

<b>SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Unlimited Department, Central Division</b>	Entered by:
TITLE OF CASE: <b>California Business Properties Association vs. California Fish and Game Commission/WM</b>	
<b>MINUTE ORDER</b>	Case Number: <b>20CECG03125</b>

**Date: February 17, 2021**

**Re: Ruling on Petitioners' Motion for Stay**

Department: **403**

Judge/Temporary Judge: **Kristi Culver Kapetan**

Court Clerk: **Estela Alvarado**

Reporter/Tape: **Not Reported**

Contested

Appearing Parties:

**Plaintiff: No Appearances**

appearing on behalf of Plaintiff

**Defendant: No Appearances**

appearing on behalf of Defendant

Off Calendar

Set for \_\_\_\_\_ at \_\_\_\_\_ Dept \_\_\_\_\_ for \_\_\_\_\_

[X] Upon further review on this matter having been previously Taken Under Advisement on 01/26/2021; the Court now issues a Ruling.

[X] The Order Denying Petitioners' Motion for Stay becomes the order of the court. See attached copy of the signed Order dated 02/17/2021.

[X] Service by the clerk will constitute notice of the order.

FILED

FEB 17 2021

FRESNO COUNTY SUPERIOR COURT  
By \_\_\_\_\_

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION

CALIFORNIA CONSTRUCTION AND	)	Case No. 20CECG03125
INDUSTRIAL MATERIALS	)	
ASSOCIATION, et al.,	)	ORDER DENYING PETITIONERS' MOTION
	)	FOR STAY
Petitioners,	)	
	)	Date: January 26, 2021
vs.	)	
	)	Dept.: 403
CALIFORNIA FISH AND GAME	)	
COMMISSION, a California Public	)	Judge: Kristi Culver Kapetan
Agency and DOES 1-20,	)	
	)	
Respondent.	)	
	)	

Having heard oral argument on this matter on January 26, 2021 and having considered the papers of the parties, the Court denies Petitioners' Motion for Stay, for the reasons below.

**I.**

**Introduction**

Petitioners move to stay the underlying administrative action before Respondent California Fish and Game Commission, pending final judgment on Petitioners' First Amended Verified Petition for Writ of Mandate. The court denies the motion for stay, finding Petitioners' showing inadequate. Weighing the public interest against Petitioners' enumerated concerns, it is clear to the court that a stay would be against the public interest as it would strip

1 the Joshua tree of its legal protection under the California  
2 Endangered Species Act (CESA). (Fish & Gam., §§ 2085, 2068.)

3 **II.**

4 **Discussion**

5 A. Authority

6 Petitioner's authority for the requested stay is Code of  
7 Civil Procedure section 1094.5, subdivision (g), which provides,  
8 in relevant part: "... the court ... may stay the operation of the  
9 administrative order or decision pending the judgment of the court  
10 ... . However, no such stay shall be imposed or continued if the  
11 court is satisfied that it is against the public interest. ..." The  
12 burden rests with the petitioner to establish the elements  
13 required to obtain a stay. (*Board of Med. Quality Assur. v.*  
14 *Superior Court* (1980) 114 Cal.App.3d 272, 276; *Elizabeth D. v.*  
15 *Zolin* (1993) 21 Cal.App.4th 347, 354.) Petitioners have not met  
16 their burden.  
17

18 B. A Stay Would Harm the Public Interest

19  
20 The CESA contains the California State Legislature's findings  
21 that a public interest exists in maintaining stable populations of  
22 California fish, wildlife and plants. Certain "species of fish,  
23 wildlife, and plants are in danger of, or threatened with,  
24 extinction because their habitats are threatened with destruction,  
25 adverse modification, or severe curtailment, or because of  
26 overexploitation, disease, predation, or other factors." (Fish &  
27 Gam. Code, § 2051, subd. (b).) "These species of fish, wildlife,  
28 and plants are of ecological, educational, historical,

1 recreational, esthetic, economic, and scientific value to the  
2 people of this state, and the conservation, protection, and  
3 enhancement of these species and their habitat is of statewide  
4 concern." (*Id.* § 2051, subd. (c); see also *California Forestry*  
5 *Assn. v. California Fish & Game Commission* (2007) 156 Cal.App.4th  
6 1535, 1545- 1546 ["laws providing for the conservation of natural  
7 resources such as the CESA are of great remedial and public  
8 importance ..."].) Thus, "it is the policy of the state to  
9 conserve, protect, restore, and enhance any endangered species or  
10 any threatened species and its habitat." (Fish & Gam. Code, §  
11 2052.)  
12

13         The Legislature chose to protect the public interest, by  
14 extending CESA's protection to species for which the Commission  
15 determines that listing "may be warranted." (Fish & Gam. Code, §§  
16 2074.2, subd. (e)(2), 2085.) Although CESA is patterned on the  
17 federal Endangered Species Act, the Legislature affirmatively  
18 acted to add protection for "candidate" species, which is not a  
19 protection found in the federal act. This means that the  
20 Legislature deliberately weighed the public interest in protection  
21 of species that might not ultimately be deemed appropriate for  
22 listing as endangered or threatened, against the public effects  
23 imposed by that protection, and decided in favor of mandating  
24 protection during a species' candidacy. (*People v. Frahs* (2020) 9  
25 Cal.5th 618, 853 [when enacting legislation, Legislature is deemed  
26 to be aware of then-existing laws].)  
27  
28

1           The court concludes that Petitioners have not made a  
2 sufficient showing in light of Legislature's express findings  
3 regarding the public interest in protecting threatened species as  
4 set forth in the CESA.

