SUMMARY OF APPELLATE CASES

DECIDED BY THE COURTS IN 2019 – 2020

ACWA
Association of California Water Agencies

OCTOBER 2020

Acknowledgements

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Foreword

This is the 12th annual summary of recent appellate court cases and decisions that may be of interest to ACWA member agencies and their counsel. It was prepared by members of the ACWA Legal Affairs Committee and other attorneys from the water community. Your comments and suggestions are welcome with regard to both the relevance of the cases included and the usefulness of the information provided.

About ACWA's Amicus Curiae Program

ACWA's Legal Affairs Committee receives many requests for assistance, primarily in litigation matters. The committee considers providing assistance if the issue is of major significance to ACWA members, and recommends ACWA involvement only when 1) there is a common interest in the same outcome among a significant portion of ACWA's membership, and 2) there will be no material adverse impact on a significant number of ACWA member agencies.

Committee recommendations are forwarded to the ACWA Board of Directors for consideration.

Absent extenuating circumstances, requests for assistance must be submitted to the ACWA office (Legal Affairs Committee staff liaison) or the committee chair at least 60 days prior to the requested action. The types of requests considered include:

- amicus curiae brief requests at the appellate or, in extraordinary cases, trial court level;
- requests concerning whether an appellate opinion should be published or depublished;
- the submission of views to the Attorney General and others who are working on opinions of interest to ACWA members;
- requests from other ACWA committees or an ACWA region seeking the committee's input concerning a particular legal issue; and
- miscellaneous discussions of legal issues of interest to ACWA members.

Prior to considering any request for assistance involving a matter in litigation, ACWA staff determines whether any ACWA member opposes the request and provides an opportunity for the member's counsel to address the committee, along with counsel for the requesting agency.

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Water Rights

City of Santa Maria v. Adam (2019) 43 Cal.App.5th 152

Summary: Overlying groundwater rights holders' claim that an amended adjudication judgment protected their overlying rights from future prescription was not ripe for review because resolution of the claim would require the court to speculate about future scenarios.

Discussion: Following entry of an amended judgment quieting title in appellants to overlying groundwater rights in the Santa Maria Valley Groundwater Basin, appellants filed a motion with the trial court seeking to clarify that the amended judgment protected their overlying rights from future prescription. The trial court denied the appellants' motion on the merits and concluded that, among other things, the language of the amended judgment left open the possibility of future prescription.

The Sixth District Court of Appeal concluded that the issue of whether appellants' overlying groundwater rights were protected from future prescription was not ripe for review. Because there was no evidence that the basin was in overdraft (i.e., a necessary requirement for prescriptive rights to accrue) and no specific factual scenario for the court to review, the court reasoned that it would have to speculate about hypothetical scenarios where other water users attempt to prescript against appellants' overlying rights. The court noted that appellants could pursue legal remedies in the future *if* overdraft occurred or another water user asserted a claim of prescription. The court also concluded that the appellants had not demonstrated that they would suffer hardship without a decision on whether future prescription was possible. As such, the court reversed the trial court's decision on the merits and directed the trial court to deny the appellants' motion to clarify on the ground that it was not ripe for review.

Gomes v. Mendocino City Community Services District (2019) 35 Cal.App.5th 249

Summary: A community services district's authority to manage groundwater included the power to impose extraction limitations, but the district's groundwater management program was invalid because it was not adopted in accordance with the governing law.

Discussion: The plaintiff landowner (Landowner) brought suit against the Mendocino City Community Services District (District) challenging the District's groundwater management program, which included a water shortage contingency plan imposing a groundwater extraction limitation. The District was created pursuant to the Community Services District Law (the Act), and legislation , which authorizes the district to establish groundwater management programs pursuant to a multi-step approval process that includes, among other things, noticed public hearings and a protest process. In 1990, the District passed an ordinance in compliance with the Act that required a property owner to obtain a groundwater extraction permit for "new development" or a "change in use." Thereafter, in 2007 the District adopted additional groundwater management measures but did *not* comply with the Act's multi-step approval process. These measures included a water shortage contingency plan, which under certain circumstances required all landowners with developed parcels to obtain a groundwater extraction permit with an extraction allotment. The trial court found in favor of the District, concluding that the Act only required the District to follow the multi-step approval process in adopting its first groundwater management program but not for similar subsequent approvals.

The First District Court of Appeal reversed the trial court. The court first held that the District's authority under the Act to manage groundwater resources includes the authority to impose extraction limitations even if such authority is not expressly set forth in the Act. The court then held that the Act's language requires that all

groundwater management programs or measures must comply with the multi-step approval process, not just the initial program. The court noted that the policy underlying the Act's approval process is to give affected landowners the ability to meaningfully participate in the development and approval of water management programs. As such, the court found that the District's groundwater measures not adopted in compliance with the Act were void and invalid.

Stanford Vina Ranch Co. v. State of California (Cal. At. App. June 18, 2020) __ Cal.Rptr.3d __, 2020 WL 3396269

Summary: The State Water Resources Control Board (Board) has the authority to issue temporary emergency regulations establishing minimum flow requirements and temporary curtailment orders pursuant thereto to protect threatened fish species in furtherance of its constitutional and statutory mandate to prevent the unreasonable use of water.

Discussion: In January 2014, the California governor issued a declaration of state of emergency due to the severe and persistent drought conditions existing in the state. Thereafter, in May 2014 and again in March 2015, the Board adopted temporary emergency regulations setting minimum flow requirements for three creeks tributary to the Sacramento River during periods when certain protected fish species were present in the creeks. The emergency regulations were intended to enable the fish to survive their yearly migration during the drought. Pursuant to the Board's regulations, diversions that threatened to drop the flow of water in these creeks below the minimum flow requirements were declared per se unreasonable and subject to curtailment by the Board. In June and October 2014, and again in April and October 2015, the Board issued curtailment orders for Deer Creek pursuant to the emergency regulations, directing all water right holders in the Deer Creek watershed to immediately cease or reduce diversions to ensure maintenance of the minimum flows set by the emergency regulations.

The Plaintiff irrigation company, Stanford Vina Ranch Company (Stanford Vina), has senior water rights to operate a diversion dam and ditches for agricultural use on Deer Creek. After the second curtailment order, Stanford Vina brought suit against the Board, challenging the Board's adoption of the emergency regulations and issuance of the curtailment orders and arguing, among other things, that the regulations and curtailment orders amounted to a taking of Stanford Vina's water rights without a hearing, that the Board violated the rule of priority in issuing the regulations and curtailment orders, and that the Board misapplied the rule of reasonable use. Citing to the unique circumstances presented by the persistent extreme drought conditions, the trial court entered judgment against Stanford Vina on all causes of action. Stanford Vina appealed.

Citing heavily to and expanding upon *Light v. State Water Resources Control Bd.* (2014) 226 Cal. App. 4th 1463 (*Light*), the Third District Court of Appeal affirmed the trial court. It concluded that adoption of the regulations was within the Board's regulatory authority in furtherance of its constitutional and statutory mandate to prevent the unreasonable use of water consistent with Water Code section 275 and Article X, Section 2 of the California Constitution. Additionally, the Court of Appeal held that the Board's authority to prevent the unreasonable use of water extends to regulation of all water users, including those with riparian and pre-1914 water rights. In holding that the regulations and curtailment orders did not amount to a taking of Stanford Vina's water rights, the Court of Appeal rationalized that Stanford Vina possessed no vested right in the "unreasonable use" of water, i.e., to divert water in contravention of the emergency regulations.

