

RECENT CALIFORNIA DECISIONS

FOURTH DISTRICT UPHOLDS LEAD AGENCY'S DECISION NOT TO PREPARE SUBSEQUENT CEQA ANALYSIS FOR A PROJECT INITIALLY EVALUATED IN A NEGATIVE DECLARATION

Abatti v. Imperial Irrigation District, ___ Cal.App.4th ___, Case No. D058329 (4th Dist. Apr. 26, 2012).

The Fourth District Court of Appeal has upheld an irrigation district's decision not to require subsequent analysis under the California Environmental Quality Act (CEQA) for changes to an "equitable distribution plan" initially evaluated in a negative declaration instead of an Environmental Impact Report (EIR). In so doing, the court reaffirmed key principles articulated in *Benton v. Board of Supervisors*, 226 Cal. App.3d 1467 (1991), which established that CEQA's subsequent environmental review requirements applied to negative declarations as well as EIRs.

Factual Background

The Imperial Irrigation District (IID) adopted a resolution in November 2006 to establish an "equitable distribution plan" pursuant to state law. The plan is to be implemented in the event that in any year, the expected demand for water is likely to exceed the supply expected to be available to IID. IID prepared a negative declaration for the plan pursuant to CEQA.

In December 2007, IID adopted regulations to implement the plan. Those regulations set forth the manner in which water apportionment would be conducted under the plan in the event a supply and demand imbalance occurred. IID adopted an "environmental compliance report" that concluded certain modifications to the plan have been incorporated into the regulations, and those modifications did not require any further CEQA review.

IID adopted revised regulations to implement the plan in November 2008. Like the 2007 regulations, those regulations established a means of apportioning water in the event of a water supply and demand imbalance. IID adopted another "environmental compliance report" that again concluded no additional CEQA review was warranted pursuant to § 21166 of CEQA (Pub. Res. Code § 21166) and CEQA Guideline § 15162 (14 Cal. Code Regs. § 15162).

A group of agricultural land owners and users (collectively, appellants) in Imperial County sued IID, alleging that the district violated CEQA because IID did not prepare an environmental impact report for the 2008 regulations. The trial court denied appellants' claim and held that there was substantial evidence supporting IID's determination that the adoption of the 2008 regulations did not require the preparation of an EIR.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court decisions, finding that IID complied with CEQA for two overarching reasons. First, the court held that CEQA Guideline § 15162 is a valid regulation that implements § 21166 of CEQA. Second, the court held that there was substantial evidence in IID's record to support the district's determination that adoption of the 2008 regulations did not require the preparation of an EIR.

CEQA Guideline § 15162 Is a Valid Regulation Implementing CEQA § 21166

Appellants alleged that IID improperly applied a "substantial evidence" standard and relied on CEQA § 21166 and CEQA Guideline § 15162 to determine whether an EIR was required for the 2008 regulations. Instead, appellants argued, IID should have applied the "fair argument" standard to determine whether an EIR was required. The court disagreed.

The court began by confirming the holding in *Benton v. Board of Supervisors*, 226 Cal.App.3d 1467 (1991). *Benton* held that CEQA § 21166 extended CEQA's requirements for subsequent environmental review to those projects in which an agency's initial environmental determination resulted in the issuance of a negative declaration rather than an EIR, even though the text of CEQA § 21166 refers only

to EIRs. As a corollary, the *Benton* court held that CEQA Guideline § 15162 was valid even though the text of CEQA § 21166 refers only to EIRs and makes no mention of negative declarations.

The court determined that the *Benton* court correctly concluded that CEQA Guideline § 15162 validly implements CEQA § 21166. The court found that the guideline is valid because it furthers the purposes of CEQA § 21166. The court quoted *Benton*:

If a limited review of a modified project is proper when the initial environmental document was an EIR, it stands to reason that no greater review should be required of a project that initially raised so few environmental questions that an EIR was *not* required, but a negative declaration was found to satisfy the environmental review requirements of CEQA. (Quoting *Benton v. Board of Supervisors*, 226 Cal.App.3d 1467, 1479-80 (1991) (emphasis in original).)

The court found this rationale persuasive, noting in addition that CEQA Guideline § 15162 was adopted pursuant to CEQA § 21083, which mandates that the CEQA Guidelines include objectives and criteria for the preparation of both EIRs and negative declarations.

Substantial Evidence Supported the District's Determination that the 2008 Regulations Did Not Require an EIR

Turning to the substantive merits of appellants' challenge, the court held that the record contained

substantial evidence to support IID's determination that the 2008 regulations did not require the preparation of an EIR. In particular, the court determined that the 2008 regulations did not constitute a substantial change to the project requiring additional environmental review. The court based this determination on the fact that the 2008 regulations did not substantially increase the priority preference that industrial users of water would receive over agricultural users in times of a water shortage.

Conclusion and Implications

The court concluded that the *Benton* court correctly determined that CEQA Guideline § 15162 is a valid regulation that implements the principles contained in CEQA § 21166. The court also concluded that there is substantial evidence to support IID's determination that it was not required to prepare an EIR prior to adopting the 2008 regulations. This case reaffirms the principle articulated in *Benton* that the subsequent environmental review standards built into CEQA § 21166 and CEQA Guideline § 15162 also apply to projects initially evaluated by way of a negative declaration, and not just by way of an EIR. As such, this case reaffirms the principle that the standard of review that applies to changes in a project initially evaluated in a negative declaration is the substantial evidence—rather than the “fair argument”—standard of review. (Scott Birkey)

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