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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

HIGHLY-ANTICIPATED GROUNDWATER SUSTAINABILITY PLANS EMERGE FOR CALIFORNIA'S 'CRITICALLY OVERDRAFTED' GROUNDWATER BASINS

By Derek Hoffman, Esq. and Chris Carrillo, Esq.

For well over 150 years, the State of California did not comprehensively regulate its groundwater basin aquifers. That changed at the height of the historic multiyear drought, when California's Sustainable Groundwater Management Act (SGMA) took effect on January 1, 2015. SGMA requires local Groundwater Sustainability Agencies (GSAs) to develop and implement Groundwater Sustainability Plans (GSPs) to achieve long-term basin sustainability. On January 31, 2020, GSPs for approximately 20 "critically overdrafted" basins were due for submission to the California Department of Water Resources (DWR). These highly anticipated GSPs are now available for review and public comment on DWR's website. The shape of groundwater management in California is *rapidly* evolving, and will continue to evolve as these and other GSPs are evaluated, updated, implemented—and in some basins—litigated.

SGMA Background

GSPs must be adopted by local GSAs and submitted to DWR by January 31, 2022 for high- and medium-priority basins that are neither adjudicated nor subject to an approved GSP Alternative. For high- and medium-priority basins that are designated "critically overdrafted," the deadline to submit adopted GSPs was two years earlier, January 31, 2020. DWR is required to post each submitted GSP on its website and evaluate it within two years for compliance with SGMA and DWR's GSP Emergency Regulations (California Code of Regulations, Title 23, Division 2, Subchapter 2, § 350 *et seq.*) (GSP Regulations). In the event that a GSA fails to submit a timely GSP, or submits a GSP that fails to satisfy SGMA and the GSP Regulations, that basin may be placed in DWR probationary status and subjected to intervention and regulation directly by the California State Water Resources Control Board.

Basin Sustainability

SGMA requires achieving basin sustainability within 20 years of GSP adoption. While SGMA provides the legal framework and minimum standards for sustainability, it authorizes GSAs to specifically define sustainability for their local basins. That determination must be based upon technical and policy considerations. GSAs are required, for example, to consider the best available science and information in developing their GSPs and projects and management actions, and are required to consider the interests of all beneficial users and uses of groundwater within the basin. (California Water Code § 10723.2.)

GSPs must identify a "sustainability goal," which is defined under SGMA as:

> . . .the existence and implementation of one or more groundwater sustainability plans that achieve sustainable groundwater management by identifying and causing the implementation of measures targeted to ensure that the applicable basin is operated within its sustainable yield. (*Id.* § 10721(u).)

"Sustainable yield" is defined as the maximum quantity of water, calculated over a *base period* representative of *long-term conditions* in the basin and *including any temporary surplus*, that can be withdrawn annually from a groundwater supply *without causing an undesirable result*. (*Id.*, § 10721(w).)

In other words, determining a basin's "sustainable yield" is complex and is intrinsically linked to avoiding specific, undesirable results. In its Draft Best Management Practice publication for Sustainable Management Criteria (SMC BMP), DWR explains the "Role of Sustainable Yield Estimates in SGMA," stating that "that SGMA does not incorporate sustainable yield estimates directly into sustainable management criteria." It continues:

> . . .basin-wide pumping within the sustainable yield estimate is neither a measure of, nor proof of, sustainability. Sustainability under SGMA is only demonstrated by avoiding undesirable results for the six sustainability indicators. (SMC BMP, p. 32.)

Thus, the careful study, definition, establishment and management of sustainable management criteria for each sustainability indicator are integral to achieving complaint and effective GSP. SGMA defines undesirable results as one or more of the following effects caused by groundwater conditions occurring throughout the basin:

> (1) Chronic lowering of groundwater levels indicating a significant and unreasonable depletion of supply if continued over the planning and implementation horizon. Overdraft during a period of drought is not sufficient to establish a chronic lowering of groundwater levels if extractions and groundwater recharge are managed as necessary to ensure that reductions in groundwater levels or storage during a period of drought are offset by increases in groundwater levels or storage during other periods.
>
> (2) Significant and unreasonable reduction of groundwater storage.
>
> (3) Significant and unreasonable seawater intrusion.
>
> (4) Significant and unreasonable degraded water quality, including the migration of contaminant plumes that impair water supplies.
>
> (5) Significant and unreasonable land subsidence that substantially interferes with surface land uses.
>
> (6) Depletions of interconnected surface water that have significant and unreasonable adverse impacts on beneficial uses of the surface water. (Wat. Code § 10721(x).)

SGMA does not define the threshold at which a specific sustainability indicator becomes *significant* and *unreasonable*. Rather, local GSAs are tasked with this weighty responsibility. Given the vast and varied users of groundwater in each basin and the potentially significant operational and financial impacts of GSP projects and management actions, the importance of establishing sustainable management criteria based upon the best available science and information and carefully informed policy considerations cannot be overstated.

GSPs must identify minimum thresholds, five-year interim milestones, and ultimate measurable objectives for each sustainability indicator. GSAs are afforded SGMA-enumerated powers, in addition to existing legal authority held by individual GSA member agencies, to implement GSPs within their jurisdictional areas. (*Id.* § 10725.) However, these powers are not unlimited. Municipalities retain, for example, their land use and well-permitting authorities, though coordination with GSAs may be required. (*Id.* §§ 10726.4, 10726.8, 10727.4). And, perhaps the most widely recognized SGMA limitation is its declared intent to "preserve the security of water rights in the state to the greatest extent possible consistent with sustainable groundwater management." (*Id.* § 10720.1(b).) SGMA expressly does not authorize a GSA to determine or alter California common law water rights or priorities. (*Id.* § 10720.5). Rather, water rights determinations remain within the role of the courts, primarily through the SGMA companion "comprehensive adjudication" legislation (California Code of Civil Procedure, Part 2, Title 10, Chapter 7, Article 1, § 830, *et seq.*) Through comprehensive adjudications, and other forms of litigation, pumpers are empowered to increase GSA accountability throughout the GSP development process, and ultimately seek a judgment as an alternative to a GSP.

'Critically Overdrafted' Basins

With the exception of a handful of GSP Alternatives (*i.e.*, specific types of basin managements plans that must satisfy specific SGMA and regulatory requirements), California's "critically overdrafted basins" represent the first group required to be managed under GSPs. Through its Bulletin 118 publication, DWR designated 21 basins that are "subject to critical conditions of overdraft" based upon certain criteria in the Water Code. SGMA incorporates those Bulletin 118 designations. (Wat. Code § 10720.7(a).)

California's 21 critically overdrafted basins are geographically concentrated primarily in the Central Valley, in Central- and Southern California coastal areas and, to a lesser extent, in desert inland Southern California. They include DWR Basins:

> 3-001 Santa Cruz Mid-County; 3-002.01 Corralitos—Pajaro Valley; 3-004.01 Salinas Valley—180/400 Foot Aquifer; 3-004.06 Salinas Valley—Paso Robles Area; 3-008.01 Los Osos Valley—Los Osos Area; 3-013 Cuyama Valley; 4-004.02 Santa Clara River Valley—Oxnard; 4-006 Pleasant Valley; 5-022.01 San Joaquin Valley—Eastern San Joaquin; 5-022.04; San Joaquin Valley—Merced; 5-022.05 San Joaquin Valley—Chowchilla; 5-022.06 San Joaquin Valley—Madera; 5-022.07 San Joaquin Valley—Delta-Mendota; 5-022.08 San Joaquin Valley—Kings; 5-022.09 San Joaquin Valley—Westside; 5-022.11 San Joaquin Valley—Kaweah; 5-022.12 San Joaquin Valley—Tulare Lake; 5-022.13 San Joaquin Valley—Tule 5-022.14 San Joaquin Valley—Kern County; 6-054 Indian Wells Valley; 7-024.01 Borrego Valley—Borrego Springs.

With the exception of Pajaro Valley (for which a GSP Alternative was approved) and Los Osos Area (which is deemed adjudicated), each of the 19 remaining basins were required to submit their adopted GSPs to DWR by the January 31, 2020 deadline. DWR's GSP Portal indicates that GSPs were timely submitted (though, at the time of this writing, some had not been accepted for review as DWR awaited receipt of certain related documents).

Any practitioner that was meaningfully involved in developing those GSPs will undoubtedly acknowledge the intense effort that was required to meet the January 31, 2020 deadline. However, the submission of GSPs marks the *beginning* of the path to sustainability as GSAs continue to monitor basin conditions, implement projects and management actions, and amend and update their GSPs. Implementing the GSPs will require a greater, sustained intensity of effort and engagement, and will likely trigger litigation in some areas.

In certain basins where GSPs would impose particularly aggressive groundwater pumping restrictions and/or fees, litigation has already begun. In Borrego Springs Sub-basin (DWR Basin No. 7-024.01) located in the inland desert area of San Diego County, the local GSA developed one of the first GSPs in the State which included imposing approximately 75 percent pumping reductions. In lieu of adopting and submitting the GSP, a proposed stipulated judgment and physical solution has been negotiated among the vast majority of the basin groundwater producers and submitted to DWR as a comprehensive adjudication GSP Alternative.

In the Indian Wells Valley (DWR Basin No. 6-054) located in eastern Kern County and portions of San Bernardino and Inyo counties, the Indian Wells Valley Groundwater Authority has adopted a GSP that includes, as a primary management action, allocating a static estimated annual basin recharge of 7,650 AFY among selected groundwater users, and assigning virtually all agricultural producers a temporary, non-transferable pumping allocation comprising a fraction of groundwater in storage. Once the temporary allocations are used (which for some could be less than one year), those agricultural producers would be required to cease pumping entirely or pay yet-to-be-defined pumping fees on every acre foot of production to fund imported water infrastructure and imported water supplies. A group of agricultural interests recently filed a verified complaint in Kern County Superior Court including claims to quiet title and for declaratory relief and seeking a physical solution among a group of large groundwater producers in the basin. The complaint declares that it does *not* seek a comprehensive adjudication, citing provisions of the comprehensive adjudication law that exempt certain types of actions among limited groundwater producers that do not involve a comprehensive allocation of the basin's groundwater supply or a comprehensive determination of water rights. (Code Civ. Proc. § 833(b)(1)-(3).). The complaint does not name the GSA and does not directly challenge the GSP.

