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CALIFORNIA LAND USE™
LAW & POLICY Reporter

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CALIFORNIA LAND USE™
LAW & POLICY Reporter

RECENT CALIFORNIA DECISIONS

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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

CALIFORNIA WATER COMMODITIZED?— A NEW PRICING INDEX EMERGES ON THE NASDAQ

By Derek Hoffman and Michael Duane Davis

On the first day of one esteemed university economics course, a professor circulates physical objects around the classroom for students to heft and examine—things like corn, wheat, soybeans, gold, silver, copper, spices and wood. These items, the lesson goes, are valuable natural resources. They also comprised the means of trade in the earliest of civilizations—gold for wheat; spices for wood—that is, until the concept of *money* took hold as the primary currency of trade. "Currency" is commonly defined as the fact or quality of being generally accepted or in use. So long as money is "generally accepted" and "in use" in the marketplace, those with gold can simply *buy* wheat. Those with spices can simply *buy* wood. No longer must one commodity be directly exchanged for another.

In today's sophisticated and global marketplace, thousands if not millions of commodities transactions occur daily. Data-driven financial indexes inform buyers and sellers regarding commodity prices. Tradable financial instruments enable transactions not only to meet today's commodity demands but also future demands, and can hedge against anticipated fluctuations in price and availability.

But what about water? More specifically, what about California water? Is it—or should it be—considered a commodity? How does such a characterization reflect and respect established water rights, laws and regulations? How are—or should—water rights transactions be priced, and based on what types and quality of information?

A New Index on the NASDAQ®

Indexes have long existed to track value and provide investors with access to *companies and utilities* that develop, produce, treat and supply water resources (*e.g.*: S&P Global Water Index, ticker symbol: SPGTAQD). Likewise, indexes for commodities like those mentioned above are ubiquitous.

On October 31, 2018, a new index emerged. The NASDAQ Veles California Water Index (ticker symbol: NQH20) (NQH20 or Index) tracks what it describes as the "spot price" of *water* in California based on certain types of groundwater and surface water transactions in specific California water markets. Veles Water Limited's (Veles) Chief Executive Officer expects the Index:

> . . .to facilitate tradeable cash-settled futures contracts within [a year] to allow farmers, utilities and industrial water users to hedge the financial risk of volatile water availability [and] provide investors with a means to speculate on the future price of water without taking on the underlying risk of owning assets. (*See*, https://www.globalwaterintel.com/news/2019/2/california-water-pricing-index-launches-on-nasdaq, last visited February 21, 2019.)

NQH20 was developed and is maintained by NASDAQ, Veles and WestWater Research LLC (WestWater). NASDAQ created the world's first electronic stock market and today provides global trading, clearing, exchange technology, listing, information, and public company services, including supporting more than 100 marketplaces in 50 countries and over 4,000 total listings with a market value of approximately $15 trillion. (*See*, https://business.nasdaq.com, last visited February 21, 2019.) Veles is a financial products company based in the United Kingdom specializing in water pricing, water financial products, and water economic and financial methodologies. (*See*, www.

veleswater.com, last visited February 21, 2019.) Data for the Index is provided exclusively by WestWater, an economic and financial consulting firm specializing in water rights and water resource acquisition and development throughout the United States.

Index Calculations, Adjustments, Pricing

While many aspects of the Index are deemed proprietary, NASDAQ provides some information about the functionality of the Index in its "NQH20 Methodology Report" (Index Report) (*See*, https://indexes.nasdaqomx.com/docs/methodology_NQH2O.pdf, last visited February 21, 2019.) The Index Report states that listed figures reflect the "commodity value of water" at the source, and do not include additional costs associated with transportation or losses such as through evaporation. Index data is also limited to transactions resulting from arms-length negotiations, and excludes transactions that do not include financial consideration.

The Index is priced in terms of U.S. Dollars per acre-foot and uses a "modified volume-weighted average" of prevailing prices in selected underlying water markets after adjusting for "idiosyncratic pricing factors" specific to those water markets and specific types of eligible transactions. The Index is calculated and published following the close of business each Wednesday based on data obtained through the end of the prior week.

On opening day, the Index listed a California water "spot price" of $511.33 per acre-foot based upon 293 water transactions between approximately January and August 2018. Since then, the listed spot price has ranged between a low of $ 447.64 per acre-foot and a high of $576.30 per acre-foot. (*See*, https://indexes.nasdaqomx.com/Index/History/NQH2O, last visited February 21, 2019.)

Index Data: Eligible Water Markets and Transactions

Only certain groundwater and surface water markets and transactions are deemed eligible data sources for the Index. As described in the Index Report, current Index-eligible data sources are limited to five large and actively traded markets in California, including four groundwater markets and a generally-described surface water market.

Central Basin—Groundwater

The Central Basin underlies an approximately 227-square-mile area in Los Angeles County. The original judgment in Central Basin adjudication was entered in 1965 (*Central and West Basin Water Replenishment District v. Charles E. Adams et al.*, Los Angeles County Superior Court Case No. 786656) and has since been amended several times including most recently in 2013. The Central Basin adjudication establishes limits on total annual groundwater production and establishes allowed pumping allocations (APA) among the parties. The total APA exceeds the natural yield of the basin and relies upon recharge from imported and reclaimed water. The adjudication authorizes parties to purchase or lease APA through an established "Exchange Pool". Unused APA may be carried over into the following administrative year subject to certain timing and volumetric limitations; and, carryover water may also be traded. Eligible transactions for inclusion in the Index include permanent transfers of APA, single- and multi-year leases of APA and leases of carryover water.

Chino Basin—Groundwater

The Chino Basin underlies an approximately 235-square-mile area of the Upper Santa Ana River Watershed within portions of San Bernardino, Riverside, and Los Angeles counties. The original judgment in the Chino Basin adjudication was entered in 1978 (*Chino Basin Municipal Water District v. City of Chino et al.*, San Bernardino Superior Court Case No. RCV 164327 (now Case No. RCV 51010)), and has since been amended several times including most recently in 2012. The Chino Basin adjudication established a basin safe yield and allocated water rights among three distinct producer "Pools", including an Overlying Agricultural Producers Pool, an Overlying Non-Agricultural Producers Pool and an Appropriative Producers Pool.

Transfers and leases of water rights are subject to specific limitations. Transfers are generally not permitted within the Agricultural Pool; though, unused water is made available annually to the Appropriative Pool. Overlying Non-Agricultural Pool producers may both permanently transfer and temporarily lease water within their Pool and may lease water annually to Appropriative Pool producers pursuant to specific regulatory requirements. Appropriative Pool produc-

ers which primarily comprise municipal water providers, may both permanently transfer and temporarily lease water within their Pool. Both Overlying Non-Agricultural Pool and Appropriative Pool producers may carry over unexercised rights subject to certain limitations. Supplemental water may be stored, and both carryover and storage water may be transferred following the same rules applicable to the use of groundwater rights for each Pool.

Eligible transactions for the Index include temporary (single- and multi-year) transfers within the Appropriative Pool and within the Overlying Non-Agricultural Pool, and annual leases from the Overlying Non-Agricultural Pool to the Appropriative Pool pursuant to the regulatory framework. Eligible temporary transfers include those with single or multi-year terms. Temporary transfers of carryover and storage water are also considered eligible. The Index also includes permanent transfers of rights among Appropriative Pool and Overlying Non-Agricultural Pool producers.

Main San Gabriel Basin—Groundwater

The Main San Gabriel Basin underlies an approximately 167-square mile area in the southeasterly portion of Los Angeles County. The original judgment in the Main San Gabriel adjudication was entered in 1973 (*Upper San Gabriel Valley Municipal Water District v. City of Alhambra, et al.*, Los Angeles County Superior Court Case No. 924128), and has since been amended several times including most recently in 2012. Among many of its major components, the judgment established a Watermaster responsible to determine an annual basin Operating Safe Yield (OSY). The judgment allocated prescriptive water rights (and other types of rights in certain circumstances) among producers, which also provides the basis for each party's share of the OSY. Unused OSY may be carried over one fiscal year. Eligible transactions for the Index include both temporary (single- and multi-year) transfers of production rights and carry over, as well as permanent transfers of water rights.

Mojave Basin Alto Subarea—Groundwater

The Mojave Basin Area underlies an expansive approximately 3,400-square-mile area the high desert region of San Bernardino County. The original judgment in the Mojave Basin Area adjudication was entered in 1996 (*City of Barstow, et al. v. City of Adelanto, et al.*, Riverside County Superior Court Case No. CIV 208568) comprising a stipulation among over 75 percent of the parties and representing over 80 percent of the verified water production within the basin. The judgment was partially amended in 2002 following a decision of the California Supreme Court (*City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224 (2000)) arising from appeals pursued by certain non-stipulating parties.

The judgment recognized five distinct but hydrologically interconnected Subareas including the Alto (including a portion referred to as the "Transition Zone"), Centro, Este, Oeste and Baja Subareas. The judgment required each Subarea to ensure a certain amount of Mojave River flow to adjacent downstream Subareas. The Judgment established Base Annual Production Rights (BAP) within each Subarea, and imposed Rampdown obligations to achieve basin sustainability. Each year, the court reviews and determines the volume of water to be allocated to water producers in the form of a Free Production Allowance (FPA), which is a portion of BAP that may be produced during without incurring a Replacement Obligation necessary to fund imported supplemental water. Unproduced FPA may be carried over for one administrative year. The judgment authorizes both temporary and permanent transfers of BAP and FPA.

Eligible transactions for the Index are limited to those within the Alto Subarea, which is the largest and most active Subarea market. The Index includes temporary (single- and multi-year) transfers, including carryover, and permanent transfers of Alto Subarea BAP.

Surface Water

As noted in the Index Report, the majority of California's surface water resources originate north of the Sacramento-San Joaquin River Delta (Delta), while the majority of demand for that water is located south of the Delta. The extensive California State Water Project (SWP) and federal Central Valley Project (CVP) storage and conveyance facilities enable a surface water market through which (complex) water transfers are established among parties throughout California. The Index Report describes eligible surface water transactions for the Index to include temporary (single- and multi-year) and permanent

transfers of SWP entitlements, CVP entitlements, and "other surface water entitlements.

A First Step—To Where?

