

ENVIRONMENTAL  
LAW

ARTICLES SECTION



# THE CALIFORNIA ENVIRONMENTAL QUALITY ACT AT 40

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I'm delighted to be here with my distinguished fellow panelists to join in a discussion of CEQA at 40. It's been observed that, although early on the California Supreme Court played an active role in interpreting and shaping CEQA, in the years that followed there was something of a hiatus in the court's CEQA jurisprudence, until the last five or six years, during which the court has issued a number of CEQA opinions.

First, I would like to briefly revisit the court's seminal CEQA cases, decided in the 1970s, the cases that set the stage for all that was to follow. Next, I'll describe the court's internal procedures for granting review and assigning cases. Finally, I'll touch on some of the principles established in our recent CEQA decisions.

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\* Associate Justice, California Supreme Court, 1994–2017. Remarks delivered at the State Bar of California Environmental Law Section 2010 Environmental Law Conference at Yosemite®, Session 2: “CEQA Turns 40,” October 22, 2010 (with co-panelists Susan Brandt-Hawley, Kip Lipper, James G. Moose, Ronald B. Robie, and Lisabeth D. Rothman).

## I. INSIDE THE COURT

### A. HOW CASES COME TO US

Before the Supreme Court can address an issue, of course, one of the parties in the case has to petition for review. Someone has to bring a lawsuit challenging an agency's CEQA compliance, the party losing in the trial court has to appeal, and the loser in the Court of Appeal has to petition us. We receive approximately 7,000 petitions a year, and we grant approximately one to two percent. Under our rules, a case is grantworthy (1) if there is a conflict among the lower courts, or (2) the issue is a recurring one that needs to be resolved, or (3) the case poses a question of statewide importance that would benefit by our resolution. In other words, we grant review to secure uniformity of decision or to settle an important rule of law.

### B. CEQA GRANTS

With respect to CEQA cases, as I mentioned, the court's decisional output has fluctuated over the years. In the early days, right after CEQA's enactment, the Supreme Court accepted a number of cases involving the act, starting of course with the monumental *Friends of Mammoth*.<sup>1</sup> Until *Friends of Mammoth*, CEQA was thought to apply only to public works projects. *Friends of Mammoth* put an end to that, with the court holding that the act applied as well to governmental agency approval of private projects. We also articulated the principle that CEQA "must be interpreted to afford the fullest possible protection to the environment within the reasonable scope of statutory language."<sup>2</sup> Had we been wrong, the Legislature could have said so. Instead, it codified our decision.

After *Friends of Mammoth*, the next case to come before us was *No Oil, Inc. v. City of Los Angeles*,<sup>3</sup> involving off-shore drilling of test oil wells, a project the trial court ruled did not require an Environmental Impact Report ("EIR"). In *No Oil* we rejected the trial court's standard that an EIR is required only if "there is a reasonable possibility that the

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<sup>1</sup> *Friends of Mammoth v. Board of Supervisors of Mono County*, 8 Cal.3d 247 (1972).

<sup>2</sup> *Id.* at 259.

<sup>3</sup> *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68 (1974).

project will have a momentous or important effect of a permanent or long enduring nature,'”<sup>4</sup> and adopted the rule that an EIR is required if there is “‘substantial evidence that the project “may have a significant effect” environmentally,’”<sup>5</sup> and this is so even if there also is substantial evidence supporting the contrary conclusion of no significant environmental impact.

The same year as *No Oil*, 1975, we decided *Bozung v. Local Agency Formation Commission*,<sup>6</sup> involving a city’s annexation of agricultural land where a development was proposed and was expected to occur “within the near future.” in *Bozung*, we held that CEQA requires an EIR before any governmental activity — in this case, annexation — that may have as its *ultimate* consequence a physical change in the environment, and we also held that an EIR must be prepared at the earliest possible stage in the sequence of governmental actions that might lead to development. Finally, the last in this series of early cases was *Wildlife Alive v. Chickering*,<sup>7</sup> decided in 1976, where we held exemptions from CEQA are to be narrowly construed.

The net result of these cases was that CEQA should be broadly construed to effectuate its purpose of environmental protection, and exemptions to CEQA should be narrowly construed. After this early activity, the court in the ensuing decades issued only a few CEQA opinions, until the last five or six years. The question seems to be if there is a particular reason.

Some have speculated that the composition of the court might explain our willingness or disinclination to take CEQA cases, but I would argue that’s simply not the case. While the court’s composition might affect *how* a case is decided, it doesn’t affect whether to grant review. Basically, we grant the cases that need to be decided. When there’s a conflict we almost always grant review. An exception might be when it appears the trend in the Courts of Appeal is in a particular direction, and we agree with the trend, so it appears likely the issue will be resolved without our input. Other reasons not to take an otherwise grantworthy case are (1) that the case is

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<sup>4</sup> *Id.* at 78.

<sup>5</sup> *Id.* at 75.

<sup>6</sup> 13 Cal.3d 263 (1975).

<sup>7</sup> 18 Cal.3d 190 (1976).

not a good vehicle, in that it has some procedural problem or unusual facts that would preclude a clear statement on the point, or (2) there's recent legislation that has resolved the question, or (3) the court decides to let the issue "percolate" in the Courts of Appeal so we can have the benefit of the lower courts' views.

In the early years, there were a number of questions concerning the scope and application of the new law that needed addressing and which the court evidently felt were appropriate for judicial resolution. As time went on, these questions became fewer and so did petitions to our court.

### C. CONFERENCE AND ASSIGNMENT OF CASES

So, let me take you to our Wednesday morning conference. Every Wednesday morning, we meet in the chief's chambers to discuss and vote on petitions for review. The number of petitions can vary from 150 (this past week) to over 500 (two weeks ago, when we had a double conference). Of course, we have our "A" list and our "B" list, the "A" list petitions being those that we expressly consider at conference and the "B" list being those that are deemed routine and are not discussed. Four votes are required to grant a petition. If a petition is granted, after conference the chief justice assigns the case to one of the justices who voted to grant.

We don't know exactly what the chief justice's system is, but no one has ever complained; well — with some few exceptions. At the least, he considers who is likely to write an opinion that will garner a majority, and he also considers each justice's work load.

No justice is considered an expert in an area of the law for the purpose of being assigned cases; in other words, we don't specialize, and even if we *think* we're a specialist, that holds no weight in the assignment process. Nor is it our practice for individual justices to request assignment of a particular case. Be that as it may, some kinds of cases do tend to be assigned in bunches. For a number of years, I seemed to be assigned all the SLAPP cases (Strategic Lawsuit Against Public Participation). I may at some point have said, "Please, don't SLAPP me again!" Others have complained of drowning in water cases. But this is all in fun. With respect to CEQA, for reasons unknown to me, of the court's twelve most recent CEQA opinions, I was the assigned author of seven.

## D. FROM GRANT TO OPINION

Moving, then, from the grant of review to the opinion, what happens is that after the case is assigned and has been fully briefed, the assigned chambers prepares a so-called calendar memorandum setting out the issues and the arguments, the proposed analysis, and the assigned justice's tentative conclusion. The other justices then have 30 days to submit written preliminary responses, which can range from a straight concur with no comment, to concur with reservations, doubtful, or disagree, all of which require a statement of reasons. When the calendar memo has garnered a tentative majority, the case is set — or calendared — for oral argument. We confer on each case immediately after argument. If the assigned justice retains her majority, she drafts an opinion, which is then circulated, and any dissenting justice circulates a dissent. When everyone has signed one of the opinions, the case is filed.

## II. THE COURT'S ROLE IN DEVELOPING CEQA

In the early years the court played an important role in the evolution of CEQA, addressing its substantive provisions and giving the law a broad scope. Today the cases that come to us involve not so much the meaning and scope of the law, but its proper application, both procedurally and substantively. Doubtless to the frustration of practitioners and agencies, many of the decisions are intensely fact specific and not amenable to “bright line” rules. But I'll mention a few established principles:

### A. THE STANDARD OF REVIEW

First, the standard of review — judicial review of an agency's compliance with CEQA extends only to whether there was a prejudicial abuse of discretion. The court does not pass on the correctness of the EIR's environmental conclusions, but only on its sufficiency — procedurally or factually — as an informational document. A prejudicial abuse is established if the agency has not proceeded in a manner required by law, or if the agency's factual conclusions are not supported by substantial evidence. We review questions of law or procedure *de novo* and questions of fact for substantial evidence. The court's scrutiny, therefore, depends on the nature of the alleged defect.

In recent cases, we've reviewed de novo the following issues of law or procedure: whether an activity is a project (*Muzzy Ranch Co. v. Solano County Airport Land Use Commission*<sup>8</sup>); what is the proper baseline for CEQA analysis (*Communities for a Better Environment v. South Coast AQMD*<sup>9</sup>); what is the appropriate time for CEQA compliance (*Save Tara v. City of West Hollywood*<sup>10</sup>); is mitigation feasible and can an agency be responsible for mitigation of off-site impacts (*City of Marina v. Board of Trustees of the California State University*<sup>11</sup>); the necessity for recirculation of a draft EIR after public consultation and input (*Vineyard Area Citizens v. City of Rancho Cordova*<sup>12</sup>); and whether the agency followed correct procedure in analyzing cumulative impacts (of a timber harvest plan, in its choice of assessment areas) (*Ebbetts Pass Forest Watch v. Cal. Dept. of Forestry*<sup>13</sup>), to name only a few.

## B. SUBSTANTIVE DECISIONS

We've also issued some substantive decisions:

(1) In *Muzzy Ranch* — we held CEQA may require lead agencies to consider the effects of “displaced development” resulting from restrictive land use policies, where such development can be reasonably anticipated.

(2) In *Communities for a Better Environment* — we held the proper baseline for CEQA analysis is actual conditions in existence, not previously permitted pollution levels.

(3) In *City of Marina* — we held an agency's mitigation responsibility may extend to off-site impacts.

(4) In *Save Tara* — we held an agency's substantial commitment to a public-private agreement for land use was an “approval” requiring an EIR, notwithstanding the agreement was conditioned on subsequent CEQA compliance.

(5) And in *Vineyard Area Citizens* — we established that an EIR must contain all its relevant information in one document so as to clearly

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<sup>8</sup> 41 Cal.4th 372 (2007).

<sup>9</sup> 48 Cal.4th 310 (2010).

<sup>10</sup> 45 Cal.4th 116 (2008).

<sup>11</sup> 39 Cal.4th 341 (2006).

<sup>12</sup> 40 Cal.4th 412 (2007).

<sup>13</sup> 43 Cal.4th 936 (2008).



communicate the project's significant environmental effects, and we also outlined the information an EIR for a long-term land development project must contain concerning its proposed water sources and the environmental impacts of using those sources.

## CONCLUSION

Let me conclude by saying that, as the cases come to the court, we will continue to take the ones that require resolution and do our best to clarify the law — admittedly not an easy task with CEQA. Thank you.

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*Honoring Justice Kathryn Werdegar for*

## LANDMARK DECISIONS INTERPRETING THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

SUSAN BRANDT-HAWLEY AND JAN CHATTEN-BROWN\*

We celebrate the legacy of Justice Werdegar on the California Supreme Court with gratitude. As each of her authored opinions interpreting the California Environmental Quality Act (CEQA) has issued, we — along with our colleagues practicing on all sides of California’s environmental bar — have marveled at their depth and breadth.

In 1970, the Legislature declared that California agencies shall “take all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise.”<sup>1</sup> Justice Werdegar’s comprehensive opinions impart in elegant and exacting prose an overarching respect for the mandates of CEQA combined with a pragmatic approach to its interpretation. Along with her leadership on a court that has issued many landmark environmental rulings, Justice Werdegar has authored an

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<sup>1</sup> CAL. PUB. RESOURCES CODE, § 21001, subd. (b).

unprecedented number of CEQA opinions, addressing a wide range of environmental issues affecting water supply, rapid transit, oil refineries, historic resources, airports, university expansion, and, most recently, control of greenhouse gases. None of these topics are simple.

Many of Justice Werdegar's decisions address the varying standards of review in CEQA cases. The opinions also illuminate the act's substantive mandate, markedly different from the federal National Environmental Policy Act (NEPA), as CEQA requires California's public agencies not only to study projects' significant environmental impacts but to mitigate those impacts to the extent feasible.

Justice Werdegar's opinions also emphasize the Supreme Court's commitment to judicial enforcement of CEQA's mandates despite acknowledged costs. Recently, *Center for Biological Diversity v. Department of Fish and Wildlife (CBD)*<sup>2</sup> held that CEQA documents addressing Southern California's Newhall Ranch project were gravely flawed. In reversing the judgment, the *CBD* opinion held that the scope of the court's review "does not turn on our independent assessment of the project's environmental merits. . . . CEQA's requirements for informing the public and decision makers of adverse impacts, and [imposing] feasible mitigation measures, *still need to be enforced.*"<sup>3</sup> As discussed below, Judge Werdegar's ruling led to a settlement of the Newhall Ranch project accomplishing significant environmental protections.

Beyond an unparalleled body of landmark CEQA rulings with direct effects on the cases at hand and enduring precedent shaping countless other projects, Justice Werdegar has contributed to environmental legal practice in seminars such as the 2010 State Bar Environmental Section's annual Yosemite Environmental Law Conference. In a panel convened in honor of the Act's 40th anniversary, Justice Werdegar reviewed CEQA's legacy and challenges with grace and warmth, to the delight of hundreds of environmental attorneys.<sup>4</sup>

While we will discuss some of Justice Werdegar's opinions, we can only hint at their substance and import in enforcing the mandates of CEQA

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<sup>2</sup> 62 Cal.4th 204 (2015).

<sup>3</sup> *Id.* at 204, 240 (emphasis added).

<sup>4</sup> [Editor's note: see Kathryn Mickle Werdegar, *The California Environmental Quality Act at 40*, 13 CAL. LEGAL HIST. 3 (2018).]

to the great benefit of California's citizens and landscapes. On behalf of the environmental bar, and, if we may, on behalf of our environment, we honor and thank her.

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## MITIGATION AND CEQA'S SUBSTANTIVE MANDATE

Justice Werdegar authored two opinions addressing the duty of the California State University (CSU) to mitigate off-campus impacts of its significant expansion projects. The first was a unanimous opinion in *City of Marina v. Board of Trustees of the California State University*,<sup>5</sup> with Justice Chin concurring. The ruling required CSU to mitigate the off-campus environmental impacts of campus expansions. The decision contributes to CEQA jurisprudence in many ways, addressing the standard of review for adjudicating EIR adequacy, the assessment of legal feasibility of project mitigation measures, and CEQA's substantive mandate that agencies adopt feasible mitigations *before* considering project approval based on considerations of public benefit.

The Fort Ord Reuse Authority (FORA) in Monterey County approved a capital improvement plan identifying roadways, utilities, and other infrastructure improvements for long-term development of the closed army base. The Army had transferred over a thousand acres to CSU for use as a new Monterey Bay (CSUMB) campus. FORA's capital improvement plan included infrastructure for the expanded CSU campus.

CSU prepared an EIR analyzing the impacts of adopting a Master Plan to substantially increase enrollment at CSUMB. The EIR concluded that expanding the campus would result in significant environmental impacts including: 1) drainage impacts from increased development-related runoff, 2) increased water supply demand, 3) increased traffic on off-campus roads, 4) increased sewage flows, and 5) need for increased fire protection. Identified mitigation measures called for improvement of the Fort Ord base infrastructure.

FORA contended that CSU should contribute \$20 million for its share for roads and fire protection. CSU refused to pay, asserting it was exempt

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<sup>5</sup> 39 Cal.4th 341 (2006).

from paying for road improvements or fire protection services and that any payment to FORA that was not specifically authorized by the Government Code was prohibited by the Constitution, would be an illegal gift of public funds, and was thus legally infeasible.

Acknowledging that environmental impacts would be significant and unavoidable, CSU approved the Master Plan based on a CEQA statement of overriding considerations, finding that off-campus environmental impacts would be outweighed by public benefits provided by the expanded university. CSU agreed to pay for water, sewer, and drainage improvements, but since CSU and FORA did not agree on the amounts for that infrastructure, CSU adopted a statement of overriding considerations as to those costs as well.

The nearby City of Marina joined with FORA in challenging CSU's actions in court, seeking contribution for the off-campus infrastructure costs of the campus expansion project. The Monterey County Superior Court granted the petition. The Court of Appeal reversed. FORA's petition for review was granted by the Supreme Court.

Justice Werdegar's opinion addressed the standard of review for considering the adequacy of an EIR: a question of law. "An EIR that incorrectly disclaims the power and duty to mitigate identified environmental effects based on erroneous legal assumptions is not sufficient as an informative document."<sup>6</sup> Underscoring CEQA's substantive mandate that projects with significant impacts cannot be approved without adoption of identified feasible mitigations and alternatives, the *City of Marina* opinion held — in a subsequently much-cited passage — that CSU had unlawfully adopted the statement of overriding considerations without first making findings as to whether the Master Plan's significant environmental impacts could be feasibly mitigated.<sup>7</sup> The court stated:

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<sup>6</sup> *City of Marina*, 39 Cal.4th 341, at 366.

<sup>7</sup> An earlier unanimous Supreme Court opinion authored by Justice Werdegar had also focused on CEQA findings for a statement of overriding considerations, on an ancillary procedural issue of whether appellants failed to exhaust remedies when they did not request reconsideration of an agency's findings at the administrative level. (*Sierra Club v. San Joaquin LAFCO*, 21 Cal.4th 489 (1999).) The Supreme Court reversed the Court of Appeal judgment, ruling that a petitioner need not request reconsideration to present "for the second time the same evidence and legal arguments one has previously raised solely to

CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible. Such a rule, even were it not wholly inconsistent with the relevant statute [citation] would tend to displace the fundamental obligation of "[e]ach public agency [to] mitigate or avoid the significant effects on the environment of projects that it carries out or approves . . . whenever it is feasible to do so' [citation]."<sup>8</sup>

The CSU Trustees abused their discretion in determining that the project's infrastructure effects could not feasibly be mitigated, as discussed below, and it necessarily followed that their statement of overriding considerations was invalid.

The *City of Marina* opinion ruled *as a matter of law* that CSU incorrectly treated mitigation of off-campus environmental impacts caused by its proposed expansion as legally infeasible. "CEQA requires the Trustees to avoid or mitigate, if feasible, the significant environmental effects of their project (Pub. Resources Code, § 21002.1, subd. (b)), and . . . payments to FORA may represent a feasible form of mitigation."<sup>9</sup> As the lead agency, CSU had discretion to fix the appropriate amount of payments to FORA in light of CEQA's requirement that mitigation measures be "roughly proportional."<sup>10</sup>

CSU argued that mitigation payments were legally infeasible because there was no way to guarantee that FORA would implement the infrastructure improvements, particularly in light of "dispute[s]" regarding the implementation of this "regional mitigation."<sup>11</sup> As the EIR explained, the payments sought from CSU represented only a fraction of the money required to build the infrastructure called for by FORA's own capital improvement plan. But while paying a fee is not adequate mitigation unless accompanied by a reasonable mitigation plan, the record contained

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exhaust administrative remedies . . ." (*Id.* at 510.) The case overruled the court's contrary decision in *Alexander v. State Personnel Board*, 22 Cal.2d 198 (1943). (*Id.*)

<sup>8</sup> *City of Marina*, 39 Cal.4th 341, at 368–369.

<sup>9</sup> *Id.* at 369.

<sup>10</sup> CEQA GUIDELINES, § 15126.4, subd. (a)(4)(B).

<sup>11</sup> *City of Marina*, 39 Cal.4th 341, at 363.

evidence that FORA had in fact adopted such a plan and could implement it. The *City of Marina* opinion held that CSU committed an error of law by contending that CEQA requires more. While CSU's ability to make payments to FORA might be infeasible if the Legislature failed to appropriate money for that purpose, CSU was required to specifically seek such funding.

*City of San Diego v. Board of Trustees of California State University*,<sup>12</sup> another unanimous opinion authored by Justice Werdegar, is a successor to *City of Marina*. The CSU Trustees approved a significant expansion of the campus at San Diego State University that would contribute to significant off-campus traffic impacts. The City of San Diego sued CSU for refusing to reimburse the city for its share of the impacts.

As noted in the *City of San Diego* opinion, the primary issue in *City of Marina* was CSU's assumption that campus geographical boundaries define the extent of the CSU Board's duty to mitigate.<sup>13</sup> At San Diego State, CSU refused to contribute to off-campus traffic mitigation based on language in *City of Marina*:

Fair-share mitigation is recommended that would reduce the identified impacts to a level below significant. However, the university's fair-share funding commitment is necessarily conditioned up[on] requesting and obtaining funds from the California Legislature. If the Legislature does not provide funding, or if funding is significantly delayed, all identified significant impacts would remain significant and unavoidable.<sup>14</sup>

Anticipating that the Legislature might not make an earmarked appropriation for mitigation, given the resources already budgeted for campus expansion, the CSU Board found that off-campus mitigation for San Diego State traffic would be infeasible. It certified the expansion of the EIR based on a statement of overriding considerations that the project's benefits would outweigh its unmitigated significant impacts. The Supreme Court granted review. It ruled that the language being relied upon by CSU from its earlier decision in *City of Marina* was dictum that:

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<sup>12</sup> 61 Cal.4th 945 (2015).

<sup>13</sup> *Id.* at 957.

<sup>14</sup> *City of Marina*, 39 Cal.4th 341, at 367.



does not justify the Board's assumption that a state agency may contribute funds for off-site environmental mitigation only through earmarked appropriations, to the exclusion of other available sources of funding. The erroneous assumption invalidates both the Board's finding that mitigation is infeasible and its statement of overriding considerations. Accordingly, we will affirm the Court of Appeal's decision directing the Board to vacate its certification of the EIR.<sup>15</sup>

The opinion thus held that the lack of a legislatively earmarked appropriation does not make mitigation costs legally infeasible and thus cannot satisfy CSU's duty to adopt feasible mitigation measures to address off-campus impacts.

## STANDARD OF REVIEW FOR EIR ADEQUACY; REVIEW OF LONG-TERM WATER SUPPLY

Justice Werdegar's opinion in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*<sup>16</sup> is among the most influential CEQA decisions issued by the court since CEQA was codified in 1970. Its clarification of procedural mandates that enforce CEQA's environmental protections has to date been relied upon in eight of the court's subsequent decisions and hundreds of appellate rulings. The opinion addresses CEQA's dual standards of review for EIR adequacy and the appropriate level of environmental review for a project's near-term and long-term water supplies. Justice Baxter concurred and dissented.

The court held that the EIR's analysis of the long-term water supply that would serve a 6,000-acre community plan was inadequate as a matter of law. The EIR improperly claimed to tier from a future regional water planning environmental document, failed to explicitly incorporate and/or tier from the discussion in another relevant EIR, and relied on a mitigation measure that would curtail development if an adequate water supply did not materialize without first analyzing the environmental impacts of such action.