Modesto Irrigation District v. Tanaka (2020) 48 Cal.App.5th 898, reh'g denied (June 3, 2020), review filed (June 16, 2020)

Summary: In analyzing riparian rights in relation to property that was severed from the watercourse through transfer of ownership, the key determining factor is the intention of the parties at the time of the execution of the grant deed transferring title.

Discussion: In 2011, the Modesto Irrigation District (District) initiated this action seeking declaratory and injunctive relief to enjoin the landowner from diverting water from the river for use on a land-locked parcel of

farmland that her great-grandfather acquired pursuant to a 130-year-old deed and that had subdivided from a larger riparian tract. The grant deed expressed the transfer to the present landowner's great-grandfather as follows: "Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof." The trial court admitted and considered extensive extrinsic evidence and entered judgment in favor of the District, declaring that the landowner has no present riparian right to continue diverting water to her farm and enjoined her from making such diversions.

The Third District Court of Appeal reversed, reaffirming the principal that although extrinsic evidence may be properly admitted to interpret a contractual agreement, such evidence cannot be used to provide a meaning to the instrument to which it is not reasonably susceptible. Noting the express language of the grant deed was expansive and used language generally understood to include riparian rights, the court concluded that the grantors intended to transfer the land along with all appurtenant rights to the present landowner's great-grandfather. Because the language of the grant deed did not expressly refer to riparian rights, the court also considered extrinsic evidence. Following a lengthy historical review the use of the land and history of the transfers, the court concluded that the extrinsic evidence, including the grantee having been a farmer who sought to farm the land and could not do so without water, supported the court's conclusion that the broad language of the deed reflected an intent to transfer the riparian rights along with the property.

Delta Stewardship Council Cases (2020) 48 Cal. App. 5th 1014

Summary: The Sacramento-San Joaquin Delta Reform Act of 2009 (Act) delegated authority to the Delta Stewardship Council (Council) to regulate water use of those holding water rights in the Delta, in furtherance of the Council's duty to adopt and implement a legally enforceable Delta Plan, and the Legislature intended for the Council to work and coordinate its actions with all agencies having responsibilities in the Delta, including the State Water Resources Control Board (Board).

Discussion: After the adoption of the Council's Delta Plan in 2013, various parties initiated seven lawsuits challenging, in part, the validity of, and seeking to set aside, the Delta Plan and Delta Plan regulations. The federal and state water contractors (Water Contractors) were among the parties challenging the Delta Plan and its regulations, partly arguing that the Delta Plan's Water Resources Policy 1 (23 Cal. Code Regs. § 5003) (WR P1) is unlawful because it exceeds the Council's regulatory authority under the Act by impermissibly regulating water rights. WR P1 prohibits the export, transfer, or use of water in the Delta if all of the criteria listed in the regulation apply, including failure of the export recipient to adequately contribute to reduced reliance on the Delta and improved regional self-reliance consistent with the regulation. The trial court rejected this and nearly all of the other legal challenges made by the Water Contractors based on violations of the Act, but found certain statutory violations, and thus vacated and set aside the Delta Plan and applicable regulations and ordered the Council to correct the identified deficiencies. Timely appeals were filed. While the appeals were pending, the Council adopted amendments to the Delta Plan (Delta Plan Amendments).

In regards to WR P1, the Third District Court of Appeal rejected the Water Contractor's contention that the regulation is unlawful, concluding that the Legislature's delegation of authority to the Council under the Act includes the authority to regulate water use by those holding water rights. The Court of Appeal found this authority to be in furtherance of the Council's duty to adopt and implement a legally enforceable Delta Plan that furthers the coequal goals for the Delta, which include improving statewide water supply reliability, and protecting and restoring a vibrant and healthy Delta ecosystem, in a manner that preserves, protects and enhances the unique agricultural, cultural, and recreational characteristics of the Delta. The Court of Appeal explained that the Council's regulatory authority over water use is limited under the Act to state and local land use actions that qualify as covered actions (which are geographically limited plans, programs, or projects that will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh). The Court of Appeal rationalized that the statutory language of the Act is clear and unambiguous; the Legislature intended an overlap in regulatory authority between the Council and Board, and

directs the Council to coordinate its actions with all agencies having responsibilities in the Delta, including the Board.

Clean Water Act and California Porter-Cologne Act

County of Maui v. Hawaii Wildlife Fund (2020) 140 S.Ct. 1462 48 Cal.App.5th 898

Pacific Coast Federation of Fishermen's Assns v. Glaser (9th Cir. 2019) 945 F.3d 1076

Summary: Defendants operating agricultural drainage systems in California's Central Valley had the burden to demonstrate that the Clean Water Act permitting exception for "discharges composed entirely of return flows from irrigated agriculture" covered their discharges, and the district court improperly interpreted the term "entirely" to mean "majority."

Discussion: The U.S. Bureau of Reclamation and San Luis & Delta Mendota Water Authority jointly administer the Grasslands Bypass Project (the Project). The Project is a drainage system consisting of a network of perforated drain laterals underlying farmlands in the Central Valley. The Project catches contaminated irrigation runoff and discharges it into surrounding navigable waters. Plaintiffs, a group of commercial fishermen, recreationists, biologists, and conservation organizations, filed a lawsuit alleging that the Project violates the National Pollutant Discharge Elimination System (NPDES) permitting requirement of the Clean Water Act (CWA) (33 U.S.C. § 1251 et seq.) by discharging pollutants without a permit.

According to the Ninth Circuit, Congress intended for the permitting exception for "discharges composed entirely of return flows from irrigated agriculture" (33 U.S.C. § 1342(l)(1)) to be defined broadly. According to the legislative history, farmers relying on irrigation are to be treated equally with those relying on rainfall. Accordingly, all discharges related to crop production are exempt from the permitting requirement.

The district court granted partial summary judgment, striking three theories of liability because Plaintiffs failed to provide evidence showing that discharges stemmed from activities unrelated to crop production. Only one claim remained, regarding discharges from lands underlying a solar project (the Vega Claim). Plaintiffs agreed to dismiss the Vega Claim in light of the court's ruling that the NPDES permitting exemption applies unless a "majority of the total commingled discharge" is unrelated to crop production. It was undisputed that discharges from the Vega Claim do not make up a "majority" of the Project's discharges.

The Ninth Circuit reversed, holding that the district court incorrectly placed the burden on Plaintiffs. After a plaintiff establishes the elements of a CWA violation, the burden shifts to the defendant to demonstrate applicability of an exception. Defendants – not Plaintiffs – had the burden of establishing that the Project's discharges were "composed entirely of return flows from irrigated agriculture" under section 1342(l)(1). Accordingly, defendants ought to have been required to demonstrate that the discharges at issue were composed entirely of irrigation return flows.

The district court also erred by holding that section 1342(l)(1) applies unless a "majority of the total commingled discharge" is unrelated to crop production. The Ninth Circuit reasoned that Congress intended for discharges that include return flows from activities unrelated to crop production to be excluded from the statutory exception. The district court's erroneous interpretation of the word "entirely" to mean "majority" caused Plaintiffs to dismiss their Vega Claim unnecessarily.

Columbia Riverkeeper v. Wheeler (9th Cir. 2019) 944 F.3d 1204

Summary: The constructive submission doctrine, which provides that if a state does not submit a total maximum daily load for an impaired water body then the Environmental Protection Agency is required to create its own, can apply to individual TMDLs if a state fails to act for a prolonged period of time.

Discussion: Clean Water Act section 1313 requires states to identify "impaired waters," in which there is a high quantity of specific pollutants or conditions, such as temperature, and submit a ranked list to the Environmental Protection Agency (EPA). States are then required to submit a total maximum daily load (TMDL) for each pollutant for each impaired water. If EPA rejects the TMDL, it is required within thirty days to submit its own TMDL for the water body. Previous cases had held that if a state fails to submit its TMDL, then it is constructively submitting no TMDL, triggering EPA's duty to create its own TMDL for the state.

