SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

DATE/TIME	**January 12, 2021**	**DEPT. NO**	**21**
JUDGE	**HON. SHELLEYANNE W. L. CHANG**	**CLERK**	**E. HIGGINBOTHAM**
COUNTY OF ALAMEDA, a political subdivision of the State of California, **Petitioner,** **v.** **CALIFORNIA DEPARTMENT OF PARKS AND RECREATION; DEPARTMENT OF PARKS AND RECREATION OFF-HIGHWAY MOTOR VEHICLE RECREATION DIVISION; and DEPARTMENT OF PARKS AND RECREATION OFF-HIGHWAY MOTOR VEHICLE RECREATION COMMISSION and, DOES 1 through 20,** **Respondents.**		**Case No.: 34-2016-80002496**	
Nature of Proceedings:	**RULING ON SUBMITTED MATTER RE: PETITION FOR WRIT OF MANDATE**		

This matter came on for hearing on October 27, 2020. Having considered the filings and arguments of the parties, the Court now rules as set forth herein.

I. Factual And Procedural Background

The State has operated Carnegie SVRA as an off-highway motor vehicle recreation park pursuant to a General Plan adopted in 1981. Off-highway motor vehicle recreation in the State Park System is limited to the SVRAs, of which there are nine statewide. SVRAs consist of "areas selected, developed, and operated to provide off-highway vehicle recreation opportunities… Areas shall be developed, managed, and operated for the purpose of providing the fullest appropriate public use of the vehicular recreational opportunities present…while providing for the conservation of cultural resources and the conservation and improvement of natural resource values over time." (Pub. Res. Code § 5090.43(a).) Prior to development of any new facilities as part of an SVRA, the Department "shall prepare a general plan or revise any existing plan" for the SVRA. (Pub. Res. Code § 5002.2(a).) The general plan shall be approved by the Commission. (*Id.* at (a)(3).)

Carnegie SVRA is located in Alameda and San Joaquin counties. The SVRA originally included 1,575 acres, and then expanded to include a 3,100-acre Expansion Area. Parks acquired the Expansion Area between 1996 and 1998 and added it to Carnegie SVRA.

In May 2012 the Division issued a notice of preparation and began the process to define the General Plan project and identify topics for EIR study. The General Plan was to cover both the Original and the Expansion Area. On April 23, 2015, the Division released a Preliminary General Plan and Draft EIR for public review. The Division released the Final EIR and Draft General Plan on September 16, 2016.

On October 21, 2016, the Commission adopted Resolution 03-2016, certifying the Final EIR for the Carnegie SVRA and adopting a Statement of Overriding Considerations. The Commission also adopted Resolution 04-2016, approving the General Plan for Carnegie SVRA. On October 26, 2016, the State of California, Off-Highway Motor Vehicle Recreation Division filed a Notice of Determination with the State Clearinghouse.

Petitioner has raised several challenges to Respondents' certification of the EIR and approval of the General Plan for the Carnegie SVRA.

II. Standard

In reviewing whether Respondents complied with CEQA, the court's inquiry is whether there was a prejudicial abuse of discretion. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426.) Abuse of discretion can be established in two ways: (1) by demonstrating Respondent did not proceed in the manner required by law, or (2) by demonstrating Respondent's decision is not supported by substantial evidence. (*Id.*) The standard of review depends on which type of error is alleged. The court determines de novo whether Respondent has proceeded in the manner required by law, and "scrupulously enforce[s] all legislatively mandated CEQA requirements." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) The court accords much greater deference to Respondent's factual determinations and conclusions, upholding them if they are supported by substantial evidence. (*Vineyard Area Citizens*, supra, 40 Cal.4th at 435; *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 275.)

Substantial evidence "means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. (14 CCR §15384.) It includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (*Id.*) The substantial evidence standard is "highly deferential." (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 984.)

Under the substantial evidence test, the court "must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision." (*Id.*) It must also "resolve reasonable doubts in favor of the administrative finding and decision." (*Laurel Heights Improvement Assn. of San Francisco v. Regents* (1988) 47 Cal.3d 376, 393.) The court "may not set aside an agency's approval of an

EIR on the ground that an opposite conclusion would have been equally or more reasonable." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) "A court's task is not to weigh conflicting evidence and determine who has the better argument. These questions are left to the discretion of the agency and its environmental consultants; it is they who decide how best to prepare an EIR to achieve CEQA's informational purpose." (*San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 12.)

The interpretation of statutes is an issue of law on which the court exercises its independent judgment. (See, *Sacks v. City of Oakland* (2010) 190 Cal.App.4th 1070, 1082.) In exercising its independent judgment, the Court is guided by certain established principles of statutory construction, which may be summarized as follows. The primary task of the court in interpreting a statute is to ascertain and effectuate the intent of the Legislature. (See, *Hsu v. Abbara* (1995) 9 Cal.4th 863, 871.) This extends to a challenge that a regulation exceeds the agency's authority, although the Court gives great weight to the agency's interpretation. (*Nick v. City of Lake Forest* (2014) 232 Cal.App.4th 871.)

The starting point for the task of interpretation is the words of the statute itself, because they generally provide the most reliable indicator of legislative intent. (See, *Murphy v. Kenneth Cole Productions* (2007) 40 Cal.4th 1094, 1103.) The language used in a statute is to be interpreted in accordance with its usual, ordinary meaning, and if there is no ambiguity in the statute, the plain meaning prevails. (See, *People v. Snook* (1997) 16 Cal.4th 1210, 1215.) The court should give meaning to every word of a statute if possible, avoiding constructions that render any words surplus or a nullity. (See, *Reno v. Baird* (1998) 18 Cal.4th 640, 658.) Statutes should be interpreted so as to give each word some operative effect. (See, *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 390.)

Beyond that, the court must consider particular statutory language in the context of the entire statutory scheme in which it appears, construing words in context, keeping in mind the nature and obvious purpose of the statute where the language appears, and harmonizing the various parts of the statutory enactment by considering particular clauses or sections in the context of the whole. (See, *People v. Whaley* (2008) 160 Cal.App.4th 779, 793.)

