

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

**Date: February 16, 2022**

**Re: Ruling on Writ of Mandate**

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 02/04/22 and after further review of the arguments, facts and evidence; the court now adopts the Order Denying Petition for Writ of Mandate in Part and Statement of Decision. The attached signed order serves as the order of the court.

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

FILED

02/16/2022

FRESNO COUNTY SUPERIOR COURT

By ealvarado

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

California Business Properties )  
 Association, )  
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 Petitioners, )  
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 v. )  
 California Fish and Game )  
 Commission, )  
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 Respondents/Real )  
 Parties in Interest. )  
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No. 20CECG03125  
 Dept. 403  
 ORDER DENYING PETITION FOR  
 WRIT OF MANDATE IN PART AND  
 STATEMENT OF DECISION

After considering all of the papers submitted in support,  
 opposition, and reply to the petition for writ of mandate, and  
 after considering the oral arguments made by counsel, this court  
 rules as follows:

The writ of mandate is denied as set forth herein.

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**I. Introduction**

Petitioners request the court issue a writ of mandate directing the California Fish and Game Commission ("Commission") to vacate its September 22, 2020 approval of the petition to list the western Joshua tree<sup>1</sup> as a candidate species under the California Endangered Species Act, (Fish & G. Code, § 2050, et seq. ["CESA"<sup>2</sup>].) For the reasons set forth below, this court denies the petition for writ of mandate. (Code Civ. Proc., § 1094.5.)

**II. Statutory Background**

The California Endangered Species Act ("CESA") contains the California State Legislature's findings that a public interest exists in maintaining stable populations of California fish, wildlife and plants. Certain "species of fish, wildlife, and plants are in danger of, or threatened with, extinction because their habitats are threatened with destruction, adverse modification, or severe curtailment, or because of overexploitation, disease, predation, or other factors." (Fish & Gam. Code, § 2051, subd. (b).) "These species of fish, wildlife, and plants are of ecological, educational, historical, recreational, esthetic, economic, and scientific value to the people of this state, and the conservation, protection, and enhancement of these species and their habitat is of statewide concern." (*Id.* § 2051, subd. (c); see also *California Forestry Assn. v. California Fish & Game Commission* (2007) 156 Cal.App.4th 1535, 1545– 1546 ["laws providing for the conservation of natural resources such as the CESA are of great remedial and

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<sup>1</sup> References to the "Joshua tree or trees" are to the western Joshua tree (*Yucca brevifolia*).  
<sup>2</sup> Undesignated statutory references are to the Fish and Game Code.

1 public importance ..."].) Thus, "it is the policy of the state to  
2 conserve, protect, restore, and enhance any endangered species or  
3 any threatened species and its habitat." (Fish & Gam. Code, § 2052.)

4 The Legislature chose to protect the public interest, by  
5 extending CESA'S protection to species for which the Commission  
6 determines that listing "may be warranted." (Fish & Gam. Code, §§  
7 2074.2, subd. (e)(2), 2085.) Although CESA is patterned on the  
8 federal Endangered Species Act, the Legislature affirmatively acted  
9 to add protection for "candidate" species, which is not a protection  
10 found in the federal act. This means that the Legislature  
11 deliberately weighed the public interest in protection of species  
12 that might not ultimately be deemed appropriate for listing as  
13 endangered or threatened, against the public effects imposed by  
14 that protection, and decided in favor of mandating protection during  
15 a species' candidacy. (*People v. Frahs* (2020) 9 Cal.5th 618, 853  
16 [when enacting legislation, Legislature is deemed to be aware of  
17 then-existing laws].)

18 The CESA applies to both "endangered" and "threatened" species.  
19 (Fish & Gam., §§ 2052, 2053, 2055.) "Threatened" species are those  
20 "not presently threatened with extinction." (*Id.*, § 2067.) CESA  
21 requires a listing petition to include minimum foundational data  
22 requirements (Fish & G. Code, § 2072.3; Cal. Code Regs., tit. 14,  
23 § 670.1(d)), and that "[a]ny finding pursuant to this section is  
24 subject to judicial review under Section 1094.5 of the Code of Civil  
25 Procedure." (Fish & G. Code, § 2076.)

