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FEATURE ARTICLE

CALIFORNIA SUPREME COURT ISSUES HIGHLY-ANTICIPATED CEQA DECISION ADDRESSING THE STANDARD OF REVIEW FOR EIRS AND REQUIREMENTS FOR AIR QUALITY ANALYSES

By Chris Stiles

On December 24, 2018, the Californian Supreme Court issued its highly-anticipated decision in *Sierra Club v. County of Fresno*. Finding that portions of the air quality analysis in an Environmental Impact Report (EIR) violated the California Environmental Quality Act (CEQA), the High Court made four important holdings: 1) when reviewing whether an EIR's discussion of environmental effects "is sufficient to satisfy CEQA," courts must be satisfied that the EIR "includes sufficient detail to enable those who did not participate in its preparation to understand and consider meaningfully the issues the proposed project raises"; 2) an EIR must show a "reasonable effort to substantively connect a project's air quality impacts to likely health consequences"; 3) a lead agency "may leave open the possibility of employing better mitigation efforts consistent with improvements in technology without being deemed to have impermissibly deferred mitigation measures"; and 4) a lead agency "may adopt mitigation measures that do not reduce the project's adverse impacts to less than significant levels, so long as the agency can demonstrate in good faith that the measures will at least be partially effective at mitigating the project's impacts."

Factual Background and Procedural History

The controversy arose over an EIR prepared by the County of Fresno (County) for the Friant Ranch project, a proposal for a master-planned community near the unincorporated community of Friant in north-central Fresno County. The project included a Specific Plan and Community Plan Update. The Specific Plan provided the framework for the development of approximately 2,500 single and multi-family residential units that are age restricted to "active adults" age 55 and older, other residential units that are not age restricted, a commercial village center, a recreation center, trails, open space, a neighborhood electric vehicle network, and parks and parkways. The project also included 250,000 square feet of commercial space on 482 acres and the dedication of 460 acres to open space. The Community Plan Update expanded a pre-existing Community Plan's boundaries to include the Specific Plan area and added new policies that were consistent with the Specific Plan and the County's General Plan.

The County certified the EIR and approved the project on February 1, 2011. In its analysis of air quality impacts, the EIR generally discussed the health effects of air pollutants such as Reactive Organic Gases (ROG), oxides of nitrogen (NOx), and particulate matter (PM), but without predicting specific health-related impacts resulting from the project's emissions. The EIR found that the project's long-term operational air quality effects were significant and unavoidable, even with implementation of all feasible mitigation measures. The EIR recommended a mitigation measure that included a "substitution clause," allowing the County, over the course of project build-out, to allow the use of new control technologies equally or more effective than those listed in the adopted measure. The County chose to approve an alternative that was identified as the "environmentally superior alternative" in the EIR, rather than the initial proposal.

Shortly after the County approved the project, the Sierra Club filed a lawsuit alleging that the EIR violated CEQA in various ways. The trail court denied the petition in full. The Sierra Club appealed.

The Fifth District Court of Appeal reversed the

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trial court's judgment on three grounds. First, the court held that the EIR was inadequate because it failed to include an analysis that correlated the project's emission of air pollutants to its impact on human health. Second, it found that the mitigation measures for the project's long-term air quality impacts violated CEQA because they were vague, unenforceable, and lacked specific performance criteria. Third, the court held that the EIR's statement that the air quality mitigation provisions would *substantially* reduce air quality impacts was unexplained and unsupported.

The real party in interest, Friant Ranch, L.P., petitioned the California Supreme Court to review four issues:

> (1) Does the substantial evidence standard of review apply to a court's review of whether an EIR provides sufficient information on a topic required by CEQA, or is this a question of law subject to independent judicial review?
>
> (2) Is an EIR adequate when it identifies the health impacts of air pollution and quantifies a project's expected emissions, or does CEQA further require the EIR to correlate a project's air quality emissions to specific health impacts?
>
> (3) Does a lead agency impermissibly defer formulation of mitigation measures when it retains discretion to substitute the adopted measures with equally or more effective measures in the future as better technology becomes available, or does CEQA prohibit the agency from retaining this discretion unless the mitigation measure specifies objective criteria of effectiveness?
>
> (4) Do mitigation measures adopted by a lead agency to reduce a project's significant and unavoidable impacts comply with CEQA when substantial evidence demonstrates that, on the whole, the measures will be at least partially effective at mitigating the impact, or must such measures meet the same (or even heightened) standards of adequacy as those adopted to reduce an impact to a less than significant level?

The Supreme Court granted review on October 1, 2014. Given the nature of these issues, the case garnered widespread attention. Numerous entities, including air districts, environmental groups, governmental organizations, and building associations, participated in the case as *amici curiae*.

The Supreme Court issued a unanimous decision on December 24, 2018, affirming in part, and reversing in part, the Court of Appeal's decision.

The Supreme Court's Decision

The Standard of Review

First addressing the standard of review, the Supreme Court set out to answer the following question: What standard of review must a court apply when adjudicating a challenge to the adequacy of an EIR's discussion of adverse environmental impacts? The court held that, in certain circumstances at least, claims alleging that the discussion of environmental impacts in an EIR is inadequate may be reviewed *de novo* under the "procedural" prong of CEQA's standard of review.

The Court started its analysis with the key CEQA statute, which provides that:

> . . .abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. (Pub. Resources Code, § 21168.5.)

The Court explained that, based on this language, its prior decisions have articulated "a procedural issues/factual issues dichotomy," with a substantially different standard of review applied to each type of error. While courts determine *de novo* whether an agency has employed the correct procedures, the agency's substantive factual conclusions are accorded greater deference and will be upheld if they are supported by substantial evidence. In other words, when reviewing an agency's compliance with CEQA, procedural issues are reviewed de novo and factual issued are reviewed under the "substantial evidence" standard.

After observing that the distinction between *de novo* review and substantial evidence review has worked well in judicial review of agency determinations, the Court explained that the issue of whether an EIR's discussion of environmental impacts is adequate, such that it facilitates "informed agency

decision-making and informed public participation," does not "fit neatly within the procedural/factual paradigm." The Court then examined some of its previous decisions, as well as those of the courts of appeal, that addressed the standard of review for a variety of claims.

Relying heavily on its previous decision in *Laurel Heights Improvement Assn. v. Regents of University of California,* 47 Cal.3d 376 (1988), the Court held that, although there are instances where the agency's discussion of significant project impacts may implicate a factual question that makes substantial evidence review appropriate:

> . . .whether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question.

The Court explained, for example, that:

> . . .a conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence.

The Court held that in these instances, claims that an EIR's discussion of environmental impacts is inadequate or insufficient may be reviewed *de novo*. Although agencies have considerable discretion to decide the manner of the discussion of potentially significant effects in an EIR, the Court concluded that a reviewing court must determine whether the EIR includes enough detail:

> . . .to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.

The Court determined that this inquiry presents a mixed question of law and fact, and as such, "it is generally subject to independent review."

The EIR's Air Quality Discussion

Having established the applicable standard of review, the Court next considered whether the EIR's air quality analysis complied with CEQA. The challenged EIR quantified the amount of air pollutants the project was expected to produce and also provided a general description of each pollutant and how it affects human health. The EIR also explained that a more detailed analysis of health impacts was not possible at the early planning phase and that a "Health Risk Assessment" is typically prepared later in the planning process. Nevertheless, the Court of Appeal found that the EIR was inadequate under CEQA because its analysis failed to correlate the increase in emissions that the project would generate to the adverse impacts on human health. The Supreme Court agreed, with qualifications.

According to the Supreme Court, an EIR must reflect "a reasonable effort to substantively connect a project's air quality impacts to likely health consequences." Stated differently, the Court held that an EIR must show "a reasonable effort to discuss relevant specifics regarding the connection between" 1) the "general health effects associated with a particular pollutant" and 2) the "estimated amount of that pollutant the project will likely produce." The Court further explained that an EIR must:

> . . .provide an adequate analysis to inform the public how its bare [emissions] numbers translate to create potential adverse [health] impacts or it must adequately explain what the agency does know and why, given existing scientific constraints, it cannot translate potential health impacts further.

Here, the EIR quantified how many tons per year the project would generate of ROG and NOx (both of which are ozone precursors), but did not quantify how much ozone these emissions would create. Although the EIR explained that ozone can cause health impacts at exposures for 0.10 to 0.40 parts per million, the Court found this information to be meaningless because the EIR did not estimate how much ozone the project would generate. Nor did the EIR disclose at what specific levels of exposure to PM, carbon monoxide, and sulfur dioxide would trigger adverse health impacts. In short, the Court found that the EIR made:

> . . .it impossible for the public to translate the bare numbers provided into adverse health impacts or to understand why such translation

is not possible at this time (and what limited translation is, in fact, possible).

Outlining the unhealthy symptoms associated with exposure to various pollutants, as the EIR at issue had done, was insufficient to fulfill the requirements of CEQA.

Notably, the Court was not persuaded by the real party in interest's explanation, which was supported by *amici curiae* briefs submitted by air districts, as to why the connection between emissions and human health that the plaintiffs sought could not be provided in the EIR given the state of environmental science modeling in use at the time. Even if that was true, the Court explained, the EIR itself must explain why it is *not* scientifically possible to do more than was already done in the EIR to connect air quality effects with potential human health impacts.

The Court noted that, on remand, one possible topic to address would be the impact the project would have on the number of days of nonattainment of air quality standards per year, but the Court stopped short of stating such a discussion is required. Instead, the Court noted that the County, as lead agency, has discretion in choosing the type of analysis to provide.

Mitigation Measures

The Court next turned to the EIR's discussion of mitigation measures that were identified to reduce air quality impacts. The specific mitigation measure at issue (Mitigation Measure 3.3.2) included a suite of measures that were designed to reduce the project's significant air quality impacts by providing shade trees, utilizing efficient "PremAir" or similar model heating, ventilation, and air conditioning systems, building bike lockers and racks, creating bicycle storage spaces in units, and developing transportation related mitigation that will include trail maps and commute alternatives. The measure included a substitution clause that allowed the lead agency to:

> . . .substitute different air pollution control measures for individual projects, that are equally effective or superior to those propose[d] [in the EIR], as new technology and/or other feasible measures become available [during] build-out within the [project].

The EIR stated that the measures would "substantially reduce" air quality impacts related to human activity within the entire project area, but not to a level that is less than significant. Accordingly, the EIR concluded that even with mitigation, the project's operational air quality impacts were significant and unavoidable.

