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This Issue

Prevailing Wage Law and Conservation

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Land trusts should be aware that California's prevailing wage requirements can apply to conservation or restoration projects that receive public funding. Generally, a contractor who uses public funds on a project that involves construction, demolition or alteration of the land must pay its employees prevailing wages. Simple construction activities that might be associated with a conservation or restoration project—such as building trails or park structures—can trigger prevailing wage requirements. Projects that convert a land use from one type to another (such as from agricultural to riparian habitat) can also constitute an alteration that triggers prevailing wage. Failure to pay prevailing wages when required can result in back-pay obligations and fines. Given the case-by-case nature of the inquiry, land trusts should consider seeking advice from counsel or the California Department of Industrial Relations if a proposed conservation or restoration project has the potential to require paying prevailing wages.

What Are California's Prevailing Wage Laws?

California's Labor Code generally requires the payment of prevailing wages to workers employed on public works.¹ The prevailing wage is determined by the California Department of Industrial Relations by craft on a regional basis.² A public work is "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds . . ."³ For the purposes of prevailing wage law requirements, construction also includes work during the design and preconstruction phases, such as inspection and land surveying. Demolition includes tearing up or removing things that were previously constructed, whether on the surface or below ground.

Public funds include money received from the state, or a political subdivision of the state, such as a city, district, or state agency. The funds may be paid either directly to, or on behalf of, the contractor. Workers employed by contractors or subcontractors for a public work contract are also deemed to be employed on a public work. Notably, a project receiving any amount of public funding is generally considered a public work in its entirety—subject to prevailing wage requirements—



San Bernardino Mountains Land Trust, San Bernardino County

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even if the public funding does not cover costs for the entire project.

Who Is Subject To California's Prevailing Wage Laws?

The developer of any project deemed to be a public work is subject to prevailing wage laws. Non-profit projects are not treated differently from for-profit projects for the purposes of prevailing wage law. The non-profit status of the developer or

contractor alone will not exempt a project from prevailing wage requirements. Public agencies that carry out a project with their own resources are not subject to prevailing wage requirements.⁴

Are There Exemptions?

The California legislature has carved out several narrow exemptions. Volunteer workers need not be paid prevailing wages under current California law. This exemption expires on January 1, 2017 unless it is extended. As such, CCLT monitors this exemption and works to extend it as needed.

Another exemption applies to certain projects funded via Fish and Wildlife Code § 1501.5. The Department of Fish and Wildlife is authorized to enter into contracts for fish and wildlife habitat preservation, restoration, and enhancement with both public and private entities. Work done under these contracts, or with these funds, is typically not considered a public work or improvement and is not subject to prevailing wage law. Importantly, the contract authorizing the work *must be made directly* with the Department of Fish and Wildlife for this exemption to apply.⁵

A very limited number of other prevailing wage exemptions could potentially apply to certain types of conservation or restoration projects. For example, prevailing wage law does not apply to public works projects costing \$1,000 or less.⁶

Programs or Entities to Know

COMPLIANCE MONITORING UNIT. The CMU was created by the California Department of Industrial Relations to reform the Labor Compliance Program for monitoring bond-funded projects. Beginning August 1, 2010, agencies that award bond funds pay a fee to monitor compliance with, and enforcement of, prevailing wage and labor laws.

CENTER FOR CONTRACT COMPLIANCE. The Center for Contract Compliance (CCC) may request information from a land trust about whether it is complying with prevailing wage, labor and public contract bidding laws. CCC is a nonprofit organization formed by labor interests; you can learn more at <http://socalccc.org>.

CCC's website states that it "advocates compliance with prevailing wage, labor and public contract bidding laws to establish a level playing field for contractors competing for public works contracts, guarantee workers are properly compensated, and facilitate quality construction for public agencies. These laws and regulations include: Labor Code, Public Contract Code, Contractors' State License Law, Apprenticeship Standards, Code of Federal Regulations, California Code of Regulations, Cal/OSHA Standards, and Davis-Bacon Act".

Sample Wording for Your Contracts

For a contract developed by land trust:

1. General obligation to comply with laws:
“Contractor agrees that all work performed under this Agreement and all work product will comply with all applicable laws and regulations.”
2. Suggest pairing this general obligation with related wording in the contract indemnity clause in favor of the land trust, such as the following (see *bold italics*):

“Contractor shall indemnify, defend, save, protect and hold [land trust] and its officers, agents, directors, employees and customers harmless against all claims, losses, expenses (including reasonable attorneys’ and expert witnesses’ fees and costs) and injuries to person or property (including death) **resulting in any way from any negligence or willful misconduct of Contractor, or resulting from any breach by contractor of Contractor’s obligations under this Agreement.**”

For a contract generated by a public agency for a contractor to perform a “public works” project (as defined under California statute), the public agency may require the project contract to contain very detailed wording relating to compliance with California’s prevailing wage laws. Different agencies use different forms of contract and will usually require their form/ wording to be utilized. Below is sample wording specifically relating to prevailing wage compliance and related matters (e.g., worker’s compensation) from a public agency contract, to provide a flavor of what a much more detailed provision looks like; the sections specifically relating to prevailing wage compliance and recordkeeping are *italicized*:

Employees, Work Day, Apprenticeship, Non-Discrimination And Wages.