III. Discussion

A. Requests for judicial notice.

In support of its opening brief, Petitioner has filed a request for judicial notice concerning two statutory sections. Respondents have not filed an opposition. The request is **GRANTED**.

In support of their opposition Respondents have filed a request for judicial notice concerning seven statutory sections. Petitioner has not filed an opposition. The request is **GRANTED**.

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B. The EIR improperly constrained the project objectives.

Pursuant to the CEQA Guidelines, the description of the project shall include,

[a] statement of the objectives sought by the proposed project. A clearly written statement of objectives will help the lead agency develop a reasonable range of alternatives to evaluate in the EIR and will aid the decision makers in preparing findings or a statement of overriding considerations, if necessary. The statement of objectives should include the underlying purpose of the project and may discuss the project benefits. (14 CCR § 15124.)

The General Plan project objectives include,

Manage Carnegie SVRA for the protective of sensitive natural and cultural resources and high-quality OHV recreational experiences.

Manage the entire SVRA in accordance with the purpose of acquisition.

Promote public health and safety at Carnegie SVRA.

Anticipate Future demand for OHV recreation opportunities and identify strategies to accommodate them at Carnegie SVRA.

Provide management options for operating all portions of Carnegie SVRA in keeping with California's OHMVR Act of 2003, as amended.

Increase the diversity of OHV opportunities at Carnegie SVRA.

Provide interpretive opportunities for biological and cultural resources.

Provide for adaptive management of park operations and resources.

Plan orderly implementation of long-term capital improvements at Carnegie SVRA.

Guide the enhancement of recreation opportunities that support family and community-oriented use.

Provide a framework for the provision of adequate facilities for Carnegie SVRA management operations.

Comply with resource protection requirements, including air quality plans, stormwater management plans, and regulations protecting biological and cultural resources. (AR 8264.)

Petitioner asserts that throughout the EIR process, Respondents interpreted these objectives as reflecting a legal prohibition on using the Expansion Area *solely* for non-motorized recreation. In response to a comment that the DEIR should include analysis of a nonmotorized recreational alternative, the FEIR provides,

> State Parks has statutory jurisdiction over the planning area property and classifies it as SVRA lands. Planning efforts associated with the property must be consistent with the OHMVR Act (Public Resources Code Section 5090.01 et seq.), the OHMVR Division's mission statement, and statutory guidance for SVRA lands. The Public Resources Code (Sections 5090.02[c][1] through 5090.02[c][3]) requires the OHMVR Division to expand existing OHV recreation areas and sustain them for long-term use. The expansion area was acquired with California's OHV Trust Fund monies to expand Carnegie SVRA and provide additional OHV recreation opportunities. Therefore, the alternatives to the proposed project considered developing the planning area to provide recreational use of Carnegie SVRA while staying consistent with the OHMVR Act and the OHMVR Division's mission statement. See Master Response 7, "Draft Environmental Impact Report Alternatives Analysis." (AR 88.)

Another comment response provides, "State Parks deems a non-OHV alternative as an inappropriate alternative that would not attain most of the basic objectives of the project as presented in the DEIR." (AR 329.)

Further, in the "Project Background" section, the DEIR provides,

> SVRAs are OHV parks that are operated by the Off-Highway Motor Vehicle Recreation (OHMVR) Division of State Parks. OHVs are land vehicles that are used mostly for recreation purposes, such as all-terrain vehicles (ATVs), off-highway motorcycles, and 4-wheel-drive (4WD) trucks. The OHMVR Division is mandated to ensure that SVRAs are managed for long-term environmental sustainability and to comply with applicable environmental laws, guidelines, and regulations.
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> ...
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> The planning team took into account several considerations when it originally created a range of uses and potential alternatives for evaluation, before the team selected the preferred concept described in the General Plan. These considerations provided guidelines for the concept alternatives. If a concept alternative or use did not meet these guidelines, it was not considered as part of the General Plan process. The planning team's assumptions are listed below.
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> 1. *Property ownership*: The property is owned by State Parks and operated by the OHMVR Division. Planning efforts associated with the property must be consistent with the OHMVR Division's mission statement.

2. *State Parks land classification*: The planning area is classified as SVRA lands by State Parks. Planning efforts must be consistent with statutory guidance for SVRA lands. (AR 8260.)

Petitioner argues Public Resources Code section 5090.02(c)(3) authorizes Respondents to consider the Expansion area for non-motorized recreation in order to protect and conserve wildlife and landscape features. Section 5090.02 provides Legislative findings and intent, with subdivision (c)(3) providing that it is the Legislature's intent,

> [t]he department should support both motorized recreation and motorized off-highway access to nonmotorized recreation.

Petitioner argues this statutory language does not prohibit Respondents from designating the Expansion area for nonmotorized recreation and in fact encourages Respondents to consider the Expansion area as a location for solely nonmotorized recreation. Petitioner further cites to subdivision (a)(3), which provides that the Legislature has found, "[t]he indiscriminate and uncontrolled use of [off-highway motor vehicles] may have a deleterious impact on the environment, wildlife habitats, native wildlife, and native flora." Subdivision (b) provides, "[t]he Legislature hereby declares that effectively managed areas and adequate facilities for the use of off-highway vehicles and conservation and enforcement are essential for ecologically balanced recreation."

Respondents cite to Public Resources Code section 5090.43, subdivision (a) which, in 2016, provided that SVRAs,

> shall be established on lands where there are quality recreational opportunities for off-highway motor vehicles and in accordance with the requirements of Section 5090.35. Areas shall be developed, managed, and operated for the purpose of making the fullest public use of the outdoor recreational opportunities present. The natural and cultural elements of the environment may be managed or modified to enhance the recreational experience consistent with the requirements of section 5090.35.