The Columbia and Snake Rivers, in Washington and Oregon, have multiple species of salmon and steelhead trout whose populations are threatened by temperatures over 68° F. Due to a number of point sources discharging into the Columbia and Snake Rivers, their temperatures were frequently over 68° F, leading Washington and Oregon to list the rivers as impaired waters. In 2001, Washington and Oregon entered into a Memorandum of Agreement with EPA whereby EPA would create the temperature TMDL for the Columbia and Snake Rivers. After a draft temperature TMDL was submitted in 2003, neither EPA nor the states took further action. Plaintiff environmental groups (Plaintiffs) filed a citizen suit under the Clean Water Act, asking the court to find that Oregon and Washington had constructively submitted no TMDL for the rivers due to the amount of time that had elapsed since they were listed as impaired waters. That finding would trigger EPA's requirement to create its own TMDL within thirty days.

The Ninth Circuit affirmed the district court's order granting summary judgment for Plaintiffs. While the court recognized that its previous decisions had focused on states not submitting TMDLs for the entire state, it held that the same concepts support application of the constructive submission doctrine to individual TMDLs. It focused primarily on the nondiscretionary language of section 1313 of the Clean Water Act for both states and EPA, as well as the fact that allowing states to choose not to submit a specific TMDL would defeat the purpose of the entire TMDL program. The court also clarified that this ruling does not impact the ability of states to prioritize particular TMDLs. It distinguished the circumstances by clarifying that the constructive submission doctrine applies to individual TMDLs when a state has failed to develop a TMDL and has failed to develop a plan to create the TMDL over a prolonged period of time.

County of Butte v. Department of Water Resources (2019) 39 Cal.App.5th 708, review granted Dec. 11, 2019, S258574

Summary: A lawsuit challenging the environmental predicate to a water quality certificate, issued under the Clean Water Act in connection with an application for federal relicensing of a hydroelectric dam, cannot go forward in state court due to federal preemption, and the certificate conditions cannot be challenged until their implementation following issuance of a federal license.

Discussion: The Federal Energy Regulatory Commission (FERC) requires that every application for a federal hydropower license that may result in the discharge of pollutants must provide a water quality certificate (Certificate) issued pursuant to Section 401 (33 U.S.C. § 1341) of the Clean Water Act (CWA) (33 U.S.C. § 1251 et seq.) certifying that the proposed project will comply with the CWA, including state water quality standards. In California under the Porter-Cologne Act (Water Code § 13160 et seq.), the State Water Resources Control Board (SWRCB) is responsible for the certification decision. SWRCB must comply with the California Environmental Quality Act (CEQA) before issuing the Certificate.

The Department of Water Resources (DWR) applied to FERC to extend its federal license to operate Oroville Dam as a hydroelectric facility. SWRCB issued a CEQA document for its pending certification decision, and plaintiffs sued. The trial court dismissed the complaint, and plaintiffs appealed.

In an earlier opinion issued in December 2018, the Third District Court of Appeal held that the due to federal preemption under the Federal Power Act (FPA) (16 U.S.C. § 791a et seq.) jurisdiction to review the matter lies with FERC, not in the state courts. Although state court review of the Certificate is the one exception to federal preemption during FERC relicensing, plaintiffs cannot challenge the Certificate because it did not exist when this action was filed, and they cannot challenge the

physical changes made by the SWRCB in the Certificate until their implementation following issuance of a federal license. Thus, plaintiffs failed to tender a state law question reviewable in state court. The court dismissed the appeal.

Plaintiffs petitioned for review in the California Supreme Court, review was granted, and in April 2019 the matter was transferred back to the Third District with directions to reconsider the case in light of *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal. 5th 677 (*Eel River*). In the present opinion, the Third District reviewed *Eel River*, as directed by the Supreme Court, and held that it is distinguishable and does not apply in this case. The Interstate Commerce Commission Termination Act of 1995 (ICCTA) (49 U.S.C. § 10706 et seq.), not the FPA, was at issue in *Eel River*. The court reasoned that the issue in *Eel River* was whether the ICCTA preempted the application of CEQA to a railroad authority project. The State Legislature had created the railroad authority and empowered it to operate a railroad. The Supreme Court found the purpose of the ICCTA was deregulatory (unlike the FPA), and the state as the owner of the railroad was granted autonomy to apply its environmental law. For that reason, the federal law did not preempt the application of CEQA. In contrast, the FPA occupies the field of regulating hydropower projects, and Congress' intent to preempt state law is unmistakably clear. In light of this opinion, the Third District once again dismissed the appeal.

Plaintiffs petitioned once again for review in the California Supreme Court. In December 2019, the Supreme Court granted review to consider the following questions: (1) To what extent does the FPA preempt application of CEQA when the state is acting on its own behalf, and exercising its discretion, in deciding to pursue licensing for a hydroelectric dam project? (2) Does the FPA preempt state court challenges to an environmental impact report prepared under CEQA to comply with the Certification?

Barclay Hollander Corp. v. Cal. Regional Water Quality Control Bd. (2019) 38 Cal. App.5th 479

Summary: Regional Water Quality Control Board correctly determined that the California Administrative Procedure Act did not apply to its determination to include Plaintiff in its revised Cleanup and Abatement Order, and the comment and review procedures provided by the Water Board were sufficient to provide due process.

Discussion: In 1966, Plaintiff purchased land from Shell Oil Company (Shell) for a residential subdivision. In modifying the land to prepare it for development, Plaintiff took actions including breaking up concrete reservoirs, ripping up reservoir floors, and moving soil. In 2008, the Los Angeles Regional Water Quality Control Board (RWQCB) learned that the soil and groundwater under the land was potentially contaminated and ordered Shell to investigate. After the investigation, the RWQCB determined Shell was a discharger under Water Code section 13304 and issued a Cleanup and Abatement Order (CAO). Section 13304 is part of the Porter-Cologne Act and provides that Water Boards may issue orders mandating cleanup and abatement of waste by anyone who has, is, or will discharge waste into waters of the state.

In 2011, the RWQCB determined that Plaintiff was also a potential discharger and thus jointly and severally liable for the cleanup costs. In 2013, the RWQCB issued a draft revised CAO (RCAO) including Plaintiff as a responsible party. Plaintiff filed multiple comments in response. On December 24, 2014, Plaintiff for the first time asked for a formal hearing. Plaintiff then filed another comment. The RWQCB declined to provide a formal hearing, based in part on the quantity of commentary and evidence already provided by Plaintiff. The RWQCB then finalized its RCAO including Plaintiff as a discharger.

Plaintiff then sued on the basis that the RWQCB did not follow the due process and procedural requirements of the California Administrative Procedure Act (APA). The Second District Court of Appeals affirmed the trial court's order upholding the RWQCB's decision. The opinion focused on the fact that the APA's hearing procedures only apply when the APA is made applicable to those proceedings. Plaintiff did not cite, and the court could not find, any part of the Water Code that applied those provisions of the APA to an RCAO. Instead, the RWQCB properly followed Water Code section 13267, which authorizes a Water Board to investigate threats to the waters of the state. Additionally, Plaintiff waived the

opportunity to proceed more formally by waiting over a year to make a request for a formal hearing. The court also disposed of Plaintiff's due process claims. It found that the time lapse between the initiation of the proceedings and the due process claim meant Plaintiff had waived any due process claim. By providing multiple opportunities for Plaintiff to comment on the proposal, the RWQCB had provided sufficient due process.

