

Client Alert

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Solar Project Prevails Over Williamson Act, CEQA Claims in *Save Panoche Valley*

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A recent California appellate decision broke new ground for solar energy developers by upholding a County's decision to cancel numerous Williamson Act contracts and approve a large solar project despite potentially significant impacts under the California Environmental Quality Act (CEQA). In *Save Panoche Valley v. County of San Benito*, the Sixth District Court of Appeal found that the County's decision to approve a 399 MW photovoltaic solar project was supported by substantial evidence under both the Williamson Act and CEQA. The first-of-its kind published decision may have important implications for similar projects by affirming that California's interest in promoting renewable energy may outweigh interests in protecting other resources.

THE WILLIAMSON ACT CHALLENGE

The state's Williamson Act (Government Code section 51200 et seq.) allows agricultural landowners to enter into contracts with local government agencies that require the land to be used for agricultural or related purposes for at least ten years, in exchange for reduced property tax assessments. Once entered, a contract can only be terminated in specific circumstances. One option is to seek cancellation by the local agency, which may only occur if the cancellation is found to be consistent with the Williamson Act, or in the public interest, on the basis of specific findings.

As renewable energy developers are increasingly aware, the Williamson Act often acts as a high hurdle to utilize agricultural lands for energy projects, even where the land currently has limited agricultural value. *Save Panoche Valley* represents just the latest effort for the courts and public agencies to balance protection of agricultural resources against the state's demand for aggressive development of renewable energy sources. For example, in 2011, the Legislature enacted SB 618 (Wolk) in an attempt to expand the potential for siting solar facilities on unproductive land subject to Williamson Act contracts. The legislation allows a contract to be rescinded in favor of a "solar-use easement," subject to certain conditions. However, the requirement that eligible lands must have "significantly reduced agricultural productivity" and other criteria mean that the "solar-use easement" option is available only on a narrow set of contracted lands.

SAVE PANOCHE VALLEY LITIGATION

In 2009, Solargen Energy proposed an ambitious photovoltaic solar project on approximately 4,900 acres in rural San Benito County, on land primarily used for cattle grazing. Initially, Solargen requested that the County find the project compatible with the Williamson Act, which the County's Agricultural Preserve Advisory Committee (APAC) denied. (The California Department of Conservation, which administers the Williamson Act on a statewide level, has consistently taken a position that utility-scale solar projects are not eligible for compatibility findings). Next, Solargen requested cancellation of contracts on approximately 7,000 acres, 4,500 of which were within the project

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site. The County's APAC recommended denial of the cancellation. However, in October 2010, the County approved the contract cancellations and a conditional use permit for the project, after certifying the Environmental Impact Report (EIR) for the project and adopting a statement of overriding considerations under CEQA.

Three organizations (Save Panoche Valley, the Santa Clara Valley Audubon Society, and the Sierra Club) sued to stop the project, alleging violations of the Williamson Act and CEQA.

Williamson Act Claims Rejected: With respect to the Williamson Act cancellation, the project opponents argued that the County erred in its findings—required for cancellation—that (1) other public concerns substantially outweigh the objectives of the Williamson Act, and (2) there is no proximate, non-contracted land that would be available and suitable for a large-scale solar facility. The Court of Appeal rejected both arguments.

- **Other Public Concerns:** First, the Court found that there was “substantial evidence in the record to support the County’s determination that the public’s interest in renewable energy outweighed the purpose of the Williamson Act.” Specifically, the record contained substantial evidence that the project would help further the state’s efforts to increase renewable energy supply and reduce greenhouse gas emissions. The Court also looked at the small percentage of contracted land the site represented in both the county and state and the fact that Solargen committed to removing the panels after termination of the project. Ultimately, the Court declined to weigh the “pros and cons of cancelling the Williamson Act contracts”—it held that its inquiry ended when it found substantial evidence to support the County’s conclusion, which it did. While there has been uncertainty regarding whether statewide policies to increase renewable energy provide adequate evidence to support the “other public concerns” prong of the cancellation finding, this aspect of the decision appears to confirm that they do.
- **Proximate Non-Contracted Land:** The Court also found substantial evidence in the record to support the County’s determination that no proximate, non-contracted land existed that was both available and suitable for the project. The project’s opponents pointed to an alternative location that they claimed would be suitable—but, notably, the site was over 60 miles away, which the Court concluded did not qualify as “proximate.” Additionally, the site was located across two counties, encumbered by several Williamson Act contracts itself, and Solargen had been unable to come to an agreement with the landowner about use of the site.

CEQA Claims Rejected: The project’s opponents raised a number of CEQA claims, particularly relating to agricultural and biological impacts. The Court rejected these claims across the board, and reached several significant findings in the process.

- **Agricultural Impacts:** The suit challenged the EIR’s treatment of agricultural impacts, despite the fact that the project would preserve certain agricultural lands in and around the project site, remove the solar facilities and restore the site at the end of the project’s life, and provide approximately 4,500 acres of rangeland or 285 acres of high quality cropland as compensatory mitigation through conservation easements. The Court rejected the petitioners’ assertion that this was inadequate simply because it would not create *additional* agricultural lands, finding that “[t]he goal of mitigation measures is not to net out the impact of a proposed project, but to reduce the impact to insignificant levels.”

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- **Biological Impacts:** During the public comment period on the EIR, the California Department of Fish and Wildlife (CDFW) submitted a comment letter asserting that the project had the potential to result in unlawful “take” of certain sensitive species, including the blunt-nosed leopard lizard, and recommended certain surveying and avoidance measures for the project. The FEIR incorporated several mitigation measures that apparently responded to CDFW’s concerns. While the lawsuit alleged the EIR’s impact analysis and mitigation measures were inadequate, the Court rejected each of these assertions and made a number of notable findings:
 - Although CDFW had raised concerns about “take” and the need for species surveys in its comment letter, the County was “not required to conduct all possible tests or exhaust all research methodologies to evaluate impacts,” as the County’s analysis was supported by substantial evidence.
 - The County’s decision to include a mitigation measure requiring pre-construction surveys for protected species did not constitute improper deferral of mitigation because the measure included specific measures to be implemented based on the results of the survey, which were not “loose or open-ended.”
 - To support their position regarding the inadequacy of mitigation measures, the opponents could not simply rely upon positions taken by CDFW that were contrary to the County’s conclusions—rather, they needed to specify what evidence the *County* relied upon in reaching its conclusions and to show that this evidence could not support the County’s findings.
 - The County’s decision to identify specific lands for off-site biological mitigation, and its decision to adopt specific mitigation ratios for habitat impacts, were supported by substantial evidence. The Court reiterated a recent appellate court’s statement, in *Banning Ranch Conservancy v. City of Newport Beach*, that “mitigation need not account for every square foot of impacted habitat to be adequate. What matters is that the unmitigated impact is no longer significant.” While the opponents may have differing views about the adequacy of mitigation, they were not able to overcome the deferential “substantial evidence” standard of review.

FORECAST SUNNY FOR SOLAR?

As the state continues to work toward achieving its ambitious greenhouse gas reduction and renewable energy goals, conflicts between these goals and resource protection policies will continue to surface, and local governments will need to balance these potentially competing interests based on each project’s unique facts. But *Save Panoche Valley* sends a strong signal that the existence of Williamson Act contracts or other important resources on a site are not necessarily a prohibitive barrier to renewable energy development, so long as the agency’s determinations are carefully reasoned on the basis of substantial evidence.

The case is *Save Panoche Valley v. County of San Benito*, __ Cal. App. 4th ____, Court of Appeal Case No. H037599 (filed June 25, 2013).

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