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CALIFORNIA LAND USE™
LAW & POLICY Reporter

RECENT CALIFORNIA DECISIONS

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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

MISSISSIPPI V. TENNESSEE: U.S. SUPREME COURT DETERMINES THAT EQUITABLE APPORTIONMENT DOCTRINE APPLIES TO INTERSTATE GROUNDWATER DISPUTES

By Jason Groves and Lisa Claxton

In a *unanimous* opinion issued on November 22, 2021, the U.S. Supreme Court in *Mississippi v. Tennessee*, 595 U. S. ___ (2021) extended the equitable apportionment doctrine to a dispute over groundwater. As a case of first impression, the court determined the groundwater contained within the Middle Claiborne Aquifer was an interstate resource "sufficiently similar" to the Court's past applications of the equitable apportionment doctrine to warrant the same treatment. However, because Mississippi declined to request equitable apportionment of the Middle Claiborne Aquifer to remedy its alleged harms, the Court dismissed Mississippi's complaint seeking $615 million in damages against Tennessee.

Background: Mississippi and Tennessee's dispute over the Middle Claiborne Aquifer

The aquifer at issue–the Middle Claiborne Aquifer–spans tens of thousands of square miles underneath portions of eight states in the Mississippi River Basin, including Mississippi and Tennessee. The City of Memphis (City), Tennessee, through its public utility Memphis Light, Gas and Water Division, pumps groundwater from the Middle Claiborne Aquifer to supply the City with clean, affordable drinking water. The City's160 wells are all located within Tennessee and provide the City with approximately 120 million gallons of water per day to meet its municipal needs. Some of the wells are within a few miles of the state's border with Mississippi. Pumping from the City's wells contributes to a regional cone of depression that extends into Mississippi.

In 2005 during prior litigation, the State of Mississippi sued the City of Memphis and its public utility in federal district court, alleging that Memphis had wrongfully appropriated Mississippi's groundwater. The U.S. District Court dismissed the case for failing to join an indispensable party, Tenessee. *Hood ex rel. Miss. v. Memphis*, 533 F.Supp.2d 646 (N.D. Miss. 2008). The Fifth Circuit Court of Appeals affirmed the lower court's dismissal. *Hood ex rel. Miss. v. Memphis*, 570 F.3d 625 (5th Cir. 2009). The District Court and the Fifth Circuit's decisions turned on whether the Middle Claiborne Aquifer should be equitably apportioned among the states. Mississippi petitioned for *certiorari* and requested leave to file a bill of complaint over the alleged taking on Mississippi's water. In 2010, the Court denied Mississippi's request without prejudice. *Mississippi v. City of Memphis*, 559 U.S. 901 (2010); 559 U.S. 904 (2010).

In 2014, Mississippi again filed for leave. The Supreme Court granted Mississippi leave to file a bill of complaint against the State of Tennessee, the City of Memphis, and the City's public utility (Tennessee). In this litigation, Mississippi alleged that Tennessee's groundwater pumping from the Middle Claiborne Aquifer created a substantial drop in pressure and groundwater levels, altering the historical flow of groundwater within the Middle Claiborne Aquifer. Furthermore, Mississippi asserted the resulting cone of depression from Tennessee's pumping extended into Mississippi and hastened the natural flow of groundwater from one state to the other. According to Mississippi, this allowed Tennessee to forcibly siphon billions of gallons of high-quality groundwater from portions of the aquifer underlying Mississippi that, under natural circumstances, would have never reached Tennessee. Mississippi also argued that Tennessee's groundwater pumping had required Mississippi to spend additional money to deepen its wells

within the Middle Claiborne Aquifer and use more electricity to pump water to the surface.

Mississippi did not seek equitable apportionment. Instead, Mississippi based its claims on an absolute ownership theory and pursued various tort claims against Tennessee, seeking at least $615 million in damages.

The Special Master's Report

The Supreme Court appointed Judge Eugene E. Siler, Jr. of the Sixth Circuit Court of Appeals as Special Master to conduct an evidentiary hearing and issue a report. After a five-day hearing, the Special Master determined the features and physical characteristics of the Middle Claiborne Aquifer made it an interstate resource and therefore subject to equitable apportionment between the states. [*Report of Special Master* at 26; https://www.ca6.uscourts.gov/sites/ca6/files/documents/special_master/Mississippi%20v.%20Tennessee%20Special%20Master%20Report.pdf]

In reaching that conclusion, the Special Master considered four different theories that all highlighted the interstate character of the groundwater contained within the Middle Claiborne Aquifer.

First, under the Aquifer Theory, the Special Master found the Middle Claiborne Aquifer is a single interconnected hydrogeological unit underneath several states. Geographically, the aquifer extends from portions of Kentucky to portions of Louisiana, Mississippi, and Alabama, making the Middle Claiborne Aquifer interstate in character and an interstate resource. Mississippi conceded that when viewed as a whole, the aquifer crosses multiple state boundaries but argued that water within two subunits are only found within Mississippi. According to Mississippi, the two subunits should be treated separately from the larger aquifer. The Special Master found that a subunit's presence within a single state "did not extinguish its interstate nature" as a component of a regional hydrogeologic unit.

Second, under the Pumping Effects Theory, the Special Master found that the cone of depression caused by Tennessee's wells within Tennessee affected the groundwater underneath Mississippi and created a drawdown that could be seen across the region. The pumping effects from Tennessee's wells demonstrated the Middle Claiborne Aquifer's interconnectedness as a single hydrogeological unit that spans across state boundaries. In fact, Mississippi's complaint acknowledged some degree of hydrogeologic connection based on its well-to-well interference claims against Tennessee, underscoring the interstate character of the aquifer.

Third, under the Flow Theory, the Special Master found that the natural flow of water inside the Middle Claiborne Aquifer indicated the water would ultimately flow, even if slowly (as little as one to two inches per day), across the Mississippi-Tennessee border. This interstate movement of water under natural conditions further supported the finding that the aquifer is an interstate resource and a component of an interconnected hydrological unit.

Lastly, under the Surface Connection Theory, the Special Master found that some of the water inside the Middle Claiborne Aquifer discharged into the Wolf River, an interstate tributary of the Mississippi River. According to the Special Master, any connection to an interstate surface stream demonstrated the aquifer and its groundwater were, in fact, interstate resources.

Equitable Apportionment is Mississippi's Exclusive Remedy

After finding the Middle Claiborne Aquifer an interstate resource under each of the four theories, the Special Master concluded that equitable apportionment is Mississippi's exclusive remedy for its dispute with Tennessee over the interstate water resource. Since Mississippi and Tennessee had not previously entered an interstate compact to allocate the groundwater, the Special Master saw no compelling reason "to chart a new path for groundwater resources" by allowing a damage claim to proceed rather than equitable apportionment between the two states. *Id.* at 26. Accordingly, the Special Master recommended the Court dismiss Mississippi's complaint, but with leave to bring a new claim for the equitable apportionment of the Middle Claiborne Aquifer.

Mississippi filed exceptions in response to the Special Master's Report, arguing the Special Master erred in concluding the aquifer should be equitably apportioned. Tennessee also objected to the Special Master's Report, but only because the Special Master should not have recommended the Court to grant Mississippi leave to amend its complaint.

Equitable Apportionment under the Supreme Court's Original Jurisdiction

Traditionally, States involved in a dispute over interstate waters have two choices: enter an interstate compact or petition the Supreme Court to equitably apportion the resource. The equitable apportionment doctrine is a federal common law doctrine first pioneered by the Supreme Court in 1907 to govern disputes between states concerning their rights to use interstate bodies of water. *Kansas v. Colorado*, 206 U.S. 46 (1907).

Since its inception, the Court has applied equitable apportionment as the exclusive remedy for interstate disputes over interstate rivers and streams when there is no controlling statute, compact, or prior apportionment. *Mississippi v. Tennessee*, 585 U.S. ___ (2021) (slip op., at 4). Over time, the doctrine's guiding principle–that States have an equal right to make reasonable use of a shared water resource–led the Supreme Court to extend the doctrine's application beyond typical disputes over interstate rivers and streams. *Id.* at 7. The Supreme Court has applied the doctrine not only to disputes over interstate surface waters, but also to disputes over groundwater pumping that affected the flow of interstate streams (*Nebraska v. Wyoming*, 515 U.S. 1 (1995)) and to anadromous fish that migrate through interstate water systems (*Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017 (1983)). However, the Court had never considered whether equitable apportionment should also apply to competing claims to interstate groundwater.

The Supreme Court's Decision

In a 9-0 opinion authored by Chief Justice John Roberts, the Supreme Court held that the waters of the Middle Claiborne Aquifer are interstate waters subject to equitable apportionment. The Court's holding extends the doctrine to an interstate aquifer for the first time. However, in deciding the case of first impression, the Court:

> . . .resist[ed] general propositions and focus[ed] [its] analysis on whether equitable apportionment of the Middle Claiborne Aquifer would be 'sufficiently similar' to past applications of the doctrine to warrant the same treatment. *Mississippi v. Tennessee*, 585 U.S. ___ (2021) (slip op., at 7).

In other words, the Court stopped short of pronouncing any sweeping bright-line rule that would automatically categorize unallocated groundwater within any transboundary aquifer as interstate water subject to equitable apportionment. That said, the Court had little difficulty dispensing with Mississippi's arguments that the hydrogeologic nature of the Middle Claiborne aquifer, in particular, made it distinguishable from other interstate resources that the Court has equitably apportioned in the past.

Although the Court did not announce any specific test for determining whether a particular aquifer is an interstate resource, its rationale in this case is instructive. Here, the Court determined the Middle Claiborne Aquifer warranted equitable apportionment because the aquifer: 1) is a transboundary resource, 2) contains water with a natural transboundary flow, and 3) because the use of the aquifer in another state creates interstate effects.

Transboundary Resources

First, the Court noted as a threshold matter that all prior applications of the equitable apportionment doctrine concerned disputes over transboundary resources. The Court explained that the multistate character of the Middle Claiborne Aquifer was beyond dispute in this case. Both Mississippi and Tennessee have wells within their territories that provide access to the groundwater stored in the same aquifer that straddles both states. Furthermore, the Court emphasized that the expert scientific consensus in this case viewed the Middle Claiborne Aquifer as a single hydrogeological formation spanning multiple states, making it a transboundary resource.

Transboundary Natural Flow

Second, the Court pointed out that all past applications of the equitable apportionment doctrine occurred in cases involving a water resource that flowed naturally across state lines or the fish that lived in that water. Mississippi argued for different treatment due to the "extremely slow" natural flow rate in the aquifer. However, the Court did not find this persuasive since it had previously applied the doctrine to rivers that have occasionally run dry. *Kansas v. Colorado*, 206 U.S. 46, 115 (1907). Additionally, the Court explained that even the slow flow rate did not mean the total volume of water crossing state lines

was trivial. The evidence suggested that the mere "one or two inches" of transboundary natural flow from Mississippi to Tennessee amounted to over 35 million gallons (*i.e.*, 107 acre-feet) of water per day that crossed the state line. The Court concluded that a slow flow rate, at least in the context of this case, did not shield the aquifer from equitable apportionment.