United Artists Theatre Cir., Inc. v. Cal. Regional Water Quality Control Bd. (2019) 42 Cal.App.5th 851

Summary: The term "permitted" in Water Code section 13304 of the Porter-Cologne Act is ambiguous under the terms of the statute, and the court interpreted it as whether a lessor "knew or should have known that a lessee's activity created a reasonable possibility of discharge into waters of the state of wastes that could create or threaten to create a condition of pollution or nuisance."

Discussion: Water Code section 13304 provides that a Regional Water Quality Control Board (RWQCB) may include in its abatement and cleanup orders a person who has permitted waste to be discharged into waters of the state that causes or threatens to cause a condition of pollution. The term "permitted" is not defined in the statute and had not been interpreted in prior case law as to the extent of knowledge required by a party to be deemed as having "permitted" the discharge.

Plaintiff owned property and leased part of it to a dry cleaner that used perchlorethylene (PCE) as a cleaning solvent. The dry cleaner's activities polluted local groundwater and the RWQCB issued a section 13304 cleanup and abatement order to both the dry cleaner and Plaintiff. Plaintiff challenged the CAO in part because it did not have actual or constructive knowledge of any discharge. The trial court entered judgment for Plaintiff, holding that the term "permitted" was ambiguous, and interpreted it as requiring "actual or constructive knowledge of either a specific discharge or of a dangerous condition that poses a reasonable suggestion of a discharge at the site."

The First District Court of Appeals reversed the trial court's decision and remanded the case with instructions to apply a different interpretation of "permitted." While the appellate court agreed that "permitted" was ambiguous, it disagreed with the trial court's requirement of actual or constructive knowledge. Looking at legislative history, case law, and other State Water Resources Control Board decisions, the court little guidance on how to interpret "permitted," but that these authorities supported a broader interpretation while still requiring evidence of awareness. Moreover, interpreting "permitted" broadly helps accomplish the objective of the Porter-Cologne Act to conserve water resources and protect them from degradation by expanding liability and increasing the likelihood that someone who profited from pollution will bear the cleanup costs. Thus, the proper interpretation of "permitted" requires that Plaintiff "knew or should have known that a lessee's activity created a reasonable possibility of discharge into waters of the state of wastes that could create or threaten to create a condition of pollution or nuisance."

Tesoro Refining & Marketing Co. LLC v. L.A. Regional Water Quality Control Bd. (2019) 42 Cal.App.5th 453

Summary: The State Water Resources Control Board's definition of "discharged" in Water Code section 13304 of the Porter-Cologne Act includes continuous waste discharges from a source, rather than just the initial contaminating event, was correct.

Discussion: Under Water Code section 13304, Regional Water Quality Control Boards can issue cleanup and abatement orders (CAO) to anyone who has discharged waste into waters of the state. Courts had not previously ruled on whether "discharged" pertains only the initial contaminating event of waste discharge, or whether it includes discharges that continue to occur after the initial event until it is stopped. The State Water Resources Control Board (State Board) had a long-standing policy adopting the latter position.

The Los Angeles Regional Water Quality Control Board (Regional Board) issued a CAO to Plaintiff based on benzene, and other petroleum hydrocarbons, found in the soil and groundwater near Plaintiff's pipelines. Through the administrative process with the Regional Board, Plaintiff's primary objection was that it was not responsible for

the discharge that caused the contamination. After the Regional Board finalized its decision, Plaintiff petitioned the State Board, claiming for the first time that if any "discharge" occurred, it occurred before 1970. Since the Porter-Cologne Act was not passed until 1970, to the discharge was an improper retroactive application of the statute. Plaintiff's argument centered on the idea that a "discharge" occurs at a fixed point in time, such that there is one "discharge." The State Board took no action, and Plaintiff's petition was deemed denied. Plaintiff filed a writ of mandate challenging the denial and raised similar arguments. The Regional Board responded that "discharge" includes ongoing waste discharges from the source that continue to impact or threaten groundwater. The trial court applied the Regional Board's interpretation of "discharge" and entered a judgment in its favor.

The Second District Court of Appeals affirmed the trial court's decision and held that "discharged" in section 13304 includes continuous waste discharges. Although Plaintiff did not raise the retroactivity issue with the Regional Board, the court held that the failure to raise the argument did not constitute a failure to exhaust administrative remedies. This was because the State Board had a long-standing interpretation of "discharged" that aligned with the Regional Board's interpretation in this case, and thus raising the retroactivity argument would have been futile. Moreover, the State Board's longstanding interpretation made judicial deference to that interpretation appropriate. The court also held that interpreting "discharged" to include ongoing emissions helps best attain the legislative purpose of the Porter-Cologne Act to protect the state's waters.

Endangered Species Act

Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs
(9th Cir. 2019) 932 F.3d 843

Summary: The Ninth Circuit affirmed the district court's dismissal of a case brought against various federal agencies alleging violations under the Endangered Species Act and the National Environmental Policy Act for approving mining and power plant activities on tribal land because a corporation wholly owned by an Indian tribe was a necessary party that could not be feasibly joined due to tribal sovereign immunity.

Discussion: A coalition of conservation organizations (Plaintiffs) sued the Bureau of Indian Affairs (BIA), as well as several other federal agencies, including the U.S. Fish and Wildlife Service (FWS) (Federal Defendants) after Federal Defendants approved permits for mining and power plant activities to continue on Navajo Nation land.

Plaintiffs alleged violations of the Endangered Species Act (ESA) (16 U.S.C. § 1531 et seq.) and the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 et seq.). Specifically, Plaintiffs argued that the biological opinion issued by U.S. Fish and Wildlife Service (FWS) violated the ESA, and the other Federal Defendants violated the ESA by relying on it. Plaintiffs also argued that Federal Defendants violated NEPA because the statement of purpose and need for the project in the Environmental Impact Statement was unlawfully narrow, the Federal Defendants did not consider reasonable alternatives, and failed to take the requisite "hard look" at mining impacts.

The Navajo Transitional Energy Company (NTEC), which was organized under Navajo law and formed so that the Navajo Nation could purchase the mine, intervened and moved to dismiss the case, arguing it was a necessary party that could not be joined. The district court granted the motion to dismiss, which the Ninth Circuit Court of Appeals upheld.

If the Plaintiffs succeeded, it would retroactively affect approvals for mining operations. As a result, the mine would not be able to operate and the Navajo Nation would lose a key source of revenue and the financial investments it had already made. Therefore, the Ninth Circuit held that NTEC had a protected interest, finding that no other party to the litigation could adequately represent NTEC's interests in ensuring that mine and power plant operations continued. The Ninth Circuit also concluded that NTEC shared the Navajo Nation's tribal immunity and therefore, NTEC could not be feasibly joined.

The Ninth Circuit weighed whether the action should proceed in equity. The court considered the Federal Rule of Civil Procedure 19(b) factors that, generally, evaluate

if a judgment rendered without a necessary party would prejudice that party, and if there is any way to lessen or avoid that prejudice. The Ninth Circuit held that the factors weighed in favor of dismissing the suit.

The Ninth Circuit considered whether the public rights exception would allow the case to continue without NTEC. The public rights exception allows a case to proceed if the matter seeks to vindicate a public right as long as it will not destroy an absent parties' rights. The Ninth Circuit was unwilling to apply the exception since the suit threatened to destroy NTEC's legal entitlements.

Defenders of Wildlife v. U.S. Dept. of the Interior (4th Cir. 2019) 931 F.3d 339

Summary: The U.S. Fish and Wildlife Service's determination that a proposed pipeline would not jeopardize the continued existence of certain endangered species was arbitrary and capricious because it did not rely on the best available data and it failed to establish enforceable take limits.