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<sup>15</sup> *City of San Diego*, 61 Cal.4th 945, at 950.

<sup>16</sup> 40 Cal.4th 412 (2007).

While CEQA does not require “assurances of certainty regarding long term future water supplies at an early phase of planning for large land development projects,”<sup>17</sup> an agency cannot simply ignore or assume a solution to a water supply problem, but must provide enough information for decision makers to consider pros and cons of supplying water.<sup>18</sup> EIR analysis must address both short- and long-term water supply, and the supplies identified cannot be “paper water” but must be reasonably likely to be available.<sup>19</sup> Finally, if ultimately the availability of long-term water supplies is uncertain, the EIR must address the environmental impacts of securing possible replacement sources or alternatives to use of water.<sup>20</sup> The *Vineyard* opinion describes CEQA’s dual standards of review in detail. An adequate EIR requires strict compliance with law:

[A]n agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. (§ 21168.5.) *Judicial review of these two types of error differs significantly . . . .* In evaluating an EIR . . . a reviewing court must adjust its scrutiny to the nature of the alleged defect . . . . For example, where an agency failed to require an applicant to provide certain information mandated by CEQA and to include that information in its environmental analysis, we held the agency “failed to proceed in the manner required by CEQA.” [Citations.] In contrast, in a factual dispute over “whether adverse effects have been mitigated or could be better mitigated” [citation] the agency’s conclusion would be reviewed only for substantial evidence.<sup>21</sup>

Under *Vineyard*, adequacy of an EIR analysis presents a question of law. However, once an adequate EIR is certified, an agency’s fact-based conclusions and CEQA findings as to the significance of environmental impacts and the feasibility of alternatives and mitigations are deferentially reviewed for substantial evidence.<sup>22</sup> Here, the EIR’s analysis of the project’s

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<sup>17</sup> *Id.* at 432.

<sup>18</sup> *Id.* at 431.

<sup>19</sup> *Id.* at 432.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 427 (emphasis added).

<sup>22</sup> *Id.* at 435.

long-term water supply was not missing, but was held by the court to be insufficient as a matter of law.

## STANDARD OF REVIEW FOR EIR ADEQUACY; PRECOMMITMENT

A community group filed *Save Tara v. City of West Hollywood*<sup>23</sup> to apply CEQA protections to a large white colonial-style home in an intensely developed part of West Hollywood. The facts were colorful and intriguing. The name Tara had long been associated with the house, both because of its appearance and because the owner, Mrs. Weismann, loved the movie *Gone with the Wind* and was reported to have died at 101 while watching it in the home where she had lived since she was a child. By that time, the home was a city-designated cultural monument and had been divided into four apartments. Her friends who lived in the other units helped take care of her.

During her lifetime, Mrs. Weismann willed Tara to the city. While she reportedly wanted the lush gardens around the home to be maintained and recommended that the property become a city park and the house used for public purposes, no such conditions were included in her grant to the city.

Upon acquiring possession of Tara after Mrs. Weismann's death, the city accepted a proposal by a private developer to develop thirty-five units of senior housing. The proposal called for demolition of an existing structure, removal of many of the mature trees, and construction of thirty-five of the units in a three- or four-story building that would wrap around the historic house. Such construction would have changed the context of the historic site and eliminate much of the verdant landscaping that was a treasured community oasis.

Area residents began a campaign to save the house and its surrounding urban forest, organizing themselves as Save Tara. At a hearing before the City Council, the group argued that the historic property should become a community center or library that would protect its monument status. They lost in a close vote before the City Council. Without conducting any CEQA review, the city entered into a development agreement with the private developer for a senior housing project to be called "Laurel Place." As part

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<sup>23</sup> 45 Cal.4th 116 (2008).

of the agreement, the city committed to give the developer the land and financial support if it obtained HUD funding.

Save Tara's lawsuit challenged the city's approval of the agreement without first preparing an EIR and conducting a CEQA process. Save Tara lost in the trial court, but the Court of Appeal reversed, holding it unlawful for the city to enter into the agreement for the development of Tara prior to conducting CEQA review. A dissent argued that the case was moot because an EIR was prepared for the project while the litigation was pending.

The Supreme Court granted the city's petition for review. Justice Werdegar authored the now-landmark case for a unanimous court, holding that the proper timing of CEQA review is a question of law subject to independent judicial review, rather than a factual question entitled to agency deference. This important distinction between an agency's duty to follow the procedures required by CEQA versus its discretion to make factual determinations to be accorded deference built upon Justice Werdegar's directly referenced earlier decision in *Vineyard Area Citizens* that underscored CEQA's dual standards of review.

The *Save Tara* opinion then addressed whether the subsequent preparation of an EIR had mooted the appeal, and concluded that it had not because nothing irreversible had happened with the property.

The primary focus of the *Save Tara* opinion was whether the city had erred in approving a development agreement without first preparing and certifying an EIR. The opinion examined CEQA's statutory mandate that agencies must certify an EIR for any project that they intend to carry out or approve which may have a significant environmental effect. The opinion also considered CEQA's implementing regulations, the CEQA Guidelines, prepared by the Governor's Office of Planning and Research. The Supreme Court has repeatedly held that the Guidelines are entitled to great weight except where they are clearly unauthorized or erroneous. Guidelines section 15352 defines what constitutes an approval for purposes of CEQA, providing that for a private project an approval occurs "upon the earliest commitment to the issue by the public agency . . ." <sup>24</sup> Guidelines section 15004 states that "EIRs and negative declarations should be prepared as early as feasible in the planning process to enable environmental

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<sup>24</sup> *Save Tara*, 45 Cal.4th 116, at 129.

considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment.”<sup>25</sup>

In reaching its decision that environmental review should have occurred before approval of agreements between the city and the developer, the *Save Tara* opinion disapproved three appellate cases that had allowed certain commitments to projects to be made before preparation of environmental review documents. The Supreme Court stated in prior decisions that the timing of environmental review required a delicate balance between having enough information and yet assuring that EIRs are not reduced to post hoc rationalizations to support action already taken. *Save Tara* holds that, “[w]hile an agency may certainly adjust its rules as to ‘the exact date of approval,’ an agency has no discretion to define approval so as to make its commitment to a project precede the required preparation of an EIR.”<sup>26</sup>

*Save Tara* emphasized the importance of avoiding “bureaucratic and financial momentum” when environmental analysis is postponed.<sup>27</sup> Importantly, “[i]f, as a practical matter, the agency has foreclosed any meaningful options to going forward with the project, then for purposes of CEQA the agency has ‘approved’ the project.”<sup>28</sup> In holding that a formal project approval is not needed to prove violation of CEQA, the opinion protects the integrity of CEQA that is threatened when EIRs become meaningless post hoc rationalizations for agency decisions that are already manifest.

Despite strong language regarding the need for timely environmental review, *Save Tara* also recognized certain exceptions to the general rule that development decisions having the potential to significantly affect the environment must be preceded rather than followed by CEQA review, focusing on CEQA’s reference to “commitment” in defining project approval. As the Court noted, CEQA was not “intended to place unneeded obstacles in the path of project formation and development.”<sup>29</sup> The *Save Tara* opinion noted the impossibility of establishing a “bright line” rule distinguishing between reasonable project planning and unlawful precommitment

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 132.

<sup>27</sup> *Id.* at 135.

<sup>28</sup> *Id.* at 139.

<sup>29</sup> *Id.* at 137.

but made clear that exceptions to requiring early preparation of EIRs must not be allowed to swallow the rule.<sup>30</sup>

Under the facts of the case, the city had sent a letter to HUD supporting the developers' application for funding and confirmed that it would give the applicant the land, then worth \$1.5 million, and invest up to \$1 million in additional support for the development. Without environmental review, eviction notices had been served upon tenants who shared the house with Mrs. Weismann. These were primary facts evidencing precommitment as a matter of law.

Beyond the beneficial impacts of the *Save Tara* decision on CEQA practice statewide, its impact on Tara itself was also significant. After the develop-

ment agreements were set aside, the city reapproved the project. However, the combination of changed project economics and escalating efforts by the community led to Tara's preservation. Today, it sits in a city park and its beautiful trees remain standing.



TARA HOUSE PARK, CITY OF  
WEST HOLLYWOOD, CALIFORNIA

## ANALYSIS OF GREENHOUSE GASES, THE “TAKING” OF FULLY PROTECTED FISH, AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

The final CEQA decision authored by Justice Werdegarr, *Center for Biological Diversity, et al. v. Department of Fish and Wildlife*,<sup>31</sup> addressed the Newhall Land and Farm project in the Santa Clarita Valley. The Newhall Ranch project has long been proposed as the largest new city in California, with 58,000 residents as well as commercial and business uses, all planned for 12,000 acres along the Santa Clara River. There have been many legal

<sup>30</sup> *Id.* at 138.

<sup>31</sup> 62 Cal.4th 204 (2015).

challenges to the proposed project over many years. The Supreme Court's review involved approvals of a Resource Management and Development Plan and a Spineflower Conservation Plan by the California Department of Fish and Wildlife, challenged by the Center for Biological Diversity (CBD) and other environmental groups.

The decision involved three complex issues: 1) the adequacy of the Newhall Ranch EIR's analysis of greenhouse gases (GHGs); 2) application of state law to the three-spined stickleback, an endangered and fully protected species of fish in the Santa Clara River; and 3) application of CEQA's requirement to exhaust administrative remedies.

### INADEQUACY OF GHG ANALYSIS

In 2006, California passed the landmark California Global Warming Solutions Act, commonly referred to as AB 32. The act calls for reduced GHG emissions to 1990 levels by 2020. AB 32 required the Air Resources Board (ARB) to prepare a "Scoping Plan" to determine maximum feasible and cost-effective reductions by 2020. It adopted a Scoping Plan in 2008 that established a "business as usual" model and calculated the percentage by which emissions would need to be reduced below that level.

The EIR calculated that the Newhall Ranch project would achieve a 31 percent reduction below "business as usual" GHG emissions, while the ARB Plan projected the need for a 29 percent reduction by 2020. While the EIR projected an increase in GHGs because of the project, it declined to determine what levels of emissions would be significant "because of the absence of scientific and factual information regarding when particular quantities of [GHGs] become significant."<sup>32</sup> CBD challenged the GHG analysis for a variety of reasons, including the propriety of using the Scoping Plan model and what they believed to be inflated emission reductions that the project was expected to achieve. As to the use of the Scoping Plan, they argued that it was intended to demonstrate the extent to which existing sources would have to be reduced, and not what new emission sources would be acceptable without interfering with the state's climate objectives. CBD argued for some numerical threshold rather than compliance with the state's Scoping Plan.

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<sup>32</sup> *CBD*, 62 Cal.4th 204, at 222.

Justice Werdegar authored the Supreme Court's decision, rejecting CBD's argument that it was inappropriate to utilize the Scoping Plan's required reductions as a criterion for determining significance. But the opinion concluded that the EIR failed to support by substantial evidence its contention that project emissions would be reduced below the level of significance. Further, the Scoping Plan for reducing GHG levels statewide did not explicitly apply to what emission levels should be allowed from individual new projects without being considered significant. New sources *may* have to be more efficient than what can be achieved by the retrofit of existing sources, and it may be more cost-effective to achieve emission reductions from new rather than existing sources.

The *CBD* opinion footnoted legislation since passed to require the state to slash greenhouse gas emissions to 40 percent below 1990 levels by 2030. The opinion also notes the existence of the executive orders signed by both Governors Schwarzenegger and Brown. These orders set the goal of reducing GHG emissions to 80 percent below 1990 levels by 2050.

The opinion's rejection of DFW's GHG emission analysis challenges agencies to carefully consider how to prepare adequate EIRs, but the court gives substantial guidance to agencies and EIR preparers. Particularly helpful is the opinion's explication of "potential pathways to compliance." By way of example, an agency may determine significance by: 1) determining what level of reduction from "business as usual" a new development must achieve to comply with statewide GHG reduction goals; 2) assessing consistency with AB 32's goals by looking at compliance with regulatory programs with performance standards; 3) complying with locally adopted Climate Action Plans or Sustainable Community Strategies; or 4) relying on existing numerical thresholds of significance, rather than determining significance anew.

The *CBD* opinion also makes clear that even if an agency finds significant cumulative GHG impacts, it may still approve a project *if* it adopts feasible alternatives and mitigations.

## EXHAUSTION OF ADMINISTRATIVE REMEDIES

The Court of Appeal ruled that two challenges to the EIR were not preserved under Public Resources Code section 21177, which sets forth the exhaustion of administrative remedies doctrine under CEQA. Subdivision (a)



provides that before an alleged ground for noncompliance may be brought it must have been “presented to the public agency orally or in writing by any person during the public comment period . . . or prior to the close of the public hearing on the project . . .” DFW held no public hearing. However, here a joint EIR/EIS was prepared by the DFW and the Army Corps of Engineers. National Environmental Policy Act (NEPA) regulations allow public comment on a final EIS at any time before the agency’s decision. During the Corps’ comment period, plaintiffs submitted comments on cultural resources and steelhead impacts.

DFW stated in the EIR that comments during the Corps’ comment period on the FEIS/EIR were given to Newhall and responses were prepared. The lead agencies then jointly prepared an addendum to the FEIS/FEIR, and the addendum was included in the revised FEIS/FEIR. The *CBD* opinion held that the court “need not decide whether every federally mandated comment period on a final combined EIS/EIR also constitutes a CEQA comment period for purposes of section 21177(a).” Here, the comments were adequate to exhaust remedies under CEQA because DFW treated the comment period as applying to CEQA issues. The *CBD* opinion underscored the purpose of the exhaustion doctrine, which is to lighten the load on the judiciary by providing a remedy at the administrative level. That occurred in this case.

#### THE INTERFACE BETWEEN THE FISH AND GAME CODE AND CEQA

DFW and Newhall argued that the capture and relocation of the unarmored three-spined stickleback was an appropriate mitigation measure. The *CBD* opinion concluded that such capture and relocation is not permitted by Fish and Game Code section 5515, which prohibits the taking or possession of the fish. DFG can collect and relocate endangered and special status species as a conservation measure, but not as a project mitigation measure. The opinion relied upon Fish and Game Code section 5515(a)’s provision that scientific research does not include any action taken as mitigation for a CEQA project as well as the definition of “take” in section 86 of the code as including pursue, catch and capture.

Of the ten CEQA decisions authored by Justice Werdegar during her twenty-three years on the Supreme Court, six decisions were unanimous.

In the *CBD* case, Justice Corrigan concurred and dissented and Justice Chin dissented.

Justice Corrigan agreed with the majority opinion as to the protection afforded by California law on the stickleback and the conclusion that use of AB 32 as a standard for determining significance of GHG impacts was proper. The justice disagreed that the decision that GHG impacts were not significant was not supported by substantial evidence. The majority opinion rejected Justice Corrigan's assertion that the court's analysis *required* greater GHG efficiency and noted that DFW failed to substantiate its assumption that the Scoping Plan's statewide emissions reduction target can also serve as the criterion for an individual land use project.

Justice Chin dissented both as to the GHG analysis and as to the protections for the three-spined stickleback. Regarding GHG emissions, he was especially concerned with the majority opinion's suggestion that agencies might have to look beyond compliance with GHG reduction goals for 2020. (It is worth noting that since the time of the decision, the Legislature has passed SB 32, which sets a GHG reduction goal for 2030 based upon achievement of the 2050 reduction goal.)

Justice Chin particularly expressed concern regarding what he characterized as an "inordinate delay of project." Writing for the majority, Justice Werdegar responded that appellate review of lower court CEQA rulings cannot turn on a court's "independent assessment of the project's environmental merits. Even if Newhall Ranch offered the environmentally best means of housing this part of California's growing population, CEQA's requirements for informing the public and decision makers of adverse impacts, and for imposition of valid, feasible mitigation measures, would still have to be enforced."<sup>33</sup>

In September 2017, most of the petitioners in the *CBD* case entered into a settlement with Newhall that would surely be pleasing to Justice Werdegar. The project was dramatically revised in many ways to protect natural resources and reduce impacts. It sets a new standard for residential development by requiring that the project be a zero net GHG emitter, via a series of extremely stringent on-site emission strategies. Solar energy and electric charging stations and subsidies for electric vehicles will be a big part of

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<sup>33</sup> *Id.* at 240.

the development. The project-related emissions will be offset by Newhall, with a preference for local, then state, and then national offsets. In addition to GHG emission reductions, the project was redesigned to preserve the stickleback without relocation, thus also reducing the impacts on the Santa Clara River. While the Court of Appeal on remand reaffirmed its decision on issues relating to steelhead trout and cultural resources, further protections of cultural and natural resources were built into the settlement and the project redesign will also aid the steelhead.

How was settlement achieved? The willingness of the Supreme Court to take a hard look at the adequacy of an agency's environmental analysis, and its attention to enforcement of the state's GHG reduction goals and species protection laws were powerful forces. The outcome of this case is a dramatic example of how enforcing CEQA's requirements for full disclosure — a hallmark of Justice Werdegar's tenure — is of great and lasting benefit to California.

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These brief discussions of some of Justice Werdegar's CEQA opinions cannot do justice to them. These are landmark cases in every sense of the word, earning the admiration of California citizens and CEQA lawyers statewide. Statements of but a few are included here:

“Always nuanced and written with care, Justice Werdegar's environmental opinions have had — and will long have — sweeping relevance in environmental law.”

— Jim Arnone, global Chair of the Environment, Land & Resources Department at Latham & Watkins.

“Justice Werdegar's CEQA opinions provided the roadmap I followed in bringing the San Diego State University case to the Supreme Court and ultimately led to environmental protection for municipalities and communities alike.”

— Christine M. Leone, City of San Diego Deputy City Attorney.

“Just as U.S. Supreme Court Justice John Paul Stevens emerged as that Court's most influential environmental voice over the course of his thirty-five-year tenure on the High Court, California Supreme

Court Justice Kathryn Werdegar has been this state's most commanding environmental law presence over the past twenty-three years. Her numerous, authoritative opinions on CEQA, preemption and many other key environmental law issues will influence lower courts, environmental lawyers and California's environment far into the future."

— Richard Frank, UC Davis Professor of Environmental Practice.

"Our firm has greatly appreciated Justice Werdegar's careful, thoughtful opinions in the environmental arena, and particularly her mastery of the California Environmental Quality Act. She has made a true and lasting contribution to our understanding of that law."

— Rachel Hooper, partner, Shute, Mihaly and Weinberger.

"The towering impact Justice Werdegar will have on California environmental jurisprudence for decades to come would be hard to understate. The fundamental power and strength of her writing will inevitably stand the test of time. California is the better for having had Justice Werdegar on the Supreme Court."

— Doug Carstens, partner, Chatten-Brown & Carstens.

"Justice Werdegar has authored some of the most significant and oft-cited decisions addressing California environmental law, particularly with respect to CEQA. Her decisions address such basic issues as determining when CEQA applies and identifying the appropriate standard of judicial review. Her writing is clear and graceful. Justice Werdegar's decisions show that she has made a genuine effort to strike a delicate balance between agency discretion and protection of the environment. We will all continue to look to her work for many years."

— Jim Moose and Whit Manley, Remy Moose Manley.

Thank you, Justice Werdegar. We wish you many years of enjoyable walks and hikes in the beautiful state that you have played such a significant role in preserving.

# JUSTICE WERDEGAR, STATE POLICE POWER AND OBSTACLE PREEMPTION:

## *An Enduring Legacy*

SEAN B. HECHT\*

Among former California Supreme Court Justice Kathryn Werdegar's important legacies is her body of opinions interpreting the scope of implied federal preemption of state laws. Justice Werdegar's opinions in this area reveal her understanding of the legitimate scope of state police-power protection of public health, consumer protection, and the environment in the face of federal preemption defenses to state law claims. In some cases, preemption of a particular state law is not clear on the face of the federal statute, but a defendant contends that Congress' objectives will be frustrated by the state law at issue and consequently seeks to apply "obstacle preemption" as a defense. In the opinions where she addressed obstacle preemption, Justice Werdegar viewed implied federal preemption in an appropriately bounded way. Her opinions acknowledge the room for state authority to apply expansively in these important areas, where state policy power is at its strongest, in the absence of a clear intent by Congress to forbid application of state law. Her cogent approach to preemption has ensured that California retains its proper authority to exercise police-power functions for the betterment of the state's residents.

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## OBSTACLE PREEMPTION IN THE CALIFORNIA SUPREME COURT

The doctrine of obstacle preemption requires that state laws cannot coexist with federal laws “where the challenged state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”<sup>1</sup> Frequently, defendants faced with liability under state statutes will attempt to invoke obstacle preemption, claiming that liability available under the state law frustrates the will of Congress in enacting a federal statute in a related area of law. There are many areas where federal and state laws cover similar conduct or have overlapping jurisdiction, so over-application of this doctrine, especially in fields where state regulatory authority is traditionally robust, creates the potential for widespread invalidation of state statutes meant to regulate or prohibit conduct that the California Legislature believes to be potentially injurious to California residents.

In the final decade of her long career on the bench, Justice Werdegar authored several unanimous opinions addressing the scope of obstacle preemption in a range of contexts. Three of her opinions on obstacle preemption stand out as particularly noteworthy: *Viva! Int’l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*;<sup>2</sup> *Quesada v. Herb Thyme Farms, Inc.*,<sup>3</sup> and *People v. Rinehart*.<sup>4</sup> These opinions demonstrate the justice’s consistent application of a judicial philosophy — consistent with longstanding precedent — that limits obstacle preemption to a narrow range of cases where application of state law truly frustrates Congress’ purpose. This approach retains states’ ability to protect health, safety, consumer rights, and the environment even where Congress has enacted laws on the same subject.

These opinions follow precedent in California, including a much-cited opinion authored by former Chief Justice Ronald George, that applies a similar philosophy.<sup>5</sup> All these cases, in turn, follow clear federal precedent — now potentially at risk as the U.S. Supreme Court’s composition changes

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<sup>1</sup> *Arizona v. United States*, 567 U.S. 387, 399–400 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>2</sup> 41 Cal.4th 929 (2007).

<sup>3</sup> 62 Cal.4th 298 (2015).

<sup>4</sup> 1 Cal.5th 652 (2016).

<sup>5</sup> *Bronco Wine Co. v. Jolly*, 33 Cal.4th 943 (2004), as modified (Oct. 13, 2004).

under President Donald Trump — applying a presumption against federal preemption of state laws. This presumption is particularly strong in obstacle preemption cases.<sup>6</sup> And the cases are consistent with Ninth Circuit precedent, including the recent case *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*,<sup>7</sup> in which a three-judge panel upheld very strict regulations on the production of foie gras in California against a preemption challenge.