Interstate Pumping Effects on the Aquifer

Lastly, and citing its 2021 opinion in *Florida v. Georgia*, 592 U.S. ___ (2021), the Court considered the interstate effects caused by transboundary use of the resource a hallmark of prior cases applying equitable apportionment. In this case, the evidence showed that when Tennessee pumps groundwater from the aquifer, a regional cone of depression spans multiple state lines. In fact, the interstate pumping by Tennessee had drawn down the aquifer to the point that Mississippi allegedly needed to drill deeper wells in the Middle Claiborne Aquifer to supply its own water needs. Thus, the Court reasoned that Tennessee's actions within its territory "reach through the agency of natural laws to affect the portion of the aquifer that underlies Mississippi" and warranted applying the equitable apportionment doctrine to the Middle Claiborne Aquifer.

State Sovereignty Does Not Mandate a Different Result

After determining the Middle Claiborne Aquifer is an interstate resource, the Court rejected Mississippi's argument that it maintains sovereign ownership of all groundwater originating within its state boundaries. Pointing to its 1938 case of *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938), the Court emphasized it has consistently denied the proposition that a state may exercise exclusive ownership or control of "interstate" waters flowing from within their boundaries. In the Court's view, a state's jurisdiction over the lands within its borders, including the beds of streams and other waters, does not confer unfettered "ownership or control" of flowing interstate waters themselves. Moreover, the Court explained, "The origin of an interstate water may be relevant to the terms of an equitable apportionment. But that feature alone cannot place the resource outside the doctrine itself."

Mississippi relied on the 2013 decision in *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614 (2013) for its sovereign ownership theory. The Court concluded *Tarrant* did not apply because it involved the interpretation of the Red River Compact in a dispute between water agencies in Texas and Oklahoma and was not an equitable apportionment case. Additionally, to the extent that *Tarrant* stands for the proposition that "one State may not physically enter another to take water in the absence of an express agreement," the Court reasoned, "that principle is not implicated here." Unlike the situation in *Tarrant*, the parties stipulated that Tennessee's wells were all vertical wells and that Tennessee did not physically enter or propose to enter Mississippi to divert its share of the water.

Lastly, the Court voiced concern with the potential policy implication of Mississippi's exclusive ownership and control theory. If taken to its logical end, Mississippi's position might allow an upstream State to attempt to cut off flow to downstream States.

Mississippi Disavows Equitable Apportionment of the Middle Claiborne Aquifer

In addition to dismissing Mississippi's Complaint, the Court also declined to decide whether Mississippi should be granted leave to file an amended complaint seeking equitable apportionment in the present case. The Court noted that Mississippi never requested equitable apportionment as alternative relief in its Complaint and expressly rejected the doctrine as a desired remedy throughout the case. Therefore, the Court would not assume that Mississippi will seek equitable apportionment in the future.

Burden of Proof

The Court closed its opinion by highlighting the exacting burden of proof and joinder standards for equitable apportionment actions. Doing so seemed to signal caution to Mississippi and potentially other States who seek equitable apportionment to resolve interstate groundwater disputes going forward.

To receive equitable apportionment under the Court's original jurisdiction, a State "must prove by clear and convincing evidence some real and substantial injury or damage." The Court would also need to consider a broader range of evidence than Mississippi had previously presented, including not only

the physical properties and flow of a water resource, but also existing consumptive uses and return flow patterns, the availability of alternative water supplies, and the costs and benefits to the parties. Furthermore, an equitable apportionment action would likely require Mississippi to join additional parties, such as other states that rely on the Middle Claiborne Aquifer.

Conclusion and Implications

The Court's decision in *Mississippi v. Tennessee* marks a new era in interstate water jurisprudence. For the first time ever, the Court determined that certain groundwater can be classified as interstate water and allocated by the Court using the equitable apportionment doctrine. As prolonged western droughts continue creeping eastward and the demand for water increases across the county, the likelihood of new and intensifying disputes between states over interstate groundwater will likely follow. The Supreme Court showed its willingness to extend the equitable apportionment doctrine to assist States in allocating rights to disputed interstate groundwater. However, the Court also appears to warn States seeking equitable apportionment as their chosen remedy to be careful of what they ask for. Such cases will undoubtedly require extensive technical expert analysis of the hydrogeology of the interstate aquifer and the feasibility of alternatives, and the economic costs and benefits to all affected States.

As other equitable apportionment cases have shown, the fundamental premise of equitable apportionment is the states' equality of right to the resource, and not necessarily equality of the amount apportioned. The Court's opinion therefore begs the question: to what extent will this case motivate Mississippi, Tennessee, and other similarly situated states to attempt to negotiate an interstate compact addressing previously unallocated interstate groundwater? The Supreme Court's opinion is available online at: https://www.supremecourt.gov/opinions/21pdf/143orig_1qm1.pdf.

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LEGISLATIVE DEVELOPMENTS

$1.2 TRILLION INFRASTRUCTURE LEGISLATION PROVIDES FUNDING AND NEPA STREAMLINING FOR KEY ENVIRONMENTAL AND INFRASTRUCTURE PROJECTS

On November 15, 2021, President Biden signed the landmark $1.2 trillion infrastructure legislation package, more commonly referred to as the Infrastructure Investment and Jobs Act (IIJA or Act). The 2,700+-page Act has been touted as providing key funding to rebuild and modernize the nation's roads, bridges, public transportation, broadband, energy and resource infrastructure needs. The Act also includes a significant amount of funding amount directed by the federal government towards cleaning up pollution and funding to protect the communities against the detrimental effects of climate change. The Act could help make significant strides towards the Biden administration's goal of reaching 100 percent clean energy by 2035. In addition to the more-discussed funding provisions, the Act also contains substantive provisions designed to streamline the environmental permitting processes, particularly for the National Environmental Policy Act (NEPA) environmental reviews for "major projects" under NEPA, which includes most infrastructure projects being funded by IIJA, and amends certain NEPA streamlining provisions for infrastructure projects covered under the Fixing America's Surface Transportation (FAST) Act of 2015 .

IIJA Background

In June 2021, President Biden signed off on an bipartisan agreement to allocate trillions of dollars in infrastructure improvements across the country. The agreement proposed to spend $973 billion over five years—totaling $1.2 trillion over eight years—on infrastructure projects. On August 10, 2021, the Senate passed the IIJA. After weeks of debate on amendments and tension along party lines, especially concerning what is considered "core infrastructure," on November 5, 2021, the House approved the Act. There are several environmental and climate-related investments in the Act.

Key Provisions of the Infrastructure Investment and Jobs Act

Climate Resilience and Ecosystem Restoration

The IIJA designates over $50 billion for climate resilience in order to help communities prepare for extreme fires, floods, storms and drought—in addition to a major investment in the weatherization of homes. This represents one of the largest investments in the resilience of physical and natural systems for the country. The Act provides financial resources for communities that are recovering from or are vulnerable to disasters, increases funding for the Federal Emergency Management Agency (FEMA) and the U.S. Army Corps of Engineers (Corps) programs that help reduce flood risk and damage, and provides additional funding to the National Oceanic and Atmospheric Administration for wildfire modelling and forecasting. The IIJA includes an assignment of over $2 billion in funding to the Departments of the Interior and Agriculture for ecosystem restoration and $1 billion for Great Lakes restoration. The Act also sets aside $350 million to build wildlife corridors, to ensure animals can get under, around or over roads to migrate, mate and maintain biodiversity

Physical Infrastructure Improvements

The IIJA allocates about $110 billion for roads, bridges, highways, and surface transportation projects, including $40 billion of new funding for bridge repair, replacement, and rehabilitation, and around $16 billion for major projects that are too large or complex for traditional funding programs. The investment aims to repair and rebuild the roads and bridges "with a focus on climate change mitigation, resilience, equity, and safety for all users, including cyclists and pedestrians."

The Act also provides a major investment, of about $39 billion, for repair of public transit, and

$66 billion allocation for passenger and freight rail. These transit funds are intended to be allocated to modernizing bus and rail fleets and increasing access to communities that currently lack public transportation options. The rail funds could eliminate Amtrak's maintenance backlog and increase railway service areas outside the Northeast and mid-Atlantic regions. The package includes $12 billion in partnership grants for intercity rail service, including high-speed rail. These public transit investments will help reduce greenhouse gas emissions by repairing, upgrading, and modernizing the nation's transit infrastructure.

Another $17 billion is allocated towards port improvements and $25 billion towards airport improvements. The intent is to allow for reduced congestion and emissions, and promoting electrification and utilizing other low-carbon technologies.

Clean Energy

The IIJA provides a roughly $73 billion investment in upgrading power infrastructure such as new transmission lines and the expansion of renewable energy. For example, the Act allocates $16.3 billion to the Department of Energy (DOE) for energy efficiency and renewable energy, with specific funds allocated for continued development of battery storage technology to provide backup for variable renewable generation. This allocation also includes $21.5 billion to establish a new Office of Clean Energy Demonstrations within the DOE to research carbon capture, hydrogen power, resilient and adaptable electric grids, and other technologies. The IIJA will distribute $3 billion over five years for demonstration projects on the processing of battery materials and the construction and retrofitting of processing facilities, as well as an additional $3 billion for grants for similar activities relating to manufacturing and recycling batteries to reduce the life cycle environmental impacts of battery components.

The Act further commits $7.5 billion funding to zero- and low-emissions buses, ferries, and vehicles, including investment towards zero- and low-emission school buses, and another $7.5 billion for building a nationwide network of plug-in electric vehicle chargers, including deployment of EV chargers along highway corridors to facilitate long-distance travel.

Clean Water

The IIJA invests over $50 billion in water infrastructure improvements to protect against droughts and floods, and weatherization technology aimed to increase resilience of water systems. Another $55 billion is invested in advancing clean drinking water—the Act allocates $15 billion to replace all of the nation's lead pipe,$200 million to address lead in school drinking waters, and contribute to addressing "forever" contaminants like per- and polyfluoroalkyl substances (PFAS). Earlier in October, Biden administration issued a PFAS Strategic Roadmap that outlined various actions that the U.S. Environmental Protection Agency will take between 2021 and 2024 regarding PFAS, including developing a Notice of Proposed Rulemaking to designate perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act. (*See:* https://www.epa.gov/pfas/pfas-strategic-roadmap-epas-commitments-action-2021-2024)

Environmental Remediation

The IIJA begins the process of reinstating the Superfund tax "polluter pays" principle, and also provides $21 billion in environmental remediation investment, including Superfund and brownfield sites, abandoned mines, and for the closure of orphan gas wells.