According to Veles' CEO:

> . . .[w]ater is our most important commodity and until now, there were no financial risk management instruments available in the global financial markets. We see the [Index] as an important first step to understanding water as a commodity, which means a more transparent and accessible marketplace for all.

Similarly, NASDAQ's Vice President and Head of Research and Product Development for NASDAQ's Global Indexes, Dave Gedeon, stated that:

> . . .[t]he NASDAQ Veles California Water Index can bring dramatic change to the way we quantify and value an important resource. (*See*, https://www.nasdaq.com/press-release/nasdaq-launches-water-pricing-index-20190108-00379, last visited February 21, 2019.)

Notably, these comments declare the Index to be a first step toward dramatic change in the way water is valued. This begs the question, "a first step to where?" One notable financial industry leader has painted a picture of what he believes this "dramatic change" will be. In a lengthy report principally authored by Willem Buiter, Global Chief Economist for Citi Investment Research & Analysis (a division of Citigroup Global Markets Inc.) (Citi) Citi predicted in 2011:

> I expect to see in the near future a massive expansion of investment in the water sector, including the production of fresh, clean water from other sources (desalination, purification), storage, shipping and transportation of water. I expect to see pipeline networks that will exceed the capacity of those for oil and gas today. I see fleets of water tankers (single-hulled!) and storage facilities that will dwarf those we currently have for oil, natural gas and LNG … I expect to see a globally integrated market for fresh water within 25 to 30 years. *Once the spot markets for water are integrated, futures markets and other derivative water-based financial instruments—puts, calls, swaps—both exchange-traded and OTC will follow. There will be different grades and types of fresh water, just the way we have light sweet and heavy sour crude oil today. Water as an asset class will, in my view, become eventually the single most important physical-commodity based asset class, dwarfing oil, copper, agricultural commodities and precious metals.* (Citi, "Global Themes Strategy: Thirsty Cities—Urbanization to Drive Water Demand, July 20, 2011, http://www.capital-synthesis.com/wp-content/uploads/2011/08/Water-Thirsty-Cities.pdf, last visited February 21, 2019.)

Water Rights and SGMA

The changes predicted by Citi are, indeed, dramatic. While price indexing may serve to inform market participants and transactions, water markets themselves are governed by established and (generally) orderly water rights laws and principles —at least in California and the United States.

In California, one potentially fertile testing ground for the Index's informational value may be through the implementation of the Sustainable Groundwater Management Act of 2014 (SGMA). As of today, the California Department of Water Resources has identified 517 distinct groundwater basins and sub-basins, approximately a quarter of which are required to develop and implement first-ever Groundwater Sustainability Plans (GSPs) to achieve long-term basin sustainability.

Among its many features, SGMA authorizes newlyformed Groundwater Sustainability Agencies (GSAs) to establish groundwater pumping allocations and transferability as a management tool to achieve basin sustainability. (California Water Code, § 10726.4). GSP allocation schemes are, however, subject to limitations including, for example, generally complying with established land use plans and occurring only within the GSA's jurisdictional boundaries. (*Id.*) Of course, neither a GSP nor a GSA has authority to determine or alter water rights, which also delimits the parameters of an allocation framework. (*Id.* at § 10720.5.)

In this context, the question to be tested in the coming years would be whether and to what extent the Index (or something like it) might meaningfully inform a specific buyer and/or seller regarding an appropriate price in transacting a pumping alloca-

tion transfer in a specific groundwater basin pursuant to a specific allocations framework that is subject to specific GSP provisions and other State laws and municipal ordinances. Extending the hypothetical, the question becomes more acute with respect to inter-basin transfers (subject to the same, if not more, legal limitations). In other words, the ultimate informational value of the Index will likely be shaped by the extent to which the underlying assumptions and data that are used for the Index are considered to be similar to and reflective of the local conditions of a particular basin and transaction.

As GSAs implement allocation frameworks through their GSPs resulting in new local markets, more transactional data will presumably become available for inclusion in the Index, which may reduce perceived data asymmetry and build confidence in the Index. Regardless, buyers and sellers will need sufficient information about the Index itself, including how it functions and the data upon which it is based, in order to evaluate its appropriateness in valuing a particular transaction.

Conclusion and Implications

Clearly, the value of water as a natural resource necessary to life and economy in California will only continue to rise. The whiplash of the recent historic Drought followed by dramatic wet years has triggered major changes in California water law and policy, including providing for the development of new water markets and more expansive and robust databases and information.

Transferability of water resources will continue to serve an important management tool. The price attributed to a particular transfer is expected to be governed by *market conditions*, the applicable *laws and ordinances* and the nature and value of the underlying water *rights* upon which the transaction is based. The informational value of the Index to any particular transaction remains to be seen and will depend on these and many other factors. A buyer and seller would need to evaluate whether and to what extent the "spot price" of the Index reflects the unique local conditions and aspects of the transaction. That informational value may grow over time as new and broader market data is incorporated.

So long as that buyer and seller are transacting in a system still governed by water rights laws, they are probably not confronted with the naval-gazing question of whether water is simply a commodity.

Derek Hoffman is a senior associate attorney at Gresham | Savage practicing extensively in the areas of California water rights and natural resources law, real estate, business and eminent domain. In his water law practice he represents landowners, agricultural interests, developers, water districts, mutual water companies and regional to multi-national businesses in evaluating, protecting and litigating water rights and supply. He actively represents clients in SGMA implementation and provides guidance for effective water resources management and compliance with state and federal water law and regulation. Derek writes regularly for the *California Water Law & Policy Reporter.*

Michael Duane Davis is of counsel and vice president of Gresham | Savage who has represented businesses, individuals and governmental clients in complex real estate and business transactions and litigation for nearly 40 years. Mr. Davis has decades of experience evaluating water rights and resources and in water rights disputes, with an emphasis on groundwater basin adjudications. He has represented dozens of clients in the Mojave and Antelope Valley Groundwater Adjudications. He provides business and land use guidance, and water resources management under the Sustainable Groundwater Management Act, and regarding Urban Water Management Plans, Integrated Regional Water Management Plans, Water Supply Assessments and Proposition 218. He has extensive experience serving as general counsel to numerous county water districts and mutual water companies. Mr. Davis serves on the Editorial Board of the *California Water Law & Policy Reporter*.

LAND USE NEWS

PRESIDENT TRUMP CUTS FEDERAL FUNDING FOR CALIFORNIA'S HIGH-SPEED RAIL

On February 19, 2019, the U.S. Department of Transportation, Federal Railroad Administration (FRA) announced its plans to cancel $929 million in grant funds that were to go toward the California High Speed Rail project (CA HSR). The FRA sent a letter to the California High-Speed Rail Authority (CHRSA) and Governor Gavin Newsom stating that:

> FRA has determined that CHSRA has materially failed to comply with the terms of the agreement and has failed to make reasonable progress on the Project (as defined in the Agreement), significantly endangering substantial performance.

The FRA's determination cited many factors, including "failures relating to required state expenditures necessary to advance the Project according to the Project's schedule," and the fact that the FRA:

> . . .has determined that CHRSA will not complete the project by 2022, the end of the Agreement's period of performance.

FRA further announced that it is:

> . . .actively exploring every legal option to seek the return of $2.5 billion in Federal funds FRA previously granted for this now-defunct project.

Both of these grants make up approximately a quarter of the funding for the CA HSR project. Cancellation or return of such grants would likely result in California having to tap into other sources to fund the project.

Many view this decision as politically-motivated, since California has sued the Trump administration 38 times in the last year and a half. The lawsuits include battles over immigration, healthcare, education, the environment, and LGBTQ rights. Just a day before FRA announced this decision, California led over a dozen states in challenging President Trump's national emergency over the proposed wall along the Mexican border. President Trump tweeted on February 19, 2019:

> The failed Fast Train project in California, where the cost overruns are becoming world record setting, is hundreds of times more expensive than the desperately needed Wall!

Typically, federal and local funding agencies give routine extensions to projects that are behind schedule or over budget. While the CA HSR is over budget, this is not uncommon for megaprojects.

Governor Gavin Newsom's own remarks regarding the CA HSR project are also cited in the FRA letter as a potential catalyst for the decision. In his first State of the State speech on February 12, 2019, since taking office, Governor Newsom said that he intends to scale back the project, stating that:

> The project, as currently planned, would cost too much and take too long. There's been too little oversight and not enough transparency. Right now, there simply isn't a path to get from Sacramento to San Diego, let alone from San Francisco to LA. I wish there were.

Governor Newsom did note that California does "have the capacity to create a high-speed rail link between Merced and Bakersfield." But many are speculating that even this shorter project is likely to run out of funding before its completion. Newsom also stated that he was "not interested in sending $3.5 billion in federal funding that was allocated to this project back to Donald Trump," sparking a Twitter battle between the two politicians.

According to the FRA letter, California had until March 5, 2019, to challenge the decision, but provided a response by March 4, 2019. CHRSA CEO Brian Kelly wrote in CHRA's response:

> [A]ny 'clawback' of federal funds already expended on this project would be disastrous

policy. It is hard to imagine how your agency—or the taxpayers—might benefit from partially constructed assets sitting stranded in the Central Valley of California. It is equally difficult to image the policy benefit of sending home more than 2,600 craft workers, men and women who have been dispatched to work on the 119-mile segment now under construction in the Central Valley, one of the nation's most economically distressed regions. Similarly, there is no benefit to sending 'stop work' notices to the 488 small businesses, 15 of which are from outside California, contracted to work on this project. This infrastructure legacy would forever be a travesty.

Conclusion and Implications

Kelly went onto urge the FRA to work toward restoring "the functional relationship between our agencies so progress on this project and related economic benefits can continue…" For now, the future of the project remains relatively uncertain and it is likely that this dispute over funding will end up in the courts.
(Brittany Ortiz, Nedda Mahrou)

RECENT FEDERAL DECISIONS

THE TRUMP ADMINISTRATION BORDER WALL—NINTH CIRCUIT DETERMINES ILLEGAL IMMIGRATION ACT ALLOWS FOR WAIVER OF ENVIRONMENTAL LAWS

Center for Biological Diversity et al. v. U.S. Department of Homeland Security et al., ___F.3d___, Case Nos. 158-55474; 18-55475; and 18-55476 (9th Cir. Feb 11, 2019).