The Fifth District Court of Appeal concluded that the EIR's use of the term "substantial" to describe the impact the proposed mitigation measures would have on reducing the project's significant health effects, without further explanation or factual support, amounted to a "bare conclusion" that did not satisfy CEQA's disclosure requirements. The Supreme Court agreed. According to the Court, the EIR "must accurately reflect the net health effect of proposed air quality mitigation measures." Here, however, the EIR included no facts or analysis to support the inference that the mitigation measures will have a quantifiable "substantial" impact on reducing the adverse effects.

The Court then examined whether the air quality measure impermissibly deferred formulation of mitigation because it allowed the County to substitute equally or more effective measures in the future as the project builds out. The Court held that this substitution clause did not constitute impermissible deferral of mitigation because it allows for "additional and presumably better mitigation measures when they become available," consistent with CEQA's goal of promoting environmental protection. The Court noted that mitigation measures need not include precise quantitative performance standards, but they must be at least partially effective, even if they cannot mitigate significant impacts to less than significant levels. The Court also held that the mitigation was adequately enforceable even though the County had some discretion to determine what specific measures would be implemented.

Finally, the Court decided:

> . . .whether a lead agency violates CEQA when its proposed mitigation measures will not reduce a significant environmental impact to less than significant levels.

The Court held that "the inclusion of mitigation measures that partially reduce significant impacts does not violate CEQA." The Court noted that, in enacting CEQA to protect the environment, the Legis-

lature did not seek to prevent all development, and that if, after feasible mitigation measures have been implemented, significant effects still exist, a project may still be approved if it is found that the unmitigated significant effects are outweighed by the project's benefits. Thus, mitigation measures will not be found inadequate simply because they do not reduce impacts to a less than significant level.

Conclusion and Implications

Although the California Supreme Court endeavored to settle the standard of review, its opinion leaves the door open for further debate. In summarizing its main holding, for example, the Court explained that the question of whether an EIR's discussion of a potentially significant impact is sufficient or insufficient (*i.e.*, whether it includes enough detail "to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project") is "generally" subject to independent review because it presents a mixed question of law and fact, implying that a different standard of review might apply in some circumstances. Indeed, the Supreme Court concluded the same paragraph by stating that:

> . . .to the extent a mixed question requires a determination whether statutory criteria were satisfied, de novo review is appropriate; but to the extent factual questions predominate, a more deferential standard is warranted.

Elsewhere, the Court emphasized that "agencies have considerable discretion to decide the manner of the discussion of potentially significant effects in an EIR" and also noted that "there are instances where the agency's discussion of significant project impacts may implicate a factual question that makes substantial evidence review appropriate," providing the decision to use a particular methodology as an example. Thus, it seems litigants in CEQA cases will *continue* to argue over which standard of review should apply for claims that present mixed questions of law and fact, and whether a particular dispute concerns the "sufficiency" of the discussion or instead the "manner" in which it is presented. Agencies and applicants are likely to emphasize the need for courts to defer to agencies on methodological issues and factual conclusions, and to assert that EIR discussions should be upheld as long as they are not too conclusory. Project opponents, on the other hand, are likely to claim that, regardless of how detailed an analysis might be, it might still be insufficient to allow members of the public "to understand and consider meaningfully the issues the proposed project raises." In any event, the new rule that courts must determine whether an EIR includes "sufficient detail" for the discussion of any topic, without any deference to the lead agency, will likely create more uncertainly in the CEQA domain.

The Supreme Court was somewhat clearer in articulating CEQA's requirements for the analysis of air quality impacts in EIRs, but *considerable uncertainty* remains there as well. The Court's basic holding was that an EIR must reflect "a reasonable effort to substantively connect a project's air quality impacts to likely health consequences." To satisfy this very general requirement, the Court explained, an EIR must:

> . . .provide an adequate analysis to inform the public how its bare [emissions] numbers translate to create potential adverse [health] impacts or it must adequately explain what the agency does know and why, given existing scientific constraints, it cannot translate potential health impacts further.

Whether this is viewed as a "new" requirement or a clarification of existing law, EIRs have not typically included the type of air quality analysis that the Court held CEQA requires. Agencies and practitioners are working to figure out what will pass muster under this new decision, particularly the requirement that EIRs discuss hypothetical analysis that is not scientifically possible to do. The greatest technical challenges will likely arise in connection with efforts to ascertain the ultimate health effects of ozone precursors, which must rise into the atmosphere before being converted to ozone in the presence of sunlight. Ascertaining the ultimate fate of these specific ozone molecules may prove to be exceedingly difficult, particularly for relatively small projects.

The Court's discussion regarding the adequacy of mitigation measures is helpful, but not as groundbreaking as the other issues. Including a substitution clause that allows for additional and presumably better mitigation measures when they become available does not constitute impermissible deferral of

mitigation, and is consistent with CEQA's goal of promoting environmental protection. The Supreme Court seemed not to want a rigid application of CEQA to impede technological innovation. Similarly, an agency may adopt mitigation measures that reduce environmental impacts, even if they do not reduce impacts to a less than significant level, because CEQA was not enacted to prevent all development and some reduction in environmental impacts is better than none.

The Supreme Court's opinion is available at: http://www.courts.ca.gov/opinions/documents/S219783A.PDF

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REGULATORY DEVELOPMENTS

SHASTA DAM PROJECT UPDATE: PROGRESSING THROUGH THE CEQA AND NEPA REGULATORY PROCESS

A new dam project is underway in California known as the Shasta Dam and Reservoir Enlargement Project (Shasta Dam Project). Although dams in California are not well-received by some stakeholder groups given potentially adverse environmental impacts to fisheries for some projects as well as safety issues to human populations if dam failure occurs, the Shasta Dam Project is gaining legs by recently undergoing a scoping and comment period under the California Environmental Quality Act (CEQA), with the federal environmental impact equivalent under the National Environmental Policy Act (NEPA) being much further along in the regulatory approval process.

Background

Shasta Dam and reservoir are located in northern California approximately ten miles north of Redding and about 100 miles south of the Oregon state border. The dam was built between 1938 and 1945, standing at 602 feet tall, providing flood control, hydropower supply and water for irrigation, municipal and environmental uses. The reservoir is also used extensively for various recreational activities.

Shasta Dam and reservoir is federally owned and operated by the U.S. Bureau of Reclamation (Bureau), and serves as the Bureau of Reclamation's largest reservoir in the federal Central Valley Project (CVP), comprising approximately 41 percent of the CVP's total 9 million acre-feet of storage.

Federal feasibility study efforts started back in 1980 under Public Law 96-375 to evaluate a 200-foot rise along with other options, followed in 2004 under Public Law 108-361 to confirm feasibility authorization, among other things, with such authorization confirmed. In 2006, a scoping report was done, and during 2015, the feasibility report and Environmental Impact Statement (EIS) under NEPA was sent to Congress. In 2018, Congress appropriated $20 million for Shasta preconstruction activities.

The current calendar year is set to be a big one for the Shasta Dam Project. The Bureau has indicated that it anticipates completing the Biological Assessment during February; 90 percent design plan completed during May; a final, executed Record of Decision under NEPA during September; and a construction contract award with a Notice to Proceed during December. The Bureau further anticipates the reservoir filling date will be during Spring of 2024.

The Shasta Dam Project

The Bureau states that the goals of Shasta Dam Project are to raise the dam by 18.5 feet, which increase Shasta reservoir's storage capacity by 630,000 acre-feet. More specifically, The Bureau states this project would improve water supply reliability for agricultural, municipal and industrial, and environmental uses, while also reducing flood damage and improving Sacramento River temperatures and water quality below the dam for anadromous fish.

All of these benefits, however, come at a price. An 18.5-foot raise requires an additional 2,500 acres of land, which would require the federal government to acquire approximately 200 parcels of non-federal land mostly located in the community of Lakehead. Another category of cost is construction itself to raise the dam 18.5 feet, which the Bureau estimates to be $1.4 billion in 2014 dollars. The Bureau has said it will pay for half the cost, but that local and state partners will need to pay the other half.

As with any large project, various governmental agencies and stakeholder groups are involved. Among interested federal agencies are the U.S. Forest Service due to National Forest System lands that may be impacted; the Bureau of Indian Affairs with the Winnemem Wintu Tribe and other tribal interests voicing strong concerns; the U.S. Army Corps of Engineers for regulatory permitting for construction and other activities; and the U.S. Fish and Wildlife Service for fisheries evaluations, which in its 2015 comments on the NEPA document said raising the dam will not benefit salmon.

Other stakeholder interests include the environmental protection groups, also commonly referred to as non-governmental organizations (NGOs) — the NGOs as well as other stakeholders have much to say, especially now that CEQA is underway and is being assisted with by Westlands Water District. Westlands is the Fresno County irrigation district often involved in state water projects with some reporting in a controversial way. During a December 12, 2018 CEQA scoping session in Redding, one local member of the public said the purpose of the project is to send much more water to Westlands, while an NGO representative at that meeting said raising Shasta Dam would violate state law because a taller dam would result in the reservoir rising and further inundating the McCloud River, which is protected under state law. John Laird, the then-California Secretary of Natural Resources reportedly sent a letter to Congress last year making a similar point. With the change in state administrations on January 7, it is unclear whether current Natural Resources Secretary Wade Crowfoot will share his predecessor's position.

Conclusion and Implications

As with past water supply shortages, future shortages will happen due to drought, regulatory actions, or some combination thereof, making storage of water—whether in reservoirs or groundwater basins a highly-effective tool to help overcome or worse yet survive severe shortages. As for the fisheries science and related methodologies and interpretations, the conflict is tense between one school of thought advocating for more water releases in rivers and streams to benefit fish (hence, little-to-no purported need for new dams or increasing existing dams), while another school of thought favors better-managed and timed releases so that the quantity and quality of water (*i.e.*, temperature) improves given temperature is a critical factor for fishery health rather than simply looking to quantity of flows. Accordingly, at its broad conceptual level, the Shasta Dam Project implicates potential benefits for water users of all types, including fisheries, with much more to be determined as to this project's implications to local landowners, fisheries and water users downstream.
(Wesley A. Miliband)

CALIFORNIA DEPARTMENT OF WATER RESOURCES MOVES FORWARD ON SALTON SEA HABITAT CONSERVATION PROJECT

The California Department of Water Resources (DWR) is moving along with a large-scale, multi-million-dollar species habitat conservation and air quality management project at the southern end of the Salton Sea (Project). The Project comprises a significant component for Phase 1 of the Salton Sea Management Program (SSMP). DWR recently released a Request for Qualifications (RFQ) seeking contractors for the Project. The release of the RFQ is a significant step forward in implementing the SSMP and combating one of the state's most significant public health and ecological challenges.