Where Congress does not explicitly state that it is preempting state authority, courts find implied preemption in three situations. First, state law cannot coexist with federal law when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement federal law.<sup>8</sup> Second, state law cannot stand when compliance with both federal and state regulations is an impossibility.<sup>9</sup> And finally, when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” it must yield to federal law.<sup>10</sup>

## JUSTICE WERDEGAR’S CONTRIBUTIONS TO OBSTACLE PREEMPTION JURISPRUDENCE

### *VIVA! INT’L VOICE FOR ANIMALS v. ADIDAS PROMOTIONAL RETAIL OPERATIONS, INC.*: STATE AUTHORITY TO PROTECT WILDLIFE

Justice Werdegar made her first major contribution to the jurisprudence of obstacle preemption in *Viva! Int’l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*<sup>11</sup> In *Viva!*, the Court considered the application of a state law that prohibited products made from kangaroo from being imported into or sold within California.<sup>12</sup> The defendant asserted

<sup>6</sup> See, e.g., *Quesada v. Herb Thyme Farms, Inc.*, 62 Cal.4th 298, at 314–15.

<sup>7</sup> 729 F.3d 937 (9th Cir. 2013).

<sup>8</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947).

<sup>9</sup> *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142–143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963).

<sup>10</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). *Bronco Wine Co. v. Jolly*, 33 Cal.4th 943, at 428.

<sup>11</sup> 41 Cal.4th 929.

<sup>12</sup> CAL. PEN. CODE, § 6530.

that the state law thwarted federal policies, embodied in the application of the Endangered Species Act to kangaroos, that were intended to influence the management of kangaroo populations in Australia. The defendant thus urged a finding of preemption. The Court found that the state law was not an obstacle to any federal policy.

In the 1970s, the U.S. Fish and Wildlife Service listed various species of kangaroos as threatened species under the Endangered Species Act. As noted by the court:

Such a listing carries with it a prohibition on importation of the species, subject to exemptions or permits issued under the Act. (16 U.S.C. §§ 1538, 1539; 50 C.F.R. §§ 17.21(b), 17.31(a) (2007).) Fish and Wildlife thereafter formally banned commercial importation of the three species, as well as their body parts and products made from the bodies of the species. (45 Fed.Reg. 40959 (June 16, 1980); 60 Fed.Reg. 12888 (Mar. 9, 1995).) The ban was to remain in place until those Australian states commercially harvesting the three species “could assure the United States that they had effective management plans for the kangaroos, and that taking would not be detrimental to the survival of kangaroos.” (60 Fed.Reg. 12905 (Mar. 9, 1995); see 16 U.S.C. § 1533(d) [authorizing special species regulations]; 50 C.F.R. §§ 17.21(b), 17.31(a) (2007) [import restrictions apply absent special regulation].)<sup>13</sup>

Years later, the Fish and Wildlife Service delisted the species, meaning that federal law no longer prohibits their importation into the United States.<sup>14</sup> The defendant argued that because, under the federal act, states may not “prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter,” federal policy will not allow a state to prohibit importation of non-endangered, or delisted, species into the United States. (§ 6(f).)

The Court disagreed. Justice Werdegar found:

In the end, Adidas’s preemption argument rests on the assertion that Penal Code section 653o is an obstacle to federal law because

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<sup>13</sup> *Viva! Int’l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 41 Cal.4th 929, at 947.

<sup>14</sup> *Id.*



the current state of federal law allows kangaroo trade. Not so. The key here is the meaning of the word “authorized” in section 6(f). The trial court and Court of Appeal viewed a “failure to prohibit” as equivalent to “authorization.” But if that were so, there would be no room for state regulation, despite an evident federal intention that there be significant room for such regulation. Either an action would be prohibited by federal law, in which case state regulation would be superfluous, or it would not be prohibited by federal law, in which case state regulation would be preempted (in these courts’ views). The express language and legislative history of section 6(f) preclude this reading. Instead, every action falls within one of three possible federal categories. An action may be prohibited, it may be authorized, or it may be neither prohibited nor authorized. Within this last gray category of actions — a category that at present includes the import of products made from these three kangaroo species — section 6(f) grants states free room to regulate.<sup>15</sup>

In its analysis, the court relied on the police power interest in regulating wildlife management, citing numerous authorities. The court noted:

There is a presumption against federal preemption in those areas traditionally regulated by the states: “[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” ([citations omitted]; *Bronco Wine Co. v. Jolly*, 33 Cal.4th at p. 974 [in areas of traditional state regulation, a “strong presumption” against preemption applies and state law will not be displaced “unless it is clear and manifest that Congress intended to preempt state law”]; *Olszewski v. Scripps Health*, 30 Cal.4th at p. 815 [presumption against preemption ““provides assurance that the “federal-state balance” [citation] will not be disturbed unintentionally by Congress or unnecessarily by the courts’”]).<sup>16</sup>

The court found that despite the implication of foreign policy interests and federal application of the Endangered Species Act alongside traditional state police powers, there was no preemption. It summed up its conclusion

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<sup>15</sup> *Id.* at 952.

<sup>16</sup> *Id.* at 938.

by noting that “Congress has expressly identified the scope of the state law it intends to preempt; hence, we infer Congress intended to preempt no more than that absent sound contrary evidence.”

The opinion demonstrates careful attention to legislative text in order to infer intent to preempt or not to preempt state law. Its impact is to confirm that state regulation to address a traditional police power area, wildlife protection, can exist alongside the flagship federal law on the same topic, where Congress did not clearly determine otherwise.

*QUESADA v. HERB THYME FARMS, INC.:*  
STATE AUTHORITY TO PROTECT CONSUMERS  
THROUGH REGULATING FOOD LABELING FRAUD

Justice Werdegar’s second significant foray into obstacle preemption analysis was in *Quesada v. Herb Thyme Farms, Inc.*<sup>17</sup> In *Quesada*, the court considered whether a plaintiff could bring a cause of action for fraud or misrepresentation in a California state court alleging that a grower certified under the federal Organic Foods Production Act of 1990<sup>18</sup> is intentionally mislabeling conventionally grown produce and selling it as organic. Thus, while in *Viva!* a state statute was claimed to be incapable of coexisting with a federal statute, the defendant in *Quesada* argued that certain state tort actions, otherwise available under state law, could not apply to specific conduct in light of the federal statutory scheme. Here, too, the court found in favor of state law’s ability to address the conduct at issue.

When Congress developed national organic standards, its intention was to provide uniform national standards for consumers. Congress was explicit about its purpose:

“It is the purpose of this chapter — [§] (1) to establish national standards governing the marketing of certain agricultural products as organically produced products; [§] (2) to assure consumers that organically produced products meet a consistent standard; and [§] (3) to facilitate interstate commerce in fresh and processed food that is organically produced.” (7 U.S.C. § 6501.) These three goals interrelate and mutually reinforce each other. A uniform national standard

<sup>17</sup> 62 Cal.4th 298.

<sup>18</sup> 7 U.S.C. §§ 6501–6522.

for marketing organic produce serves to boost consumer confidence that an “organic” label guarantees compliance with particular practices, and also deters intentional mislabeling, “so that consumers are sure to get what they pay for.” In turn, uniform standards “provide a level playing field” for organic growers, allowing them to effectively market their products across state lines by eliminating conflicting regulatory regimes. Standards that enhance consumer confidence in meaningful labels and reduce the distribution network’s reluctance to carry organic products may increase both supply and demand and thereby promote organic interstate commerce.<sup>19</sup>

Nonetheless, the law provided no private federal cause of action to enforce its provisions.

The court also considered the field of food labeling in order to assess the role of state regulation in the context of the federal law. It noted that this regulatory authority was an exercise of state police powers:

The regulation of food labeling to protect the public is quintessentially a matter of longstanding local concern. The first state legislation designed to address fraud and adulteration in food sales was enacted in 1785. California began regulating food mislabeling in the 1860s, just a few years after statehood. In response to widespread mislabeling, misbranding, and adulteration by food suppliers, by the late 18th century “many if not most states exercised their traditional police powers to regulate generally the marketing of impure or deceptively labeled foods and beverages.”<sup>20</sup>

Ultimately, the court concluded that a state tort cause of action was very much in concert with Congress’ goals:

By all appearances, permitting state consumer fraud actions would advance, not impair, these goals. Substitution fraud, intentionally marketing products as organic that have been grown conventionally, undermines the assurances the USDA Organic label is intended to provide. Conversely, the prosecution of such fraud, whether

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<sup>19</sup> 62 Cal.4th 298, at 316 (citations omitted).

<sup>20</sup> *Id.* at 313 (citations omitted).

by public prosecutors where resources and state laws permit, or through civil suits by individuals or groups of consumers, can only serve to deter mislabeling and enhance consumer confidence. (See *Bates v. Dow Agrosiences LLC*, supra, 544 U.S. at p. 451, 125 S.Ct. 1788 [“Private [state] remedies that enforce federal misbranding requirements” can “aid, rather than hinder” the effectiveness of those labeling requirements].)<sup>21</sup>

In the end, the Court in *Quesada* decisively held that the state cause of action could readily coexist with or even aid in furthering the goals of the federal law, and was not an obstacle to Congress’ goals in enacting the statute. Justice Werdegar’s close attention to statutory text, in light of the especially strong presumption against implied preemption of core state police powers, led directly to this conclusion.

#### *PEOPLE v. RINEHART*: STATE AUTHORITY TO REGULATE MINING’S ENVIRONMENTAL IMPACTS

The capstone of Justice Werdegar’s obstacle preemption jurisprudence was her unanimous opinion in favor of the state’s moratorium on suction-dredge mining on federal lands in *People v. Rinehart*.<sup>22</sup> This case raised the question whether a state may enact or enforce laws or regulations that have the effect of prohibiting particular methods of mining on federal lands. Justice Werdegar’s opinion confirmed that the federal Mining Law of 1872<sup>23</sup> can coexist with robust regulatory authority, for the purpose of environmental protection, over mining on federal public lands.

The narrow question in *Rinehart* was whether the California Legislature could lawfully enact a moratorium on suction-dredge mining in streambeds that included mining on federal lands. But the case necessarily confronts a broader issue: whether a range of state regulations on mining that apply to federal lands may be preempted by the Mining Law. Miners and property-rights advocates have long argued that states’ authority to restrict mining on federal lands is very limited. On the other hand, states such as California and Oregon have determined that in certain cases, mining

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<sup>21</sup> *Id.* at 316–17 (citations omitted).

<sup>22</sup> 1 Cal.5th 652.

<sup>23</sup> R.S. §§ 2319 *et seq.* (codified at 30 U.S.C. §§ 22 *et seq.*).

will impair environmental quality or other resources to such an extent that sharply limiting or even prohibiting certain activities is warranted.

The General Mining Law of 1872 allows U.S. citizens to explore for, discover, and mine “valuable minerals” from most federal lands without paying the government for the minerals. (Today, the Mining Law applies to “hard rock” minerals such as metals, but does not apply either to fuel minerals, such as coal, oil and gas, or to “common varieties” including, for example, sand and gravel for use in construction.) The Mining Law facilitated rapid development of parts of the American West and some significant environmental cost.

Federal land management has evolved significantly since the 1870s. Statutes such as the Federal Land Policy and Management Act (FLPMA)<sup>24</sup> and the National Forest Management Act (NFMA)<sup>25</sup> require the government to balance multiple uses before committing to allow particular activities. At the same time, Congress has never amended the Mining Law. And the Mining Law’s general framework of allowing hard rock mining activities on federal lands can be in tension with both federal and state agencies’ ability to ensure that other values are upheld. The federal government can impose various requirements and restrictions on mining activity to ensure that there is no unnecessary or undue degradation of the land and its resources. These requirements generally include the need for approval of a Plan of Operations as well as adherence to federal regulations.<sup>26</sup> Nonetheless, federal agencies typically allow small-scale “recreational” mining to proceed without any federal permit or other discretionary approval.

At the same time, federal and state agencies and courts have consistently interpreted the Mining Law to allow state and local governments to regulate mining activity on federal lands. Specifically, where state environmental regulatory laws are not in conflict with federal laws, they may limit the activities on federal lands.<sup>27</sup> State laws often, for example, require

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<sup>24</sup> 43 U.S.C. §§ 1701 *et seq.*

<sup>25</sup> 16 U.S.C. §§ 1600 *et seq.*

<sup>26</sup> *See, e.g.*, 36 C.F.R. Part 228, Subpart A (“set[ting] forth rules and procedures through which use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws . . . shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources”).

<sup>27</sup> *See California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987).

mitigation of the environmental impacts of mining activity, as well as reclamation (restoring the landscape after mining activities are completed). State regulation of mining activity existed before, and immediately after, the enactment of the Mining Law, and continues to this day.<sup>28</sup> California has many laws that regulate mining. For example, since 1961, the state has required anyone engaging in suction-dredge mining to obtain a permit and to comply with permit conditions.<sup>29</sup> By imposing a moratorium, the law at issue in this case went considerably further than the regulations that existed previously to govern suction-dredge mining.<sup>30</sup>

According to the State of California's petition for review in *Rinehart*:

Suction dredge mining is a method for mining from the bed of a water body. This method typically uses a four- to eight-inch wide motorized vacuum, though sometimes a larger vacuum is used; the vacuum is inserted into the bottom of a stream and sucks gravel and other material to the surface, where it can be processed to separate any gold that might be present. Suction dredge mining is a way to recover gold that was placed in waterways by the Nineteenth Century's now-antiquated and highly destructive practice of hydraulic mining.<sup>31</sup>

Unfortunately, suction dredge mining can negatively affect stream and river ecosystems, because their operation creates disturbances in the water and the riverbed.<sup>32</sup>

In 2006, a Native American tribe sued the state Department of Fish and Wildlife, claiming that the state's suction-dredge mining permit program was not environmentally protective enough and needed to undergo environmental review for potential revision. The case was resolved through a consent decree; the department promised to perform environmental review. The state Legislature enacted a moratorium on new permits in 2009,

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<sup>28</sup> See *People v. Rinehart*, 1 Cal. 5th 652, at 667–70 (discussing early state regulation of mining activities in California).

<sup>29</sup> CAL. STATS. 1961, ch. 1816, § 1, p. 3864 (former FISH & G. CODE § 5653).

<sup>30</sup> CAL. STATS. 2009, ch. 62, § 1, adding Fish & G. Code (former § 5653.1).

<sup>31</sup> *People v. Rinehart*, 1 Cal.5th 652, at 657.

<sup>32</sup> CAL. STATS. 2009, ch. 62, § 2 (finding that “suction or vacuum dredge mining results in various adverse environmental impacts to protected fish species, the water quality of this state, and the health of the people of this state”).

until the completion of the environmental review.<sup>33</sup> The moratorium law has been since amended to eliminate the ending date, based on a legislative finding that such mining causes adverse impacts. And the Department of Fish and Wildlife enacted regulations that confirm the ban.<sup>34</sup> Suction-dredge mining nonetheless apparently remained a common practice, at least when the events underlying this case transpired.

The miner in this case, Brandon Rinehart, holds a mining claim within the Plumas National Forest in northern California. He was cited, and charged with two misdemeanors, for suction-dredge mining in a streambed in violation of state law. He claimed in his defense that the state law is preempted by federal law and thus invalid. He contended that by outlawing suction-dredge mining, the state is effectively prohibiting all profitable mining on his claim because suction-dredge mining is only mining method that would allow him to make a profit. He further contended that federal law requires that the state not eliminate his ability to make money from mining the claim.<sup>35</sup>

The legal context for this case arises in part from a U.S. Supreme Court case, *California Coastal Commission v. Granite Rock Co.*<sup>36</sup> In that case, the Supreme Court rejected a facial challenge to a California Coastal Commission requirement that a miner obtain a state permit before mining on federal land. The Court in *Granite Rock* found that Congress did not intend to preempt state regulatory laws when it enacted the Mining Law. The Court assumed that NFMA and FLPMA would preempt state statutes determining the land use for a particular area of federal land; it held nonetheless that state laws that impose reasonable environmental regulations are not preempted by those federal laws, because Congress did not enact the Mining Law with the expectation that it would prevent state and local regulation of mining practices.<sup>37</sup>

In the *Rinehart* case, the trial court sided with the state, finding that the state law is not preempted. Mr. Rinehart appealed, and the Court of

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<sup>33</sup> CAL. STATS. 2009, ch. 62.

<sup>34</sup> See generally FISH & G. CODE, §§ 5653, 5653.1, 13172.5; information available at <https://www.wildlife.ca.gov/licensing/suction-dredge-permits>.

<sup>35</sup> *People v. Rinehart*, 1 Cal.5th 652, at 658–59.

<sup>36</sup> 480 U.S. 572 (1987).

<sup>37</sup> *Id.*

Appeal reversed the trial court decision, agreeing with the miners' argument that the state moratorium violated federal law that generally allows miners to obtain and maintain property rights in federal lands for the purpose of mining. The Court of Appeal held that if application of state law makes a mining claim "commercially impracticable," the Mining Law trumps state law and a state may not apply its law, because the Mining Law contemplates that miners be able to profitably work their claims.<sup>38</sup> In the Court of Appeal's view, the state was, in effect, making a land-use determination to ban all mining by preventing commercially impracticable mining, frustrating the intent of the Mining Law. (The Court of Appeal's order would have remanded the case to the trial court to determine whether the state in this case has, in fact, made mining commercially impracticable for Mr. Rinehart.)

The state successfully petitioned the California Supreme Court to hear its arguments why the Court of Appeal got it wrong.<sup>39</sup> The Supreme Court reversed the Court of Appeal, holding that the state law was not an obstacle to Congress' intended goals under the Mining Law. In an opinion by Justice Werdegar, the court held that "[t]he federal statutory scheme does not prevent states from restricting the use of particular mining techniques based on their assessment of the collateral consequences for other resources."<sup>40</sup>

In her opinion, Justice Werdegar carefully analyzed the historical role of the Mining Law and cases decided by multiple courts since the enactment of that law. The opinion provides a deep and well-articulated analysis of the relationship between state police powers to protect health and safety and the federal Mining Law, concluding:

The federal laws Rinehart relies upon reflect a congressional intent to afford prospectors secure possession of, and in some instances title to, the places they mine. But while Congress sought to protect miners' real property interests, it did not go further and guarantee

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<sup>38</sup> *People v. Rinehart*, 1 Cal.5th 652, at 659.

<sup>39</sup> Professors John Leshy (UC Hastings), Eric Biber (UC Berkeley), Alex Camacho (UC Irvine), and I filed an amicus curiae brief in support of the state's position (with assistance from two of Eric's students). The brief is available at [http://legal-planet.org/wp-content/uploads/2016/08/S222620\\_ACB\\_Leshy.pdf](http://legal-planet.org/wp-content/uploads/2016/08/S222620_ACB_Leshy.pdf).

<sup>40</sup> *People v. Rinehart*, 1 Cal.5th 652, at 670.



to them a right to mine immunized from exercises of the states' police powers.<sup>41</sup>

Justice Werdegar's opinion displays a nuanced command of the history of the application of the Mining Law and its complex relationship to complementary state laws (once again implementing traditional state police powers) over its long tenure; indeed, it includes a careful analysis and discussion of Congress' reaction to state regulation in the years following the enactment of the Mining Law, supporting the conclusion that the state moratorium at issue in *Rinehart* can coexist with the Mining Law. It also provides a clear and persuasive analysis of the function of the Mining Law, including the well-supported conclusion that "[t]he mining laws were neither a guarantee that mining would prove feasible nor a grant of immunity against local regulation, but simply an assurance that the ultimate original landowner, the United States, would not interfere by asserting its own property rights."<sup>42</sup>

The opinion also provides some insight into how the leading U.S. Supreme Court case on federal preemption of state regulation of mining on federal lands, *California Coastal Comm'n v. Granite Rock Co.*,<sup>43</sup> should be applied. Notably, however, the court avoided some of the core questions left open by the Court in *Granite Rock*, by carefully framing the dispute as one over "obstacle preemption." The court noted that *Granite Rock* "for the first time clearly established the states' authority to regulate on environmental grounds mining claims within their borders,"<sup>44</sup> and the court also implicitly rejected Mr. Rinehart's claim, based on an interpretation of language from *Granite Rock*, that where such regulation "render[s] mining . . . commercially impracticable," it is preempted by federal law. Justice Werdegar's view that this state law was not an obstacle to the federal goal, while not binding in other states, is likely to be noted by government agencies and courts in other states, and thus to empower states to use their regulatory powers more broadly, where appropriate, to restrict mining activities that they find to be harmful to resources.<sup>45</sup>

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<sup>41</sup> *Id.* at 657.

<sup>42</sup> *Id.* at 666.

<sup>43</sup> 480 U.S. 572 (1987).

<sup>44</sup> *People v. Rinehart*, 1 Cal.5th 652, at 671.

<sup>45</sup> Editor's Note: *cert. denied*, 583 U.S. \_\_\_\_ (Jan. 8, 2018) (No. 16-970).

JUSTICE WERDEGAR'S LEGACY:  
CAREFUL, SYSTEMATIC REVIEW OF IMPLIED  
PREEMPTION DEFENSES WHERE THE STATE'S  
CORE POLICE POWERS ARE AT ISSUE

Each of the three opinions discussed in this essay addresses obstacle preemption in a distinct context, and each bears on important questions of the balance of state and federal authority where state police powers are implicated. Taken together, the opinions affirm and extend prior California Supreme Court precedent, and develop the law consistent with U.S. Supreme Court and Ninth Circuit jurisprudence. First, the opinions apply a strong presumption that Congress did not intend to impliedly preempt state law. Second, they recognize the strength and primacy of regulation under general state police powers, in the absence of congressional intent to deprive a state of the authority to use those powers. Finally, they look carefully at federal statutory text and contextual clues to determine whether the specific state law at issue frustrates Congress' purpose and goals.

In a sense, Justice Werdegar's body of opinions applying obstacle preemption doctrine — solid as it is — is unremarkable. Her opinions straightforwardly and persuasively apply obstacle preemption doctrine to various specific legal controversies. But in another way, the opinions are significant: they present models of how to persuasively and systematically analyze an obstacle preemption defense with reference to a full range of sources, in contexts where the arguments in favor of and against application of state law require significant work to develop and analyze. Because obstacle preemption requires a deep attempt to understand Congress' goals and purposes, courts often need to bring nuanced and complex analysis to bear, drawing on multiple sources, to adequately address these claims. Moreover, Justice Werdegar's opinions are appropriately skeptical of inferences that Congress intended to preempt application of state laws implementing core police powers to protect health, safety, and the environment without clear evidence of intent to do so. Her opinions significantly advance this body of jurisprudence, and will surely stand the test of time.

