Remy Thomas Moose & Manley LLP
455 Capitol Mall, Suite 210
Sacramento, CA 95814

Whitman F. Manley
wmanley@rtmmlaw.com

April 22, 2011

VIA FEDERAL EXPRESS

The Honorable J. Anthony Kline, Presiding Justice
The Honorable Paul R. Haerle, Associate Justice
The Honorable James A. Richman, Associate Justice
California Court of Appeal, First Appellate District
350 McAllister Street
San Francisco, CA 94102

Re: Request for Publication: *Center for Biological Diversity v. California Fish and Game Commission*, Case No. A127555

Dear Justices Kline, Haerle, and Richman:

Pursuant to California Rules of Court, rule 8.1120(a), we respectfully request publication of the opinion issued by this Court in *Center for Biological Diversity v. California Fish and Game Commission* (April 8, 2011, A12755) (the "Opinion").

We submit this letter on behalf of the California State Association of Counties ("CSAC") and the League of California Cities ("League"). This letter sets forth CSAC's and the League's interest in publication and the reasons CSAC and the League believe the Opinion meets the standards for publication set forth in California Rules of Court, rule 8.1105(c).

The parties to the appeal have not authored this letter in whole or in part, nor have the parties to the appeal made a monetary contribution for the preparation of this letter.

The Opinion examines the rule of law set out in *Karuk Tribe of Northern California v. California Regional Water Control Board* (2010) 183 Cal.App.4th 330 ("*Karuk Tribe*") with regard to awards of attorney's fees under Code of Civil Procedure section 1021.5, and applies that rule to facts that differ significantly from the original decision in *Karuk Tribe*. The Court's analysis also addresses legal issues of continuing public interest and makes a significant contribution to the legal literature on this topic. Therefore, pursuant to rules 8.1105(c)(2), (c)(6), and (c)(7), of the California Rules of Court, the Opinion warrants publication.

1. CSAC and the League Have an Interest in Publication of the Opinion.

We submit this request for publication on behalf of CSAC and the League. CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case concerns matters affecting all counties.

The League of California Cities is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

CSAC and the League have an interest in the development of case law pursuant to Code of Civil Procedure section 1021.5. While section 1021.5 is valuable tool to encourage citizen enforcement of the laws as private attorney generals, in many types of litigation, such as litigation under the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 *et seq*.), a prevailing petitioner often assumes that he or she is entitled to an award of attorney's fees, regardless of the significance of the litigation or the scope of the remedy achieved. This assumption is inconsistent with the purposes behind section 1021.5.

As the Supreme Court has explained, the private attorney general doctrine "rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of *fundamental public policies* … and that, without some mechanism authorizing the award of fees, private actions to enforce such *important public policies* will as a practical matter be infeasible." (*Woodland Hills Residents Ass'n v. City Council* (1979) 23 Cal.3d 917, 933 [emphasis added].)

Thus, the purpose of the doctrine is to encourage enforcement of fundamental and important public policies. That said, fees are sometimes awarded to prevailing petitioners as a matter of course, even when the substantive purposes of the litigation are not achieved and only minor procedural defects in the agency's actions are found. Such minor defects can cost the citizens of the state hundreds of thousands of dollars in attorney's fees (*see*, *e.g*., *Karuk Tribe*, *supra*, 183 Cal.App.4th at p. 341 [$138,250 awarded by trial court]; Opinion, slip op. at p. 6 [$257,675 awarded by trial court]), in addition to the significant

attorneys' fees incurred by public agencies to defend such claims for attorney's fees, in some cases for remand orders involving relatively minor procedure errors. This is money that could be spent ensuring public safety, fixing roads, maintaining essential infrastructure, or simply curtailing the public debt.

2. The Opinion's Discussion of "Significant Public Benefit" Merits Publication.

The Court's Opinion *in Center for Biological Diversity v. California Fish and Game Commission* (Case No. A127555) gives important guidance regarding the significant public benefit requirement of Code of Civil Procedure section 1021.5. In particular, the Opinion reaffirms and explains one of the holdings of *Karuk Tribe*.