Background

The Salton Sea is a desert lake extending approximately 35 miles long and 15 miles wide between the Coachella and Imperial valleys. The Salton Sea was formed around 1904, when the Colorado River swelled, broke through extensive irrigation structures and flowed into the Salton Basin for many months. The Salton Sea, which is saltier than the ocean provides fish habitat and a food supply food for millions of migratory birds on the Pacific Flyway. Over the last several decades, water levels at the Salton Sea have declined and salinity concentrations have increased, posing threats to the ecosystem and wildlife. Dust emissions caused by the receding shoreline and exposed lake bed have also created air quality problems and other health hazards for local communities.

The Salton Sea Management Plan

In May 2015, then-Governor Brown created a Salton Sea Task Force (Task Force). He directed the Task Force to seek input from tribal leaders, federal agencies, local water districts, local leaders and other public and private stakeholders with an interest in the Salton Sea to develop a comprehensive management plan for the Salton Sea.

The Task Force developed a multi-phased SSMP to address the urgent public and ecological health issues resulting from decreasing water levels. Phase 1 of the SSMP is a ten-year plan that outlines a series of projects to expedite construction of habitat and suppress dust on areas of playa that have been, or will be, exposed at the Salton Sea by 2028 (Phase 1 Plan). Total project costs for the Phase 1 Plan are projected to be approximately $303 million.

The Project and Request for Qualification

The Project is the first step in implementing the Phase 1 Plan, it aims to suppress hazardous dust contributing to human health issues while creating habitat for endangered migratory birds at the quickly receding Salton Sea. The Project area encompasses approximately 3,770 acres of exposed lakebed at the southwest end of the Salton Sea, about eight miles from of the town of Westmorland in Imperial County.

The state is prepared to commit up to $190 million for the Project, though that funding is contingent upon obtaining the necessary easements from the Imperial Irrigation District in order to access property required to implement the Project. Through the RFQ, DWR seeks to establish a partnership with a design and build construction firm with the expertise, resources, and vision that will help advance the Project. The release of the RFQ is an important step for the state toward fulfilling its commitments to the Salton Sea.

Responses to the RFQ must be submitted by April 15, 2019. The RFQ and more information can be found on the DWR website at water.ca.gov/Program/Engineering-And-Construction/Design-Build-Contracting

If all goes according to plan, it is anticipated that the DWR will issue a request for proposals for the Project as early as July 2019.

Conclusion and Implications

The Salton Sea requires dedicated resources and effective, collaborative project management if it is to provide benefits that outweigh its mounting harm and challenges. After years of planning, the release of the RFQ marks a notable step forward in Project implementation and demonstrates the state's commitment to advance the SSMP toward successfully managing the Salton Sea.

(Paula Hernandez, Michael Duane Davis)

LAWSUITS FILED OR PENDING

STATE OF WYOMING FILES APPEAL TO THE NINTH CIRCUIT SEEKING TO OVERTURN THE DISTRICT COURT'S DECISION REGARDING THE ESA LISTING OF THE GREATER YELLOWSTONE GRIZZLY BEAR

On December 5, 2018, the State of Wyoming, shortly followed by several co-defendants, filed an appeal to the Ninth Circuit Court of Appeals of the U.S. District Court for the District of Montana's (District Court) decision to vacate the delisting of the Greater Yellowstone Ecosystem grizzly bear (Yellowstone Grizzly) from the federal Endangered Species Act (ESA). Wyoming's appeal of the District Court's ruling continues the ongoing battle between conservationists and the hunting community regarding a well-beloved species. [*Crow Indian Tribe v. United States*, ___F.Supp.3d___ (D. Mt. 2018).]

Grizzly Bear Population in the United States

Before European settlement began, upwards of 50,000 grizzlies roamed the lands of the United States. As settlement moved westward in the 19th Century, the government began "bounty programs aimed at eradication, [and] grizzly bears were shot, poisoned, and trapped wherever they were found.": (Final Rule: Endangered and Threatened Wildlife & Plants; Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered & Threatened Wildlife, 82 Fed. Reg. 30,502, 30,508 (June 30, 2017)) (2017 Final Rule). Most recently, only six ecosystems of grizzly bears remain in the United States: 1) the Greater Yellowstone Ecosystem (GYE), covering portions of Wyoming, Montana, and Idaho; 2) the Northern Continental Divide Ecosystem (NCDE) of north-central Montana; 3) the Cabinet-Yaak area extending from northwest Montana to northern Idaho; 4) the Selkirk Mountains in northern Idaho, northeast Washington, and southeast British Columbia; 5) north-central Washington's North Cascasdes area; and 6) the Bitterroot Mountains of western Montana and central Idaho. 82 Fed. Reg. 30,508-09. The GYE and NCDE maintain the largest grizzly bear populations with an estimated 700 to 900 bears. *Id.* Fewer than 100 bears occupy each of the remaining four ecosystems. *Id.*

First Attempts to Delist the Yellowstone Grizzly

In 2007, the Fish and Wildlife Service (Service) published its final rule (2007 Final Rule), which identified the Yellowstone Grizzly as a "distinct population segment" and delisted the Yellowstone Grizzly from the endangered and threatened species list. A "distinct population segment" of a larger species may be listed once the Service finds that, in addition to being endangered or threatened, the population segment is discrete—that is, "markedly separated from other populations of the same taxon"—and significant. Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4,722, 4725 (Feb. 7, 1996).

As litigation ensued challenging the 2007 Final Rule, the Ninth Circuit Court of Appeals affirmed the lower court's ruling to vacate and remand the 2007 Rule to the Service to determine the listing status of the Yellowstone Grizzly. The Ninth Circuit affirmed the District Court's ruling because the Service failed to rationally take into account the emerging threat of whitebark pine tree (a prominent food source to the Yellowstone Grizzlies) loss when delisting the Yellowstone Grizzly from the ESA.

The *Humane Society v. Zinke* Decision

In August 2017, as the Service continued to analyze the listing status of the Yellowstone Grizzly, the United States District Court for the District of Columbia (D. D.C.) decided *Humane Society of the United States v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017) (*Humane Society*). The court in *Humane Society* invalidated a similar final rule published by the Service relating to the designation of the Western Great Lakes population of the gray wolf as a distinct population segment and the Service's decision to delist the Western Great Lakes gray wolves.

Importantly, the D.C. Circuit provided that the Service must review the status of the entire listed

species from which the distinct population segment was carved, which had been ignored entirely in its delisting determination of the Western Great Lakes population. Thus, the Service was compelled to analyze the effects of delisting the Western Great Lakes gray wolves on the larger gray wolf species as a whole.

2017 Final Rule Delisting Yellowstone Grizzly

Approximately ten years after the Ninth Circuit remanded the 2007 Final Rule, the Service again published a final rule delisting the Yellowstone Grizzly on June 30, 2017 (2017 Final Rule). *See,* Final Rule, 82 Fed. Reg. at 30,505. Recognizing that the holding in *Humane Society* may have some relevance in its analysis, the Service reopened public comments on the impacts of the *Humane Society* decision on its determination to delist the Yellowstone Grizzly.See, Request for Comments: Endangered and Threatened Wildlife & Pants; Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered & Threatened Wildlife, 82 Fed. Reg. 57,698 (Dec. 7, 2017) (Request for Comments). Ultimately, after the Request for Comments period, the Service determined that the 2017 Final Rule did not require modification. The Service found that despite the D.C. Circuit's decision in *Humane Society*, the "consideration and analyses of grizzly bear populations elsewhere in the lower 48 States is outside the scope of [the 2017 Final Rule]. *See,* 2017 Final Rule, 82 Fed. Reg. at 30,546.

Shortly after the publication of the 2017 Final Rule, the Crow Tribe (Tribe), along with several co-plaintiffs (plaintiffs), commenced a lawsuit objecting to the Service's actions relating to the Yellowstone Grizzly as arbitrary and capricious under the ESA and Administrative Procedure Act (APA).

The District Court's Decision

Arbitrary and Capricious Standard of Review under the APA

Pursuant to § 706(2)(A) of the APA, a court is required to:

> . . .hold unlawful and set aside agency action, findings, and conclusions found … to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

Of the four factors to be considered under the arbitrary and capricious standard, Plaintiffs alleged that the Service "entirely failed to consider an important aspect of the problem.": *See, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Specifically, the District Court analyzed if the Service acted arbitrarily and capriciously when: 1) delisting the Yellowstone Grizzly and analyzing its impacts of such action on the remaining endangered and threatened grizzly bear population not located in the GYE; 2) failing to include a recalibration methodology utilizing the best available science in its 2017 Final Rule; and 3) analyzing the need for translocation or natural connectivity of other grizzly bear populations in other regions.

The Services' Piecemeal Approach to Grizzly Bear Protections

The thrust of the plaintiffs' argument rests with the fact that the Service blatantly excluded any analysis or consideration of the effect of delisting the Yellowstone Grizzly on other members within the grizzly bear species, which remain protected under the ESA. Specifically, plaintiffs relied heavily upon the similar fact pattern and analysis by the D.C. Circuit in *Human Society* to argue that the Service acted in violation of the APA and ESA. The Service maintained that *Humane Society* was wrongly decided, and that the facts in *Humane Society* were distinguishable because the remaining grizzly bear populations outside of the GYE remained protected, unlike the remaining population of the gray wolves in *Humane Society*. The District Court was unconvinced by the Service's arguments:

> The Service does not have unbridled discretion to draw boundaries around every potential healthy population of a listed species without considering how that boundary will affect the members of the species on either side of it.

The District Court further held that the Services' "piecemeal approach" in segmenting off a healthy portion of an endangered species population contravenes the ESA's "policy of institutionalized caution.":See, *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1167 (9th Cir. 2011).

