

ment's action could not be final until the litigation was concluded, and no compensation could be due until after that time—a holding that defies *First English*. *Del Monte Dunes* upheld compensation for precisely the period of time that *Landgate* rejected it.

Although the U.S. Supreme Court denied certiorari in *Landgate*, it will have another opportunity to consider California's jurisprudence. The same issue is now pending in a petition expected to be ruled on in early October, in a case called *Buckley v. California Coastal Commn.*, 68 Cal.App.4th 178 (1998), U.S. Sup. Ct. case no. 98-1894 (petition filed by the author of this commentary). Contrary to the U.S.

Supreme Court's hope that California now provides "a facially adequate procedure," I believe an analysis of cases like *Landgate* and *Buckley* demonstrate that California's "facial" remedy is a mask. There is no remedy available in fact, just as there wasn't before *First English*. It is too long a subject to append here, but the refusal to compensate in *Landgate* is directly contrary to the holding in *First English*—indeed, it makes the *First English* dissent the law of California.

Thus, whether these cases will again be filed in federal court (because of the absence of a real California remedy) and how juries will be employed remains an open question. Or, as one might put it, the jury is still out.

## CALIFORNIA LISTED THREATENED AND ENDANGERED PLANTS ARE PROTECTED UNDER THE CALIFORNIA ENDANGERED SPECIES ACT

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The California Native Plant Society (CNPS) disagrees with the recent article by Thornton, Bridges and Sweigert (the authors) entitled "Does Fish and Game have the Authority to Require a Permit or MOU for the Take of Listed Plant Species in the Development of Private Property?" which appeared in the March, 1999 Issue of *California Land Use Law & Policy Reporter* [8 Cal. Land Use L. & Policy Rptr. 169]. The article presents the thesis that the California Endangered Species Act (CESA) (Calif. Fish and Game Code (FGC) §§ 2050 *et seq.*) allows private landowners to remove (destroy) state-listed rare, threatened, and endangered plant species without limit or penalty, subject only to the so called "10 day notice and salvage" provisions of the Native Plant Protection Act (NPPA) (FGC §§1900 *et seq.*). The authors rely heavily on a non binding 1998 opinion by ex-Attorney General Dan Lungren to support their arguments.

### The NPPA Only Impacts "Rare" Plants

The article's thesis is incorrect. Plants classified as rare are the only species subject to the NPPA. The Legislature clearly intended to provide the full protections of the CESA to plants classified as

threatened and as endangered. As described below, this interpretation is consistent with the legislative history, with historic and recent actions of the Legislature, and is demonstrated in the language and purpose of the CESA itself.

### The Legislature Intended to Extend the State ESA to Threatened and Endangered Plants

First, the legislative history clearly shows that the Legislature fully intended to extend the CESA's provisions to threatened and endangered plants. The current form of the CESA was created with the passage of AB 3309 in 1984. Analyses of this bill by legislative analysts, by the Resources Agency, and by the public all contain statements confirming the understanding of all interested parties that threatened and endangered plants would be covered by the new law (see *e.g.* Resources Agency analysis (6/24/84): "AB 3309 also would . . . extend the provisions of the Act to plants"; Senate Republican Caucus analysis, 8/23/84: "This bill would repeal [the existing CESA] and enact the California Endangered Species Act, which would apply to endangered or threatened animal and plant species . . ."; CNPS letter in support of AB 3309, 6/20/84:

... the proposed legislation simplifies and consolidates laws and processes affecting rare and endangered species, the result will be better protection for important plant species and clearer direction and guidelines for developers.

Second, as both the authors and the Lungren Opinion point out, the NPPA refers only to rare and endangered plants while the CESA refers only to threatened and endangered species. Both Lungren and the authors attempt to resolve this discrepancy by making the illogical assertion that: "the NPPA authorization to destroy plants carries over to CESA for plants listed as threatened or endangered under [CESA]." They go on to quote the Lungren opinion that "[a]ny other conclusion would result in greater protection for threatened plant species than for plants designated as endangered," and state that "[s]uch an absurd result cannot have been intended by the Legislature." Indeed, we agree that the Legislature could not have intended such an absurd result. However, the more logical conclusion, which is supported by the record, is that the Legislature intended to extend CESA coverage to the two most imperiled groups, threatened and endangered plants, leaving the less imperiled "rare" category to the inferior protection of the NPPA. Any other interpretation would mean that the Legislature purposely condemned all listed plants to virtually unlimited destruction under the NPPA, which is inconsistent with the purpose of the CESA.