Discussion: In 2017, the U.S. Fish and Wildlife Service (FWS) issued a Biological Opinion (BiOp) and Incidental Take Statement (ITS) in connection with the proposed Atlantic Coast Pipeline, which will transport natural gas from West Virginia to Virginia to North Carolina. In 2018, after the Fourth Circuit Court of Appeals vacated the BiOp and ITS, the FWS issued a new BiOp and Statement. The 2018 BiOp concluded that the pipeline will not jeopardize the continued existence of four endangered and threatened species: the rusty patched bumblebee (RPBB), the clubshell, the Indiana bat, or the Madison Cave isopod. Petitioners sought review, challenging the BiOp's no-jeopardy conclusion for the RPBB and the clubshell and the take limits for the Indiana bat and the Madison Cave isopod.

The Endangered Species Act (ESA) (16 U.S.C.S. § 1536) prohibits federal agencies from engaging in any action likely to jeopardize the continued existence of any endangered or threatened species. The ESA requires that the FWS determine whether a proposed action reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species (50 C.F.R. § 402.02). In fulfilling this requirement, ESA section 7(a)(2) requires agencies to use the best scientific and commercial data available. If an agency concludes that a proposed project is not likely to jeopardize the continued existence of a listed species, but will result in a take of some members of that species, under section 7(b)(4) it must issue a valid ITS setting enforceable limits on the quantity that may be taken.

The Fourth Circuit held that FWS's conclusion that the pipeline will not jeopardize the RPBB was arbitrary and capricious. To determine the number of RPBB likely to be impacted by the pipeline, the FWS made population estimates based on surveys of other bee species. First, the court found that FWS provided no reasonable explanation for its reliance on this data and ignored evidence that the bee species in the surveys were not reliable comparators to the RPBB. Next, it found that the FWS's no-jeopardy conclusion was at odds with the agency's own evidence of the importance of the bees likely to be killed by the pipeline construction to RPBB survival. Third, the opinion failed to consider the overall status of the RPBB and the pipeline's impact on the species' recovery.

With regard to the clubshell, the Fourth Circuit agreed with Petitioners that FWS acted arbitrarily and capriciously. The BiOp arbitrarily concluded that a clubshell population likely to be impacted by the pipeline construction was not relevant in the jeopardy analysis because it was not naturally reproductive. Additionally, FWS relied on data that was out of date, and ignored more recent data.

Finally, the agency's ITS failed to create enforceable take limits for the Indiana bat and the Madison Cave isopod. Specifically, FWS used habitat surrogates without establishing a causal link between the surrogates and the take of the species. The ITS also arbitrarily dismissed significant causes of take.

California v. Bernhardt (N.D.Cal. 2020) ___ F.Supp.3d ___, 2020 WL 3097091

Summary: When asserting that regulatory amendments violate the ESA, environmental plaintiffs need only allege an increased risk of future environmental injury to establish injury-in-fact necessary for standing. For claims of ESA procedural violations, environmental plaintiffs

must allege that they will suffer harm by virtue of their geographic proximity to and use of areas that will be affected by the challenged agency actions to establish injury-in-fact sufficient for standing.

Discussion: In 2018, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the Services), issued three revisions (Final Rules) to the implementing regulations in the Endangered Species Act (ESA) (16 U.S.C. § 1531 et seq.), in accordance with Executive Order 13777 directing federal agencies to eliminate allegedly unnecessary regulatory burdens. The following year, California, 20 other states and cities (State Plaintiffs) sued the U.S. Secretary of the Interior, the Secretary of Commerce and the Services (Federal Defendants), alleging that the Final Rules undermined key substantive and procedural requirements of the ESA. Federal Defendants moved to dismiss the State Plaintiffs' First Amended Complaint (FAC) for lack of jurisdiction, arguing that the State Plaintiffs lacked Article III standing and that their claims were not ripe. The district court denied the motion finding that the State Plaintiffs alleged sufficient facts in the FAC to invoke federal jurisdiction.

The court denied the motion to dismiss, concluding that the allegations in the FAC were sufficient to establish injury-in-fact, causation, and redressability for both the substantive and procedural claims. The court found that the State Plaintiffs alleged specifically how the Final Rules caused concrete and particularized injuries. For example, the State Plaintiffs alleged that the Final Rules undermined the requirements of the ESA by injecting economic considerations, and eliminating the so-called "Blanket Rule," which by default extends all protections afforded to endangered species to threatened species. The State Plaintiffs' further allegations that the Final Rules would result in loss of biological diversity and diminish natural resources were sufficient to establish injury-in-fact. The court expressly rejected Federal Defendants' argument that the alleged harms were speculative and conjectural, holding that "an increased risk of future environmental injury constitutes injury-in-fact for purposes of standing." Accordingly, plaintiffs need not show that every application of the regulations will harm them, or wait until they are injured by application of the regulation to file suit.

The State Plaintiffs also alleged various procedural violations related to the adoption of the Final Rules pursuant to the National Environmental Policy Act and the Administrative Procedure Act. The State Plaintiffs adequately alleged that they would suffer harm by virtue of their geographic proximity to and use of areas that will be affected by the challenged agency actions. The court held that the "enhanced risk" of biodiversity loss to the State Plaintiffs' fish and wildlife natural resources as a result of the Final Rules, was sufficient to establish injury-in-fact and causation for the procedural claim. Again, the court disagreed that the State Plaintiffs need await injury and assert an as applied challenge. Lastly, the Court held that the State Plaintiffs' allegations of injury-in-fact also satisfied the requirements that their claims be constitutionally ripe.

Center for Environmental Health v. Wheeler (N.D.Cal. 2019) 429 F.Supp.3d 702

Summary: Plaintiffs' interest in ensuring that pesticide registration will not jeopardize listed species continues until the Environmental Protection Agency and the U.S. Fish and Wildlife Service complete their formal interagency consultation, as required by the Endangered Species Act.

Discussion: Pursuant to Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136 et seq.), pesticides may not be distributed or sold unless registered with the Environmental Protection Agency (EPA). As part of the registration process, EPA must consult with the U.S. Fish and Wildlife Service (FWS) because registration of pesticides constitutes a federal agency action subject to the requirements of the ESA (16 U.S.C. § 1531 et seq.).

In 2014, EPA began evaluating the effects of pesticide products containing the active ingredient, malathion, on species listed under the ESA. In 2017, EPA transmitted its biological evaluation to FWS to initiate formal consultation. Originally, EPA and FWS agreed to conclude their consultation and issue a final biological opinion by December 2017. However, in November 2017, and again in October 2018, FWS requested extensions for the consultation period. EPA consented to the extensions such that a draft of the biological opinion

would be issued in April 2020 and a final biological opinion would be issued in March 2021. In May 2018, environmental groups (Plaintiffs) brought an action against the EPA, FWS, and the Secretary of the Interior (Defendants) for violation of ESA section 7(a)(2) for failing to complete the requisite interagency consultation.

Plaintiffs alleged that Defendants violated their procedural duty under ESA section 7(a)(2) when, after concluding that registration will adversely affect listed species, the Defendants neglected to carry out a formal consultation and issue a biological opinion. Consequently, Plaintiffs argued that Defendants violated their substantive duty under section 7(a)(2) to ensure that registration is not likely to jeopardize the continued existence of listed species. The Defendants moved to dismiss the claim for mootness, asserting that since the EPA had initiated consultation, and consultation was still ongoing at the time of the suit, the procedural obligations under the ESA were satisfied. Defendants argued that an order directing EPA to comply with the procedural duties would provide no effective relief to Plaintiffs.