Removal of Recalibration Methodology

A recalibration method is used to calculate new estimates for a species population in any given year and then utilized in making listing and delisting determinations. Additionally, the ESA requires that the Service make listing and delisting determinations "solely on the basis of the best mandates and commercial data.": 16 U.S.C. § 1533(b)(1)(A). The Service conceded that the current recalibration model may not remain the best available science but that the methodology will remain in place until another population estimator was approved. The Service ignored concerns about the existing recalibration methodology and removed the requirement to utilize the "best available science" for changing the estimator in the 2017 Final Rule mostly due to political pressures from the states. The District Court ruled that there was clear evidence that the Service made its decision on recalibration in the 2017 Final Rule not based on the best available science or law, but rather, a concession to the states' hardline position in utilizing old recalibration methods.

Lack of Natural Connectivity Provisions

The ESA provides that the Service consider the "natural or manmade factors affecting [the Yellowstone Grizzly's] continued existence," including the population's genetic health while under the threat of endangerment. 16 U.S.C. § 1533(b)(1)(A). In its 2017 Final Rule, the Service recognized that "[t]he isolated nature of the [Yellowstone Grizzly] was identified as a potential threat when listing occurred in 1975.": 82 Fed. Reg. at 30,535. Without an adequate gene pool, the Yellowstone Grizzly will be at an increased risk of endangerment than currently exists. 82 Fed. Reg. at 30,535-36.

The District Court held that the Service failed to logically support its conclusion that the Yellowstone Grizzly population was not threatened by its isolation. Specifically, in the 2007 Final Rule, the Service:

> . . .recommended that if no movement or successful genetic interchange was detected by 2020, grizzly bears from the [NCDE] would be translocated into the [GYE] grizzly bear population to achieve the goal of two effective migrants every 10 years (i.e., one generation) to maintain current levels of genetic diversity. 82 Fed. Reg. at 30,536.

The 2017 Final Rule did not maintain the same commitment to translocation in order to create a genetically diverse grizzly bear population. The lack of commitment to translocation was based on the Services' reliance on two distinct studies that were "illogically cobbled together" to conclude the Yellowstone Grizzly population is currently sufficiently diverse.

Conclusion and Implications

The holding in *Crow Indian Tribe v. United States* stayed the first grizzly hunt in 44 years in Wyoming. As Wyoming and its co-defendants appeal the District Court's decision to the Ninth Circuit, the current conservation strategy to protect the Yellowstone Grizzly and remaining grizzly bear population remains in place. As the public sentiment shifts toward environmental concerns and conservation efforts, Wyoming faces an uphill battle in its appeal to argue that the 2017 Final Rule should not be vacated but reaffirmed. The District Court's decision is available online at: https://www.mtd.uscourts.gov/sites/mtd/files/Order%20in%20Crow%20Indian%20Tribe%2C%20et%20al%20vs.%20U.S.A.%2C%20et%20al%20and%20State%20of%20Wyoming%2C%20el%20al.pdf

Wyoming's December 2018 appeal to the Ninth Circuit is available online at: https://www.courtlistener.com/recap/gov.uscourts.mtd.55114/gov.uscourts.mtd.55114.280.0.pdf

(Nicolle Falcis, David Boyer)

CALIFORNIA SUPREME COURT TO DECIDE WHETHER PERMITS FOR GROUNDWATER WELLS ARE SUBJECT TO CEQA

In yet another indication of the heightened scrutiny of groundwater pumping in California, the California Supreme Court will soon decide whether a county-issued permit for construction of a groundwater well is subject to review under the California Environmental Quality Act (CEQA). (Pub. Res. § 21000 *et seq.*) Such permits have long been issued without CEQA review, on the premise that issuance of such permits is a ministerial act, and hence not a "project" as defined by CEQA. However, in *Protecting Our Water & Environmental Resources v. Stanislaus County* the Fifth District Court of Appeal held that a county exercised discretion in deciding whether to issue a well permit, and hence CEQA applied. The California Supreme Court has accepted review of the *Protecting Our Water* decision, as well as a second decision by the same court at the same time reaching the same conclusion, and a third, earlier decision from the Second District Court of Appeal that reached the opposite conclusion. The second and third cases are stayed pending resolution of the *Protecting Our Water* case. [*Protecting Our Water & Environmental Resources v. Stanislaus County,* California Supreme Court, Case No. S251709; Fifth District Court of Appeal, Case No. F073634, *Unpub.*, August 24, 2018.]

Background

In general, one incident of the ownership of land is a right to use groundwater beneath the land for beneficial uses. Local authorities, however, typically regulate the construction, repair, reconstruction, or abandonment of wells. The task of ensuring wells are built, maintained and closed in accordance with good standards is typically assigned to the city or county health department. Under Water Code § 13801, local agencies must adopt standards for wells that meet or exceed standards developed by the Department of Water Resources (DWR) and published in Bulletin 74-81. Those standards were updated in Bulletin 74-90.

The Stanislaus County Well Ordinances and CEQA Process

Stanislaus County (County) ordinances required wells to meet specified standards, including Bulletin 74-81, as it may be amended or updated. The County designated issuance of well construction permits as ministerial, and hence not subject to CEQA, unless the applicant sought a variance from the standards. In 2014, the County adopted an ordinance prohibiting the unsustainable extraction of groundwater and the export of water from the county, with certain exceptions. Since November 2104 the county had issued over 400 permits without CEQA review. In that time six applications had been deemed subject to CEQA, and none resulted in a permit.

Plaintiffs Protecting Our Water and Environmental Resources and California Sportfishing Protection Alliance filed a complaint for declaratory relief alleging the County violated CEQA through a "pattern and practice" of approving well construction permits without applying the environmental review procedures of CEQA. The trial court concluded that the County's approval of exempt, non-variance well construction permits was "ministerial" and therefore not subject to CEQA.

The *Protecting Our Water* Decision and Other Rulings

In an *unpublished* decision issued in *Protecting Our Water* on August 24, 2018, the Fifth District Court of Appeal reversed. It found the County was making a discretionary decision when it applied standards in Bulletin No. 74-90 intended to keep wells untainted by potential pollution or contamination sources. The Bulletin provides estimates of distances from potential sources of contamination generally thought to be adequate to protect against contamination, but emphasizes that a case by case determination is required. The court concluded that judging how far a well should be from a contamination source called for a discretionary decision by the County. It explained that the County's determination of "whether

a particular spacing is 'adequate' inherently involves subjective judgment."

The Court of Appeal was mindful of the impact that requiring CEQA review might have on homeowners seeking to install a well, explaining:

> . . .[w]e understand that requiring CEQA review for these relatively small, routine projects may seem unnecessarily burdensome and of little benefit. Yet, we are constrained by what the law says about ministerial versus discretionary government approvals. Given the discretion accorded to the County, that standard leads us to conclude that CEQA applies here.

The *Coston v. Stanislaus County* Decision

A second appeal decided at the same time, *Coston v. Stanislaus County*, involved the same CEQA issue between another set of petitioners and the County. (California Supreme Court Case No. S25172; Fifth District Court of Appeal No. F074209; *unpublished* opinion; Stanislaus County Superior Court; 2016561.) The *Coston* opinion repeats verbatim the analysis from the *Protecting Our Water* decision. The California Supreme Court has granted review of *Coston* as well, but has been deferred pending a decision in *Protecting Our Water*.

The Second District Court's Decision in *California Water Impact Network*

In contrast to *Protecting Our Water* and *Coston*, the Second District Court of Appeal held that issuance of a well permit under the ordinances of San Luis Obispo County is a ministerial act not subject to CEQA in *California Water Impact Network v. County of San Luis Obispo*, 25 Cal.App.5th 666 (2nd Dist. 2018). This court concluded:

> . . .that issuance of a well permit is a ministerial action under the ordinance. If an applicant meets fixed standards, County must issue a well permit. The ordinance does not require use of personal or subjective judgment by County officials. There is no discretion to be exercised. CEQA does not apply. *California Water Impact Network*, 25 Cal.App.5th at 672.

The petitioners in a *California Water Impact Network* argued San Luis County had discretion to deny or condition well permits based on cumulative depletion of the groundwater. The court disagreed, finding that the standards in Bulletin No. 74-81 are directed at protecting groundwater quality, not quantity. The issue raised in *Protecting Our Water* regarding discretion to decide adequate distance from potential sources of contamination apparently was not raised in *California Water Impact Network*. The California Supreme Court has granted review of *California Water Impact Network* and stayed briefing pending a decision in *Protecting Our Water*. *California Water Impact Network v. County of San Luis Obispo*, 2018 Cal. LEXIS 9068, 429 P.3d 827, 239 Cal.Rptr.3d 662.

Conclusion and Implications

The days in which groundwater pumping in California was subject to minimal regulatory review are rapidly coming to a close. The advent of the Sustainable Groundwater Management Act is the most noted development, but other longer existing laws are being used to bring new focus on the use of groundwater, whether through the public trust doctrine or as in this case CEQA.

If *Protecting Our Water* is affirmed, it may open the door to more challenges under CEQA, including challenges in which petitioners contend that CEQA analysis of well permitting must consider the cumulative impacts of pumping on a basin. That is, that the permitting decision should address water quantity as well as water quality. Those claims did not succeed in *Protecting Our Water* or *California Water Impact Network*, but petitioners can be expected to keep trying.

The court in *Protecting Our Water* was careful to note it was not ruling on the level of CEQA review required for a well permit, and observed that in many cases well permits in Stanislaus County may be appropriate candidates for negative declarations, mitigated negative declarations or perhaps even an exemption (other than the ministerial exemption). Even a limited level of required CEQA review will require a significant change from past practice however. (Dan O'Hanlon)

CALIFORNIA'S NEW GOVERNOR AND HOUSING: GAVIN NEWSOM DIRECTS LAWSUIT ALLEGING CITY'S HOUSING ELEMENT VIOLATES THE HOUSING ELEMENT LAW

California's housing crisis is perhaps the state's best-known feature, or now at least tied with sunshine and surfing. Despite of flurry of legislation in recent years, the state's housing production continues to lag behind what is needed to keep pace with demand and population growth. Housing production has averaged fewer than 80,000 homes a year over the last ten years, well below the projected need of 180,000 additional homes annually needed. This lack of supply, coupled with a multi-year economic expansion, has resulted in punishing affordability numbers: the state's median home price is around $600,000 (and much higher in portions of the Bay Area and coastal southern California), while nearly one-third pay more than 50 percent of their income toward rent.