### **What is "Endangered" under the NPPA Is "Endangered" under the CESA**

In fact, in AB 3309, the Legislature explicitly "uplisted" all plants identified as endangered under the NPPA to be classified as endangered under the CESA (FGC § 2062). The Legislature explicitly did not "uplist" plants classified as rare to the threatened category (FGC § 2067). This is a clear indication of the Legislature's intent that endangered plants receive the full protections of the CESA. If the Legislature had intended the NPPA exemptions to apply to endangered plants, there would have been no need for the Legislature to "uplist" NPPA-listed endangered plants since the CESA would not have added any additional protections for such plants. Instead, it would have been necessary to "downlist" plants that would normally be listed as threatened

after 1984 under the CESA to coverage under the NPPA. No such "downlisting" occurred. Since 1984, no plants have been listed under the NPPA.

Third, CESA § 2086 and § 2087, effective January 1, 1998, provide an exemption from the CESA's take prohibition for incidental or accidental take of endangered and threatened species pursuant to ongoing and routine agricultural activities. If the take of endangered plant species by agricultural activities was already exempt from the CESA's take prohibition under the NPPA (FGC § 1913(a)), CESA §§ 2086 and 2087 would only need to apply to animal species. However, these sections apply to all endangered species except fish, which are specifically excluded. Plants are not specifically excluded. In addition, §

2081.5 of the CESA includes a specific exception for take of newly discovered endangered (and threatened) plants incidental to an ongoing surface mining operation. This section applies to all surface mining operations and does not cross-reference the NPPA's far less stringent provisions. In fact, FGC § 2081.5 specifically assumes that the mining operation already has a memorandum of understanding (*i.e.* incidental take permit) for plants pursuant to FGC § 2081 prior to the initiation of mining activities. This again leads to the conclusion that the Legislature intended CESA's more protective exceptions to supersede the NPPA exemptions.

### **Importing NPPA's Broad Take Exemptions into the CESA Would Be Contrary to the Latter's Purpose**

Finally, interpreting the CESA to incorporate the NPPA's broad and open ended take exemptions would eviscerate protection for endangered and threatened plant species, contrary to the overall purpose of the CESA. FGC § 2052 states that "it is the policy of the state conserve, protect, restore and enhance any endangered species . . . and its habitat." "Conserve" is defined broadly as:

to use, and the use of, all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided pursuant to this chapter are no longer necessary. (*i.e.* to the point of recovery)

(FGC § 2061)

In contrast, under the NPPA, landowners must only provide the Department with notice if they have themselves first been notified by the Department of the presence of listed species on their property. Since the Department is rarely aware of which species occur on private land, this excludes the majority of landowners—and of rare plants—from even the NPPA's weak protection. Further, in the rare case where a landowner would be required to allow a salvage opportunity, that salvage may well kill the plants. Under NPPA, there is no assurance—or legal requirement—that any attempt will be made to actually conserve salvaged plants. The Department is provided only ten days to salvage rare plants, meaning that salvage may occur at times that are wholly inappropriate biologically. For example, some plants should not be moved while flowering. And, if an attempt is made to move plants, transplantation has a poor record of success in rare plant conservation. A 1991 study by the Department itself found that, even under optimum conditions with ample time for planning, transplantation was effective in less than 6 percent of cases studied. Because of its notorious unreliability, the California Botanical Society, the American Society of Botany, and CNPS all have adopted policies in opposition to transplantation as a primary means of rare plant conservation.

The primary purposes of the 1984 amendments of the CESA were to update the CESA to (1) adopt for California agencies consultation procedures similar to those in § 7 of the federal Endangered Species Act, and (2) to improve the ability of the CESA to meet its stated goal to conserve, protect, and restore endangered and rare species. Legislative analyses at the time noted that California law prior to 1984 fell "somewhat short of enabling [the intent of the CESA] to be met in practice" (Resources Agency analysis of AB 3309, 9/11/84). Given these goals, it would be illogical for the Legislature to purposefully condemn California's rarest plant species to the inadequate protection of the NPPA.