Section 3090.35 subdivision (a) provided, in 2016,

> [t]he protection of public safety, the appropriate utilization of lands, and the conservation of land resources are of the highest priority in the management of the state vehicular recreation areas; and, accordingly, the division shall promptly repair and continuously maintain areas and trails, anticipate and prevent accelerated and unnatural erosion, and restore lands damaged by erosion to the extent possible.

Respondents argue that the Expansion Area was purchased with monies from the Off-Highway Vehicle Trust Fund, which is funded by service fees for the issuance of identification for off-highway motor vehicles. (Veh. Code § 38225.) All monies in this fund are to be allocated according to Public Resources Code section 5090.61. In 2016, Section 5090.61 provided that the

funds "shall be available for the support of the division in implementing the off-highway motor vehicle recreation program and for the planning, acquisition, development, construction, maintenance, administration, operation, restoration, and conservation of lands in the system." Respondents assert that section 5090.61 therefore mandates that monies from the fund *cannot* be used to purchase land that would be used solely for off-highway vehicle access to nonmotorized recreation.

At the hearing on this matter, Respondents argued there is a public need for additional OHV opportunities in the Carnegie SVRA. Respondents acknowledged that they must consider the Carnegie SVRA as a whole (including both the existing Carnegie Area as well as the Expansion Area) when determining whether the SVRA accomplishes the general legislative intent to provide motorized recreation as well as motorized off-highway access to nonmotorized recreation. However, Respondents reiterated their position that the Off-Highway Vehicle Trust Funds *cannot* be used to expand the Carnegie SVRA and then only provide off-highway motorized vehicle access to nonmotorized recreation opportunities. Respondents argue such use of funds does not further the payees' interests in acquiring more opportunities for OHV use. Respondents then argued that even if they were permitted to consider only OHV access to nonmotorized recreation in evaluating project alternatives, their failure to do so is not a CEQA violation as they argue the EIR contained a reasonable range of alternatives.

In response to Respondents' argument that the EIR contained a reasonable range of alternatives, Petitioner argues that Respondents' decisions were based on an erroneous interpretation of the law, and that their interpretation of statutory directives is subject to this Court's *de novo* review. Further, Petitioner argues that the application of such an erroneous legal standard is a failure to proceed in the manner required by law, and consequently is per se a violation of CEQA. Petitioner further argues that Respondents rejected one of the project alternatives on the basis.

The DEIR provides that project alternatives were considered,

> [h]owever, implementation of the proposed project...would cause no significant impacts, with the exception of air quality impacts related to operations, which are significant and unavoidable. Therefore no alternatives exist that could reduce or eliminate significant environmental impacts. However, alternatives were identified that have the potential to minimize at least one less-than significant impact in at least one resource area...The following two project alternatives are considered in the alternative analysis:
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> - No-project Alternative
> - Reduced Developed Use Area Alternative
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> ...
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> Under the Reduced Developed Use Area Alternative, developed and OHV uses in the planning area would be restricted to a smaller area...All goals and guidelines would be implemented as described in the General Plan. *This*

alternative is considered the environmentally superior alternative given the increased Limited Recreation areas; however, this alternative does not meet the project objectives. (AR 8248)(emphasis added.)

The Court, exercising its independent judgment with regard to Respondents' statutory interpretation finds Respondents have failed to proceed in the manner required by law. Public Resources Code section 5090.02 subdivision (c)(3) **directs Respondents to support *both* motorized recreation and motorized off-highway access to nonmotorized recreation.** The statute does not mandate Respondents to prioritize OHV use, but rather directs Respondents to strike a balance to support both activities. Respondents have not cited to *any* authority that *prohibits* them from adding acreage to an existing SVRA without including OHV recreation opportunities on the newly acquired acreage or, considering the Carnegie SVRA as a whole, utilizing the additional acreage with a reduced use alternative. Clearly, in the present circumstances OHV recreation opportunities are already available in the Carnegie SVRA, therefore if the Expansion Area includes solely off-highway motorized access to nonmotorized recreation (or, more likely, minimal OHV recreation as was presented in the reduced use alternative) the Carnegie SVRA as a whole complies with the legislative intent concerning SVRAs.

Respondents further argue that using property acquired with OHV Trust Fund monies for an alternative that bans OHVs would "violate the law" as inconsistent with this funding source and statutory purpose. The Court rejects this contention as it is based on a misunderstanding of the funding statute. Public Resources Code section 5090.61 authorizes use of the Trust Fund monies to support the Division in implementing the off-highway vehicle recreation program which specifically defines including nonmotorized recreation. Subdivision (b)(1) further states that the monies be used for the "planning, acquisition, development, maintenance, administration, operation, *restoration, and conservation of lands* in the system." Consideration of using the Expansion Area for non-motorized recreation or minimal OHV recreation is consistent with the statutory authority for uses of these funds, such as "acquisition, development...restoration and conservation of lands." Respondents further argue that these funds must be used to support OHV recreation; they are not available to support passive recreation that completely excludes OHVs. (Resp. Opp. p. 19:8-9.) However, Respondents conceded at oral argument that the park must be considered as a whole, including the existing Carnegie Park and the Expansion Area. The Court finds Respondents' use of monies from the Off-Highway Vehicle Trust Fund does not constrain Respondents' ability to consider other alternatives, when viewing the SVRA as a whole.

At oral argument, Respondents asserted that they had in fact engaged in the balancing test required by the statutes and that substantial evidence supported Respondents' decision to have OHV activity on the Expansion Area and in rejecting both the Reduced Use Alternative and the No Project Alternative. However, the record and Respondents' arguments concerning their statutory interpretations belie this argument. The administrative record demonstrates Respondents consistently asserted that they did not have the authority to implement a project alternative that did not prioritize OHV use. Accordingly, the Court finds there is no evidence that Respondents *meaningfully* considered the alternatives under the appropriate statutory directives. The Court finds that Respondents did not proceed in the manner required by law.

