COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

DEC 20 2000

REMITTITUR

FRIENDS OF LAKE SKINNER WILDLIFE,
Plaintiff and Appellant,
v.
CALIFORNIA DEPARTMENT OF FISH AND GAME, et al.
Defendants and Respondents.

E026200

(Super.Ct.No. RIC324114)

The County of Riverside

I, STEPHEN M. KELLY, Clerk of the Court of Appeal, State of California, Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above entitled cause on October 16, 2000 and this opinion or decision has now become final.

Appellant to recover costs on appeal.

Witness my hand and seal of the Court
this December 19, 2000.

Stephen M. Kelly, Clerk

By: A. Smith
Deputy Clerk

cc: All parties (Copy of remittitur only, Rule 25(e), California Rules of Court).

Superior Court Clerk/Riverside County
P. O. Box 431 - Appeals
Riverside, CA 92502

Sylvia Cano Hale
Office Of The State Attorney General
300 S. Spring St.; 11 North Tower
Los Angeles, CA 90013 1204

Norman N. Flette
P.O. Box 54153/Terminal Annex
700 N. Alameda St., 11th Flr.
Los Angeles, CA 90054 0153

Mitchell S. Wagner
7710 Balboa Avenue;Suite 316
San Diego, CA 92111

COPY

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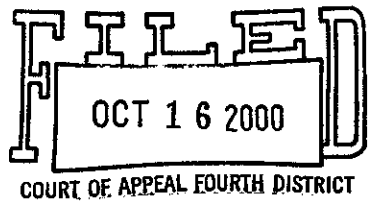
COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA



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CALIFORNIA DEPARTMENT OF FISH AND GAME et al.,

Defendants and Respondents.

E026200

(Super.Ct.No. RIC 324114)

OPINION

APPEAL from the Superior Court of Riverside County. Gloria Connor Trask, Judge. Reversed with directions.

Mitchell S. Wagner for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Mary Hackenbracht, Senior Assistant Attorney General, Douglas B. Noble, Supervising Attorney General, and Sylvia Cano Hale, Deputy Attorney General, for Defendant and Respondent, California Department of Fish and Game.

N. Gregory Taylor, Karen L. Tachiki, Norman N. Flette, and John C. Clairday for Defendant and Respondent Metropolitan Water District of Southern California.

1. Introduction

Plaintiff Friends of Lake Skinner Wildlife appeal the trial court's judgment denying its petition for writ of mandate to compel defendants the California Department of Fish and Game (DF&G), Metropolitan Water District of Southern California (Metropolitan), and other member agencies of the Reserve Management Committee (RMC) to comply with the California Environmental Quality Act (CEQA) before applying and issuing future permits to eradicate beaver populations in the Southwestern Riverside County Multi-Species Reserve (Reserve) and Lake Skinner. Before denying plaintiff's petition, the trial court rejected plaintiff's request to present extra-record evidence of the existence of other beavers in and around the Reserve after the expiration date of the depredation permit. Plaintiff claims, and we agree, that the trial court erred in excluding its extra-record evidence.

We reverse and remand.

2. Factual and Procedural History

The Lake Skinner Reserve is managed by the RMC, which is comprised of various agencies, including the U.S. Fish and Wildlife Service (Service), DF&G, Metropolitan, Riverside County Habitat Conservation Agency, and the Riverside County Regional Park and Open Space District.

RMC approved Resolution 80 in December of 1998. The resolution provides that the reserve's riparian habitat was threatened by nonnative species, including the beaver. The resolution further provides that the riparian zone at Middle and Tucalota Creeks

sustained essential nesting area for the least Bell's vireo and the southwestern willow flycatcher, both of which were state and federally-listed endangered species. Approximately 15 to 20 beavers had entered the riparian habitat and caused significant damage to the cottonwood and willow trees. To preserve the riparian habitat, Service and DF&G recommended the permanent removal of the beavers from the Middle and Tucalota Creeks.

On January 11, 1999, DF&G issued a depredation permit to Metropolitan to capture and kill 20 beavers in the reserve area. The permit expired on March 11, 1999.