In August and September of 2017, the Secretary of the Department of Homeland Security (Secretary) published a notice of determination in the Federal Register that waived applicable environmental laws for the construction of the border wall in San Diego and Calexico. On February 11, 2019, a three-judge panel from the Ninth Circuit Court of Appeals determined the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) authorizes the Department of Homeland Security's (DHS) waiver of environmental laws that environmental groups seek to enforce is appropriate.

Factual Background

On August 2, 2017, the Secretary published a notice of determination regarding the construction and evaluation of wall and replacement of fourteen miles of fencing in San Diego County. The Secretary invoked § 102 of the IIRIRA's authorization to waive all legal requirements that the Secretary herself determines necessary to ensure expeditious construction barriers under the IIRIRA. Similarly, On September 12, 2017, the Secretary again invoked § 102's waiver in another notice of determination in the Federal Register in Calexico. The construction in Calexico involved a three-mile replacement of primary fencing along the border near Calexico. The secretary deemed both the projects as "necessary" and waived twenty-seven federal laws in its notice.

Plaintiffs, the State of California, Center for Biological Diversity (Center), and various environmental groups (Coalition) asserted three claims: 1) *ultra vires* claims, which alleging that the Department of Homeland Security exceeded its statutory authority in working on the border barrier projects and issuing waivers; 2) environmental claims contending that DHS violated various environmental laws by building the wall; and 3) constitutional claims asserting that the Secretary's waivers violate the U.S. Constitution.

The U.S. District Court rejected the constitutional claims and granted summary judgment to DHS with respect to the others. Plaintiffs each appealed the District Court's judgment. Now in a consolidated case, the Ninth Circuit Court heard the appeals and chose not to decide the environmental claims at this time stating that the claim was not ripe.

Then Ninth Circuit's Ruling

Jurisdiction

Section 102(c)(2)(A) states that the U.S. District Courts of the United States:

> . . .shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought or claim alleging a violation of the Constitution of the United States.

The Ninth Circuit Court interpreted this provision to mean that only constitutionally based claims are under the exclusive jurisdiction of District Courts.

Paragraph 1 includes a waiver provision that the:

> . . .Secretary of Homeland Security shall have the authority to waive all legal requirements… in such secretary's sole discretion, determines necessary to ensure the expeditious construction of the barriers and roads under this section.

Additionally, § 102(c)(2)(C) states that:

> . . .[a]n interlocutory of final judgment decree, or order of the district court may be reviewed upon petition for a writ of certiorari to the supreme court of the United States.

The Ninth Circuit Court interpreted the three provisions to mean that the Supreme Court's direct review only applies to claims under the District Court's exclusive jurisdiction—the constitutional claims—and have no bearing on any other claim including Plaintiffs' *ultra vires* and environmental claims.

Ultra Vires Claims Do Not Survive Summary Judgment

Plaintiffs argue that the San Diego and Calexico Projects are not authorized by § 102(a) ad 102(b) and challenge the scope of the Secretary authority to build roads and walls.

Under § 102 (a) of the IIRIRA states that:

> . . .[t]he Attorney General, in consultation with the Commissioner of Immigration and Naturalization, shall take such actions as may be necessary to install *additional physical barriers and roads* (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of *high illegal entry* into the United States. (Emphasis added.)

Specifically, plaintiffs argued that § 102(a) only applies to "additional physical barriers" and because the projects aim to replace the border fencing and do not technically create new and additional barriers, they fall out of the scope of the statute's authority. Plaintiffs contend that legislative intent was to only include construction of barriers that would add to the total miles of the border wall.

By relying on *Webster's Dictionary*®, the Ninth Circuit Court ultimately held that the term "additional" is equivalent to "supplemental" and that barrier means "a material object…that separates…or serves as a unit or barricade." The Ninth Circuit Court further opined that, common sense supports the court's analysis and to suggest that Congress would authorize DHS to build barriers but implicitly prohibit its repairs "makes no practical sense."

Plaintiffs also argued that the borders were not in areas of "high illegal entry" because there are other places with *higher* illegal entry. However, plaintiffs' argument failed because the IIRIRA does not define what constitutes "high illegal entry" and it certainly does not dictate that illegal entry is a comparative determination. Further, the panel found that plaintiffs did not dispute the DHS statistics that show that San Diego and El Centro are in the top 35 percent of the border where the most illegal immigrants are apprehended. In essence, plaintiffs were challenging the Secretary's discretion in selecting where to exercise her authority under § 102(a), which is barred under § 102(c). Finally, the Ninth Circuit determined that § 102(b) does not impose limits on the section's broad grant of authority.

The Dissent

In her dissent, Ninth Circuit Judge Consuelo M. Callahan's argued that the plain language of § 102 of limits appellate review of the lower California court's decision to the U.S. Supreme Court. Judge Callahan disagrees and reasons the majority ignores the plain language of the text which requires that for all actions filed in a District Court that arises from "any section undertaken, or any decision made, by the Secretary of Homeland Security," —that appellate review is limited to the Supreme Court.

Callahan criticizes majority's analysis and contends that the opinion ignored the statute's restriction on appellate jurisdiction by arguing that the ultra vires claims do not "arise out of" the Secretary's waiver of legal requirements under § 102 (c). Thus, § 102(c) restricts review of this case to the Supreme Court and should have never been determined by the Ninth Circuit.

Conclusion and Implications

In this 2-1 decision, the Ninth Circuit ultimately upheld the Trump administration's decision to reconstruct a border wall in Calexico and San Diego, supporting the Secretary's decision. The Ninth Circuit Panel's discussion of its interpretation of the statutes provides a seemingly iron-clad protection for the Secretary's decisions made under § 102(c) and even bolsters the Secretary's authority by holding that the section does not impose any limits. The Secretary's broad authority stems from legislative intent to prioritize border security and sacrifice other federal policy concerns including many environmental considerations. The panel's ruling in *In Re Border Infrastructure Environmental Litigation* is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2019/02/11/18-55474.pdf

(Rachel S. Cheong; David D. Boyer)

CALIFORNIA LAND USE™ LAW & POLICY Reporter

DISTRICT COURT GRANTS SUMMARY JUDGMENT TO U.S. FISH AND WILDLIFE SERVICE IN RESPONSE TO TEXAS' EFFORTS TO DELIST WARBLER FROM THE ENDANGERED SPECIES ACT

General Land Office of Texas v. U.S. Fish & Wildlife Service, ___F.Supp.3d___, Case No. 1:17-cv-00538-SS (W.D. Tex. Feb. 6, 2019).

On February 6, 2019, the U.S. District Court for the Western District of Texas granted a motion for summary judgment filed by defendant U.S. Fish and Wildlife Service (FWS) against plaintiff General Land Office of the State of Texas (Texas) relating to the listing of the golden-cheeked warbler (Warbler). In June 2017, Texas requested judicial review of the FWS' decision to deny a petition to delist the Warbler from the endangered species list. On March 1, 2019, Texas filed an appeal to the U.S. Court of Appeals for the Fifth Circuit.

History of the Warbler in Texas

The Warbler is a small, migratory songbird that breeds exclusively within central Texas. 55 Fed. Reg. 18,846-01 (May 4, 1990). Its breeding range is miniscule due to the Warbler's dependence on bark from specific juniper trees to construct nests. Due to an influx of planned developments in the City of Austin and Travis County in the 1980s, the Warbler's available breeding habitat was significantly impacted and reduced. The threat of eviscerating more of the Warbler's breeding habitat caused an emergency petition to be filed with the FWS in February 1990. The emergency petition urged for the Warbler's protection under the federal Endangered Species Act, 16 U.S.C. § 1531 *et seq*. (ESA). The Warbler was determined to be endangered because of the ongoing and threatened destruction of its range, the threat of nest predation, the inadequacy of existing regulatory mechanisms, and the threat of habitat fragmentation. At that time, the FWS did not designate a critical habitat because specific elements of the required habitat for the Warbler's survival were not known.

Pursuant to the ESA, the FWS was required to develop and implement a recovery plan for the conservation and survival of the Warbler (Recovery Plan). 16 U.S.C. § 1533. The Recovery Plan identified criteria to be considered for delisting the Warbler:

> Sufficient breeding habitat has been protected to ensure the continued existence of at least one viable, self-sustaining population in each of the eight Texas regions outlined in the Recovery Plan. . . .
>
> The potential for gene flow exists across regions between demographically self-sustaining populations where needed for long-term viability. . . .
>
> Sufficient and sustainable non-breeding habitat exists to support the breeding population,
>
> All existing Warbler populations on public lands are protected and managed to ensure their continued existence . . . .and
>
> All of these criteria have been met for 10 consecutive years.

The Recovery Plan also encouraged research on the Warbler to help establish the necessary habitat for the Warbler's survival, including taking other steps to manage and protect the population and its habitat.

The 2014 Five-Year Review

The Recovery Plan mandated that the FWS conduct a review of the Warbler's endangered status every five years. For unexplained reasons, the first five-year review occurred in 2014 (although several reviews were required since the FWS issued its final rule in 1990). The FWS determined that although progress had been made toward meeting the five-factor criteria for delisting in the Recovery Plan, the Warbler was still threatened by the widespread destruction of its habitat largely due to rapid suburban development. At that time, the Warbler remained in danger of extinction and the FWS did not recommend a change to its status.

The Petition to Delist

Less than one year after the conclusion of the 2014 Five-Year Review, a petition was filed with the FWS requesting the removal of the Warbler from the

endangered species list (Petition to Delist). The Petition to Delist primarily argued that the FWS' initial listing relied on studies that dramatically underestimated the Warbler's population size and size of the Warbler's breeding habitat.

Those in favor of removing protections for the Warblers cited to a Texas A&M Institute of Renewable Natural Resources survey conducted in 2015 (A&M Study). The A&M Study demonstrated that the Warbler's breeding habitat was more widely distributed and variable than originally anticipated by the FWS. Additionally, the A&M Study stated that the Warbler population was possibly five times greater than the FWS believed in 1990.