The Court also finds, contrary to Respondents' argument, that this error renders inadequate Respondents' CEQA compliance. The administrative record demonstrates that the entirety of Respondents' project objectives, consideration of alternatives, response to comments[1], etc. relied on this erroneous interpretation of the law in crafting the EIR and its analysis. This pervasive error makes it virtually impossible for the Court to parse out specific sections of the EIR that have been impacted and are therefore legally incorrect. Accordingly, on this error alone, the Court finds the EIR is invalid and cannot be used to support the subject project.

While the Court finds the error concerning the project objectives invalidates the entire EIR and the Court need not analyze Petitioner's additional challenges to the EIR and General Plan, the Court will provide analysis concerning several additional arguments in the interests of judicial economy.

C. Piecemealing of the environmental review process.

A program EIR is "an EIR which may be prepared on a series of actions that can be characterized as one large project are related either:

> (1) Geographically,
> (2) As logical parts in the chain of contemplated actions,
> (3) In connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program, or
> (4) As individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways. (14 CCR § 15168.)

When using a program EIR with later activities, they must be "examined in the light of the program EIR to determine whether an additional environmental document must be prepared.

> (1) If a later activity would have effects that were not examined in the program EIR, a new initial study would need to be prepared leading to either an EIR or a negative declaration. That later analysis may tier from the program EIR as provided in Section 15152.
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> (2) If the agency finds that pursuant to Section 15162, no subsequent EIR would be required, the agency can approve the activity as being within the scope of the project covered by the program EIR, and no new environmental document would be required. Whether a later activity is within the scope of a program EIR is a factual question that the lead agency determines based on substantial evidence in the record. Factors that an agency may consider in making that

[1] For example, in *Covington v. Great Basin Unified Air Pollution Ctrl. Dist.*, the Third District Court of Appeal found an agency must give "a good faith, reasoned response" to comments, including indicating why "such measures are not feasible." ((2019) 43 Cal.App.5th 867, 883.) Because Respondents here took an incorrect legal position as to the scope of their authority, their response to comments concerning reduced OHV project alternatives was not "good faith" or "reasoned."

determination include, but are not limited to, consistency of the later activity with the type of allowable land use, overall planned density and building intensity, geographic area analyzed for environmental impacts, and covered infrastructure, as described in the program EIR.

(3) An agency shall incorporate feasible mitigation measures and alternatives developed in the program EIR into later activities in the program.

(4) Where the later activities involve site specific operations, the agency should use a written checklist or similar device to document the evaluation of the site and the activity to determine whether the environmental effects of the operation were within the scope of the program EIR.

(5) A program EIR will be most helpful in dealing with later activities if it provides a description of planned activities that would implement the program and deals with the effects of the program as specifically and comprehensively as possible. With a good and detailed project description and analysis of the program, many later activities could be found to be within the scope of the project described in the program EIR, and no further environmental documents would be required. (14 CCR § 15168 (c).)

The CEQA Guidelines also discuss the tiering process that occurs subsequent to finalization of a program EIR.

Where a lead agency is using the tiering process in connection with an EIR for a large-scale planning approval, such as a general plan or component thereof (e.g., an area plan or community plan), the development of detailed, site-specific information may not be feasible but can be deferred, in many instances, until such time as the lead agency prepares a future environmental document in connection with a project of a more limited geographical scale, as long as deferral does not prevent adequate identification of significant effects of the planning approval at hand. (14 CCR § 15152 (c).)

Petitioner argues Respondents identified the EIR as a program EIR in order to enable improper piecemealing of the environmental review process. Respondents acknowledge that the General Plan includes "facility descriptions" but argues these are not specific projects being approved as part of the General Plan's EIR. (AR 8249.) Respondents further argue the "visitor experience areas" identified are *allowable* uses within different parts of the SVRA, but are not commitments to a definite course of action as to any of these potential allowable future uses.

Prior to the hearing on this matter, the Court asked the parties to specifically address *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, as part of their oral arguments. In *Rio Vista Farm Bureau Center*, the project at issue was adoption of a hazardous waste management plan, which was incorporated into the County's general plan. (*Id.* at 371.) The appellant argued the FEIR failed to comply with CEQA because it did not provide a "description of potential future facilities or the 'degree to which project-level decisions' have

been made by the County." (*Id.*) The First District Court of Appeal held the EIR was sufficient as the general plan made "no commitment to future facilities other than furnishing siting criteria and designating generally acceptable locations. While the Plan suggests that new facilities may be needed by the County, no siting decisions are made; the Plan does not even determine that future facilities will ever be built." (*Id.*) Further,

> [w]hile we agree with appellant that additional hazardous waste facilities in the County may be a foreseeable consequence of the Plan, any such facility would not alter the nature or scope of the initial assessment considered in the FEIR, which functions independently as merely a general planning device. The Plan is not, as we read it, the first part of a fragmented project; rather it provides the general guidelines required by law for any separate, but as yet undetermined, future hazardous waste management project. The scope of the Plan, as appropriately described in the FEIR, is limited to recitation of policies, requirements, and siting criteria, and designation of general areas in which future facilities may permissibly be located. No specific facility has been proposed, and the County has not committed to a definite course of action. Moreover, any future projects have been expressly made contingent upon CEQA compliance...
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> An EIR is not required for an element of a master plan which has not been proposed for development. Where, as here, an EIR cannot provide meaningful information about a speculative future project, deferral of an environmental assessment does not violate CEQA. (*Id.* at 373)(citations omitted.)

Petitioner argues *Rio Vista Farm Bureau* is distinguishable because in that matter the County did not own all the land subject to the general plan. Petitioner further argues no siting decisions were made in *Rio Vista Farm Bureau*, whereas in this case a preferred concept for site use has been developed, including distinct visitor experience areas. (See AR 8249.) In light of these decisions having been made as part of the subject project, Petitioner argues Respondents were obligated pursuant to CEQA to provide more detailed analysis of environmental impacts resulting from these decisions than was required in *Rio Vista Farm Bureau Center*. (See *Cleveland National Forest Foundation v. San Diego Assn. of Gov'ts* (2017) 17 Cal.App.5th 413, 441.)