On February 19, 1999, plaintiff, in an effort to prevent action under the depredation permit, filed its petition for writ of mandate, or, in the alternative, a complaint for injunctive relief against RMC, DF&G, and does 1 to 10. Plaintiff also filed an application for a temporary restraining order (TRO). The trial court denied plaintiff's TRO application because plaintiff had failed to establish that it was likely to prevail on the merits and because issuing the TRO would create greater irreparable harm to the habitat of the endangered species.

On March 9, 1999, plaintiff filed its first amended petition for writ of mandate or, in the alternative, complaint for injunctive and declaratory relief. Plaintiff requested that the court compel RMC to comply with the requirements of CEQA before applying for or issuing another depredation permit to eradicate the beaver population.

In its answer, DF&G raised several affirmative defenses, including that the action was moot because the depredation permit expired on March 11, 1999. DF&G stated that

only one beaver had been observed in the reserve after the permit expiration date.[1] Metropolitan also raised the defense of mootness in its answer. Metropolitan admitted, however, that beavers inhabit other areas of the reserve.

Plaintiff subpoenaed witnesses Kevin Brennan and Judson Monroe to testify at the hearing scheduled on October 1, 1999. DF&G moved to quash Brennan's subpoena and Metropolitan moved to quash Monroe's subpoena. In support of their motions, DF&G and Metropolitan argued that judicial review was limited to the administrative record. The trial court granted DF&G and Metropolitan's motions.

On the same day, the trial court denied plaintiff's petition for writ of mandate on the ground of mootness because the depredation permit expired on March 11, 1999, and the DF&G relocated the beavers without resorting to its authority under the permit.[2] The trial court also found that RMC's issuance of the depredation permit under Fish and Game Code section 4181 was a ministerial act that was exempt from the requirements of CEQA.

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[1] On July 29, 1999, the parties stipulated that DF&G would cease to capture and kill beavers at the reserve prior to the hearing. The parties also stipulated that DF&G would retain the option to capture and relocate beavers to other areas within the reserve if it found beavers destroying riparian habitat.

[2] Although DF&G claims that it did not resort to its authority under the depredation permit, its expert stated that it is unlawful to relocate beavers without a permit.

3. Discussion

In response to plaintiff's notice of intent to call witnesses, DF&G and Metropolitan incorrectly informed the court that judicial review was limited to the administrative record under *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559. The trial court erroneously agreed with DF&G and Metropolitan and ruled: "The court, having considered the moving and opposing papers and oral argument, grants [DF&G's] Motion to Quash the subpena served on Kevin Brennan by [plaintiff] and grants Metropolitan's Motion to Quash the Notice to Appear served on [Metropolitan] to compel the testimony of Judson Monroe. The court rules that judicial review is limited to the administrative record and that the administrative record consists of the resolution to apply for a depredation permit to trap and kill beavers, the application for the depredation permit, the diagrams and photographs numbered 00001 to 00041 documenting damage by beavers at the Reserve, and the depredation permit. The court rejects [plaintiff's] offer of proof to show the presence of forty to sixty beavers in and around Lake Skinner and the Reserve."

In direct conflict with the trial court's ruling, however, the California Supreme Court held that extra-record evidence is admissible to address a factual dispute in traditional mandamus actions involving ministerial acts.[3] (*Western States Petroleum*

[3] Even in quasi-legislative administrative decisions, extra-record evidence may be admitted when relevant to issues other than the validity of the agency's decision. (*Western States Petroleum Assn. v. Superior Court, supra*, 9 Cal.4th at pp. 575-576, fn. 5,

[footnote continued on next page]

Assn. v. Superior Court, supra, 9 Cal.4th at p. 576.) Unlike in quasi-legislative actions, where the administrative record usually is adequate to allow judicial review, in ministerial or informal administrative actions, there is little or no administrative record to provide an evidentiary basis for meaningful review. (*Id.* at p. 575; *Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1390.)

As the parties agree, DF&G and Metropolitan, in applying for or issuing the depredation permit, followed only those procedures required for ministerial acts. As with most ministerial or informal administrative actions, the administrative record in this case was minimal, consisting of merely the resolution, the application, the permit, and some pictures and diagrams. The entire administrative record consisted of 41 pages. Nothing in that 41-page record resolved the factual dispute of whether beavers continued to pose a threat to endangered species in the Reserve after the depredation permit's expiration date. Thus, in light of the limited record available for judicial review, extra-record evidence should have been admitted.