The Petition to Delist identified two reasons to explain the increased habitat and population of the Warbler in the A&M Study: 1) the technological advances since the initial 1990 listing provided improved satellite imagery and sampling techniques, which provided scientists with the ability to identify Warbler population and habitats; and 2) the shift in understanding what was required for a better breeding habitat for the Warbler. The Petition to Delist argued that since the destruction of the Warbler's habitat did not threaten the continued survival of the Warbler, it was inappropriate for the Warbler to remain on the endangered species list. According to the Petition to Delist, since the initial delisting was founded upon "a fundamental misunderstanding of the existing abundance and population structure" of the Warbler, the Petition to Delist should be granted.

The Service's 90-Day Finding

Upon receipt of a petition to remove an animal from the endangered species list, the FWS is required to issue a 90-day finding. In the instant case, the FWS acknowledged that the Warbler population and habitat size may be larger than initially estimated, but that:

> . . .threats of habitat loss and habitat fragmentation are ongoing and expected to impact the continued existence of the warbler in the foreseeable future. (M000449 (Petition to Review Form).)

The FWS also questioned the reliability of the A&M Study since population estimates were difficult to ascertain and the study overestimated the Warbler populations in areas of low Warbler density. Ultimately, despite the information and data presented in the A&M Study, the FWS concluded that the Warbler continues to be in danger of extinction and none of the recovery criteria set forth in the Recovery Plan had been achieved.

The Lawsuit to Delist

Texas argued that the FWS improperly denied the Petition to Delist when it failed to consider new and substantial scientific data and refused to designate a critical habitat for the Warbler. A "critical habitat" consists of specific areas within the existing habitat that contained physical and biological features essential to the animals' conservation that may require special protections, as well as areas beyond the existing habitat determined to be essential for conservation.

Alleged New and Substantial Scientific Data

Texas alleged that during the 90-day finding, the FWS ignored the studies, specifically the A&M Study, presented in the Petition to Delist. According to Texas, the A&M Study consisted of new scientific information that would undoubtedly lead a reasonable person to conclude delisting may be warranted. However, the District Court remained unconvinced of Texas' position because the FWS took into account several of the data points and information presented in the A&M Study during its 2014 Five-Year Review. Additionally, the A&M Study merely compiled the existing literature already available on the Warbler population and habitat. It did not present any new evidence that the FWS allegedly ignored.

The District Court's Decision

Texas contended that the FWS acted arbitrarily and capriciously when it failed to designate a critical habitat for the Warbler upon adding the bird to the endangered species list. The plaintiff believed the FWS must designate the Warbler's critical habitat necessary for its survival or the Warbler must be delisted. The District Court, however, found that these claims had no support within the language of the law.

The ESA specifically requires the FWS to consider five factors, and only those five factors, in determining whether a delisting was appropriate. None of the five factors required the FWS to designate a critical habitat.

The District Court looked to the legislative history for further support of its position. The legislative

history of the ESA revealed that Congress wanted to avoid the economic analysis that comes with a critical habitat designation. *Alabama-Tombigee Rivers Coal. V. Kempthorne*, 447 F.3d 1250, 1266 (11th Cir. 2007). The *Kemthorne* court stated that in prior versions of the ESA that required economic analysis and designation of a critical habitat, the pace of the listing process slowed. Based on the clear intention of Congress, the District Court decided that the FWS' failure to designate a critical habitat for the Warbler was not fatal to its continued listing.

Conclusion and Implications

In the end, the District Court rejected all of Texas' claims and the Warbler remained protected under the ESA.

With Texas' appeal to the Fifth Circuit currently pending, Texas continues its uphill battle to delist the Warbler. If the Fifth Circuit reverses the District Court's decision to keep the Warbler on the endangered species list, then it is likely that rapid residential and commercial development would begin in lands previously protected as Warbler habitats. Development in these areas has been stalled due to the high costs to mitigate such lands to protect the Warbler population and habitat.

For more information regarding the current listing status of the Warbler, visit www.fws.gov.
(Nicolle A. Falcis, David D. Boyer)

DISTRICT COURT FINDS BLM'S FAILURE TO QUANTIFY GREENHOUSE GAS EMISSIONS PRIOR TO AUTHORIZATION OF OIL AND GAS LEASES VIOLATED NEPA

WildEarth Guardians, et al. v. Zinke, et al., ___F.Supp.3d___, Case No. 16-1724 (D. D.C. Mar 19, 2019).

On March 19, 2019, in *WildEarth Guardians, et al. v. Zinke, et al.* U.S. District Judge Rudolph Contreras of the U.S. District Court for the District of Columbia held that the U.S. Bureau of Land Management (BLM) violated the National Environmental Policy Act (NEPA) when it authorized oil and gas leases on federal land without adequately quantifying climate change impacts of the oil and gas leasing. The court granted in part plaintiffs' motion for summary judgment and remanded the NEPA documents at issue to the BLM "so that BLM may satisfy its NEPA obligations in the manner described [in the court's order]."

Background

Plaintiffs WildEarth Guardians and Physicians for Social Responsibility challenged BLM's approval and issuance of 473 oil and gas leases, issued through 11 different lease sales, covering over 460,000 acres of land in Wyoming, Utah, and Colorado. The parties agreed to first brief the merits of plaintiffs' claims concerning the Wyoming leasing decisions, to be followed by briefing on the Utah and Colorado leasing decisions. The court's March 19, 2019 decision addressed the Wyoming lease sales.

As summarized by the court, the BLM's authorization of oil and gas development on federal lands is governed by the Federal Land Policy and Management Act, NEPA, and BLM's Land Use Planning Handbook, and involves the following three stages: 1) Land Use Planning Stage; 2) Leasing Stage; and 3) Drilling Stage. In this case, the plaintiffs challenged BLM's failure to comply with NEPA at the Leasing Stage.

Under NEPA, federal agencies must "consider the environmental consequences of their actions" and prepare an Environmental Impact Statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." (42 U.S.C. §4332(C).) BLM determined that the lease sales at issue did not require issuance of EISs and instead issued Environmental Assessments (EA) and Findings of No Significant Impacts (FONSI). Plaintiffs alleged that the EAs and FONSIs "failed to sufficiently account for the greenhouse gas (GHG) emissions that would be generated by oil and gas development on the leased parcels." The court ultimately agreed.

The District Court's Decision

BLM's NEPA Analysis of Potential GHG Emissions Was Inadequate

The court concluded that:

> . . .BLM did not take a hard look at drilling-related and downstream GHG emissions from the leased parcels, and it failed to sufficiently compare those emissions to regional and national emissions. These shortcomings also rendered the challenged FONSIs deficient, because the FONSIs could not convincingly state that BLMs leasing decisions would not significantly affect the quality of the environment.

First, the court summarized the general principle under NEPA that:

> . . .an agency cannot defer analyzing the reasonably foreseeable environmental impacts of an activity past the point when that activity can be precluded.

Because the BLM cannot preclude oil and gas drilling after having sold leases authorizing such drilling, it cannot defer more detailed environmental analysis until a later time. "While it may be true that after the leasing stage BLM can impose conditions to limit and mitigate GHG emissions and other environmental impacts, . . .the leasing stage is the point of no return with respect to emissions. Thus, in issuing the leases BLM 'made an irrevocable commitment to allow some' GHG emissions" and must "fully analyze the reasonably foreseeable impacts of those emissions at the leasing stage."

Although the BLM was not required to analyze the site-specific environmental impacts of individual drilling projects, given that BLM could not reasonably foresee the projects to be undertaken on specific leased parcels at the Leasing Stage, it was required quantify drilling-related GHG emissions in the aggregate, across the leased parcels as a whole:

> BLM had at its disposal estimates of (1) the number of wells to be developed; (2) the GHG emissions produced by each well; (3) the GHG emissions produced by all wells overseen by certain field offices; and (4) the GHG emissions produced by all wells in the state. With this data, BLM could have reasonably forecasted, by multiple methods, the GHG emissions to be produced by wells on the leased parcels.

In addition to drilling-related GHG emissions, BLM was also required to evaluate the potential indirect effects associated with the leases, namely, the GHG emissions generated by the downstream use of oil and gas produced from the leased parcels. Under NEPA, an agency must evaluate the indirect effects of a proposed action "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." (40 C.F.R. §1508.8(b).) The court concluded that:

> . . .the lease sales are a 'legally relevant cause' of downstream GHG emissions, and BLM was required to consider those emissions as indirect effects of oil and gas leasing.

Although the court required BLM to evaluate on remand whether quantification of emissions from downstream oil and gas use is possible, it did not mandate such quantification, as it did with respect to drilling-related emissions.

Finally, the court agreed with plaintiffs that the BLM's failure to quantify GHG emissions rendered the EA's cumulative impacts analysis inadequate:

> Without access to a data-driven comparison of GHG emissions from the leased parcels to regional and national GHG emissions, the public and agency decisionmakers had no context for the EA's conclusions that GHG emissions from the leased parcels would represent only an 'incremental' contribution to climate change.

Conclusion and Implications

Rather than vacating the leases, the court elected to remand the NEPA documents to the BLM. "BLM's NEPA violation consists merely of a failure to fully discuss the environmental effects of those lease sales; nothing in the record indicates that on remand the agency will necessarily fail to justify its decisions to issue EAs and FONSIs." However, the court did enjoin BLM from authorizing any new drilling on the lands subject to the Wyoming leases until "BLM sufficiently explains its conclusion that the Wyoming Lease Sales did not significantly affect the environment." (Nicole Martin)

RECENT CALIFORNIA DECISIONS

FOURTH DISTRICT COURT FINDS COASTAL COMMISSION'S COASTAL ACT 'DO NOVO' REVIEW MOOTS CEQA CHALLENGE TO LOCAL AGENCY'S APPROVAL OF COASTAL PERMIT

Fudge v. City of Laguna Beach, ___Cal.App.5th___, Case No. G055711 (4th Dist. Feb. 13, 2019).

The Fourth District Court of Appeal upheld the trial court's determination that the California Coastal Commission's (Commission) acceptance of an appeal of a local agency's decision to grant a Coastal Development Permit (CDP) mooted a California Environmental Quality Act (CEQA) action challenging the local agency's decision. According to the court, because appeals to the Commission are heard *de novo* under the Coastal Act, the Commission's acceptance of the appeal nullified the local agency's decision. Despite the fact that the project was completed while the case was pending, thereby rendering the entire case moot, the court elected to decide the case in any event because it presented a classic example of a question of public interest that is capable of repetition, yet evading review.

