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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Enviros, Fish Dept. Take Project Row To Calif. High Court

By **Beth Winegarner**

Law360, San Francisco (September 2, 2015, 4:21 PM ET) -- Environmental groups urged the California Supreme Court on Wednesday to revive a suit challenging the approval of a massive mixed-use residential project along a river north of Los Angeles that they say could harm endangered species, a case that will test the scope of the California Endangered Species Act.

Center for Biological Diversity attorney John Buse **told the justices** that **the appeals court wrongly agreed** with the California Department of Fish & Wildlife's argument that a proposal to move the stickleback fish didn't count as an illegal "taking" under state statutes. The department and the developers of the 11,999-acre Newhall Ranch project say moving the fish will protect them, but Buse argued that state laws don't allow it.

"It's still an eviction. It's not conservation," Buse argued. "The department's expert has suggested a number of things to avoid interacting with the stickleback."

Relocating the stickleback could wind up harming them, argued Center for Biological Diversity attorney Kevin Bundy. "These are fish with very specific likes and dislikes," he said.

"Apparently!" said California Supreme Court Justice Goodwin Liu.

Fish & Wildlife's attorney, Tina Thomas of Thomas Law Group, argued that the mitigation measures in the Newhall EIR don't involve "taking" the stickleback. But Justice Carol Corrigan asked, "Don't you have to capture them to move them?"

To constitute "taking," it must result in harm to the species; it can't be a move designed to protect them, Thomas argued. The agency is using the same measures it has used since the 1980s to protect species, she said.

"Just bothering them can cause them harm," Justice Corrigan said. "Reasonable minds can differ on the definitions, but that's not our job. They give us these terms and we have to give meaning to them."

Justice Kathryn Werdegar noted that state statutes say if "taking" is used for mitigation under the California Environmental Quality Act, it's not permissible. Thomas argued that there's an exception to that rule for scientific research.

Justice Liu asked why there was a scientific exception to the "taking" rules if Fish & Wildlife is correct in its argument that its own practices are an exception to those rules. Thomas said that

"taking" has to be read as "harm to the species."

The environmental groups also challenged the Newhall project's environmental impact report because it assessed future emissions under a "business as usual" standard; objectors say the project will increase greenhouse gas emissions twentyfold. The EIR disclosed the increased emissions, but said there was no way to know what the impact of those emissions wold be, Bundy said.

Newhall developers used an impermissible baseline for measuring the project's emissions, allowing for increased emissions when state law requires reductions, Bundy argued.

Newhall's attorney, Arthur Scotland of Nielsen Merksamer Parrinello Gross & Leoni LLP, argued that agencies have wide discretion regarding their methodology on calculating emissions, and the courts are required to give those decisions deference. At the time the Newhall EIR was approved, there was no accepted scientific model for reducing emissions, he said.

Chief Justice Tani Cantil-Sakauye asked whether those models are available now, should the court remand the case. Scotland said that there isn't.

"So they used an acceptable process, and the developers should not be at risk because nobody came up with better rules?" asked Justice Corrigan.

"Exactly," Scotland said, adding that Newhall is designed as a self-contained community that will ultimately reduce traffic compared to other projects that could be built there. "You can't have a standard in California where there's no development," he argued.

As is common with development projects challenged by the EQA, Newhall Ranch has been in the works for more than a dozen years. The Los Angeles Board of Supervisors approved the project in 1999, and the project saw its first of many challenges in 2000, when the United Water Conservation District sued the city to stop the project.

The plaintiffs are Wishtoyo Foundation's Ventura Coastkeeper arm, California Native Plant Society, Friends of the Santa Clara River, and Santa Clarita Organization for Planning and the Environment. They have filed other lawsuits to stop the project, as well.

The plaintiffs are represented by John T. Buse and Adam F. Keats of Center for Biological Diversity, Jan Chatten-Brownand Douglas P. Carstens of Chatten-Brown & Carstens LLP, Sean B. Hecht of University of California at Los Angeles School of Law and Jason Adam Weiner of Wishtoyo Foundation/Ventura Coastkeeper.

The Department of Fish and Game is represented by its own Thomas Ray Gibson and John H. Mattox, and by Tina Anne Thomas, Ashle T. Crocker and Amy Rachel Higuera of Thomas Law Group.

Newhall is represented by Mark Joseph Dillon of Gatzke Dillon & Ballance LLP, Arthur George Scotland of Nielsen Merksamer Parrinello Gross & Leoni LLP, Miriam A. Vogel of Morrison & Foerster LLP and Downey Brand LLP.

--Additional reporting by Juan Carlos Rodriguez. Editing by Kelly Duncan.