As requested by this court, the parties provided supplemental briefing on this issue. In its supplemental brief, Metropolitan argues that the trial court excluded the evidence without explanation. This argument is disingenuous. Based on our review of the language of the court's decision and the transcript of the hearing on the motions to quash, the trial court's rationale was sufficiently clear.

[footnote continued from previous page]
578-579.) Certainly, jurisdictional issues such as mootness do not concern, in any way, the validity of the agency's decision.

In its statement of decision, the court ruled that judicial review was limited to the administrative record. In the next sentence, the court rejected plaintiff's extra-record evidence. In context, it is readily apparent that the court excluded Brennan and Monroe's testimony because such evidence went beyond the scope of the administrative record.

The record of the proceeding reveals that the trial court also rejected the extra-record evidence as irrelevant because the agency action involved was ministerial and the matter was moot. As stated above, however, extra-record evidence is admissible in the context of a traditional mandamus action challenging a ministerial decision under the California Supreme Court's holding in *Western States Petroleum Assn. v. Superior Court*, *supra*, 9 Cal.4th at page 576.

Furthermore, the court cannot decide whether plaintiff's petition is moot without first determining whether beavers continued to pose a threat to the endangered species in the Reserve and, thus, provide grounds for issuing future depredation permits. As Metropolitan notes in their brief, defendants argue that the petition is moot because plaintiff has provided "no basis upon which to assume beavers will return in significant numbers, since beavers are not native to the Reserve, and only one beaver was observed at the Reserve after the DFG removal activity." Defendants cannot have it both ways. The administrative record contains no evidence as to the likelihood of DF&G's issuance of future depredation permits to trap and kill beaver. Nothing in the administrative record reveals the number of beavers remaining in the Reserve or Lake Skinner. In light of RMC's resolution concerning the beaver population's effect on the riparian habitat in the

Reserve and Service's recommendation to permanently remove beavers from the area, the presence of more than one beaver may suggest that future depredation permits are likely to be issued. (See *Nebel v. Sulak* (1999) 73 Cal.App.4th 1363, 1367-1368; *Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation & Park Dist.* (1994) 28 Cal.App.4th 419, 425.)

Therefore, we conclude the trial court abused its discretion in excluding plaintiff's extra-record evidence. Accordingly, we remand to allow the court to reconsider the issue of mootness[4] after allowing plaintiff to present extra-record evidence that is not otherwise inadmissible under the general rules of evidence.

4. Ministerial Act

In addition to finding the petition moot, the trial court also concluded that the issuance of the challenged depredation permit was a ministerial act exempt from CEQA compliance.

Compliance with CEQA is not required for ministerial decisions. (Cal. Code Regs., tit. 14, § 757.)[5] A "ministerial" decision is described as "a governmental decision

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[4] Because plaintiff's amended complaint pertains to the issuance of future permits, the relevant jurisdictional issue may be one of ripeness, rather than mootness. Nevertheless, we cannot determine whether the facts have sufficiently congealed to permit intelligent and useful review without more than a one-sided evaluation of facts outside of the administrative record. (See *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 171.)

[5] All further section references will be to Title 14 of the California Code of Regulations unless otherwise stated.

involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out. Common examples of ministerial permits include automobile registrations, dog licenses, and marriage licenses. A building permit is ministerial if the ordinance requiring the permit limits the public official to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength requirements in the Uniform Building Code, and the applicant has paid his fee." (§ 15369.) By contrast, "'[d]iscretionary project' means a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity . . . ." (§ 15357.)

In DF&G's implementing regulations, issuance of a depredation permit is listed as a ministerial decision. (§ 757, subd. (b)(4).) Nevertheless, plaintiff claims the trial court erred in concluding that issuance of the depredation permit was a ministerial act. Specifically, plaintiff argues that agency action cannot be characterized as ministerial if the action significantly affects the environment. Based on our analysis below, we agree with plaintiff and conclude that an action that is listed as ministerial is not exempt from compliance with CEQA if that action, in fact, involves a discretionary decision or significantly affects the environment.