# WHAT HAPPENED TO HISPANIC NATURAL RESOURCES LAW IN CALIFORNIA?

PETER L. REICH\*

## INTRODUCTION

California has an elaborate statutory regime regulating the exploitation of natural resources, including water, minerals, land, and tidal areas, dating largely from the 1960s through the 1990s.<sup>1</sup> Yet this considerable body of legislation makes no mention of law originating under the Spanish and Mexican authorities governing the province in 1769–1821 and 1821–1848, respectively. Scholars of California history and geography have noted the relatively minimal environmental impact of pre-1848 European settlement, but have not asked whether the Hispanic tradition left any permanent footprints on legal development.<sup>2</sup> This gap is particularly evident compared to

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<sup>1</sup> See generally KENNETH MANASTER & DANIEL P. SELMI, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE (2017). See also CALIFORNIA ATTORNEY GENERAL'S ENVIRONMENTAL TASK FORCES, PRIMER ON PUBLIC ENVIRONMENTAL LAW IN CALIFORNIA (1971).

<sup>2</sup> John W. Caughey, *The Californian and His Environment*, in ESSAYS AND ASSAYS: CALIFORNIA HISTORY REAPPRAISED 3 (George Knoles ed., 1973) (few effects other than sea otter and beaver hunting by Russian and U.S. poachers); WILLIAM A. SELBY, REDISCOVERING THE GOLDEN STATE: CALIFORNIA GEOGRAPHY 49–50, 136, 189–190 (2d ed. 2006) (overgrazing in some areas but little mining or water depletion). See also GREEN

researchers' documentation of Spanish and Mexican influences on contemporary resource law in other parts of the Southwest.<sup>3</sup>

When the United States succeeded to Mexican sovereignty in 1848, California courts were confronted with water, mining, and land disputes, and so had to interpret the laws and customs under which conflicting claims arose. As will be seen, in these decisions many judges heavily cited legal sources from Spain and Mexico, which described a system especially well adapted to the geography of the region. The presence in and suitability of the Hispanic natural resources tradition in these cases raise the question of why its traces are not more apparent in the state today. Synthesizing my research in a series of articles and a recent book, this essay explores the reasons for the eventual superseding of Spanish and Mexican natural resources law by common law and modern statutes.<sup>4</sup>

## WATER ALLOCATION

Legal historians of the Hispanic Southwest, which included California, have shown that water rights during the Spanish and Mexican periods were communal. Water was allotted among users, especially during times

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VERSUS GOLD: SOURCES IN CALIFORNIA ENVIRONMENTAL HISTORY (Carolyn Merchant ed., 1998) (contrasting Native American and Hispanic limited resource use with intensive post-1848 economic development).

<sup>3</sup> See Michael M. Brescia & Michael C. Meyer, *Natural Resources and the Law in Hispanic Arizona: The Babocómari Ranch and the Living Legacies of the Gadsden Purchase*, 58 J. SW. 29 (2016) (Arizona land and irrigation rights); Michael C. Meyer & Michael M. Brescia, *The Treaty of Guadalupe Hidalgo as a Living Document: Water and Land Use Issues in Northern New Mexico*, 73 N.M. HIST. REV. 321 (1998) (New Mexico grazing, wood-cutting, and water rights); CHARLES R. PORTER, JR., *SPANISH WATER, ANGLO WATER: EARLY DEVELOPMENT IN SAN ANTONIO* (2009) (Texas water allocation); Peter L. Reich, *Litigating Property Under the Guadalupe Hidalgo Treaty: The Sangre de Cristo Land Grant Case*, 5 SCHOLAR 217 (2003) (Colorado grazing, wood-cutting, and water access).

<sup>4</sup> For more detailed exposition of the topics discussed *infra*, see Peter L. Reich, *Mission Revival Jurisprudence: State Courts and Hispanic Water Law Since 1850*, 69 WASH. L. REV. 869 (1994); Peter L. Reich, *Western Courts and the Privatization of Hispanic Mineral Rights Since 1850: An Alchemy of Title*, 23 COLUM. J. ENVTL. L. 57 (1998); Peter L. Reich, *Dismantling the Pueblo: Hispanic Municipal Land Rights in California Since 1850*, 45 AM. J. LEGAL HIST. 353 (2001); PETER L. REICH, *THE LAW OF THE UNITED STATES–MEXICO BORDER: A CASEBOOK* 313–350 (2017).

of drought in this chronically arid region.<sup>5</sup> Such rights were not absolute or exclusive as under Anglo-American common law, but were regularly apportioned by provincial and territorial governors between *pueblos* (towns) and other consumers like missions and individual farmers.<sup>6</sup> When the 1848 Treaty of Guadalupe Hidalgo transferred sovereignty over most of the Southwest to the United States, the treaty's provision that preserved existing property rights often resulted in the *pueblos'* successor cities vying for water supplies against landowners.<sup>7</sup>

In the 1870s this conflict came to a head over the Los Angeles River. Upstream landowners in the San Fernando Valley diverted water from the river, threatening the growth of Los Angeles and the revenue it enjoyed from selling surplus water to other users.<sup>8</sup> Initially, the California courts refused to grant the city an absolute right to the river, in accordance with Hispanic law's fair allocation principle.<sup>9</sup> But in 1895 the California Supreme Court held that Los Angeles could monopolize its local water source based on a so-called "pueblo water right" supposedly originating in the Spanish period, though this theory is contradicted by the ample evidence of communal sharing presented in opposition to the city.<sup>10</sup>

In subsequent years the courts extended Los Angeles' right to water to supply its newly annexed areas, the river's subterranean flow, the entire aquifer underlying the San Fernando Valley, reclaimed floodwater, and

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<sup>5</sup> NORRIS C. HUNDLEY, *THE GREAT THIRST: CALIFORNIANS AND WATER — A HISTORY* 38–60 (rev'd ed. 2001); MICHAEL C. MEYER, *WATER IN THE HISPANIC SOUTHWEST: A SOCIAL AND LEGAL HISTORY, 1550–1850* 157 (1984).

<sup>6</sup> For a specific example of this type of accommodation, see HUNDLEY, *supra* note 5, at 51–58 (water dispute resolved between Los Angeles and San Fernando mission).

<sup>7</sup> Treaty of Guadalupe Hidalgo, Article VIII, 1848, 9 Stat. 922, 929–930. See Federico M. Cheever, Comment, *A New Approach to Mexican Land Grants and the Public Trust Doctrine: Defining the Property Interest Protected by the Treaty of Guadalupe Hidalgo*, 33 UCLA L. REV. 1364 (1986) (discussing the scope of the treaty).

<sup>8</sup> HUNDLEY, *supra* note 5, at 127.

<sup>9</sup> *City of Los Angeles v. Baldwin*, 53 Cal. 469 (1879); *Feliz v. City of Los Angeles*, 58 Cal. 73 (1881); *Elms v. City of Los Angeles*, 58 Cal. 80 (1881).

<sup>10</sup> *Vernon Irrigation Co. v. City of Los Angeles*, 39 P. 762 (Cal. 1895). See also Reich, *Mission Revival Jurisprudence*, *supra* note 4, at 891–894 (detailing voluminous data on Hispanic custom and law, including testimonial proof that the *pueblo* never monopolized all the river's water, revealed in the manuscript *Vernon* case file).

surplus water from the Owens River.<sup>11</sup> The putative pueblo water right was also applied to give San Diego exclusive control over the San Diego River, and has been upheld regarding Los Angeles as recently as 1975, despite the contradictory evidence still before the court.<sup>12</sup> Texas and New Mexico state courts' explicit rejection of any purported pueblo water right vividly contrasts with California's refusal to follow the communal Hispanic water law tradition, so well adapted to a desert environment.<sup>13</sup>

## MINERAL EXTRACTION

As with water, mining under the Hispanic legal regime differed markedly from the common law's individual property rights approach. Spanish and Mexican tradition held that the sovereign owned precious minerals and had the prerogative to distribute concessions through an elaborate process of discovery, official registration, and monitoring.<sup>14</sup> This centralized control and system of allocation accorded with the communal Hispanic policy of exercising governmental power over natural resources for the common good.<sup>15</sup>

Paralleling the trajectory of water law development, U.S. courts in California initially followed Mexican law, holding that the state, as successor to the prior polity, owned all precious minerals despite some landowners' assertion that their surface property included an underground estate as well.<sup>16</sup> The California Supreme Court upheld this precedent in 1858 in

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<sup>11</sup> *City of Los Angeles v. Pomeroy*, 57 P. 585 (Cal. 1899); *City of Los Angeles v. City of Glendale, Same v. City of Burbank*, 142 P.2d 289 (Cal. 1943).

<sup>12</sup> *City of San Diego v. Cuyamaca Water Co.*, 287 P. 475 (Cal. 1930); *City of Los Angeles v. San Fernando*, 537 P.2d 1250 (Cal. 1975).

<sup>13</sup> *In re Contests of City of Laredo*, 675 S.W.2d 257 (Tex. Ct. App. 1984); *State ex rel. Martinez v. City of Las Vegas*, 89 P.3d 47 (N.M. 2004). See also DANIEL TYLER, *THE MYTHICAL PUEBLO RIGHTS DOCTRINE* (1990) (elaborating on the concept's ahistorical nature).

<sup>14</sup> REALES ORDENANZAS PARA LA DIRECCIÓN, RÉGIMEN Y GOBIERNO DEL IMPORTANTE CUERPO DE LA MINERÍA DE NUEVA ESPAÑA (1783); MARVIN D. BERNSTEIN, *THE MEXICAN MINING INDUSTRY* 11 (1964).

<sup>15</sup> See LANE SIMONIAN, *DEFENDING THE LAND OF THE JAGUAR: A HISTORY OF CONSERVATION IN MEXICO* 62 (1995).

<sup>16</sup> *Hicks v. Bell*, 3 Cal. 219 (1853); *Stoakes v. Barrett*, 5 Cal. 37 (1855); *McClintock v. Bryden*, 5 Cal. 97 (1855).



**MARIPOSA COUNTY COURTHOUSE — OLDEST COURTHOUSE IN CALIFORNIA, BUILT IN 1854; SITE OF THE 1857 TRIAL OF JOHN C. FRÉMONT'S CLAIM OF MINERAL RIGHTS IN HIS RANCHO LAS MARIPOSAS LAND GRANT PURCHASE (CONSTRUCTED ON LAND DONATED TO THE COUNTY BY FRÉMONT IN LIEU OF TAXES).**

complex litigation between individual prospectors and explorer John C. Frémont, who claimed exclusive dominion over gold-bearing quartz on his land in the Sierra Nevada foothills.<sup>17</sup>

But a year later, two justices from the prior three-judge panel had been replaced, and the court reversed itself to side with Frémont concerning surface owners' subterranean rights. Disregarding the Merced Mining Company's extensive briefing on Hispanic mineral law, Chief Justice Stephen Field wrote for the majority that the state of California's regulatory power had not been exercised over minerals underneath private property.<sup>18</sup> Going further in an 1861 decision, Field held explicitly that surface proprietors owned the precious metals underneath their land.<sup>19</sup> He based his theory of

<sup>17</sup> *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279, 311–314 (1859).

<sup>18</sup> *Id.* at 373–376.

<sup>19</sup> *Moore v. Smaw and Frémont v. Flower*, 17 Cal. 199 (1861).

mineral privatization on the unsupported argument that the U.S. Congress, in establishing a confirmation process for land claims under the Guadalupe Hidalgo treaty (the 1851 California Land Act), impliedly conveyed both the surface and subsurface when it validated a grant.<sup>20</sup> These decisions constituted a clear rejection of Mexico's resource tradition, despite the lack of any evidence that either the treaty drafters or Congress ever meant to do so in settling land titles.<sup>21</sup>

Surface mineral proprietorship is still the rule in California, having been affirmed by a 1955 federal district court applying state law. Remarkably, the judge admitted that Hispanic law indicated otherwise, but considered that Field's version of the claim-resolution process should be paramount.<sup>22</sup> Courts in New Mexico and Arizona, and legislators in Texas have all accepted California's privatization approach.<sup>23</sup> As a result of these decisions in California and other frontier regions, simple placer mining by individuals gave way to increasingly elaborate, expensive, and ecologically harmful extractive techniques, like the stamp mills used by Frémont and hydraulic mining.<sup>24</sup> It should be noted that Mexico's own late-nineteenth-century departure from the Hispanic tradition of close government supervision over mining, in favor of more intensive private exploitation, resulted in similar environmental destruction.<sup>25</sup>

## LAND USE PATTERNS

As with water and minerals, land use in Hispanic California followed a model of government control and distribution. The Spanish Crown promulgated the Laws of the Indies in 1513 and 1523 for the orderly settlement

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<sup>20</sup> *Id.* at 124–125.

<sup>21</sup> See Reich, *An Alchemy of Title*, *supra* note 4, at 71–78 (illuminating the extensive discussions of Hispanic mineral law in the *Biddle Boggs* and *Moore* appellate briefs).

<sup>22</sup> *Blue v. McKay*, 136 F. Supp. 315 (D.D.C. 1955), *aff'd*, 232 F.2d 688 (D.C. Cir.), *cert. denied*, 352 U.S. 846 (1956).

<sup>23</sup> *Catron v. Laughlin*, 72 P. 26 (N.M. 1903); *Gallagher v. Boquillas Land & Cattle Co.*, 238 P. 395 (Ariz. 1925); TEX. CONST. of 1866, art. VII, § 39.

<sup>24</sup> DUANE A. SMITH, *MINING AMERICA: THE INDUSTRY AND THE ENVIRONMENT* 48 (1987); RODMAN W. PAUL, *MINING FRONTIERS OF THE FAR WEST: 1848–1880* 30–33 (1963).

<sup>25</sup> See BERNSTEIN, *supra* note 14, at 18–19, 27–29; SIMONIAN, *supra* note 15, at 54–55, 63, 245n.76.



of the New World. They specified that towns had to include a sufficient number of *solares* (residential lots) at the center, around which would be placed *ejidos* (commons) for various public uses, while beyond them would lie *dehesas y tierras de pasto* (grazing areas) and *propios* (municipal grounds) which could be leased to generate revenue.<sup>26</sup> Such communal uses were an inheritance from Spain, where strict limitations on grazing and selling land protected communities from resource exhaustion and thus avoided the “tragedy of the commons.”<sup>27</sup> *Propios* were never intended to be sold, and officials or individual citizens could sue municipal councils for alienating these lands.<sup>28</sup> In Mexican California, *ayuntamientos* (town councils) could only rent rather than sell pueblo land to individuals, and improvement requirements were imposed on lot owners.<sup>29</sup> As might be expected, when American political control was installed in 1846, land speculators and settlers pressured the new authorities to privatize the communal aspects of the Hispanic land system.

In a series of cases beginning in the 1850s, the California Supreme Court oscillated on the question of whether municipalities could sell public land to private purchasers. Initially, the court held that San Francisco’s U.S. *alcalde* (mayor), having the same power as his Mexican predecessor, could not alienate the city’s pueblo lands, and cited Hispanic legal treatises in support.<sup>30</sup> But several years later Justice Solomon Heydenfeldt wrote for the court in overruling these decisions, asserting without any basis that Mexican authorities had been allowed to sell municipal property.<sup>31</sup> Yet by the end of the decade the court had reversed itself again, relying on Hispanic sources to find that pueblo lands had been held “in trust for

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<sup>26</sup> *Fundación de Pueblos en el Siglo XVI*, 6 BOLETÍN DEL ARCHIVO GENERAL DE LA NACIÓN 321, 343–344, 346–347 (1935).

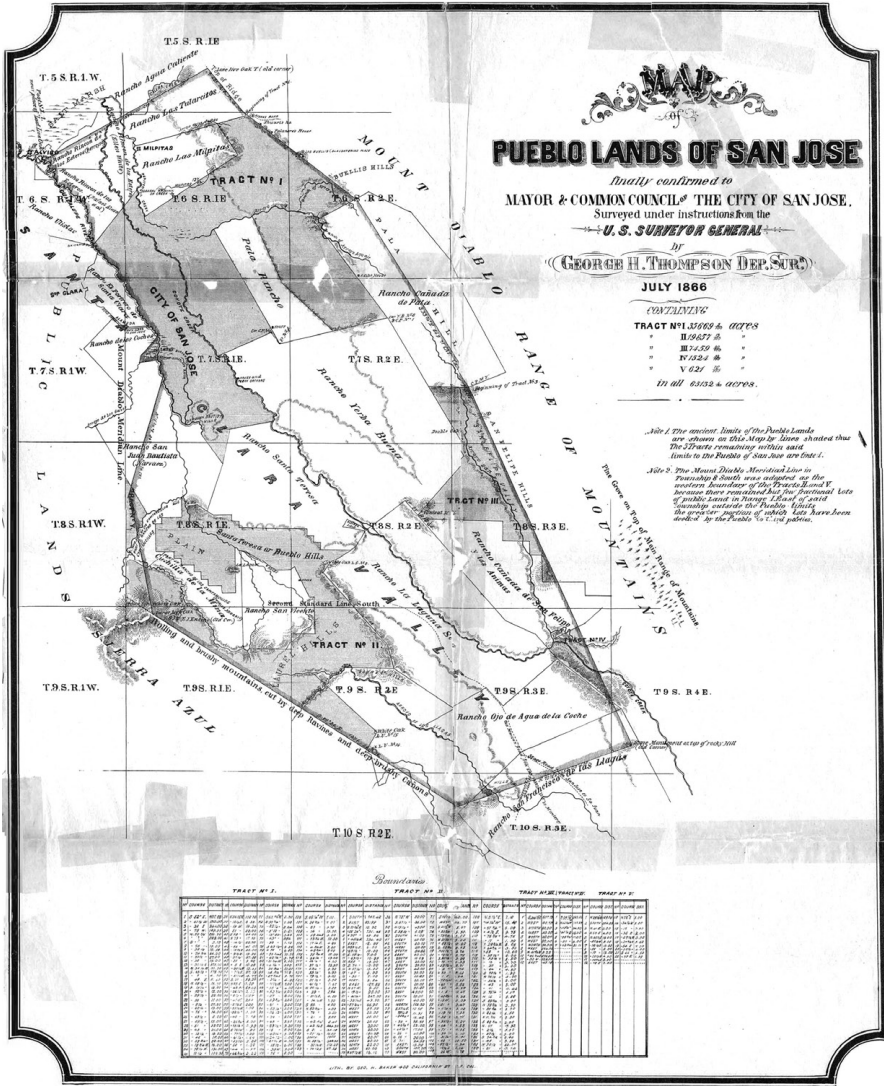
<sup>27</sup> See DAVID E. VASSBERG, *LAND AND SOCIETY IN GOLDEN AGE CASTILE* 21, 35–36 (1984).

<sup>28</sup> *Id.* at 24–25.

<sup>29</sup> José Figueroa, *Plan de propios y arbitrios* . . . August 8, 1834, Archives of California, State Papers, Missions and Colonization, v. II (original in Bancroft Library, UC Berkeley); Miroslava Chávez, *Women and the American Conquest in Los Angeles: From the Mexican Era to American Ascendancy* 22, 81–82 (Ph.D. dissertation, UCLA, 1998).

<sup>30</sup> *Ladd v. Stevenson and Parker*, 1 Cal. 18 (1850); *Woodworth v. Fulton*, 1 Cal. 295 (1850).

<sup>31</sup> *Cohas v. Raisin*, 3 Cal. 443 (1853).



**PUEBLO LANDS OF SAN JOSÉ — 1866 U.S. GOVERNMENT MAP OF PUEBLO LANDS (IN GRAY) BELONGING TO THE PUEBLO OF SAN JOSÉ AND SOLD AFTER INCORPORATION BY THE CITY OF SAN JOSÉ TO PAY MUNICIPAL DEBTS (SEE FOOTNOTE 33 ON FACING PAGE).**

Published in FREDERIC HALL, THE HISTORY OF SAN JOSE AND SURROUNDINGS (1871).

the public use,” and so could not be sold at auction to satisfy city debts.<sup>32</sup> In the 1860s and 1870s the court maintained this position, holding that these lands could not be mortgaged and that the public use dedication was permanent.<sup>33</sup>

The California Supreme Court ultimately disregarded Hispanic law and returned to the privatization perspective, ruling in 1903 that Monterey could lawfully sell its pueblo lands to speculators.<sup>34</sup> Lower state courts likewise permitted the cities of Los Angeles and San Diego to alienate many acres of public property, markedly ignoring the historical limitation on municipal power.<sup>35</sup> The upshot of California cities’ sale of their pueblo lands was that large portions of the urban commons were eliminated. Even when cities retained parks or other public areas, they often located them asymmetrically in places inaccessible to the majority of residents — a policy exemplified by San Francisco’s Golden Gate Park and Griffith Park in Los Angeles.<sup>36</sup> This departure from the Spanish and Mexican tradition of reserving centrally located land for the public benefit constituted an opportunity lost for maintaining open space and keeping cities livable.<sup>37</sup>

## TIDELANDS ACCESS

A final topic wherein California courts have considered the impact of Hispanic law concerns public ownership of and access to tidelands. Under Roman law, “the sea-shore” up to the highest winter tide was common

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<sup>32</sup> *Hart v. Burnett*, 15 Cal. 530 (1860).

<sup>33</sup> *Branham v. Mayor and Common Council of San José*, 24 Cal. 585 (1864); *San Francisco v. Canavan*, 42 Cal. 541 (1872). See also Peter L. Reich, *Introduction to FREDERIC HALL, THE LAWS OF MEXICO: A COMPILATION AND TREATISE RELATING TO REAL PROPERTY, MINES, WATER RIGHTS, PERSONAL RIGHTS, CONTRACTS, AND INHERITANCES* (reprint 2016) (1885) (noting that *Branham* attorney was noted expert in Mexican law).

<sup>34</sup> *Monterey v. Jacks*, 73 P. 436 (1903).

<sup>35</sup> *Dunlop v. O’Donnell*, 6 Cal. App. 2d 1 (1935); *DeYoung v. City of San Diego*, 194 Cal. Rptr. 722 (1983).

<sup>36</sup> See MARY P. RYAN, *CIVIC WARS* 205–209 (1997); Mary Katherine Gibson, *The Changing Conception of the Urban Park in America: The City of Los Angeles as a Case Study* 32 (M.A. thesis, UCLA, 1977).

<sup>37</sup> See Reich, *Dismantling the Pueblo*, *supra* note 4 (discussing municipal land alienation validated by courts that knowingly overrode the Hispanic legal model).



§ 1466. *What Are the Things a Man may Do upon the Sea-shore.*—Every man who chooses may build a house or cabin upon the sea-shore as a retreat, and he may erect there any other edifice whatever to serve his purposes; provided he does not thereby interfere with the use of the shore, which every one has a right in common to enjoy. He may also build galleys there, or any other vessel whatever; or stretch and mend his nets; and when he is there, or employed for these or other purposes of a similar nature, no one has a right to disturb him. And by the sea-shore is understood all that space of ground covered by the waters of the sea in their highest annual swells, whether in winter or summer.