Proposition 10, Costa-Hawkins, and General Plan Housing Elements

In November, voters rejected Proposition 10, which would have repealed Costa-Hawkins, the 1995 law that *eliminated* rent control for apartment units constructed after February 1, 1995 (or earlier, depending on the jurisdiction). One of the major arguments against Proposition 10 concerned the potential impact of the repeal of Costa-Hawkins on the supply of rental housing, with opponents pointing to studies finding that rent control decreases the supply of housing, including the state Legislative Analyst's Office, which analyzed the potential impacts of a repeal and concluded that it likely would discourage new housing construction.

The concern regarding housing supply is not new. For decades California cities have been required to identify in the Housing Element of their General Plans how they will meet their fair share of needed housing, called a Regional Housing Needs Assessment (RHNA), a number calculated by the state Housing and Community Development (HCD) Department in conjunction with regional planning bodies based upon demographic population information. In theory, jurisdictions must identify how they will meet their individual RHNA allocation to ensure that adequate housing is available for all income levels, including low and very low-income households. In practice, many jurisdictions simply identify areas where housing could theoretically be built without regard to market conditions or entitlement impediments, among other constraints on production, resulting in a significant gap between potential and actual production.

Assembly Bill 72 and the Housing Element Law

A common complaint concerns the lack of "teeth" in the state's Housing Element law and application of RHNA numbers, as the state has rarely called cities to task for clearly deficient Housing Elements and a failure to take realistic steps to meet RHNA allocations. As a partial response to this criticism, in 2017 the state adopted AB 72, which directs HCD to review any action or failure to act by a local government that it determines is inconsistent with an adopted housing element or the state's Housing Element Law. AB 72 further provides that HCD may revoke housing element compliance if the local government's actions do not comply with state law and authorizes HCD to notify the Attorney General that a jurisdiction is in violation of state law for noncompliance with, among other things, California's Housing Element Law. HCD may take any of the actions authorized by AB 72 after issuing written findings to the local government "as to whether the action or failure to act substantially complies with [California's Housing Element Law]," and providing a reasonable time, no longer than 30 days, for the local government to respond. Gov. Code, § 65585, subd. (i)(1)(A).

The New California Administration Steps in

On January 25th the Newsom administration showed that it takes AB 72 and existing Housing Element Law seriously, as it sued the City of Huntington Beach (City), alleging that the City's 2013 Housing Element violates the Housing Element Law, and the City has failed to enact an amendment bringing the 2013 Housing Element into substantial compliance with the law.

Specifically, the lawsuit focuses on the City's 2015 amendment to its Beach and Edinger Corridors Specific Plan (Plan) that reduced the maximum number of allowable housing units in the Plan. Given that the City's 2013 Housing Element relied almost solely on additional housing units in the Plan area to meet the City's RHNA allocation and the 2015 amendment reduced permitted units below the RHNA allocation, HCD nullified its certification of the City's 2013 Housing Element. The City thereafter responded to HCD (and to litigation brought by affordable housing advocates) by drafting an amendment to its housing element, which HCD approved. However, in March 2016 the city council unanimously rejected the amendment, and the City has taken no subsequent action to address the 2015 Plan amendment or the fact that its 2013 Housing Element has been deemed non-complaint by HCD.

Conclusion and Implications

Given the unanimous city council rejection in 2016 of the Plan amendment and more recent comments by City officials, it appears that the City is taking a defiant pose. In 2018 city council member Kim Carr claimed that the RHNA is "inflated and based on faulty data" and stated "I do not support the state dictating to the city how many homes we need to build or penalizing the city for failing to do so." In response to the lawsuit, Huntington Beach city attorney Michael Gates accused the state of unfairly targeting the City. Then, immediately following the state's lawsuit, the City filed suit against the state, alleging that SB 35, which requires housing projects to be approved faster if they offer affordable housing and meet certain other conditions, is unconstitutional and impermissibly interferes with municipal affairs.

While the outcome of both lawsuits is uncertain, the illustrate that the Newsom administration appears ready and willing to aggressively enforce existing housing law (while almost certainly seeking further pro-housing development changes) and that many local governments will just as aggressively attempt to maintain as much local control over housing development as possible. For more information regarding California's action against the City of Huntington Beach, *see*, https://www.gov.ca.gov/2019/01/25/housing-accountability/
(Alex DeGood)

RECENT FEDERAL DECISIONS

FOURTH CIRCUIT GRANTS PETITION FOR REVIEW OF SPECIAL USE PERMIT AND ROD ISSUED BY FOREST SERVICE FOR NATURAL GAS PIPELINE

Cowpasture River Preservation Association v. U.S. Forest Service, 911 F.3d 150 (4th Cir. 2018).

The U.S. Court of Appeals for the Fourth Circuit granted a petition to review the U.S. Forest Service's (Forest Service) amendment of the forest plans for George Washington National Forest (GWNF) and Monongahela National Forests (MNF), issuance of a Record of Decision (ROD) and Special Use Permit (SUP) authorizing the construction of a natural gas pipeline through parts of the GWNF and MNF, and grant of a right of way through the Appalachian National Scenic Trail (ANST). The court held that the Forest Service's decisions "arbitrarily and capriciously" violated the National Forest Management Act (NFMA) and the National Environmental Policy Act (NEPA). The court also determined the Forest Service violated the Mineral Leasing Act (MLA) because it lacked the statutory authority to issue a pipeline right of way across the ANST.

Factual and Procedural Background

Atlantic Coast Pipeline, LLC (Atlantic), proposed a 604.5-mile natural gas pipeline called Atlantic Coast Pipeline from West Virginia to North Carolina. The proposed route crossed parts of the GWNF and MNF and required a right of way across the ANST. Construction of the pipeline would require clearing trees and other vegetation in the national forest and digging, blasting, and flattening ridgelines.

NEPA requires an Environmental Impact Statement (EIS) any time a federal agency takes major action which significantly affects the quality of the human environment. An EIS must include a description of likely environmental effects, adverse environmental effects, and potential alternatives for the project being considered.

The Federal Energy Regulatory Commission (FERC) was the lead agency for preparing the EIS and approved the route for the pipeline. As FERC prepared the EIS, the Forest Service reviewed and provided comments on drafts. The Forest Service requested ten site-specific stabilization designs in areas with challenging terrain and identified several concerns about potential adverse environmental impacts, including landslide risk, erosion impact, and degradation of water quality.

In May 2017, however, the Forest Service "suddenly and mysteriously" withdrew its requests for the site-specific stabilization designs. In late 2017, the Forest Service issued a final ROD to adopt the EIS and project-specific amendments to 13 standards in the GWNF and MNF forest plans. In early 2018, the Forest Service granted a SUP for a pipeline right of way across the ANST.

Cowpasture River Preservation Association and other groups (petitioners) filled a petition to review the Forest Service's decision on February 5, 2018. Petitioners claimed the Forest Service violated NFMA, NEPA and MLA when issuing the SUP, ROD, and the right of way across the ANST.

The Fourth Circuit's Decision

The National Forest Management Act

The NFMA requires the Forest Service to develop a forest plan consistent with promulgated regulations (2012 Planning Rule). A forest plan provides a framework for "where and how certain activities can occur in a national forests." The Forest Service is then required to ensure that all activities on national forest land comply with the forest plans. Substantive requirements in the 2012 Planning Rule apply to forest plan amendment if the requirement is "directly related to the plan direction being added, modified, or removed by the amendment."

The Court of Appeals determined that the Forest Service acted "arbitrarily and capaciously" when it concluded the forest plan amendments for the

pipeline project were not directly related to the 2012 Planning Rule and that the amendments would not have a "substantial adverse effect" on national forest land. As a result, the court remanded the matter to the Forest Service to conduct a proper analysis of the amendments in light of the 2012 Planning Rule.

In addition, the court determined the Forest Service violated NFMA and its own forest plans by failing to analyze whether the project's needs could have reasonably been met on non-national forest land. The court remanded this issue to the Forest Service for consideration.

The National Environment Policy Act

Under NEPA, the Forest Service can only adopt FERC's EIS if the Forest Service undertakes an independent review of the EIS and determines that all of its comments and suggestions are satisfied. Petitioners argued the Forest Service violated the NEPA because it failed to study alternative routes and failed to look at landslide risk, erosion, and degradation of water quality based on the Forest Service's own comments on the EIS. The court held that the Forest Service was required to resolve all of its comments and concerns before adopting the FERC's EIS. The Forest Service acted "arbitrarily and capriciously" in not taking a "a hard look at the environmental consequences" of the pipeline project.

The Mineral Leasing Act

The Forest Service argued that it had the proper authority to grant a right of way across the ANST under the MLA. The Court of Appeals disagreed and held that the MLA specifically excludes lands in the National Park System from the authority to grant pipeline rights of way. Additionally, the Forest Service would not be the appropriate agency head because it handles trail management and not trail administration. Therefore, the court vacated the Forest Service's ROD and SUP, which granted the right of way to the project proponent.

Conclusion and Implications

This case presents a relatively rare instance where a federal agency's actions are determined to be arbitrary and capricious under several environmental laws.
(Daniella V. Hernandez, Rebecca Andrews)

NINTH CIRCUIT FINDS FISH AND WILDLIFE SERVICE COULD NOT WITHHOLD DRAFT JEOPARDY OPINIONS FROM DISCLOSURE UNDER FOIA EXEMPTION

Sierra Club, Inc. v. U.S. Fish and Wildlife Service, 911 F.3d 967 (9th Cir. 2018).

This action deals with materials generated during the U.S. Environmental Protection Agency's (EPA) proposed new regulations under § 316(b) of the federal Clean Water Act (CWA) for cooling water intake structures and its consultation with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS; and together the Services) about potential impacts under the federal Endangered Species Act (ESA). The consultation was to ensure that the agency's action would not be likely to jeopardize the continued existence or result in the destruction or adverse modification of habitat of any endangered or threatened species. Plaintiff Sierra Club made a request under the Freedom of Information Act (FOIA) to the Services for records generated during EPA's rulemaking process in connection with the cooling water intake structure regulations. The Services withheld many of the documents under "Exemption 5" of FOIA, which shields documents subject to the "deliberative process privilege" and this appeal from the U.S. District Court's ruling followed.

FOIA Exemption 5: Must Be Pre-Decisional and Deliberative

Because FOIA mandates a policy of broad disclosure of government documents, agencies may only withhold documents under the act's exemptions. Under Exemption 5, FOIA's general requirement to

make information available to the public does not apply to interagency or intra-agency memorandums or letters that would not be available by law to a party other than another agency in litigation with the agency. The deliberative process privilege, claimed by the Services in this case, permits agencies to withhold documents:

> . . .to prevent injury to the quality of agency decisions by ensuring that the frank discussion of legal or policy matters in writing, within the agency.