The California Supreme Court addressed a similar issue in *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105. Although the case involved a categorical exemption, rather than a ministerial act, the court's reasoning is equally applicable here.[6]

"CEQA is a comprehensive scheme designed to provide long-term protection to the environment. [(Pub. Resources Code, § 21001.)] In enacting CEQA, the Legislature declared its intention that all public agencies responsible for regulating activities affecting the environment give prime consideration to preventing environmental damage when carrying out their duties. [Citations.] CEQA is to be interpreted 'to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' [Citation.]

"Generally, CEQA applies to discretionary projects. [(Pub. Resources Code, § 21080, subd. (a).)] A *project* is an activity undertaken by a public agency which may cause a physical change in the environment. [(Pub. Resources Code, § 21065; § 15378.)] A *discretionary project* is one subject to 'judgmental controls,' i.e., where the agency can use its judgment in deciding whether and how to carry out the project. [(§ 15002, subd. (i); cf. *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 271-

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[6] "'Categorical exemption' means an exemption from CEQA for a class of projects based on a finding by the Secretary for Resources that the class of projects does not have a significant effect on the environment." (§ 15354; see *Mountain Lion Foundation v. Fish & Game Com., supra*, 16 Cal.4th at p. 124.)

273.)] [¶] If a public agency proposes to approve a discretionary project, the agency's activity may nonetheless be exempt from CEQA by legislative command. [Citations.]" (*Mountain Lion Foundation v. Fish & Game Com., supra*, 16 Cal.4th at p. 112.)

"The Legislature has directed the Secretary [of the Resources Agency] to promulgate a list of classes of projects that have no significant effect on the environment. [Citations.] A project falling within such a categorical exemption is not subject to CEQA. [Citations.]

". . . '[A] categorical exemption represents a determination by the Secretary [of the Resources Agency] that a particular project does not have a significant effect on the environment. [(Pub. Resources Code, § 21084.)] It follows that an activity that may have a significant effect on the environment cannot be categorically exempt. [Citation.]" (*Mountain Lion Foundation v. Fish & Game Com., supra*, 16 Cal.4th at p. 124.)

In *Mountain Lion Foundation*, the California Supreme Court held that despite the Fish and Game Commission's invocation of a categorical exemption, the delisting of an endangered or threatened species may significantly affect the environment and, therefore, cannot be exempt from the requirements of CEQA. (*Mountain Lion Foundation v. Fish & Game Com., supra,* 16 Cal.4th at p. 124.) The court unequivocally declared that, "[w]henever a project may have a significant and adverse physical effect on the environment, an EIR must be prepared and certified. [(Pub. Resources Code, § 21100; case citations omitted.)]" (*Id.* at p. 113.)

Similarly, in *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, the Supreme Court

held a categorical exemption did not apply to the Fish and Game Commission activity of setting hunting and fishing seasons. "We have held that no regulation is valid if its issuance exceeds the scope of the enabling statute. [Citations.] The [Secretary of the Resources Agency] is empowered to exempt only those activities which do not have a significant effect on the environment. (Pub. Resources Code, § 21084.) It follows that where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper." (*Id.* at pp. 205-206.)

The same is true of ministerial acts. "[T]he discretionary-ministerial designation of a project is not necessarily determinative of its environmental impact." (*Day v. City of Glendale* (1975) 51 Cal.App.3d 817, 824; see also *Prentiss v. City of South Pasadena* (1993) 15 Cal.App.4th 85, 91-92.)

Section 21100 of the Public Resources Code provides, in part: "All lead agencies shall prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project which they propose to carry out or approve that may have a significant effect on the environment." As with decisions that are designated as categorically exempt, a project or activity that is designated as ministerial cannot circumvent this unambiguous statutory requirement.

In *Friends of Westwood, Inc. v. City of Los Angeles, supra,* 191 Cal.App.3d 259, a citizens' group sought to compel the city to comply with CEQA before issuing a building permit for the construction of an office tower. The appellate court decided whether the issuance of a building permit for a major construction permit constituted a ministerial

project within the meaning of CEQA. (*Id.* at pp. 262, 281.) Crucial to the court's determination was the distinction between ministerial and discretionary action and the reason behind the deletion of "building permits" from the list of ministerial actions in section 21080 of the Public Resources Code. (*Id.* at pp. 267-269.) The court emphasized that, when a public officer performs a ministerial act, he or she exercises absolutely no discretion and has no choice but to dispense his or her duty precisely as prescribed by some existing law. (*Id.* at p. 267.) The court also noted that, although the issuance of building permits initially was included in this list of ministerial actions in the bill for section 21080 of the Public Resources Code, it subsequently was deleted from the proposed legislation because it did not involve a purely ministerial act.[7] (*Id.* at pp. 267-268.) Issuing a building permit may involve discretion in requiring substantial changes in the design of the building. (*Id.* at pp. 268-269.)