5           C. Petitioners' Arguments

6           Petitioners offer six specific arguments in favor of a stay;  
7 they are unpersuasive.  
8

9           1. *"No Immediate Threat" to the Joshua Tree*

10           Petitioners cite multiple pages from the proposed  
11 administrative record (AR 7, 22, 53, 93, 104-105, 107) for the  
12 proposition that because the Joshua tree's extinction is "decades  
13 away," no significant harm will befall the species if the court  
14 ends Joshua tree's protection granted by its candidate species  
15 status under the CESA.  
16

17           The CESA applies to both "endangered" and "threatened"  
18 species. (Fish & Gam., §§ 2052, 2053, 2055.) "Threatened" species  
19 are those "not presently threatened with extinction." (*Id.*, §  
20 2067.) Petitioners' argument makes a false equivalency between  
21 "extinction" and "harm." Adopting this position would contravene  
22 the express language of the CESA which provides protections to  
23 threatened species. Furthermore, the court has reviewed the  
24 administrative record. It contains evidence that the Joshua tree  
25 is under a real, significant and immediate threat from  
26 development, fire, drought, and climate change. (AR 29-36, 37-53,  
27 104.)  
28

1           2. *"Existing Protections" for the Joshua Tree Are Adequate*  
2           Petitioners claim the California Drought, Water, Parks,  
3 Climate, Coastal Protection, and Outdoor Access For All Act of  
4 2018 (CNDPA) and unspecified "local laws" will provide adequate  
5 protection if the Joshua Tree's protection under the CESA is  
6 ended. The CNDPA "protect[s] California desert native plants from  
7 unlawful harvesting on both public and privately owned lands" and  
8 expressly regulates the Joshua tree. (Pub. Res. Code, §§ 80002,  
9 80073, subd. (a); AR 57.) However, the CNDPA permits the harvest,  
10 transplanting, and destruction of protected plants with a permit  
11 issued by the applicable County agricultural commissioner or  
12 sheriff. (Food & Agr. Code, § 80073.) Furthermore, the CDNPA  
13 does not apply to "[t]he clearing of land for agricultural  
14 purposes," or "[t]he clearing or removal of native plants from  
15 a... building site, or road or other right-of-way by the landowner  
16 or his or her agent, if the native plants are not to be  
17 transported from the land or offered for sale...." (Food & Agr.  
18 Code, § 80117, subds. (a), (c).) Accordingly, there is no legal  
19 impediment under the CNDPA to destroying trees for agricultural or  
20 development purposes, provided the trees are not transported or  
21 sold.

22           The administrative record also contains evidence that the  
23 existing laws are inadequate to protect the species from the  
24 current threats to its survival. (AR 53-63.)

25           3. *Public Interest to Ensure Respondent Abides by the Law*  
26           CESA requires a listing petition to include minimum  
27 foundational data requirements. (Fish & G. Code, § 2072.3; Cal.  
28 Code Regs., tit. 14, § 670.1(d).) Petitioners argue that the

1 Listing Petition and Evaluation did not include the statutorily  
2 required data on abundance and population trend. (AR 24-25, 90-91,  
3 95, 261.)

4 A citizen's public interest in having the laws executed and  
5 the public duties enforced has been long recognized. (See *Board*  
6 *of Social Welfare v. County of Los Angeles* (1945) 27 Cal.2d 98,  
7 100-101.) However, the Legislature weighed the public interest in  
8 seeing the CESA enforced appropriately against the public interest  
9 in protecting endangered and threatened species, and codified the  
10 result at Fish and Game Code section 2076: "Any finding pursuant  
11 to this section is subject to judicial review under Section 1094.5  
12 of the Code of Civil Procedure." The Legislature was aware of the  
13 stay provision in section 1094.5, as it has been part of the  
14 statute since its adoption in 1945. (See Code Civ. Proc., §  
15 1094.5, added by Stats. 1945, ch. 868, § 1, amended by Stats.  
16 1949, ch. 358, § 1; Stats. 1974, ch. 668, § 1; Stats. 1975, 2nd  
17 Ex. Sess., ch. 1, § 26.5; see also *Royal Convalescent Hospital,*  
18 *Inc. v. State Board of Control* (1979) 99 Cal.App.3d 788, 794.)  
19 Every administrative writ of mandate must contain one or more  
20 allegations that the "respondent has proceeded without, or in  
21 excess of, jurisdiction; whether there was a fair trial; and  
22 whether there was any prejudicial abuse of discretion." (Code  
23 Civ. Proc., § 1094.5, subd. (b). The general interest in  
24 enforcing public laws and duties does not override the public  
25 interest as expressed by the Legislature in the CESA.