1. **Skilled Workers.** Contractor and all subcontractors shall only employ workers suitably skilled in the Work.
2. **Character of Workers.** Anyone employed on the Project by Contractor, or any subcontractor, who in the opinion of Agency Representative is incompetent, disorderly, or otherwise acts improperly, after written notification, shall be dismissed from the Project and not further employed on any part of the Work.
3. **Lawful Working Day.** Work performed by workers more than eight (8) hours during any one (1) calendar day and more than forty (40) hours in any one (1) calendar week may be permitted pursuant to the overtime provisions of Labor Code Section 1815 and then only upon such terms, conditions and requirements as provided and fixed by law. As provided in California Labor Code §1813, Contractor shall forfeit twenty-five dollars (\$25.00) for each worker employed in the execution of the Contract by Contractor or by any subcontractor for each calendar day during which such worker is required or permitted to work in violation of Labor Code Sections 1810 through 1815.
4. **Apprenticeship Standards.** Contractor shall comply fully with the requirements of California Labor Code §1777.5 regarding employment of registered apprentices. If Contractor willfully fails to comply with this code section, Contractor may be denied the right to bid on any Agency contract for a period of one (1) year from the date of non-compliance determined by the California Division of Apprenticeship Standards. When Agency receives from the Division notice that Contractor is not in compliance with apprenticeship standards, Agency shall withhold from Contract payments the amount of the civil penalty imposed by the Division, which funds may be released to Contractor upon order of the Administrator or upon completion of the Contract.
5. **Non-Discrimination.** Contractor and its subcontractors will comply with all applicable equal employment opportunity and affirmative action laws throughout the term of this Agreement. Contractor hereby certifies that it will not unlawfully discriminate in its employment with regard to race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, sexual preference, or age; that all federal, state and local directives and executive orders regarding non-discrimination in employment will be complied with; and that the principle of equal opportunity in employment will be demonstrated positively and aggressively. Contractor further certifies that it shall require the compliance of its subcontractors on the Work with all of the provisions of this paragraph. Contractor hereby acknowledges its understanding that this Contract may be canceled, terminated or suspended in whole or in part and Contractor and/

or its subcontractors declared ineligible for future contracts with Agency, in the event Contractor and/or its subcontractors are found in non-compliance with the terms hereof.

- 6. Wages.** *As required by law, Contractor shall pay all workers California Prevailing Wages for each trade or classification on the job during the term of this Agreement. These rates include, but are not limited to, employer payments for health and welfare, pension, vacation, travel time, subsistence pay and for apprenticeship and training obligations. The current issue of the Director of the Department of Industrial Relations for the State of California GENERAL PREVAILING WAGE RATES for straight time, overtime, Saturday, Sunday, and Legal Holidays is herein incorporated as part of this Contract. Any and all revisions to the GENERAL PREVAILING WAGE RATES that take effect during the Contract shall be adopted as part of this Contract. Contractor shall post Prevailing Wage Rates on job site. A copy of the GENERAL PREVAILING WAGE RATES is available for review at the office of Agency Representative. Copies of the prevailing wage rates are on file at Agency's principal office. For those crafts or job classifications requiring special prevailing wage determinations, please contact the Division of Labor Statistics and Research, Prevailing Wage Unit, P.O. Box 603, San Francisco, CA 94101, (415) 703 4281. Agency will not recognize any claim for additional compensation because of payment by Contractor of any wage above the GENERAL PREVAILING WAGE RATES. The possibility of wage increases is an element to be considered by Contractor in determining its bid, and may not under any circumstance form the basis of a claim against Agency.*
- 7. Labor Code §1861.** Contractor has executed the affidavit, attached hereto and incorporated herein as Attachment C, pursuant to Labor Code §1861.
- 8. Holidays.** Holiday wage rates shall apply to holidays recognized in the collective bargaining agreement of the particular craft or classification concerned.
- 9. Contractor and Subcontractors Compliance.** *Contractor and each subcontractor shall pay general prevailing per diem wages (including holiday and overtime pay) to all of their workers on the Project.*
- 10. Penalty.** *Contractor shall forfeit as penalty to Agency fifty dollars (\$50.00) for each calendar day or part day for each worker who is paid less than the general prevailing wage rates. Contractor shall pay any worker who was paid less than general prevailing wage rate an amount equal to the difference between the prevailing wage rate and the amount paid to the worker pursuant to California Labor Code §1775. [NOTE: the statutory provision allows a penalty per day of not more than \$200, so the dollar amount may vary]*
- 11. Payroll Record Requirements.** *Contractor and each subcontractor shall keep accurate payroll records showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week and the actual per diem wages paid to each journeyman, apprentice, worker or other employee employed on the Project pursuant to California Labor Code §1776. Payroll records shall be available for inspection at all reasonable hours by Agency Representative and a copy shall be available to the employee, the employee's representative, the California Division of Labor Standards Enforcement and the California Division of Apprenticeship Standards. If a complaint is filed with Agency or the Division of Labor Standards Enforcement alleging that Contractor or subcontractor has paid less than prevailing wage on the Project, Agency shall withhold from progress payments to Contractor an amount equal to one hundred and twenty-five percent (125%) of the amount claimed until the allegation is settled.*
- 12. Records.** *Contractor and all subcontractors shall submit on forms approved by Agency Representative a certified copy of their payroll records along with any and all progress payment request(s). Failure to provide such records within ten (10) days as required by Labor Code Section 1776 shall result in a penalty of twenty-five dollars (\$25.00) per each calendar day or part thereof for each worker until Contractor complies with Section 1776. Certified payrolls shall be current to within one (1) week of the progress payment certificate. No progress payment shall be made by Agency without current, complete and accurate certified payroll records on file with Agency Representative. Agency shall retain a copy of certified payroll records for ninety (90) calendar days after completion of the Contract. Agency may charge a reasonable fee for copying any records.*