Basin Conditions of Concern, Projects and Management Actions

By and large, the GSPs adopted for California's critically overdrafted basins recognize and identify the basin conditions that must be addressed in order to achieve sustainability, and they identify projects and management actions that may be considered for implementation as warranted. Most GSPs seek to achieve sustainability over the SGMA-authorized twenty-year timeline, recognizing that the adjustments, costs and impacts of their GSPs will require time and careful implementation. Many GSPs appropriately prioritize monitoring, evaluating and honing their sustainable management criteria during the first five-year implementation period, prior to implementing significant projects or management actions. Nearly all GSPs have yet to clearly determine how they will fund their sustainability programs.

The following provides a survey-level view of a few selected GSPs in different regions of the State.

The Cuyama Basin (DWR Basin No. 3-013)

The Cuyama Basin is located within California's Central Coast Hydrologic Region, primarily in Santa Barbara County. The Cuyama Basin Groundwater Sustainability Agency is the exclusive GSA for the basin. It is a joint powers authority comprising: Kern, Santa Barbara, San Luis Obispo and Ventura Counties, Cuyama Community Services District and the Cuyama Basin Water District.

Primary Sustainability Indicators of Concern

The GSP identifies declining groundwater levels and degraded water quality as the primary sustainability indicators of concern. It indicates that some areas of the basin have experienced no significant change in water levels while areas with the greatest concentration of irrigated agriculture occurs have shown declines. Groundwater quality varies but includes high levels of total dissolved solids (TDS) that exceed California's recommended secondary maximum contaminant level in some areas, and areas with high concentrations of nitrate and arsenic. The GSP finds that the lowering of groundwater levels has resulted in increased water quality degradation and elevated TDS levels. The GSP indicates that annual basin overdraft is approximately 26,000 acre-feet per year (AFY), and estimates that reducing pumping to 40,000 AFY is necessary to achieve long-term sustainability.

Projects and Management Actions

The GSP identifies primary projects and management actions including: 1) expanding monitoring programs; 2) a pumping allocation program to be implemented over a 15-year period beginning in 2023; 3) a cloud seeding project, described as a type of weather modification with the objective to increase the amount of precipitation that would fall in the Basin watershed and is estimated to yield up to 4,000 AFY of additional supply; and 4) diversion of high stormwater flows from the Cuyama River into basin recharge, which is estimated to support up to 4,000 AFY in groundwater production. Estimated implementation costs range up to approximately $5 million per year.

The Salinas Valley—180-400 Ft. Aquifer (DWR Basin No. 3-004.01)

The Salinas Valley—180-400 Ft. Aquifer is located within the Central Coastal region in Monterey County. It is one of multiple Salinas Valley sub-basins. The sub-basin is named for its two-primary water-bearing units: the 180-Foot Aquifer and the 400-Foot Aquifer, and it encompasses an approximately 140 square-miles. The basin is managed by three GSAs: 1) the Salinas Valley Basin Groundwater Sustainability Agency (a joint powers authority comprising multiple counties, cities and other agencies); 2) the County of Monterey GSA; and 3) the Marina Coast Water District GSA.

Primary Sustainability Indicators of Concern

The GSP identifies declining groundwater levels and sea water intrusion as the primary sustainability indicators of concern. According to the GSP, agricultural irrigation comprises approximately 85 percent of total groundwater use within the sub-basin, and urban/domestic use primarily the remainder. According to the GSP, concentrated groundwater pumping near the coastal area has resulted in declining groundwater levels and seawater intrusion. During the drought years 2013 to 2017, increased pumping expanded the sea water impacted areas from 12,500 acres to 18,000 acres. The GSP reports that in 2005, nitrate levels exceeding the primary maximum contaminant level

(MCL) were found in 32 percent of public water supply samples in the greater Salinas Valley Basin. The GSP estimates historical average sub-basin overdraft to be 10,900 AFY, and projects overdraft in the amount of 8,100 AFY in 2030, and 8,600 AFY in 2070. The GSP aims to mitigate the projected long-term projected 8,600 AFY overdraft, and to mitigate existing short-term overdraft estimated at over 40,000 AFY.

Projects and Management Actions

The GSP identifies primary projects and management actions including: 1) a three-tiered pump fee designed to incentivize reduced pumping; 2) in-lieu projects designed to provide direct delivery of surface water to offset pumping; 3) direct recharge projects through recharge basins or injection; 4) indirect recharge projects designed to decrease evapotranspiration and increased infiltration, such as removing invasive species from riparian corridors, and capturing storm water flows; and 5) hydraulic barrier development to control seawater intrusion, such as injection wells aligned parallel to coastline areas. The GSP anticipates developing the fee structure and refining and prioritizing selected projects within the first three years of GSP implementation. The GSP estimates that planned activities will cost over $11 million over the first five years of implementation.

The Merced Basin (DWR Basin No. 5-022.04)

The Merced Sub-basin is located within the northern portion of the larger San Joaquin Valley Groundwater Basin, and encompasses an area of about 801 square miles. The basin is managed by three GSAs pursuant to a memorandum of understanding: Merced Irrigation-Urban Groundwater Sustainability Agency, Merced Sub-basin Groundwater Sustainability Agency, and Turner Island Water District Groundwater Sustainability Agency #1.

Primary Sustainability Indicators of Concern

The GSP identifies multiple sustainability indicators of primary concern, including declining groundwater levels, degraded water quality, land subsidence, and depletions of interconnected surface waters. Notably, the GSP indicates that loss of groundwater in storage is not a concern because historical reductions have been insignificant relative to the total volume of freshwater water storage. The historical water budget finds an annual average rate of overdraft (change of storage) of 192,000 AFY from 2006 through 2015. According to the GSP, sustainable yield was estimated by modifying conditions in the groundwater model to balance out the change in stored water over time. In order to achieve a net-zero change in groundwater storage over a long-term average condition, the GSP states that current agricultural and urban groundwater demand in the basin would need to be reduced by approximately 10 percent, absent implementation of any new supply-side or recharge projects.

Projects and Management Actions

The GSP aims to achieve its sustainability goal by allocating a portion of the estimated basin sustainable yield to each of the three GSAs and coordinating the implementation of programs and projects to increase both direct and in-lieu groundwater recharge. The GSAs have not yet reached agreement on allocations or how they will be implemented. The GSP identifies twelve potential projects, which categorically include basin recharge, monitoring wells, water system interties and additional conveyance canals, water use efficiency programs, and streamlining certain replacement wells, and other project categories. The GSP anticipates completing all projects by 2026. GSP implementation costs are estimated to range between $1.2 million and $1.6 million per year, with additional costs for projects and management actions ranging up to $22.9 million.

The San Joaquin Valley—Kern Sub-Basin (DWR Basin No. 5-022.14)

The Kern Sub-basin is the southernmost area of the San Joaquin Valley Groundwater Basin. It is managed by 11 organized GSAs and five coordinated GSPs. Six GSAs are included in the GSP developed by the Kern Groundwater Authority GSA (KGA). Two GSAs are included in the Kern River Groundwater Sustainability Agency GSP. Three additional district-specific GSPs have been prepared in the sub-basin by Buena Vista Water Storage District, Henry Miller Water District, and Olcese Groundwater Sustainability Agency.

The KGA's GSP covers the largest GSA area within the sub-basin, comprising 1.2 million acres of the sub-basin's approximate 1.8 million-acre area.

The KGA is a joint power authority including 16 member entities made up of water districts/agencies, groundwater banking projects, and organized non-districted lands. Each KGA member is assigned the sole right and responsibility to implement SGMA within its respective boundaries and/or management areas, in a manner determined by the member, so long as the implementation actions do not interfere with the surrounding KGA members or other GSAs.

Primary Sustainability Indicators of Concern

The KGA's GSP includes basin-wise coordinated sustainable management criteria and water modeling budgets (historical, baseline and projected). Those budgets indicate that the basin, as a whole, averages overdraft in the amount of 324,326 AFY over the baseline conditions of which the KGA area comprises more than two-thirds of the deficit. Each KGA member agency addresses its own individual water supply sources, projects and management actions in greater detail in its individual management area plans comprising its dedicated GSP chapter.

Projects and Management Actions

The GSP indicates that KGA members have collectively identified more than 150 projects and management actions. They include expanding local and regional conveyance and recharge facilities, better utilizing surplus surface water supplies, developing new conveyance and recharge projects, and participating in the California WaterFix or other thru-Delta improvement projects. Management actions include implementing district level fee structures to incentivize reduced groundwater pumping, participating in local, regional, and state-wide water markets, and establishing individual landowner groundwater allocations. According to the GSP, the coordinated modeling effort shows that the implementation of the identified projects and management actions throughout the basin would result in an average *surplus* of 85,578 AFY over the projected future baseline condition.

Conclusion and Implications

All GSPs that were submitted to DWR and accepted for review are posted on DWR's website at https://sgma.water.ca.gov/portal/gsp/all. The deadline to submit public comments on each individual GSP is also provided. Virtually every GSP spans well over 1,000 pages (and some, over several thousand pages) including technical and other supporting attachments. The GSPs submitted for California's critically overdrafted basins collectively represent a truly "Herculean" effort to meet this crucial SGMA milestone. DWR is required to review the GSPs, consider all public comments, and render an evaluation of each GSP within two years. If the last five years have taught us anything, it is that January 2022 will be here before we know it. And at that point, DWR will have received an even larger wave of high- and medium-priority basin GSPs to review. In the meantime, GSPs for critically overdrafted basins will begin implementation, though the actual path forward for any particular GSP very much remains to be seen.

Derek Hoffman is a Shareholder at Gresham Savage Nolan & Tilden, PC in San Bernardino. He represents a wide range of clients in securing, evaluating, protecting and litigating water rights and supplies. His practice includes guiding clients through the implementation of California's Sustainable Groundwater Management Act and other state and federal natural resources laws and regulations. Derek is a member of the Editorial Board of the *California Water Law & Policy Reporter*.

Chris Carrillo is an Associate at Gresham Savage Nolan & Tilden, PC in San Bernardino. He is a member of the firm's Litigation Practice Group. Mr. Carrillo is a frequent contributor to the *California Water Law & Policy Reporter* and is the former Chairman and an active Board member for the East Valley Water District in San Bernardino County.

LAND USE NEWS

GOVERNOR NEWSOM TAKES EXECUTIVE ACTION TO HALT EVICTIONS THROUGH STATEWIDE MORATORIUM

In response to the global COVID-19 pandemic, California Governor Gavin Newsom issued several Executive Orders to address eviction of commercial and residential tenants in the State of California. The first Executive Order essentially suspended state law preemption of municipal ordinances that restricted evictions for non-payment of rent. The second provided residential tenants with an extra number of days to respond to an action for eviction due to non-payment of rent. Both are tied to COVID-19's impacts to the state economy. The third Executive Order authorized the Judicial Council to adopt rules which, in effect, would suspend any laws that would be inconsistent with the two prior orders.