26 "Code of Civil Procedure section 1094.5, the state's  
27 administrative mandamus provision, provides the procedure for  
28 judicial review of adjudicatory decisions rendered by

1 administrative agencies." (*Young v. City of Coronado* (2017) 10  
2 Cal.App.5th 408, 418.) The essential task in administrative  
3 mandamus proceedings is to "determine both whether substantial  
4 evidence supports the administrative agency's findings and whether  
5 the findings support the agency's decision." (*Topanga Assn. for a*  
6 *Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515  
7 (*Topanga*.) Furthermore, under Code of Civil Procedure section  
8 1094.5, there is "a requirement that the agency which renders the  
9 challenged decision must set forth findings to bridge the analytic  
10 gap between the raw evidence and ultimate decision or order."  
11 (*Ibid.*) In essence, the inquiry is not expansive, but rather  
12 narrowly focused on the substance of administrative agency's process  
13 in reaching the challenged decision. (*Young v. City of Coronado*,  
14 *supra*, 10 Cal.App.5th at p. 418.)

### 15 **III. Standard of Review**

16 "Where it is claimed that the findings are not supported by  
17 the evidence, in cases which the court is authorized by law to  
18 exercise its independent judgment on the evidence, abuse of  
19 discretion is established if the court determines that the findings  
20 are not supported by the weight of the evidence. In all other cases,  
21 abuse of discretion is established if the court determines that the  
22 findings are not supported by substantial evidence in the light of  
23 the whole record." (Code Civ. Proc., § 1094.5, subd. (c).) The  
24 two separate standards of review differ in the amount of deference  
25 given to an administrative hearing officer's decision: "under the  
26 substantial evidence test, the findings of the administrative agency  
27 must be upheld if, after review the entire record, the trial court  
28 determines that substantial evidence exists supporting the agency's

1 findings. The independent judgment or weight of the evidence test,  
2 on the other hand, requires the trial court to reconsider the  
3 evidence and make its own independent findings of fact." (*Harlow*  
4 *v. Carleson* (1976) 16 Cal.3d 731, 735.)

5 In addition, "[t]he [Fish & Game] Commission's determinations  
6 are judicially reviewed for substantial evidence." (*Central Coast*  
7 *Forest Assn v. Fish & Game Com.* (2018) 18 Cal.App.5th 1191, 1198.)  
8 Accordingly, "[w]here the Commission has made a determination on  
9 matters that are technical or obscure, and over which the  
10 Commission, through the department's staff of scientists, has "a  
11 comparative interpretive advantage over the courts[,]"" we defer  
12 to the Commission's determination on those matters." (*Ibid.*) In  
13 essence, the reviewing court indulges "all presumptions and resolves  
14 all conflicts in favor of the [agency's] decision. Its findings  
15 come before us 'with a strong presumption as to their correctness  
16 and regularity.'" (*Donley v. Davi* (2009) 180 Cal.App.4th 447, 456,  
17 citations omitted.; see also *Central Coast Forest Assn. v. Fish &*  
18 *Game Com., supra*, 18 Cal.App.5th at p. 1206, fn. 11 ["The  
19 Commission's decision was not reversible for failure to consider  
20 evidence unless that evidence could have led the Commission to a  
21 different conclusion."].) In other words, "[i]f the Commission's  
22 decision is clearly justified by the weight of the evidence, we of  
23 course affirm." (*Central Coast Forest Assn. v. Fish & Game Com.,*  
24 *supra*, 18 Cal.App.5th at p. 1206.) "Only if the evidence clearly  
25 weighs against the Commission's decision may we reverse." (*Ibid.*)

26 Furthermore, when the trial court is authorized to exercise  
27 its independent judgment in reviewing the administrative decision,  
28 "abuse of discretion is established if the court determines that

1 the findings are not supported by the weight of the evidence." (Code  
2 Civ. Proc., § 1094.5, subd. (c).) Nevertheless, even under the less  
3 deferential independent judgment standard, the reviewing court  
4 still "tak[es] into account and respect[s] the agency's  
5 interpretation of its meaning." (*Kern, Inyo & Mono Counties*  
6 *Plumbing, etc. v. California Apprenticeship Council* (2013) 220  
7 Cal.App.4th 1350, 1358.)