In *Karuk Tribe*, this Court reversed a decision of the trial court to award fees to the petitioner. The petitioner sought to force the Regional Water Quality Control Board to enforce state water quality laws against several federally-licensed hydroelectric facilities on the Klamath River. The Regional Water Quality Control Board declined to do so, finding that federal law preempted the field and as such the board was without authority to enforce state water quality laws. The trial court, sua sponte, remanded the matter to the board for additional findings in light of two cases that the trial court felt had not been fully evaluated in the board's original findings. The board readopted its findings, but inserted a longer discussion of the two cases. The trial court affirmed the board's decision. The trial court then awarded the petitioner $138,250 in attorney's fees as a prevailing party because, according to the trial court, the augmentation of the board's findings served an "important public benefit."

This Court reversed. The Court found that an attorney fee award was not merited because none of the three statutory prerequisites under section 1021.5 was present. First, petitioners were not "successful" parties in that they did not achieve their strategic objective in the lawsuit, which was to enforce state water law as against the hydroelectric project. Second, the lawsuit did not result in the "enforcement of an important right affecting the public interest." Third, the case did not result in a "significant benefit" being "conferred on the general public or a large class of persons." (*Id*. at p. 335.) The Court noted the board was not required by law to adopt findings, so the public benefit of lengthening them had minimal value. The *Karuk Tribe* Court explained:

> The best that can be said for the unorthodox proceeding that occurred here is that the Board, following what was in effect a remand from the trial court, augmented the reasoning behind its decision that it was without authority to grant the private parties' request that it enforce state law. Federal law was accepted as preeminent by the Board when this controversy began—and by the trial court when it ended. We conclude, as a matter of law, that it is not worth $138,250 to have a state agency polish up and augment the recitals

> and reasoning supporting a decision that was already more than legally sufficient.

(*Id*. at pp. 335-336.)

In sum, the opinion in *Karuk Tribe* provides common-sense guidance on these matters. In particular, *Karuk Tribe* makes clear that a party is not "successful" for purposes of Code of Civil Procedure section 1021.5 when the party does not achieve its basic aims in the litigation, even if peripheral relief is granted.

As the Court acknowledged, the facts in *Karuk Tribe* are "unorthodox." (*Id*. at p. 335.) Thus, one could argue—and indeed the petitioner in *Center for Biological Diversity v. California Fish and Game Commission* (Case No. A127555) did argue—that applicability of the *Karuk Tribe* opinion should be limited. (See Opinion, slip op. at p. 10, fn. 4.) Thus, the petitioner argued that the facts that make *Karuk Tribe* unique are: (1) that the agency in that case was not required to make findings in the first instance so any challenge to the findings would be of no value to the public, and (2) the agency in that case was only analyzing legal issues, rather than adopting factual findings based on the record. (*Ibid*.)

In this Court's Opinion, however, the Court makes clear that the underlying legal principles set forth in *Karuk Tribe* are not limited to the unorthodox facts of that case. Rather, those principles apply to any public interest lawsuit where the remand order directs the public agency to correct a procedural error or address a procedural question, and the remand does not ultimately result in any substantive change in the public agency's decision. The Opinion, like the *Karuk Tribe* opinion, speaks frankly about courts using a common-sense assessment of whether the plaintiff' lawsuit actually accomplished anything, beyond merely obtaining a writ of mandate and a judgment to correct some peripheral procedural error, stating: "Thus, [here] it was not a substantive remand, but a purely procedural one". (See Opinion, slip op. at p.12.)

