



Third District Rejects CEQA Challenges To El Dorado Irrigation District Ditch Piping Project, Holds EIR's Project Description And Analysis Of Potential Hydrology, Biological Resources, and Wildfire Impacts Were Adequate

By [Arthur F. Coon](#) on March 1, 2022

In an opinion filed January 28, and later certified for publication on February 16, 2022, the Third District Court of Appeal affirmed a judgment denying a petition for writ of mandate that challenged on CEQA grounds the El Dorado Irrigation District's ("EID") decision to undertake its Upper Main Ditch piping project. *Save the El Dorado Canal v. El Dorado Irrigation District, et al.* (2022) ____ Cal.App.5th _____. The challenged water conveyance project would replace about three miles of EID's open and unlined earthen ditch system with a buried water transmission pipeline in order to conserve water and improve water quality. Petitioner alleged the EIR's project description was inadequate because it omitted the material fact that the ditch section to be abandoned as a water conveyance also served as the watershed's only drainage system, and that the EIR insufficiently analyzed the abandonment's impacts on hydrology, biological resources, and wildfires.

The Project, Its Background, And The Litigation

EID, a public water agency in El Dorado County, relies exclusively on surface water to meet its potable water demand. It maintains a water conveyance system comprised of 1,250 miles of pipe and 27 miles of earthen ditches – historic relics of the 1800's mining industry converted over time into a water delivery system – connecting its water facilities and treatment plants. The Upper Main Ditch is a roughly three-mile open and unlined earthen ditch connecting the Forebay Reservoir to the Reservoir 1 Water Treatment Plant (WTP).

A 2017 study showed the Upper Main Ditch annually lost between 11% and 33% of the water conveyed through it to seepage and evapotranspiration, and that piping that segment would save a minimum of

1,350, and an average of 1,800, acre-feet of water per year. This would help EID meet its legally imposed water conservation mandates and would also enhance water quality by reducing contamination and erosion problems to which the open ditch was susceptible.

The project as originally proposed would have routed the pipeline under the existing ditch and berm for its entire 3-mile length. The EIR studied three alternatives – two alternative alignments and the “No-Project Alternative” – and EID ultimately approved the “Blair Road alternative,” which would run the pipeline along an existing public right-of-way, Blair Road, for 8,200 feet; along the ditch for about 1,500 feet; and along other District and privately owned property for about 2,600 feet before connecting to the Reservoir 1 WTP. The Blair Road alternative’s alignment was about 3,100 feet shorter than the proposed project, and EID found it would have fewer eminent domain and construction activity impacts on private owners along the existing ditch, and would require the least number of trees to be removed along the route. The District found the impacts that Petitioner complained of were lessened to a less-than-significant level by adopted mitigation measures.

The trial court, following extensive briefing, issued a 74-page ruling denying Petitioner’s Petition, and the judgment was affirmed on appeal.

The Court of Appeal’s Opinion **Project Description Issue**

The Court rejected appellant’s argument that the EIR’s project description was inadequate because it allegedly omitted a “crucial fact,” i.e., that the 3-mile ditch segment to be abandoned by EID is the *only* drainage system for its 315-acre watershed. Before reaching the substance of this argument, however, the Court addressed respondents’ contention that it was forfeited because appellant’s opening brief failed to cite the relevant portions of the EIR’s project description. The Court found a “different, but equally problematic” issue with appellant’s briefing, namely that it improperly attempted to raise a “separate and distinct” *environmental setting* issue under the brief’s *project description* heading, and it held that separate issue was forfeited because not raised under a separate heading. (Citing Cal. Rules of Court, rule 8.204(a)(1)(B), *San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Bd.* (2010) 183 Cal.App.4th 1110, 1135.)