8 Finally, when interpreting statutory language, "[w]e must  
9 select the construction that comports most closely with the apparent  
10 intent of the Legislature, with a view to promoting rather than  
11 defeating the general purpose of the statute, and avoid an  
12 interpretation that would lead to absurd consequences." (*People v.*  
13 *Jenkins* (1995) 10 Cal.4th 234, 246; *Lateef v. City of Madera* (2020)  
14 46 Cal.App.5th 245, 254 ["We are also mindful, however, that "[o]ur  
15 primary goal is to implement the legislative purpose, and, to do  
16 so, we may refuse to enforce a literal interpretation of the  
17 enactment if that interpretation produces an absurd result at odds  
18 with the legislative goal.'"].)

19 As discussed below, the listing petition included evidence from  
20 which the Commission could derive sufficient information of  
21 population trend and abundance, in addition to the other statutory  
22 components. Substantial evidence supports the Commission's  
23 decision. (*Central Coast Forest Assn v. Fish & Game Com., supra*, 18  
24 Cal.App.5th at p. 1198; *Center for Biological Diversity v. Fish &*  
25 *Game Com.* (2008) 166 Cal.App.4th 597, 599, (*Center for Biological*  
26 *Diversity*).)

1           **IV. Statutory and Regulatory Components (section 2072.3)**

2           To be designated "endangered," the species must be in serious  
3 danger of becoming extinct throughout all, or a significant portion,  
4 of its range ..." (Fish & G. Code, § 2062.) A "threatened" species  
5 is one which is "likely to become endangered in the foreseeable  
6 future ..." (Fish & G. Code, § 2067.)

7           Fish and Game Code section 2072.3 sets forth the requirements  
8 a petition must satisfy for acceptance. (*Central Coast Forest Assn.*  
9 *v. Fish & Game Com.* (2017) 2 Cal.5th 594, 605.) The petition "shall,  
10 at a minimum, include sufficient scientific information that a  
11 petitioned action may be warranted." (Section 2072.3.) In  
12 addition, "[t]he section then lists specific information the  
13 petition 'shall include': population trend, range, distribution,  
14 abundance, life history, factors affecting the population's ability  
15 to survive and reproduce, degree and immediacy of the threat, impact  
16 of existing management efforts, suggestions for future management,  
17 availability and sources of information, kind of habitat necessary  
18 for species survival, and a detailed distribution map. The section  
19 then ends by making this list nonexhaustive, stating broadly that  
20 "[t]he petition shall also include ... any other factors that the  
21 petitioner deems relevant. (*Central Coast Forest Assn. v. Fish &*  
22 *Game Com., supra*, 2 Cal.5th at p. 605.)

23           If the Commission finds those components insufficient, it is  
24 required to publish a notice of that finding, including the reason  
25 for the objection. (Cal. Code of Regs., tit. 14, § 670.1, subd.  
26 (e)(1).) In contrast, no reasons are required if the Commission  
27 finds the petition sufficient - the only requirement is that a  
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1 notice of finding that the petition is accepted for consideration  
2 will be published. (*Id.* subd. (e)(2).)

3 "Under CESA a petition for listing must be accepted for  
4 consideration if it is supported by sufficient information to lead  
5 a reasonable person to conclude there is a substantial possibility  
6 the requested listing could occur." (*Center for Biological*  
7 *Diversity v. Fish & Game Com., supra*, 166 Cal.App.4th at p. 599.)  
8 Sufficient information is "that amount of information, when  
9 considered with the Department's written report and the comments  
10 received, that would lead a reasonable person to conclude the  
11 petitioned action may be warranted." (*Id.* at p. 609-610.)  
12 "Substantial possibility" is more than a "reasonable possibility"  
13 but there is no requirement that "listing be more likely than not."  
14 (*Id.* at p. 610.) In essence, "the standard, at this threshold in  
15 the listing process, requires only that a substantial possibility  
16 of listing could be found by an objective, reasonable person." (*Id.*  
17 at p. 611.)

18 In *Center for Biological Diversity*, the Commission's findings  
19 noted that "[h]istorical data in particular is unavailable for many  
20 species. Gaps in information are not necessarily fatal to a petition  
21 to list a species, provided the Commission at this point in the  
22 process can discern, despite the factual uncertainties, a  
23 substantial possibility that the species is in serious danger of  
24 extinction." (*Center for Biological Diversity, supra*, 166  
25 Cal.App.4th at p. 607.) Nevertheless, the Commission rejected a  
26 listing petition for the California Salamander on the basis the  
27 petition lacked sufficient information regarding population trend

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1 and population abundance and thus lacked the components enumerated  
2 in section 2072.3. (*Id.* at pp. 608-609.)