Respondents argue *Rio Vista Farm Bureau* is controlling and on point. Respondents contend the preferred concept map does not approve trails or campgrounds or specific uses, and is merely akin to, "siting criteria, and designation of general areas in which future facilities may permissibly be located." Respondents also argue *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* is applicable in the Second District Court of Appeal's summarization of the law that,

> [w]hile an FEIR cannot defer all consideration of cumulative impacts to a later time, it may legitimately indicate that more detailed information may be considered in future project EIR's. " 'Tiering' " refers to "the coverage of general matters in broader EIRs (such as on general plans . . .) with subsequent .

. . site-specific EIRs . . . concentrating solely on the issues specific to the EIR subsequently prepared." (Guidelines, § 15385.)

An FEIR need only conform with the general rule of reason in analyzing the impact of future projects, and may reasonably leave many specifics to future EIR's. "CEQA recognizes that environmental studies in connection with amendments to a general plan will be, on balance, general." (*Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 625.)

Deferral of more detailed analysis to a project EIR is legitimate. It has been held that "where practical considerations prohibit devising such measures early in the planning process (e.g., at the general plan amendment or rezone stage), the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. . . [Citation.]" (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1029.) ((1993) 18 Cal.App.4th 729, 746-47.)

In response, Petitioner argues the project constitutes a site use plan. The Expansion Area was acquired for a specific use, as an SVRA, and the map demonstrates that certain uses/activities will be permitted in certain distinct sections of the Expansion Area. For example, Petitioner argues the entrance locations are clearly defined. Accordingly, Petitioner argues *Rio Vista Farm* and *Al Larson Boat Shop* do not apply and the EIR in this case improperly deferred analysis of reasonably foreseeable impacts to future phases. (See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431.)

The Court finds Petitioner is correct. The facts in this case are distinguishable from *Rio Vista Farm Bureau* and *Al Larson Boat Shop*. Here, the Respondents purchased the property with the intent of using it to expand the SVRA. Unlike the general plan in *Rio Vista Farm Bureau*, Respondents have ownership of and control over the entirety of the land subject to the general plan. Further, Respondents *have* made definitive decisions as part of the "program" EIR that make certain reasonably foreseeable impacts ready for analysis *now*, as opposed to a circumstance wherein environmental analysis must be detailed because the project decisions will not be made until a future date. Respondents here have committed to a selection of development "zones" such as a gathering area and interpretive facility at the Tesla Coal Mine site, Gathering and Service areas as denoted in Figure 2-3 of the Draft EIR (AR008268), as well as entrance and exit locations for the Expansion Area.

This case is analogous to *Laurel Heights Improvement Assn. v. Regents* (1988) 47 Cal.3d 376. Similar to the facts in that case, the intended use of the property has been established. Like the facts before the Supreme Court, the future expansion and general type of future use is reasonably foreseeable here. Respondents have clearly stated the purpose for the acquisition was to expand OHV use at Carnegie SVRA; various areas within the Expansion area have contemplated uses such as an Advanced Trails area, an Intermediate/Beginner Trails area, and a Potential Gathering Area. The Court acknowledges that case law does not require absolute precision. Although Respondents argue that the specific site of the visitors' center, for example, has not been determined, the use of the land outlined in the General Concept Map is clearly

foreseeable. As the Supreme Court in *Laurel Heights* pointed out, "[t]he fact that precision may not be possible, [] does not mean that no analysis is required." (*Id* at p. 399.)

While Respondents argue a more substantial environmental review will be done at a future date, CEQA does not authorize them to delay analysis in such a manner. On this issue, the Court finds the Respondents did not proceed in the manner required by law.

D. The General Plan Guidelines

Petitioner argues that the "EIR attempted to bridge its recognition of impacts and its contrary findings of 'no significant impact' with General Plan guidelines that allegedly made the project self-mitigating." (Op. Br., p. 28.) Petitioner argues the General Plan guidelines are inadequate because (1) they defer to regulatory permitting, even where the relevant regulatory agencies found the EIR analysis, General Plan guidelines, and approach improper; (2) they contemplate 'take' of protected species as part of the project's 'self-mitigation;' and (3)...they purport to mitigate impacts, but do not comply with requirements for disclosure, analysis, and reporting of mitigation." (*Id.*)

To the extent Petitioner argues the EIR fails to include a CEQA required component by inadequately disclosing potential impacts, the Court's review of such action is *de novo*. (*Citizens of Goleta Valley*, supra, 52 Cal.3d 564.) To the extent Petitioner argues the General Plan guidelines do not reach the "correct" conclusions concerning significant impacts, the Court's review is pursuant to the substantial evidence standard. (*Preserve Wild Santee*, supra, 210 Cal.App.4th 475.)

(1) *Defer to regulatory permitting*

Petitioner then identifies several comments made by the "Responsible and Trustee Agencies" claiming that the guidelines are too vague, fail to consider the current level of impacts, and are doubtful in their ability to offset significant impacts to the environment. (See Op. Br., pp. 28-29.) However, Petitioner does not identify any specific guidelines, or make any attempt to establish how a specific guideline, or guidelines, is insufficient to comply with CEQA.

"A reviewing court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document...an EIR is presumed adequate...and the plaintiff in a CEQA action has the burden of proving otherwise. (*Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners of the City of Long Beach* (1993) 18 Cal.App.4th 729, 740)(citations omitted.) "The substantial evidence standard is applied to [the EIR's] conclusions, findings and determinations. It also applies to challenges to the scope of an EIR's analysis of a topic, the methodology used for studying an impact, and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions." (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198.)