Factual and Procedural History

In 2016, Hany Dimitry bought a house located on the coastline in the City of Laguna Beach. He planned to demolish the house and replace it with a new, three-story, single-family residence. Dimitry's neighbor Mark Fudge opposed the project, contending that the existing house, which was built in 1930, had historical value as a relatively unaltered example of Spanish Colonial Revival Design and that the new house would obstruct view corridors.

In 2017, the city approved a CDP for demolition, but took no action on the proposed new house. In June of that year, Fudge appealed the city's approval of the CDP to the Commission, as permitted under the Coastal Act. The next month, while the Commission's *de novo* hearing was pending, Fudge filed a CEQA lawsuit in the superior court seeking to vacate the city's issuance of the CDP.

After the Commission accepted Fudge's appeal of the CDP, both Dimitry and the city demurred to Fudge's petition on the ground that the Commission's acceptance of the appeal mooted any possibility Fudge might be able to obtain relief against the city in court. The trial court agreed and dismissed the case. Fudge appealed.

The Court of Appeal's Decision

Before addressing Fudge's arguments, the court gave a lengthy overview of CEQA and the Coastal Act, as the two main pieces of land use legislation relevant to the case. The court first compared CEQA's requirements for environmental review with the Coastal Act's goals to protect, maintain, and enhance the coastal zone environment. The court then explained that under the Coastal Act, local agencies with certified Local Coastal Programs (LCPs) are authorized to approve CDPs in the first instance, but their decisions may be appealed to the Commission. While local agencies must comply fully with CEQA, the Commission is partially exempt from CEQA's EIR requirements because it has a certified regulatory program. Once the Commission accepts an appeal, it has *de novo* authority over a CDP, and does not review the local agency's CEQA determination.

Highlighting the complexity in this area of the law, the court started its opinion with the following observation:

> We venture once again into the brambled thicket of the California Environmental Quality Act—an area of the law largely governed by the unfortunate fact that complicated problems often require complicated solutions. This case is rendered more recondite by the involvement of the California Coastal Commission's rules and procedures, effectively overlaying the enigmatic with the abstruse. The Commission's "*de novo*" hearing under the Coastal Act nullified the city's CEQA determination.

De Novo Is *De Novo*

Fudge's main argument was that he should be able to maintain his CEQA lawsuit against the city notwithstanding the Commission's appellate authority because the Commission's hearing was not truly *de novo* since different rules and procedures would be used. Namely, the city was required to make its decision under CEQA, while the Coastal Commission's decisions are based in the Coastal Act. Thus, according to Fudge, the Commission's hearing was not really *de novo* because it would not be heard "in the same manner" as a city's original granting of the CDP. Fudge based his argument on a Supreme Court case from 1937 that used the term "in the same manner" to describe *de novo* hearings in a different, non-Coastal Act, context. Because the Commission would decide the appeal under the Coastal Act, Fudge argued that there must still be something left of the city's decision for him to attack in court—specifically the alleged deficiencies under CEQA inherent in that decision.

The Court of Appeal disagreed. The court reasoned that Fudge's view of *de novo* was incorrect because the courts are bound by the intent of the Legislature as to what hearings would look like. The court explained that when it comes to a local agency's decision on a CDP, the Legislature has constructed a system in which appeals to the Commission would be heard *de novo* under the Coastal Act even though the original local decision was decided under CEQA. And the California Legislature created different rules for the Commission to use for *de novo* hearings, as reflected in Public Resources Code § 21080.5. That section provides that when a regulatory program of a state agency is certified by the Secretary of the Resources Agency and requires submission of environmental information, that information may be submitted "in lieu of" the usual Environmental Impact Report (EIR). Thus, according to the court, the Legislature intended that the Commission's *de novo* review would not be heard "in the same manner" as local agencies, which are subject to CEQA's EIR requirements. Based on this Legislative scheme, the court held that when the Commission accepts an appeal, that acceptance nullifies the lower entity's decision. Accordingly, there was nothing left of the city's decision for Fudge to attack in court and the trial court properly dismissed the CEQA case against the city. Fudge's only means of legal redress was to challenge the Commission's decision on the CDP.

Conclusion and Implications

While the Court of Appeal could have simply declared the dispute moot, it decided to publish this opinion because it involved questions regarding the environment and home development that are likely to re-occur. Sorting through the complicated set of rules the Legislature has created for appeals of CDP decisions under the Coastal Act, and its interplay with CEQA, the court held that even if the original local decision was decided under CEQA, it was the intent of the Legislature under the Coastal Act to allow for the Commission to hear CDP appeals *de novo*. This decision should prevent project opponents from filing CEQA lawsuits challenging a local agency's approval of a CDP while appeals to the Commission regarding the same CDP are pending.The opinion is available here: https://www.courts.ca.gov/opinions/documents/G055711M.PDF
(Caroline Soto, Chris Stiles)

THIRD DISTRICT COURT REJECTS CHALLENGE TO RECIRCULATED ENVIRONMENTAL IMPACT REPORT FOR QUARRY PROJECT

Ione Valley Land, Air, and Water Defense Alliance, LLC v. County of Amador, *Unpub.*, Case No. C081893 (3rd Dist. Feb. 26, 2019).

In *Ione Valley Land, Air, and Water Defense Alliance, LLC v. County of Amador*, an *Unpublished* decision, the Third District Court of Appeal considered a second challenge to a recirculated Environmental Impact Report (EIR). In this case, the County of Amador (County) certified a final EIR and approved the Newman Ridge Project (Project), an aggregate quarry and related facilities near Ione owned by real parties in interest Newman Minerals and others (applicants). Ione Valley Land, Air, and Water Defense Alliance, LLC (LAWDA) filed a petition for writ of mandate under the California Environmental Quality Act (CEQA) challenging the certification and approval for failure to adequately address traffic impacts. The trial court ordered County to address the traffic issues and recirculate the EIR, which the County did and subsequently re-approved the Project. Thereafter LAWDA brought a second petition challenging the recirculated EIR as to traffic impacts as well as other issues not previously raised in the first challenge. The trial court denied LAWDA's petition and the appellate court affirmed. The Court of Appeal held that issues not previously raised were barred by the doctrine of res judicata and the County adequately addressed the traffic

Factual and Procedural Background

Applicants' proposed Newman Ridge Project consisted of two parts: the Newman Ridge Quarry and the Edwin Center. The Newman Ridge Quarry was a 278-acre quarry from which it was anticipated five million tons of rock would be extracted per year for 50 years. The adjacent Edwin Center was a 113-acre area to host processing and transportation facilities. The County certified an EIR and approved the Project in 2012.

In November 2012, LAWDA filed a petition for writ of mandate (first petition), claiming that the County's approval of the Project violated CEQA, as well as the State Mining and Reclamation Act and the Planning and Zoning Law.

In February 2014, the trial court entered its order granting the first petition in part and denying it in part. The trial court found two traffic-related deficiencies in the EIR, one having to do with surface street traffic impacts and the other with rail traffic impacts. The trial court issued a written ruling along with its order, requiring the County to: 1) vacate certification of the EIR, 2) vacate approval of the Project, 3) "recirculate for public comment the revised [draft EIR] pertaining to traffic issues," 4) decide anew whether to certify the EIR, 5) decide anew whether to approve the Project, and 6) notify the trial court that it had complied with the peremptory writ. In all other respects, the trial court denied the petition. The County complied with the writ and thereafter brought a motion to discharge the writ, which the trial court granted in August 2015

Prior thereto, in April 2015, LAWDA filed a new petition for writ of mandate (second petition), challenging the certification of the partially recirculated EIR and approval of the Project. The County and applicants demurred to the second petition, claiming that many of the contentions relating to the EIR were litigated and resolved in connection with the first petition. The trial court issued an order denying LAWDA's second petition.

LAWDA appealed. On appeal, LAWDA contended the trial court erred by denying the petition: 1) as to impacts other than traffic impacts, and 2) as to traffic impacts.

The Court of Appeal's Decision

Impacts Other Than Traffic and the *Res Judicata* Claim

LAWDA raised several additional alleged deficiencies other than traffic impacts in its second petition. However, the trial court's writ of mandate directed the County to revisit only the 2012 EIR's traffic impacts analysis, denying the first petition with respect to other parts of the 2012 EIR.

LAWDA attempted to argue res judicata should not apply because the trial court ordered the County to vacate its certification of the 2012 EIR and approval of the Project, which the County did. Thus,

LAWDA argued the County's later action was a new certification, allowing LAWDA to challenge all of its elements. The court found this argument had no merit because whether the EIR had been decertified did not alter the fact that the sufficiency of a component of the EIR had been litigated and resolved. The court concluded the County was not required to revisit impacts or issues other than traffic impacts because the trial court's writ of mandate only required recirculation of the EIR as to traffic impacts. Thus, it further concluded, all issues LAWDA sought to raise on appeal were precluded except those having to do with traffic impacts because the remaining issues were litigated, or could have been litigated, in the prior proceeding and because the writ of mandate only required further action as to traffic impacts.

CEQA Statutes and Guidelines Claims as to Traffic Impacts

LAWDA argued the recirculated EIR failed to adequately analyze and mitigate traffic impacts because 1) the County's response to concerns from Caltrans was deficient, 2) the partially recirculated EIR failed to account for an expansion of the Mule Creek State Prison, and 3) the partially recirculated EIR failed to respond to the City of Galt's concerns regarding traffic impacts at rail crossings. The court rejected all three arguments.

The Court of Appeal held the County did address comments raised by Caltrans to the recirculated EIR when it responded that the information addressed by Caltrans was not new to the partially recirculated draft EIR but had been in the 2012 draft EIR. Caltrans made a similar comment on the 2012 draft EIR, and the County had responded to that comment.

As to the second argument, the County's traffic consultant concluded the Mule Creek State Prison Expansion Project concluded would not change the traffic impacts noted in the prior EIR because those intersections where traffic impacts were already noted as being significant would remain significant and those where impacts were below the threshold of significance would remain far below the significance level. The court concluded this analysis was sufficient and nothing more was required.