3       Regarding population trend, the Commission found that the  
4 petition did not provide sufficient information on population trend  
5 because the asserted studies "surveyed only a very limited portion  
6 of the total range or used questionable sampling methods" which  
7 resulted in a "population status report that is potentially  
8 inaccurate and misleading." (*Center for Biological Diversity,*  
9 *supra*, 166 Cal.App.4th at p. 606.) The Commission also found that  
10 the best available data was that championed by the opposition, which  
11 provided "credible evidence" and refuted population decline. The  
12 Commission also rejected correlative habitat evidence because there  
13 was no credible evidence that salamanders occupied much of the  
14 "hypothetical or presumptive habitat." Regarding population  
15 abundance, the Commission found that "infer[entail]" and  
16 "anecdotal" information was only "speculation" and "guesswork,"  
17 insufficient to establish an "accurate assessment of the historic  
18 or current population of a species ...." (*Id.* at p. 607.)

19       The trial court reversed the Commission finding that, among  
20 other things, there was nothing "scientifically flawed" about the  
21 submitted studies, the Commission mischaracterized the impact of  
22 habitat loss, and that population trends have been "reliably  
23 estimated from locality records without historical or current range-  
24 wide population abundance estimates." (*Center for Biological*  
25 *Diversity, supra*, 166 Cal.App.4th at p. 608.) In particular, the  
26 trial court noted, "[s]cientific literature indicates that  
27 information about past distribution from historical occurrence data  
28 can be used to infer a decline in distributions from historical and

1 projected loss of habitat. The USFWS used similar peer-reviewed  
2 analytical methodology biased on threats to habitat associated with  
3 known salamander occurrences to determine population decline and  
4 threat to survival." (*Ibid.*)

5 The appellate court focused on the findings of the Commission  
6 rather than the ruling of the trial court and noted that the  
7 salamanders' unique characteristics and human population growth  
8 supported a "strong inference of threat or endangerment." (*Center*  
9 *for Biological Diversity, supra*, 166 Cal.App.4th at p. 611.) A  
10 similar inference was raised due to one of the salamanders' genetic  
11 units becoming hybridized. (*Id.* at p. 612.) In particular, the  
12 court noted "[t]he loss of a majority of the natural breeding  
13 habitat sites and fragmentation of the remaining habitat, in these  
14 circumstances, afford a strong inference of threat or endangerment.  
15 [The expert]'s plausible estimate of less than 5,000 breeding female  
16 salamanders in the state, for a species with these breeding  
17 characteristics, enhances the strength of this inference." (*Id.* at  
18 p. 611.)

19 The appellate court reasoned that "if Commission members were  
20 to choose to draw the available inferences from this information in  
21 support of listing the species as endangered or threatened in a  
22 proceeding under section 2075.5, we see no basis for judicial  
23 intervention to overturn that decision." (*Center for Biological*  
24 *Diversity, supra*, 166 Cal.App.4th at p. 612.) Only if conflicting  
25 evidence was "very strong," would a reasonable person conclude the  
26 evidence supporting listing to be rendered "insubstantial." (*Ibid.*)  
27 Because the conflicting evidence did not support such a conclusion,  
28

1 the appellate court affirmed the trial court's reversal of the  
2 Commission's rejection.

3 **V. Abundance and Population Trend Components contained in the**  
4 **Administrative Record**

5 The listing petition states that the range of the Joshua tree  
6 encompasses approximately 4.7 million acres. (AR 23-23.)  
7 Petitioners concede that a perfect number of existing Joshua trees  
8 in unnecessary (Opening Brief, at p. 16:3; 17:4), but logically  
9 assume abundance and population trend information establish a  
10 baseline for determining whether Joshua trees are actually declining  
11 or otherwise no longer self-sustaining. (Opening Brief, pg. 15:27-  
12 16:5; 20:21-26.)