"As with all substantial evidence challenges, an appellant challenging an EIR for insufficient evidence must lay out the evidence favorable to the other side and show why it is

lacking. Failure to do so is *fatal*. A reviewing court *will not* independently review the record to make up for appellant's failure to carry his burden." (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266)(emphasis added)(see also *South County Citizens for Smart Growth v. County of Nevada* (2013) 221 Cal.App.4th 316, 331)(finding an EIR challenger has the "burden of setting forth all evidence favorable to the [agency] and showing wherein it is lacking.") An effort to rectify this error in a reply brief is insufficient, because "it deprives the respondent of the opportunity to respond." (*South County Citizens for Smart Growth*, 221 Cal.App.4th at 331.)

The Court finds Petitioner has not carried its burden to demonstrate that the guidelines are too vague or defer to regulatory permitting, as Petitioner has not identified sufficient evidence to enable to the Court to engage in a meaningful review.

(2) *"Take" of protected species*

Petitioner argues the "EIR's reliance on General Plan guidelines was further defective, because such guidelines assumed 'take" of special status species as part of mitigating impacts to those species." (Op. Br., p. 30.) Petitioner argues surveys are needed to determine whether special status species are present or whether a particular tiered project might cause impacts. Petitioner specifically refers to the Foothill yellow-legged frog, the California Tiger Salamander, western pond turtle, Alameda whipsnake, and American badger. Petitioner then cites to the EIR's direction that the guidelines "direct State Parks to consult with the permitting agencies on the potential effects of specific projects on special-status plant and wildlife species." (AR 31.) Such consultation could include a "take" of a special status species. Petitioner argues that allowing a take permit for mitigation evades CEQA's required analysis of avoiding impacts to special status species.

Petitioner argues the "error is most stark as to the EIR's analysis of the 'self-mitigating' impacts to the Golden Eagle." (Op. Br., p. 31.) As the Golden Eagle is a fully-protected species, it cannot be taken. Further, Petitioner argues Golden Eagles are relatively common in the Expansion Area, with specific nests observed in and around the area. (AR 29, 9714.) As the Golden Eagle is fully-protected pursuant to California law, it may not be taken or possessed at any time. (See Fish & Game Code § 3511(a)(1).) In light of the Golden Eagle's common presence in the Expansion Area, Petitioner argues there will certainly be significant impacts to the species should any OHV operation, increased human activity, or construction noise and lighting occur.

Respondent acknowledges that a "take" of a Golden Eagle is prohibited by California law and argues the EIR does not assume a prohibited "take" of this species. Instead, Respondent argues, the EIR demonstrates a "commitment to regulatory compliance" and anticipates that a "take" pursuant to Federal law may be necessary, as federal law more broadly defines the term "take" such that to even disturb the species is a violation. If such action is needed, Respondent argues the EIR indicates Parks would prepare a comprehensive eagle management plan. (See AR 29-30.)

The Court finds that at this time the impact to the Golden Eagle is too speculative, as Respondent has not prepared a map of where trails, facilities, or other recreational opportunities

will be constructed. Should an illegal "take" of any species be proposed as part of any future project, the time to challenge the EIR's sufficiency will be ripe at that time. Further, to the extent any future project may cause significant impacts to other wildlife, identified by Petitioner or not, such impacts are too speculative at this point. The time to challenge significant impact determinations and proper mitigation will be at the time of EIR certification for those sub-projects. The Court *does not* at this time find that any General Plan guidelines are sufficient to constitute mitigation of significant impacts in connection with any species.

(3) *Wildlife Guideline 1.7*

Petitioner's next argument concerns improper deferring of "reasonably foreseeable impact analysis." (Op. Br., p. 35.) Petitioner argues the Guidelines are too vague and therefore defer mitigation improperly under the guise of future tiering. The only guideline Petitioner actually identifies and discusses, however, is Guideline 1.7. This guideline provides,

> If construction activities are planned within suitable upland habitat for special-status herpetofauna (California red-legged frog, California tiger salamander, western pond turtle, or tester spadefoot) and within the known maximum upland dispersal distance of those species from known breeding habitat, develop and implement appropriate measures to avoid or compensate for potential direct and indirect impacts of project-specific activities on special-status herpetofauna in upland habitats. Before the start of construction, implement any protection or mitigation measures agreed upon during consultation with the wildlife agencies. (AR 9830.)

Petitioner argues this language ignores the reality that the EIR recognizes that these species have habitat covering the entire planning area map. (AR 9704.) Accordingly, Petitioner argues, "[i]mpacts to these habitats are reasonably foreseeable and require no act of prophecy or speculation." (Op. Br., p. 36.) Petitioner argues further guidelines "typify improper deferred mitigation" and refers to several specific guidelines.

Respondents argue Petitioner fails to acknowledge the Guidelines' performance standards, and takes them out of context. With regard to Wildlife Guideline 1.7, Respondents argue that it is "one...among several that prevent significant impacts to special-status herpetofauna by requiring development of avoidance and compensation measures in consultation with wildlife agencies." (Oppo., p. 39.) With regard to four different species, Respondents assert the EIR discusses Guidelines 1.1, 1.2, and 1.3, as well as Wildlife Guidelines 1.2 and 1.7, and does not rely exclusively on any one guideline.

The Court refers the parties to its discussion below concerning the insufficiency of Wildlife Guideline 1.7 in deferring mitigation to a future "consultation." (At p. 20, post)

E. <u>The Guidelines as providing self-mitigation</u>

The General Plan adopts a self-mitigating approach which is not prohibited under CEQA or the cases cited by Respondents in their Opposition. Petitioners however, argue that in adopting

such an approach, Respondents impermissibly failed to separately identify and analyze the significant impacts before proposing mitigation measures as the Court in *Lotus v. Department of Transportation* held. ((2014) 223 Cal.App.4th 645, 658.) Respondents argue that CEQA permits incorporating minimization and avoidance measures into the project and cite *Gilroy Citizens* and assert that the test is whether there is substantial evidence supports the impact analysis. The Court disagrees that the proper test is substantial evidence.