Thus, to qualify under this exemption, a document must be both "pre-decisional and deliberative."

A document is pre-decisional if it is:

> . . .prepared in order to assist an agency decision-maker in arriving at his [or her] decision, and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.

Similarly, deliberative materials include subjective documents which reflect the personal opinions of the writer rather than the policy of the agency or that inaccurately reflect or prematurely disclose the views of the agency. Under the "functional approach," the Ninth Circuit considered whether the contents of the documents reveal the mental processes of the decision-makers and would expose the Services' decision-making process:

> . . .in such a way as to discourage candid discussion within the agency and thereby undermine [their] ability to perform [their] functions.

The Ninth Circuit's Decision

The court noted that although some of the Biological Opinions in this action were not *publicly* issued, they nonetheless represented the Services' final views and recommendations regarding the EPA's then-proposed regulation:

> Both the Supreme Court and this court have held that the issuance of a biological opinion is a final agency action. *Bennet v. Spear*, 520 U.S. 154, 178 (1997); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 940 (9th Cir. 2006). So our focus is on whether each document at issue is pre-decisional as to a biological opinion, not whether it is pre-decisional as to the EPA's rulemaking.

Where a document is created by a final decision-maker and represents the final view of an entire agency as to a matter which, once concluded, is a final agency action independent of another agency's use of that document, it is not pre-decisional. Here, the record reflected the finality of the conclusions in many of the draft opinions, which had been approved by final decision-makers at each agency and were simply awaiting signature. Therefore, these opinions were not within the scope of FOIA's Exemption 5.

Only some of the draft jeopardy opinions could reveal inter- or intra- agency deliberations and were thus exempt from disclosure. Those documents were successive drafts of the Services' recommendations for the proposed rules, and comparing the drafts would shed light on the internal vetting process.

But many of the documents did not contain line edits, marginal comments, or other written material that exposed any internal agency discussion about the jeopardy findings. Nor did they contain any insertions or writings reflecting input from lower level employees. Since they did not reveal any internal discussions about how recommendations were vetted, those materials were not deliberative.

Conclusion and Implications

This opinion highlights the fact that FOIA's exemptions must be interpreted narrowly because the act is meant to promote public disclosure. For purposes of withholding documents under Exemption 5, an agency has the burden to prove that the documents are both pre-decisional and deliberative, and therefore are not subject to disclosure. The opinion may be accessed online at the following link: http://cdn.ca9.uscourts.gov/datastore/opinions/2018/12/21/17-16560.pdf

(Nedda Mahrou)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT APPLIES CEQA FAIR ARGUMENT STANDARD TO MITIGATED NEGATIVE DECLARATION—REQUIRES EIR FOR PROJECT

Georgetown Preservation Society v. County of El Dorado, et al.,
___Cal.App.5th___, Case No. C084872 (3rd Dist. Dec. 17, 2018).

In December 2018, the Court of Appeal for the Third District issued its decision in *Georgetown Preservation Society v. County of El* Dorado. The court dealt with whether the El Dorado County Review Board (Board) properly adopted a Mitigated Negative Declaration under the California Environmental Quality Act (CEQA) based on the board's application of its Design Review Guidelines in connection with a developer's request to erect a chain discount store on three vacant main street lots in a hamlet's historic center. This case deals with the application of the fair argument standard in connection with CEQA.

Factual and Procedural Background

This case arose out of a developer's attempt to erect a Dollar General® chain discount store on three vacant Main Street lots in Georgetown. Georgetown is an unincorporated Gold Rush-era hamlet in rural El Dorado County (including the county board of supervisors: County) and is also a state Historical Landmark and not far from where the California Gold Rush began. The project is proposed to be located on a 1.2-acre lot, consisting of three parcels to be merged in a commercial zone on Main Street. The project area is surrounded by a museum, a historic stamp mill, a park, a post office, a local library, some commercial property, the American River Inn bed and breakfast, and a historic residence.

In response to the proposed project, local residents, acting through the Georgetown Preservation Society (Society), objected to the project claiming it would impair the look of Georgetown. The residents lodged many criticisms in many forms, including petitions signed by residents and letters arguing that the project did not fit into Georgetown functionally or visually. Some of the letters in the record were from local residents who are architects, professional engineers, city planners, and a landscape architect and restoration ecologist.

The County approved the project because the County found the project design, architectural treatments, and associated improvements substantially conform to the El Dorado County Historic Design Guide and would not substantially detract from Georgetown's historic commercial district. The Society appealed this finding to the board of supervisors (Board). The Board denied the Society's appeal, which the County then followed by filing its notice of determination, referencing a Mitigated Negative Declaration.

Following the County's Mitigated Negative Declaration, the Society promptly filed the instant petition for writ of mandate, alleging several CEQA violations (some of which were abandoned) including that the County had not adequately reviewed traffic issues and aesthetics. In a second claim the Society alleged violation of Planning and Zoning Laws, including that the project was inconsistent with parts of the County's General Plan.

Following moving and opposing papers and oral arguments, the trial court issued a ruling finding that the public comments submitted to the County provided substantial evidence to support a fair argument that the project may have significant aesthetic impacts, thus requiring an Environmental Impact Report (EIR). The trial court also found the County had made no credibility determinations regarding the public comments and therefore those comments could not be categorically disregarded. The County appealed the trial court's findings.

The Court of Appeal's Decision

At the heart of this case is the issue of aesthetics and the requirements of CEQA related thereto and if lay commentary on nontechnical matters can satisfy

the fair argument test which would trigger the need for an EIR.

Initially the Court of Appeal set out a few of the general rules governing CEQA, its requirements regarding EIRs and when a Negative Declaration and a Mitigated Negative Declaration may be appropriate. Specifically, the court found that a Mitigated Negative Declaration may be appropriate:

> . . .when the initial study has identified potentially significant effects on the environment, but (1) revisions in the project plans ... would avoid the effects or Mitigated the effects to a point where clearly no significant effect on the environment would occur, *and* (2) *there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.* (Cal. Code Regs., tit. 14, § 15369.5, italics added.)

Substantial Evidence and the Fair Argument Standard

Furthermore, the court pointed out that for CEQA purposes "substantial evidence":

> . . .means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence. (Cal. Code Regs., tit. 14, § 15384(a), italics added; see also § 21082.2.)

Historic Design Review and Public Controversy

The court then turned to analyze the effects of the County's historic design review and whether it was sufficient to arrive at the County's Mitigated Negative Declaration and determination that it is not required to prepare an initial EIR in connection with the project. The court noted that a leading treatise explained:

> . . .a strong presumption in favor of requiring preparation of an EIR is built into CEQA. This presumption is reflected in what is known as the 'fair argument' standard, under which an agency must prepare an EIR whenever substantial evidence in the record supports a fair argument that a project may have a significant effect on the environment. (1 Kostka & Zischke, Practice Under Cal. Environmental Quality Act (*Cont. Ed.Bar 2d ed.* 2018) Initial Study, § 6.3.)

Included in the court's discussion of the fair argument standard is the issue of whether a project can be insulated from CEQA review and preparation of an EIR if a fair argument is presented that a project may have a significant impact on the environment as well as the nature of the comments (in this case from residents of Georgetown) giving rise to the fair argument and if such comments can be contradicted by expert opinions thereby eliminating the need for an EIR.

The court pointed out that the mere existence of a public controversy does not satisfy the fair argument standard. (*See*, Cal. Code Regs., tit. 14, § 21082.2, subd. (b); *Bowman v. City of Petaluma,* 185 Cal. App.3d 1065 (1986), 1080-1081, 230 Cal.Rptr. 413.). The court did find (and concur with the trial court) that the fair argument standard was met in this case and that, since many commentators objected to the size and over-all appearance of the proposed building, it cannot seriously be disputed that this body of opinion meets the low threshold needed to trigger an EIR. In support of this, the court pointed out that many cases, some involving aesthetics, have found lay commentary on nontechnical matters to be admissible and probative, such that they can satisfy the fair argument test. (*See, e.g.*, *Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.*, 215 Cal.App.4th 1013, (2013), 1053-1054, 156 Cal. Rptr.3d 449).

Specifically, the court stated that:

> . . .in this case, a large number of interested people believe this project would have a significant and negative effect on aesthetics. They

> have commented that the project is too big and too boxy or monolithic to blend in, such that its presence will damage the look and feel of the historic center of Georgetown. That is enough to trigger an EIR. (2018 WL 6600087, p. 9).

Lay Opinion

Lastly, despite the County's argument that it "reasonably found that lay opinions of even longtime residents did not amount to substantial evidence where those lay opinions lacked a factual basis, ignored the project's substantial compliance with the County's Historic Design Guide, and were contradicted by undisputed experts in historic architecture and the County's reasonable finding of General Plan consistency" the court pointed out that the trial court noted the County never made any such findings "reasonably" or otherwise and the evidentiary record does not contain that the County made any such findings. The court even went on to point out that, even if it considered that the County did make such findings that the public opinions lacked credibility and foundation, the court would find the County abused its discretion. The court pointed out that:

> . . .many of the commentators were local residents and therefore capable of giving a lay opinion on the nontechnical aesthetic issues of size and general appearance [which is in controversy for whether or not an EIR was triggered].

Conclusion and Implications

The Court of Appeal ultimately concluded that "[it] ha[s] not considered evidence of general societal conditions or economic consequences or individualized impacts. [But], the evidence clearly shows that the low-threshold fair argument test has been met. Despite the subjective nature of aesthetic concerns, it is clear that the project *may* have a significant adverse environmental impact. Whether it likely *will* or *will not* have such an impact is a question that an EIR is designed to answer." The court's opinion is available online at: https://scholar.google.com/scholar_case?case=9058333253001468456&q=Georgetown+Preservation+Society+v.+County+of+El+Dorado&hl=en&as_sdt=2006&as_vis=1
(Alexis B. Sinclair, Matthew Henderson)

FOURTH DISTRICT COURT AFFIRMS ATTORNEY'S FEES AWARD FOR TRESPASS TO 'LANDS UNDER CULTIVATION' DESPITE NO DAMAGE TO CULTIVATED PORTION OF PROPERTY

Hoffman v. Superior Ready Mix Concrete, L.P., ___Cal.App.5th___, Case No. D072929 (4th Dist. Dec. 19, 2018).