The Executive Orders

Governor Newsom issued Executive Order N-28-20 on March 16, 2020, which suspended state law limitations on local ordinances restricting both commercial and residential evictions, but only as to evictions for non-payment of rent resulting from COVID-19 related financial impacts (such as decreases in household or business income arising from quarantines or closure orders).

On Friday, March 27, 2020, Governor Newsom followed Order N-28-20 with Executive Order N-37-20 which provides residential tenants with an extended 60-day period in which to respond to an action for eviction due to non-payment of rent, but only if the tenant: 1) timely paid all rent due and owing prior to the date of the Order and 2) notifies the landlord not later than seven days after the date rent is otherwise due that the tenant needs to delay payment of all or a portion of the rent for COVID-19 related reasons "including but not limited to" inability to work due to COVID-19 related sickness, layoffs, loss of hours, or lack of alternative childcare during school closures.

Both of the Governor's Executive Orders specifically preserve the right of local jurisdictions to impose and enforce limitations on both commercial and residential evictions. Several counties and cities throughout the state have also adopted COVID-19 related moratoria on residential and commercial evictions due to non-payment of rent where the failure to pay is caused by COVID-19 related financial impacts. Suspending commercial evictions for COVID-19 related reasons is a rapidly evolving area of the law and, as this crisis continues, it is likely that even more local jurisdictions will adopt their own version of these types of ordinances.

On the same day Executive Order N-37-20 was issued, the Governor also issued Executive Order N-38-20 authorizing the Judicial Council of California to adopt certain rules meant to suspend relevant statutes that are inconsistent with the above-referenced Executive Orders. On April 6, 2020, the Judicial Council adopted several emergency rules which went into effect immediately. The first of such rules, Emergency Rule No. 1, was adopted by the Judicial Council for the purpose of implementing the goals of the Governor's directive to address the crisis surrounding residential tenants who have experienced COVID-19 pandemic-related loss of income, as well as to protect litigants and court staff from having to appear at unlawful detainer proceedings.

Conclusion and Implications

Given the uncertainty surrounding the COVID-19 pandemic, it is unclear when the Governor will lift the state of emergency that was declared on March 4, 2020; however, it is possible that the state of emergency will exist through the end of May. If the state of emergency is not lifted until the end of May, and Emergency Rule No. 1 is not otherwise amended or repealed, landowners will not be able to file and serve an unlawful detainer action to evict tenants on an expedited basis until September.

It is important to note that neither the Governor's eviction moratorium orders nor the related local enactments have the effect of 1) excusing a tenant's underlying obligation to pay rent or 2) prohibiting a landlord from enforcing any lease remedy for non-

payment of rent other than eviction (such as application of tenant security deposits to unpaid rent or enforcement of landlord's rights under lease guaranties or other lease security).

A copy of Executive Order N-37-20 is available online at the following link: https://www.gov.ca.gov/wp-content/uploads/2020/03/3.27.20-EO-N-37-20.pdf. The link to Executive Order N-38-20 is available here: https://www.gov.ca.gov/wp-content/uploads/2020/03/3.27.-20-EO-N-38-20-text.pdf. (Nedda Mahrou)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION RELEASES KLAMATH RIVER PROJECT INTERIM PLAN, WHICH PROVIDES ADDITIONAL WATER FOR ENDANGERED SPECIES

In late March 2020, the U.S. Bureau of Reclamation (Bureau) released a proposed Interim Plan to operate the Klamath River Project for a three-year period, with up to an additional 40,000 acre-feet per year made available for the benefit of endangered species and their critical habitats. The Interim Plan would govern the project's operations while the Bureau, the National Marine Fisheries Service (NMFS), and the U.S. Fish and Wildlife Service (FWS) complete consultation on the Bureau's proposed longer-term operations plan. The Bureau's long-term operations plan is the subject of a federal Endangered Species Act lawsuit filed by the Yurok Tribe and environmental groups.

Background

The Klamath River Project (Project) is located in Klamath County, Oregon, and Siskiyou and Modoc counties in California. The Project, which is operated by the Bureau of Reclamation, supplies irrigation water for approximately 230,000 acres of farmed land. Project water is stored and released from three reservoirs: Upper Klamath Lake, Clear Lake, and Gerber Reservoir. Additional water is available to the Project from the Klamath and Lost rivers, which is delivered through a network of diversion structures, canals, and pumps. Approximately 200,000 acres are served from Upper Klamath Lake and the Klamath River, and 30,000 acres are served from the Lost River, Clear Lake, and Gerber Reservoir. Several federally endangered species, such as coho salmon, and their critical habitats are dependent on the waters of the Klamath River.

The federal Endangered Species Act imposes requirements for protection of endangered and threatened species and their ecosystems, and makes endangered species protection a governmental priority. For marine and anadromous species (like salmon), the Secretary of Commerce, acting through the National Marine Fisheries Service, may list any species, subspecies, or geographically isolated populations of species as endangered or threatened. In addition to listing a species as endangered or threatened, the Secretary of the Interior must also designate "critical habitat" for each species, to the maximum extent prudent and determinable. For species other than marine or anadromous species, such as for terrestrial species, the Secretary, acting through Fish and Wildlife Service (FWS) may list and otherwise regulate the take of such species.

The Biological Opinions

At its most basic level, a Biological Opinion (BiOp)evaluates whether an agency action is likely to either jeopardize the continued existence of a listed species or result in the destruction or adverse modification of such species' designated critical habitat. Opinions concluding that the proposed action is likely to jeopardize a species' continued existence or adversely modify its critical habitat are called "jeopardy opinions," and must suggest "reasonable and prudent alternatives" that the Secretary believes will minimize the subject action's adverse effects. However, "no jeopardy" opinions do not require reasonable and prudent alternatives, but may still set forth reasonable and prudent measures that the action agency must follow if it is to obtain "incidental take" coverage, i.*e.* legal protection for incidentally taking a protected species.

On March 29, 2019, the National Martine Fisheries Service and the U.S. Fish and Wildlife Service (collectively: the Services) submitted to the Bureau their coordinated Biological Opinions evaluating the Bureau's 2018 Biological Assessment for proposed operations of the project, as modified (2018 Operations Plan). In evaluating the Bureau's 2018 Operations Plan, the Services each prepared Biological Opinions in 2019, concluding that the 2018 Operations Plan would not jeopardize the continued existence of Southern Oregon/Northern California

Coast (SONCC) coho salmon, Southern Resident killer whale (SRKW), and Lost River sucker (LRS) and Shortnose suckers (SNS), nor would it destroy or adversely modify their designated critical habitat.

Subsequently, the Bureau analyzed the 2018 Operations Plan under the National Environmental Policy Act (NEPA), resulting in an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI), which was finalized on April 1, 2019. Thereafter, the Bureau began operating the Project pursuant to both Services BiOps and the EA. However, in late summer 2019, Earth Justice on behalf of the Yurok Tribe, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources filed a lawsuit, Case No. 3:19-cv-04405-WHO, in the U.S. District Court for the Northern District of California, challenging, among other things, the "no jeopardy" and "no adverse modification" conclusions in NMFS' BiOp, as well as the Bureau's associated EA.

In August 2019, it was discovered that "computer modeling input files" used to evaluate the amount of available habitat for SONCC coho fry in the Bureau's 2018 Operations Plan and NMFS' 2019 BiOp, contained erroneous information related to the BiOp's "Weighted Usable Area habitat curves" for SONCC coho salmon. Accordingly, the files revealed effects of the 2018 Operations Plan on listed species or their critical habitats that were not previously considered in the BiOp or EA. In particular, the Bureau has expressed concerns related to the amount of habitat available for juvenile coho salmon, in addition to disease mitigation as had previously been the focal point of the Bureau's consultation with NMFS. The Bureau requested re-initiation of formal consultation with both Services on November 13, 2019.

Prior to the Bureau's request to reinitiate consultation with the Services, plaintiffs in the federal lawsuit filed a motion seeking a preliminary injunction to force the Project to operate under a 2012 operations plan in compliance with a corresponding BiOp from 2013, and which would require the Bureau to increase Klamath River flows to address coho salmon disease and habitat concerns. In late January, plaintiffs modified their motion for preliminary injunction, requesting an additional 50,000 acre-feet (AF) of water allocated for Klamath River flows for the benefit of endangered species and their critical habitats.

The New Environmental Assessment and the Proposed Action Alternative

On February 7, 2020, as part of the reinitiated consultation process, the Bureau transmitted a new Environmental Assessment to both Services for Project operations from April 1, 2020, through March 31, 2024. However, the Bureau and the Services subsequently agreed that additional time would be required to complete the consultations. Accordingly, the Bureau proposes to operate the Project pursuant to the Interim Plan for the period of April 2020 to March 2023 while the Bureau and the Services continue the formal consultation process. Litigation over the 2018 Operations Plan and NMFS' 2019 BiOp will be stayed pending the consultation process, provided the Project is operated in accordance with the Interim Plan.

The Interim Plan constitutes the Bureau's Environmental Assessment for Project operations during the three-year period to which it applies, and analyzes two water management approaches: A No-Action Alternative, and a Proposed Action Alternative. The EA adopts the "Proposed Action Alternative."

The Proposed Action Alternative consists of water supply and water management approaches for Upper Klamath Lake, and the Klamath and Lost rivers. These approaches attempt to replicate natural hydrologic conditions observed in the Upper Klamath Basin. The EA reflects the Bureau's effort to comply with the ESA, while also maintaining reliable water deliveries to agricultural water users during the agricultural season. The Proposed Action Alternative generally includes: 1) storing waters of the Klamath and Lost rivers; 2) operating the Project to deliver water for irrigation purposes subject to water availability; and 3) maintaining conditions in Upper Klamath Lake and the Klamath River that comply with ESA requirements.

Under the Proposed Action Alternative, Project operations conducted after the agricultural season would be oriented toward filling Upper Klamath Lake during the fall/winter in order to bolster the ecologic benefit of the volumes available for the Environmental Water Account, which includes habitat and disease mitigation flows. The Proposed Action Alternative provides an additional 40,000 acre-feet of water for the Environmental Water Account, which

is 20,000 acre-feet more than a proposed but rejected alternative in the 2018 Operations Plan and 10,000 acre-feet less than the amount plaintiffs requested in their motion for preliminary injunction.