In *Lotus*, the petitioners challenged the sufficiency of an EIR approved by Caltrans concerning highway construction that passed through a state park. (*Id.* at 647.) The First District Court of Appeal reversed the judgment for further proceedings, finding that the EIR was insufficient "insofar as it fails to properly evaluate the significance of impacts on the root systems of old growth redwood trees adjacent to the roadway." (*Id.* at 648.) The Court noted that the EIR incorporated the proposed mitigation measures "into its description of the project" and then concluded that any "potential impacts from the project will be less than significant." (*Id.* at 655-56.)

Like the Court noted in *Lotus*, the General Plan should disclose the avoidance, minimization and mitigation measures are not part of the project. And as the *Lotus* court found, "by compressing the analysis of impact and mitigation measures into a single issue, the EIR disregards the requirements of CEQA." (*Id.* at 656.) Here, the EIR fails to inform the public the extent of the impacts, fails to make the necessary evaluation and determination regarding the impacts, and fails to make the necessary evaluation and any findings concerning the proposed mitigation measures, and adopt a monitoring program. The Court finds this is a structural deficiency and as the *Lotus* court held, "this shortcutting of CEQA requirements subverts the purposes of CEQA by omitting material necessary to informed decision –making and informed public participation. It precludes both identification of potential environmental consequences arising from the project and a thoughtful analysis of the sufficiency of measures to mitigate those consequences." (*Id.* at 658.)

Gilroy Citizens for Responsible Planning v. City of Gilroy cited by Respondents is distinguishable. ((2006) 140 Cal.App.4th 911.) The Court in that case was dealing with a later draft EIR which was tiered from a General Plan and for which an EIR had been prepared and certified and in which the effects of later development were examined at a sufficient level of detail. The Court held that specific impacts had already been considered in the plan. The Court in that case did not opine on the legal efficacy of the general plan and EIR containing the self-mitigating language. (*Id.* at 928, fn. 14.) Cases are not authority for propositions not considered. (*City of Bellflower v. Cohen* (2016) 245 Cal.App.4th 438, 452.)

At the hearing on this matter, Petitioner reiterated its argument that the Guidelines do not set meaningful performance standards. Specifically, Petitioner referred to Soils Guideline 1.2, which provides,

> Develop an adaptive management plan for soil resources consistent with PRC Section 5090.35(a) and the OEIMVR Division *Soil Conservation Standard and Guidelines* or subsequent amendments or replacement documents. Incorporate the tools and techniques identified as appropriate to site conditions at Carnegie

SVRA. Also incorporate other tools and techniques that may apply to specific facility conditions and management structure at the SVRA. (AR 9825.)

In *Preserve Wild Santee v. City of Santee*, the City of Santee certified an EIR for a development project. On appeal, the petitioners reasserted their claim that the EIR improperly deferred mitigation of the project's impacts on the Quino checkerspot butterfly. ((2012) 210 Cal.App.4th 260, 268.) The Fourth District Court of Appeal noted that the EIR at issue did not,

> specify performance standards or provide other guidelines for the active management requirement...[it] appears the success or failure of mitigating the project's impacts to the Quino largely depends on what actions the approved habitat plan will required to actively manage the Quino within the preserve. An EIR is inadequate if the success of failure of mitigation efforts...may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR.
>
> Moreover, the EIR does not state, nor is it readily apparent, why specifying performance standards or providing guidelines for the active management of the Quino within the preserve was impractical or infeasible at the time the EIR was certified. The fact that the City and wildlife agencies must ultimately approve the habitat plan does not cure these informational defects. (*Id.* at 281)(citations omitted.)

The Court reversed judgment, finding in favor of petitioner's claims that the EIR violated CEQA by improperly deferring mitigation of the project's impacts to the Quino. (*Id.* at 292.)

The Court agrees with Petitioner's argument that the EIR does not, with regard to the Soils Guidelines, "specify performance standards or provide other guidelines for" management requirements. The future of the Guidelines and the SVRA also appears to depend upon the "tools and techniques" that will be identified in the future, which tools and techniques have not "been subject to analysis and review within the EIR."

Petitioner next identified NRM Guideline 2.4, which provides,

> Apply state-of-the-art science and ecological knowledge to the management of natural communities and associated habitat functions at the SVRA. Management strategies shall take current science and results from ongoing management and research into consideration. Work with the academic community to continue to allow research at the SVRA and apply knowledge gained through on-site and off-site research to site-specific resource management. OHMVR Division environmental scientists shall conduct research and coordinate studies with research at other SVRAs, as appropriate. (AR 9828.)

Petitioner then cited to *Covington v. Great Basin Unified Air Pollution Control District*, in which the petitioners challenged the approval of a geothermal power plant. ((2019) 43

Cal.App.5th 867, 871.) Petitioners challenged the adequacy of the EIR to adopt all feasible mitigation measures. (*Id.*) The EIR determined that certain emissions would be significant and unavoidable, even with mitigation, and that no additional feasible mitigation measures were available to further,

> substantially reduce fugitive n-pentane emissions. This finding was based on the fact that the Project would include '"state of the art equipment and best available technology" to limit ROG emissions. The EIR does not define "state of the art equipment and best available technology," and comments to the EIR identified additional equipment and technology to further mitigate the fugitive n-pentane emissions. However, these additional mitigation measures were not adopted. (*Id.* at 877.)

The Third District Court of Appeal summarized its findings as to one of Petitioners' proposed mitigation measures,

> The point raised by petitioners and their expert is that the emissions the Project will produce will have a significant environmental effect, thus the Project should employ the stricter LDAR program that is feasible for petroleum refineries and chemical plants, and would be feasible here. The District made no attempt to show that such an LDAR program would not be feasible here. The measures proposed by petitioners do not require additional equipment—only that the leak rate triggering repair be a smaller number, and that there be an outside limit to the number of days allowed for repair. The District was required to give a good faith, reasoned analysis for not adopting the stricter LDAR program utilized in petroleum refineries and chemical plants. The stricter LDAR program may not be feasible for a geothermal plant. The point is, the District made no attempt to explain why such a program was not feasible. Accordingly, there is insufficient evidence in the record to find that no further mitigation measures were feasible. (*Id.* at 881.)