This case involves application of California Civil Code of Procedure § 1021.9, which allows an award of attorney's fees to a prevailing plaintiff in a trespass action involving lands under cultivation or used for the raising of livestock. The Court of Appeal for the Fourth Judicial District found that attorney's fees under the statute could be awarded to a plaintiff who used a portion of her land to grow plants for an intended nursery, even though the defendant's trespass did not occur on the areas where plaintiff was actually growing plants.

Factual Background

Plaintiff owns landlocked property that is surrounded on three sides by defendant's land—a vested mining operation under the Surface Mining and Reclamation Act. Both landowners have easements across the other's property. Plaintiff purchased the property intending to open a commercial nursery and koi-growing operation and installed a water well, water storage tank, irrigation system and fencing. For nearly a decade, plaintiff grew a variety of plants, including palm trees and fruit trees. She also propagated plants by seed or cuttings to increase inventory. However plaintiff lost approximately 65 percent of the plant inventory when the water well pump on the property broke.

Plaintiff later sued defendant for various causes of action, including trespass to land, arguing that defendant's trespass damaged five areas on plaintiff's

property. The jury returned a special verdict for plaintiff on the trespass cause of action and awarded compensatory damages. The court framed the issue on appeal as whether § 1021.9 allows a prevailing plaintiff to recover attorney's fees where the trespass did not damage the portion of the property used for cultivation and did not disrupt any agricultural cultivation on the property.

The Court of Appeal's Decision

The specific question presented to the court was the proper interpretation of § 1021.9, which provides that:

> In any action to recover damages to personal or real property resulting from trespassing on lands either under cultivation or intended or used for the raising of livestock, the prevailing plaintiff shall be entitled to reasonable attorney's fees in addition to other costs, and in addition to any liability for damages imposed by law.

Analysis under the *Hawworth* Decision

The court reviewed two cases to determine whether the trial court properly concluded that the trespass occurred on "lands under cultivation." In *Haworth v. Lira,* 232 Cal.App.3d 1362 (1991), the plaintiffs raised horses and other animals on their property in an area zoned as an "equestrian district," which allowed homeowners to keep horses and other large domestic animals as an accessory use to residential uses. In that case plaintiffs prevailed in a trespass action after their neighbor's dogs came onto their property and injured one of their horses. There, the court noted that attorney's fees under § 1021.9 were proper because the statute is not limited to actions brought by commercial ranchers and farmers.

Analysis under the *Quarterman* Decision

On the other hand, in *Quarterman v. Kefauver*, 55 Cal.App.4th 1366 (1997),the court there found that § 1021.9 did not apply to a prevailing plaintiff's trespass action after their neighbor's actions caused lead contamination to a backyard garden. That court found that:

> . . .when the Legislature refers to land as cultivated, under cultivation, used for cultivation, or suitable for cultivation, the ordinary import of the description usually is to agricultural land used for farming and growing crops, or at least rural land as opposed to urban backyards.

Trespass and Damages

Here, the land was in fact under cultivation. While the plaintiff had not yet opened a nursery business on the property, the property was zoned for agricultural use and was located in a rural farming area. Since plaintiff's land was under cultivation, the next issue was whether the defendant's trespass must cause damage to that portion of the land actually being cultivated. The court found that attorney's fees may be awarded under § 1021.9 for trespass on agricultural land being cultivated, even where the defendant did not damage crops themselves or interfere with agricultural operations. Therefore, plaintiff was properly awarded attorney's fees by the trial court as the prevailing plaintiff in the trespass action.

Conclusion and Implications

The takeaway from this opinion is that the term "lands under cultivation" was interpreted to refer to the character of the land, not the specific area of the land that was trespassed upon. The Fourth District Court focused on the character of the land as a whole to award plaintiff attorney's fees, even though the defendant's trespass did not necessarily touch the portions of her property that were used for cultivation purposes. The opinion may be accessed online at the following link: http://www.courts.ca.gov/opinions/documents/D072929.PDF
(Nedda Mahrou)

CALIFORNIA LAND USE™ LAW & POLICY Reporter

SIXTH DISTRICT COURT FINDS SCHOOL DISTRICT METHODOLOGY FOR DETERMINING DEVELOPER FEES RAN AFOUL OF *SHAPELL INDUSTRIES* FACTORS

Summerhill Winchester LLC v. Campbell Union School District, ___Cal.App.5th___, Case No. H043253 (6th Dist. Dec. 4; *certified for pub.* Dec 20, 2019).

In the recent decision in *Summerhill Winchester LLC v. Campbell Union School District*, the Sixth District Court of Appeal found that the Campbell Union School District's (CUSD) fee study did not contain sufficient data to support its calculation of a development fee and that the study's use of hypothetical new schools which CUSD was not going to build and each additional student generated by development would result in a financial impact could legally support the fee imposed by CUSD. This case outlines the three pronged *Shapell Industries* test and the methodology required for determining legally supportable development fees.

Factual and Procedural Background

Education Code § 17620 authorizes a school district:

> . . .to levy a fee, charge, dedication, or other requirement against any [new residential] construction within the boundaries of the district, for the purpose of funding the construction or reconstruction of school facilities. . . . (Ed. Code, § 17620, subd. (a)(1).)

These fees are known as "Level 1" fees.

In 2012, CUSD commissioned a Level 1 Developer Fee Study (Fee Study). In 2012, CUSD had three middle schools and nine elementary schools. At the time of the Fee Study, CUSD's enrollment already exceeded the Fee Study's calculated capacity by 311 students. The Fee Study also projected future enrollment growth, but these projections did not take into account any new residential construction. The Fee Study projected that 359 additional students would enroll in CUSD's schools over the next five years after the 2011/2012 school year. However, the Fee Study devoted little attention to future new residential construction. There was just a single paragraph addressing how much new residential construction was expected within CUSD's boundaries in the next five years.

The Fee Study projected that "it will cost [CUSD] an average of $22,039 to house each additional student in new facilities." This figure was based on a projected $12.8 million cost to build a new 600-student elementary school and a projected $24.4 million cost to build a new 1,000-student middle school. However, CUSD and the school board (Board) conceded that they "do not contend that there is a need to build two new schools for 1,600 students for an expected capacity increase by 2016-17 of 359 students." Based on the Fee Study's ultimate calculation that a development fee should be $6.21 per square foot (which implies that CUSD would build the aforementioned new elementary and middle schools), the Board imposed the statutory maximum for a Level 1 fee in 2012 of $3.20 per square foot. CUSD was entitled to 70 percent of such fee per an agreement with the related high school district. Therefore, In March 2012, the Board, relying on the Fee Study, adopted a resolution imposing a fee of $2.24 per square foot on new residential construction and making numerous findings regarding development within the district and the needs for adequate school facilities.

SummerHill Winchester, LLC (SummerHill) owns a 110-unit residential development project in the City of Santa Clara (City) that is within CUSD's boundaries. In 2012 and 2013, SummerHill tendered to CUSD under protest development fees of $499,976.96.

SummerHill filed a petition for a writ of mandate and complaint for declaratory relief seeking a refund of the fees it had paid to CUSD and a declaration that the fees were invalid.

At the Trial Court

The trial court granted SummerHill's petition on the ground that the Fee Study did not contain sufficient support for the Board's resolution and ruled that

the Fee Study: 1) did not project the total amount of housing that was to be constructed in the district; 2) did not adequately estimate the number of new students in the district resulting from the new development; and 3) did not establish the necessary relationship between the number of new students and the proposed capital facilities. Following the trial court's granting CUSD time to revise the Fee Study and enact new resolutions and SummerHill's motion for reconsideration, the trial court The court concluded that a recalculation was not possible without "amending some of the data relied upon by the Board" and ordered that SummerHill's fees be refunded.

CUSD and the Board appealed the trial court's findings and order to refund SummerHill's fees.

The Court of Appeal's Decision

Initially, the Court of Appeal set out its standard of review and stated that the ultimate question, whether the agency's action was arbitrary or capricious, is a question of law. (*Shapell Industries, Inc. v. Governing Board,* 1 Cal.App.4th 218, 233 (1991)) A court accords no deference to the trial court's decision. (*Ibid.*) The court's role is to determine whether the enactment of the challenged fees by CUSD and the Board lacked evidentiary support or failed to demonstrate a rational connection between the relevant factors, the purpose of the statute, and the decision to enact the fees.

The court's analysis began by stating that facilities fees are justified only to the extent that they are limited to the cost of increased services made necessary by virtue of the development. The Board imposing the fee must therefore show that a valid method was used for arriving at the fee in question, "one which established a reasonable relationship between the fee charged and the burden posed by the development."

Three Prong Test under the *Shapell Industries* Decision

The Court of Appeal then outlined the three prong *Shapell* test used when analyzing such fees: 1) since the fee is to be assessed per square foot of development, there must be a projection of the total amount of new housing expected to be built within the District; 2) in order to measure the extent of the burden imposed on schools by new development, the District must determine approximately how many students will be generated by the new housing; and 3) the District must estimate what it will cost to provide the necessary school facilities for that approximate number of new students." (*Shapell*, *supra*, 1 Cal. App.4th at p. 235).

Regarding the first prong of the Shapell test, the court found that the Fee Study failed to project the "total amount of new housing expected to be built within the District." Instead, the Fee Study simply stated that the amount of new residential development would be "in excess of 133 residential units." The court stated that:

> . . .w]hile precision is not required this vague and unrestricted figure is little better than saying that 'some' development is anticipated since it provides no guidance for CUSD and the Board to determine *whether* new school facilities are needed due to the anticipated development.

For the second prong of the *Shapell* test, the court found that:

> . . .[l]ike the [F]ee [S]tudy's failure to estimate the total amount of new development, the [F] ee [S]tudy's reliance on its assertion that at least 67 new students would be generated by new development could not provide a basis for the Board to determine *whether* new school facilities were needed. Indeed, despite the fact that the [F]ee [S]tudy based its calculations on the cost of building two new schools, CUSD and the Board do not dispute that even the total projected enrollment increase (including both new students from new development and other new students) will *not* necessitate the construction of such schools.

Lastly, the Court stated that "[i]t was not enough, as CUSD and the Board claim, that the Board stated in its resolution that the fees would be used for "school facilities." Government Code § 66001 requires that "the facilities *shall be identified*." (Gov. Code, § 66001, subd. (a)(2), italics added.) The Fee Study could not identify the *cost* on which to base the fees without identification of facilities that would satisfy quantified needs.