*SIETE PARTIDAS* — COVER PAGE OF SPAIN'S MEDIEVAL  
 LAW CODE (1565 EDITION) AND TRANSLATION BY  
 FREDERIC HALL OF SECTION ON TIDELANDS ACCESS  
 (SEE FOOTNOTE 39 ON FACING PAGE).

property, which could be used by all for fishing, shelter, and beaching boats.<sup>38</sup> Spain's medieval law code, the *Siete Partidas*, expressed this concept as royal sovereignty over the "highest swells of the sea."<sup>39</sup> Incorporating this principle, Spanish and Mexican land grants in California were bounded by the high tide line, although disputes emerged during the U.S. confirmation process regarding how far some parcels extended into navigable waters.<sup>40</sup> Scholars have noted this Hispanic legal antecedent to the modern public trust doctrine, which authorizes government regulatory power over waterways.<sup>41</sup> Yet almost all California cases upholding government jurisdiction to manage access to tidelands have failed to cite Spanish or Mexican law in support.<sup>42</sup>

In a striking exception to this trend, the California Supreme Court upheld Los Angeles' title to Ballona Lagoon, an arm of the Pacific Ocean subject to tidal influence and claimed by adjacent landowners under an 1839 grant from Mexico.<sup>43</sup> The city wished to dredge the lagoon, construct sea walls, and make other improvements without condemning any property by eminent domain. Writing for the majority, Justice Stanley Mosk

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<sup>38</sup> J. INST. 2.1.1.; 2.1.3.; 2.1.5.

<sup>39</sup> FREDERIC HALL, *THE LAWS OF MEXICO: A COMPILATION AND TREATISE RELATING TO REAL PROPERTY, MINES, WATER RIGHTS, PERSONAL RIGHTS, CONTRACTS, AND INHERITANCES* § 1466 (reprint 2016) (1885) (translating Partida 3, Título 28). See also *Humble Oil & Refining Co., et al. v. Sun Oil Co., et al.*, 191 F.2d 705, 720 (5th Cir. 1951) (citing *id.*).

<sup>40</sup> ERNEST R. BARTLEY, *THE TIDELANDS OIL CONTROVERSY* 61n.8 (1953). See, e.g., *SISTER MARY STE. THÉRÈSE WITTENBURG, THE MACHADOS AND RANCHO BALLONA* 35 (1973) (arguments before the Land Commission whether a rancho's boundary reached the sea or ended at an inner, enclosed bay resolved in favor of the latter).

<sup>41</sup> Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CALIF. L. REV. 217, 225, 240 (1984); MOLLY SELVIN, *THIS TENDER AND DELICATE BUSINESS: THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW AND ECONOMIC POLICY, 1789–1920* 219–225 (1987).

<sup>42</sup> See, e.g., *Boone v. Kingsbury*, 273 P. 797 (Cal. 1928) (authorizing the "useful purpose" of oil drilling); *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971) (filling of a bay restricted to protect ecology and recreation); *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983) (limiting municipal water rights when their exercise would eradicate natural habitat). Cf. *United States v. Coronado Beach Co.*, 255 U.S. 472 (1921) (construing federal tidelands reservation narrowly to block condemnation of island that was part of Mexican grant as confirmed).

<sup>43</sup> *City of Los Angeles v. Venice Peninsula Properties*, 644 P.2d 792 (Cal. 1982).



**BALLONA WETLANDS — ARTISTIC DEPICTION OF “WIYOT’S CHILDREN” AT THE EARLY TONGVA/GABRIELEÑO NATIVE-AMERICAN VILLAGE OF SA-ANGNA IN PRESENT-DAY PLAYA DEL REY**

*(detail of painting by Mary Leighton Thomson, available at <http://www.ballonafriends.org/history.html>).*

ruled that the lagoon was subject to the public trust in tidelands, that the title of plaintiffs’ predecessors was limited by the trust according to Mexican law, and that by the Treaty of Guadalupe Hidalgo the U.S. government, the state, and the city succeeded to ownership of the public’s rights.<sup>44</sup> However, this recognition of the Hispanic basis for the public trust proved ephemeral, for the U.S. Supreme Court reversed the decision on the procedural ground of the state’s failure to assert its interest during the land grant confirmation proceedings.<sup>45</sup>

<sup>44</sup> *Id.*

<sup>45</sup> *Summa Corp. v. California ex rel. State Lands Commission et al.*, 466 U.S. 198 (1984). See REICH, *THE LAW OF THE UNITED STATES–MEXICO BORDER*, *supra* note 4 (detailing U.S. courts’ use of Mexican law regarding the public trust and other doctrines). See also Cheever, *A New Approach*, *supra* note 7 (discussing the land grant–public trust relationship).

## CONCLUSION

For a variety of reasons Hispanic natural resources law has not retained much of a presence in contemporary California jurisprudence. Many post-annexation judges considered Spanish and Mexican principles, but the overall trend was to reject these in favor of common law. In the words of legal historian Morton Horwitz, the mid-nineteenth-century perspective was one in which “[d]ominion over land began to be regarded as an absolute right to engage in any conduct on one’s property regardless of its economic value.”<sup>46</sup> In line with this historical process, the prior anti-developmental tradition was either distorted (as in the “pueblo water right”), overridden (as with minerals and land claims), or procedurally blocked (as with tidelands access). These decisions facilitated a degradation of resources that has been only partially reversed by California’s modern environmental regime.

After an intervening century of intensive exploitation, sustainability policies now echo much of the Hispanic legal approach to water, minerals, land, and coastal areas. But such enlightened regulation still exists uneasily with suburbanized planning. The contrast between fire management rules in Mexican Baja California and those in U.S. Southern California offers a clear example of how reclaiming parts of the traditional model can contribute to resource conservation and public safety. In Mexican Baja, restricting construction in wildlands while allowing periodic natural fires there limits fuel build-up, so that frequent but low-intensity burns affect few people or properties. But north of the border, private residential housing sprawling into increasingly remote areas is protected by fire suppression policies that allow chaparral to proliferate and thus feed far more destructive conflagrations.<sup>47</sup> The implication of this difference is that exerting greater control over where individuals

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<sup>46</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* 102 (1977).

<sup>47</sup> RICHARD A. MINNICH & ERNESTO FRANCO VIZCAÍNO, *LAND OF CHAMISE AND PINES: HISTORICAL ACCOUNTS AND CURRENT STATUS OF NORTHERN BAJA CALIFORNIA’S VEGETATION* 136–138 (1998). See also Molly Hunter, *Wildland Fire Use in Southwestern Forests: An Underutilized Management Option?*, 47 NAT. RES. J. 257 (2007) (noting the ecological benefits to U.S. forests where the Mexican model is followed and resource managers do not suppress fires).

may live will save lives as well as landscapes. We cannot return wholesale to the communal natural resources laws of California's past, but we can implement aspects of that approach which have proved effective in this geographical setting.

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# FROM CORPORATISM TO CITIZEN OVERSIGHT:

*The Legal Fight over California Redwoods, 1969–1999*

DARREN F. SPEECE\*

## INTRODUCTION<sup>1</sup>

In 1986, Charles Hurwitz was known in Northern California only as the shadowy Texas Wall Street tycoon who had suddenly and forcibly purchased a titan of the North Coast timber industry. Hurwitz would do little to improve his image on the North Coast, and his company suffered as a result, deepening the already intense Redwood Wars as he waged war against local activists over the fate of the forest he had purchased. The first time Charles Hurwitz, CEO of Maxxam Group Holding, Inc., addressed his new employees at The Pacific Lumber Company, he replied to a question about his intentions by telling the crowd, “There’s a little story about the golden rule. Those who have

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<sup>1</sup> An earlier version of this article was first published as Darren F. Speece, “From Corporatism to Citizen Oversight: The Legal Fights over the California Redwoods, 1970–1996,” *Environmental History* 14, No. 4 (October 2009): 705–736. Portions of this article are also utilized in Darren F. Speece, *Defending Giants: The Redwood Wars and the Transformation of American Environmental Politics* (Seattle: University of Washington Press, 2017).

the gold, rule.”<sup>2</sup> That twist of the biblical Golden Rule about treating others as you’d like to be treated became shorthand for the popular press’ overly simplistic morality story about a conflict between Wall Street and local environmentalists over the fate of Headwaters Forest. The forest was located approximately 250 miles north of San Francisco, and at the time it was the world’s last privately owned and unprotected old-growth redwood forest complex, containing half-a-dozen groves of giant redwoods nearly 300 feet tall, 20 feet in diameter, and nearly 2,000 years old. After Hurwitz acquired Pacific Lumber, North Coast activists identified a 60,000-acre forest threatened by the company’s new logging regime. Pacific Lumber and activists fought for 20 years over how that forest should be managed. They fought in the media, in legislative halls, in the forests, and especially in the courtroom. Litigation developed into the activists’ most powerful tool, and the state courts of California were the most frequent venue for the battles among timber companies, activists, and government agencies. The battles transformed California’s and the nation’s forestry regulations on private land, and demonstrated the power granted to citizen activists by the environmental protection regime erected during the 1970s.

Hurwitz’s quotation did epitomize the history of California forestry regulation to that point. Until 1970, state law *had* granted the timber industry authority to self-regulate. After 1970, however, citizens successfully leveraged the courts to challenge the state’s forestry regime, with its traditional focus on timber production. Thus, by the time Hurwitz orchestrated the takeover of The Pacific Lumber Company and uttered his infamous phrase in 1986, the California Board of Forestry — although still heavily influenced by the needs of the timber industry — had endured nearly two decades of legal assault on the state’s long-standing production-focused logging practices and institutions.<sup>3</sup>

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<sup>2</sup> The quote can be found in numerous articles, including Ellen Schultz, “A Raider’s Ruckus in the Redwoods,” *Fortune*, April 24, 1989, 72, and John Skow, “Redwoods: The Last Stand,” *Time*, June 24, 2001, <http://www.time.com/time/magazine/article/0,9171,1101940606-164513,00.html>. The best description of the incident at Scotia is by David Harris, *The Last Stand: The War Between Wall Street and Main Street over California’s Ancient Redwoods* (New York: Times Books, 1995).

<sup>3</sup> Because of this corporatist system, no “iron triangle” existed to govern private timber operations on private land in California. The industry was left to its own devices, and the board helped coordinate fire and pest protection, as well as reforestation efforts.



THE MISTY ENVIRONS OF HEADWATERS FOREST.

*Photo by the author. All rights reserved.*

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A close study of the history of citizens' legal campaigns against California's forestry regulations challenges some of the key literature about postwar environmental politics by shifting the focus of study from the national perspective to the local perspective. The typical narrative of postwar environmental politics, as constructed by Stephen Fox, Samuel Hays, Robert Gottlieb, Michael Kraft, Richard Lazarus, and others, has, until recently, emphasized the nationalization and professionalization of

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After 1970, because the Board of Forestry was retained, an iron triangle of the Board, the courts, and interest groups regulated timber operations on private land. This is a very different situation than the regulation of the national forests where Congress, the courts, the Forest Service, and interest groups shaped forest service policy on public lands after 1970. See Paul Hirt, *A Conspiracy of Optimism: Management of the National Forests since World War Two* (Lincoln: University of Nebraska Press, 1994) and Dennis C. Le Master, *Decade of Change: The Remaking of Forest Service Statutory Authority during the 1970s* (Westport, Conn.: Greenwood Press, 1984) for analyses of the changes in national forest governance and management.

“modern” environmentalism and the development of command-and-control federal environmental regulation. At its core, the narrative explains how the expanded, largely white middle-class environmental movement — animated by its understanding of popular ecology and of the destructive forces of modern industry — rose up and demanded a cleaner, more beautiful environment filled with greater recreation opportunities. Earth Day 1970 represents the culmination of that popular upsurge, and from there, professional “environmentalists,” politicians, and bureaucrats took the reins and built the modern environmental protection regime. Environmental politics was then integrated into the everyday horse-trading of Capitol Hill. There, D.C.-based environmental groups, business interests, and state actors lobbied and debated the scope and intent of the new environmental laws, and the courts rendered judgments.<sup>4</sup>

The top-down narrative of nationalization and professionalization frays when viewed from a local perspective, however. Many scholars have addressed local activism and its effects on the federal environmental

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<sup>4</sup> On the rise of modern environmentalism, see especially Samuel P. Hays, *Beauty, Health, and Permanence: Environmental Politics in the United States, 1955–1985* (Cambridge: Cambridge University Press, 1987) and *A History of Environmental Politics since 1945* (Pittsburgh: University of Pittsburgh Press, 2000); Roderick Nash, *Wilderness and the American Mind* (New Haven: Yale University Press, 1973); Richard J. Lazarus, *The Making of Environmental Policy* (Chicago: University of Chicago Press, 2004); and Adam Rome, *The Bulldozer in the Countryside: Suburban Sprawl and the Rise of American Environmentalism* (Cambridge: Cambridge University Press, 2001). On the nationalization and professionalization of modern environmental politics and the environmental movement, see Thomas R. Dunlap, *Faith in Nature: Environmentalism as Religious Quest* (Seattle: University of Washington Press, 2004), who argued that professional national groups tried to impose their ideologies on local people; J. Brooks Flippen, *Nixon and the Environment* (Albuquerque: University of New Mexico Press, 2000); Stephen Fox, *The American Conservation Movement: John Muir and His Legacy* (Madison: University of Wisconsin Press, 1985), whose argument, to be fair, revolved more around the role of the “radical amateur” in the environmental movement, despite the professionalization of the movement; Robert Gottlieb, *Forcing the Spring: The Transformation of the American Environmental Movement* (Washington, D.C.: Island Press, 1993); Michael E. Kraft, *Environmental Policy and Politics* (New York: Pearson Longman, 2007); James Salzman and Barton H. Thompson, *Environmental Law and Policy* (New York: Foundation Press, 2003); Joseph L. Sax, *Mountains Without Handrails: Reflections on the National Parks* (Ann Arbor: University of Michigan Press, 1980); and James Morton Turner, “The Promise of Wilderness: A History of American Environmental Politics, 1964–1994” (PhD diss., Princeton University, June 2004).

protection regime and public land management, but there are relatively few treatments of the local politics of forestry on private land. The federal studies illuminated the dramatic postwar changes in federal policy for public land management, the rifts and tensions between local and national environmental groups during the spotted owl conflict, and the ways local groups affected the implementation of the Wilderness Act and the National Environmental Policy Act. Studying the Redwood Wars demonstrates how local activists on the North Coast of California developed a litigation campaign to discredit and destroy the Progressive-Era corporatist system in order to better consider non-commercial forest resources in the regulation of private timber land.<sup>5</sup>

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<sup>5</sup> Hirt, *Conspiracy of Optimism* and Le Master, *Decade of Change* are great studies of the transformation of federal land management. Some of the recent treatments of local forestry activism as it related to federal laws such as the Wilderness Act of 1964, the Endangered Species Act, and the National Forest Management Act include William Dietrich, *The Final Forest: The Battle for the Last Great Trees of the Pacific Northwest* (New York: Penguin Books, 1993); Kathie Durbin, *Tree Huggers: Victory, Defeat & Renewal in the Northwest Ancient Forest Campaign* (Seattle: The Mountaineers, 1996); Kevin R. Marsh, *Drawing Lines in the Forest: Creating Wilderness Areas in the Pacific Northwest* (Seattle: University of Washington Press, 2007); and Samuel P. Hays, *Wars in the Woods: The Rise of Ecological Forestry in America* (Pittsburgh: University of Pittsburgh Press, 2007). Henry F. Bedford produced a wonderful study of the local activism in New Hampshire regarding the NEPA impacts on the nuclear industry, *Seabrook Station: Citizen Politics and Nuclear Power* (Amherst: University of Massachusetts Press, 1990). The literature on the Redwood Wars is largely journalistic and autobiographical, including Judi Bari, *Timber Wars* (Monroe, Me.: Common Courage Press, 1994); Joan Dunning, *From the Redwood Forest: Ancient Trees and the Bottom Line: A Headwaters Journey* (White River Junction, Vt.: Chelsea Green Publishing, 1998); Dave Foreman, *Confessions of an Eco-Warrior* (New York: Harmony Books, 1991); and Julia Butterfly Hill, *The Legacy of Luna: The Story of a Tree, a Woman, and the Struggle to Save the Redwoods* (San Francisco: HarperSanFrancisco, 2000). Harris, *The Last Stand* is the only journalistic book that deals solely with the Headwaters conflict. The journalistic and polemical treatments that attend briefly to the Headwaters conflict include Alston Chase, *In a Dark Wood: The Fight over Forests and the New Tyranny of Ecology* (New York: A Richard Todd Book / Houghton Mifflin Company, 1995); David Helvarg, *The War against the Greens: The "Wise-Use" Movement, the New Right, and the Browning of America* (Boulder: Johnson Books, 2004); Christopher Manes, *Green Rage: Radical Environmentalism and the Unmaking of Civilization* (Boston: Little, Brown, 1990); Jacqueline Vaughn, *Green Backlash: The History and Politics of the Environmental Opposition in the U.S.* (Boulder: Lynne Rienner Publishers, 1997); and Susan Zakin, *Coyotes and Town Dogs: Earth First! and the Environmental Movement* (New York: Viking,

Under corporatist governance, the state officially grants industries the ability to improve efficiencies via self-regulation. The state facilitates industry participation by forming official regulatory boards on which industry holds a majority of seats. The idea behind corporatism is that those people with the best knowledge of an industry's operations ought to be the ones who set the rules and govern the development of the industry. The state administers the programs and brings resources to the table. Corporatism, thus, is a formal institutional arrangement, not a description of the policy preferences of a regulatory board. The U.S. Forest Service, Bureau of Land Management, and the Fish and Wildlife Service never were managed by corporatist boards, and accordingly, national environmental litigation addressed agency action and statute interpretation. However, the states utilized corporatist boards more frequently, which complicated the shift to the modern environmental protection regime. Stephanie Pincetl correctly identified the role of California's Progressive-Era governance traditions in preventing land use and ownership reform in California, but largely without considering successful challenges to corporatist arrangements. The history of California forestry reveals persistent insurgence, intense local activism, and the breakdown of a corporatist, production-focused governance tradition. That history also points to the national consequences, most of them unintended, of the local activism.<sup>6</sup>

Litigation was the local reformers' most successful tool during the Redwood Wars. A small group of citizens leveraged the power of the courts and the Legislature, while simultaneously marshalling more power into their own hands. Their legal campaign accomplished four things that

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1993). A few scholarly books that are focused on environmentalism briefly mention the Headwaters conflict, including Hays, *Wars in the Woods*, Carolyn Merchant, *Radical Ecology: The Search for a Livable World* (New York: Routledge, 2005) and Rik Scarce, *Eco-warriors: Understanding the Radical Environmental Movement* (Walnut Creek, Calif.: Left Coast Press, Inc., 2006). In their scholarly treatments, Hays and Merchant identify the wrong timber company and incorrect forest, respectively.

<sup>6</sup> *Corporatism*, as used here, refers to the definition Ellis Hawley used in his classic article, "The Discovery and Study of a 'Corporate Liberalism,'" *The Business History Review* 52, No. 3 (Autumn 1978): 309–320. Hawley defines *corporatism* as a system whereby industries are guided by "officially recognized, non-competitive, role-ordered occupational or functional groupings . . . where the state properly functions as a coordinator, assistant, and midwife rather than director or regulator."

advocacy, protests, and direct action alone could not accomplish. First, citizen suits forced the state to legislatively abandon the official corporatist and development-only focus of state forestry laws. Second, the cases forced the Board of Forestry to back away from its traditional alliance with the timber industry at crucial times. Third, the litigation permanently blocked proposed harvests of many old-growth redwood groves. And finally, the cases drove President Bill Clinton, Governor Pete Wilson, and Pacific Lumber to negotiate a settlement of the Headwaters Forest conflict. As scholars have pointed out, public demonstrations created the necessary political will to act at times during the establishment of the modern environmental protection regime, advocacy helped build the national and state laws, and national litigation pushed the implementation of the laws along. In California, the long corporatist tradition mitigated the usefulness of those tools because the Legislature had previously abrogated its legislative duties with respect to the timber industry. As a result, citizens took their case to the courts to dismantle corporatism and production-focused timber regulation.<sup>7</sup>

The California forestry challenges deserve to be counted among the most important environmental law developments in the postwar United States because they fundamentally transformed an entire system of governance.

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<sup>7</sup> Some good analyses of general postwar citizen group legal history with respect to NEPA are Hays, *Beauty, Health, and Permanence*, chapter 14; Lazarus, *The Making of Environmental Policy*; William H. Rodgers, Jr., *Environmental Law* (St. Paul: West Publishing Company, 1994); Salzman and Thompson, *Environmental Law and Policy*; Joseph L. Sax, *Defending the Environment: A Strategy for Citizen Action* (New York: Alfred A. Knopf, Inc., 1971); David B. Sicilia, "The Corporation Under Siege: Social Movements, Regulation, Public Relations, and Tort Law since the Second World War," in *Constructing Corporate America: History, Politics, Culture*, eds. Kenneth Lipartito and David B. Sicilia (Oxford: Oxford University Press, 2004); and Richard B. Stewart, "A New Generation of Environmental Regulation?," *Capital University Law Review* 29 (2001): 21–182. With respect to the Forest Service, the Monongahela and Tongass cases are the most important. Paul Hirt's analysis of the use of the courts to challenge the "get out the cut" mentality of the U.S. Forest Service is a very important study, especially chapter 11, "From Gridlocked Conflict to Compromised Policy Reform, 1969–1976, in *A Conspiracy of Optimism*. Le Master, *Decade of Change* recounts the history of the way citizen suits, industry and congressional pressure to increase harvests, and Forest Service implementation of clearcutting, led to the creation of the Renewable Resources Planning Act of 1974 and the National Forest Management Act of 1976, which transformed Forest Service oversight and the agency's mission.