Notably, 17,000 acre-feet of the additional water for the Environmental Water Account would come from Upper Klamath Lake, while the rest would be supplied by other Project facilities. As analyzed in the EA, Upper Klamath Lake levels are not anticipated to decline significantly due to the additional water releases. In particular, the Proposed Action Alternative would maintain Upper Klamath Lake levels deemed to be protective of ESA-listed suckers, because it includes spring and annual Upper Klamath Lake minimums deemed important to sucker spawning and survival. The remaining 23,000 acre-feet from the Project's other supplies would be largely consistent with what the Bureau proposed in its 2018 Operations Plan. Following the winter months, when Upper Klamath Lake increases would be stored for the benefit of species and habitat, the Project would be operated to provide the Project's irrigation supply during the following spring/summer operational period.

Conclusion and Implications

While parties on both sides of the litigation involving the 2018 Operations Plans and NMFS' 2019 Biological Opinion generally perceive the Interim Plan as an acceptable compromise during the Bureau of Reclamation and the Services' continuing consultation process, it is unclear what longer-term operations plan will be developed. Potentially, the three-year Interim Plan may influence longer-term project operations by providing a test case weighing additional Environmental Water Account supplies with irrigation supplies and needs. It also remains to be seen whether there will be any deviation from the Interim Plan operations and whether plaintiffs will challenge any such deviations for purposes of lifting the stay on litigation. Finally, whether increased flows from the Environmental Water Account will provide the hoped-for ecological benefits remains to be seen, and could play an important role in future negotiations. For more information, *see:*

U.S. Bureau of Reclamation, *Environmental Assessment—Klamath Project Operating Procedures 2020-2023*, available at: https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=42944.
(Miles B.H. Krieger, Steve Anderson)

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE ISSUES INCIDENTAL TAKE PERMIT FOR LONG-TERM OPERATIONS OF THE STATE WATER PROJECT

On March 31, 2020, the California Department of Fish & Wildlife (CDFW) issued an Incidental Take Permit (ITP) to the California Department of Water Resources (DWR) under the California Endangered Species Act (CESA) for the long-term operations of the State Water Project (SWP). The permit, which is intended to minimize impacts to Delta smelt, longfin smelt, and winter and spring-run chinook salmon (Covered Species) from SWP operations, has attracted controversy from both the environmental community and water agencies with an interest in SWP operations.

Background

The CESA prohibits any person or public agency from taking species listed as threatened or endangered by the California Fish and Game Commission. Fish & Game Code § 2080. CDFW, however, can authorize take of listed species by issuing an ITP if the take is "incidental to an otherwise lawful activity," the impacts of the take are minimized and fully mitigated, the necessary mitigation measures are fully funded by the applicant, and the taking will not jeopardize the continued existence of the species at issue. *Id.* at § 2081.

The SWP is operated by DWR conveys an average of 2.9 million acre-feet of water per year to communities and farms throughout California. TP at p. 2. Like the federal Central Valley Project (CVP), the SWP operates a large pumping plant in the Sacramento-San Joaquin River Delta. *Id.* at p. 3. The operations of both projects have caused take of the Covered Species in the past and likely will do so in the future.

Historically, the SWP and CVP have coordinated their operations, and DWR obtained incidental take coverage for SWP operations under CESA by securing a consistency determination from CDFW based on federal Biological Opinions. In 2019, however, DWR announced that it would seek an ITP for SWP operations that did not rely on the federal process for analyzing the effects of coordinated CVP and SWP operations under section 7 of the federal Endangered Species Act.

DWR Applies for and Receives ITP from CDFW

DWR thus prepared a draft Environmental Impact Report (DEIR) analyzing the effects of its proposed operations under the California Environmental Quality Act (CEQA) and submitted its ITP application to CDFW. The operations described in the ITP application, however, differed from the proposed project analyzed in the DEIR. (DWR, Final Environmental Impact Report for Long-Term Operation of the California State Water Project (FEIR) at I-1 (Mar. 27, 2019).

After submitting the application, DWR worked with CDFW staff to refine Alternative 2b in the DEIR, which CDFW had indicated was more likely to be acceptable under the CESA than the proposed project analyzed in the DEIR. *See id.* On March 27, 2020, DWR certified the FEIR, selected refined Alternative 2b as the environmentally superior alternative, and issued a notice of determination stating that DWR would implement refined Alternative 2b. CDFW issued the ITP four days later.

Overview of the ITP

The ITP authorizes incidental take of Delta smelt, longfin smelt, and winter and spring-run chinook salmon from SWP operations subject to a host of conditions of approval. For example, the ITP requires DWR to "reduce the maximum seven-day average diversion rate" at the Barker Slough Pumping Plant to less than 60 cubic feet per second (cfs) between January and June of dry and critical water years when larval longfin and Delta smelt are present, with the possibility of further reductions based on recommendations provided by the Smelt Monitoring Team. ITP at 98. The ITP also requires DWR to spend more than $300 million on habitat mitigation projects to benefit the Covered Species. *Id.* at 127. All told, the ITP contains 86 pages of conditions DWR must meet to maintain incidental take coverage for the operations of the ITP. *See id.*at 50-136.

Among the conditions are requirements for additional outflow from the Delta. For example, Condition of Approval 8.17 requires DWR to curtail SWP exports to protect Delta outflows from April 1 to May 31. *Id.* at 102-104. Although DWR may increase exports by up to 150,000 acre-feet beyond what would otherwise be allowed under Condition of Approval 8.17 with written permission from CDFW, the excess exports must be accounted for and redeployed for CDFW's use in the next year, unless the next year is critical. *Id.* at 105. Thus, DWR's compliance with the ITP is expected to decrease the availability of SWP supplies while passing the increased costs associated with operating to the ITP to SWP Contractors. *Id.*at 134 (All costs of the Project, including the costs of mitigation and monitoring activities required by this ITP shall be. . .charged to SWP Contractors.)

Conclusion and Implications

The issuance of the ITP has been met with controversy from many corners of California's water community. Many environmental interest groups have suggested that the ITP is insufficiently protective of the Covered Species, while agricultural and water agency stakeholders have expressed concerns about the interaction between the operations of the SWP under the ITP and CVP operations under new Biological Opinions issued by the U.S. Fish & Wildlife Service and the National Marine Fisheries Service, as well as the potential that the ITP will interfere with potential voluntary agreements to implement Bay-Delta Water Quality Control Plan Update. The Metropolitan Water District of Southern California's board of directors has already voted to sue the state over the ITP, and other stakeholders are likely to challenge the ITP as well.
(Sam Bivins, Meredith Nikkel)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT MAKES CLEAR THAT THE ADMINISTRATIVE 'FINALITY' REQUIREMENT UNDER *WILLIAMSON COUNTY* FOR FEDERAL LAND USE TAKINGS CLAIMS REMAINS INTACT

Pakdel v City and County of San Francisco, 952 F.3d 1157 (9th Cir. 2020).

In one of the first federal "takings" cases after last year's U.S. Supreme Court decision in *Knick v. Township of Scott*, Case No. 17-647, 588 U.S. ___ (2019), the U.S. Court of Appeals for the Ninth District, in a March 18, 2020 decision, made clear that the administrative "finality requirement" elaborated in the 1985 decision *Williamson County Regional Planning Commission v. Hamilton Back*, 473 U.S. 172 (1985), still remains in place. As part of this finality requirement, a prospective federal takings plaintiff must pursue the procedurally available avenues, within the timelines prescribed by local agencies, to seek relief from a challenged land use decision before bringing a federal action.

Factual and Procedural Background

Plaintiffs owned a tenancy-in-common interest in a multi-unit building in the City of San Francisco (City). Under a fairly common ownership arrangement in the city, several tenants-in-common share ownership over an entire building and then enter into agreements among themselves to give each owner an exclusive right to occupy a particular unit. Plaintiffs leased their tenant-in-common unit to a tenant but planned on occupying the unit upon their retirement.

Until recently, the City conducted a lottery to determine which tenant-in-common buildings could be converted into condominium units and the lottery faced a severe backlog. In 2013, to clear the backlog, the city temporarily suspended the lottery and replaced it with the Expedited Conversion Program (ECP) which allowed tenancy-in-common property to be converted into condominium property on the condition that its owner agreed to offer any existing tenants in affected units with lifetime leases within the converted property. The City also had procedures to request exemptions to the lifetime lease offer requirement.

Plaintiffs purchased their property in 2009. In 2015, plaintiffs, along with their co-owners, applied to convert the building into a condominium building under the ECP. While advancing through the application process, plaintiffs had several opportunities to seek a waiver from the lifetime lease requirement. They never did so and in January 2016, the San Francisco department of public works approved plaintiffs' "tentative conversion map." In November of 2016, plaintiffs signed an agreement with the city to offer a lifetime lease to their tenants and even offered their tenants such a lease. At the last minute, before signing executing the lifetime lease they offered to their tenant, tenants refused to sign the lease and instead sued the City in the U.S. District Court for the Northern District of California. Plaintiffs contend under various theories that the City's lifetime lease requirement violated the Takings Clause of the Fifth Amendment of the U.S. Constitution.

The *Knick v. Township of Scott* Decision

Plaintiffs case reached the U.S. District Court before the U.S. Supreme Court's decision in *Knick v. Township of Scott*. Before *Knick*, regulatory takings plaintiffs had to clear two hurdles in local and state venues before seeking relief in federal court. Such plaintiffs needed to: 1) obtain a final decision through whatever administrative procedures were available to challenge the alleged taking in the local jurisdiction (Finality Requirement), and 2) exhaust all state court remedies available to obtain compensation for regulatory takings (Exhaustion Requirement). The U.S. Supreme Court's decision in *Knick* eliminated the exhaustion requirement.

Because plaintiffs filed their lawsuit before the *Knick* decision, the U.S. District Court dismissed plaintiffs' suit for failure to exhaust all available state remedies to obtain compensation. Plaintiffs appealed to the Ninth Circuit.

The Ninth Circuit's Decision

The Ninth Circuit began by noting that constitutional challenges to local land use decisions are not considered by federal courts until the posture of such challenges are considered "ripe." Before *Knick* case needed to meet the two requirements, above, before it was "ripe" for federal review:

> First, under the finality requirement, a takings claim challenging the application of land-use regulations was not ripe until the government entity charged with implementing the regulations ha[d] reached a final decision regarding the application of the regulations to the property at issue… Second, under the state-litigation requirement, a claim was not ripe if the plaintiff did not seek compensation [for the alleged taking] through the procedures the State ha[d] provided for doing so.

The Ninth Circuit acknowledged that the U.S. Supreme Court's *Knick* decision removed the second requirement above, and as a result, plaintiffs' failure to seek just compensation in state court no longer barred them from brining their takings claim in federal court. The Court of Appeals then analyzed whether plaintiffs takings claims were ripe under the first pre-*Knick*, "finality" requirement.