NEPA Streamlining Provisions

The IIJA also includes key NEPA streamlining provisions. In order to obtain bipartisan support, § 11301 of the Act amends § 139 of title 23 of the United States Code to provide permanent NEPA streamlining provisions to the federal permitting and environmental review process for "major projects" as defined under NEPA, called as the "One Federal Decision" or "OFD." The OFD streamlining provisions effectively decrease the federal permitting timeline for infrastructure projects by requiring, among other things: 1) federal agencies to coordinate immediately and create a joint project schedule; 2) one agency to lead the NEPA process; 3) the lead agency to invite other agencies to participate in the environmental review within 21 calendar days instead of the prior time limit of 45 calendar days; 4) agencies to work at the same time and not wait in turn; 5) the NEPA

review process to be completed within two years from the publication of the notice of intent, pursuant to a schedule developed by the lead agency; 6) the generation of a readable review document with a presumptive 200-page limit for the alternatives analysis portion of an Environmental impact Statement (EIS); and 7) the production of a timely "record of decision" within 90 days of the agencies' issuance of the final EIS. In fact, a number of these provisions reflect requirements and objectives set forth in Executive Order 13807, issued by President Trump in 2017.

In addition to reviving elements of Executive Order 13807, the IIJA also reauthorizes and amends those sections of the FAST Act of 2015 to streamline review of certain large infrastructure projects. For example, one provision of IIJA amends and permanently reauthorizes § 41002 (42 U.S.C. 4370m) of the FAST Act that pertain to environmental permitting. The federal permitting provisions of IIJA (Section 70801) amends the performance schedules for the Federal Permitting Improvement Steering Council formed under the FAST Act to have the most efficient possible processes, including alignment of federal reviews of projects, reduction of permitting and project delivery time, and consideration of the best practices for public participation. The federal agencies now have a recommended performance schedule of two years to permit the covered projects. The Act makes the permitting reforms established by the FAST Act, which were set to expire in 2022, permanent and extends them to projects sponsored by Indian tribes or located on tribal land. Another important amendment to the FAST Act provisions under the IIJA include requiring a single, joint interagency EIS for a project, where an EIS is required.

In addition, the IIJA includes several provisions related to NEPA processing that would apply only to the transportation projects, including several provisions with respect to categorical exclusions. The Act also establishes a new categorical exclusion under NEPA for certain oil and gas pipeline gathering lines, and expands the scope of the existing categorical exclusion for projects of limited federal assistance to include those that receive $6 million or less in federal funding and have overall implementation costs of $35 million or less.

Critics of the Act's streamlining provisions argue that the provisions would decrease the public's ability to participate in the permitting process, and make it easier for agencies to ignore impacts on communities most affected by permitting decisions. But industry groups have long argued that the current environmental permitting is needlessly lengthy and complicated, and has prevented badly needed infrastructure from reaching the intended communities.

Conclusion and Implications

The Infrastructure Investment and Jobs Act provides key funding opportunities for those with infrastructure projects across a wide variety of industries, including transportation, telecommunications, energy and water. The Act focuses and creates new opportunities in not just on traditional infrastructure projects such as roads, tunnels and bridges, but also focusses on new technologies such as electrification technology, broadband infrastructure and a new focus on water. However, how soon the Act leads to actual results will depend on how soon he federal agencies are able to implement programs and regulations to implement the Act provisions, and how soon the states and local agencies, as the owners and operators of most infrastructure, are able to mobilize their own resources to design and build or repair the infrastructure projects. The White House has recognized the importance of implementation by announcing a new executive order on November 15, 2021, to guide how the bill is implemented. The EO establishes an Infrastructure Implementation Task Force to support inter-agency coordination and directs agencies to follow the Biden administration's priorities in implementing the Act.

In spite of the magnitude of the funding provisions, some critics see the IIJA, by itself, to be insufficient to meet the investment needed to meet the climate change and clean energy goals. The proposed Build Back Better Bill, HR 5376, in comparison, is seen as a bigger tool for significant shift in climate change policy by including $555 billion in clean energy funding [*see:* https://www.congress.gov/bill/117th-congress/house-bill/5376?q=%7B%22search%22%3A%5B%22build+back+better%22%2C%22build%22%2C%22back%22%2C%22better%22%5D%7D&s=1&r=1] This includes $320 billion in tax credits for solar panels, building efficiency, and electric vehicles, making it cheaper and easier to deploy clean renew-

able energy. But for now, the Build Back Better Bill's chances of passage in Senate appear to be very low.

For more informatation on the IIJA, *see:* https://www.congress.gov/bill/117th-congress/house-bill/3684. (Hina Gupta)

REGULATORY DEVELOPMENTS

DEPARTMENT OF THE INTERIOR APPROVES SOLAR PROJECTS ON BLM-MANAGED CALIFORNIA LANDS, SOLICITS INTEREST FOR SOLAR LEASING ON BLM-MANAGED LANDS IN COLORADO, NEW MEXICO AND NEVADA

Advancing the Biden administration's goal of substantially increasing the production of renewable energy from federally-owned lands, on December 21, 2021 the Department of the Interior's Bureau of Land Management (BLM) issued Decision Records approving the Arica and Victory solar energy projects on a combined 2,665 acres of federally-owned lands located in Riverside County, California. Together, the projects will generate 465 megawatts (MW) of electricity using photovoltaic technology, as well as provide 400 MW of battery storage. [*See:* BLM Rights of Way Case File Nos. CACA 56898 and CACA 56477, Decision Records dated December 2021; Call for Nominations or Expressions of Interest for Solar Leasing Areas on Public Lands in the States of Colorado, New Mexico, and Nevada, 86 Fed.Reg. 242, 72272 (Dec. 21, 2021)]

The projects were approved in conformance with the Desert Renewable Energy Conservation Plan (DRECP), a "collaborate, inter-agency landscape-scale planning effort covering 22.5 million acres in seven California counties." DRECP Record of Decision (2016), at ES-1. The DRECP seeks to "facilitate the timely and streamlined permitting of renewable energy projects" while advancing "federal and state conservation goals and other federal land management goals" while meeting "the requirements of the federal Endangered Species Act … and Federal Land Policy and Land Management Act." *Ibid.*

In addition, the Department of the Interior (DOI) issued a solicitation for "nominations or expressions of interest" in opportunities for utility-scale solar leases within identified solar energy zones (SEZ) on federally-owned lands in Colorado, New Mexico and Nevada. 86 Fed.Reg. 242, 72272. The SEZ were designated in the 2012 Western Solar Plan, which "amended BLM resource management plans (RMPs) to designate SEZs on public land determined to be suitable for utility-scale solar energy development" in six southwestern states. 86 Fed.Reg. 242, 72272.

Background

The process for adopting the DRECP began in 2008, with DOI and its partner federal and state agencies seeking to streamline the permitting process for utility-scale renewable energy projects in the California desert counties of Imperial, Inyo, Kern, Los Angeles, Riverside, San Bernardino, and San Diego, while advancing conservation of identified species and other natural and cultural resources, as well as fulfilling BLM's mandate to manage federal lands for multiple uses. A draft of the plan was released six years after the effort began, in 2014, and the DRECP was adopted in 2016.

The DRECP utilized two strategies that departed from prior BLM planning effort. Previously, BLM's decisions to allow specific private development activities on federally-owned lands were reactive, i.e., BLM waited for private applications to identify specific areas proposed for development before engaging in any analysis of that land for suitability. The DRECP, however, implemented Land Use Plan Amendments to the California Desert Conservation Area Plan to identify "areas appropriate for renewable energy development." Second, the DRECP covers private, state, and federal land, enabling landscape-level planning.

Also in 2008, BLM initiated the Western Solar Plan (WSP), with similar goals to the DRECP:

> . . .to streamline permitting of utility-scale renewable energy development on federally-owned lands in the southwest, while advancing conservation and multiple-use goals.

The WSP was narrower in scope than the DRECP, however, in that it targeted only solar energy development, and covers only BLM-managed federal lands. Like the DRECP, the WSP used Land Use Plan Amendments, this time to designate SEZs as appro-

priate for utility-scale solar development. The WSP was adopted in 2012.

The Projects Approved and Nominations Solicited

The Arica and Victory projects are located on 2,665 acres of adjacent lands and will share access roads, transmission and interconnection infrastructure, and each project will install up to 200 MW of battery storage. BLM formally consulted with the U.S. Fish and Wildlife Service (FWS) pursuant to the Endangered Species Act, with FWS determining that the projects were consistent with its Biological Opinion for the DRECP, including that the projects are not likely to jeopardize the continued existence of the federally threatened Mojave population of the desert tortoise. FWS concurred with BLM's determination that the projects are not likely to adversely affect various federally-endangered bird species. Likewise, BLM obtained concurrence with its finding of no effect for all historical properties located within the project's area of potential effect. BLM's consultation with six Indian tribes is ongoing.

BLM's solicitation of "nominations or expressions of interest" for solar leasing within the WSP seeks development proposals to be submitted up to and including January 20, 2022. 86 Fed.Reg. 242, 72272. In the event that multiple proposals are received for the same or overlapping lands, BLM "may hold a competitive leasing process." 86 Fed.Reg. 242, 72273. In the absence of multiple proposals, BLM "may accept and process non-competitive solar development applications" for lands identified in the notice. *Ibid.*

Conclusion and Implications

The Obama administration invested in a multiple-year effort to adopt landscape-level planning in support of utility-scale renewable energy development on a commercially-sustainable timeline and with greater certainty regarding mitigations. The fate of these efforts was unclear during the four years of the Trump administration. In just under a year, the Biden administration has begun in earnest the long-awaited implementation process.
(Deborah Quick)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD CONSIDERS IMPOSING MANDATORY WATER USE RESTRICTIONS STATEWIDE IN RESPONSE TO DROUGHT CONDITIONS

In response to worsening drought conditions, government officials and water suppliers in various places throughout California have begun taking emergency actions to reduce residential and commercial outdoor water use. Implementing Governor Newsom's executive orders, the State Water Resources Control Board (SWRCB) has now proposed statewide mandatory water use restrictions that will be considered for approval in early January.

Background

In April 2021, Governor Newsom issued the first of a series of drought emergency executive orders, starting with specific listed counties. In July 2021, Newsom signed Executive Order N10-21, calling on all Californians to voluntarily reduce water use by 15 percent as compared to 2020. Following reports that voluntary efforts achieved reductions of approximately just 5 percent, Newsom issued a proclamation in October 2021 declaring that drought conditions constituted a state of emergency throughout the entire state. The October proclamation authorized the SWRCB to use emergency regulations pursuant to Water Code § 1058.5 to restrict wasteful water practices. Accordingly, on November 30, 2021, the SWRCB published a Notice of Proposed Emergency Rulemaking along with proposed text for an emergency regulation. As of the date of this writing, the SWRCB was scheduled to vote upon a resolution adopting the emergency regulation on January 4, 2022.

California Drought Conditions

The SWRCB observes that drought is a recurring element of California's hydrology, but that drought conditions are reaching to further extremes. The western states experienced some of the hottest temperatures on record throughout the summer of 2021. As of early December 2021, approximately 92 percent of the State was experiencing severe, extreme, or exceptional drought, up from approximately 74 percent one year prior, according to the U.S. Drought Monitor. In addition, as represented more fully by the chart below, many of California's key lakes and reservoirs were falling well below their historical average seasonal capacity when the SWRCB issued the proposed regulation:

- Shasta Lake Reservoir—46 Percent [of Early December Percentage of Average]
- Lake Oroville Reservoir—63 Percent
- Trinity Lake Reservoir—49 Percent
- San Luis Reservoir—45 Percent
- New Melones Reservoir—67 Percent
- Don Pedro Reservoir—76 Percent
- Lake McClure Reservoir—48 Percent

Though California has recently experienced substantial increases in snowpack and precipitation from significant atmospheric river events, many forecasts still predict that California's drought conditions are likely to continue into 2022 and beyond, especially if increased temperatures result in earlier-than-normal snowmelt and runoff.