The environmental litigation of citizens at the federal level expanded, clarified, and enforced particular aspects of the modern federal environmental protection regime. For example, the National Environmental Policy Act (NEPA) and other laws expanded the responsibilities of federal agencies to non-commercial landscape resources, and they empowered citizens to participate in agency decisions and act as private attorneys general. And citizens turned to the courts using NEPA and other legal tools to force agencies to better consider public and ecological health and to comply with the new environmental laws. In the case of the Forest Service, local citizen groups sued the agency during the early 1970s and drove Congress to pass sweeping legislation that overhauled the agency's mission and oversight. However, as dramatic as the changes in environmental regulation and oversight were at the federal level, the fundamental structure of governance that was handed down from the Gilded Age and the New Deal remained unchanged. The U.S. regulatory system maintained its command-and-control structure. The Forest Service still maintained a client-agency relationship with the timber industry. The litigation campaign orchestrated by North Coast activists was different because it dealt with state law and private land, it gutted a governance structure and philosophy — corporatism — and it destroyed part of the vestigial remains of the corporatist tradition.<sup>8</sup>

The federal cases are important because they clarified legislative mandates and forced agency action to fulfill new legal obligations, but they did not reorder institutions in the same way as the North Coast activists' efforts in California. The most-studied litigation involved the implementation of the Clean Air and Clean Water Acts, the Endangered Species Act,

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<sup>8</sup> The most well-known environmental cases include *Scenic Hudson Preservation Conference v. Federal Power Commission*, 407 U.S. 926 (1972) because it was the first time an environmental group was granted legal standing. *Sierra Club v. Morton*, 405 U.S. 727 (1972) changed the traditional injury-in-fact standing requirements to allow citizens to use the citizen suit provisions of the federal environmental laws if they could demonstrate they had suffered recreational or aesthetic injuries. Previously, standing was granted only if the plaintiffs could demonstrate specific economic or personal harm to themselves. The literature also prioritizes the cases that clarified the 1970s environmental laws. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) clarified that the Endangered Species Act was to be implemented without consideration of the economic impact of protecting species. Likewise, *Lead Industries Association v. EPA*, 647 F.2d 1130 (Fed. Cir. 1980) established the principle that the EPA must *only* base air quality standards on health considerations, not on economic or technical considerations.



and the National Forest Management Act. Those cases helped define the scope and intent of the modern environmental protection regime. The literature is rich with analysis of those cases and their effects. This article focuses on the eight most important cases in the movement to transform California forestry governance. Because the movement set its sights on the fundamental transformation of institutions, increased regulation of private property, and giant redwoods, it led to, and was part of, one of the most important environmental battles of the late twentieth century in the United States. As such, its place in environmental law needs to be better situated than it currently is.

## THE CORPORATIST TRADITION

The California Board of Forestry was a model of corporatism long before Herbert Hoover popularized the concept, and the Board of Forestry remained an official corporatist body until 1970. In 1885, California became one of the first states to regulate private timber land through the use of an appointed Board of Forestry, and that Board of Forestry appears to be one of the first incarnations of corporatist regulatory entities. As previously noted, under corporatist governance, the state grants industries the ability to improve efficiencies via self-regulation. The state facilitates industry participation by forming official regulatory boards on which industry holds a majority of seats. The California Board of Forestry was created and designed to ensure that those with intimate knowledge of the industry could guide the development of California timber operations. The board's mission was not to wrest control of the timber industry from large companies and landholders, but rather to efficiently manage the industry by safeguarding its interest in long-term timber harvests. However, the Board of Forestry was more committed to its economic development goals than it was to its conservation mission.<sup>9</sup>

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<sup>9</sup> Samuel P. Hays provides the classic interpretation of conservationism and progressivism in *The Gospel of Efficiency: The Progressive Conservation Movement, 1890–1920* (Cambridge: Harvard University Press, 1959), chapter 13. Hays argues that progressivism and conservationism were motivated by the efficient use of resources via the central guiding hand of executive branch scientific experts, not by “people versus the interests” politics. The Board of Forestry in California was similar, but different, in that the Board was not composed of scientific experts but rather experts of the industry.

The 1885 Board of Forestry was established to ward off the predicted timber shortage, and the governor appointed its five members based on their knowledge of timber industry operations. Rather than address harvest methods or forest regeneration to ward off the predicted shortage, the first Board of Forestry mostly concerned itself with recommendations to the Legislature to protect the inventories of the state's private timber operators. Indeed, from 1885 until its dissolution in 1893, no law was passed that dealt with a forestry issue other than the prevention of fires and trespassing. A singular exception in early California history was a law passed in 1868, long before the establishment of the board, that encouraged the planting of shade and fruit trees along highways in order to protect travelers from the heat and to provide a source of food in case of emergency.<sup>10</sup>

In 1905, the Legislature reorganized the Board of Forestry, but retained the corporatist structure. The new Board of Forestry was formally charged with preventing fires, protecting public and private land from trespass, managing the state parks, and purchasing clearcut land to manage as state forests to regenerate the timber supply. Timber harvesting methods were left to the judgment of individual timber operators. On the recommendation of the Board of Forestry, the Legislature passed five fire prevention laws, including the 1923 Compulsory Fire Patrol Act, as well as an insect abatement law in 1923, all in an effort to protect the timber supply.<sup>11</sup>

In 1927, the Board of Forestry was reorganized within the new Department of Natural Resources, and the reorganization — still a body of five members appointed by the governor, based on knowledge of the timber

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The state forester, overseen by the board, provided technical analysis and advice. Stephanie S. Pincetl, *Transforming California: A Political History of Land Use and Development* (Baltimore: Johns Hopkins University Press, 1999) argued that the progressive boards and commissions created during the Progressive Era directly contributed to land use and ownership patterns during the twentieth century because the regulatory boards were composed of business experts focused on development.

<sup>10</sup> Chapter 498 of the 1868 Assembly; see C. Raymond Clar, *California Government and Forestry from Spanish Days Until the Creation of the Department of Natural Resources in 1927* (Sacramento: Division of Forestry, Department of Natural Resources, State of California, 1959) [vol. 1], 74 and 96–98.

<sup>11</sup> Clar, *California Government and Forestry* [vol. 1], 214, 297, 402, 411, 433, 445. And see Samuel Trask Dana and Myron Krueger, *California Lands: Ownership, Use, and Management* (Washington, D.C.: The American Forestry Association, 1958), 64 and 68, and Schrepfer, *Fight to Save Redwoods*, 23.

industry — officially recommitted its members to timber supply and water. The new Parks Commission took over control of the management of recreation resources. During the life of the third Board of Forestry, in addition to the usual fire prevention, state nursery, and regeneration laws and recommendations, a minimum diameter law that prohibited the harvest of trees smaller than eighteen inches in diameter was passed in 1943. That law marked the first time the Board of Forestry encroached upon the management prerogatives of private industry in the name of conservation, and it came long after a 1932 Department of Agriculture report that recommended selective cuts in Redwood Country in order to prevent deforestation.<sup>12</sup>

After World War II, the Legislature made some cosmetic changes to the regulatory regime, but maintained its corporatist orientation. Without legislative oversight, the Board of Forestry continued to support development but not forest conservation. For example, the 1943 law prohibiting the harvest of trees less than eighteen inches in diameter may appear to mark a move away from corporatism, toward greater legislative oversight, but that law was in fact another in the long history of regulations devised by businesses in order to protect their markets. In this case, the minimum diameter law protected big timber companies from competition from small, independent, “gyppo” contractors best suited to harvest small trees. Like the minimum diameter law, the 1945 Forest Practice Act that governed timber operations on private land also appeared to undercut corporatism while promoting conservationism. The law required the Board of Forestry to create forest practice rules to ensure that the state’s private timber operators used the best conservation practices. However, it also perpetuated industry self-regulation, and when the Board of Forestry created the rules, it predictably declined to include penalties for violations. Finally, in 1960 the Board of Forestry, despite the recommendations of North Coast timber reports, began approving large clearcuts because the timber industry wanted to capitalize on the housing boom and on decreased timber production

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<sup>12</sup> See C. Raymond Clar, *California Government and Forestry [vol. 2]: During the Young and Rolph Administrations* (Sacramento: Division of Forestry, Department of Conservation, State of California, 1969), 36–37, 52, 121–125, 148–150, 189–274. Also see, Pincetl, *Transforming California*, 110; S.B. Show, “Timber Growing Practice in the Coast Redwood Region of California,” Technical Bulletin 283, March 1932, in USDA Technical Bulletins No. 276–300 (Washington, D.C.: U.S. Government Printing Office, 1932).

in the Pacific Northwest. None of these postwar logging developments is surprising. The Board of Forestry's own assessment of its postwar priorities were to prevent fire from destroying timber and to protect the timber industry from unfair competition from within — priorities that reveal the influence of the postwar housing boom on the timber industry as well as its commitment to helping the timber companies operate profitably.<sup>13</sup>

The resilience of California's corporatist Board of Forestry stands in stark relief against the rising tide of "modern environmentalism" and the resulting changes in environmental politics after World War II. The popularity of outdoor recreation increased dramatically, as did concern about suburban development and humankind's impact on the planet. As a result, national environmental groups like the Sierra Club and The Wilderness Society grew in size and stature. And local groups arose to combat local pollution, local land management, and suburban development. While the nation's environmental attention swung from nuclear fallout to Dinosaur National Monument to The Wilderness Act, the California Board of Forestry remained beyond reproach for the most part. Outside of loud complaints, no active opposition to the board's operations was apparent until the late 1960s. And why would there have been? Most of the state's residents did not live near enough to timber lands to witness the increased logging and clearcutting. The Save The Redwoods League purchased grand redwood groves and created parks out of them for recreationists and scientists. Appreciation of the non-economic values of forests did not become widespread until well after World War II. And the timber industry was a major contributor to California's postwar prosperity, just as it was nationally. As a result, residents of the North Coast seemed unwilling to bite the hand that fed them, and other Californians were not concerned with North Coast logging.<sup>14</sup>

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<sup>13</sup> C. Raymond Clar, *California Government and Forestry* [vol. 2], 36–37, 52, 121–125, 148–150, 189–274. Also see, Pincetl, *Transforming California*, 110; Dana and Krueger, *California Lands*, 69, 70, 71, 187, 188, 192–193; Pincetl, *Transforming California*, 162–165; and Michael G. Barbour, et al., *Coast Redwood: A Natural and Cultural History* (Los Olivos, Calif.: Cachuma Press, 2001), 188.

<sup>14</sup> Samuel P. Hays and Roderick Nash provide classic discussions about the changing attitudes of the American public toward natural resources and landscapes during the nineteenth and twentieth centuries (Hays, *Beauty, Health, and Permanence* and Nash, *Wilderness and the American Mind*). See also, J.W. Penfold, "The Dinosaur

Challenges to the Board of Forestry's predominance first emerged in the 1950s, when citizen groups such as the Sierra Club complained about the rate of timber harvests and the prolific use of clearcutting in Redwood Country. As a result, the Legislature took steps to increase its oversight of the timber industry. In 1962, the Legislature commissioned a report that concluded that the forest practice rules "failed to provide adequate enforcement" to protect public values in water, fishing, and recreation." In 1967, another legislative report concluded that the rules needed to be broadened if California were to avoid major damage to its most important watersheds. A final legislative committee study of the forest practice rules concluded in 1971 that logging was one of the primary causes of the 80 percent decline in salmon and steelhead runs in Northern California. The agitation of the Sierra Club and others thus helped undercut confidence in the corporatist regulatory regime by pressuring the Legislature to study the industry in more detail.<sup>15</sup>

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Controversy," *Sierra Bulletin* 36, No. 10 (December 1951); Rome, *Bulldozer in the Countryside*; Stephen M. Spencer, "Fallout: The Silent Killer," *The Saturday Evening Post*, August 29, 1959; and McGee Young "From Conservation to Environment: The Sierra Club and the Organizational Politics of Change," *Studies in American Political Development* 22 (Fall 2008): 183–203. See Pincetl, *Transforming California*, 163, for a discussion of the new pro-timber attitudes of North Coast residents after World War II.

<sup>15</sup> See Henry Sadler, "Winter Damage in Redwood Parks," *Sierra Bulletin* 41, No. 8 (October 1956): 12–18; Peggy Wayburn and Edward Wayburn, "Our Vanishing Wilderness," *Sierra Bulletin* 42, No. 1 (January 1957): 6–9; George Ballis, "Havoc in Big Trees," *Sierra Bulletin* 42, No. 5 (May 1957): 10–11; Peggy and Edward Wayburn, "Bulletin," *Sierra Bulletin* 44, No. 9 (December 1959); Peggy Wayburn, "The Tragedy of Bull Creek," *Sierra Bulletin* 45, No. 1 (January 1960): 10–11; Newton B. Drury, "Chapter II — Bull Creek Story: Redwoods and You," *Sierra Bulletin* 45, No. 4 (April/May 1960): 10–13; and Susan R. Schrepfer, *The Fight to Save the Redwoods: A History of Environmental Reform, 1917–1978* (Madison: University of Wisconsin Press, 1983), 108–110, 112, 117, 144; and Pincetl, *Transforming California*, 162–165, regarding the 1950s Sierra Club and Fish and Game complaints; Assembly Interim Committee on Natural Resources, Planning and Public Works, *Findings and Recommendations Related to the Forest Practice Act, 1961–1962*, quoted in Sharon Duggan and Tara Mueller, *A Guide to the California Forest Practice Act and Related Laws* (Point Arena, Calif.: Solano Press Books, 2005), 1; Assembly Subcommittee on Forest Practices and Watershed Management, *Man's Effect Upon the California Watershed, 1965–1967*, quoted in Duggan and Mueller, 1–2; Committee on Salmon and Steelhead Trout, *An Environmental Tragedy*, 1971, quoted in Duggan and Mueller, 2. The history of state legislators, agency employees, and environmentalists pushing these studies and reforms still needs to be told. For this study, the fact

## THE DESTRUCTION OF CORPORATISM

The inability, or unwillingness, of the Board of Forestry to accommodate the public's desire to consider the non-commercial values of the forest led directly to citizen actions that repealed the 1945 Forest Practice Act and the Board of Forestry it authorized. In the late 1960s, Bayside Timber Company obtained a logging permit from the board for land in San Mateo County, near Santa Cruz. Down-slope residents objected to the logging plan because of projected erosion and watershed damage, and successfully pressured the county Board of Supervisors to reject Bayside's road-building permit. Bayside Timber subsequently sued the county, but in 1971, the First District Court of Appeal in California ruled in favor of the county's right to block the logging. The court declared that the 1945 Forest Practice Act unconstitutionally delegated legislative authority to "persons pecuniarily interested in the timber industry."<sup>16</sup>

The court identified two main problems with the 1945 act, despite recent amendments. First, the act authorized the governor to appoint a five-person board comprising three representatives of the timber industry, one from the grazing industry, and one from the general public. Second, all forest practice rules were to be approved by two-thirds of the timber owners in any forest district before being finalized by the Board of Forestry. While the *Bayside* case was working its way to appeal in 1970, the Legislature attempted to fix the self-regulation problem by increasing the size of the Board of Forestry to seven members. The additional two members were to be from the general public with "an interest in and knowledge of the environment." The court noted that the additional Board of Forestry members did not change the fact that two-thirds of a district's private timber owners had to approve all forest practice rules, and so the court declared the 1945 act unconstitutional. As the first successful attack on the Board of Forestry's independence, the *Bayside*

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they took place, and the framework they set up, are the most important aspects of that history because it is that framework that led to the changes in law during the 1970s that gave citizens greater access to the bureaucracy and courts. See Henry J. Vaux, *Timber in Humboldt County*, California Agricultural Experiment Station Bulletin 748 (University of California, 1955); William D. Pine, "Humboldt's Timber: A Present and Future Problem," pamphlet (Eureka, Calif.: Humboldt County Board of Supervisors, 1952).

<sup>16</sup> *Bayside Timber v. Board of Supervisors*, 20 Cal. App. 3d 1, 7 (1971).

decision marks the beginning of citizen actions to overhaul California's forestry regime.<sup>17</sup>

Subsequent passage of the 1973 Forest Practice Act, as NEPA did in 1970 for federal environmental protection law, marked a sea change in private land use law in California because the law was designed to shift the state's focus toward resource conservation, and it deputized the citizenry. The new law reflected the more powerful status of scientists in postwar environmental politics and was based on the 1972 UC Davis Report's recommendation of a system of "resource conservation standards to protect watersheds and ecological values." The law charged the Board of Forestry and the Division of Forestry it oversaw with creating forest practice rules to end the depletion of timber resources, "giving consideration to values relating to recreation, watershed, wildlife, range and forage, fisheries, regional economic vitality, employment and aesthetic enjoyment." The law additionally required timber companies to submit Timber Harvest Plans before any new cutting and to allow the Department of Fish and Game and the Water Quality Control Boards to comment on the plans.

The most important sections of the new law for citizen groups provided greater citizen oversight of the Timber Harvest Plan process. The new law mandated public review of Timber Harvest Plans before final approval, and another section allowed citizens to challenge the Department of Forestry (CDF) and the Board of Forestry decisions in court (following the model of the NEPA and the federal Clean Air and Water Act amendments of 1970 and 1972, respectively). The citizen suit provision specifically allowed citizens to sue CDF and the Board of Forestry to obtain judicial review of administrative decisions. Additionally, the state Code of Civil Procedure granted citizens the right to challenge discretionary agency actions. Environmental activists eagerly embraced these new tools and were able to aggressively use the citizen suit provisions because, unlike federal environmental cases,

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<sup>17</sup> Forest Practice Act, § 4572, as amended in 1970, quoted in *id.*, at 9. Sharon Duggan, "Citizen Enforcement of California's Private Land Forest Practice Regulations," *Journal of Environmental Law & Litigation* 8 (Spring 1993): 291–315. Duggan rightly argues that *Arcata* (see next section) provided motivation for citizens to watchdog the timber harvest plan review process (p. 4). However, *Bayside* marks the beginning of the citizen watchdog era because citizens and citizen groups pressured the county Board of Supervisors to reject a harvest plan and argue the unconstitutionality of the 1945 FPA on appeal.

issues of standing regarding environmental group plaintiffs never became an issue in California. The courts had long recognized an exception to the specific economic injury/interest test for cases involving a “public right . . . to procure the enforcement of a public duty.” The new act also reconstituted the Board of Forestry with five members from the public, three from the forest products industries, and one from the livestock industry, a move naively meant to break the timber industry’s grip on the board. Out of this system, a legal and political battle arose over control of board policies and California’s last unprotected ancient forests.<sup>18</sup>

## “HITTING THE DONKEY”: FORCING OUT DE FACTO CORPORATISM WITH CONTINUED LITIGATION

### ARCATA AND GALLEGOS: TWO EARLY STEPS TO FORCE BOARD COMPLIANCE WITH CEQA AND FPA

The Board of Forestry, like its federal counterparts, largely resisted its new responsibilities during the 1970s, and citizens continued to challenge the state’s corporatist tradition for logging regulation, just as citizen groups challenged federal agency actions under NEPA. In 1973, over the objections of the National Park Service, the Board of Forestry ruled that clearcutting in the Redwood Creek watershed did not harm Redwood National Park. It also approved an Arcata National Corporation harvest plan within the watershed. The Natural Resources Defense Council, in line with their federal efforts to clarify and enforce NEPA, sued Arcata National and the state forester, arguing that the plan did not adequately consider environmental harm as required by the California Environmental Quality Act (CEQA, the state equivalent of NEPA), which required environmental

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<sup>18</sup> Institute of Ecology at the University of California, Davis, *Public Policy for California Forest Lands* (UC Davis, 1972), quoted in Duggan and Mueller, *Guide to Forest Practice Act*, 2–3. See Pincetl, *Transforming California*, 167–168, and Barbour, *Coast Redwood*, 188–189. For a detailed review of the sections of the 1973 Forest Practices Act (Pub. Res. Code § 4511 et seq.), see Duggan and Mueller, 6–9 and 790–796. The citizen suit provision of the FPA is contained within Pub. Res. Code § 4514.5. The ability to challenge discretionary actions is found in Code of Civ. Pro. §§ 1085 and 1094.5. See Duggan and Mueller, 797–798, for a discussion of issues of standing in California.



impact studies prior to any state agency taking actions that could cause significant environmental impacts. The law also required state agencies to propose mitigations for environmental impacts. Arcata National argued that CEQA guidelines did not apply to the Timber Harvest Plans because plan approval was a ministerial duty of the state forester, not a discretionary action. Superior Court Judge Arthur Broaddus ruled in 1975 that Timber Harvest Plans were a discretionary action and thus governed by CEQA, and further ruled that the content of the contested harvest plans failed to fulfill the Environmental Impact Report requirement of CEQA. Development-focused corporatism was hit with a second major blow when Arcata National unsuccessfully tested the industry and the Board of Forestry's autonomy in a 1976 appeal of Judge Broaddus' ruling.<sup>19</sup>

The Board of Forestry's continued resistance to its duties to CEQA and the non-economic mandates of the Forest Practice Act encouraged citizens to continue their legal challenges to corporatism. In 1978, Sonoma County residents Francine Gallegos and Louise Patterson, along with the Camp Meeker Improvement Association, obtained a writ of mandate to negate the Board of Forestry's approval of a Chenoweth Lumber Company harvest plan, one that the Department of Health concluded would "threat[en] . . . the quantity and quality of water in the Camp Meeker area." In a sequence of events that became a pattern through the 1980s, CDF rejected the Chenoweth harvest plan based on the Department of Health's concerns, but Chenoweth appealed to the Board of Forestry, the board overturned CDF's dismissal, and citizens sued.

Gallegos et al. successfully argued that the *Arcata* ruling did not fully capture all of the ways CEQA applied to timber plans. Specifically, they charged the Board of Forestry with failure to comply with CEQA requirements because the Board of Forestry had not based its decision on "substantial evidence" and had not responded to public comments regarding

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<sup>19</sup> *Natural Resources Defense Council, Inc. v. Arcata National Corp.*, 59 Cal. App. 3d 959 (1976); 58 Ops. Cal. Atty. Gen 250 (1975). See Schrepfer, *Fight to Save Redwoods*, 194 and 197, for a discussion of the Board's refusal to heed National Park Service orders to enforce the California Forest Practice Act and stop logging in the watershed. The California Environmental Quality Act is California Public Resources Code §§ 21000–21006, 21050, 21060–21072, 21080–21098, 21100–21108, 21150–21154, 21156–21159.9, 21160–21162, and 21165–21177.



**GIL GREGORIO PROTESTING CORPORATISM.**

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the Chenoweth harvest plan. The appellate court agreed with Gallegos et al. and the *Arcata* court that harvest plans had to fulfill CEQA requirements for Environmental Impact Reports. The *Gallegos* court went even further and demanded that the board and state forester had to respond *in*

*writing* to public comments regarding significant environmental impacts of a harvest plan, and that the response needed to explain the state forester's decision in a "reasoned" manner based on "substantial evidence." Even though official corporatist rule had ended, the industry would continue to appeal to the corporatist-leaning Board of Forestry when bureaucrats threatened to block logging plans. The Board of Forestry denied the industry's appeals only after repeated defeats in court during the 1980s and 1990s demonstrated that the *Gallegos* ruling had to be heeded.<sup>20</sup>

The *Gallegos* and *Arcata* decisions provided the foundation for nearly all subsequent local citizen challenges of harvest plans. The two rulings required that harvest plans fully comply with CEQA, including: the requirements that other relevant agencies be consulted, that feasible alternatives and mitigation be implemented, that the agency make the harvest plans available to the public, and that the agency respond to public comments in a reasoned manner. CDF, the Board of Forestry, and the timber industry resisted these mandates, but, as described below, EPIC and other groups sued to force compliance with the laws and court precedents. It was through these legal channels that local citizens chipped away at the Board of Forestry's corporatist orientation, forcing it to step back from its traditional alliance with the timber industry several times during the late 1980s and 1990s.<sup>21</sup>

### *EPIC v. JOHNSON*: A SUCCESSFUL MODEL

Although the Sierra Club was instrumental in the fights over Redwood National Park and in the 1976 amendments to the Forest Practice Act, and continued to play a major role in California logging politics, the legal campaign to destroy the corporatist traditions of the Board of Forestry was largely driven by a small group of North Coast residents committed to the

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<sup>20</sup> Barbour, *Coast Redwood*, 189–190. A writ of mandate compels a public agency to correct prior actions not consistent with the law. *Gallegos v. California State Board of Forestry*, 76 Cal. App. 3d 945 (1978).