The opinion in *Center for Biological Diversity v. California Fish and Game Commission* (Case No. A127555) applies the rule set out in *Karuk Tribe* in a situation involving common sorts of facts, and thus makes clear that the *Karuk Tribe* opinion should not be limited to its unusual procedural situation. For example, in the *Center for Biological Diversity* case, the remand order required the California Fish and Game Commission to address a different standard of review in making its listing decision, than the incorrect standard of review it may have used previously in rejecting a listing petition in the first instance. The Commission did so, but reached the same conclusion, under the different standard of review. The trial court—not having the benefit of *Karuk Tribe*—concluded this minor procedural remedy conferred a "significant benefit" and enforced an "important right" affecting the public interest, and awarded petitioner $257,675 in attorney's fees. This Court, applying its common sense and the rule set out in *Karuk Tribe* reasoned as follows:

> No one disputes that the [California Endangered Species Act] embodies a significant public policy and enforcing it constitutes an important public interest. … But was that interest actually "enforced" in a manner that resulted in a "significant benefit"? We think not.

(Opinion, slip op. at p. 12.)

The Opinion reiterates and applies the reasoning of *Karuk Tribe*, but in a case that is unencumbered by the unique facts in the *Karuk Tribe* case. It thus would be of great benefit to many litigants if published, in no small part because it will reduce the current uncertainty over fee requests under Code of Civil Procedure section 1021.5, particularly where petitioners assert that the mere issuance of a writ of mandate in a California Endangered Species Act case or a CEQA case, for instance, is automatically sufficient to satisfy the "significant public benefit" requirement in Code of Civil Procedure section 1021.5 for an award of attorney's fees.

Instead, the Opinion makes clear that a remand for the agency merely to clarify findings, for instance, does not necessarily satisfy the "significant public benefit" standard in section 1021.5. Rather, the petitioner must show that the remand served the petitioner's substantive aims in the litigation. The Opinion directs trial courts to consider the benefits of the action in practical terms, including considering whether the petitioner achieved the objective underlying the filing of the lawsuit. Publication of the Opinion would resolve any dispute over the general applicability of the principals announced in *Karuk Tribe*.

The Court in *Karuk Tribe* quoted Justice Brandeis' statement that "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right." *Karuk Tribe* settled it, and settled it right. The Opinion in *Center for Biological Diversity* reiterates this, and forestalls any arguments that *Karuk Tribe* ought to be ignored in cases involving section 1021.5, because of it "unorthodox" procedural situation. Therefore, the Opinion settles legal issues of continuing public interest, and publication will reduce the probability that these now-settled issues will be relitigated in the future at the public taxpayers' expense. (Cal. Rules of Court, rule 8.1105(c)(2), (c)(6).)[1]

---

[1] / The Opinion provides a much more comprehensive and insightful discussion of the circumstances satisfying the "significant public benefit" requirement in Code of Civil Procedure section 1021.5 than provided in the prior cases noted in the Opinion, slip opinion at pages 14-15, which only addressed circumstances where the plaintiff failed to achieve its underlying litigation objective, as in *Ebbetts Pass Forest Watch v. Department of Forestry* (2010) 187 Cal.App.4th 376, 388 (clarification of the law did not change the agency's decision on the underlying issue), or where the remand order resulted in a de

3. Conclusion

CSAC and the League believe the Opinion meets several of the standards for publication set forth in California Rules of Court, rule 8.1105(c). On behalf of CSAC and the League, we respectfully request that the Court certify the Opinion in *Center for Biological Diversity* for publication.

Very truly yours,

REMY, THOMAS, MOOSE and MANLEY, LLP

Whitman F. Manley

cc: All counsel of record
Proof of service attached

---

minimis correction to the agency's decision, as in *Concerned Citizens of La Habra v. City of La Habra* (2005) 131 Cal.App.4th 329, 335 (correction of "minor" CEQA blemish), *King v. Lewis* (1990) 219 Cal.App.3d 552, 556-557 (three words changed in an impartial ballot analysis), and *Mandicino v. Maggard* (1989) 210 Cal.App.3d 1413, 1416-1417 (de minimis changes ordered to ballot argument).