As to the third argument, the court held the County responded to the City of Galt's comment, writing that the 2012 draft EIR disclosed the Project's impacts on rail crossings through the City of Galt. The court found this response sufficient. As to additional arguments made by LAWDA under this third heading, the court noted that distinct arguments each must be made under their own heading. Failure to separately head distinct arguments forfeits those not fairly included in the heading, and refused to address LAWDA's remaining arguments on this ground.

Conclusion and Implications

The Third District Court thus concluded: 1) LAWDA's arguments relating to impacts other than traffic impacts were precluded by res judicata, and 2) LAWDA failed to establish that CEQA statutes and guidelines required reversal as to traffic impacts. The court affirmed the judgment denying LAWDA's petition, and even awarded County its costs on appeal. (Giselle Roohparvar)

CALIFORNIA LAND USE™ LAW & POLICY Reporter

SECOND DISTRICT COURT FINDS EMINENT DOMAIN CONDEMNEE NEED ONLY PROVE ANY UNAVOIDABLE LOSS OF GOODWILL TO ESTABLISH ENTITLEMENT TO COMPENSATION

Los Angeles County Metropolitan Transportation Authority v. Yum Yum Donut Shops, Inc., ___Cal.App.5th___, Case No. B276280 (2nd Dist. Feb. 26, 2019).

This appeal resulted from an eminent domain lawsuit between the Los Angeles County Metropolitan Transportation Authority (MTA) and Yum Yum Donut Shops, Inc. (Yum Yum), after MTA sued Yum Yum to take one of the confectionary's donut shops that was in the path of a proposed rail line. The focus of the appeal centered on Yum Yum's entitlement to receive goodwill compensation under Code of Civil Procedure § 1263.510; specifically, whether a condemnee is entitled to compensation for lost goodwill if *any* portion of that loss is unavoidable.

Factual and Procedural Background

The land MTA sought to condemn was a Yum Yum donut shop that had operated for over 30 years and was located in a beneficial location according to Yum Yum's criteria for selecting shop locations. Yum Yum's criteria includes multiple components, including locations that are: on the morning traffic side of the street, located on a heavily trafficked street leading to a freeway, in a free-standing and visible building, and a location with easy access and parking. After MTA began eminent domain proceedings against Yum Yum, the donut chain evaluated three potential sites for relocation that MTA had proposed, but ultimately found that none of those locations satisfied all of their store selection criteria.

The parties appeared at a bench trial to determine the issue of whether Yum Yum was entitled to compensation for the loss of goodwill resulting from MTA's taking of this particular donut shop. MTA's goodwill expert testified that the goodwill value of Yum Yum's store was worth $620,000, and it could recapture $202,000, $138,000, or $340,000, in good will at each of the three relocation sites. Nevertheless, MTA argued that Yum Yum applied overly strict location selection criteria and unreasonably rejected the three potential relocation sites, precluding it from *any* lost goodwill compensation under § 1263.510. The trial court agreed with MTA and never held a jury trial on the value of Yum Yum's lost goodwill and entered judgment in MTA's favor.

Compensation for Loss of Goodwill from Takings

Section 1263.510 provides for compensation for the loss of goodwill resulting from a taking. The statute defines goodwill as:

> . . .the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.

Determining liability for a loss of goodwill under § 1263.510 involves a two-step process. First, the court must determine whether the party seeking compensation has presented enough evidence to establish entitlement to *some* compensation. If this first step is met, the matter goes to a jury, which determines the *amount* of loss. Therefore, if a party meets certain qualifying conditions for compensation, it has a right to a jury trial on the amount of compensation due.

The Court of Appeal's Decision

Legislative History

The Court of Appeal spent a significant amount of its focus on the legislative history behind § 1263.510, which was passed in response to criticism of injustice occurring as a result of "historic refusal to compensate condemnees whose ongoing businesses were diminished in value by a forced relocation." The court noted that it would remain "mindful" of the legislative history in interpreting the remedial statute, which is to be *liberally construed* in favor of compensating business owners for lost goodwill. Of particular importance to the court was that nothing in § 1263.510's language provides that the condemnee is entitled to no compensation at all for lost goodwill if the condemnee fails to mitigate a portion of the loss.

The Impact of Relocation

At the bench trial, Yum Yum had argued that it would need to invest somewhere between $250,000 to $300,000 to relocate its store, and most of those expenses would not have been recoverable under the Relocation Act (Gov. Code, § 7262, subd. (a), Cal. Code Regs., tit. 25, §§ 6090, subds. (a), (b) & (i), 6094.) The court observed that there is no authority compelling a condemnee to relocate when the investment required to relocate would make it dis-economic to do so. Also, MTA's own expert conceded that there would be a loss of goodwill if Yum Yum relocated to one of the three proposed locations. Therefore, the Court of Appeal reversed the trial court's judgment and remanded with instructions to enter an order that Yum Yum established its entitlement to compensation for goodwill, and that a jury trial be held on the value of Yum Yum's lost goodwill.

Conclusion and Implications

This case shows that a business may establish an entitlement to goodwill damages from a taking even if it fails to mitigate as to some of its loss of goodwill. Once the party is able to show that it will lose some of amount of goodwill from the taking, it is entitled to compensation and a jury trial to determine the value of the loss.

The opinion may be accessed online at the following link: https://www.courts.ca.gov/opinions/documents/B276280.PDF
(Nedda Mahrou)

SIXTH DISTRICT COURT AFFIRMS TRIAL COURT'S UPHOLDING OF ZONING ORDINANCE REGULATING LIVESTOCK

Perez v. County of Monterery, ___Cal.App.5th___, Case No. H044364 (6th Dist. Feb. 14, 2019).

The Sixth District Court of Appeal has held that an ordinance that imposed various health and safety requirements to the keeping of five or more roosters was not unconstitutional.

Factual Background

A Monterey County ordinance provides that no one may keep more than four roosters on a single property without a rooster keeping operation permit. The permit application must include a plan describing the:

> . . .method and frequency of manure and other solid waste removal, . . [and such] . . . other information that the Animal Control Officer may deem necessary to decide on the issuance of the permit.

A permit cannot be issued to anyone who has a criminal conviction for illegal cockfighting or other crime of animal cruelty. Permitted rooster keeping operations must comply with certain minimum standards, such as maintaining structurally sound pens that protect roosters from cold and are properly cleaned and ventilated. The ordinance includes four exemptions from the permit requirement: for poultry operations (defined as raising more than 200 fowl for the primary purpose of producing eggs or meat for sale); poultry hobbyists (a member of a recognized organization that promotes the breeding of poultry for show or sale); minors who keep roosters for an educational purpose; and minors who keep roosters for a Future Farmers of America project or 4-H project.

Plaintiffs Heriberto Perez and Miguel Robles (Perez) sued to challenge the validity of the ordinance, seeking a declaratory judgment that the law is unconstitutional. No evidence was introduced at trial other than the text of the ordinance and some related legislative documents. The trial court found that the ordinance did not violate the constitution and entered judgment for the County. Perez timely appealed.

Legal Background

A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. *Tobe v. City of Santa Ana,* 9 Cal.4th 1069, 1084 (1995).To succeed on a facial challenge, a plaintiff must show that the law in question could never be applied in a constitutional manner; it is not enough to show that the law would be unconstitutional under some circumstances. Ap-

pellate courts use their independent judgment to decide whether the challenged law is constitutional. *Vergara v. State of California*, 246 Cal.App.4th 619, 628 (2016).

The Court of Appeal's Decision

Regulatory Taking Claim

The court first addressed Perez's claim that the ordinance operated as a regulatory taking in violation of the Fifth Amendment because it deprived Perez of all economically beneficial use of his property. The court rejected Perez's claim because a regulatory taking "requires evidence of how the regulation affects the property in question," which is an as applied, factual inquiry, rather than a facial attack on a regulation or ordinance. Slip Op. at pp. 3 – 4.

Commerce Clause Claim

The court next addressed Perez's claim that the ordinance violated the Commerce Clause of the U.S. Constitution, which prohibits local regulations that "impose[] a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits.' " Slip Op. at p. 4, citing *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 390 (1994). Perez asserted that ordinance imposed a burden on interstate commerce by forcing rooster owners to immediately divest themselves of all but four of their rooster and thereby likely sell a majority of the roosters in interstate commerce. The court rejected this argument, noting that the ordinance did not force rooster owners to sell roosters, but merely required a permit to keep more than four. Further, the court held that Perez provided no evidence that the ordinance would result in roosters being sold, or evidence of any impact on interstate commerce.

Equal Protection Claim

The court then addressed the claim that the ordinance violated the Equal Protection clause of the Fourteenth Amendment because it treated minors more favorably that adults in that it provided exceptions to minors keeping roosters for certain activities. The court rejected this claim, stating that:

> . . .age is not a suspect classification under the Equal Protection Clause, . . .so laws] . . .may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. Slip Op. at pp. 5 – 6, citing *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000).

The court acknowledged the differential treatment by age, but stated that Perez did not "articulate how the differential treatment completely fails to advance a legitimate government purpose." Slip Op. at p. 6. The ordinance's text stated that it:

> . . .serves the public health, safety and welfare by establishing a comprehensive approach to the keeping of five or more roosters that balances promotion of agriculture and agricultural education with prevention of operations that are unsanitary, inhumane, environmentally damaging, and potentially conducive of illegal conduct.

The court held that this distinction was rationally related to a legitimate government purpose.

The court next rejected Perez's claim that the ordinance functioned as an impermissible Bill of Attainder by singling out individuals who want to keep more than four roosters, holding that the ordinance did not "single out a person or group for punishment," but rather "prospectively regulates the keeping of roosters." Slip Op. at p. 7.

California Constitution Claim

Finally, the court rejected Perez's claim that the ordinance violated the California Constitution's right to privacy and the right to possess property, holding that:

> Plaintiffs make no effort to identify a specific privacy interest implicated by the ordinance, much less explain why any purported invasion of privacy is not outweighed by the County's competing interest in establishing humane and sanitary standards for the keeping of roosters. Slip Op. a p. 8.

The court similarly rejected Perez's property claim, holding that the ordinance was a "reasonable restraint[ ] to avoid societal detriment." Slip Op. at p. 8, citing *People v. Byers* (1979) 90 Cal.App.3d 140, 147.