<sup>21</sup> In addition to the published court opinions and regulations, Sharon Duggan offers a detailed analysis of codes, laws, and rulings of the 1970s regarding CEQA, the Timberland Productivity Act, and the FPA. She also provides analysis of a few of the subsequent rulings related to defining the laws regulating timber harvesting in California that this article does not cover. See Duggan, "Citizen Enforcement."

conservationism and ecological environmental values set forth by Gifford Pinchot (first chief of the U.S. Forest Service) and decidedly uninterested in state or national politics or citizen groups, except where needed to effect local land management changes. This cadre included Humboldt and Mendocino residents Kathy Bailey (state chair of California Sierra Club's state forestry program and the person responsible for convincing national Sierra to partner with locals on the litigation effort), Sharon Duggan (a native North Coast attorney working in the Bay Area), and other activists who established the Environmental Protection Information Center (EPIC).<sup>22</sup>

EPIC was formed in 1977 in southern Humboldt County (approximately 200 miles north of San Francisco along the coast) by residents Robert Sutherland (who changed his name to The Man Who Walks in the Woods), Ruthanne Cecil, and other activists. EPIC was initially an ad hoc group that worked on local environmental issues, but in 1981, EPIC was formally incorporated with a broader set of goals:

- 1) preserve critical old growth forest remnants and the biological diversity they contain;
- 2) reduce the degradation of timberlands through improvement of forest practices (toward sustainability);
- 3) stabilize the local economy through sustainable production in healthy, diverse forests;
- 4) educate the citizenry regarding their public interest in the forests, its intrinsic value, and the avenues of influence available to them through state and federal agencies; and
- 5) channel information on environmental matters of all kind.<sup>23</sup>

The local organization from the small town of Garberville (population approximately 2,000) quickly became a major player in logging regulation by aggressively using the citizen suit provisions of CEQA and the Forest Practice Act to challenge Board of Forestry actions. In doing so, EPIC's actions paralleled the legal actions of national environmental groups that increasingly turned to the courts in response to the Reagan administration's decreased enforcement of environmental laws. Unlike the national efforts,

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<sup>22</sup> See Schrepfer, *Fight to Save Redwoods*, 129–228, for a detailed account of the 1968 and 1978 efforts to create Redwood National Park.

<sup>23</sup> "Organizational History and Goals," undated, Archives of the Environmental Protection Information Center, "EPIC Publications" binder, EPIC offices, Redway, California.



SOME OF THE EARLY EPIC FAMILY MEMBERS. IN ITS EARLY YEARS, EPIC EMBODIED MUCH OF THE EARLY MEMBERS' 1960S COUNTERCULTURE AND POLITICAL IDEALS: AN ORGANIZATION THAT WOULD BE RUN BY THE COMMUNITY, NOT "HOITY-TOITY" MIDDLE-CLASS DONORS, AS THE MAN WHO WALKS IN THE WOODS EXPLAINED TO THE AUTHOR.

*Photographer Unknown. All rights reserved by the Environmental Protection Information Center.*

however, EPIC's work was built on a local vision of responsive government and sustainable communities that would produce timber, jobs, and wildlife habitat in perpetuity. However, forestry operations were governed at the state level, and endangered species law at the state and national levels, so the local activists were forced to engage in litigation and politics outside their local region in order to effect local change, just as groups such as the Headwaters Alliance and the Oregon Natural Resources Council (ONRC) were forced to engage the federal courts and the Forest Service to protect local landscapes on federal land during the 1970s and 1980s. Unlike the Pacific Northwest movement, however, nearly all of the national environmental groups chose

not to engage. EPIC drove the litigation strategy, and they often split the bills with the Sierra Club — but only on the insistence of Kathy Bailey and because of her ability to convince the California Sierra Club of the importance of the work.<sup>24</sup>

Though the locals' goals were broad, they were focused on local quality of life. Bailey, Duggan, Woods, Richard Geinger, and the other local activists involved in the campaign against corporatism were local activists first and foremost, and, as told by Woods, if they could have avoided state and national authorities, they would have. For example, Bailey, Geinger, and Sutherland moved to the North Coast in the early 1970s after burning out in the anti-war movement and the counterculture of the Bay Area. Bailey and Sutherland grew up in the Midwest, and Geinger grew up in the Northeast. They all came from middle-class backgrounds and moved west to be near the natural beauty of the region. After moving to the North Coast to escape politics, each was drawn back in because of the local behavior of timber companies. During the late 1970s, Bailey successfully orchestrated a county initiative to ban the use of Agent Orange on logged-over land. Nearly simultaneously, Sutherland, Geinger, Cecil, and Marylee Bytheriver (a founder of EPIC who assisted as a paralegal in preparing its cases) successfully worked to stop Humboldt timber companies from aerially spraying pesticides on the countryside. As Bailey explained it, she re-engaged in politics locally out of concern for her children's health

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<sup>24</sup> From "Organizational History and Goals." See Roger W. Findley, et al., *Cases and Materials on Environmental Law*, 6th ed. (St. Paul: Thomson/West, 2003), 688–689. See Durbin, *Treehuggers*, for the story of local Oregonians and Oregon groups that fought to stop logging on federal lands during the spotted owl conflict regarding the implementation of NFMA. According to Woods, the original EPIC bylaws were clear that EPIC was only to work at the local (Southern Humboldt) political arena, on purely local issues. With respect to the Sierra/EPIC relationship: Woods and Bailey both confirmed that the Sierra Club's litigation role was to help fund the litigation and to give the plaintiffs additional clout in front of Superior Court judges. EPIC attorneys and staff crafted and drove the actual litigation. In fact, when I corresponded with the Sierra Club litigation team about tracking down their files on the Headwaters cases, the director of the team told me that the only person at Sierra directly involved with the litigation was Bailey, who was a volunteer organizer, not an attorney. EPIC led the litigation teams, and they sometimes hired lawyers from the Sierra Club Legal Defense Fund, which, despite its name, is not a part of the Sierra Club. SCLDF changed its name during the 1990s to Earthjustice to end the confusion.

and education, and she only really wanted to work on Mendocino issues. Likewise, Sutherland and Geinger were interested in Southern Humboldt watershed, forest, and human health. Duggan was a North Coast native, and her interest in forestry litigation stemmed from a concern about the rapid changes in the landscape and forest health of the North Coast. Duggan grew up while the local timber companies were selling their land to Georgia-Pacific and Louisiana-Pacific, which led to increased industrial timber operations, including greatly expanded clearcuts and the related watershed damages.



ATTORNEY SHARON DUGGAN.

*Unknown photographer. All rights reserved by the Environmental Protection Information Center.*

That their litigation efforts had state and national implications was due to the avenues available to the activists to pursue local change, not because they set out to change state or national law.<sup>25</sup>

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<sup>25</sup> Kathy Bailey, interview by author, Philo, California, March 20, 2007; Kevin Bundy, interview by author, April 26, 2007, San Francisco; Sharon Duggan, interview by author, Oakland, April 27, 2007. Locals grew concerned about the state of North Coast forestry during the early 1970s when the Atlanta-based Georgia-Pacific acquired The Union Lumber Company of Mendocino County as well as surrounding family ranches in what locals referred to as an “unprecedented consolidation of land.” See Lynwood Carranco and John T. Labbe, *Logging the Redwoods* (Caldwell, Idaho: Caxton Printers, 1975), 77; David Cross, “Sally Bell Redwoods Protected! Sinkyone Coast Purchased for Park,” *Earth First! Journal* 7, No. 3 (February 2, 1987): 1–4. Richard Geinger, interview by author, Redway, California, March 22, 2007; Paul Mason, interview by author by phone, February 16, 2007; Robert Sutherland, interview by author, Arcata, California, April 22, 2008 (all recordings and handwritten notes in possession of author). Sutherland told me that he only wanted EPIC to work on issues within southern Humboldt County and that he wanted to deal with them in the local arena. However, because timber harvesting on private land involved state regulation, they had to engage state agencies. And, when the state courts and agencies proved to be a dead end, they based their case on federal law (ESA) once the marbled murrelet was designated a threatened species.

EPIC's first lawsuit, *EPIC v. Johnson*, was initiated in 1983, and resulted in a landmark appellate decision that paved the way for much of the environmental community's forestry reform efforts in California, especially in the state's remaining unprotected and privately-owned old-growth forests. The *Johnson* case challenged a 75-acre harvest plan on Georgia-Pacific land in northern Mendocino County, near the Sinkyone Wilderness State Park. The Department of Forestry approved the clearcutting of the Sally Bell Grove, an old-growth redwood grove and the last remaining stand of trees in the immediate area. The grove was situated on a steep slope bound by the Pacific Ocean to the west and clearcuts on the other three sides. Thus, the grove acted as the hill's "keystone" by anchoring the slope's soil and preventing it from wasting into the ocean. The grove also contained a Native American Archeological site. EPIC and the Sinkyone Council prepared to challenge G-P logging plans in Sally Bell Grove throughout the summer of 1983. They prepared an on-the-ground resistance and a legal attack for any logging plans in the Sally Bell Grove. The on-the-ground resistance plan was developed in consultation with the group Earth First!, and it offered the EPIC lawyers the time they needed to get to court when logging began.<sup>26</sup>

In court, EPIC and the Department of Forestry (CDF) made arguments that were notably similar to those made by plaintiffs and defendants, respectively, in nearly every case dealing with old-growth forests between 1983 and 1997. Sharon Duggan successfully argued that CDF, in approving the plan, had violated three CEQA requirements: first, CDF had not adequately responded to public comments on the harvest plan; second, CDF failed to consider the cumulative impact of the harvests on the hillside; and third, CDF failed to consult with relevant agencies with jurisdiction over the project (in this case the Native American Heritage Commission). CDF did not dispute EPIC's claims. Instead, it argued that, according to the rules, it could consider only the Forest Practice Act when approving plans. Therefore, CEQA's requirements about consultation, cumulative impact, and public comments were irrelevant to Timber Harvest Plans. It appears that CDF and the timber industry were hoping for a judgment that would

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<sup>26</sup> Environmental Protection Information Center, Inc. v. Johnson, 170 Cal. App. 3d 604 (1985), 624, n. 10 re: "keystone" determination; Cross, "Sally Bell Redwoods," 1-4; Duggan, Geinger, and Sutherland interviews and correspondence with author.





OUT OF THE COURTROOM AND INTO THE WOODS. WHEN EPIC CHALLENGED GEORGIA-PACIFIC AND THE CALIFORNIA DEPARTMENT OF FORESTRY OVER THE SALLY BELL GROVE HARVEST PLAN IN 1983, PROTEST AND DIRECT ACTION PLAYED A CRITICAL ROLE IN THE SOUTHERN HUMBOLDT/NORTHERN MENDOCINO COMMUNITY'S STRATEGY. EARTH FIRST! CO-FOUNDER MIKE ROSELLE (UPPER RIGHT) WAS RECRUITED BY THE MAN WHO WALKS IN THE WOODS (LEFT OF ROSELLE, WITH HEADBAND) TO HELP LOCAL ACTIVISTS ORGANIZE DIRECT ACTIONS TO PREVENT LOGGING ACTIVITY UNTIL EPIC COULD OBTAIN A TEMPORARY RESTRAINING ORDER.

*Photo by Debbie Unterman. All rights reserved.*

overturn the previous rulings because they made the same arguments as in *Arcata* and *Gallegos*. At the same time, CDF contended that, contrary to EPIC's claim, it implicitly addressed the cumulative effects of its decisions by minimizing the impact of each individual project. That assessment of cumulative impact analysis — coupled with CDF's continued use of the argument that CEQA did not apply to harvest plans — demonstrated the degree of intransigence within the agency. By definition, one cannot analyze cumulative impact without studying past and future plans. The court

ruled for EPIC in 1985, striking another blow to the Board of Forestry's industry-friendly economic development priorities.<sup>27</sup>

The *Johnson* case provided EPIC with valuable experience, a strong precedent, and successful arguments. EPIC and other citizens used the *EPIC v. Johnson* model with increasing frequency and success. Prior to *Johnson*, there were only two published opinions for cases challenging harvest plans. After *Johnson*, environmental groups would challenge plans every year. But if EPIC members thought the Board of Forestry and the timber industry would take this third defeat at the hands of environmental groups as a signal to reform the Forest Practice Rules and Forestry methodology, they were wrong. CDF and the timber industry would continue to argue they were exempt from CEQA, despite the growing stack of precedents building against that position. Duggan believed that the agency and the industry were hoping they would eventually find a judge or panel that would agree with them, which made sense given their long experience with self-regulation.<sup>28</sup>

#### USING THE *JOHNSON* MODEL ON THE DONKEY AGAIN AND AGAIN

Woods was convinced that the North Coast activists needed to continue to combine litigation with direct action in order to “hit the donkey” enough to make it move. Activists had overturned official corporatism in 1971, and they won three important cases during the subsequent fifteen years that reinforced the Legislature's orders that the Board of Forestry end its corporatist traditions which allowed the industry to determine its own harvest practices. After the *Johnson* decision, North Coast activists steeled themselves to break corporatism's back by challenging harvest plan after harvest plan using the *Johnson* model. From 1985 to 1995, the Board of Forestry, EPIC, Sierra Club, and the timber industry jostled repeatedly in court after court over the same issues. What became known as Headwaters Forest became the focal point of many of the battles between environmental activists and corporatism, but the activists challenged harvest

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<sup>27</sup> See *EPIC v. Johnson* for discussion of EPIC's arguments, CDF's arguments, and the court's analysis of the arguments.

<sup>28</sup> Duggan, “Citizen Enforcement,” 12 n. 55, cites *Gallegos and Seghesio v. County of Napa*, 135 Cal. App. 3d 371 (1982) as the two previous THP challenges.

plans all over the North Coast that were rubber-stamped by CDF. The litigation during that period produced three major state precedents and one major federal precedent that drove wedge after wedge between the Board of Forestry and the industry.

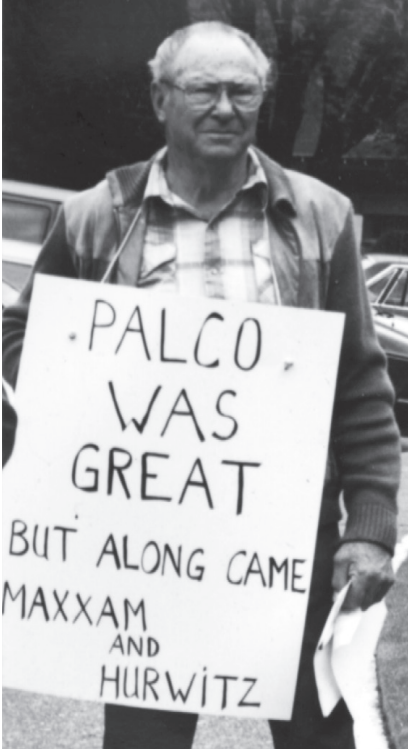
#### *MAXXAM I AND II, AND NATIVE SALMON: PUTTING AN END TO RUBBER-STAMPING*

The leveraged buyout of Pacific Lumber by Maxxam in 1985 was the key event that propelled Headwaters Forest into the middle of the citizen challenges to California's corporatist tradition. Environmental activists, shareholders, and timber workers all initially reacted negatively to the buyout, creating an under-siege atmosphere in the rural North Coast of California. The Murphy family-run Pacific Lumber was in many respects a model corporate citizen. But perceptions changed after the company was taken over by Texas-based Maxxam Corporation in 1985. The Murphy-run company had sold and donated 20,000 acres of their land for parks, avoided clearcutting since the Great Depression, and left 30–70 percent of the trees on the land by practicing selective logging in old-growth stands.

Despite the “family business” image, by 1975, no investor group owned more than five percent of Pacific Lumber stock, and, by 1985, the company was a full-fledged conglomerate working in real estate, agriculture, cutting and welding, and lumber. However, Pacific Lumber retained its small-town image up to the time of the Maxxam takeover. Maxxam, led by Charles Hurwitz, purchased Pacific Lumber for nearly \$900 million, financed by “junk bond” legend Michael Milken.<sup>29</sup> The takeover of Pacific Lumber by Hurwitz, a well-known “corporate raider” that hostilely acquired undervalued companies — such as McCulloch Oil and Simplicity Patterns — and sold off their assets, generated local concern about the future of Pacific Lumber. Specifically, the takeover allowed John Campbell, the executive

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<sup>29</sup> John Campbell, interview by author, Fortuna, California, April 24, 2008 (recording and handwritten notes in possession of author). The various diversification efforts can be found in the annual reports of The Pacific Lumber Company 1976–1982, Selected Corporate Annual Reports on Microfiche, 1975–1983, Library of Congress, Business Reading Room, Washington, D.C.; Evelyn Nieves, “Lumber Company Approves U.S. Deal to Save Redwoods,” *The New York Times*, March 3, 1999, A1, and “The Headwaters Forest Stewardship Plan: A Citizens’ Alternative to Maxxam Management of Headwaters Forest” (Redway, Calif.: The Trees Foundation, 1997), 20.



**THE MORALITY TALE. WHEN MAXXAM ACQUIRED THE PACIFIC LUMBER COMPANY, MANY ACTIVISTS, COMMUNITY MEMBERS, AND JOURNALISTS ATTRIBUTED THE COMPANY'S INCREASED TIMBER HARVESTS AND CLEARCUTS TO THE JUNK BOND DEBT OF THE NEW COMPANY.**

*Unknown Photographer. All rights reserved by the Environmental Protection Information Center.*

vice president of Forest Products, to implement his long-held desires to reinstitute clearcutting and to harvest the remaining old growth on the property in order to maximize the timber growth rate of the land and to maximize operational efficiency. The new management of the forest drew the attention of local environmentalists, and for the next thirteen years, the conflict between Pacific Lumber and local activists escalated and peaked just before the Headwaters Deal was finalized in 1999. Many local residents feared Maxxam would cut quickly and leave the area without its major employer while devastating its forest land. Earth First! activist Greg King trespassed on Pacific Lumber land to determine the size and quality of the company's holdings. In the process, King discovered a vast old-growth redwood forest in the middle of the property and named it Headwaters Forest because several major streams and rivers originate inside the forest.<sup>30</sup>

<sup>30</sup> Jane Kay, "Last Stand: Fighting for the Tall Trees," *San Francisco Examiner*, December 16, 1995; Elliot Diringer, "Cutting a Deal on Redwoods: A Tangled Tale of Trees, Takeovers and a Texas S & L," *The San Francisco Chronicle*, Sept. 4, 1996, A1; Andy Caffrey, "Partners in Crime: Bill Clinton, Pete Wilson, Wall Street and the Death of the Redwood Forest," *Save Headwaters Forest Report*, 3; "Deal Saves Giant Redwoods: 2,000-year-old Forest on Pacific Coast to be Made a Preserve," *The Gazette* (Montreal, Quebec), March 3, 1999, A14; Nieves, "Lumber Company" and "Spring Headwaters Campaign," *Headwaters Updates* 30 (Winter 1998), 5; John Campbell, interview with author, Fortuna, California, April 24, 2008. During our interview, Campbell made it

Between 1987 and 1993, both EPIC and local Earth First! activists ratcheted up their efforts. Court after court found the Board of Forestry guilty of operating under a de facto policy of automatically approving Timber Harvest Plans without considering the plans' relationship to the Forest Practice Act or CEQA. The policy was a product of a century of corporatism during which the Board of Forestry's primary duty was to facilitate timber harvests. Especially on Pacific Lumber land, Earth First! activists kept constant tabs on logging activity, as locals had done during the Sally Bell Grove conflict, and they staged dramatic direct actions and protests, most notably Redwood Summer in 1990 and the tree-sits and near constant occupations of the Headwaters Forest old-growth groves. Tensions on the North Coast grew as logging was delayed, activists swarmed the county, the spotted owl conflict raged to the north, and as EPIC won in court after court. The three major precedent-setting EPIC cases during this time period — *EPIC v. Maxxam I*, *EPIC v. Maxxam II*, and *Californians for Native Salmon and Steelhead Association, et al. v. California Department of Forestry (Native Salmon)* — forcefully chipped away at that corporatist tradition and strengthened the role of citizens as private attorneys general. Then, in 1994, the California Supreme Court delivered a crushing blow to corporatist autonomy and the legal argument that CEQA did not apply to harvest plans in *Sierra Club and EPIC v. Board of Forestry*.<sup>31</sup>

In 1987, the ruling in *Maxxam I* bolstered the court's *Johnson* decision that CEQA rigorously applied to harvest plans and the decision further discredited Forestry and its practices. EPIC asked for writs of mandate against three Pacific Lumber old-growth harvest plans (two within Headwaters

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clear that the Maxxam takeover did not radically alter the forest management plans of Pacific Lumber; rather, the takeover made it easier and more urgent for Campbell to increase old-growth logging activity.

<sup>31</sup> Environmental Protection Information Center, Inc. v. Maxxam Corp., Humboldt Superior Court No. 79879 (1987); Environmental Protection Information Center, Inc. v. Maxxam Corp., 4 Cal. App. 4th 1373 (1992); Californians for Native Salmon and Steelhead Association, et al. v. California Department of Forestry, 221 Cal. App. 3d 1419; Sierra Club, et al. v. State Board of Forestry, 7 Cal.4th 1215. The best sources regarding the direct action activity on North Coast are Bari, *Timber Wars*; Dunning, *From the Redwood Forest*; Hill, *Legacy of Luna*; Darryl Cherney, interview with author, Redway, California, April 23, 2008; and Alicia Littletree, interview with author, Ukiah, California, May 20, 2008 (all recordings and notes in possession of author).

Forest) because the plans lacked cumulative impact studies and mitigation alternatives. CDF tried a new argument in this case; it argued that its hands were tied because, even though the harvests would cause significant environmental harm, the land had been zoned for timber production by the Timber Production Act, which, according to CDF, superseded the court's *Johnson* ruling. In Humboldt County Superior Court, Judge Frank Peterson ruled for EPIC and found that CDF had "rubber-stamped" the plans because the plans were approved before they were completed. Additionally, the judge found that CDF intimidated Fish and Game biologists to prevent them from filing non-concurrence opinions that objected to the plans. Fish and Game opposed the plans because they did not contain any scientific information about the presence of species of concern, like the marbled murrelet, in the harvest areas.<sup>32</sup>

By 1987 a pattern was developing: EPIC and Sierra Club would challenge old-growth harvest plans based on the *Johnson* model, local Earth First! activists would stage direct actions to delay logging activity, and Pacific Lumber would experiment with defense arguments. For example, *Maxxam II* challenged two more 1987 Pacific Lumber harvest plans within Headwaters Forest and one Simpson Timber plan. Simpson Timber withdrew its plan, but Pacific Lumber fought the writs of mandate. The company abandoned the unsuccessful agency arguments regarding CEQA's irrelevance to harvest plans and the superseding authority of the Timber Production Act. Instead, the company challenged the scientific analysis that its land was important for species of concern. Pacific Lumber argued that Fish and Game should not have concerned itself with the species on its land because the species were not dependent upon old-growth redwood groves. The company also claimed that the state already owned enough redwood land to maintain viable populations of species that were dependent on old-growth redwoods.