Requesting An Opinion From The Department of Industrial Relations

A land trust may choose to require a project contractor to comply contractually with prevailing wage requirements. On request, the Department may issue a written opinion on whether prevailing wage laws apply to a particular project. Prior opinion letters are also made available for public review, which can provide general guidance on the types of activities that may or may not be covered.⁷

A land trust may choose to contractually require a project contractor to comply with prevailing wage requirements. Although an experienced contractor should have a good understanding of prevailing wage laws and may be a useful resource to a land trust, the contractual agreement would not absolve the land trust from complying with prevailing wage law. In the event of a violation, the land trust may be able to seek indemnification from the contractor (if established by the contractor contract), but the land trust—as the project developer—would likely be responsible for ensuring compliance with prevailing wage laws.

Given the fact-specific nature of this inquiry, a determination of whether work is a public work should be made on a case-by-case basis, and land trusts should con-

sider consulting with counsel and/or the Department prior to performing such work if public funds are involved and the applicability of prevailing wages is in question.

ments. For instance, in Land Clearing Project, PW 2008-015 (Jun. 11, 2008), the Department determined that a project involving removing trees and other obstacles from the land, tearing down buildings and other structures, and backfilling and compacting of dirt was subject to prevailing wage law. Such tearing down and removal was considered “demolition.” Further, the work fell within the definition of alteration because the character of the agricultural land was changed to open space habitat. In *Owens Lake South-*

ern Zones Managed Vegetation Project, PW Case No. 2002-096 (Jan. 4, 2006), the Department determined that the maintenance of a drainage and irrigation system and other public facilities at a restoration vegetation site, the pre-construction inspection of the drainage and irrigation systems, and testing soil and the water used to irrigate were public works subject to prevailing wage requirements.

Because conservation or restoration projects may not involve the construction of permanent facilities, a central question is whether prevailing wage law applies often involves whether the project results in an “alteration.” When evaluating

this question, the Department considers whether the work would change a “characteristic of the land.” For example, in *River Partners*, PW 11-0027 (Jul. 3, 2012), the Department decided that a compensatory mitigation project that restored forested riparian habitat on previously agricultural land constituted an alteration of the land because the use changed from agricultural to open space habitat. Similarly, in *Owens Lake Southern Zones Managed Vegetation Project*, PW Case No. 2002-096 (January 4, 2006), the Department determined that transplanting salt grass plugs as part of a soil reclamation project, which involved both preparation of the planting area and digging the soil to plant the salt grass plugs, amounted to an alteration. In *Ecosystem Restoration and Flood Attenuation Project, San Joaquin River*, PW Case No. 2009-055 (Oct. 5, 2010), the Department found that planting trees, shrubs, and native grass as part of a project to create 633 acres of restored riparian habitat was an alteration because it modified a particular characteristic of land. And in *Howe Creek Ranch Habitat Restoration Project*, PW Case No. 1004-050 (Oct. 19, 2005), the Department found that the work of planting trees was an alteration because it would modify a characteristic of the land by “creating an area of trees where previously there was none.”

In contrast, in *Tree Removal Project, County of San Bernardino*, PW 2005-026 (Jul. 28, 2006), the Department determined that removal of tree debris from private property to prevent a fire hazard

Visitors to Your Site

On occasion, volunteers have been approached at volunteer work parties by individuals asking about the nature of the project, claiming that the volunteers could be paid or that they are displacing paying or union jobs.