The court concluded that the ESA does not simply require the EPA to *initiate* consultation, but rather, requires EPA *to consult* with FWS. Defendants' procedural duty to consult is not satisfied until the requisite formal consultation process is concluded. Thus, because the consultation was ongoing, Plaintiffs had a continued interest in compelling Defendants' compliance with the ESA. The court held that Plaintiffs' claim was not moot because it could grant various effective relief such as "an order requiring Defendants to complete the consultation by a date certain, an order imposing interim measures or mitigating any harm that may have resulted from the delay, and/or a declaration that Defendants are violating section 7(a)(2) of the ESA."

2 // CEQA/NEPA

CEQA Cases

Union of Medical Marijuana Patients, Inc. v. City of San Diego (2019) 7 Cal.5th 1171

***Summary*:** Adoption of zoning ordinance that authorized establishment of medical marijuana dispensaries, capped the number of dispensaries, and regulated their location and operation, was a "project" that could require environmental review under CEQA.

***Discussion*:** In 2014, the City of San Diego (City) adopted an ordinance regulating medical marijuana dispensaries. The ordinance capped the number of dispensaries within the City, and also regulated the location and operation of those dispensaries. The City found the adoption of the ordinance did not constitute a project under CEQA because it determined the ordinance would not result in a reasonably foreseeable indirect impact on the environment.

Petitioner Union of Medical Marijuana Patients (UMMP) challenged the City's adoption of the ordinance, arguing the City violated CEQA by failing to conduct any environmental review. UMMP argued the amendment of a zoning ordinance is considered a "project" requiring environmental review under Section 21080 of the Public Resources Code, which states CEQA "shall apply to discretionary projects to be proposed or carried out or approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances . . . unless the project is exempt by this decision." UMMP also argued the ordinance fell into the definition of a "project" under Section 21065 of the Public Resources Code, which defines a "project" as an activity that "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."

The trial court denied the petition, finding that the ordinance was not a "project" under CEQA. The court of appeal affirmed.

On review, the Supreme Court first addressed Section 21080. Although Section 21080 includes zoning amendments as an example of "discretionary projects," the Supreme Court rejected UMMP's argument that zoning amendments are discretionary projects as a matter of law. Rather, Section 21080 should be read in conjunction with Section 21065, such that zoning amendments may be considered "projects" reviewable under CEQA only when they "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."

The Supreme Court next evaluated whether the ordinance at issue met this standard. The Court explained that, prior to the enactment of the ordinance, no medical marijuana dispensaries were legally permitted to operate in City. The Court also found the closure of existing stores and the establishment of new stores could cause citywide changes in patterns of vehicle traffic, which was a sufficiently plausible impact to conclude the ordinance may result in a "reasonably foreseeable" change in the environment. The Court thus found the ordinance constituted a "project" under CEQA.

Hollywoodians Encouraging Rental Opportunities (HERO) v. City of Los Angeles (2019) 37 Cal.App.5th 768

***Summary*:** City's Mitigated Negative Declaration was appropriate for project converting vacant apartment building to a boutique hotel using "existing conditions" baseline, and City was not required to complete a full environmental impact report to address cumulative impacts from loss of affordable housing and displacement of tenants, as the property at issue had been vacant for two years prior to the owner's application to the City.

***Discussion*:** In 2009, the owner of an 18-unit apartment received approval from the City of Los Angeles (City) to demolish the structure and replace it with a condominium project. The City prepared and adopted a mitigated negative declaration for the condominium project. However, in early 2014 the developer withdrew the condominium project due to a lack of funding. In the interim, however, the owner filed notice to withdraw the 18 units from rental housing use, pursuant to the Ellis Act, (Govt. Code, § 7060, subd. (a)), which generally prohibits a public entity from compelling a residential real property owner to continue to offer accommodations for rent or lease. The apartment building was completely vacant of renters by October 2013.

Nearly two-years later, in July 2015, the owner filed an application with the City, seeking to convert the building to a 24-room boutique hotel. The City prepared an initial study for the 2015 hotel project, which determined that converting the building to a hotel would have a less than significant impact on population and housing because it would displace no tenants, having been vacated years earlier. In addition, the project was below the City's own adopted minimum threshold of significance consisting of displacement of 25 multi-family units. The City's Zoning Administrator therefore adopted another mitigated negative declaration (MND), and approved various other related applications, which was ultimately upheld and adopted by the City Council on July 1, 2016.

Petitioners sought a writ of mandate contending the City should have prepared an EIR to appropriately analyze the direct, indirect, and cumulative impacts to housing and population from displacing tenants from the former apartment building between 2009 and 2013. The trial court disagreed and upheld the City's MND, holding the environmental baseline comprised of existing conditions, and the building was vacant at the time the initial study was prepared.

On appeal, the court of appeal agreed, and upheld the City's MND. Petitioners argued the City should have prepared an EIR because substantial evidence in the record supported a fair argument that a cumulative environmental effect of approving this project and similar ones would result in the elimination of rent-subsidized housing in Hollywood and a related displacement of tenants. The court, however, held this argument lacked merit because it was founded on the wrong baseline.

The court of appeal noted that the environmental baseline "normally consists of the physical environmental condition in the vicinity of the project, as they exist at the time . . . the environmental analysis is commenced," citing section 15125 of the CEQA Guidelines and the Supreme Court's decision in *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 315.) Relying on the CEQA Guidelines, the court of appeal held that Petitioners' CEQA claim failed because the relevant baseline in 2015 was a vacant building that had already been withdrawn from the residential housing market.

The court of appeal rejected Petitioners' contention that the City's baseline inappropriately assumes that the apartment owner would never re-convert the rent-controlled apartment units, finding this contention was "purely speculative." Without evidence that the owner had backed out of the 2009 condominium project as an attempt to end-run CEQA's requirements, the two projects were considered separate, and the court found the City appropriately used the 2015 baseline with no tenants for its MND.

The City was not required to inquire into the cumulative impact of the Project with respect to population and housing because there was "no substantial evidence that the Project may have an adverse impact on the supply of rent-stabilized housing units in the Hollywood area or on displacement of residents." Since the baseline issue was dispositive, the court of appeal did not consider Petitioners' procedural contentions, nor whether the loss of affordable housing causes substantial adverse effects on human beings within the meaning of CEQA.

The Lake Norconian Club Foundation v. Department of Corrections and Rehabilitation (2019) 39 Cal.App.5th 1044

Summary: an agency's failure to act is not a "project" subject to CEQA review under Section 21065 of the Public Resources Code, even though the agency's inactivity could result in negative environmental consequences.

Discussion: The Lake Norconian Club (the Former Hotel) was an unoccupied and deteriorated structure that served as a luxury hotel during the 1930s. Thereafter, it was used for various other purposes, including a military hospital, a drug rehabilitation center, and administrative offices for the Department of Corrections and Rehabilitation (the Department), which operated prison facility adjacent to the Former Hotel. The Former Hotel was listed on the National Register of Historic Places.

In 2013, the Department circulated an environmental impact report (EIR) that contemplated the closure of the closure of the prison. The EIR, among other things, analyzed the effect of the closure of the prison on the Former Hotel. In 2013, the Department certified the EIR. Thereafter, the Legislature rescinded the closure of the prison; however, the Department found that even though the prison would not be closed, it lacked the funding to repair or rehabilitate the Former Hotel.