The Proposed Emergency Regulation

Under the SWRCB proposed regulation, the following are deemed wasteful and unreasonable water uses, and are prohibited:

- Incidental runoff of outdoor irrigation water.
- Vehicle washing with a hose that is not equipped with a shot-off nozzle.
- Washing hardscapes such as driveways, sidewalks, and asphalt with potable water.
- Using potable water for street cleaning or construction purposes.
- Using potable water to fill fountains and other decorative water fixtures (including lakes and ponds) except where recirculation pumps are used and refilling only replaces evaporative losses.
- Watering lawns and ornamental landscapes during and within 48 hours after measurable rainfall of at least a quarter-inch of rain.
- Using potable water for watering lawns on public street medians or landscaped areas between the street and sidewalk.

The regulation also prohibits homeowner associations, cities, and counties from impeding drought response actions taken by homeowners. Notably, violation of the regulation is punishable by a fine of up to $500 per day. If approved, the regulation will apply to all Californians and remain in effect for one year unless rescinded earlier or extended by the SWRCB.

At the time of this writing, the public comment period on the proposed emergency regulation was scheduled to run through December 23, 2021. The proposed emergency regulation and related materials are located on the SWRCB website at: https://www.waterboards.ca.gov/water_issues/programs/conservation_portal/regs/emergency_regulation.html.

SWRCB Anticipated Outcomes

The SWRCB estimates that the mandatory restrictions will result in statewide reductions of Californians' outdoor water use of up to 20 percent compared to 2020. The regulation is largely predicated upon the 2014-2015 mandatory water use restrictions implemented by former Governor Brown and the SWRCB during the 2012-2016 drought, which resulted in an approximately 25 percent statewide water use reduction.

Conclusion and Implications

Despite significant forecasted revenue reductions for water suppliers, the proposed emergency regula-

tion seeks to preserve California's water supplies in anticipation of continued, potentially multi-year, drought conditions. Due to more frequent and severe drought conditions over the past several decades, and the commensurately increased responsive regulations, the SWRCB likely perceives that Californians are more accustomed now than ever to statewide permanent or periodic water restrictions. If enforcement is robust, and implemented in combination with public education and outreach, the regulation has the potential to successfully reduce statewide water use to stretch out currently available supplies. At the same time, many Californians may be understandably frustrated by a perceived inconsistent, "emergency-based" management approach from year to year.
(Byrin Romney, Derek Hoffman)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT FINDS FEDERAL AVIATION ADMINISTRATION PROPERLY RELIED ON ENVIRONMENTAL ASSESSMENT FOR AIR CARGO PROJECT AT AIRPORT

Center for Community Action and Environmental Justice v. Federal Aviation Administration, 18 F.4th 592 (9th Cir. 2021).

Petitioners Center for Community Action and Environmental Justice, Sierra Club, Teamsters Local 1932, Shana Saters, Martha Romero, and State of California (collectively: petitioners) petitioned for review of the Federal Aviation Administration's (FAA) decision finding that no significant environmental impact would result from construction and operation of an air cargo facility (Project) at the San Bernardino International Airport (Airport). The Ninth Circuit Court of Appeals denied the petition, finding the Environmental Assessment (EA) was sufficient and no further review was required.

Factual and Procedural Background

The Project at issue involved the construction and operation of an air cargo facility, including a 658,000-square-foot sort, distribution, and office building to be operated by third party air carriers transporting cargo to and from the Airport. The Airport is under the control of the San Bernardino International Airport Authority. Because the Airport Authority had received federal funding for previous Airport projects, the Project proponents sought FAA approval under the Airport and Airway Improvement Act. The FAA's review of the Project under its statutory scheme triggered its duties under the National Environmental Policy Act (NEPA). The FAA evaluated the environmental effects of the Project and issued a Record of Decision, which included a Final Environmental Assessment and Finding of No Significant Impact (FONSI) under NEPA. Petitioners petitioned for review of the FAA's finding that no significant impact would result.

The Ninth Circuit's Opinion

In reviewing a finding that a project has no significant effects, courts must determine whether the agency has met NEPA's "hard look" requirement, based its decision on consideration of the relevant factors, and provided a convincing statement of reasons to explain why a project's impacts are insignificant. The statement of reasons is critical in determining whether the agency took a hard look at the potential environmental impacts of a project. An Environmental Impact Statement (EIS) must be prepared if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor. An agency action only may be overturned if it is arbitrary, capricious, an abuse of discretion, or not in accord with law.

Study Areas

Petitioners made various challenges regarding the FAA's compliance with NEPA. The Ninth Circuit first addressed arguments regarding the FAA's use of certain "study areas" (a General Study Area and a Detailed Study Area). In attacking the parameters of the study areas, petitioners principally argued that the FAA did not conform its study areas to the FAA's Order 1050.1F Desk Reference. But the Ninth Circuit found this could not alone undermine the FAA's analysis because the Desk Reference does not serve as binding guidance upon the FAA. Instead, the Ninth Circuit found, petitioners must show that the FAA's nonadherence had some sort of EA significance aside from simply failing to follow certain Desk Reference instructions. The court found that petitioners had failed to make such a showing and had not otherwise shown that the use of the two study areas resulted in the FAA failing to take a "hard look" at the Project.

Cumulative Impacts

The Ninth Circuit next addressed petitioners' claim that the FAA failed to sufficiently consider the

Project's cumulative impacts. Petitioners first argued that the FAA only considered past, present, and reasonably foreseeable projects within the General Study Area and should have instead expanded its assessment to include an additional 80-plus projects. But the only specific cumulative impact resulting from these projects petitioners claimed the FAA failed to consider was associated with traffic, and the Ninth Circuit found the record showed the FAA did consider that the 80-plus projects would result in large average daily trips in the first year of Project operations. While petitioners also more generally claimed that a better cumulative impact analysis was required, the Ninth Circuit found that they had not pointed to anything specific, and the fact that petitioners could not identify any specific impacts suggested there were none.

Petitioners also argued the EA did not disclose specific, quantifiable data about the cumulative effects of related projects and did not explain why objective data about those projects could not be provided. The Ninth Circuit dismissed this claim as being based on a misreading of legal precedent, noting that quantified data in a cumulative effects analysis is not required. Consistent with requirements, the Ninth Circuit found the FAA did provide detailed information about cumulative impacts. The only specific deficiency petitioners asserted regarding this information was with respect to the EA's cumulative air quality impact discussion. But the Ninth Circuit again disagreed, finding that there was nothing to suggest the air quality analysis was deficient.

Arguments Regarding CEQA

Petitioners (principally, the State of California) also argued that the FAA needed to prepare an EIS because the Environmental Impact Report (EIR) prepared under the California Environmental Quality Act (CEQA) found that the Project could result in significant impacts on air quality, greenhouse gas emissions, and noise. While they did not argue that CEQA and NEPA analysis must reach the same conclusions, they did contend that if a CEQA analysis finds significant environmental effects stemming from a project, a NEPA analysis must essentially explain away this significance. To that end, petitioners argued that the EA should have refuted the CEQA findings regarding air quality, greenhouse gas impacts, and noise. In all respects, the Ninth Circuit found that the analysis in the EA was sufficient for NEPA purposes.

Truck Trips

Petitioners also alleged various errors related to the FAA's calculations regarding truck trips emissions generated by the Project. But the Ninth Circuit found that petitioners failed show any arbitrariness or capriciousness in the EA's truck trip calculation method, and there was no claim that the EA's methodology was improper or that the data relied on was erroneous. The Ninth Circuit also rejected a number of other specific claims regarding truck trip calculations.

California and Federal Environmental Standards

Finally, petitioners argued that the FAA failed to consider the Project's ability to meet California state air quality and federal ozone standards. Petitioners first claimed that the EA failed to assess whether the Project met certain air quality standards set by the California Clean Air Act. The Ninth Circuit disagreed, finding that petitioners failed to articulate any violation of the state law stemming from the Project. The court also noted that the EA did discuss California air quality law, and there was no reason to believe a violation was likely to occur. Petitioners also claimed that the EA failed to assess whether the Project met federal ozone standards. Again, the Ninth Circuit found that petitioners provided no reason to believe the Project threatened a violation of the federal ozone standards. The court also rejected petitioners' argument that the EA failed to assess whether the Project met California's greenhouse gas emissions standards.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the review of an EA under NEPA and a detailed discussion of a variety of technical issues, as well as some discussion about the relationship between NEPA and CEQA. There also was a lengthy dissent. The decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/11/18/20-70272.pdf.
(James Purvis)

CALIFORNIA LAND USE™ LAW & POLICY Reporter

DISTRICT COURT REJECTS TRIBAL CHALLENGE TO EXISTING LICENSED HYDROELECTRIC PROJECT

Sauk-Suiattle Indian Tribe v City of Seattle and Seattle City Light, ___F.Supp.4th___, Case No. 2:21-cv-1014 (W.D. Wash. Dec. 2, 2021).

U.S. District Court Judge, Barbara Rothstein has dismissed claims filed by the Sauk-Suiattle Indian Tribe seeking relief from continued operation of a Federal Energy Regulatory Commission (FERC) licensed hydroelectric project on the basis of laws in effect prior to the issuance of the FERC license.

Background

The Sauk-Suiattle Indian Tribe (Tribe) is a federally recognized Indian Tribe with territorial treaty claims to the Skagit River Basin. Under the Boldt Decree, the Sauk-Suiattle "usual and accustomed" fishing areas are tributary to the Skagit River. *US v Washington*, 384 F.Supp. 312, 376 (W.D. Wash. 1974). Which means, fish migrating to Sauk-Suiattle Usual and Accustomed fishing areas must travel up the Skagit River, giving the Sauk-Suiattle Indian Tribe a keen interest in the functioning hydrology of the Skagit River.

The City of Seattle (City)j owns and operates a series of 3 dams comprising the Skagit River Hydroelectric Project. The lowest of these three dams on the Skagit River is the Gorge Dam completed in the 1920s, which "as constructed 'blocks fish passage within the Skagit River from the area below to the area above suck dam." Order @ p.2. Despite the blockage, the Skagit Project received an operating license from the Federal Power Commission, predecessor to the Federal Energy Regulatory Commission (FERC), in 1927. The original 50-year license was renewed in 1995 after an extended relicensing review and settlement process, of which the Sauk-Suiattle Indian Tribe was a participant. The 1995 renewal is due to expire in 2025. Negotiations are currently underway to address permit terms in the re-licensure of the Skagit Project when this license expires

The Lawsuit

The Sauk-Suiattle Indian Tribe filed an action against the City of Seattle and its utility department, Seattle City Light, in State (Skagit County) Superior Court seeking declaratory and prospective injunctive relief under the U.S. and Washington State Constitutions, Territorial Acts of Congress, the Magna Carta, and related common laws, among others, that the City owned dam structure unlawfully blocks the passage of migrating fish notwithstanding its operation under its FERC license. The City of Seattle had the action removed to the U.S. District Court on the grounds of original jurisdiction and subsequently filed a Motion to Dismiss. The U.S. District Court denied the Sauk-Suiattle's Motion for Remand (November 9, 2021). The Court shortly thereafter granted the City of Seattle's Motion to Dismiss (December 2, 2021).