26 ///

27 ///

28 ///

1           4. *Public Interest in "Preventing Significant Harm to*  
2                     *Petitioners and the Public"*

3           Petitioners argue the tree's candidate status makes it a  
4 crime for a landowner to remove or transplant a Joshua tree on  
5 their property without a proper permit. This is true, and,  
6 moreover, it is authorized by the CESA. Furthermore, Petitioners  
7 assert "numerous existing operations" and "in-progress development  
8 projects" will be required to obtain permits while the legality of  
9 the Respondent's acceptance of the Listing Petition is challenged.  
10 However, Petitioners provide no evidence as to how many  
11 individuals and/or entities will be affected by the tree's  
12 candidate status. Again, the CESA specifically authorizes the  
13 process - candidate species protection, the Department issuing  
14 take permits and approving individual projects if appropriate  
15 mitigation and enhancement measures are provided - about which  
16 Petitioners complain. (Fish & Gam. Code, §§ 2080, 2081, 2084,  
17 2085; *Natural Resources Defense Council v. Fish & Game Comm.*  
18 (1994) 28 Cal.App.4th 1104, 1121.) Accordingly, this argument  
19 fails to persuade the court.

20           5. *Public Interest in "Preventing Legally Erroneous*  
21                     *Precedent"*

22           Petitioners contend that Respondent's decision establishes  
23 "'new precedent' for listing species without CESA-mandated data."  
24 Petitioners cite no authority establishing that candidacy  
25 decisions of Respondent constitute binding precedent,  
26 particularly, as here, while they are being challenged in a writ  
27 proceeding. Accordingly, the court does not find this argument  
28 persuasive.



1           6. *Public Interest in "Preserving the Status Quo" During*  
2           *Review*

3           The CESA allows Petitioners to challenge Respondent's  
4 determination of candidate status via writ of administrative  
5 mandate. (Fish & Gam. Code, § 2076.) Petitioners argue that  
6 absent a stay, Respondent could permanently list the Joshua tree  
7 before the instant writ is resolved. Petitioners claim allowing  
8 the permanent listing "would divest the Court of authority to  
9 provide Petitioners' requested the relief" denying Petitioners  
10 "the benefit of their writ petition" and could also result in  
11 irreconcilable outcomes.

12           However, Petitioners cite no authority that a permanent  
13 listing "divests" this court of jurisdiction. While a permanent  
14 listing of the Joshua tree could potentially render this challenge  
15 to the candidacy decision moot, if the court determines that the  
16 issues presented in this case are those of continuing public  
17 interest that are likely to recur and evade review if not  
18 resolved, the court can decide the merits of this Petition. (See  
19 *People v. Harrison* (2013) 57 Cal.4th 1211, 1218 [courts have  
20 inherent discretion to resolve a moot issue that is one of broad  
21 public interest that is likely to recur and may otherwise evade  
22 review].) Accordingly, a stay is not required to protect  
23 Petitioners' right of redress to the courts.

24           Likewise, irreconcilable outcomes are unlikely. The court  
25 will review the candidacy decision in this proceeding. The final  
26 permanency finding will be addressed in a different proceeding.  
27 These reviews will turn different administrative records. (Fish &  
28

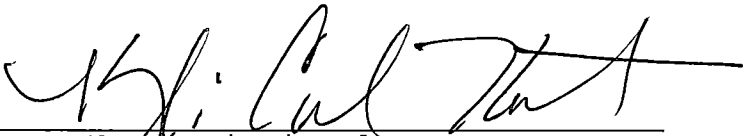
1 Gam. Code, §§ 2074.6, 2075.5.) The court finds this argument  
2 unpersuasive.

3 IV.

4 **Disposition**

5 Accordingly, Petitioners' Motion to Stay is denied.

6  
7 DATED this 17<sup>th</sup> day of February, 2021

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11 \_\_\_\_\_  
12 Hon. Kristi Culver Kapetan,  
13 Judge of the Superior Court  
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<p align="center"><b>SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO</b>  Civil Department, Central Division  1130 "O" Street  Fresno, California 93724-0002  (559) 457-6316</p>	<p align="center"><i>FOR COURT USE ONLY</i></p>
<p>TITLE OF CASE:  <b>California Business Properties Association vs. California Fish and Game Commission/WM</b></p>	
<p align="center"><b>CLERK'S CERTIFICATE OF MAILING</b></p>	<p>CASE NUMBER:  <b>20CECG03125</b></p>

I certify that I am not a party to this cause and that a true copy of the:

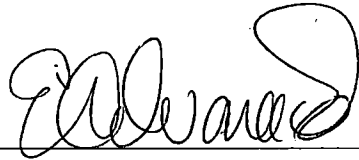
**Minute Order & Order Denying Petitioners' Motion for Stay, dated 2/17/21**

was placed in a sealed envelope and placed for collection and mailing on the date and at the place shown below following our ordinary business practice. I am readily familiar with this court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

Place of mailing: Fresno, California 93724-0002

On Date: 02/17/2021

Clerk, by \_\_\_\_\_, Deputy



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