13 Petitioners' trial brief identifies several statements from  
14 the administrative record approximating an absence of a reliable  
15 estimation of western Joshua tree population size. (See Trial  
16 Brief, p. 16.) None of the statements are attributable to the  
17 Commissioners, and there is no indication the Commission adopted  
18 such a proposition as a finding of fact. Furthermore, the studies  
19 contained in the Listing Petition impliedly and explicitly used  
20 abundance and population trend information to form a baseline for  
21 their various study parameters - a concept which was impliedly  
22 adopted by the Commission. In essence, a reasonable person would  
23 view such samples as representative of the species as a whole, and  
24 petitioners agree that a precise number is unnecessary.

25 • **The Listing Petition's Scientific Studies**

26 The Listing Petition is supported largely by peer-reviewed  
27 journal articles and studies addressing a variety of circumstances  
28 affecting the Joshua tree. Abundance and population trend do not

1 appear to be main point of any one particular study, however, the  
2 studies uniformly use such factors before departing into their  
3 principle inquiry. For example, a report addressing the effects of  
4 wildland fire on Joshua trees contained tables stating the specific  
5 number of trees in the studied area. (AR 787-788). Similarly,  
6 studies on the genetic separation and plant restructuring mapped  
7 and numbered Joshua tree locations. (AR 2076, 2178-2179 [referring  
8 to 1200 trees studied]). Finally, the Joshua Tree Species Status  
9 Assessment prepared by the U.S. Fish & Wildlife Service provided a  
10 specific tree count (AR 2485 [describing 4-112 trees per ha over a  
11 range of 3,255,088 ac]) in addition to factors affecting habitat  
12 loss and plant projections. (AR 2520-2523.)

13       The body of the Listing Petition references several studies in  
14 its "Abundance and Population Trends" section. (AR 24.) Defalco,  
15 Esque, Scoles-Sciulla, and Rodgers, Desert Wildfire and Severe  
16 Drought Diminish Survivorship of the Long-Lived Joshua Tree, 2010  
17 ("Defalco") found that pronounced El Nino Southern Oscillation  
18 cycles have increased which has led to increased threat from  
19 wildfires and drought events. (AR 532.) The study sites were five  
20 areas in Joshua Tree National Park that had been affected the May  
21 1999 Juniper Fire Complex which burned nearly 5700ha. (AR 533-  
22 534.) The study found that "[b]y the spring 2004 census, the average  
23 survival for burned plants was 20% compared with 74% for unburned."  
24 In other words, 26% of the unburned plants died. The study concluded  
25 that drought and damage from changing diet of herbivores due to  
26 lack of precipitation and competition from alien annual grasses  
27 were factors. (AR 536.)

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1 The Harrower and Gilbert, Context-dependent mutualisms in the  
2 Joshua tree-yucca moth system shift along a climate gradient, 2018  
3 ("Harrower and Gilbert") study provided specific Joshua tree numbers  
4 in the study area. (AR 804.) The study also found that "Joshua  
5 trees are limited to a narrow range of climate conditions ... the  
6 survival of the species requires colonization of new habitats." (AR  
7 800.) The study also noted that "Joshua trees seem to be dying  
8 back at low elevations ... but they do not seem to be moving  
9 successfully into higher elevations." (AR 812.)

10 The Harrower and Gilbert study "sampled two 20 x 200-m belt  
11 transects randomly positioned and separated by 50 m, and running  
12 from southeast to northwest at each of the 11 sites." (AR 803.)  
13 The study also notes that "Joshua trees are distributed across a  
14 1200-m elevational range JTNP, peaking at intermediate elevations.  
15 The number of dead Joshua trees peaks at both the lowest (1004m)  
16 and highest (2214) elevations across the range ... The ratio of dead  
17 to living trees was greater at the lower elevations where the sites  
18 are warmer and drier than sites at higher elevation. These sites  
19 fall in a transitional ecotone between the Colorado and Mojave  
20 Desert where plant communities change significantly in response to  
21 local climate. Vegetation in transition zones such as these is  
22 predicted to be particularly sensitive to changes in climate.  
23 Patterns of size and reproduction across the elevation gradient  
24 were consistent with expectations from the models ... with Joshua  
25 trees dying and not reproducing at lower elevations. These results  
26 also agree with a recent demographic analysis of Joshua trees that  
27 found a negative relationship between warming temperatures and stand  
28 density, potentially constraining tree establishment." The study

1 noted a declining habitat which potentially extirpated<sup>3</sup> the Joshua  
2 Tree from the Joshua Tree National Park. (AR. 801.)