Whether FERC licensed hydroelectric projects are subject to existing state and federal laws prohibiting the blockage of stream.

The Federal Power Act, 16 USC 791a *et seq*, provides FERC "broad and exclusive jurisdiction" to license hydroelectric power facilities, which includes "constructing, operating, and maintain dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient … for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction." 16 USC. 797(e).

The Sauk-Suiattle assertions attempt to step back into the land before FERC jurisdiction, not to question the validity of the licensure, but argue that the construction and operation of the Gorge dam Is illegal as a matter of law notwithstanding the FERC license.

In support of pre-licensure legality, the Sauk-Suiattle argue that prohibitions against complete stream blockages found in Territorial acts, as incorporated into the State Constitution and the state's Enabling Act which was in place when the dam was originally constructed and licensed survive despite Congressional action to repeal certain territorial acts through adoption into state law prior to subsequently repeal. The Sauk-Suiattle further argue that violates the common law in that it unreasonably interferes with

the Tribes enjoyment of its property constituting a nuisance.

The District Court's Decision

The Court's ruling seems to sidestes the multiple Sauk-Suiattle arguments. Rather, the court implicitly found instead that FERC regulations prevail, notwithstanding whether there may be legal issues related to the construction and operation. Without reaching the question of whether it can legally exist in its current form, the Project has a license from FERC to operate in the manner that it operates—fish migration block and all. The U.S. Courts of Appeal have exclusive jurisdiction to review the operations of hydroelectric projects under its jurisdiction. Without jurisdiction to review the claim, the District Court ruled instead to dismiss.

Conclusion and Implications

We expect to see this case appealed to the Ninth Circuit Court of Appeals.

In a separate action pending in King County Superior Court, the Sauk-Suiattle Indian Tribe has filed an action against the City of Seattle for violations of the Consumer Protection Act, seeking Certification as a Class Action. This Tribe is alleging harm due to "unfair and deceptive practices associated with claims of superlative environmental responsibility" in connection with its Skagit Project and environmental performance. Case 21-2-12361-5 SEA. A notice for hearing on the City's motion to dismiss has been set for January 14, 2022.
(Jamie Morin)

RECENT CALIFORNIA DECISIONS

SECOND DISTRICT COURT FINDS PETITIONER FAILED TO EXHAUST ADMINISTRATIVE REMEDIES REGARDING POTENTIAL NOISE IMPACTS IN CEQA CHALLENGE

AIDS Healthcare Foundation v. City of Los Angeles,
___Cal.App.5th___, Case No. B313529 (2nd Dist. Nov. 1, 2021).

The City of Los Angeles (City) certified an Environmental Impact Report (EIR) and approved a project. AIDS Healthcare Foundation (AHF) filed a petition for writ of mandate challenging those actions on the ground that, among other things, the EIR failed to comply with the California Environmental Quality Act (CEQA). The Superior Court denied the petition and AHF appealed, claiming the EIR failed to sufficiently evaluate cumulative construction noise impacts. In an unpublished decision, the Court of Appeal for the Second Judicial District affirmed, finding AHF did not raise its argument during the administrative proceedings and was barred from raising it in the litigation.

Factual and Procedural Background

The City of Los Angeles circulated a draft EIR for a proposed project in the Hollywood area of Los Angeles (Project). Among other things, the draft EIR addressed the impact of noise during Project construction. It found that on-site construction noise impacts would be significant and require mitigation; off-site construction noise impacts would be less than significant, and no mitigation measures were required. The draft EIR also evaluated cumulative noise impacts in light of other nearby projects that, if constructed concurrently with the Project, would result in significant and unavoidable cumulative construction noise impacts (both on-site and off-site).

AHF submitted comments regarding the draft EIR's analysis of, among other things, the Project's noise impacts. Regarding mitigation, including mitigation for cumulative noise impacts, AHF asserted that the draft EIR:

> . . .does not adequately discuss the feasibility of additional mitigation measures beyond those proposed, and does not provide information regarding the incremental benefits of increasing mitigation beyond that in the identified mitigation measures.

The final EIR responded to AHF's comments. Regarding noise impact mitigation measures, the final EIR concluded that the mitigation identified in the draft EIR met the requirements of CEQA and would minimize the Project's adverse impacts.

In August 2020, the City's deputy advisory agency (DAA) held a hearing on the proposed Project, during which AHF's counsel appeared and argued. However, counsel made no further argument regarding the analysis of noise impacts. A few days later, the DAA certified the EIR and approved the Project. In its letter of determination, in connection with cumulative noise impacts, the DAA noted that neither the developer nor the City had any control over the timing or extent of the construction of any of the related project.

AHF then appealed to the City's planning commission (Commission). In support of its appeal, AHF attached a letter restating the comments it made in its comment letter on the draft EIR. At the hearing, AHF argued that the EIR's analysis of existing ambient noise levels was incomplete and, among other things, failed to consider all feasible mitigations that could reduce those impacts. AHF did not refer to any particular mitigation measure or raise any issue with respect to the staggering of project construction schedules. The Commission then denied AHF's appeal.

AHF next appealed to the city council (Council), in which it re-asserted most of the same arguments. The Council's planning and land use management committee (LUMC) heard the appeal. AHF appeared

but did not raise any issue regarding noise impacts. The Committee recommended that the City deny the appeal. The Council then adopted the LUMC recommendation, denying the appeal, certifying the EIR, and approving the Project.

AHF filed a petition for writ of mandate challenging the City's certification of the EIR and Project approval on the grounds that the EIR failed to comply with CEQA. In its opening brief in support of its petition, AHF asserted for the first time that the City could reduce the cumulative noise impact by scheduling, or staggering, the timing of the Project so that it does not overlap with the construction of other projects. The Superior Court denied the petition. With respect to the issue of noise impacts, the Superior Court declined to consider the issue on the merits, finding that AHF failed to exhaust this issue during administrative proceedings. AHF then appealed.

The Court of Appeal's Decision

On appeal, AHF contended that the EIR failed to consider that cumulative construction noise resulting from the simultaneous construction of the Project and other nearby projects could be mitigated by requiring that construction schedules of the projects be staggered. The City and the developer argued that AHF never raised this alleged error during the City's administrative process and therefore failed to exhaust its administrative remedies.

Generally, an action or proceeding alleging that an EIR failed to comply with CEQA cannot be brought unless the alleged grounds for noncompliance with CEQA was presented to the public agency during the administrative process. The objections "must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them." Here, the Court of Appeal found that AHF never asserted at any point during the CEQA process that the City should have staggered construction schedules as a mitigation measure for cumulative noise impacts or that the EIR was flawed for failing to address that possibility. While AHF had broadly commented that the EIR did not adequately discuss the feasibility of additional mitigation measures beyond those proposed, it did not identify other potential measures or suggest staggering construction.

The Court of Appeal also disagreed with AHF's claim that the issue was preserved because the City's DAA had noted that the City did not have any control over the timing or extent of the construction of any of the related projects. The court found this argument to be without merit, concluding that even if the DAA's comment implied that mitigation of cumulative noise impacts by staggering construction schedules was beyond the City's control, neither AHF nor any other person ever alleged a failure to consider or analyze such a mitigation measure as a ground for noncompliance with CEQA.

The court also disagreed with AHF that the exhaustion doctrine should not apply because raising the possibility of staggering construction schedules would have been futile, as the City would claim it was legally precluded from implementing such measure. Even if such measure ultimately would have been rejected, the Court of Appeal found that raising such an issue would have resulted in a more complete record for review. The court also noted that, given questions regarding the ultimate implementation of the other projects, the issue also likely would have been rendered moot on appeal. The court therefore affirmed the Superior Court decision.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the specificity required to exhaust administrative remedies, particularly in the context of mitigation. The decision is available online at: https://www.courts.ca.gov/opinions/nonpub/B313529.PDF.
(James Purvis)

THIRD DISTRICT COURT UPHOLDS CITY OF SACRAMENTO'S EIR AND APPROVAL OF 'MCKINLEY WATER VAULT PROJECT'

Citizens for a Safe and Sewage Free McKinley Park v. City of Sacramento, Unpub., Case No. C090760 (3rd Dist. Nov. 24, 2021).

In a November 24, 2021 *unpublished* opinion, the Third District Court of Appeal in *Citizens for a Safe and Sewage Free McKinley Park v. City of Sacramento* upheld the denial of Citizens for a Safe and Sewage-Free McKinley Park's petition for writ of mandate that challenged the City of Sacramento's approval of the McKinley Water Vault Project. The appellate court rejected the group's claims that the city violated the California Environmental Quality Act (CEQA) by failing to adequately analyze environmental impacts and alternatives or recirculate the Environmental Impact Report (EIR) due to the addition of significant new information following the public review period.

Facts and Procedural Background

The City of Sacramento (City) operates a combined sewer and stormwater system that serves over 200,000 residents in downtown and greater Sacramento, such as the McKinley Park area in East Sacramento. The combined system collects and conveys both wastewater and stormwater within the same pipe network to facilities for treatment and discharge. While the system's capacity is generally sufficient to withstand stormwater, outflows can occur during large storm events, thereby resulting in flooding and wastewater discharge onto local streets, including those in McKinley Park.

In 2015, an update to the City's Combined Sewer System Improvement Plan identified a project that would alleviate stresses on the combined sewer system by providing additional storage capacity that can be utilized when the system approaches maximum capacity during large storm events. The project would be located in McKinley Park, which is bounded by a 32-acre residential neighborhood. Over approximately two years, the project would require installation of a large concrete vault and related infrastructure and equipment underneath the existing baseball field at the park. After installation, the project would replant any removed trees, install new trees, and construct a new baseball field.

The City published the draft EIR for the project in April 2018, and later the final EIR (FEIR) in September 2018. The FEIR included updated information about the project's design based on newly completed renderings that showed the project's footprint would be smaller than originally contemplated. The City approved the project and certified in the EIR in October 2018.

In November 2018, Citizens for a Safe and Sewage-Free McKinley Park (Citizens) filed a petition for writ of mandate alleging the City violated CEQA because: 1) the EIR failed to adequately analyze the various environmental impacts; 2) the EIR failed to adequately analyze a reasonable range of alternatives; and 3) the City failed to recirculate the EIR after significant new information was added following the public comment period. The trial court denied the petition. Citizens timely appealed.

The Court of Appeal's Decision

The Third District Court of Appeal applied the substantial evidence standard to consider whether the City abused its discretion in approving the project and certifying the EIR. Under this standard, the court rejected each of Citizens' claims by concluding that Citizens failed to carry their burden of showing why the City's decision was unsupported.

