpose. Thus, the only possible basis for alleging that the Agreement is not an enforceable contract, to which C&R may be bound as a signatory party, is lack of consideration. Whether or not C&R receives funds directly pursuant to the Agreement is irrelevant in determining whether it is a party to the Agreement.

Consideration is evident in the express terms of the Agreement in that significant benefits are to accrue to C&R in the form of \$270,000.00 in habitat restoration work to be performed on the C&R property including, inter alia, the construction of fencing, repair of waterways, and hedgerow planting. The terms of the Agreement as they relate to C&R are partially specified in the "Management Plan" a document specifically incorporated by reference on page twelve (p. 12) of the Agreement as "Exhibit E." (See "Attachment A" to Request for Determination.) The Management Plan states that the owners of C&R are "always seeking new opportunities to improve the value of the land for wildlife." (Agreement, Exhibit E, p. 1.) The habitat restoration work contemplated by the Agreement is in furtherance of the owners' of C&R stated desire to improve the value of their property and constitutes a clear and substantial benefit in dollars expended on behalf of C&R, and an increase in the value of the C&R property.

Moreover, contrary to RCD's assertions, C&R is obligated to perform work pursuant to the terms of the Agreement in the form of ongoing maintenance, as is clearly specified in the Management Plan. C&R agrees to maintain the project site for the twenty-five-year management period (pursuant to an agreement which "will be formally acknowledged and endorsed by the landowners"), including the operation and maintenance of an irrigation system. C&R must also implement, inter alia, a rotational grazing system on the property, perform weed control, and maintain a well and fencing in "operational condition." (Agreement, Exhibit E, p. 1.) Moreover,

C&R agrees to potentially onerous provisions relating to any legal action resulting from the failure to complete or allow timely completion of the project, including accepting “liability to repay [RCD] for damages, and for any costs for legal representation or prosecution incurred by [WCB] in seeking reparation of damages against [RCD], as well as any costs for legal representation or prosecution incurred by [RCD] in seeking reparation of damages against [C&R].” (Agreement, Exhibit F, p. 2, unsigned “Cooperator Agreement”.)

The terms of the Agreement bind C&R to significant and ongoing obligations and potentially impose additional legal and financial burdens on C&R. The benefits conferred upon, and the obligations incurred by C&R pursuant to the terms of the Agreement are significant and constitute valid consideration, and despite RCD’s characterizations to the contrary, C&R is contractually bound by and is a party to the Agreement.

**B. The Exceptions to Generally Applicable Public Works Law Specified in Fish and Game Code Section 1501.5, subdivision (d)(6), are Inapplicable to a Contract Between Two Public Entities and a Private Entity.**

RCD correctly reads Fish & G. Code section 1501.5 to require that in order for work performed under a contract to be excepted from a public work designation, the contract must be between public agencies (or Indian tribes, or non-profits). However, RCD incorrectly argues that pursuant to subdivision (d) work performed under a multi-party contract between public agencies, Indian tribes, and/or non-profits, which also includes a private party (i.e., not a public agency, Indian tribe or non-profit), must also be excepted from a classification as public work. RCD’s interpretation of Fish & G. Code section 1501.5 does not withstand scrutiny.

Fish & G. Code section 1501.5 permits the Department of Fish and Game to grant funds to public agencies for fish and wildlife habitat preservation, restoration, and enhancement. (Fish & G. Code, § 1501.5, subd. (b).) The Department may enter into contracts with both public and private entities to meet its goals. (Fish & G. Code, § 1501.5, subd. (a).) Work performed under Section 1501.5 cannot be classified as public work or a public improvement pursuant to Labor Code section 1720, et seq. (Fish & G. Code, § 1501.5, subd. (c).) However, certain types of contracts are specifically excluded from the general public work exception of Section 1501.5, subdivision (c); such as contracts for the construction of office, storage, garage, or maintenance buildings; drilling wells and installation of pumping equipment; construction of permanent hatchery facilities, including raceways, water systems, and bird enclosures; and the construction of permanent surfaced roadways and bridges. (Fish & G. Code, § 1501.5, subd. (d)(1)-(4).) Contracts with public agencies, nonprofit organizations, or Indian tribes are specifically excluded from the exemptions of subdivision (d) to the general exception from public work found in subdivision (c). (Fish & G. Code, § 1501.5, subd. (d)(6).) In other words, contracts between the Department and public agencies, nonprofit organizations, and/or Indian tribes as specified by Fish & G. Code section 1501.5 are not contracts for public work.

In the instant matter the agreement between WCB, RCD, and C&R is a contract between two public agencies, and a private entity, respectively. The familiar maxim of statutory interpretation *expressio unius est exclusio alterius* is relevant in addressing the instant matter. The maxim can be read to mean that when a statutory provision specifies particular items, whichever items are subsequently omitted are understood to be excluded. Fish & G. Code section 1501.5, subdivision

(d)(6) lists three specific types of entities. The list is a restatement of the three types of entities to which the Department may grant funds as stated in subdivision (b), but subdivision (d)(6) does not reference the “private entities” specified in subdivision (a) with whom the Department may otherwise enter into contracts. The inclusion of “private entities” in subdivision (a), and the exclusion of “private entities” in subdivisions (b) and (d)(6) demonstrates a clear legislative intent to exclude contracts with private entities from the public works “carve out” provisions of Fish & G. Code section 1501.5. Those contracts which are intended by the Legislature to be exempted from the exclusion to the exception to a public work determination are specifically listed in subdivision (d). Those entities not listed in subdivision (d)(6) were not intended by the Legislature to be included in the carve out.

