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[CALIFORNIA ENDANGERED SPECIES ACT PROHIBITS STATE AGENCIES FROM TAKING THREATENED AND ENDANGERED SPECIES WITHOUT PERMIT AUTHORITY](#)

[Kern County Water Agency v. Watershed Enforcers, No. A117715 \(1st Dist. June 17, 2010\)](#)

By *[Keith Garner](#)* and Alex Merritt

Last month the California Court of Appeal for the First District held that the California Endangered Species Act ("CESA") prohibits a state agency from taking threatened or endangered species without proper permit authority. In reaching this conclusion, the court resolved an interesting question of statutory construction, finding that a state agency is a "person" for purposes of CESA. The decision also indicates that courts will construe CESA liberally to promote the Legislature's goal of conserving threatened and endangered species.

Kern County Water Agency v. Watershed Enforcers concerned the Harvey O. Banks Pumping Plant, a facility that diverts water from the Sacramento River Delta as part of the State Water Project. In connection with its operations, the Banks Pumping Plant entrains and kills significant numbers of fish, including winter-run chinook salmon, spring-run chinook salmon, and delta smelt. California lists all three fish as threatened or endangered species.

Watershed Enforcers, a nonprofit environmental group, petitioned for a writ of mandate to compel the Department of Water Resources, which runs the Banks Pumping Plant, to stop taking the threatened and endangered fish without permit authority. Kern County Water Agency, San Luis & Delta Mendota Water Authority, and Westlands Water District intervened. The trial court ruled for Watershed Enforcers and issued the writ. DWR and the water agencies appealed.

While the appeal was pending, DWR complied with the writ by obtaining the necessary permits. After DWR had complied with the writ and abandoned its appeal, the case became moot, but the water agencies continued to pursue their appeal. In deciding whether to reach the merits of the appeal, the First District noted that courts have "inherent discretion to consider a moot issue if it raises a matter of general public interest that is likely to recur." The court found that *Watershed Enforcers* presented such an issue, and therefore decided to consider the merits of the appeal.

The appeal concerned CESA Section 2080, which prohibits the taking of threatened and endangered species. In relevant part, Section 2080 provides that "[n]o person shall . . . take . . . any species . . . that the [Fish

and Game Commission] determines to be an endangered or threatened species." The water agencies argued that DWR, a state agency, was not a "person" within the meaning of Section 2080. They further argued that because Section 2080 did not apply, DWR was not prohibited from taking the threatened and endangered fish, and did not need to obtain permits. The court of appeal took the case to decide whether a state agency is a "person" within the meaning of Section 2080.

The crux of the water agencies' argument was that a state agency does not come within the general statutory definition of "person" in Section 67 of the California Fish and Game Code. Section 67 defines "person" as "any natural person or any partnership, corporation, limited liability company, trust, or other type of association." The water agencies argued that a state agency was not any of the enumerated entities and therefore not a "person." The court agreed "that the literal textual meaning of this definition would seem to exclude state agencies." Nevertheless, the court went on to decide that a state agency was a "person" within the meaning of CESA Section 2080.

In deciding that a state agency was a "person" under CESA, the court pointed to broad qualifying language in the "General Definitions" chapter of the Fish and Game Code. That chapter provides that the specific definitions will govern the construction of the code, "[u]nless the provisions or the context otherwise requires" The court stated that this language "allows an alteration, and a legally permissible expansion of the specific statutory definition" in appropriate circumstances. The court then decided that the context and policies of CESA require an expanded definition of "person" that includes state agencies.

The court reviewed CESA and found that several sections expressly applied to state agencies. In particular, the court examined CESA Section 2081, which provides a mechanism for exempting state agencies from the takings prohibition in Section 2080. The court found that "it is illogical to expressly exempt an entity from a prohibition that did not apply to it in the first place. Therefore, section 2080 must apply to public entities or the exemption for public agencies in section 2081 is rendered surplusage" Similarly, the court noted that CESA Sections 2053 and 2055 contemplated that state agencies would be subject to CESA. In the context of these provisions, the court found that the "statutory language, taken as a whole . . . strongly supports the conclusion that the Legislature intended state agencies to be 'persons' under section 2080."

In addition, the court noted that the California Department of Fish and Game—the agency responsible for implementing CESA—had construed "person" to include state agencies. The court did not expressly defer to the Department's interpretation, but it cited several examples of Department regulations that treated state agencies as subject to CESA.

Throughout the opinion, the court invoked principles of statutory construction to support its conclusion. It noted that courts must construe statutes to comport with legislative intent and further general statutory purposes. In this case, the court noted that the "laws providing for the conservation of natural resources

such as CESA are of great remedial and public importance and thus should be construed liberally." (internal punctuation and citations omitted). Furthermore, the court noted that "interpreting section 2080 to exclude state agencies would lead to the unreasonable result that major actors, whose operations result in the taking of endangered and threatened species, would be exempt from the general take prohibition."

Watershed Enforcers cited three cases, in which courts assumed that state agencies were subject to the takings prohibition of CESA. The court stated that these cases were not authoritative because they had not expressly considered the statutory construction issue. But the cases prompted the court to ask the following:

"[I]n the context of preservation of endangered and threatened species, would it be logical for the Legislature to exempt government agencies from the CESA taking prohibition, when those agencies operate large enterprises (dams, pumping stations, irrigation systems, etc.) while covering individual hunters and fishermen and business associations, which would generally take species in fewer numbers and in narrower scope? From a logical policy perspective, we think not. This perhaps helps explain why three published decisions have assumed section 2080 applies to public agencies, why the agencies did not challenge the application in those cases, why DWR did not challenge it in the present case, and why CESA existed for over two decades before anyone raised this issue."

In light of all these considerations, the court concluded that "given the context and policies of CESA, including the policy of species preservation made expressly applicable to state agencies, as well as the statutory language expressly referring to state agencies, that a state agency is a 'person' within the meaning of Section 2080." The court rejected all the water agencies' authority to contrary, finding it inapplicable or unpersuasive.

The *Watershed Enforcers* decision makes clear that the take provisions of CESA apply to state agencies. It also underscores the point that courts will interpret CESA broadly to advance the statute's goal of protecting threatened and endangered species.

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