Citizens argued that the EIR violated CEQA by failing to adequately analyze numerous environmental impacts of the project, including impacts to trees, historic resources, air quality, traffic and transportation, noise and vibration, geology and soils, and hazardous materials. The Third District rejected each claim, largely finding that Citizens had failed to carry its burden of pointing to substantial evidence in the record and demonstrating why it did not support the EIR's conclusions.

Trees

Citizens asserted that the EIR was deficient because it failed to analyze how construction activities may damage or destroy dozens of trees at the project

site. The DEIR explained that it surveyed approximately 129 trees within the project area and designed the project to avoid the removal of certain trees, to the extent feasible, through the assistance of an arborist and in accordance with the City's Tree Ordinance and mitigation measures. The FEIR reiterated the project's decreased footprint would further protect trees to the maximum extent feasible.

The Court of Appeal thus concluded that Citizens failed to carry their burden to show that the EIR's tree impact analysis was deficient. Contrary to Citizens' assertions, the court explained that there was nothing in the record that indicated excavation would take place within structural root zones or tree driplines that would result in significant impacts to the structural integrity of City trees.

Historic Resources

Citizens claimed the City violated CEQA by waiting until the release of the FEIR to analyze the impacts of the project on McKinley Park as a historic resource, and that substantial evidence did not support the FEIR's conclusion that the project would be consistent with the Secretary of the Interior's Standards for Rehabilitation.

The DEIR explained that McKinley Park was not a "historic resource" pursuant to CEQA Guidelines § 15064.5, because, although it had been nominated for inclusion in the National Register of Historic Places, it had yet to be listed in the Register. Nevertheless, the DEIR concluded that the project would not result in a substantial adverse change in the significance of the park because it would maintain its existing uses once construction was finished. The FEIR similarly provided an analysis of why the project would not adversely change the historic significance or integrity of the park, based on the Secretary of Interior's Standards for Rehabilitation. Because all aspects of the project would be reversible and no aspect of the essential form or integrity of the landscape would be impacted, the FEIR concluded that impacts would be less than significant.

The appellate court therefore concluded that Citizens failed to point to any evidence in the record showing that the Park's historical significance would be materially impaired by the project, thus rising to a significant impact under CEQA. To this end, the record reflected that the public was not deprived of a meaningful opportunity to comment on this issue—the FEIR's conclusions merely bolstered the analyses presented in the DEIR.

Air Quality

Citizens also claimed the EIR's analysis for the project's air quality impacts on sensitive receptors was deficient because it was based on flawed assumptions and failed to account for two-way hauling trips and idling times and use of a single access point to the project site. The court similarly rejected this claim, finding that Citizens failed to carry its burden to show that the EIR inadequately analyzed the project's air quality impacts with respect to construction related hauling trips. To the contrary, the EIR provided a robust air quality analysis that considered potential impacts on air quality related to construction activities, hauling and vehicle trips, and potential impacts to sensitive receptors. Similarly, the DEIR identified two proposed alternative access routes that would be utilized when feasible to mitigate impacts to trees. Though the FEIR later only identified one proposed alternative access route, Citizens still failed to carry its burden of showing that traffic would be divided between the two points or result in significant impacts.

Traffic and Transportation

The court also rejected Citizens' assertion that the EIR's traffic analysis relied on materially false assumptions and failed to consider traffic impacts to residents living on streets near the project site. The court pointed to the EIR's traffic analysis, which determined that construction of the project would not substantially alter existing traffic flows or levels of service on nearby roadways. Mitigation requiring a traffic control plan would further ensure that traffic impacts remained at less than significant levels and complied with the City's traffic code. In light of this substantial evidence, Citizens failed to point to any contrary evidence in the record to support their contention that the traffic analysis was deficient.

Noise and Vibration

As to noise impacts, the court rejected Citizens' claim that the EIR failed to analyze potential noise impacts to a nearby daycare. The EIR's noise impact analysis provided detailed standards and methodologies that relied on the Appendix G Environmental Checklist and a federal roadway construction noise

model. Because sound levels would be limited to daytime hours and comply with the City's noise ordinance, the EIR concluded that sound level increases would not significantly impact the surrounding area. Contrary to Citizens' assertion, the EIR analyzed the project's potential noise and vibration impacts on nearby sensitive receptors, including the daycare. For these reasons, Citizens failed to carry its burden of showing that the EIR failed to evaluate the significance of impacts to sensitive receptors or that its analysis was deficient.

Geology and Soils

Citizens contended that the EIR was deficient because it failed to include a site-specific geotechnical report with the DEIR and its conclusions about liquefaction and landslide hazards was not supported by substantial evidence. Though the DEIR did not include the contested report, Citizens acknowledged that the report was attached to the FEIR. The court noted that the FEIR explained site-specific information regarding soils in the project area, including liquefaction impacts. The report concluded that the flat nature of the site would not lend itself to increase landslide risk. In light of this substantial evidence, the court concluded that Citizens had again failed to carry their burden of explaining how the EIR's analysis was deficient.

Hazardous Materials

Finally, Citizens contended that the EIR failed to evaluate the risks associated with storing sewage material beneath McKinley Park, including failing to analyze impacts from a leak or overflow after a large storm event. The DEIR reiterated that the purpose of the project was to alleviate existing stressors and flooding on the current system by providing additional underground storage that would only be used during large storm events. The project would be required to comply with federal and state building standards, be subject to maintenance and regular inspection. For these reasons, Citizens failed to carry their burden of showing how the hazards analysis was inadequate. Citizens did not point to any evidence to show that the EIR was deficient for failing to consider impacts from a leak in the vault or inlet pipe. Rather, Citizens only advanced conclusory statements regarding the potential hazardous emissions lacked merit, which the court ultimately rejected.

Adequacy of Project Alternatives Analysis

The Third District found no merit to Citizens' claim that the EIR's project alternatives would neither attain basic project objectives nor avoid or substantially lessen any of the project's significant environmental impacts. The DEIR analyzed one "no project" alternative and three project alternatives and discussed their ability to meet the project's seven enumerated objectives. In rejecting all three alternatives, the DEIR concluded that none of the alternatives would cause impacts less severe than the proposed project; rather, each alternative would cause more severe environmental impacts.

Citizens neither argued that the DEIR failed to include a potentially feasible alternative nor shown that the range of alternatives was unreasonable. Absent substantial evidence to the contrary, the appellate court concluded that the EIR's choice of alternatives was reasonable under CEQA Guidelines section 15126.6.

Recirculation of the EIR

The Third District rejected Citizens' final claim, which asserted that the City was required to recirculate the EIR due to the addition of significant new information following the public review period. The court explained that, under CEQA, the City's determination to not recirculate is given substantial deference and presumed correct, therefore, Citizens bears the burden of proving that the City's decision to not revise and recirculate the EIR is not supported by substantial evidence. Nevertheless, Citizens failed to carry this burden. Foremost, Citizens did not point to any substantial evidence in the record, apart from their own comment letter, to support their assertion that the FEIR proposed expanding the project by nearly 160,000 square feet. To the contrary, the EIR disclosed that the project's footprint would be reduced, with only the construction staging area remaining larger. For these reasons, Citizens "undeveloped argument" failed to show that the expansion of the staging area qualified as "significant" new information that would require further public comment and additional analysis.

The court also rejected Citizens' claim that recirculation was necessary because the City ultimately selected one access point, instead of two, for construction vehicles to enter the project site. Contrary

to Citizens' assertion, the DEIR contemplated limited access routes when feasible—therefore, this was not significant new information requiring further analysis. Finally, recirculation was not necessary because the FEIR did not include significant new information regarding the historic status of McKinley Park. The FEIR reiterated the DEIR's initial determinations that the Park's historic integrity would not be impacted by construction. For these reasons, the record reflects that the public was not deprived a meaningful opportunity to comment.

Conclusion and Implications

The Third District Court of Appeal's *unpublished* opinion represents a straight-forward analysis and application of fundamental CEQA principles and the requirements for a legally sufficient EIR. While the underlying claims are ostensibly fact-specific, the overall theme of the court's opinion is straightforward: a CEQA petitioner who challenges the sufficiency of an EIR bears the burden of pointing to substantial evidence in the record and show why the agency's decision was lacking. Here, Citizens' failure to carry this requisite burden was ultimately fatal to their claims. As such, petitioner-side practitioners should exercise caution when presenting their arguments so as to avoid conclusory statements that do not rely on, or contradict, the evidence in the record. The court's opinion is available at: https://www.courts.ca.gov/opinions/nonpub/C090760.PDF. (Bridget McDonald)

SECOND DISTRICT COURT FINDS CITY CANNOT ENJOIN COUNTY AS EXCLUSIVE CONTRACTOR FOR AMBULANCE SERVICES UNDER THE MEDICAL SERVICES ACT

City of Oxnard v. County of Ventura ___Cal.App.5th___, Case No. B312348 (2nd Dist. November 23, 2021).

The Second District Court of Appeal in *City of Oxnard v. County of Ventura* affirmed the trial court's decision denying the City of Oxnard's (City's) request for an injunction to enjoin the County of Ventura (County) from administering ambulance services within the City. The City argued that the County had the exclusive authority to administer ambulance services under the California Emergency Medical Services Act (EMSA), given that the City was not a legacy provider of such services.

Factual and Procedural Background

In 1971, the County, the City, and other municipalities entered into a Joint Powers Agreement (JPA) regarding ambulance services whereby the County: 1) administers and funds a countywide ambulance system; and 2) is the exclusive contracting party with ambulance service providers on behalf of the other JPA signatories. The County established seven exclusive operating areas (EOAs) in which private companies provide ambulance services. The City is located in EOA6, where "Gold Coast Ambulance" (GCA) is the service provider.

The JPA has no definite term. It permits parties to withdraw by providing written notice at least 180 days prior to the end of the fiscal year. Withdrawal becomes effective at the beginning of the next fiscal year.

In 1980, the California Legislature enacted the Emergency Medical Services Act (EMSA) to establish statewide policies for the provision of emergency medical services in California. (Health and Safety Code, § 1797.200 *et seq.*) The EMSA grants counties the authority to designate a local EMS agency to administer services countywide. The EMSA also includes a "transitional" provision that allows cities that were providing EMS services on June 1, 1980, to continue to do so until they cede the provision of services to the local agency. (Health and Safety Code, § 1797.201.)

Pursuant to the EMSA, the County established "VCEMSA" as the local EMS agency. For more than 40 years, VCEMSA has administered the countywide EMS program, contracted with EMS providers, and submitted EMS plans for state approval. Each plan

has indicated that VCEMSA is the County's exclusive EMS provider.

In the 2010s, City officials grew dissatisfied with GCA's provision of ambulance services. City officials determined that residents in low- and moderate-income areas were twice as likely to experience delayed ambulance responses than residents in more affluent areas. Officials also determined that GCA spent more than 12 percent of its time outside of EOA6. While outside EOA6, GCA's "floater" ambulances responded to calls in moreaffluent areas nearly twice as often as they responded to calls in less-affluent areas.

In December 2020, the City notified the County of its intent to withdraw from the JPA so it could begin administering its own ambulance services effective July 1, 2021. The City requested that the County not approve a contract extension with GCA so it could instead contract with another ambulance services provider. County officials rejected this request and approved the GCA contract extension.