3 The St. Clair and Hoines, Reproductive ecology and stand  
4 structure of Joshua tree forests across climate gradients of the  
5 Mojave Desert, 2018 ("St. Clair and Hoines") study involved ten  
6 sites across California, Utah, Nevada and Arizona that spanned  
7 "geographical and elevational range of Joshua tree." (AR 2178.)  
8 Measurements were made on 120 Joshua trees per site (1200 total  
9 trees).

10 Similarly, the Cornett, Population dynamics of the Joshua tree  
11 (*Yucca brevifolia*): twenty-three-year analysis, Lost Horse Valley,  
12 Joshua Tree National Park, 2014, ("Cornett") study involved a one-  
13 hectare study site within an area of relatively high Joshua tree  
14 density of both mature and immature trees were present. The site's  
15 general location was within Lost Horse Valley, which is located  
16 near the geographical center of Joshua tree distribution in Joshua  
17 Tree National Park. The study lasted for 23 years and found that  
18 the seventy living trees in 1990 had declined to 47 trees. "No  
19 new, young Joshua trees appeared during the study period." (AR  
20 510.)

21 The Cornett study noted "[t]he results in Lost Horse Valley  
22 parallel those found at two other study sites in Joshua Tree  
23 National park. A second site at Upper Covington Flat showed a 16%  
24 decline in Joshua tree numbers from 1988 through 2008. A third  
25 site in Queen Valley shoed a wildfire-assisted 73% decrease from  
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28 <sup>3</sup> An "Extirpated Species" is a species that "no longer exists in a specific  
location." (*Center for Biological Diversity v. Fish & Game Com., supra*, 166  
Cal.App.4th at p. 604.)

1 1990 through 2013. Taken together the three sites represent a broad  
2 geographical sampling within Joshua Tree National Park. The  
3 declines at all three sites, along with mortality of selected large  
4 trees would seem to indicate that the Joshua Tree numbers are  
5 declining throughout the Park." (AR 511) Cornett concluded that  
6 "this species may be extirpated from the Park as early as the 22nd  
7 century." (AR 509.)

8 Finally, although not specifically referenced in the Listing  
9 Petition's "abundance and population trends" section, the Dole,  
10 Loik, and Sloan, The Relative Importance of Climate Change and the  
11 Physiological Effects of CO2 on Freezing Tolerance for the Future  
12 Distribution of Yucca Brevifolia, 2002, study included future  
13 distribution mapping and noted a "general pattern of extirpation  
14 ...." (AR 549.) And the Barrows, Murphy-Mariscal, Modeling Impacts  
15 of Climate Change on Joshua Trees at their Southern Boundary: How  
16 Scale Impacts Predictions, 2011, study examined 679,585 ha area  
17 including Joshua Tree National Park and a 10km buffer surrounding  
18 the Park. (AR 159.) The study involved 70 "citizen scientists"  
19 who "were charged with recording the locations and heights of the  
20 smallest Joshua tree seedlings they could find." (AR 160.) Juvenile  
21 Joshua trees were located and coordinates collected. (*Ibid.*) The  
22 study concluded that Joshua tree habitat reduction (largely due to  
23 wildfire) will "impact a larger proportion of the remaining Joshua  
24 tree population," even within the refuge of the Joshua Tree National  
25 Park. (AR 164.)

26 • **The Department's Report**

27 The Department of Fish and Wildlife Report ("Report") noted  
28 that, as it relates to population trend component, the Listing



1 Petition "acknowledges that a reliable estimate of western Joshua  
2 tree population is not available and that no range-wide population  
3 trends have been documented." (AR 5185.) Instead, the Report notes  
4 that the Listing Petition relies on multiple studies which found  
5 that Joshua density is "negatively correlated with increasing  
6 temperature, the species range is contracting at lower elevations,  
7 recruitment is limited, and plant mortality is increasing." (*Ibid.*)  
8 The Report then lists four studies cited in the Listing  
9 Petition and notes the reports which found that the Joshua tree  
10 population within Edwards Air Force Base was stable. To the latter  
11 reports, however, no specific study size was noted and the Report  
12 notes that several internal issues "increase[ed] the uncertainty of  
13 the results."<sup>4</sup> (AR 5186.) The Report concludes that "[t]he Petition  
14 does not present an estimate of western Joshua tree population size,  
15 nor does it provide evidence of a range-wide population trend;  
16 nevertheless, the Petition does provide information showing that  
17 some populations of western Joshua tree are declining, particularly  
18 within Joshua Tree National Park."<sup>5</sup> (AR 5186.)