The Lake Norconian Club Foundation (Foundation) filed suit, asserting the Department failed to comply with CEQA when it allowed the "demolition by neglect" of the Former Hotel. The Foundation argued the failure to maintain the Former Hotel was "the equivalent of issuing a demolition permit," and was therefore a "project" that was reviewable under CEQA. The trial court agreed that the failure to seek or allocate funding was a "project," but denied the writ petition as barred by the applicable limitations period.

The judgment was affirmed, but on different grounds. The court of appeal disagreed that the alleged "demolition by neglect" constituted a "project" under CEQA. The court explained that the Department did not "directly undertake" any "activity," or otherwise issue any "lease, permit, license, certificate, or other entitlement," as required under Section 21065 of the Public Resources Code's definition of the term "project." The court declined to stretch the definition of "project" beyond the "reasonable scope of the statutory language," and thus agreed with the Department that its "failure to act" was not an "activity" subject to CEQA, even though the inactivity could have adverse environmental effects.

Prior to this decision, no California case had considered whether demolition by neglect or an agency's failure to act would be subject to CEQA compliance. Thus, as support for their decision, the court of appeal analogized to NEPA cases decided by the federal courts, which have repeatedly rejected the argument that inaction amounts to action under federal regulation.

Stopthemillenium.com v. City of Los Angeles (2019) 39 Cal.App.5th 1

***Summary*:** Developer and City prejudicially impaired the public's ability to participate in CEQA by using a flexible "concept plan" project description in draft environmental impact report (EIR) for massive multi-use project which limited construction to "impacts envelope" and massing, height, and other developmental restrictions in a future development agreement without indicating what structures will actually be built.

***Discussion*:** The Millennium Project was to be built in Hollywood using the historic Capital Records and Gogerty buildings as key features. In a detailed 2008 land use application to the City of Los Angeles (City), the project was initially intended to include 492 residential units, a 200-unit luxury hotel, a 35,000 square foot sports club and spa, 100,000 square feet of office space and 34,000 square feet for food and beverage uses. The proposed towers would reach 554 feet above street level, with "post card views." However, the 2008 proposal was withdrawn after City informed the developer that the proposed project would require a variance.

In 2011, the developer submitted another land use application. This time, the proposal was far less detailed, and contemplated a range of future project options. Although "the 2011 proposal shared similarities with the 2008 proposal," the application included no description or detail regarding what [the developer] intended to build. Rather, the 2011 proposal was intended as a "concept plan" which identified various potential uses, and outlined an "impact 'envelope' within which a range of development scenarios can occur."

The EIR analyzed three illustrative scenarios showing what *could* potentially be built under the plan, including a scenario maximizing the amount of housing units, and another maximizing the amount of commercial uses. The

City argued this was appropriate, asserting it was studying the *greatest possible* environmental impacts that could be generated by the Project.

As the court of appeal noted, however, none of the scenarios may actually occur. Because no firm data or numbers were used, "other than being assured that ten viewpoints would be preserved, the public had no idea how many buildings or towers would be built and where they would be located on the project site." Relying on the rule that a "project description" under CEQA must be "accurate, stable and finite," the court found the project description did not describe any project at all. "Rather, it presents different conceptual scenarios that Millennium or future developers may follow for the development of this site." According to the court, the development regulations provided the public and decision makers little by way of actual information. The regulations simply limitws the range of construction choices for possible future developers.

The City argued that, so long as it had analyzed worst-case scenario environmental impacts and appropriately mitigated any significant ones, CEQA's purpose had been satisfied. The court of appeal rejected this argument, explaining that "CEQA's purposes go far beyond evaluating theoretical environmental impacts." Rather, CEQA's purposes include informed decision-making and public participation. If a project description does not include sufficient detail to enable to public to provide meaningful comments, the EIR thwarts these goals, in violation of CEQA.

As a result, the court of appeal found the EIR violated CEQA.

San Diego Navy Broadway Complex Coalition v. California Coastal Commission, et al. (2019) 40 Cal.App.5th 563

***Summary*:** Even though the California Coastal Commission inaccurately informed Petitioner that the San Diego Unified Port District was the project proponent, this fact was insufficient to equitably toll the applicable statute of limitations to seeks relief against a real party in interest where the facts were clear that the City of San Diego and a developer were the true project proponents, and reliance upon the Commission's incorrect statements was unreasonable.

***Discussion*:** The City of San Diego (City) and a private developer (Developer) sought an amendment to the San Diego Unified Port District's (Port) port master plan to facilitate a proposed expansion of the San Diego Convention Center and an adjacent hotel (Project). As part of the Project, the Port circulated an environmental impact report (EIR) for public review.

Thereafter, as required by the California Coastal Act, (Pub. Resources Code, § 30000, *et seq*.), the Port submitted its approved master plan amendment to the California Coastal Commission (Commission) for certification. In October 2013, the Commission certified the amendment as consistent with the Coastal Act, and adopted revised findings in February 2014. Thereafter, the Port itself approved the Project, which was formally accepted by Commission in June 2015.

Petitioner filed its petition in November against the Port and the Commission, alleging violations of the Coastal Act and CEQA. Petitioner subsequently filed two additional actions against the Commission following its February 2014 adoption of revised findings, and June 2015 formal acceptance of the Project. The first two actions were consolidated.

Petitioner initially did not name the City and the Developer as Real Parties in Interest, even though they were the true project proponents, allegedly based on erroneous statements by the Commission that the port was the project proponent. The City and Developer ultimately intervened in 2015, which caused Petitioner to seek to add them to the action as "Doe" defendants. Although the City and Developer contended they were indispensable parties, and not timely named, the trial court found the Doe amendments were proper because Petitioner was genuinely ignorant of them being the correct real parties in interest. Eventually, the matter proceeded to the merits, and the petition was denied. Petitioner appealed, and the City and Developer cross-appealed on whether they were timely named as parties to the action.

The court of appeal affirmed the judgment, but on different grounds. The court rejected Petitioner's argument that the limitations period was equitably tolled, finding the Petitioner was not justified in relying on Commission's erroneous admission in its response to the petition that Port was the project proponent. The court explained that developers are generally indispensable parties to lawsuits challenging decisions concerning whether a developer's project can proceed. The court also noted that the Port disagreed with the Commission's characterization of the Port as the project proponent, and that "no reasonable trier of fact" could conclude that the Petitioner "was genuinely ignorant of the" roles of the City and Developer in this case. Based on these facts, the court found the equitable tolling doctrine did not apply, and thus affirmed the judgment against Petitioner.

Chico Advocates for a Responsible Economy v. City of Chico (2019) 40 Cal. App.5th 839

Summary: Impacts of a supercenter on "close and convenient shopping" are social and economic impacts not cognizable under CEQA, and a battle of the experts on appropriate methodologies and the issue of whether the project would result in urban decay is insufficient to overturn a the City's findings on potential urban decay.

Discussion: In 2015, Walmart proposed a supercenter (Project) in the City of Chico (City), resulting in the preparation and circulation of an environmental impact report (EIR). The EIR contained a lengthy analysis discussing the Project's potential to cause urban decay, which was supported by a study that concluded the Project would not cause severe economic effects that could lead to urban decay. The City voted to certify the EIR and approv the Project. Chico Advocates for a Responsible Economy ("CARE") filed a petition for writ of mandate challenging the City's approval of the Project. The trial court denied the petition, and CARE appealed.

On appeal, CARE argued the City's urban decay analysis was insufficient for two reasons. CARE first claimed the EIR adopted an "unnaturally constrained definition of urban decay" that failed to take in to account the loss of close and convenient shopping as an environmental impact. CARE also argued the EIR's findings regarding urban decay were not supported by substantial evidence.