In so concluding, the court reasoned: "To properly draw the line between 'discretionary' and 'ministerial' decisions in this context, we must ask why it makes sense to exempt the ministerial ones from the EIR requirement. The answer is that for truly ministerial permits an EIR is irrelevant. No matter what the EIR might reveal about the terrible environmental consequences of going ahead with a given project the government agency would lack the power (that is, the discretion) to stop or modify it in

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[7] Issuance of a building permit was, however, listed as a presumed ministerial action under section 15268, subdivision (b) of the CEQA Guidelines and designated as a ministerial action under the city's guidelines. (*Friends of Westwood, Inc. v. City of Los Angeles, supra*, 191 Cal.App.3d at pp. 269-270.)

any relevant way. The agency could not lawfully deny the permit nor condition it in any way which would mitigate the environmental damage in any significant way. The applicant would be able to legally compel issuance of the permit without change. Thus, to require the preparation of an EIR would constitute a useless—and indeed wasteful—gesture.

"Conversely, where the agency possesses enough authority (that is, discretion) to deny *or modify* the proposed project on the basis of environmental consequences the EIR might conceivably uncover, the permit process is 'discretionary' within the meaning of CEQA. Indeed one court held it sufficient when the only 'discretion' an agency possessed was to *delay* a project even though it could not reject or modify the project. [Citation.]" (*Friends of Westwood, Inc. v. City of Los Angeles, supra*, 191 Cal.App.3d at pp. 272-273.)

The case, *Day v. City of Glendale, supra,* 51 Cal.App.3d 817, which is cited in the note following the definition of "ministerial" in section 15269, is also instructive. In that case, residents of the City of Glendale sought to compel the city to amend its environmental guidelines and require an environmental impact report (EIR) as a condition for issuing a grading permit. Because the city guidelines listed issuance of a grading permit as a ministerial act, the trial court found that CEQA did not apply. The appellate court reversed the trial court's decision and concluded that the issuance of a grading permit constituted a discretional project within the meaning of CEQA. In their discussion of projects or activities that involve ministerial and discretionary components, the court

reasoned that, ". . . '[s]tatutory policy, not semantics, forms the standard for segregating discretionary from ministerial functions . . . .'" (*Id.* at pp. 823-824, quoting *People v. Department of Housing and Community Dev.* (1975) 45 Cal.App.3d 185, 194.) The court concluded that CEQA applies to hybrid projects of mixed ministerial-discretionary character. (*Ibid.*) Moreover, doubt as to the ministerial or discretionary character of the project should be resolved in favor of the latter characterization. (*Ibid.*)

Here, the plaintiffs seek to require CEQA compliance before the issuance of a depredation permit. "The law administered by a public agency supplies the litmus for differentiating between its discretionary and ministerial functions." (*People v. Department of Housing & Community Dev., supra,* 45 Cal.App.3d at p. 192.) Fish and Game Code section 4181 (hereafter "section 4181") provides the statutory authority. That provision states: "[a]ny owner or tenant of land or property that is being damaged or destroyed or is in danger of being damaged or destroyed by elk, bear, beaver, wild pig, or gray squirrels, may apply to [DF&G] for a permit to kill the mammals. [DF&G], upon satisfactory evidence of the damage or destruction, actual or immediately threatened, shall issue a revocable permit for the taking and disposition of the mammals under regulations adopted by the [Fish and Game Commission]."

DF&G's authority under section 4181 is not entirely ministerial in nature. At first glance, the mandatory language "shall issue" appears to preclude the exercise of any discretion. Further evaluation, however, reveals otherwise. In fact, under section 4181, DF&G has the discretion to deny the permit altogether. Section 4181 requires DF&G to

issue a revocable permit "upon satisfactory evidence of the damage or destruction, actual or immediately threatened." If the person seeking the permit provides unsatisfactory evidence of damage or destruction, DF&G, of course, can deny the permit. Even the term "satisfactory" is qualitative or subjective in and of itself. (See *Friends of Westwood, Inc. v. City of Los Angeles, supra*, 191 Cal.App.3d at p. 270; *People v. Department of Housing & Community Dev., supra*, 45 Cal.App.3d at p. 193.)