Ripeness and the 'Finality' Requirement

First the court recognized that the *Knick* decision left the first or "finality" pre-*Knick* requirement intact. Plaintiffs did not argue this, but instead argued that they satisfied the "finality" requirement by refusing to sign the lifetime lease that it agreed with the City of San Francisco to sign, after failing to attempt to seek a waiver of the lifetime lease requirement through the procedures made available by the City. The court disagreed.

In doing so, the court analyzed the rationale behind the "finality" requirement that was articulated by the Supreme Court in the 1985 case *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*. As the court in *Williamson County* noted, the finality requirement exists in constitutional land use challenges because many of the factors essential to determining whether a taking has occurred (economic impact of the action, and extent to which it interferes with investment backed expectations):

> . . .simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land use question.

The finality requirement addresses the high degree of discretion that local land use boards have in granting variances from their general regulations with respect to individual properties. In light of this discretion, federal courts simply cannot "make a sound judgment about what use will be allowed by a local land use authority merely by asking whether a development proposal" facially conforms to the land use regulations at issue. As the court noted, a federal court cannot decide whether a regulation:

> . . .has gone too far until it knows how far the regulation goes which requires a final and authoritative determination of how the regulation will be applied to the property in question.

Applying 'Finality' under *Williamson County*

The court went on to articulate that the *Williamson County* "finality" rule requires a plaintiff:

> to meaningfully request and be denied a variance form the challenged regulation before bringing a regulatory takings claim…but the term variance is not definitive of talismatic; if other types or permits are available and could provide similar relief, they must be sought.

The court then analyzed the various avenues that the San Francisco department of public works made available to plaintiffs during the ECP application. Public works staff had discretion to authorize exceptions to the lifetime lease requirements. Plaintiffs could have sought an exception at the January 7, 2016 hearing on the ECP application's tentative map. The City also notified plaintiffs that before the City approved a final conversion map, plaintiffs could raise any objections to the conditions of the tentative conversion map approval, including the lifetime lease requirements. Plaintiffs also could have raised an objection to the lifetime lease requirement to the City board of supervisors and were notified of this in a

letter that followed initial approval of the conversion map. At each of these opportunities, plaintiffs failed to seek an exception to the lifetime lease requirement, until all available procedural methods had expired.

Plaintiffs nonetheless alleged that they met the finality requirement by refusing to execute the finality lease. The court disagreed. The finality requirement requires plaintiffs to timely avail themselves of the administrative avenues available to seek a variance or exception from a challenged land use regulation:

> Plaintiffs cannot make an end run around the finality requirement by sitting on their hands until every applicable deadline has expired before lodging a token exemption request that they know the relevant agency can no longer grant. . . .

The court also recognized that although there is no exhaustion requirement for actions brought under § 1983, in the land use takings context, a property owner's failure to seek a variance (or similar exception) through procedures made available by the local land use authority, means that the authority had not reached a final decision.

Conclusion and Implications

The U.S. Supreme Court's recent decision in *Knick* was a boon for federal regulatory takings plaintiffs who want to avoid the need to pursue state court actions. However, the Ninth Circuit's decision in *Pakdel* makes clear that such plaintiffs still need to pursue the procedurally available avenues, within the timelines prescribed by local agencies, to seek relief from a challenged land use decision. *Williamson County's* finality requirement remains firmly intact, for now, within the Ninth Circuit. The court's decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/03/17/17-17504.pdf. (Travis Brooks)

RECENT CALIFORNIA DECISIONS

FOURTH DISTRICT COURT ALLOWS PETITION FOR WRIT OF MANDATE TO PROCEED IN MATTER ALLEGING AGENCY MISREPRESENTATIONS TO THE PUBLIC

Citizens for a Responsible Caltrans Decision v. California Department of Transportation, ___Cal.App.5th___, Case No. CO88409 (4th Dist. Mar. 24, 2020).

The Fourth District Court of Appeal overturned a demurrer dismissing petition for writ of mandate filed by Citizens for a Responsible Caltrans Decision (CRCD). The court concluded that Streets and Highways Code § 103 did not exempt the project from the California Environmental Quality Act (CEQA), and the Department of Transportation (Caltrans) was equitably estopped from relying on the 35-day statute of limitations.

Factual and Procedural Background

In 2005, Caltrans filed a notice of preparation for an Environmental Impact Report (EIR) analyzing construction of two freeway interchange ramps that would connect the I-5 and SR 56 highways in San Diego. The project was part of the larger North Coastal Corridor (NCC) project—a multi-project effort proposed by Caltrans and the San Diego Association of Governments (SANDAG) to improve transportation in the La Jolla and Oceanside area.

The Streets and Highways Code § 103 went into effect in January 2012. That section provides for integrated regulatory review of "public works plans" (PWP) for NCC projects by the California Coastal Commission, rather than traditional project-by-project review and approval. Four months later, Caltrans circulated a draft EIR for the I-5/SR56 project. The draft EIR explained that if, following circulation of a final EIR, a decision is made to approve the project, Caltrans would publish a Notice of Determination (NOD).

In October 2013, Caltrans issued a final EIR for a different NCC highway-widening project. The report explained that § 103 did not eliminate project-specific CEQA review or federal review under the National Environmental Policy Act (NEPA)—rather, it provided the Coastal Commission with streamlined review. In 2014, Caltrans and SANDAG issued, and the Coastal Commission approved, the PWP for the 40-year NCC project. The PWP explained that it did not supplant CEQA, NEPA, or other regulatory review schemes for individual projects proposed under the NCC.

In June 2017, Caltrans released a final EIR for the project. The report reiterated that, if it approved the project, the agency would publish a NOD to and a federal Record of Decision in accordance with NEPA. However, in contradiction to the language above, the final EIR also added that the passage of § 103, together with Public Resources Code § 21080.5:

> . . .mandate that instead of being analyzed under CEQA, the [NCC Project] and all of the projects included therein, shall be addressed under the CCC's review per its certified regulatory program.

The final EIR reasoned that because the I-5/SR56 project was identified in the PWP, and the Coastal Commission approved it in 2013, CEQA review was no longer required.

Though Caltrans concluded CEQA no longer applied to the I-5/SR56 project, it maintained that public disclosure of the project's impacts was "still desirable." Therefore, Caltrans released the Final EIR to satisfy CEQA's analytical and disclosure requirements, and provided the public with a 30-day review and comment period from July 14, 2017 to August 14, 2017. However, before this period commenced, Caltrans approved a "project report" for the I-5/SR56 project on June 30, 2017, and filed a Notice of Exemption (NOE) on July 12, 2017. The NOE concluded that the project was exempt from CEQA and its impacts were analyzed pursuant to the Coastal Commission's certified regulatory program.

CRCD's counsel first became aware of the NOE on September 28, 2017. After Caltrans refused CRCD's

request to rescind the NOE or agree to a 180-day statute of limitations, CRCD filed a petition for writ of mandate and declaratory relief 35 days later, on November 1, 2017. Caltrans filed and the trial court sustained a demurrer to the petition without leave to amend. The trial court entered judgment dismissing the petition with prejudice. CRCD appealed.

The Court of Appeal's Decision

The Fourth District Court of Appeal reviewed *de novo* the trial court's decision sustaining Caltrans' demurrer without leave to amend, and considered: 1) whether Streets and Highways Code § 103 exempts the I-5/SR56 project from CEQA review; and 2) whether CRCD's petition sufficiently alleged facts showing Caltrans was equitably estopped from raising the 35-day statute of limitations. The court treated Caltrans' demurrer as having admitted all of the properly pled material facts in the petition. The court stated that a demurrer brought on statute of limitations grounds will be overruled if the relevant facts do not clearly establish that the action is time-barred.

Streets and Highways Code Section 103

The court applied traditional rules of statutory construction to interpret Streets and Highways Code § 103 as a matter of first impression. The court held that § 103 did not statutorily exempt Caltrans from conducting CEQA review of the I-5/SR56 project because it only exempted the Coastal Commission's approval of the PWP. The court reasoned that the California Legislature intended the PWP to function as a "long range development plan" that could be approved under a certified regulatory program, pursuant to Public Resources Code §§ 21080.09 and 21080.5. This certified regulatory program only provided the Coastal Commission with approval authority. Further, § 103 only authorizes the Coastal Commission to prepare substitute documents when certifying or approving the PWP; it did not exempt Caltrans from conducting project-level CEQA review and preparing an EIR for the I-5/SR56 project.

The court also rejected Caltrans' argument that the Coastal Commission's approval of the PWP implicitly approved the I-5/SR56 project. The court explained that the PWP included numerous alternative projects for the NCC but did not include the I-5/SR56 project, as defined in the final EIR. Had the Legislature intended to exempt Caltrans from preparing an EIR for the project, or provide Caltrans with a certified regulatory program, it would have expressly done so. Because the plain language of § 103 does not provide for such exemptions, Caltrans was required to conduct individual, project-level CEQA review of the project.

Equitable Estoppel

The court concluded that CRCD pled facts in its petition sufficient to show that Caltrans was equitably estopped from relying on the 35-day statute of limitations for actions challenging CEQA exemptions. A government agency may be estopped from asserting a statute of limitations defense if the petition indicates that the agency's fraudulent or misrepresentative conduct prevented a reasonably prudent person from timely seeking legal advice or commencing litigation. Caltrans informed the public in its draft and final EIRs that the agency would file an NOD if it decided to approve the I-5/SR56 project. Caltrans, however, did not inform the public, commenters, or interested parties about its decision to file an NOE rather than a NOD. Caltrans' statements and conduct further suggested that it would not approve the project until mid-August 2017, after the public comment and review period closed. The court held that there was, at a minimum, a disputed question of fact as to whether, by approving the project in early July after repeatedly stating that project approval would follow the announced final EIR circulation and review period, Caltrans had misled CRCD about facts. CRCD's petition adequately pled that CRCD was ignorant of the true state of facts, which precluded CRCD from commencing the instant action before the 35-day statute of limitations period expired.

For these reasons, the court overruled Caltrans' demurrer and vacated the trial court's judgment dismissing CRCD's petition.

Conclusion and Implications

CEQA is a public disclosure statute. This opinion provides an important reminder that courts will not tolerate an agency misrepresenting or seemingly acting in secret to approve a project in order to avoid complying with CEQA.

The opinion is available at: https://www.courts.ca.gov/opinions/documents/D074374.PDF
(Christina Berglund, Bridget McDonald)

FIFTH DISTRICT COURT FINDS ORDINANCE BANNING CANNABIS DISPENSARIES ENFORCEABLE DESPITE EARLIER PROTEST BY REFERENDUM

County of Kern v. Alta Sierra Holistic Exchange Service,
___Cal.App.5th___, 259 Cal.Rptr.3d 563 (5th Dist. Mar. 6, 2020).