The Department may enter into agreements for fish and wildlife preservation, restoration and enhancement with entities other than public agencies, Indian tribes, and/or nonprofit organizations – it is specifically empowered to enter into such agreements with private entities pursuant to subdivision (a) – but when the Department enters into agreements with entities other than those expressly excepted by the statute, such as the Agreement in the instant matter, the services performed under such contracts are effectively deemed to be public work.

This interpretation is supported by the Legislative history. In 1990, Fish & G. Code section 1501.5 was amended by the Legislature. The summary published in the Legislative Counsel’s Digest accompanying the amendments to Section 1501.5 explains the intent behind the amendments:

Existing law also authorizes, with specified exceptions, the department to enter into contracts for fish and wildlife habitat preservation, restoration, and enhancement, as specified, which contracts are declared to be contracts for services governed by specified provisions of the State Contract Act and not subject to specified provisions of the Labor Code. Excepted from that law are contracts exceeding \$50,000 in cost for fish and wildlife habitat preservation, restoration, and enhancement, as specified.

*This bill would except contracts with public agencies, nonprofit organizations, or Indian tribes from that exception, and would exclude the cost for gravel from the determination of the cost of the contract. The bill would also except construction of temporary storage buildings from that law. (Emphasis added.)*

The bill would also authorize the department to grant funds for fish and wildlife habitat preservation, restoration, and enhancement to nonprofit entities when the department makes specified findings.

(Legis. Counsel’s Dig., Assem. Bill No. 2894 (1989-1990 Reg. Sess.); 1990 Cal. Legis. Serv. 1425; italics added.) RCD’s argument, if taken to its logical conclusion, would result in a situation where the inclusion of any of the three expressly enumerated types of entities in any contract with the Department, regardless of the additional type or number of parties to the contract, would operate to cause the work to be performed pursuant to such a contract to be excepted from a public works determination. Such a reading of the statute would create unintended mischief in the drafting of contracts related to the award of grants by the Department and open the door too wide in what is an otherwise narrowly drawn exception to generally applicable law regarding public

works. The narrowly defined, categorical exceptions to a public works determination specified in Fish & G. Code section 1501.5, subdivisions (c) and (d)(6) apply only to contracts between the Department and a public agency, an Indian tribe, and/or a nonprofit organization. When a private entity, such as C&R in the instant matter, is also a party to such a contract the work to be performed under the contract is not covered by Fish & G. Code section 1501.5, subdivision (c), and is subject to the generally applicable rules governing public works projects codified in section 1720, et seq.

**C. The Legislative Purpose Underlying Fish and Game Code Section 1501.5 is not Diminished by this Determination.**

RCD alleges that the aforementioned interpretation of Section 1501.5 (*supra*) is inconsistent with the legislative purpose of the statute. However, RCD's interpretation of section 1501.5 is not supported by the plain language of the statute. Section 1501.5 permits the Department to enter into contracts for fish and wildlife habitat preservation, restoration, and enhancement, with public and private entities, whenever the Department finds that the contracts will assist in meeting the Department's duty to preserve, protect, and restore fish and wildlife. (Fish & G. Code, § 1501.5, subd. (a).) Moreover, the Department may grant funds for fish and wildlife habitat preservation, restoration, and enhancement to public agencies, Indian tribes, and nonprofit entities whenever the Department finds that the grants will assist in meeting the Department's duty to preserve, protect, and restore fish and wildlife. (Fish & G. Code, § 1501.5, subd. (b).) Allowing the generally applicable laws governing public works projects to apply to contracts which include private entity parties, and which provide grants for habitat preservation, restoration, and enhancement, in no way interferes with the Department's obligation to preserve, protect, and restore fish and wildlife.

Further, the goals of the Legislature in enacting public works legislation would be frustrated by RCD's interpretation of Fish & G. Code section 1501.5.

The purpose of California's prevailing wage law (Lab. Code, §§ 1720–1861) is “to protect and benefit employees on public works projects.” [Citation.] “The Legislature has declared that it is the public policy of California ‘to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.’ [Citation.] The conditions of employment on construction projects financed in whole or in part by public funds are governed by the prevailing wage law. [Citations.]” [Citation.]

The coverage of the prevailing wage law is broad, and a number of specific goals are subsumed within its objective: “to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.” [Citation.] The law “was

enacted to protect and benefit workers and the public and is to be liberally construed.” [Citation.]

(*Oxbow Carbon & Minerals, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538, 546-547.) And while this Determination operates to support the Legislature’s goals in enacting public works statutes, the instant interpretation of Section 1501.5 does nothing to diminish the stated goals of the Legislature in amending Section 1501.5:


Existing law authorizes the Department of Fish and Game to expend funds for the improvement of lakes and streams for fish, as specified, and to carry out habitat improvement on private land, with permission, without the state acquiring an interest in the property.

(Legis. Counsel’s Dig., Assem. Bill No. 2894 (1989-1990 Reg. Sess.); 1990 Cal. Legis. Serv. 1425.) Fish & G. Code section 1501.5 was enacted and amended by the Legislature with the intention of facilitating the Department’s efforts to carry out habitat improvement on private land without necessitating the acquisition of that private land by the State of California. Classifying the work to be performed pursuant to contracts involving grant proceeds as public work in accordance with Section 1501.5 does not diminish the Legislature’s stated intent in enacting Fish & G. Code section 1501.5 and ensures that the legislative goals intended in the enactment and enforcement of established public works law are effectively accomplished.

For the foregoing reasons, the C&R Ranch Habitat Improvement Project is a public work within the meaning of section 1720. The exemption in the Fish & G. Code for certain types of contracts for fish and wildlife habitat preservation, restoration, and enhancement work does not apply to the contract between C&R, RCD and WCB. Therefore, the Project is subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Christine Baker  
Director