Conclusion and Implications

This case, which might seem very mundane in nature, is significant because it addresses a number of constitutional challenges that are often advanced against various ordinances and provides a clear statement of the standards applied to such challenges. The court's decision is available online at: https://www.courts.ca.gov/opinions/documents/H044364.PDF (Alex DeGood)

SECOND DISTRICT COURT DISTINGUISHES BETWEEN BROWN ACT REQUIREMENTS FOR REGULAR MEETINGS AND SPECIAL MEETINGS

Preven v. City of Los Angeles, *Unpub.*, Case No. B287559 (2nd Dist. Feb. 22, 2019).

In *Preven v. City of Los Angeles*, an *unpublished* decision, the Second District Court of Appeal considered the statutory interpretation of one of the public comment requirements of the Brown Act. In this case, meeting attendee brought a petition for writ of mandate and complaint for declaratory relief against the City of Los Angeles (City), alleging the City violated the Brown Act open meeting law by refusing to let attendee address the special city council meeting. The trial court dismissed the action, but the appellate court reversed and remanded. The appellate court held that the provision of the Brown Act that allowed for an exception to the general requirement for public comment opportunity for items already considered by a committee applied only to regular meetings and not to special meetings.

Factual and Procedural Background

On December 15, 2015, Appellant Eric Preven (Preven) addressed a meeting of the Los Angeles City Council's Planning and Land Use Management Committee (PLUM). The committee consisted of five members of the fifteen-member city council. Agenda item five for the meeting concerned a recommendation to the full city council on a proposed real estate development near Preven's residence. The committee listened to comment from members of the public, including Preven, and voted unanimously to make a report and recommendation of approval to the full city council.

The next day, on December 16, 2015, a special meeting of the city council was held to decide (among other things) whether to approve the recommendation of the PLUM committee on the real estate development. Preven attended the December 16th special meeting, and requested an opportunity to address the city council, including the ten council members who were not part of the five-member PLUM committee. His request was denied on the grounds that he and others had the opportunity to comment on the real estate development agenda item at the PLUM committee meeting the previous day.

Asserting the City's refusal to let him address the special city council meeting was part of a larger pattern of Brown Act violations, Preven sent a cease and desist demand letter to the City, and thereafter filed a petition for a writ of mandate and complaint for declaratory relief to enforce the Brown Act.

In response to the petition, the City argued the Brown Act requires only the opportunity to address a special meeting of a legislative body before it takes action. Since Preven spoke before the special city council meeting at the PLUM committee meeting, the City asserted it could bar Preven from addressing the full council on the same topic. The trial court agreed, sustained the City's demurrer without leave to amend, and entered a judgment of dismissal. The Court of Appeal reversed, finding the City's argument unpersuasive.

The Court of Appeal's Decision

Regular and Special Meetings

The court explained the purpose of the Brown Act is to facilitate public participation in local government decisions and to curb misuse of the democratic process by secret legislation. The Act distinguishes between regular and special meetings of a legislative body. The scope of permissible public comment at a regular meeting includes "any item of interest to the public ... that is within the subject matter jurisdiction of the legislative body." (Gov't Code §§ 54954.3(a); 54954.3(a).) The public's opportunity to address the legislative body must take place "before or during the legislative body's consideration" of the item at

issue. (*Id.*) However, the legislative body does need not provide an opportunity for public comment at a regular meeting:

> . . .on any item that has already been considered by a committee, composed exclusively of members of the legislative body, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the legislative body. (Gov't Code § 54953.3(a).) This is called the "committee exception."

With respect to special meetings, the scope of public comment is similarly delimited to items noticed for the special meeting. Instead of being able to address any item of interest within the legislative body's subject matter jurisdiction, the public has a right to address a special meeting on "any item that has been described in the notice for the meeting." (Gov't Code § 54954.3(a).) As with general meetings, the public must be given the opportunity to address the legislative body "before or during consideration" of the agenda item. (*Id.*) Of particular relevance, the committee exception does not apply to special meetings as it does to regular meetings.

The court ruled the trial court's holding that the committee exception applied to special meetings was in error. The court explained that the plain language of Gov't Code § 54954.3(a) specifies that the committee exception applies only to regular meetings.

Public Comment and Legislative Intent

The appellate court next responded to the City's argument that § 54954.3(a) requires the opportunity for public comment "before ... consideration" of the special meeting agenda item, and Preven was given the opportunity to comment before the special city council meeting at the PLUM committee meeting the preceding day. In response to the City's argument, the Court of Appeal looked at the statute's legislative history. It determined that the legislative history shows that § 54954.3(a)'s current requirement that the public be allowed to address a special meeting "before or during" consideration of an agenda item has the same meaning as similar "before or during" language did when it was enacted in 1991 for general meetings. The "before or during" language concerns the timing of comments *within a particular meeting*, and does operate to restrict comment based on a *prior distinct meeting*.

Conclusion and Implications

Knowledge of the the Brown Act's provisions are a must for municipal lawyers and those practicing throughout the land use arena. The Second District Court here concluded that given the plain language of the statute, and its legislative history, the Brown Act does not permit limiting comment at special city council meetings based on comments at prior, distinct committee meetings.
(Giselle Roohparvar)

FIRST DISTRICT COURT UPHOLDS EIR FOR MIXED-USE DEVELOPMENT PROJECT IN SAN FRANCISCO

SOMCAN v. City and County of San Francisco,
___Cal.App.5th___, Case No. G055711 (4th Dist. Feb. 13, 2019).

The First District Court of Appeal upheld the trial court's determination that an Environemntal Impact Report (EIR) prepared by the City and County of San Francisco for a mixed-use business and residential project complied with the California Environmental Quality Act (CEQA). The court rejected numerous claims alleging the EIR was inadequate, including challenges to the EIR's project description, cumulative impacts analysis, and the analysis of impacts related to traffic and circulation. The opinion is particularly noteworthy because it is the first appellate decision to apply the CEQA standard of review that was recently articulated by the California Supreme Court in *Sierra Club v. County of Fresno*.

Factual and Procedural History

The dispute in this case arose over the proposed construction of a mixed-use development, known as the 5M Project, covering four acres in downtown San Francisco. The project included office, retail, cultural, educational, and open-space uses for the property, which were intended primarily to support the region's technology industry and provide spaces for co-working, media, arts, and small-scale urban manufacturing.

The San Francisco Planning Department, as the lead agency under CEQA, prepared an EIR for the project. The EIR described two "options" for the project, an "Office Scheme" and a "Residential Scheme." Under both schemes, the project would result in new active ground floor space (with office, retail, educational, and cultural uses), office use, residential dwelling units, and open space. Both schemes would preserve and rehabilitate certain buildings, demolish other buildings on site, and construct four new buildings with heights ranging from 195 to 470 feet. The overall gross square footage was substantially the same in both schemes, with varying mixes of office and residential uses. The office scheme had a larger building envelope and higher density than the residential scheme.

After the city approved the project and certified the EIR, several local groups challenged the EIR by filing a petition for writ of mandate. The trial court denied relief. The petitioners appealed.

The Court of Appeal's Decision

Standard of Review

The court started its analysis with a discussion of the standard of review. Relying heavily on the recent Supreme Court decision in *Sierra Club v. County of Fresno,* the court noted the different standards of review for challenges to procedural and factual issues. Quoting from the *Sierra Club* decision, the court then explained that some claims do not fit easily into the "procedural issues/factual issues dichotomy." This is especially so when the issue is whether an EIR's discussion of environmental impacts is adequate, that is, whether the discussion sufficiently performs the function of facilitating informed agency decision-making and public participation. The court then repeated the three "basic principles" articulated by the Supreme Court regarding the standard of review for adequacy of an EIR: 1) An agency has considerable discretion to decide the manner of the discussion of potentially significant effects in an EIR; 2) However, a reviewing court must determine whether the discussion of a potentially significant effect is sufficient or insufficient, *i.e.*, whether the EIR comports with its intended function of including detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project; and 3) The determination whether a discussion is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency's factual conclusions.

Project Description

Turning to the merits, the petitioners first argued that the EIR was inadequate because it failed to provide a stable, accurate project description because the draft EIR presented two alternative schemes: the office scheme and residential scheme.

Rejecting this argument, the court first noted that the petitioners did not dispute that the EIR's project description met CEQA's technical requirements. The court then found that the project description was not confusing or misleading, despite presenting two different options. According to the court, the EIR described only one proposed project—a mixed-use development involving the retention of two historic buildings, the demolition of all other buildings, and the construction of four new buildings and active ground floor space—with two options for different allocations of residential and office units, and the analysis was not curtailed, misleading, or inconsistent.

The petitioners also complained that the final EIR adopted a proposed plan based on neither the office scheme nor the residential scheme, but a "revised" project that was a variant of another alternative identified in the draft EIR. The court determined, however, that the petitioners failed to identify any component of the revised project that was not addressed in the EIR. The court emphasized that the CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project, but is instead intended to allow consideration of other options that may be less harmful to the environment. Therefore, the court concluded, the project description was not inadequate simply because the ultimate approval adopted characteristics of one of the alternatives.

Cumulative Impacts

Petitioners challenged the cumulative impacts analysis on the ground that the EIR's list of cumulative project was inadequate because it was developed in 2012—during the "Great Recession"—and did not reflect the recent increase in development. Apart from general observations that development is "rampant" and there has been "a tremendous uptick in development pressure" in San Francisco, however, the petitioners did not point to any evidence that the Great Recession rendered the project list defective or misleading, or that the city ignored projects that were in the pipeline for the purpose of analyzing cumulative impacts. Accordingly, the court held that the petitioners had not met their burden of proving the EIR's cumulative impacts analysis was not supported by substantial evidence. Notably, the court cited *Sierra Club v. County of Fresno* for the proposition that agencies have discretion in selecting the methodology used in evaluating environmental impacts, subject to review under the substantial evidence standard.

Traffic and Circulation Impacts

Regarding traffic impacts, the petitioners argued that the EIR was inadequate because it failed to: 1) include all impacted intersections, 2) consider the impact of the Safer Market Street Plan, and 3) adequately evaluate community-proposed mitigation measures and alternatives. The court rejected each argument in turn.