The County of Kern (County) brought an action against cannabis dispensary operators for public nuisance and unlicensed operation of a dispensary. Following trial, the Superior Court found that the County's emergency measure banning most dispensaries was valid and issued a judgment in favor of the County on the public nuisance action but found that operators had not violated the dispensary licensing statute. The operators appealed, and the Fifth District Court of Appeal, in a *partially* published decision, in an issue of first impression, found that the County's ordinance was valid, despite an earlier protest by referendum, given a material change in circumstances.

Factual and Procedural Background

In 2009, the Kern County board of supervisors adopted an ordinance allowing medical marijuana dispensaries in commercially zoned areas (essentially treating them similar to pharmacies). Twice in 2010, the County then adopted moratoria on the establishment of any new medical marijuana dispensaries and prohibited existing medical marijuana dispensaries from relocating. In 2011, the County adopted a new ordinance, effectively banning medical marijuana dispensaries and declaring them a public nuisance.

The next month, a valid protest petition was received by the Board that protested the dispensary ban ordinance. Under California Elections Code § 9145, when a county receives a valid referendum petition, it must either "entirely repeal the ordinance" or submit it to the voters. In response, the board of supervisors adopted a repeal ordinance, which not only repealed the 2011 ban ordinance but also the 2009 ordinance allowing medical marijuana dispensaries in commercially zoned areas, thereby rendering the defendants' dispensaries an unauthorized, nonconforming land use.

In April 2016, the Fifth District Court of Appeal issued an opinion in *County of Kern v. T.C.E.F., Inc.*, 246 Cal.App.4th 301, which addressed the County's repeal of the 2009 ordinance authorizing dispensaries. Among other things, that opinion interpreted the phrase "entirely repeal the ordinance" to mean that a board must both: 1) revoke the protested ordinance in all its parts; and 2) not take any action that has the practical effect of implementing the essential feature of the protested ordinance. Applying that rule here, the Court of Appeal concluded that the repeal of the 2009 ordinance was, in practical effect, a reenactment of the ban on dispensaries contained in the protested ordinance. Thus, the repeal violated § 9145 and, as a result, the 2009 ordinance remained in effect.

In May 2016, the County adopted an ordinance placing a moratorium on new medical marijuana dispensaries. Later, it extended the moratorium for ten months and 15 days. In November 2016, California voters passed Proposition 64, which legalized recreational use of marijuana and reduced criminal penalties for various offenses involving marijuana. In April 2017, the County extended the moratorium for an additional year. Finally, in October 2017, the County adopted an ordinance banning commercial medicinal and recreational cannabis businesses. Any use or any property operated contrary to the 2017 Dispensary Ban Ordinance was declared to be unlawful and a public nuisance.

In October 2016, the County filed a nuisance abatement action against defendants. In January 2018, after the moratorium was replaced by a ban on dispensaries, the County filed a second amended complaint. Following trial in April 2018, the Superior Court found that the County's ordinances were valid and permanently enjoined defendants from using the property for the operation of a marijuana dispensary. Defendants appealed.

The Court of Appeal's Decision

Elections Code Section 9145 and 'Material Changes' in Circumstances

The primary issue on appeal regarded the amount of time that a county must wait before reenacting the "essential feature" of a protested ordinance

(the *T.C.E.F.* decision, while stating the "essential feature" test, did not need to address this specific question). At the outset, the Court of Appeal noted that the constitutional provisions addressing the referendum power, the text of Elections Code § 9145, and the case law do not provide a direct answer for referenda at the county level (at the city level, Elections Code § 9241 provides that an ordinance may be reenacted after one year).

After considering a range of possible interpretations, the Court of Appeal interpreted Elections Code § 9145 to find that a board of supervisors may reenact the essential feature of a repealed ordinance after there has been a material change in circumstances. A change in circumstances is "material," it found, if an objectively reasonable person would consider the new circumstances significant or important in making a decision about the subject matter of the ordinance. In evaluating whether there has been a material change in circumstances, a court evaluates the totality of the circumstances, and a county bears the burden to prove that a material change in circumstances has occurred.

In applying this interpretation to the facts of the case, the Court of Appeal found that the relevant time period began in February 2012, when the County repealed the ordinance banning marijuana dispensaries after receiving a referendum petition. That period then ended in May 2016, when an ordinance placing a moratorium on new dispensaries—an "essential feature" of the 2011 protested ordinance—was adopted as an urgency measure, and then later in October 2017 when the County banned dispensaries.

Considering the totality of the circumstances, the Court of Appeal concluded that during this period the circumstances relevant to the regulation of marijuana dispensaries changed materially. Among other things, it found that, by May 2016, the County had information that it did not have in February 2012, including information regarding the occurrence of criminal activity at or near dispensaries, traffic safety, underage use of marijuana, and hospitalization related to marijuana use.

The Impact of Proposition 64

Further, the legalization of recreational use of marijuana (via Proposition 64) in late 2016 greatly increased the potential demand and, thus, the number of dispensaries that might open if authorized. In turn, the court found, the County could reasonably infer that a larger number of dispensaries would increase the volume of criminal activity, traffic incidents, and hospitalizations involving marijuana. Consequently, the board of supervisors did not violate Elections Code § 9145 when it enacted the May 2016 moratorium on new dispensaries and later banned dispensaries, and the ordinance therefore was enforceable as against defendants.

Conclusion and Implications

The case is significant because it addresses an issue of first impression regarding the reenactment of "essential features" of ordinances by a county board of supervisors following a successful protest by referendum. It also is a reminder of how much regulatory control can be exerted by local government despite "statewide" legalization of cannabis under Proposition 64. The decision is available online at: https://www.courts.ca.gov/opinions/documents/F077887.PDF. (James Purvis)

THIRD DISTRICT COURT UPHOLDS EIR AND APPROVALS FOR MASTER PLANNED COMMUNITY DEVELOPMENT PROJECT

Environmental Council of Sacramento v. County of Sacramento, 45 Cal.App.5th 1020 (3rd Dist. 2020).

The California Third District Court of Appeal, in a decision certified for publication on March 2, 2020, affirmed a judgment denying a petition filed by Environmental Council of Sacramento and Sierra Club, which challenged the County of Sacramento's approval of the Cordova Hills, LLC master-planned community project. The court held that the Environmental Impact Report (EIR) for the project, which contemplated residential and commercial uses, and a potential university, was not deficient for failing to analyze the project without the university.

Factual and Procedural Background

In 2007, the Cordova Hills Ownership Group submitted an application to the county to develop the proposed master-planned community of Cordova Hills. The project would be located on 2,669 acres of vacant grazing land in southeastern Sacramento County, and would include residential, office, retail, a university campus, schools, parks, and trails. The project provided for 8,000 residential units to accommodate a population of 21,379 persons. If built, the proposed 224-acre university campus would accommodate an additional 4,140 student-residents.

The development application initially identified the University of Sacramento as the university tenant, but the University later withdrew from the project in 2011. Pursuant to the project's development agreement, the property owner must transfer the land back to the county if it failed to procure a university tenant within 30 years. During this 30-year window, the agreement required the property owner to provide the county with updates on the status of a potential university tenant and prohibited the owner from seeking a change in the land use designation. The agreement also required the property owner to establish a "University Escrow Account," which required separate payments of $2 million after the issuance of 1,000, 1,750, and 2,985 building permits. If a university is ultimately built, money from the escrow count would be released to university for campus-related operations. If a university is not built, the funds would be released to the county for purposes of attracting a university to the location.

In January 2010, the project applicant filed an amended application and the county published a notice of preparation for a draft EIR six months later. The county released the draft EIR in January 2011, and the final EIR in November 2012. The board of supervisors certified the final EIR and adopted a statement of overriding considerations in January 2013. The county's approvals included general plan and zoning ordinance amendments, a tentative subdivision map, an affordable housing plan, a development agreement, a public facilities financing plan, and a water supply master plan amendment.

Procedural History

In March 2013, petitioners filed a petition for writ of mandate challenging the project—alleging that the EIR contained an inadequate project description and environmental analysis, and failed to analyze land use impacts and adopt feasible mitigation measures. The petitioner's central argument claimed that, because a university is unlikely to be built, the EIR erroneously assumed buildout of a university and failed to sufficiently analyze the project without a university.

The trial court denied the petition upholding the county's certification of the final EIR and project approvals. Petitioners timely appealed.

The Court of Appeal's Decision

The court reviewed the administrative record for legal error and substantial evidence and the county's action *de novo*—resolving all reasonable doubts in favor of the county's findings and decision. Under these standards, the court affirmed the trial court's judgment denying the petition, holding that the EIR contained an adequate project description, environmental impact analysis, and feasible mitigation measures to satisfy the California Environmental Quality Act (CEQA).

Adequacy of Project Description

The court first analyzed whether substantial evidence existed to support petitioners' assertion that the EIR failed to provide an adequate project description due to the strong likelihood that a university will never be built. The project's development agreement imposed conditions on the developer to make good faith efforts to attract a university to the site. Though the developer may ultimately fail to locate a university, the court found that petitioners did not present any credible and substantial evidence to support their claim that the proposed university is an illusory element of the project. Because the EIR is not required to address the speculation that the university will not be built, the court held that the project's description was legally adequate.

Adequacy of Environmental Impact Analyses

Petitioners further contended that the EIR misrepresented the significance of the project's impacts to air quality, climate change, and traffic, by assuming the university would be built. The court dismissed each of these claims, finding that the EIR concluded impacts would be significant and unavoidable, and that adopted mitigation measure would substantially

reduce impacts.

As to the air quality analysis, the court rejected petitioners' assertion that NOx and ROG emissions would only be mitigated by 20 percent, rather than 35 percent, if the university is not built. The court explained that the EIR's mitigation measure, AQ-2, requires compliance with the project's air quality management plan, which seeks to reduce emissions by 35 percent. AQ-2 also prohibits any amendments to the Cordova Hills Specific Planning Area (SPA) that would increase emissions beyond a 35 percent reduction, unless further approved by the county. Therefore, if the university is not built, changes to the SPA cannot increase NOx and ROG emissions beyond the 35 percent reduction absent county approval.