The Court of Appeal concluded that:

> . . .[t]he Board's decision to enact a development fee in this case is invalid because the Board did not decide that its enrollment increases would necessitate the construction of new schools but nevertheless based the amount of the development fee on the cost of building new schools. This discontinuity precluded the Board from being able to demonstrate a reasonable relationship between the impact of new development and the development fee.

The Issue of Enrollment and Capacity

CUSD made one last argument in addition to the *Shapell* factors, that, since CUSD's enrollment already exceeds its capacity, each single new student will result in a financial impact on CUSD. The court responded that the argument:

> . . .does not satisfy the statutory requirement that CUSD and the Board demonstrate a relationship between the *amount* of the fee and impact of development on *the need for new or reconstructed school facilities*. Here, the [F]ee [S]tudy's use of hypothetical new schools that CUSD was not going to build as the financial premise for calculating the fee was not a reasonable alternative methodology that could legally support the fee imposed by the Board. Like the 'in excess of 133 residential units' and the *at least 67 students*, '***a*** financial impact' lacks quantification.

A "financial impact" can only be quantified using *Shapell* or other reasonable methodology and, as the Court states, the Fee Study did not accomplish that.

Conclusion and Implications

The Sixth District Court affirmed the trial court's finding that the Fee Study did not meet the *Shapell* factors and refunding of SummerHill's fees. The Court also outlined the factors required by *Shapell* when a school district is determining development fees as well as outlining a minimum standard of evidence required in the study to support such findings and imposition of a development fee. The court's opinion, later certified for publication, is available online at: https://scholar.google.com/scholar_case?case=11780362627544410742&q=Summerhill+Winchester+LLC+v.+Campbell+Union+School+District&hl=en&as_sdt=2006&as_vis=1
(Alexis Sinclair, Matt Henderson)

LEGISLATIVE UPDATE

This Legislative Update is designed to apprise our readers of potentially important land use legislation. When a significant bill is introduced, we will provide a short description. Updates will follow, and if enacted, we will provide additional coverage.

We strive to be current, but deadlines require us to complete our legislative review several weeks before publication. Therefore, bills covered can be substantively amended or conclusively acted upon by the date of publication. All references below to the Legislature refer to the California Legislature.

Coastal Resources

AB 65 (Petrie-Norris)—This bill would require specified actions be taken by the State Coastal Conservancy when it allocates any funding appropriated pursuant to the California Drought, Water, Parks, Climate, Coastal Protection, and Outdoor Access for All Act of 2018, including that it prioritize projects that use natural infrastructure to help adapt to climate change impacts on coastal resources.

AB 65 was introduced in the Assembly on December 3, 2018, and, most recently, on January 17, 2019, was referred to the Committee on Natural Resources.

Environmental Protection and Quality

AB 202 (Mathis)—This bill would extend the operation of the California State Safe Harbor Agreement Program Act, which establishes a program to encourage landowners to manage their lands voluntarily, by means of state safe harbor agreements approved by the Department of Fish and Wildlife, to benefit endangered, threatened, or candidate species, of declining or vulnerable species, without being subject to additional regulatory restrictions as a result of their conservation efforts, through January 1, 2024.

AB 202 was introduced in the Assembly on January 14, 2019, and, most recently, on January 15, 2019, was printed and may be heard in committee on February 14, 2019.

AB 231 (Mathis)—This bill would exempt from the California Environmental Quality Act (CEQA) a project: 1) to construct or expand a recycled water pipeline for the purpose of mitigating drought conditions for which a state of emergency was proclaimed by the Governor if the project meets specified criteria; and, 2) the development and approval of building standards by state agencies for recycled water systems.

AB 231 was introduced in the Assembly on January 17, 2019, and, most recently, on January 15, 2019, was printed and may be heard in committee on February 17, 2019.

SB 25 (Caballero)—This bill would amend the California Environmental Quality Act to establish specified procedures for the administrative and judicial review of the environmental review and approvals granted for projects located in qualified opportunity zones that are funded, in whole or in part, by qualified opportunity funds, or by moneys from the Greenhouse Gas Reduction Fund and allocated by the Strategic Growth Council.

SB 25 was introduced in the Senate on December 3, 2018, and, most recently, on January 16, 2019, was referred to the Committees on Environmental Quality and the Judiciary.

SB 62 (Dodd)—This bill would make permanent the exception to the Endangered Species Act for the accidental take of candidate, threatened, or endangered species resulting from acts that occur on a farm or a ranch in the course of otherwise lawful routine and ongoing agricultural activities.

SB 62 was introduced in the Senate on January 3, 2019, and, most recently, on January 16, 2019, was referred to the Committee on Natural Resources and Water.

Housing / Redevelopment

AB 11 (Chiu)—This bill, the Community Redevelopment Law of 2019, would authorize a city or county, or two or more cities acting jointly, to propose the formation of an affordable housing and infrastructure agency that would, among other things, prepare a proposed redevelopment project plan that would be considered at a public hearing by the agency where it would be authorized to either adopt the redevelopment project plan or abandon proceedings, in which case the agency would cease to exist.

AB 11 was introduced in the Assembly on December 3, 2018, and, most recently, on January 17, 2019, was referred to the Committees on Housing and Community Development and Local Government.

AB 68 (Ting)—This bill would amend the law relating to accessory dwelling units to, among other things, 1) prohibit a local ordinance from imposing requirements on minimum lot size, lot coverage, or floor area ratio, and establishing size requirements for accessory dwelling units that do not permit at least an 800 square feet unit of at least 16 feet in height to be constructed; and, 2) require a local agency to ministerially approve or deny a permit application for the creation of an accessory dwelling unit or junior accessory dwelling unit within 60 days of receipt.

AB 68 was introduced in the Assembly on December 3, 2018, and, most recently, on January 17, 2019, was referred to the Committees on Housing and Community Development and Local Government.

AB 69 (Ting)—This bill would require the Department of Housing and Community Development to propose small home building standards governing accessory dwelling units and homes smaller than 800 square feet, which would be submitted to the California Building Standards Commission for adoption on or before January 1, 2021.]

AB 69 was introduced in the Assembly on December 3, 2018, and, most recently, on January 17, 2019, was referred to the Committees on Housing and Community Development and Local Government.

AB 168 (Aguiar-Curry)—This bill would amend existing law, which allows for the ministerial approval of multi-family housing projects meeting certain objective planning standards, to require that the standards also include a requirement that the proposed development not be located on a site that is a tribal cultural resource.

AB 168 was introduced in the Assembly on January 9, 2019, and, most recently, on January 24, 2019, was referred to the Committee on Housing and Community Development.

AB 191 (Patterson)—This bill would, until January 1, 2030, exempt homes being rebuilt after wildfires or specified emergency events that occurred on or after January 1, 2017, from meeting certain current building standards.

AB 191 was introduced in the Assembly on January 10, 2019, and, most recently, on January 11, 2019, was printed and may be heard in committee on February 10, 2019.

SB 50 (Wiener)—This bill would require a city, county, or city and county to grant upon request an equitable communities incentive when a development proponent seeks and agrees to construct a residential development, as defined, that satisfies specified criteria, including, among other things, that the residential development is either a job-rich housing project or a transit-rich housing project, as those terms are defined; the site does not contain, or has not contained, housing occupied by tenants or accommodations withdrawn from rent or lease in accordance with specified law within specified time periods; and the residential development complies with specified additional requirements under existing law.

SB 50 was introduced in the Senate on December 3, 2018, and, most recently, on January 24, 2019, was referred to the Committees on Housing and Governance and Finance.

Public Agencies

SB 47 (Allen)—This bill would amend the Elections Code provisions relating to initiatives and referendums to require, for a state or local initiative, referendum, or recall petition that requires voter signatures and for which the circulation is paid for by a committee, as specified, that an Official Top Funders disclosure be made, either on the petition or on a separate sheet, that identifies the name of the committee, any top contributors, as defined, and the month and year during which the Official Top Funders disclosure is valid, among other things.

SB 47 was introduced in the Senate on December 3, 2018, and, most recently, on January 16, 2019, was referred to the Committee on Elections and Constitutional Amendments and Public Service.

SB 53 (Wilk)—This bill would amend the Bagley Keene Open Meeting Act to specify that the definition of "state body" includes an advisory board, advisory commission, advisory committee, advisory

subcommittee, or similar multimember advisory body of a state body that consists of three or more individuals, as prescribed, except a board, commission, committee, or similar multimember body on which a member of a body serves in his or her official capacity as a representative of that state body and that is supported, in whole or in part, by funds provided by the state body, whether the multimember body is organized and operated by the state body or by a private corporation.

SB 53 was introduced in the Senate on December 10, 2018, and, most recently, on January 16, 2019, was referred to the Committee on Governmental Organization.

Zoning and General Plans

AB 139 (Quirk-Silva)—This bill would amend the Planning and Zoning Law to require the annual report prepared by local planning agencies regarding reasonable and practical means to implement the General Plan or housing element to include: 1) the number of emergency shelter beds currently available within the jurisdiction and the number of shelter beds that the jurisdiction has contracted for that are located within another jurisdiction; and 2) the identification of public and private nonprofit corporations known to the local government that have legal and managerial capacity to acquire and manage emergency shelters and transitional housing programs within the county and region; and (3) to require an annual assessment of emergency shelter and transitional housing needs within the county or region.

AB 139 was introduced in the Assembly on December 11, 2018, and, most recently, on January 24, 2019, was referred to the Committee on Housing and Community Development.

AB 148 (Quirk-Silva)—This bill would, among other things, require each sustainable communities strategy set forth in a regional transportation plan prepared by a local planning agency in accordance with existing law to identify areas within the region sufficient to house an eight-year projection of the emergency shelter needs for the region.

AB 148 was introduced in the Assembly on December 13, 2018, and, most recently, on January 24, 2019, was referred to the Committees on Transportation and Natural Resources.

AB 180 (Gipson)—This bill would amend the Planning and Zoning Law to require those references to redevelopment agencies within General Plan housing element provisions to instead refer to housing successor agencies.

AB 180 was introduced in the Assembly on January 9, 2019, and, most recently, on January 10, 2019, was printed and may be heard in committee on February 9, 2019.
(Paige Gosney)

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