At the Trial Court

The City moved for a preliminary injunction to prevent the County from providing ambulance services within city limits after June 30, 2021, claiming it retained authority under the EMSA to provide such services because it was indirectly contracting for those services through the JPA. The trial court disagreed and denied the City's motion, finding: 1) the City did not have authority to contract for ambulance services; 2) the City would not suffer irreparable injury in the absence of an injunction; and (3) denying the injunction would best serve the public interest

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's findings, applying *de novo* review to interpretation of the EMSA under the abuse of discretion standard applicable to preliminary injunction decisions, under the binding holding of the California Supreme Court which held that when a city delegates the administration of ambulance services to the surrounding county, which then assumes control, the city may not later attempt to resume administration of those services. (*Valley Medical Transport, Inc. v. Apple Valley Fire Protection District* [*Valley Medical*], 17 Cal.4th 747, 761-762 (1998).)

Statutory Interpretation under EMSA

The EMSA aims to achieve integration and coordination among various government agencies and EMS providers. The California Legislature contemplated that cities would eventually be integrated into local county EMS agencies. (*County of San Bernardino v. City of San Bernardino* [*County of San Bernardino*], 15 Cal.4th 909, 925 (1997).)

County EMS agencies are required to be the exclusive contractors for EMS services where cities were not providing for those services as of June 1, 1980, and cities which were providing for those services as of June 1, 1980 are allowed to continue providing/contracting for those services but may give up the legacy right by requesting the county EMS agency to take over. (Health and Safety Code, § 1797.201)

One of the purposes of Health and Safety Code § 1797.201 is to allow cities to protect the investments they have already made in emergency medical equipment, infrastructure, personnel, *etc.* (*County of San Bernardino*, *supra*, 15 Cal.4th at pp. 929-930.) Section 1797.201 is not a broad recognition or authorization of autonomy in the administration of EMS for cities but is instead a grandfathering of existing EMS operations until those services are integrated into the larger EMS system. (*Valley Medical*, *supra*, 17 Cal.4th at p. 758.)

If a city did not provide or exercise administrative control over a specific type of EMS operations on June 1, 1980, it cannot later seek to provide or administratively control that service. This is true even if the city retains some sort of concurrent jurisdiction with the county over a service. (*County of San Bernardino*, at pp. 929, 933-934.)

Valley Medical and *County of San Bernardino* resolved the central issue in this case, which is that a city that ceased to provide EMS services and instead permitted those services to be provided or administered by the county EMS agency may not unilaterally resume administration of those services. Thus, the City cannot show a likelihood of prevailing on the merits of its claim, and the trial court's denial of its motion for a preliminary injunction was proper.

No Retained City EMS Police Power

The City claimed that the trial court's construction of Health and Safety Code § 1797.201 violated the prohibition against contracting away police powers.

Assuming that the provision of ambulance services is a police power, the exercise of that power is subject to constitutional constraints. A city has the power to make and enforce only those ordinances and regulations that are not in conflict with general laws. (Cal. Const., Art. XI, § 7.) The EMSA is a general law that relates to and acts uniformly upon the whole of any single class of individuals or objects. The City's authority to provide and administer ambulance services is thus subject to the limits set forth in the EMSA.

The City claimed that it never gave up its power under the EMSA because the County's authority to contract for and provide ambulance services within city limits arises from the JPA. But since June 1, 1980, the County's authority to provide ambulance services in city limits has not come from the JPA; it has come from the EMSA. (*County of San Bernardino*, *supra*, 15 Cal.4th at p. 929.) And under the EMSA, a city may not expand its control by excluding the county provider of ambulance services. (*County of San Bernardino*, at pp. 933-934.) City ceased contracting for, providing, and administering ambulance services when it signed the JPA in 1971. Regardless of whether it withdraws from the JPA, it may not now resume providing those services absent the County's consent.

Conclusion and Implications

This opinion by the Second District Court of Appeal affirms the exclusivity of county EMS agencies under the EMSA. Only cities that have retained their exclusive control over EMS services may continue to do so. Cities who feel they are being slighted by the county EMS agency in the provision of EMS services must obtain redress with means other than by seizing control of EMS services administration. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B312348.PDF.
(Boyd Hill)

THIRD DISTRICT COURT REJECTS SEVERAL CEQA CLAIMS BROUGHT BY PRO PER PETITIONER AGAINST AREA FLOOD CONTROL AGENCY

Gulli v. San Joaquin Area Flood Control Agency, Unpub., Case No. C088010 (3rd Dist. Dec. 3, 2021).

In an *unpublished* decision, the Third District Court of Appeal rejected a wide range of CEQA claims raised by a pro per petitioner against the San Juan Area Flood Control Agency (Agency) after the Agency did not select the petitioner's proposed flood mitigation project proposal near Stockton. For the most part, petitioner alleged a wide range of opinions that the Agency failed to comply with the California Environmental Quality Act (CEQA) when it prepared and certified an Environmental Impact Report (EIR) with its approval of a flood control wall. As both the trial court and Court of Appeal noted, many of petitioner's claims amounted to mere opinions that did not meet petitioner's burden of demonstrating that the EIR's findings were not supported by substantial evidence.

Factual and Procedural Background

In 2008, the Federal Emergency Management Agency (FEMA) revoked accreditation of levees surrounding the Smith Canal in the City of Stockton (City), which turned the surrounding area into a flood hazard zone. To mitigate this flood risk, the Agency evaluated several options and decided to construct a fixed flood wall and gate structure at the mouth of the canal. Two firms responded to a request for proposals, one of which was owned by the petitioner. Petitioner proposed an alternative to the Agency's wall and gate structure, arguing that his solution was superior based on cost, schedule, and urban levee design criteria. Petitioner's proposal was rejected.

In 2014 and 2015, the Agency prepared and certified an EIR approving the flood wall project. The Draft EIR for the project noted that several measures and alternatives had been considered but were not carried forward, including four alternatives proposed by petitioner. Petitioner made public comments and submitted letters after the DEIR was released effectively arguing that "there are much better solutions to this [flood risk] problem."

At the Superior Court

After the City certified the final EIR, petitioner filed a writ action pro per. After the Agency won a series of demurrers, petitioner amended his petition to argue under CEQA that the Agency: 1) restrained and failed to address public comments during the CEQA process; 2) piecemealed environmental review; 3) failed to recirculate the EIR after new information was discovered; 4) filed a false "notice of intent" and statement of overriding "circumstances"; 5) failed to notify interested parties; and 6) improperly evaluated various environmental impacts.

The trial court denied each of petitioner's claims noting that the burden of proof was on petitioner to demonstrate that Agency had engaged in a prejudicial abuse of discretion. To make this showing petitioner needed to demonstrate that the conclusions in the EIR were not supported by substantial evidence. To do so, petitioner was required to lay out the evidence favorable to both sides and show why the Agency's evidence was lacking. Here, the trial court noted that petitioner's claims centered on a proposed alternative that was never raised or discussed during the CEQA process and thus could not be raised for the first time in the trial court. Even if petitioner did raise his arguments at the administrative level, petitioner would not prevail because such arguments amounted to a mere "disagreement among experts" that is insufficient to render an EIR inadequate.

The Court of Appeal's Decision

Petitioner timely appealed and proceeded pro per with pleadings the court noted were2 "difficult to follow and replete with procedural violations." Ultimately the court rejected each of petitioner's claims.

Claims that the Administrative Record Failed to Conform to Public Resources Code Section 21167.6

The petitioner claimed that the administrative record prepared by the Agency violated § 21167.6(e) which sets out 11 categories of documents that must be included in the record of CEQA proceedings. The court disagreed.

Petitioner argued that the administrative record was defective because the Agency determined the contents of the record; the record did not include "prejudicial information"; the record was burdensome, duplicative and disorganized; documents were illegally redacted; and petitioner as not allowed to correct supplement, or augment the record.

The court concluded that none of petitioner's arguments affirmatively demonstrated error in the trial court's ruling that the record conformed to Public Resources Code § 21167.6(e), and that petitioner's arguments were nothing more than perfunctory claims. Petitioner also argued that the Agency violated § 21167(b)(1) by "controlling what was put into and what was let out of the record." The Agency controlled what was put in the record because the Agency had stipulated with petitioner that the Agency would pay the costs to prepare the administrative record. Here he could "hardly be heard to complain about the agreement he made." Finally the court noted that if it were to rule in favor of the petitioner on this point, the result would be that petitioner would simply be required to reimburse Agency for its costs in preparing the record and rescind the parties' stipulation, which the court was not inclined to do.

CEQA Claims

Petitioner argued that the EIR failed to address two comments, one of which was from the petitioner regarding flood impacts and another that claimed the project needed to be approved by the U.S. Army Corps of Engineers.

Regarding petitioner's correspondence, the court concluded that while the EIR did not specifically address petitioner's concern that placing fill in a nearby river would increase the flood stage, there was no prejudice because elsewhere the EIR examined whether the project would significantly raise the flood stage and concluded it would not.

The court went on to quickly reject a host of petitioner's additional CEQA claims that challenged the EIR's statement of overriding considerations, alleged the Agency's failure to notify interested parties, and that the EIR's evaluation of project alternatives, flooding impacts, and navigational safety hazards was inadequate. In the court's conclusion, these allegations were little more than the petitioner's personal opinions and conclusions that failed to show that substantial evidence did not support Agency's findings in the EIR.

Conclusion and Implications

The *Gulli* decision is helpful in demonstrating the substantial evidence standard and the burden of proof placed on CEQA plaintiffs challenging the findings in an Environmental Impact Report. A copy of the court's decision can be found online at: https://www.courts.ca.gov/opinions/nonpub/C088010A.PDF. (Travis Brooks)

SECOND DISTRICT COURT AFFIRMS CITY'S REVOCATION OF CONDITIONAL USE PERMIT FOR OPERATION OF COMMERCIAL ANTENNAE BASED ON VIOLATION OF PERMIT CONDITIONS

Indian Peak Properties, LLC v. City of Rancho Palos Verdes, Unpub., Case No. B303325 (2nd Dist. Nov. 16, 2021).

The Second District Court of Appeal in an *unpublished* opinion has affirmed the trial court's decision denying petitioner Indian Peak Properties, LLC's (Indian Peak) petition for a writ of *mandamus* against plaintiff City of Rancho Palos Verdes (City) on the grounds that the City's revocation of Indian Peak's land use Conditional Use Permit (CUP) to operate commercial antennae on residential property was not an abuse of discretion and that the City had provided Indian Peak with a fair hearing.

Factual and Procedural Background

In 2001, Indian Peak's president, then the owner of the residential property at issue, obtained a conditional use permit (CUP 230) to operate commercial antennae on the roof of the residence. The City has a municipal ordinance that regulates the installation and operation of commercial antennae (City Ordinance). In 2001, there was a horizontal antenna rack mounted on the roof with five vertical antenna masts for the reception and transmission of radio and internet signals. Each mast had four radiating elements. There were also two television antennae on the roof.