Pursuant to section 4181, the Fish and Game Commission (Commission) adopted California Administrative Code, title 14, section 401. According to the rules established by the Commission, issuance of depredation permits involves other discretionary decisions. For example, [DF&G] may issue permits "for a period not to exceed 60 days." (§ 401, subd. (m).) Also, "[p]ermits may be renewed only after a finding by [DF&G] that further damage has occurred or will occur unless such permits are renewed." (*Ibid.*) DF&G, therefore, has discretion to determine the length of time for the permit. Permit renewal also requires a finding by DF&G that further damage has occurred or will occur. Subdivision (n) of the same section provides another example: "Any person who has had their [*sic*] permit revoked or suspended by the commission shall be required, upon application for a new or subsequent permit, to appear before the commission and demonstrate to its satisfaction that the use of such a permit will be consistent with depredation control, with these regulations, and with the laws under which they are promulgated." Under this provision, the commission exercises discretion in issuing a permit to a permittee who has had his or her permit revoked or suspended in the past.

In this particular instance, the evidence of damage included Resolution 80 and 36 photographs and diagrams. DF&G, a member agency of the RMC, recommended that RMC take action to permanently remove beaver from Reserve and Lake Skinner areas. DF&G then issued the depredation permit. In issuing the permit, DF&G decided whether there was satisfactory evidence of damage or destruction, the number of beavers, the manner of the taking or killing, how the beavers should be discarded, where the depredation permit was to be executed, and when the permit would expire. Although many of these decisions may be made in routine fashion, other decisions may have a significant affect on the property involved.

The property described in the depredation permit at issue was environmentally significant in that it provided essential riparian habitat for endangered species. As stated in the "Impact Analysis" section of Resolution 80, protection of the least Bell's vireo and the southwestern willow flycatcher were the focus of the eradication effort. Plaintiff asks, however, "what about the beaver?" Plaintiff argues that the eradication of an entire species from a particular area results in a significant impact on the environment. Plaintiff, albeit over-dramatically, argues that the eradication of the beaver population at Lake Skinner and elsewhere may lead to its eventual extinction in the state. Plaintiff also argues that the beaver, as a "natural hydrology engineer" enhances riparian or wetland areas and promotes bio-diversity.

Regardless of the nature and extent of the negative environmental consequences, if any, involved, this is not a case where CEQA compliance would have been a useless

gesture. (*Friends of Westwood, Inc. v. City of Los Angeles, supra*, 191 Cal.App.3d at p. 272.) The damage or destruction involved in this case was to environmentally sensitive property. If such property was benefited in some way by the presence of the beaver population, or the evidence of damage or destruction was otherwise unsatisfactory, DF&G could have denied the permit. If such property was only being harmed by part of the population (for example, beavers located in a certain area), then the permit could have specified the area and the number of beavers. In any event, DF&G's discretion to deny or modify in some relevant way the depredation permit renders its action discretionary. (*Id.* at pp. 272-273.) Thus, we conclude that issuing a depredation permit to eradicate an entire species from a given area is a discretionary action that may require CEQA compliance in the form of a negative declaration or an environmental impact report.

5. Disposition

We reverse and remand.[8] Plaintiff shall recover its costs on appeal.

NOT TO BE PUBLISHED

s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/McKinster
J.

[8] To avoid issuing an advisory opinion on the question of whether the agency action involved was, in fact, purely ministerial (see *Neary v. Regents of University of California* (1992) 3 Cal.4th 273, 284), we decline to address, despite our serious doubts concerning, the second ground for the court's denial of plaintiff's petition.

I, Stephen M. Kelly, Clerk/Administrator of the Court of Appeal, Fourth Appellate District, State of California, do hereby Certify that the preceding and annexed is a true and correct copy of Opinn as shown by the records of this office.

WITNESS my hand and the seal of the Court this 16th day of October A.D. 20 00.

STEPHEN M. KELLY, CLERK/ADMINISTRATOR

By _____ Deputy Clerk