Thornton and coauthors characterize NPPA's notice and salvage provisions as a "balanced" approach to sensitive plant protection. That characterization is inaccurate. California's threatened and endangered listed plants are by definition among our rarest species (FGC §2062, §2067). Plants listed as "rare" are by definition less at risk (FGC § 1901). Wholesale reliance on the NPPA's notice and salvage

provisions would directly undermine the CESA by nullifying protection for threatened and endangered plants. Thus, if the goals of CESA are to have any meaning at all with respect to plants, it is clear that the NPPA exemptions cannot apply to plants listed as threatened or endangered under the CESA. Unlike the authors' interpretation, this construction of the statute renders it logical and consistent with the CESA's overriding legislative objective. Moreover, by explicitly providing the most imperiled plants, those classified as threatened and endangered, with the CESA's full protection, and specifically excluding species classified as rare, the Legislature indeed appears to have sought "balance" when it amended the CESA in 1984.

In addition to their analysis of the CESA and NPPA, The authors also inaccurately state that local governments cannot require developer to obtain a section 2081 "take" permit from the DFG during California Environmental Quality Act (CEQA) review as a condition of project approval. This is incorrect. There is no language in the CESA, CEQA or any other statute which prohibits local governments from doing so. As authority for this incorrect premise, the article cites to a section of the CEQA, Public Resources Code (PRC) § 21004, which requires local governments to exercise only those express or implied powers granted to them under laws other than the CEQA. Yet, there are numerous laws that authorize or even require local governments to protect the environment and natural resources, including endangered and threatened species, by enacting their own local plans, policies, and ordinances. See, e.g., Government Code § 65302, requiring local governments to address "wildlife" (including endangered and threatened species) in their general plans.

Furthermore, the article fails to acknowledge that PRC § 21004 itself goes on to expressly authorize local governments to "use discretionary powers provided by such other laws for the purpose of mitigating or avoiding a significant effect on the environment." Therefore, § 21004 clearly does not prevent a local government from requiring a permit under the CESA for take of plants as a condition of development approval. To the contrary, it recognizes the key role local governments play in ensuring that significant environmental effects are mitigated. Finally, contrary to the article's claim, there is

nothing in the CESA or any other law which "pre-empts" local government authority to protect plants. In fact, local governments can and should act to protect endangered species.

### Conclusion

In closing, we note that the article by Thornton and coauthors correctly states that the CNPS supported the NPPA when it was adopted in 1977. The article appears to imply that since the CNPS accepted the weakness of the NPPA in 1977, we are precluded from asserting CESA coverage for plants in 1999. This is illogical. Our goal is to conserve rare (and common) native plants. In 1977, the NPPA was a first step, and the only means available, toward that end. Indeed, Senator John Nejedly, author of the NPPA, acknowledged in correspondence at the time that the bill was merely "an appropriate first step" towards protecting California's imperiled native plants (letter to Gov. Edmund G. Brown, 9/12/77). There was never any reason to suppose that the State of California, the Legislature, or CNPS should or would stop efforts to conserve California's flora after that first step. Furthermore, times have changed in

the past 22 years. Not only have the people of California and the California Legislature come to more fully appreciate the value of California's natural heritage, but this heritage is subject to ever greater threats. Many more plant species are imperiled today than in 1977. The decline of our natural heritage and increased public support for conservation have been reflected in 20 years of amendments to the CESA which were adopted specifically and explicitly to improve on earlier species conservation law.

The CESA is the result of decades of thoughtful efforts by the Legislature to balance the rights of private landowners with the rights of the people of California to preserve their natural heritage. The CESA is not draconian. On the contrary, it sets forth conservative and prudent procedures for minimizing impacts to listed species while allowing economic use of land and resources. Any attempt to reinterpret the CESA to exclude plants listed as threatened and endangered or otherwise reduce statutory requirements for rare plant conservation would be contrary to the intent of the Legislature and language of the statute and would substantially undermine the important conservation benefit that the CESA provides for California.