19 • **Commission Testimony**

20 Testimony elicited by the Commission demonstrates that the  
21 abundance and population trend components were not overlooked. In  
22 particular, in response to such queries Department Director Charlton  
23 Bonham testified that there was not a "zero absence" of population  
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25 <sup>4</sup> There was also testimony by the Center for Biological Diversity that the reports  
addressing the Joshua Tree population at Edwards Air Force Base were not peer  
reviewed. (AR 5651.)

26 <sup>5</sup> The Department also prepared presentation material for the Commission's August  
19-20, 2020 meeting which contained a slide checking each of the section 2072.3's  
27 components, including population trend and abundance. (AR 5218-5221.) The  
material also contained a slide which noted that the listing petition did not  
28 have a range-wide population estimate, but some populations of Joshua trees were  
declining. (AR 5222.)

1 evidence. (AR 5787-5789.) In other testimony Dir. Bonham  
2 emphasized the Listing Petition's "significant information about  
3 populations of Joshua tree in certain locations, primarily in the  
4 Joshua Tree National Park." (AR 5628-5629.) Dir. Bonham proceeded  
5 to cite the above mentioned Harrower and Gilbert 2018 study which  
6 addressed Joshua tree population in certain localities and that  
7 there were more dead trees at higher, hotter, lower elevations (AR  
8 5629), and observed declines in certain sample plots in the park.<sup>6</sup>  
9 (*Ibid.*)

10 **VI. Analysis**

11 "The Commission is the finder of fact in the first instance in  
12 evaluating the information in the record[]" (*Center for Biological*  
13 *Diversity, supra*, 166 Cal.App.4th at p. 611), and "[t]he court does  
14 not substitute its judgment for that of the administrative body."  
15 (*Pitts v. Perluss* (1962) 58 Cal.2d 824, 834-835.) As a general  
16 principle, " '[t]he courts have nothing to do with the wisdom or  
17 expediency of the measures adopted by an administrative agency to  
18 which the formulation and execution of state policy have been  
19 entrusted, and will not substitute their judgment or notions of  
20 expediency, reasonableness, or wisdom for those which have guided  
21 the agency.' [Citations.]" (*Faulkner v. California Toll Bridge*  
22 *Authority* (1953) 40 Cal.2d 317, 329.).

23 The study findings presented in the listing petition, the  
24 department's report, and the testimony before the Commission  
25 convincingly refute petitioners' contentions that the listing  
26 petition lacked sufficiency and left an "analytic gap" undermining  
27

28 <sup>6</sup> Unlike rejections, the Commission's granting of a petition does not require publication of the reasons for its decision. (Cal. Code of Regs., tit. 14, § 670.1, subd. (e)(2).)

1 the Commission's findings. It is at least implied - if not self-  
2 evident - that the studies' findings of threats to the Joshua tree  
3 began with recognizing the current Joshua tree population and its  
4 prominence in its traditional range. Similarly, on the specific  
5 questions of abundance and population trend, the Department  
6 referenced study findings relevant to those specific components  
7 during the administrative proceedings. As in *Center for Biological*  
8 *Diversity, supra*, 166 Cal.App.4th 597, which specifically relied on  
9 inferential and anecdotal information to account for "[t]he absence  
10 of historic counts" (*Id.* at p. 612), the information furnished in  
11 the studies provides the Commission with information regarding  
12 abundance and population trend. Furthermore, in light of such  
13 information, there is nothing suggesting that the Commission's  
14 decision contradicts the clear purpose of the overarching statute  
15 or otherwise overstepped its authority. (See *Cleveland National*  
16 *Forest Foundation v. County of San Diego* (2019) 37 Cal.App.5th 1021,  
17 1060 ["'[A] court must defer to the agency's interpretation of such  
18 a statute unless that interpretation contradicts the clear language  
19 and purpose of the statute.' [Citation.]".])