Relatedly, petitioners claimed the county was required to recirculate the EIR to address revisions to AQ-2 based on the county's position that the mitigation measure would mitigate NOx and ROG emissions, even if the university were not built. The court rejected this contention, finding that AQ-2 requires a 35 percent reduction of NOx and ROG emissions if the SPA is amended, unless the county approves otherwise. Because the NOx and ROG emissions vastly exceed local thresholds of significance, regardless of whether they are mitigated by 20 percent or 35 percent, the 15 percent discrepancy does not increase environmental impacts or constitute significant new information requiring recirculation.

Petitioners also argued that the EIR failed to adequately address climate change impacts by assuming the university would be constructed. As with mitigation measure AQ-2, the court explained that mitigation measure CC-1 prohibited amendments to the SPA from increasing greenhouse gas emissions above the project's anticipated per capita amount. Thus, if the university is not built, the SPA cannot be amended to authorize more than the 5.80 metric tons of greenhouse gases per capita figure disclosed in the EIR.

Lastly, the court rejected petitioners' assertion that the EIR's traffic analysis was inadequate because it was based on the full buildout of the university. The court held that the EIR sufficiently analyzed traffic impacts because the full university build out constituted a "worst-case" traffic scenario. In the event the university is not built, daily traffic trips may be reduced, thus, petitioners failed to meet their burden of showing how the EIR underestimated traffic impacts.

Consistency with Regional Transportation Plan

Petitioners claimed that the EIR failed to analyze whether it was consistent with the Metropolitan Transportation Plans/Sustainable Communities Strategy (MTP/SCS) adopted by the Sacramento Area Council of Government. Petitioners asserted that including the project in the county's future MTP/SCS would require changes to the current land use pattern and transportation system. Agreeing with the county, the court found that petitioners failed to raise this issue during the administrative process, thereby waiving the issue on appeal. The court further explained that nothing in Senate Bill 375 (which mandates preparation of an SCS) or any evidence cited by petitioners, indicates a project must be evaluated under CEQA for consistency with an SCS.

Adequacy of Mitigation Measures

Finally, the court reviewed petitioners' claim that the county violated CEQA by failing to adopt feasible mitigation measures to minimize the project's environmental impacts. Specifically, petitioners argued the county should have adopted a mitigation measure that would require phasing of project development to provide assurance that a university would be constructed. Petitioners contend that if the university is not constructed, greenhouse gas emissions, vehicle miles travelled (VMT), and ozone precursors will be significantly greater. The court, however, found that petitioners failed to provide any evidence in the record to support their conclusion that phasing would be feasible. Thus, petitioners forfeited this argument as it is not the court's duty to independently review the record to find facts in support of petitioners' claim.

Conclusion and Implications

The appellate court's opinion reaffirms that an agency's failure to include a "no-build analysis" does not necessarily constitute a CEQA violation. In circumstances where an EIR contemplates the "full build out" of a multi-component project, the EIR will likely sufficiently analyze and account for all "worst case" scenario impacts, such that a "no-build analysis" is not necessary. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C076888.PDF.

(Christina Berglund, Bridget McDonald)

SECOND DISTRICT COURT UPHOLDS COASTAL COMMISSION'S CERTIFICATION OF A LOCAL COASTAL PROGRAM FOR THE SANTA MONICA MOUNTAINS

Mountainlands Conservancy, LLC v. California Coastal Commission, ___Cal.App.5th___, Case No. B287079 (2nd Dist. Apr. 1, 2020).

A group of landowners brought suit challenging the California Coastal Commission's certification of a local coastal program for the Santa Monica Mountains, which, among other things, prohibited new vineyards in the Santa Monica Mountains coastal zone. The Superior Court denied the petition, and the landowners appealed. The Court of Appeal for the Second Judicial District affirmed, finding that the Coastal Commission had followed proper procedures and that its actions with respect to vineyards were supported by substantial evidence in the record.

Factual and Procedural Background

In early 2014, Los Angeles County (County) initiated a process to amend the land use plan for the Santa Monica Mountains coastal zone and to adopt an implementation plan for the area. Compared to the previous plan (which was certified by the Coastal Commission in 1986), the County explained that agricultural uses would be restricted: while vineyards and crop areas already in existence would be allowed to continue, further establishment of such uses would be prohibited. Another significant difference involved critical habitat—the updated land use plan would designate considerably more habitat as critical.

Following action by the County board of supervisors, the program was submitted to the Coastal Commission. In advance of a public hearing, the Coastal Commission released a staff report recommending denial of the land use plan amendment as submitted, but approval subject to certain modifications. These included, among other things, clarifications to the provisions regarding agricultural uses, adding that existing uses may not be expanded. They also included a new policy stating that existing crop-based agricultural uses on lands suitable for agricultural use shall not be converted to non-agricultural use unless certain requirements are met. The staff report also addressed Coastal Act, §§ 30241 and 30242, which pertain to agricultural uses, and found that they generally did not apply and that, overall, areas suitable for agricultural uses within the plan area were limited.

In response, the plaintiffs (three limited liability companies that own land within the Santa Monica Mountains coastal zone) submitted comments challenging staff's findings in connection with §§ 30241 and 30242, in particular the conclusion that the vast majority of land in the Santa Monica Mountains was unsuitable for agricultural use. The Coastal Commission then issued an addendum to its staff report, recommending a modification to allow new agricultural uses meeting certain criteria: 1) the uses are limited to specific areas on natural slopes of 3:1 or less steep, or areas currently in agricultural use; 2) new vineyards are prohibited; and 3) organic or biodynamic farming practices are followed. Staff also removed the prohibition on expanding agricultural uses and recommended that existing uses may be expanded with the same three criteria. The staff report justified the prohibition on new vineyards due to a number of identified adverse impacts, including increased erosion, use of pesticides, large amounts of water use, their invasive nature, and adverse impacts on scenic views.

Plaintiffs responded, stating that: they had not been given them enough time to respond; even as revised, the proposed plan raised substantial issues with the Coastal Act; and the plan would still exclude new agricultural uses from the vast majority of the plan area, particularly because new agriculture would be allowed only within certain habitat areas, which were limited in designation. They also challenged the justification to prohibit new vineyards, in connection with which they submitted a UCLA study.

At its public hearing, the Coastal Commission adopted the land use plan with the modifications suggested by staff. A few months later, it also approved the County's proposed local implementation plan, with modifications. It then issued a resolution adopting the local coastal program, consisting of the land use plan and the implementation plan. Final certification by the Commission took place in October 2014, after which it became final.

At the Superior Court

Plaintiffs then filed a petition for writ of mandate seeking to set aside the Coastal Commission's actions. The Superior Court denied the petition, issuing two rulings. In its first ruling, the court: rejected them claim that the addendum to the staff report was required to be distributed at least seven days before the public hearing; found the Coastal Commission was not required to hold a separate hearing on matters deemed by plaintiffs to raise "substantial issues"; and determined that the Commission's findings in connection with Coastal Act §§ 30241 and 30242 were supported by substantial evidence.

In a second ruling, the court addressed the question of whether the ban on vineyards was supported by substantial evidence. The court found that there was substantial evidence that vineyards are harmful to the Santa Monica Mountains ecology because they require clearing and scarification, increase erosion and sedimentation, require pesticide use, and constitute an invasive monoculture. Further, the court found, of these harms, many are inherent to the nature of viticulture, and there is no evidence that they could be mitigated. The court then entered judgment and plaintiffs appealed.

The Court of Appeal's Decision

Holding of a Separate Hearing

The Court of Appeal first addressed the claim that the Coastal Commission was required to hold a separate hearing pursuant to Coastal Act § 30512, which generally requires the Coastal Commission to determine, after a public hearing, whether the land use plan of a proposed local coastal program "raises no substantial issue as to conformity with" Coastal Act policies. If the plan does raise a substantial issue, the Commission must identify the issues and hold at least one public hearing on the matters identified. The Coastal Commission, on the other hand, contended that it properly proceeded under § 30514, which pertains to amendments to certified local coastal programs and does not have the same requirement. The Court of Appeal agreed with the Coastal Commission, finding that the commission properly proceeded under § 30514 and therefore was not required to make the "substantial issue" determination otherwise required by § 30512.

Coastal Act Sections 30241 and 30242

The Court of Appeal next addressed the claim that the Coastal Commission failed to proceed in the manner required by law because it supposedly made a blanket determination that the Santa Monica Mountains are not suitable for agriculture. In particular, plaintiffs argued that Coastal Act §§ 30241 and 30242 contemplate a determination of the feasibility of agriculture in relation to a specific parcel of property, on a case-by-case basis.

In rejecting these claims, the Court of Appeal first found that plaintiffs did not cite any authority for their "case-by-case" claim. Instead, it agreed with the Coastal Commission that the point of a local coastal program is to allow local governments to do area-wide planning in conformity with the policies of the Coastal Act. Specifically in regards to §§ 30241 and 30242, the Court of Appeal found that these sections likewise do not "contemplate" a case-by-case or parcel-by-parcel determination of the feasibility of agriculture, and that the Commission's finding that the majority of land in the Santa Monica Mountains was unsuitable for agricultural use was supported by substantial evidence.

Due Proces Claim

The Court of Appeal next addressed plaintiffs' claim that the public hearing was unfair and denied them due process because the Coastal Commission gave them less than 24-hours' notice of a "new" land use plan (in an addendum to a staff report) that would completely ban vineyards. The Court of Appeal first found that the addendum, which was issued the day before the public hearing, complied with the pertinent regulations, as did the earlier staff report. The Court further observed that nothing about the proposed modifications included in the addendum (which themselves were made in response to public comment) altered the land use plan's original objective, that is, to restrict agricultural uses. The modification merely eased the categorical restriction on new agriculture. While plaintiffs claimed they had no time to refute the prohibition of new vineyards, that item never changed from the original staff report. Moreover, the Court observed, plaintiffs in fact responded to the supposedly "new" ban, both in writing and at the hearing.

Substantial Evidence Claim

Finally, the Court of Appeal addressed plaintiffs' claim that the decision to specifically prohibit new vineyards was not supported by substantial evidence. The court disagreed, finding that there was evidence that vineyards cause particular environmental harm, including testimony from the Coastal Commission's staff ecologist. By contrast, the court found, evidence cited by plaintiffs only spoke to the suitability of lands for vineyards and did nothing to counter the evidence of environmental harm caused by vineyards. In fact, the Court of Appeal found, there was nothing in the record that countered the evidence that vineyards are harmful to the ecosystem and coastal resources.