First, the court deferred to the city's determination of the geographic boundaries to use for the intersection analysis. The court noted that the city explained its reasoning for selecting certain intersections and excluding others, and the analysis was supported by substantial evidence.

Second, the court held that the city did not need to include the Safer Market Street Plan in the EIR because it was not reasonably foreseeable when the city initiated EIR preparation. Moreover, there was no evidence to indicate the Safer Market Street Plan would have any adverse impact on traffic and circulation related to the 5M Project.

Finally, the court found that the EIR did in fact address the mitigation measures that petitioners alleged were missing and did not need to analyze additional alternatives. Noting that the alternatives analyzed in an EIR are judged against the "rule of reason," the court held that the petitioners failed to show that the nine alternatives evaluated in the EIR were manifestly unreasonable. The court also held that the EIR did not need to analyze additional proposed alternatives because the alternatives were not feasible, would not meet the project objectives, or would not reduce environmental impacts.

Conclusion and Implications

Following the Supreme Court's decision in *Sierra Club v. County of Fresno*, both litigants and trial courts are in need of further guidance regarding how the standard of review should be applied. As the first opinion published in the wake of that case, this decision provides a glimpse into how appellate courts are interpreting that decision, at least for the types of claims that were at issue here. Most notably, the court emphasized that agencies have discretion to determine the methodology used in evaluating environmental impacts, and that such determinations are reviewed under the substantial evidence standard. The court also held that the project description was adequate despite some flexibility in the options and reiterated that agencies are not stuck with the initial proposal in a draft EIR.

The opinion is available here: https://www.courts.ca.gov/opinions/documents/A151521.PDF
(Chris Stiles)

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, and to the Governor refer to Gavin Newsom.

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 March 18, 2019, was amended, re-referred to the Committee on Natural Resources, read for a second time and then further amended.

AB 552 (Stone)—This bill would establish the Coastal Adaptation, Access, and Resilience Program for the purpose of funding specified activities intended to help the state prepare, plan, and implement actions to address and adapt to sea level rise and coastal climate change.

AB 552 was introduced in the Assembly on February 13, 2019, and, most recently, on March 18, 2019, was re-referred to the Committee on Natural Resources.

AB 1011 (Petrie-Norris)—This bill would direct the Coastal Commission to give extra consideration to a request to waive the filing fee for an application for a coastal development permit required for a private nonprofit organization that qualifies for tax-exempt status under specified federal law.

AB 1011 was introduced in the Assembly on February 21, 2019, and, most recently, on March 18, 2019, was amended and re-referred to the Committee on Natural Resources where it was read for a second time and further amended.

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, indefinitely.

AB 202 was introduced in the Assembly on January 14, 2019, and, most recently, on March 12, 2019, was referred to the Committee on Appropriations.

AB 231 (Mathis)—This bill would exempt from the California Environmental Quality Act (CEQA) a project: i) 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, ii) 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 February 7, 2019, was referred to the Committee on Natural Resources.

AB 296 (Cooley)—This bill would establish the Climate Innovation Grant Program, to be administered by the Climate Innovation Commission, the purpose of which would be to award grants in the form of matching funds for the development and research of new innovations and technologies to address issues related to emissions of greenhouse gases and impacts caused by climate change.

AB 296 was introduced in the Assembly on January 28, 2019, and, most recently, on February 7, 2019, was referred to the Committee on Natural Resources.

AB 394 (Obernolte)—This bill would exempt from the California Environmental Quality Act projects or activities recommended by the State Board of Forestry and Fire Protection that improve the fire safety of an existing subdivision if certain conditions are met.

AB 394 was introduced in the Assembly on February 6, 2019, and, most recently, on February 15, 2019, was referred to the Committee on Natural Resources.

AB 430 (Gallagher)—This bill would exempt from the California Environmental Quality Act projects involving the development of new housing in the County of Butte.

AB 430 was introduced in the Assembly on February 7, 2019, and, most recently, on February 15, 2019, was referred to the Committee on Natural Resources.

AB 454 (Kalra)—This bill would amend the Fish and Game Code to make unlawful the taking or possession of any migratory nongame bird designated in the federal Migratory Bird Treaty Act as of January 1, 2017, any additional migratory nongame bird that may be designated in the federal act after that date.

AB 454 was introduced in the Assembly on February 11, 2019, and, most recently, on February 21, 2019, was referred to the Committee on Water, Parks and Wildlife.

AB 490 (Salas)—This bill would establish specified procedures for the administrative and judicial review of the environmental review and approvals granted for projects that meet certain requirements, including the requirement that the projects be located in an infill site that is also a transit priority area. Among other things, the bill would require actions seeking judicial review pursuant to the California Environmental Quality Act or the granting of project approvals, including any appeals therefrom, to be resolved, to the extent feasible, within 270 days of the filing of the certified record of proceedings.

AB 490 was introduced in the Assembly on February 12, 2019, and, most recently, on March 18, 2019, was re-referred to the Committee on Natural Resources.

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 March 8, 2019, was set for hearing on April 10 in the Committee on Environmental Quality.

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 March 18, 2019, was re-referred to the Committee on Appropriations.

SB 226 (Nielsen)—This bill would require the Natural Resources and Environmental Protection agencies to jointly develop and implement a watershed restoration grant program, as provided, for purposes of awarding grants to eligible counties to assist them with watershed restoration on watersheds that have been affected by wildfire. This bill would further provide that projects funded by the grant program are exempt from the requirements of the California Environmental Quality Act.

SB 226 was introduced in the Senate on February 7, 2019, and, most recently, on March 18, 2019, was read for a second time, amended and then re-referred to the Committee on Natural Resources and Water.

SB 621 (Glazer)—This bill would require any action or proceeding brought under the California Environmental Quality Act to attack, review, set aside, void, or annul the certification of an environmental impact report for an affordable housing project or the granting of an approval of an affordable housing project, to require the action or proceeding, including any potential appeals therefrom, to be resolved, to the extent feasible, within 270 days of the filing of the certified record of proceeding with the court.

SB 621 was introduced in the Senate on February 22, 2019, and, most recently, on March 15, 2019, was set for hearing in the Committees on Environmental

Quality and the Judiciary on April 10, 2019.

SB 632 (Galgiani)—This bill would amend the California Environmental Quality Act to until a specified date, exempt from CEQA any activity or approval necessary for, or incidental to, actions that are consistent with the draft Program Environmental Impact Report for the Vegetation Treatment Program issued by the State Board of Forestry and Fire Protection in November of 2017.

SB 632 was introduced in the Senate on February 22, 2019, and, most recently, was scheduled for hearing in the Committee on Environmental Quality on April 10, 2019.

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: i) 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, ii) 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 February 4, 2019, was referred to the Committee on Housing and Community Development.

AB 1279 (Bloom)—This bill would require the Department of Housing and Community development to designated areas in this state as high-resource areas, defined as areas of high opportunity and low residential density that are not currently experiencing gentrification and displacement, and that are not at a high risk of future gentrification and displacement, by January 1, 2021, and every five years thereafter.

AB 1279 was introduced in the Assembly on February 21, 2019, and, most recently, on March 11, 2019, was referred to the Committees on Housing and Community Development and Natural Resources.

SB 50 (Wiener)—This bill would require a city, county, or city and county to grant upon request an equitable communities incentive when a develop-

ment 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 March 11, 2019, was read for a second time, amended and then re-referred to the Committee on Housing.

Public Agencies

AB 485 (Medina)—The bill would prohibit a local agency from signing a nondisclosure agreement regarding a warehouse distribution center as part of negotiations or in the contract for any economic development subsidy.

AB 485 was introduced in the Assembly on February 12, 2019, and, most recently, on February 21, 2019, was referred to the Committee on Local Government.

AB 637 (Gray)—This bill would prohibit the State Water Resources Control Board or a Regional Water Quality Control Board from adopting or implementing any policy or plan that results in a direct or indirect reduction to the drinking water supplies that serve a severely disadvantaged community, as defined.

AB 637 was introduced in the Assembly on February 15, 2019, and, most recently, on March 12, 2019, was referred to the Committee on Environmental Safety and Toxic Materials.

AB 1483 (Grayson)—This bill would require a city or county to compile a list that provides zoning and planning standards, fees imposed under the Mitigation Fee Act, special taxes, and assessments applicable to housing development projects in the jurisdiction. In addition, this bill would require each city and county to annually submit specified information concerning pending housing development projects with completed applications within the city or county, the number of applications deemed complete, and the number of discretionary permits, building permits, and certificates of occupancy issued by the city or county to the Department of Housing and Community Development and any applicable metropolitan planning organization.

AB 1483 was introduced in the Assembly on February 22, 2019, and, most recently, on March 14, 2019, was referred to the Committees on Housing and Community Development and Local Government.

AB 1484 (Grayson)—This bill would prohibit a local agency from imposing a fee on a housing development project unless the type and amount of the exaction is specifically identified on the local agency's internet website at the time the application for the development project is submitted to the local agency, and to include the location on its internet website of all fees imposed upon a housing development project in the list of information provided to a development project applicant.

AB 1484 was introduced in the Assembly on February 22, 2019, and, most recently, on March 14, 2019, was referred to the Committees on Housing and Community Development and Local Government.

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 March 13, 2019, was set for hearing in the Committee on Elections and Constitutional Amendments and Public Service on April 2, 2019.

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 March 12, 2019, was re-referred to the Committee on Appropriations.

SB 295 (McGuire)—This bill would prohibit an ordinance passed by the board of directors of a public utility district from taking effect less than 45 days, instead of 30 days, after its passage and would make conforming changes.

SB 295 was introduced in the Senate on February 14, 2019, and, most recently, on February 28, 2019, was referred to the Committee on Governance and Finance.

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: i) 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; ii) 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 iii) 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.

SB 182 (Jackson)—This bill would amend the Planning and Zoning Law to require the safety element of a General Plan, upon the next revision of the housing element or the hazard mitigation plan, on or after January 1, 2020, whichever occurs first, to be reviewed and updated as necessary to include a comprehensive retrofit plan.

SB 182 was introduced in the Senate on January 29, 2019, and, most recently, on March 18, 2019, had its March 27 hearing postponed by the Committee on Governance and Finance.
(Paige Gosney)

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