20 In addition, the "analytic route" of the Commission's ultimate  
21 conclusion is traceable between the "raw evidence and [its] ultimate  
22 decision or order." (*Topanga, supra*, 11 Cal.3d at p. 515.) The  
23 findings requirement "serves to conduce the administrative body to  
24 draw legally relevant sub-conclusions supportive of its ultimate  
25 decision; the intended effect is to facilitate orderly analysis and  
26 minimize the likelihood that the agency will randomly leap from  
27 evidence to conclusions ... [and] enable[s] the reviewing court to  
28 trace and examine the agency's mode of analysis." (*Id.* at p. 516.)

1 In essence, it brings "attention to the analytic route the  
2 administrative agency traveled from evidence to action." (*Id.* at  
3 p. 515; *Environmental Protection Information Center v. California*  
4 *Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 517.)

5 In *City of Rancho Palos Verdes v. City Council* (1976) 59  
6 Cal.App.3d 869 (*Rancho Palos Verdes*) a city was requested to vacate  
7 a public street to facilitate the construction of a shopping center.  
8 The city council adopted a resolution approving the request and  
9 finding that the subject streets were "unnecessary for present or  
10 prospective public street purposes ..." (*Id.* at p. 881.) However,  
11 because this finding was not "supported by any other finding of  
12 fact by the city council" (*Ibid*), the city council's action was  
13 determined to be inconsistent with the findings requirement pursuant  
14 to *Topanga, supra*, 11 Cal. 3d at p. 515. (*Rancho Palos Verdes,*  
15 *supra*, 59 Cal.App.3d at p. 889.) In particular, because there were  
16 no findings on "sub-issues" it could not be determined how the city  
17 council arrived at their conclusion the street was no longer  
18 necessary. (*Id.* at p. 889.)

19 Unlike the City Council's untraceable decision criticized in  
20 *Rancho Palos Verdes, supra*, 59 Cal.App.3d 869, here the Commission's  
21 Notice of Findings specified that the information supplied in the  
22 petition was sufficient to confer threshold listing when viewed in  
23 conjunction with the Department's Report. (AR 6159.) The Listing  
24 Petition, as found in the Department's Report, contained information  
25 concerning the statutory components - including those specifically  
26 challenged in this writ petition - and the Commission noted that  
27 its ultimate conclusion was based on the Department's examination  
28 of the information provided in the listing petition, in addition to

1 the administrative record. (AR 6159.) In essence, the Department's  
2 summary, as referenced in the Commission's order, establishes the  
3 requisite link between the "raw evidence" and the Commission's  
4 ultimate decision. (*Topanga, supra*, 11 Cal.3d at p. 515.)

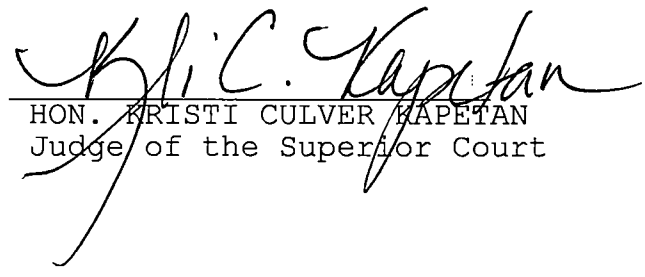
5 Accordingly, the information contained in this record is  
6 sufficient for a reasonable person to find that there is a  
7 substantial possibility that the Joshua tree could be listed after  
8 further Department review. (*Center for Biological Diversity, supra*,  
9 166 Cal.App.4th at p. 611.) In addition, the statutory provisions  
10 framing the Department's evaluation of the Listing Petition  
11 furnishes the analytic foundation for the Commission's ultimate  
12 decision to confer threshold listing to the Joshua tree.

13 **VII. Conclusion**

14 Therefore, the petition for writ of mandate is denied.

15 **So ORDERED**

16  
17 DATED this 16<sup>th</sup> day of February, ~~2021~~ 2022

18  
19   
20 HON. KRISTI CULVER KAPETAN  
21 Judge of the Superior Court  
22  
23  
24  
25  
26  
27  
28

<p style="text-align: center;"><b>SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO</b>  Civil Department, Central Division  1130 "O" Street  Fresno, California 93724-0002  (559) 457-2000</p>	<p style="text-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 / DNR</b></p>	
<p style="text-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:

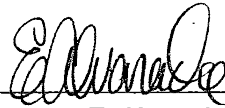
**[Minute Order and Order Denying Petition for Writ of Mandate, dated 2/16/22]**

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



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