Response points include:

- Projects are completed in full compliance of prevailing wage and labor laws.
- Volunteer projects provide a meaningful way for residents to contribute to the improvement of their community.
- No jobs are lost due to volunteer power when there is no funding to otherwise complete the community project.

Visitors may or may not be restricted from a project site depending on whether the property is in public ownership or open to the public. Hopefully, any visitor is respectful of the volunteers and will disengage from conversation if requested.

A land trust may choose to require a project contractor to comply contractually with prevailing wage requirements.

Prevailing Wage Law Can Apply To Non-Profit Conservation or Restoration Projects

No court case expressly addresses the applicability of prevailing wage law to restoration projects. However, the Department of Industrial Relations has issued several relevant opinions that provide general guidance on when conservation or restoration activities undertaken by a land trust can trigger prevailing wage require-

did not constitute an alteration because the lands would not be noticeably different after completing the project. The Department also determined that temporary erosion control measures were not alterations because they did not change the character of the land. The Department reiterated that the proper inquiry was not whether the erosion control work was temporary or permanent, but whether it modified a characteristic of the land.

These cases make clear that the conversion of land from one use to another can constitute an “alteration” and trigger prevailing wage. In contrast, relatively minor or temporary changes to a landscape that do not change its basic characteristic are unlikely to constitute an alteration (although other factors triggering prevailing wage laws may apply). Activities, such as building trails or structures associated with a park will likely qualify as construction for the purposes of prevailing wage law. Given the fact-specific nature of this inquiry, a determination of whether work is a public work should be made on a case-by-case basis, and land trusts should consider consulting with counsel and/or the Department of Industrial Relations prior to performing such work if public funds are involved and the applicability of prevailing wages is in question.

Consequences for Failing To Pay Prevailing Wages If Required

If prevailing wage requirements apply to a project but are not properly paid, the entity paying for the work (i.e., a land trust paying for a conservation or restoration project) may be obligated to pay back wages and possibly fines. If the California Division of Labor Standards Enforcement (DSLE) determines that a violation of the prevailing wage laws has occurred, it may impose fines for each worker and calendar day for which prevailing wages were

not paid as required. The DSLE may impose liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within 60 days. The DSLE may bring an action for failure to pay prevailing wages for up to six months plus 30 days following the timely recording of a notice of completion of the project. If no such notice is filed, a claim may be brought up to six months plus 90 days after the completion of the project. However, additional remedies with longer statutes of limitation may be available to employees who were not paid prevailing wages as required by law.

Conclusion

Any construction, development or alteration project—including a non-profit conservation or restoration project—that receives public funding may trigger prevailing wage law requirements. For conservation or restoration projects, prevailing wages requirements are more likely to apply if the conservation or restoration project involves adding or demolishing structures or would visibly change the characteristic of the land from one type of use to another, such as planting trees on land previously used for agricultural. However, given the case-by-case nature of the inquiry and the potentially large fines for failure to properly pay prevailing wages, land trusts should consider seeking advice from counsel and/or engaging the Department of Industrial Relations if the project has the potential to require prevailing wages.



Tejon Ranch Conservancy, Kern County

For more information on prevailing wage issues, visit CCLT’s website. Appendix A includes DIR opinions involving restoration projects.

¹ Cal. Lab. Code § 1771.

² Specifically, the prevailing wage rate is the basic hourly rate paid on public works projects to a majority of workers engaged in a particular craft, classification or type of work within the locality and in the nearest labor market area. When the Department of Industrial Relations determines that the general prevailing rate of per diem wages for a particular craft, classification, or type of worker is uniform throughout an area, the DIR Director issues a determination enumerated county by county but covering the entire area. When a particular craft, classification or type of worker is not covered by a general determination, the awarding body may request a special prevailing wage determination. California Department of Industrial Relations, “Frequently asked questions — Prevailing Wage,” available at: http://www.dir.ca.gov/OPRL/faq_prevailingwage.html.

³ Cal. Lab Code § 1720(a)(1).

⁴ Cal. Lab Code § 1771.

⁵ In addition, other requirements apply to this type of contract, which should be considered when evaluating the applicability of Fish and Game Code § 1501.5. For instance, this exemption does not apply to projects that require engineering design.

⁶ The remainder of the exemptions to California’s prevailing wage laws are codified in California Labor Code §§ 1720-1861.

⁷ The Department of Industrial Relations maintains a database of prior opinions at [http://www.dir.ca.gov/oprl/PWDecision.asp?indexentry=Alteration&codeaction=1720\(d\)\(1\)](http://www.dir.ca.gov/oprl/PWDecision.asp?indexentry=Alteration&codeaction=1720(d)(1))

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