In addition to introducing a new industry argument, *Maxxam II* marked the initial, if seemingly reluctant, split between the timber industry

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<sup>32</sup> EPIC v. Maxxam, Humboldt Superior Court No. 79879, Aug. 13, 1987, Peterson, J., pp. 2–4. The private attorney general doctrine was first used by Judge Jerome Frank in *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) to award attorney's fees to a person "vindicating the public interest." Many environmental laws passed as a part of the new social regulations include citizen suit provisions.

and the Board of Forestry. The trial judge ruled against Maxxam and again accused CDF of “rubber-stamping” and intimidation. The appellate court also disagreed with the company’s argument, but the case was dismissed in 1992 for three reasons, two of which were victories of a sort for EPIC, and one a symbol of the determination of Pacific Lumber to carry out its new timber regime: 1) Pacific Lumber felled the trees in one of the harvest areas between March 1988 and May 1988 — the date EPIC obtained a preliminary injunction; 2) CDF adopted emergency regulations covering old-growth timber plans, marbled murrelet and northern spotted owl habitat, and cumulative impact analysis; and 3) EPIC and Sierra Club obtained an injunction on the harvest plan for Lawrence Creek (the second contested plan) in 1989 via *Sierra Club v. State Board of Forestry* (discussed in the next section). The appellate court, while dismissing the case, recognized the influence of citizen groups on the Board of Forestry’s behavior, writing:

The record . . . leaves no doubt that environmental litigation, such as EPIC’s Preliminary Injunction in this case, played an important role in bringing about changes in departmental policies. To this extent, the issue of mootness is a product of EPIC’s own success.

The judge then strengthened EPIC’s position as a private attorney general by forcing Pacific Lumber to pay EPIC’s attorney fees. The company was able to log in the disputed area, but the pressure brought on the Board of Forestry by the litigation caused the agency to stray from the hardline position that CEQA did not apply to Timber Harvest Plans as evidenced by the agency’s creation of the new regulations without a direct court order. The new regulations played a key role in breaking down development-focused corporatism because the Board of Forestry responded to citizens and courts, not to the wishes of the timber industry, and the rules recognized the Board of Forestry’s responsibility to non-economic forestland resources.<sup>33</sup>

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<sup>33</sup> *Environmental Protection Information Center, Inc. v. Maxxam Corp.*, 4 Cal. App. 4th 1373 (1992). The marbled murrelet regulations are found in Cal. Code Regs., tit. 14, §§ 895.1, 912, 919.13, and 919.14. The spotted owl regulations are CCR, tit. 14, §§ 919.6(d)(1), 919.9, and 919.10. The cumulative impact regulations are in the FPR, §§ 985.1, 898, and 912.9.

Protecting Headwaters Forest was not EPIC's sole project.<sup>34</sup> In fact, one of the non-Headwaters cases filed by EPIC, *Native Salmon*, left the strongest precedent of the cases concluded between 1987 and 1993. In this case, EPIC and friends challenged a 1988 Eel River Sawmills harvest plan because CDF failed to analyze cumulative impact, and failed to respond to public comments. Sixty-five additional plans were added to the suit, and EPIC argued that the failure to fulfill CEQA requirements was a de facto CDF policy. Eel River Sawmills withdrew its plans, and before the case went to trial, CDF approached EPIC and Californians for Native Steelheads to negotiate a settlement. An agreement was signed on September 23, 1993. CDF agreed to further rule changes that put the agency in compliance with CEQA regarding cumulative impact analysis, mitigation, and public comments. The appellate decision opened the door for environmental groups to challenge policies wholesale, not just individual harvest plans, and the settlement forced written changes in CDF practices that EPIC had been fighting for over a decade to achieve.<sup>35</sup>

#### SIERRA *v.* BOARD OF FORESTRY: THE DONKEY IN THE CALIFORNIA SUPREME COURT

In 1994, the California Supreme Court sided once and for all with the citizen groups with respect to the relevance of CEQA to timber operations on

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<sup>34</sup> During my interviews with 1980s and 1990s EPIC staff members Richard Gering (staff forester), Sharon Duggan (EPIC attorney), and Kevin Bundy (EPIC media spokesman during the mid-1990s), each of them expressed the anxiety EPIC felt about the size, direction, and scope of the Headwaters conflict, and each of them stated that EPIC wanted to continue its challenges to CDF even while Headwaters work consumed ever-more time and energy.

<sup>35</sup> See "Settlement Agreement, CDF, Californians for Native Salmon and Steelhead Association, EPIC, and Fred 'Coyote' Downy," unprocessed EPIC Archives, Eureka, California. *Native Salmon*, Humboldt Superior Court No. 83329 (1989), was dismissed as moot when Eel River withdrew its harvest plans. EPIC appealed the dismissal, 221 Cal. App. 3d 1419 (1990), and the case was reinstated, prompting CDF to negotiate with EPIC. The other two cases settled were *EPIC v. CDF*, Humboldt Superior Court No. 92DR0005 (1992), which resulted in an agreement with Eel River Sawmills protecting Tom Long Creek, and *Coastal Headwaters Assn. and EPIC v. CDF*, Mendocino Superior Court No. 68285 (1995), where the trial court ruled in favor of CDF, but Save The Redwoods stepped in and bought Goshawk Grove from Eel River Sawmills. See "Sanctuary Forest Moving Forward," *Branching Out*, affiliate newsletter published by the Trees Foundation (Winter 1998–99): 3.



private land. In 1988, Pacific Lumber remained confident in the corporatist tradition of the Board of Forestry, but *Sierra Club v. State Board of Forestry* seriously damaged the allegiance between the board and industry. *Sierra Club v. State Board of Forestry* challenged two more Pacific Lumber plans in the Lawrence Creek area of Headwaters Forest and became EPIC's second major precedent-setting case and the fourth major blow to California's corporatist timber regime. CDF initially rejected the two Pacific Lumber harvest plans because they did not include marbled murrelet surveys. Pacific Lumber, like Chenoweth Lumber in 1976, appealed to the Board of Forestry, claiming it did not have to provide any survey information because the rules did not specifically require the surveys. Following the tradition of maximum production and deference to the industry, the Board of Forestry overruled its Department of Forestry and approved the plans. EPIC and Sierra Club filed for a writ of mandate to rescind the board's approval of the plans. On March 20, 1989, the board convinced Judge John Buffington that the harvest plans would not result in any significant impact on the environment, and Buffington denied EPIC's writ of mandate. EPIC and Sierra Club appealed the decision, and after the appellate court overturned Buffington's ruling, the board withdrew its support of Pacific Lumber in the case. The Board of Forestry further distanced itself from corporatist tradition when it issued the new regulations that caused the dismissal of *Maxxam II*. The two board actions demonstrated the success of citizen litigation in destabilizing the traditional relationship between the board and industry.<sup>36</sup>

When the state Supreme Court ruled against Pacific Lumber, it delivered industry independence a staggering blow. As it ended one conflict, the court escalated another when it increased the legal demands on the industry and the board to protect non-timber forest resources. Like previous lower courts, the court ruled that the Board of Forestry had to comply with CEQA and the Forest Practice Act alike and that the board had the authority to require new information from timber companies (such as wildlife surveys) that the Forest Practice Rules did not explicitly require but that the Department of Forestry deemed necessary to comply with CEQA guidelines. In fact, the court further underscored the board's non-timber responsibilities when it argued that *not* requiring timber companies to submit enough information to assess

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<sup>36</sup> *Sierra Club, et al. v. State Board of Forestry*, 7 Cal.4th 1215 (1994).

and *prevent* environmental damage violated CEQA. The victory for EPIC and Sierra Club forced the Board of Forestry to further reform its practices regarding ancient forests, and forced it to recognize its responsibilities for old-growth-dependent species. During the ten years after *Johnson*, citizen litigation exposed and discredited the de facto corporatist regime, destroyed the autonomy the board and the industry once enjoyed, and drove a wedge between the industry and the agency. However, legal battles over non-timber resources escalated because the agency, and especially the timber industry, yet again failed to embrace the ruling.<sup>37</sup>

## OWL CREEK: ENDANGERED SPECIES AND NATIONALIZATION OF THE CAMPAIGN

In 1997, the U.S. Supreme Court refused Pacific Lumber a writ of certiorari in the *Marbled Murrelet* case, reinforcing the North Coast activists' twenty-plus-year fight to include protection of habitat and ecological health in private forest management practices. The fight over corporatism was played all over the North Coast, but the fight over non-commercial responsibilities was mainly fought in the Headwaters Forest arena, and it was a fight citizen groups largely won. The federal court case reinforced the Board of Forestry's obligation to citizens and non-timber forest values, revised endangered species case precedent, and unintentionally drove President Clinton, Governor Wilson, and Charles Hurwitz to the negotiating table in an attempt to end the conflict over Headwaters Forest. EPIC filed suit in federal court because three of changes that had occurred in Northern California. First, the murrelet was protected under both the California and federal Endangered Species Acts. Second, Pacific Lumber seems to have decided that it could no longer count on the Board of Forestry to protect its interests so it became more aggressive and independent with its court actions. And third, state judges began to rule against EPIC.

The listing of the marbled murrelet as a "threatened" species on October 1, 1992 proved to be vital to EPIC's challenge of Pacific Lumber's old-growth harvesting plan. The state case challenging an old-growth harvest plan in the Owl Creek Grove of Headwaters Forest floundered in a sea of competing

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<sup>37</sup> *Id.*

motions and conflicting rulings, especially after the murrelet's federal status changed and Pacific Lumber worked feverishly to log the area. For example, on November 2, Superior Court Judge Morton Colvin rejected Pacific Lumber's motion to dismiss that case due to what the company perceived as Judge William Ferroggiaro's anti-company bias. However, Pacific Lumber simultaneously persuaded a court clerk to schedule a hearing with a visiting judge on a motion to dismiss the case, and on November 22, despite Judge Colvin's prior rejection of Pacific Lumber's dismissal motion, visiting Judge Leighton Hatch dismissed the case.<sup>38</sup>

Then the conflict turned even uglier. On November 24, 1992, the California Department of Fish and Game spoke to Pacific Lumber and told them not to resume logging in Owl Creek without complying with the federal Endangered Species Act, and the company agreed to consult with the U.S. Fish and Wildlife Service before logging. With Earth First! activists conducting nightly hikes to Owl Creek, Pacific Lumber resumed logging on November 28, Thanksgiving weekend, without consulting Fish and Game or Fish and Wildlife. It was the first time in the sixteen-year career of Pacific Lumber's chief timber operations manager, Dan McLaughlin, that the company logged over Thanksgiving, and he asserted that Owl Creek was the only area harvested. The next day, Fish and Wildlife sent EPIC a letter informing it that the harvest constituted a "taking" in violation of the Endangered Species Act. The agency had told Pacific Lumber before November 28 that the company's partial surveys indicated murrelet occupation of Owl Creek. On December 1, 1992, the California appellate court issued an emergency stay of logging operations in Owl Creek.<sup>39</sup>

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<sup>38</sup> The marbled murrelet listing is 50 CFR Part 17, Federal Register 57, No. 191 (October 1, 1993), Rules and Regulations section RIN 1018-AB56. See EPIC brief before California Court of Appeal A059797 requesting a stay, December 1, 1992, pp. 4–8, unprocessed EPIC Archives, Eureka, California.

<sup>39</sup> *Marbled Murrelet v. Pacific Lumber*, C-93-1400, Feb. 25, 1997, 36, unprocessed EPIC Archives, Eureka, California. See Department of Interior memo 1-1-92-TA-81, Nov. 29, 1992, from Wayne White, FWS Field Supervisor, to EPIC attorney Mark Harris, unprocessed EPIC Archives; *EPIC v. Board of Forestry*, Emergency Stay Order A059797, Dec. 1, 1992; cert. denied by California Supreme Court S031969, May 20, 1993, Lucas, C.J.; Panelli and Baxter, JJ., concurring, unprocessed EPIC Archives; Alicia Littletree interview and map of Owl Creek hikes from Littletree's personal papers, Ukiah, California (copy of map in possession of author).

On April 16, 1993, EPIC filed suit against Pacific Lumber, the Department of Forestry, the Board of Forestry, Fish and Game, Fish and Wildlife, and Secretary of the Interior Bruce Babbitt in federal court, arguing that all the parties were responsible for allowing “harm” to a listed species in violation of section 9 of the Endangered Species Act. EPIC filed suit in federal court because they were frustrated about the state court proceedings and Pacific Lumber logging activities. Additionally, Macon Cowles — the lead environmental attorney in the Exxon Valdez oil spill litigation — suggested that EPIC sue in federal court. EPIC attorney Sharon Duggan agreed that the claimants would have a better chance in federal court because the Humboldt County judges were growing weary of having EPIC and Pacific Lumber in their courtrooms, and the Superior Courts did not have the resources or time to thoroughly review the massive administrative records compiled in the cases.<sup>40</sup>

The cases against the agencies were dismissed later in 1993, and the case against Pacific Lumber was tried in August and September 1994. On February 27, 1995, Judge Louis Bechtle of the Ninth Circuit Court of Appeals placed a permanent injunction on the Owl Creek harvest area and found that “EPIC has proven, by a preponderance of the evidence, that marbled murrelets are nesting in THP-237” (the area of Timber Harvest Plan 237 at issue) and that Pacific Lumber had tried to minimize its detections of murrelets by neglecting PSG protocol, intimidating surveyors, sending doctored-up data sheets to state and federal agencies, and intimidating government witnesses.<sup>41</sup>

The Ninth Circuit upheld the decision on May 7, 1996, and the U.S. Supreme Court denied Pacific Lumber’s appeal on February 18, 1997. The permanent injunction was a landmark victory for EPIC, and the ruling became the first time the Endangered Species Act was used to stop logging on private land. The Ninth Circuit opinion also broadened the *Palila* standard for “harm” and “harass.” The ruling declared that “reasonable certainty” of “imminent” injury or death, not the discovery of actual injury or death — the standard the *Palila* cases established — was enough to invoke an injunction on a project. The Endangered Species Act gave EPIC

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<sup>40</sup> Duggan interview; *Marbled Murrelet v. Pacific Lumber*, C-93-1400-FMS slip op. at 12 (N.D. Cal., Feb. 2, 1994), unprocessed EPIC Archives, Eureka, California.

<sup>41</sup> *Marbled Murrelet v. Pacific Lumber*, 880 F. Supp. 1343, 1360 (N.D. Cal. 1995).



EPIC ATTORNEYS WITH PHOTO OF MARBLED MURRELET AFTER VICTORY IN *MARBLED MURRELET V. PACIFIC LUMBER* (1995), U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO; LEFT TO RIGHT: MARK HARRIS, SUSAN O'NEILL, STEVE CRANDALL, MACON COWLES.

*Unknown photographer. All rights reserved by the Environmental Protection Information Center.*

grounds to argue substantively and obtain permanent protection (rather than just forcing CDF to review its decisions). By doing so, EPIC and the federal courts sent a strong message to the Board of Forestry and to the timber industry that it could not take their responsibilities for non-timber forest values lightly.<sup>42</sup>

The post-injunction legal strategy of Pacific Lumber led the Clinton administration to significantly alter Endangered Species Act implementation

<sup>42</sup> *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996); cert. denied, 519 U.S. 1108 (1997). See Salzman, *Environmental Law and Policy*, 267, for a brief discussion of the precedent-setting nature of *Marbled Murrelet v. Pacific Lumber*.



HIGH UP IN HEADWATERS FOREST.

*Photo by the author. All rights reserved.*

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procedures and led directly to the public purchase of part of Headwaters Forest. After the permanent injunction on Owl Creek was finalized, Pacific Lumber filed a takings suit against the government, and the Clinton administration quickly decided to negotiate with Hurwitz and other land owners rather than fight takings suits or risk congressional action against the Endangered Species Act. In *Lucas v. South Carolina Coastal Council*, the U.S. Supreme Court ruled in 1992 that an injunction *could* result in a “take” of private land *if* the injunction prevented the owner from making *any* use of its land.<sup>43</sup> Hurwitz was willing to bet that he could convince the court that its *Lucas* ruling could apply to a Timber Harvest Plan, so it filed *Pacific Lumber v. United States* in May 1996. Additionally, the Republican-led Congress was threatening action to weaken Endangered Species Act protections. On September 28, 1996, the

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<sup>43</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Headwaters Deal was signed, authorizing the California Legislature and Congress to purchase more than 7,000 acres of Headwaters Forest, allowing Pacific Lumber to file a Habitat Conservation Plan for the rest of its land, and dismissing the takings suit against the federal government. Thus, a trend began. The 1982 amendments to the Endangered Species Act permitted landowners to negotiate Habitat Conservation Plans with the federal government to accelerate species recovery and to avoid protracted litigation. The plans allow for some development of endangered species habitat so long as it was accompanied by a fifty-year plan to add additional habitat. From 1982 to 1994, however, only thirty-nine plans were issued. Between 1994 and 1998, more than 230 such plans were issued, including the Headwaters Deal negotiated with Pacific Lumber.<sup>44</sup> While most environmental groups viewed the agreement as insufficient to protect the ancient forest ecosystem, the case presented the Board of Forestry with a strong statement about the need to change its traditional ways of doing business.

The North Coast Redwood Wars were not nearly over in 1996, despite the resolution of the federal court cases. EPIC and North Coast Earth First! opposed the deal, and both groups continued their fights: EPIC fought to protect more old growth and to complete the destruction of de

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<sup>44</sup> Findley, *Cases and Materials*, 970–971, 982. Also, John Campbell interview; Campbell commented on how the takings suit his company filed against the United States made Feinstein and Clinton eager to negotiate rather than have the Endangered Species Act “turned on its bottom.” Additionally, Paul Mason phone interview with author, March 12, 2007 (handwritten notes in possession of author). Mason discussed the fact that Senator Dianne Feinstein was eager to negotiate with Maxxam in order to end the conflict and prevent the Gingrich Congress from more aggressively pushing Endangered Species Act reforms. The 1982 amendments to the Endangered Species Act created § 10a, permitting the government to issue an Incidental Take Permit for development projects that would harm some members of an endangered species in exchange for a fifty-year Habitat Conservation Plan designed to increase population numbers overall. Section 10a was designed to provide land owners incentives to conduct good stewardship and keep ESA conflicts out of court. See U.S. Fish and Wildlife Service, *Status of Habitat Conservation Plans* (Washington, D.C.: U.S. Government Printing Office, 1997). Additionally, see Shi-Ling Hsu, “The Potential and Pitfalls of Habitat Conservation Planning under the Endangered Species Act,” *Environmental Law Review* 29 (October 1999): 10592–10601; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Pacific Lumber Company v. United States*, 96-257L (Fed. Cls.).

facto corporatism and the related resistance to managing private land for timber and non-timber resources. Earth First! fought to stop all logging in the old-growth groves via direct action. Famously, Julia Butterfly Hill sat in an ancient redwood for two years to protest the logging of old growth not included in the deal. Pacific Lumber filed for bankruptcy in 2007. And, in 2008, the California Supreme Court sided with EPIC in their challenge to the Sustained Yield Plan associated with Pacific Lumber's Habitat Conservation Plan.<sup>45</sup> In 2009, corporatism may have been on the decline, but the fate of Headwaters Forest was still up in the air.

## CONCLUSION

To be sure, national institutions played a large role in the development of the environmental movement and federal environmental politics. The National Resource Defense Council, Sierra Club, Wilderness Society, State Public Interest Research Groups, and others helped push the major environmental laws of the 1970s through Congress, then watchdogged the agencies charged with executing the new laws. Business associations lobbied and litigated to ensure that the laws and regulations did not unduly hinder their operations.

But the California forestry battles were largely a local affair that involved local activists, with local goals, who used the tools available to force changes in local land management. The local history of the redwood litigation demonstrates two often-neglected features of postwar environmental politics: 1) the drive to change traditional institutional arrangements in order to accommodate specific local environmental goals, and 2) the watchdog tactics local environmental activists use to ensure the implementation of environmental laws. Working at both the national and state levels, citizens helped guide the development of the modern environmental protection regime by using their deputized status in court to clarify definitions, obligations, and rules. California's citizen groups also focused on transforming the institutions charged with managing local landscapes. The legal history of citizen challenges to the California Board of Forestry from 1969–1999 demonstrates a sustained interest in

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<sup>45</sup> *Environmental Protection and Information Center v. California Department of Forestry and Fire Protection*, 44 Cal.4th 459 (2008).



conservation methodology as well as ecology, human health, and aesthetics. As Adam Rome pointed out in *Bulldozer in the Countryside*, conservationism was not cut off from modern environmentalism after World War II.<sup>46</sup> Sharon Duggan, Kathy Bailey, Woods, Richard Geinger, and the rest of the EPIC and California Sierra Club activists were committed to using their citizen attorney-general powers not only to protect endangered species, old-growth ecosystems, and human health, but also to force the timber industry and the state government to embrace more sustainable forest practices for their local communities. The byproducts of their efforts were the sweeping changes to state governance, forestry regulations for private land, and the implementation of the federal Endangered Species Act.

The center of gravity of environmental history has been shifting downward in recent years. Most early environmental historians focused on the sweeping national trends of postwar environmentalism and on the importance of industry, of national writers like Rachel Carson and Paul Ehrlich, and of the creation of the modern environmental protection regime. Robert Gottlieb and Adam Rome, among others, pushed the field to better consider on-the-ground environmentalism in the suburbs and urban areas. And, even though historians attend to local environmental politics, a D.C.-based narrative of modern environmental history continues to dominate policy and political history classrooms, as well as the popular media.

Local environmental activists in northern California took cues from national trends and events, yet forged their own path and local vision. Actions against private property set them apart from the national groups, which kept their distance from local activists so as not to jeopardize their bargaining positions inside the Capitol Hill Beltway. EPIC's goal was to change governance and timber practices on the North Coast alone, but they were forced to challenge state and national agencies, and thus political arrangements outside of the North Coast became collateral damage of the Redwood Wars. In order to more fully understand the development of the environmental movement and environmental politics, we need to examine the ways local people challenged tradition and forced state and

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<sup>46</sup> Rome, *Bulldozer in the Countryside*, 8–9.

national institutions to adjust their actions the way the Board of Forestry, the California Legislature, Congress, and the Clinton administration did with respect to EPIC's court strategy.

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