With respect to the argument concerning the adequacy of the EIR’s project description, which poses a question of law, after reviewing CEQA’s requirements for an adequate project description (citing *South of Market Community Action Network v. City and County of San Francisco* (2019) 33 Cal.App.5th 321, 332, my April 5, 2019 post on which is found [here](#)), the Court rejected it as meritless. The description disclosed that: (1) in addition to conveying water from the Forebay Reservoir, the Upper Main Ditch passively intercepts and conveys stormwater runoff from a 315-acre drainage area; (2) it can currently accommodate 10-year design stormflows before the ditch is overtopped, and water then proceeds to flow in its natural drainage course ultimately toward the American River’s South Fork; and, (3) although no longer used by EID, the approved project will leave a remnant channel in place that will continue to have the capacity to passively receive and convey stormwater flows consistent with the current condition. The Court concluded the “description adequately discloses the nature of the Upper Main Ditch and straightforwardly reveals that the Blair Road alternative would result in abandonment of the District’s maintenance easement over most of the existing ditch.” While it may be true that the Main Ditch system is the watershed’s only drainage system, the EIR was not required to specifically state that fact; “perfection” is not required in an EIR, only “adequacy, completeness, and a good faith effort at full disclosure.” The Blair Road alternative’s feature of EID’s abandonment of the existing ditch was adequately revealed in its project description and not hidden. The Court further rejected as unavailing

appellant's arguments citing parts of the EIR's project description for the *originally proposed project* and misattributing them to the approved Blair Road alternative.

Impacts Analysis Issues

In addressing and rejecting appellant's arguments that the EIR's analyses of hydrology, biological resources, and wildfire impacts were inadequate, the Court quoted extensively from portions of the DEIR and FEIR addressing those topics.

Hydrology

Appellant argued, based largely on a County comment letter, that flooding impacts of the approved project would be significant because, with EID's abandonment of the ditch, maintenance responsibility would fall to adjoining private landowners, which would foreseeably result in the ditch becoming clogged with vegetation and debris and, hence, unable to convey stormwater runoff as it previously had. The FEIR rejected this position because the project does not change the physical conditions of the Upper Main Ditch relating to its stormwater conveyance capacity, and EID reasonably assumed that private action by surrounding owners – i.e., maintaining and not filling the ditch – would ensure that it retained this capacity. Substantial evidence cited by the FEIR in support of this assumption included County's regulatory authority over specified fill activities, and private landowners' natural incentives to protect their own properties from, and to avoid civil liability to downstream owners for, flooding. While portions of the ditch no longer controlled by EID could grow vegetation or be blocked by private fill activities, it would be speculative to try to predict particular future private actions or inactions, which would be *indirect* actions with respect to the project, causing *speculative* and *not reasonably foreseeable* changes in the ditch's stormwater conveyance capacity.

The Court essentially agreed with the EIR's assumptions, rejecting appellant's argument that the evidence was insubstantial and failed to support the EIR's significance conclusion because appellant had failed to "lay out the evidence favorable to [EID's position] ... and show why it is lacking." Per the Court: "Appellant has failed to demonstrate, with citations to the administrative record favorable to the District, that the EIR's drainage analysis is inadequate." While acknowledging an EIR's obligation to adequately address a project's reasonably foreseeable indirect effects, the Court further explained that a property owner's deliberate filling of the ditch in the future is not reasonably foreseeable; that there is no reason to presume such would occur; that appellant failed to provide record cites indicating County could not adequately regulate such activities; and that mere "skepticism" that owners would seek County-required permits is not evidence. While potential lack of private owner maintenance sufficient to maintain the ditch's 10-year storm event drainage capacity is more foreseeable than illegal filling, appellant failed to cite to record evidence supporting its position on the issue or undermining EID's contrary position that flood risks such as those appellant pointed to are simply part of the baseline condition. In sum, the EIR was adequate as an informational document on these issues under CEQA's standards.

Biological Resources

Nor did the Court find merit in appellant's arguments that the EIR failed to adequately disclose and analyze the project's alleged (1) significant impacts on riparian habitat/sensitive natural communities, and (2) conflicts with local policies/ordinances protecting biological resources such as trees. The DEIR explained the Blair Road alternative's pipeline alignment was located in the disturbed areas of Blair Road and a short segment of the existing ditch, and in cross-county areas. As such, it resulted in fewer biological resources impacts than the proposed project because it required removal of fewer trees, and affected no riparian areas or communities, and like the proposed project it avoided and minimized

impacts to oak trees where feasible. It would not conflict with the County general plan's conservation element. While it would remove 145 trees, approximately 10% of which were oaks, it would as mitigated be consistent with the Oak Resources Management Plan, and the removal procedures of County's Tree Mortality Tree Removal Plan and those of CALFIRE. The approved project, involving a man-made ditch, would not affect jurisdictional waters of the United States nor would it have a significant effect on waters regulated by the California Department of Fish and Wildlife ("CDFW"), and to the extent CDFW disagreed with EID's conclusion in this regard the EIR fully disclosed the disagreement.