While the Court recognizes the language in NRM Guideline 2.4 appears problematic as it vaguely refers to "state-of-the-art science," "current science," unlike *Covington*, Petitioner has not identified, either in its briefing or at oral argument, additional mitigation measures that Respondent should have considered. The Court cannot find that Respondent failed to provide a "good faith, reasoned analysis" for not adopting a further mitigation measure, as Petitioner has not identified any such proposed measure.

Lastly, Petitioner identified Water Guideline 1.2, which provides,

> Work to attain no net loss of wetlands functions and values at the SVRA. If impacts on jurisdictional features cannot be fully avoided:
>
> > Determine the acreage of direct impacts (i.e., fill of wetlands) and indirect impacts (i.e., alterations to wetland hydrology) that would result from project implementation, and obtain necessary permits.

> Provide compensatory mitigation such that the functions and values of all affected wetlands and other waters of the United States, waters of the state, and stream and riparian habitats protected under the California Fish and Game Code are replaced, restored, or enhanced on a "no net loss" basis. Restore, enhance, and/or replace wetland, water, and riparian habitat acreage at a location and by methods agreeable to the U.S. Army Corps of Engineers (USACE), the Central Valley and San Francisco Bay Regional Water Quality Control Boards (RWQCBs), CDFW, and/or the U.S. Fish and Wildlife Service (USFWS) as appropriate and depending on agency jurisdiction. (AR 9821-22.)

Petitioner argues the language concerning consultation if impacts cannot be fully avoided is problematic. Petitioner cited to *POET, LLC v. State Air Resources Board*, in which the Air Resources Board adopted regulations, including "the low carbon fuel standards (LCFS) regulations that require the reduction of carbon content of transportation fuels sold, supplied, or offered for sale in California." ((2013) 218 Cal.App.4th 681, 697.) The Fifth District Court of Appeal discussed the ARB's argument that it was allowed to defer the specifics of mitigation with regard to NOx emissions because it was going to "conduct an extensive testing program for biodiesel and will follow that effort with a rulemaking to establish specifications to ensure there is no increase in NOx." (*Id.* at 739.) The Court found this statement did not articulate specific performance criteria as required for CEQA compliance, and therefore mitigation deferral was not permitted.

> [I]t established no objective performance criteria for measuring whether the stated goal will be achieved. As a result, we and members of the public have not been informed how ARB will determine that the requirements it adopts in a fuel specifications regulation will ensure that use of the biodiesel does not increase NOx emissions. To illustrate this point, it is unclear what tests will be performed and what measurements will be taken to determine that biodiesel use is not increasing NOx emissions. (*Id.* at 740.)

Petitioner argues Water Guideline 1.2 cannot constitute permissible deferred mitigation because it contains no meaningful performance standards. Respondent argued at the hearing that these guidelines cannot be viewed "in a vacuum" and that just because Water Guideline 1.2 may not have a performance standard does not make the EIR inadequate.

The Court has reviewed the entirety of the guidelines appearing within "Water Goal 1: Manage the SVRA for the protection of jurisdictional waters of the United States, including wetlands and waters of the state, while maintaining a quality OHV recreational experience." (AR 9821.) Included in this subdivision are Water Guidelines 1.1, and 1.2. Water Guideline 1.1 does not include any performance standards. It simply directs Respondents to "avoid locating facilities" in wetlands and that if avoidance is not feasible to "design facilities to minimize impacts." Water Guideline 1.2, restated in full above, also does not contain any performance standards, and mimics the language found to be insufficient in *POET, LLC.* Accordingly, the

Court finds these two guidelines are insufficient to support the deferred mitigation of Water Goal 1, in violation of CEQA.

The Court has concerns that the Guidelines are deemed to be the basis upon which the project is "self-mitigating" and yet the Guidelines seem to be very vague and speculative as to what kind of actions will be taken to indeed mitigate the significant impacts that development will have on these species. This is especially true when considering the fact that the preferred concept map has indicated what types of activity will occur within specifically identified areas of the Expansion Area. With regard to these species that have habitat covering the entire planning area map, the Court finds Wildlife Guideline 1.7 is insufficient in its conclusion that the mitigation measures that will be implemented are those "agreed upon during consultation with the wildlife agencies." The Court finds this insufficiency is not cured by NRM Guidelines 1.1, 1.2, and 1.3, as Respondents argue.

F. The EIR fails to respond to public comment.

The Court has already found, as detailed above, that the EIR's improper constraint of project objectives renders responses to public comment inadequate. With regard to comments received in 2012, prior to the issuance of the Draft EIR, Petitioner has not demonstrated Respondents violated CEQA by not directly responding to these specific comments.

IV. Conclusion

The petition for writ of mandate is **GRANTED**[2]**.** A judgment shall be issued in favor of Petitioner, and against Respondents, and a peremptory writ shall issue commanding Respondents to take action specially enjoined by law in accordance with the Court's ruling, but nothing in the writ shall limit or control in any way the discretion legally vested in Respondents. Respondents shall make and file a return within 60 days after issuance of the writ, setting forth what has been done to comply therewith.

Counsel for Petitioner shall prepare an order incorporating this ruling as an exhibit to the order, a judgment, and a writ of mandate; counsel for Respondents shall receive a copy for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

[2] The Court notes that in the related case of *Connolly Ranch Inc. v. State of California* (2016-80002495) the petitioner filed an "Objection to Ex Parte Communication" in connection with statements made during the hearing on the merits in this matter. The Court has not considered any comments made concerning arguments made in *Connolly Ranch* in ruling on the merits in this matter. The Court also will not consider any such comments when ruling on the merits in *Connolly Ranch*. The Court also finds that the comments do not constitute ex parte communications, and has **OVERRULED** the objection.

Declaration of Mailing

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.

Dated: January 12, 2021

E. Higginbotham, Deputy Clerk **/s/ E. Higginbotham**

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