Conclusion and Implications

The case is significant because it involves a substantive discussion of local coastal programs and related Chapter 3 policies under the Coastal Act. The decision is available online at: https://www.courts.ca.gov/opinions/documents/B287079.PDF.
(James Purvis)

SECOND DISTRICT COURT AFFIRMS INVALIDATING CITY'S APPROVAL AND MITIGATED NEGATIVE DECLARATION FOR PROJECT IN ENVIRONMENTALLY SENSITIVE AREA

Save the Agoura Cornell v. City of Agoura Hills,
___Cal.App.5th___, Case Nos. B292246, B295112 (2nd Dist. Feb. 24, 2020, *pub.* Mar. 17, 2020).

In a lengthy opinion, the Second District Court of Appeal upheld a trial court decision striking down the City of Agoura Hills' approval of a mixed-use project with a Mitigated Negative Declaration (MND) despite the project's location on an environmentally sensitive site. The Court of Appeal repeatedly found that the project MND's mitigation measures improperly deferred action, were inadequate, or lacked sufficient performance criteria to be effective. The case is another clear example of the inherent weaknesses involved in defending a Negative Declaration under the "fair argument" standard in the face of any meaningful project opposition or indication that a project may result in environmental impacts.

Factual and Procedural Background

Agoura and Cornell Roads, LP, and Doran Gelfand (appellants) sought to develop the "Cornerstone Mixed-Use Project," (Project) which proposed 35 residential apartment units along with retail, restaurant and retail on a visually prominent, undeveloped 8.2-acre hillside site in the City of Agoura Hills (City). The project site is environmentally sensitive in several regards and characterized by grasses, oak trees and scrub oak habitat, and at least three plant species considered to be rare, threatened or endangered. The project site includes an area determined to be eligible for inclusion of the California Register of Historic Resources that contained artifacts belonging to the Chumash Tribe. Portions of the site are also designated open space and a Significant Ecological Area. Project approval included a development permit, conditional use permit, oak tree permit, and a tentative parcel map. The Project was subject to the California Environmental Quality Act (CEQA), and the City prepared a MND after determining that an Environmental Impact Report (EIR) was not required.

On January 5, 2017 the city's planning commission voted to approve the project and adopt the MND. An environmental group appealed the planning commission's approval and, on March 8, 2017, despite fairly significant opposition to the project, the city council denied the appeal. After taking into account the project's proposed mitigation measures, the city council found that there was no substantial evidence in the record that the project would have a significant effect on the environment.

On April 7, 2017, Save the Agoura Knoll, a local citizens group (petitioners) filed a verified petition for writ of mandate in the Superior Court, alleging multiple CEQA violations, a violation of the Planning and Zoning Law, and a violation of the city's oak tree ordinance. The Superior Court granted the petition

as to the CEQA and Oak Tree Ordinance, but denied petitioners' Planning and Zoning Law claim.

The Court of Appeal's Decision

Procedural Arguments

Appellants raised a number of procedural arguments, likely in an attempt to avoid defending the project MND under the "fair argument" standard of review which presents a low threshold to require preparation of a full environmental impact report; an EIR is required if there is any substantial evidence in the record that from which a fair argument can be made that the project might have a significant environmental impact.

Appellants argued that petitioners could not show that they exhausted their administrative remedies because petitioners did not explicitly state that they exhausted their administrative remedies in their opening brief, instead only expressly raising that issue in their reply brief. Appellants also argued that petitioners failed to exhaust administrative remedies with respect to every CEQA claim in the petition.

Regarding the first issue above, although petitioners bear the burden of demonstrating exhaustion of administrative remedies, the court found that petitioners did not fail to do so. Petitioners were not required to specifically argue the issue of exhaustion in their opening brief, and, in any event, the opening brief stated and cited to enough evidence in the administrative record to demonstrate that they exhausted their administrative remedies.

The court also rejected appellants' claims that petitioners failed to exhaust their administrative remedies with respect to each of their CEQA claims. In each instance, the court was able to find public comments raised during hearings on the project, comment letters, and reports by the city's own consultants to determine that each of petitioners' CEQA claims were sufficiently raised during the city's approval process. As such, the court found that the city was fairly appraised of petitioners' claims, and "had the opportunity to decide matters, respond to objections, and correct any errors before the court's involvement."

Cultural Resources

The project site is home to an archaeological remains of a pre-historic Chumash Tribe settlement. The MND incorporated three mitigation measures to reduce potentially significant impacts to these resources: 1) construction monitoring requiring notification of finds and measures to preserve areas where finds occur, 2) notification to tribe representatives if human remains are encountered, and 3) if the first measure is not feasible, a data recovery excavation program to document artifacts prior to disturbance.

The Court of Appeal found that despite these measures, a fair argument existed that the project would result in significant impacts to cultural resources. The court noted that the first mitigation measure was not feasible because project designs would necessarily disturb the historical site. As such, the mitigation measures impermissibly deferred formulation of mitigation measures that might actually be effective. The court also found that the third mitigation measure was not sufficiently defined, and the MND did not sufficiently analyze how it would mitigate environmental impacts.

Appellants also challenged the evidentiary value of the comments regarding project impacts on cultural resources by Dr. Chester King. Dr. King's qualifications were sufficiently laid out in the record, and his opinions were reached after reviewing relevant studies and project approval documents. Even though Dr. King did not visit the project site, his opinion constituted substantial evidence that the project might result in significant impacts.

As to impacts to cultural resources, the court held that an MND was not appropriate and an EIR was required.

Sensitive Plant Species

The Court of Appeal also found that a fair argument existed that the project would result in significant impacts to the three sensitive plant species at the project site. All three sensitive plant species were susceptible to project impacts from fuel modification (fire prevention) activities, grading, and landscaping. The MND incorporated three mitigation measures that the court again found insufficiently addressed potential impacts: 1) avoidance of two of the three species, and if avoidance was not possible, preparation of a restoration plan including on and off-site preservation and restoration, 2) as to the third species, avoidance and, if needed, preparation of a restoration plan, and 3) with regard to fuel modification activities, measures requiring a biologist to flag all sensitive

plants on-site and demarcate a buffer of at least ten feet from the plants. The court found that the first to mitigation measures were based on old studies and were infeasible because data showed that restoration and relocation of the sensitive species was next to impossible, no feasible alternatives were provided if restoration or relocation failed.

Aesthetic Resources

The MND noted that the project site's mature oak trees offered a scenic resource, and that a knoll of oak trees on the project site was an especially significant scenic resource that the project would possibly develop or remove. Petitioners alleged that the MND insufficiently mitigated these impacts and that substantial evidence indicated that the project would cause significant aesthetic impacts. Appellants apparently did not raise substantive arguments against petitioner's claims, and instead claimed that petitioners failed to exhaust their administrative remedies with respect to aesthetic impacts. As noted above, the court disagreed rejected appellants' claims.

Oak Tree Ordinance

The project would result in removal of 29 of the 59 valley and coast live oak trees on the project site and would impact the areas where six other oak trees were located, while removing over one-third of the site's scrub oak habitat. The court found that the record contained substantial evidence that the project's grading activities would impact the subsurface water source to site oak trees without establishing any method of replacing such water. The MND's mitigation measures involving in-lieu fees and oak tree preservation program also lacked sufficient detail or any showing that they would actually mitigate the project's impacts on the site's oak trees. Accordingly, the court found that an EIR was required to analyze the project's impacts on Oak Trees.

Attorney's Fee Award

Last, the court upheld the trial court's award of $142,148 in attorney's fees to petitioners under the private attorney general statute (Code of Civ. Proc. § 1021.5.). Appellants claimed that petitioners could not collect attorney fees because they did not furnish proper notice on the attorney general of their suit within ten days of filing their action. The court rejected this claim because appellants did furnish the attorney general with the original petition within five days, although they did not furnish the attorney general with their first amended petition until approximately one month before the trial court hearing. The court noted with respect to the first amended petition, strict compliance with CEQA's ten-day notice rule was not an absolute bar to collect attorney's fees. The court also found that real party Gelfand could be held liable for attorney's fees even though he was not the applicant or the property owner. The court concluded that because Gelfand "was a real party who pursued a direct interest in the project that gave rise to the CEQA action. . . ." he was liable for petitioners' attorney's fees.

Conclusion and Implications

This case is a clear illustration of how difficult it is to defend Negative or Mitigated Negative Declarations under the "fair argument" standard, especially when faced with any meaningful project opposition or indication that a project could result in significant impacts. Under the "fair argument" standard, a local agency's approval of a project with an ND/MND will not be upheld if there is any substantial evidence in the record giving rise to a fair argument that a project might have a significant environmental impact. This is true regardless of whether competing evidence is presented. The court's decision is available online at: https://www.courts.ca.gov/opinions/documents/B292246.PDF.

(Travis Brooks)

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.

Due to COVID-19 the Legislature has generated very few bills for us to report on.

Environmental Protection and Quality

•**SB 974 (Hurtado)—**This bill would exempt from the California Environmental Quality Act (CEQA) certain projects that benefit a small community water system that primarily serves one or more disadvantaged communities, or that benefit a nontransient noncommunity water system that serves a school that serves one or more disadvantaged communities, by improving the small community water system's or nontransient noncommunity water system's water quality, water supply, or water supply reliability, or by encouraging water conservation.

SB 874 was introduced in the Senate on February 11, 2020, and, most recently, on March 24, 2020, was read for a second time, amended and then re-referred to the Committee on Environmental Quality.

Public Agencies

•**SB 931 (Wieckowski)—**This bill would amend the Ralph M. Brown Act to require a legislative body to email a copy of the agenda or a copy of all the documents constituting the agenda packet if so requested.

SB 931 was introduced in the Senate on February 5, 2020, and, most recently, on April 2, 2020, was read for a second time, amended and then re-referred to the Committee on Governance and Finance.

•**SB 1060 (Hill)—**This bill would require the Department of Historic Resources to register, as state historical landmarks or points of historical interest, trails that the Department deems to be important historical resources.

SB 1060 was introduced in the Senate on February 18, 2020, and, most recently, on April 6, 2020, had its April 14 hearing in the Committee on Natural Resources and Water postponed by the committee.

Zoning and General Plans

•**SB 1138 (Wiener)—**This bill would amend the Planning and Zoning Law to, among other things, revise the requirements of the General Plan housing element in connection with identifying zones or zoning designations that allow residential use, including mixed use, where emergency shelters are allowed as a permitted use without a conditional use or other discretionary permit. If an emergency shelter zoning designation where residential use is a permitted use is unfeasible, the bill would permit a local government to designate zones for emergency shelters in a nonresidential zone if the local government demonstrates that the zone is connected to amenities and services that serve homeless people.

SB 1138 was introduced in the Senate on February 19, 2020, and, most recently, on March 24, 2020, was read for a second time, amended and then re-referred to the Committee on Housing.

(Paige Gosney)

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Argent Communications Group
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