Nor would the project's abandonment of ditch use as a water conveyance feature significantly adversely impact forest health by depriving trees of water and/or rendering them more vulnerable to bark beetle infestations. The trees along the ditch were deep-rooted pines and oaks, not riparian species reliant on nearby flowing water to survive, and as such were adaptable to variations in water availability and would not be unduly stressed. Further, the ditch would continue to passively convey and receive stormwater, providing groundwater recharge and a continuing water source for remaining trees near the project. While stressed trees are more susceptible to the spread of bark beetle infestation, the limited number of trees potentially indirectly impacted by the project – those within 150 feet of the ditch – when considered in relation to the County's greater forested area, was not likely to contribute to a significant bark beetle infestation. Contrary to appellant's argument, the EIR's master response on the forest health/bark beetle issues was adequate and supported by substantial evidence and appellant failed to carry its burden to show otherwise.

Wildfire-related Risks

Appellant also failed to carry its burden to demonstrate that the EIR's analysis of the project's wildfire-related risks was unsupported by substantial evidence. The FEIR's responses to comments in this area more than adequately addressed them, and showed that the project would not increase fire risk or remove a source of water or tool used to fight fires. Appellant's citation to mistaken comments actually pertaining to the two-miles distant El Dorado Canal's use as a fire break during the King Fire failed to show the Upper Main Ditch was ever used to fight that fire, or as a fire-fighting resource at all; and, in any event, recent statewide evidence of fire behavior showed that a minor infrastructure feature like the project ditch would have little or no beneficial effect, and that enforcing defensible space requirements is the most effective and cost-efficient mitigation for wildfire risks to structures.

Further, the project was not inconsistent with relevant fire protection planning documents, which do not identify the Upper Main Ditch as either a current or future-planned firefighting or fire protection resource area, or as a river or lake from which water to fight fires would be drawn. The project was also consistent with the planned purpose of protecting watershed quality from wildfire impacts, including the infrastructure used to transport water from higher to lower elevations, in that it will provide more reliable transport from Forebay Reservoir to the Reservoir 1 WTP.

Conclusion and Implications

This case serves as a good reminder of several fundamental CEQA principles. These include that perfection is not required in an EIR (including its project description), only completeness, adequacy, and a good faith effort at full disclosure; that EIR preparers are permitted to make reasonable assumptions about future events that are supported by substantial evidence; that an EIR is not required to analyze and forecast future indirect impacts of a project that are speculative both in terms of occurrence and extent of impact; and that an EIR's impact analysis and good faith responses to comments will be held adequate if supported by substantial evidence, and if disagreements of experts are disclosed.



The opinion also reiterates some valuable burden of proof/briefing guidance for CEQA litigants: petitioners asserting substantial evidence challenges have the burden to “lay out” the evidence favorable to the other side and show it is lacking, and a failure to do so is fatal; and separate and distinct issues must be raised under separate and distinct headings in the brief or they are forfeited.

The case also illustrates the problematic and ironic side of CEQA, which has been much in the news of late with UC Berkeley’s enrollment woes, in that it can be deployed as a litigation weapon against virtually any type of development project – including a project, like the one in this case, that would conserve significant amounts of water and protect water quality without causing any significant adverse environmental impacts. Demonstrating CEQA compliance in this case, in the face of petitioner/appellant’s numerous arguments attacking a full EIR, entailed nearly 3 years of litigation, a 74-page trial court ruling, and a published 42-page appellate court decision. To echo CEQA reform proponents and quote The Who, “there’s got to be another way.”

Questions? Please contact [Arthur F. Coon](#) of Miller Starr Regalia. Miller Starr Regalia has had a well-established reputation as a leading real estate law firm for more than fifty years. For nearly all that time, the firm also has written Miller & Starr, California Real Estate 4th, a 12-volume treatise on California real estate law. “The Book” is the most widely used and judicially recognized real estate treatise in California and is cited by practicing attorneys and courts throughout the state. The firm has expertise in all real property matters, including full-service litigation and dispute resolution services, transactions, acquisitions, dispositions, leasing, financing, common interest development, construction, management, eminent domain and inverse condemnation, title insurance, environmental law and land use. For more information, visit www.msrllegal.com.

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