In August 2014, City received a complaint regarding the number of commercial antennae on the roof, and an inspection revealed that there were 11 vertical antennae and other equipment on the roof. The City issued to Indian Peak a notice of violation of the conditions of CUP 230 and directed Indian Peak to remove all but five of the vertical antennae or submit an application and fee to revise CUP 230. The notice stated that if the property was not brought into compliance, code enforcement action would occur.

In response to the City's notice, Indian Peak requested extensions of time, indicating it intended to submit an application for revision of CUP 230. But by October 2014, Indian Peak had done nothing, and the City referred the matter to its City Attorney. Indian Peak counsel then responded in December 2014 that the application fee was too high, that the new antennae did not require a CUP, and threatened to construct a commercial antenna of enormous proportions.

Over the next three-plus years, the City's attorneys and Indian Peak's counsel engaged in a sometimes contentious exchange of letters regarding the additional antennae, Indian Peak's obligation to comply with CUP 230 and the terms for an application to revise CUP 230. Eventually, the City agreed to a lower application fee and an expedited process for City Council review. An application for revision was filed by Indian Peak, but it was missing specific information which the City noted. Eventually, Indian Peak agreed to provide additional information in December 2017, and the City suspended its enforcement action.

On August 2, 2018, the City issued to Indian Peak a notice of public hearing to consider revocation of CUP 230 because the installation of antennae exceeded the maximum 5 allowed. Indian Peak retained new counsel and asked for an extension of time on the hearing scheduled for August 21, 2018. The new counsel letter repeated prior assertions that a revised CUP need only administrative and not City Council approval, stated that it was willing to work with the City to present alternatives to modify the antennae and asked for a 60-day extension to complete its application for revisions.

The revocation hearing took place on August 21, 2018. The Indian Peak counsel at the hearing offered

to work with the City to achieve some kind of resolution and removal of some of the antennae. The City Council voted to revoke CUP 230, citing to Indian Peak's clear pattern of lack of cooperation with the City in the process. The City Council declined to consider a potential resolution to continue the hearing.

At the Superior Court

Indian Peak filed a writ of mandate and also brought claims for damages with the superior court. Indian Peak argued that it had been deprived of a fair hearing because its counsel was not provided a reasonable opportunity to present a defense. Indian Peak also argued that the City's action in revoking CUP 230 was arbitrary and capricious because the restrictions imposed were prohibited or preempted by federal law and the City had failed to consider the merits of its application for a revision to CUP 230.

In its opposition to the writ of mandate, the City argued that Indian Peak had failed to exhaust its administrative remedies to challenge staff's assessment that the application for revision of CUP 230 was incomplete. The City conceded that federal law restricted its right to regulate a satellite dish drum antenna but contended that its insistence Indian Peak remove or receive authorization for all other antennae other than those approved in CUP 230 was not limited by federal law.

The Superior Court found that the City provided Indian Peak a fair hearing, with sufficient notice (19 days rather than the required ten days' notice). The court, using its independent judgment, rejected the argument that there was prejudicial abuse of discretion by not granting new counsel's request for continuance for several reasons: 1) there had been four years of discussion regarding noncompliance; 2) no evidence was presented that hiring of new counsel was due to circumstances beyond Indian Peak control; 3) counsel did not state that the continuance was needed to defend against the revocation hearing, but instead conceded that Indian Peak was in violation; 4) there was sufficient evidence that Indian Peak was in violation of CUP 230.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's findings, applying *de novo* review to Indian Peak's challenge of the procedural fairness, a matter of law. There was no dispute as to the City's findings for revocation under the substantial evidence standard of review—after years of unproductive discussions, the City's decision not to engage yet again in negotiations with Indian Peak was entirely reasonable.

Fair Hearing

The fair trial requirement for administrative *mandamus* claims under Code of Civil Procedure § 1094.5 is equivalent to a prescription that there be a fair administrative hearing. The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and the opportunity to meet it. The opportunity to be heard must be afforded at a meaningful time and in a meaningful manner.

Indian Peak had both notice and an opportunity to defend its conduct and fully exercised its right to be heard by submitting a written response prepared by counsel and making an oral presentation and responding to questions at the revocation hearing.

The City's denial of Indian Peak's request for a continuance of the revocation hearing after Indian Peak selected new counsel to represent it did not transform an otherwise fair procedure into one that was unfair. While Indian Peak was certainly permitted to change counsel and was not obligated to explain its reason for doing so, the presence of a new lawyer after four years of debate between the City and Indian Peak's former counsel whether additional antennae on the roof violated CUP 230, the precise issue to be addressed at the revocation hearing, did not automatically entitle Indian Peak to yet more time to research possible defenses of a charge first made four years earlier.

Whether to grant a continuance was a matter of discretion for the hearing officer. The hearing officer did not abuse that discretion because there was no showing that the new counsel needed a continuance to contest the revocation, but instead the continuance was sought for a different reason to seek to allow operation of more antennae than were permitted. Against the backdrop of years of fruitless discussion on the issue of seeking new permitting, there was no abuse of discretion in denying the request.

The denial of the request for continuance did not prejudice Indian Peak at the revocation hearing. Indian Peak admitted that the new antennae had been added to the rooftop array in violation of CUP 230.

Exhaustion of Administrative Remedies

Indian Peak asserted that the City's action in revoking CUP 230 was arbitrary because it violated its July 2016 agreement to consider Indian Peak's revision application based on limited information and did not consider whether aspects of the antenna array were protected from local land use regulation by federal law.

With respect to the revision application, Indian Peak failed to utilize available administrative remedies to challenge staff's November 2016 assessment that the application was incomplete. To the contrary, Indian Peak agreed at an in-person meeting in December 2017 to provide additional information.

With regard to the federal law argument, Indian Peak identified only the satellite dish drum antenna as protected under federal law. The City conceded it could not regulate the satellite dish drum antenna, but the satellite dish drum was not the basis for the City's revocation of CUP 230.

Conclusion and Implications

This *unpublished* opinion by the Second District Court of Appeal deals with an extreme situation of failure to comply with condition of a CUP and with an attempt to backstop that failure with a procedural claim of unfair trial based on an unfounded request for continuance. A party seeking to delay an administrative hearing based on new counsel needs to have documented support on the reasons for hiring new counsel, and not a history of previous unfounded procedural delay. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/B303325.PDF.
(Boyd Hill)

SECOND DISTRICT COURT UPHOLDS DENIAL OF UNION'S PERMISSIVE INTERVENTION INTO COMPLEX CEQA MATTER RELATED TO THE PORT OF LOS ANGELES

South Coast Air Quality Management District v. City of Los Angeles et al., 71 Cal.App.5th 314 (2nd Dist. 2021).

In a decision filed November 4, 2021, the Second District Court of Appeal upheld a Los Angeles County Superior Court order refusing to allow the International Longshore and Warehouse Union Locals 13, 63, and 94's (Union) motion for permissive intervention in a complicated and long-running action under the California Environmental Quality Act (CEQA) regarding the China Shipping Container Terminal (Terminal) in the Port of Los Angeles. The Union was a permissive litigant seeking to get involved in an action where its interests were already represented by other parties seeking to keep the Terminal open, accordingly the Court of Appeal upheld the trial court's decision to exclude the Union from the litigation.

Factual and Procedural Background

The Port of Los Angeles is the busiest seaport in the western hemisphere with significant trade with Asia. The Terminal is owned by the City of Los Angeles and is leased to several Chinese owned businesses (shipping companies). In 2001, certain entities owned by the City (City entities) issued a permit to the shipping companies to build the Terminal. In 2008, several community groups filed a CEQA lawsuit challenging the City's approval of the Terminal. As part of the settlement of that lawsuit, the City entities were required to prepare an Environmental Impact Report (EIR) which found the project would have significant and unavoidable adverse environmental impacts to air quality, aesthetics, biological resources, geology, transportation, noise, and water quality sediments and oceanography. As a result, the City entities adopted more than 50 mitigation measures to reduce these impacts. In the following years, the City entities failed to implement these measures and many were ignored altogether. As a result, in 2020, the City entities adopted an updated EIR that incorporated further mitigation measures, which were not subsequently enforced or implemented by the shipping entities.

At the Superior Court

In 2020 the South Coast Air Quality Management District (Air District) filed a petition for writ of mandate alleging that the City entities failed to enforce the 2008 and 2020 mitigation measures. The Air District's petition alleged that the 2020 EIR violated CEQA in several ways and asked the court to set aside the approvals for the Terminal pending compliance with CEQA.

In November 2020, the California Attorney General and the California Air Resources Board (CARB) filed a joint motion to intervene asserting that they were entitled to mandatory intervention under the Code of Civil Procedure. The trial court agreed that the Attorney General had a statutory right to intervene and observed that CARB had a right to partial mandatory intervention. The trial court found that CARB had particularized regulatory interest in a nearby community emissions reduction plan that would be impacted by the Terminal and related litigation.

The Union also filed a motion for permissive intervention based on the claim that 3,075 of its members would lose their jobs if the court required the Terminal to shut down. The trial court ruled that the Union's interest in the case was speculative and consequential and not direct and immediate which is required for permissive intervention. The prejudice to existing parties outweighed the reasons supporting intervention. The Union appealed the ruling and the City entities filed a brief in support of the appeal.

The Court of Appeal's Decision

The Second District Court began by noting that the court's exercise of discretion in denying the Union a "seat at the table" was proper. Under statutory provisions allowing for permissive interventions, trial courts have discretion to permit nonparties to intervene in a lawsuit provided that four factors are met: 1) the nonparty follows proper procedures, 2) it has a direct and immediate interest in the action, 3) intervention will not enlarge the issues, and 4) the reasons for intervention outweigh any opposition by existing parties. When determining whether to allow a permissive intervention, a trial court must balance the interests of those affected by a judgment against the interests of the original parties in pursuing their case unburdened by others.

The court reviewed the trial court's decision under the abuse of discretion standard and concluded that "the trial court reasonably concluded that the Air District's interest in litigating the case without Union involvement outweighed the Union's reasons for intervening." The court found that even if the Union's interest was direct, denying permissive intervention in the circumstances was a proper action of the trial court. The Union admitted its position on the merits of the case was duplicative because the City entities were already defending their actions regarding the terminal.

The appellate court also noted that Union intervention would create undue complexity in the matter. The Union represented 3,075 members but the Union also acknowledged that the Terminal provided approximately 80,000 indirect jobs in the Los Angeles region. The trial court could "reasonably conclude that permitting Union intervention in the lawsuit would spur representatives of the other tens of thousands of jobs connected to the terminal to enter the fray. That result would be unmanageable"

Here the trial court "had no mandatory obligation to open the gate to every potentially affected interest that might mobilize itself to appear." Trial judges need to balance the realities of trial court management against the claims of all wishing to be heard. As a result, the court determined that the "trial court's decision was sound."

Conclusion and Implications

This case is helpful in illustrating the difference between mandatory litigants and permissive litigants in writ actions. A permissive litigant may have a direct interest in the outcome of litigation, but the trial court has wide discretion based on the circumstances include or exclude such litigants. The court's decision can be found here: https://www.courts.ca.gov/opinions/documents/B310783.PDF.
(Travis Brooks)

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