The court of appeal first held that potential loss of close and convenient shopping is not an environmental issue that must be reviewed under CEQA. Rather, this is a social or economic impact that is not cognizable under CEQA. The court also examined the City's threshold of significance for urban decay was supported by substantial evidence and was consistent with definitions approved in other cases, such as *Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677, 685.

The court of appeal also found the City's urban decay analysis was supported by substantial evidence, and that CARE's criticisms all amounted to "nothing more than a disagreement among experts regarding the proper methodology and underlying data." Such disagreement among experts is insufficient to overturn an agency's findings regarding an EIR. As such, the court affirmed the judgment in favor of the City.

Maacama Watershed Alliance, et al v. County of Sonoma, et al. (2019) 40 Cal. App.5th 1007

Summary: Challenge to mitigated negative declaration for the construction and operation of a proposed winery rejected where petitioners were unable to proffer evidence to support a fair argument that the proposed winery would have a significant environmental effect.

Discussion: The County of Sonoma (County) adopted a mitigated negative declaration (MND) and approved a use permit for the construction and operation of a winery and tasting room (Project) in a rural part of County. Several technical reports were prepared to support the MND, including reports on geological, groundwater, wastewater and biological resources. After the County approved the Project, Maacama Watershed Alliance and Friends of Spencer Lane (Petitioners) sought judicial review of the County's decision, arguing the County should have prepared an environmental impact report (EIR) for the construction of the winery.

The court of appeal affirmed the trial court's denial of the writ petition. To determine whether an EIR was necessary,

the court applied the "fair argument" standard, which requires a court to determine whether there is substantial evidence in the record that a fair argument can be made that the project may cause a significant environmental impact.

The court of appeal found Petitioners' arguments concerning the geology and potential erosion impacts to be unpersuasive. Although the experts criticized the "data, findings, and conclusions of the county's consultants," those experts did "not provide evidence that the project is reasonably likely to cause landslides or otherwise generate harmful releases of debris." As such, the court found the expert reports offered mere "speculation and unsubstantiated expert opinion" that did not constitute "substantial evidence" of a "fair argument" that a potentially significant environmental effect would occur.

The court of appeal also found Petitioners' groundwater argument unpersuasive because measures had already been taken to mitigate water level concerns, and the winery agreed to ensure that there would be no net increase in groundwater use. Petitioners also failed to provide substantial evidence that the Project would have any significant aesthetic impacts being located in a rural part of the county in the middle of an 86 acre parcel of land. The court likewise found substantial evidence did not support the need for additional fire protection services, such that a significant environmental impact would occur and require additional mitigation.

Holden v. City of San Diego (2019) 43 Cal. App.5th 404

Summary: Although a residential development project did not conform exactly with the density recommendations in the City's General Plan, the City could rely upon a Class 32 Categorical Exemption for infill projects, which requires consistency with the lead agency's General Plan, where the City cited competing environmental interests that militated toward a lower density.

Discussion: Idea Enterprise, LP (IDEA) submitted an application City of San Diego (City) for the demolition of two existing single-family houses on adjacent parcels and construction of seven detached residential condominium units (Project). The Project area comprised of the western hillside of a canyon with a 35- to 41-degree downslope, with a range of sensitive environmental resources. City staff initially informed IDEA that the Project did not comply with the minimum density required under the City's General Plan and the Greater North Park Community Plan (the Plans). The Plans included minimum density requirements of 30-44 units/acre. However, City staff subsequently informed IDEA that the Project may be approved with seven residential units (on a site approximately a half-acre in size) due to the site's environmental sensitivity, and the fact that lower density was more protective of the environment.

The City found the Project was exempt from review under CEQA because it qualified as an infill development project pursuant to Section 15332 of the CEQA Guidelines (Class 32 Categorical Exemption). Holden, the project opponent, argued the exemption did not apply because the Project was inconsistent with the Plans, contrary to Section 15332, which requires that the Project "is consistent with . . . all applicable general plan policies as well as with applicable zoning designation and regulations." The trial court denied Holden's writ petition, and the court of appeal affirmed.

The court of appeal found that substantial evidence supported the City's exemption. The court explained that courts afford agencies great deference with respect to an agency's findings of consistency concerning its own general plan. The court found that the density provisions in the Plans were merely recommendations, and not mandates providing rigid density ranges for the development of property. The court deferred to the City's weighing of competing interests, and its finding that the heavily vegetated urban canyon and environmentally sensitive steep hillsides militated in favor of lower densities.

The court of appeal thus found that the City acted reasonably and did not abuse its discretion by "balancing those competing, and necessarily conflicting, policies and regulations" and finding the Project's density of seven dwelling units conformed to the Plans and the City's steep hillside development regulations. As such, the court affirmed the City's reliance on Section 15332 and the Class 32 exemption.

Citizens for Positive Growth & Preservation v. City of Sacramento (2019) 43 Cal.App.5th 609

Summary: City was not required to perform "level of service" analysis to determine whether transportation impacts would occur, due to new legislation stating automobile congestion and delay could no longer be considered significant environmental impacts under CEQA.

Discussion: The City of Sacramento (City) initiated an update to its General Plan (2035 General Plan), in which the City sought to change the method of evaluating traffic impacts from assessing automobile delay and congestion—using a methodology called "Level of Service," or "LOS"—to assessing increases in Vehicle Miles Traveled (VMT). The City prepared an environmental impact report (EIR) for the 2035 General Plan, which found the potential impact to traffic flow to be less than significant. The EIR did not recommend the adoption of any mitigation measures.

Citizens for Positive Growth & Preservation (Citizens) filed suit, arguing the City violated CEQA. The trial court denied the petition, and Citizens appealed.

On appeal, Citizens argued the City was required to evaluate automobile congestion and delay (*i.e.*, LOS). The court of appeal, however, noted that Section 21099(b)(2) of the Public Resources Code—which was adopted as part of the S.B. 732 legislation—provided that "[u]pon certification of" implementing guidelines "by the Secretary of the Natural Resources Agency pursuant to this section, automobile delay, as described solely by level of service or similar measures of vehicular capacity or traffic congestion, shall not be considered a significant impact on the environment" under CEQA. Because the Secretary adopted the implementing guideline—Section 15064.3 of the CEQA Guidelines—in December 2018, and mandamus actions are reviewed on appeal according to the law at the time an action is heard on appeal, the court rejected Citizen's argument that an LOS analysis should have been performed.

Citizens alternatively argued on appeal that a VMT analysis should have been performed. The court of appeal, however, explained that the requirement to assess VMT does not become effective until July 1, 2020. As such, the City was not required to perform an analysis of VMT when it considered the 2035 General Plan.

Russel Covington v. Great Basin Unified Air Pollution Control District (2019) 43 Cal. App.5th 867

Summary: District's estimation of maximum amount of emissions for geothermal plant was upheld where the project was conditioned on that maximum amount, and adequate measures were put in place to monitor the emissions. The EIR, however, was invalidated because the District failed to consider potentially feasible mitigation proposed by Petitioners to lessen significant and unavoidable air quality impacts.

Discussion: Laborers' International Union of North America Local Union No. 783 and certain individual members (Petitioners) challenged the Great Basin Unified Air Pollution Control District's (District) approval of a geothermal energy power plant on national forest land (Project) adjacent to several other geothermal power facilities. The District, along with the Bureau of Land Management and the United States Forest Service, prepared a joint environmental impact report/environmental impact statement (EIR) to comply with both CEQA and NEPA.

The EIR estimated that the Project would result in fugitive emissions of reactive organic gases (ROG) of up to 410 pounds per day, which was greater than the District's adopted threshold of significance for ROG of 55 pounds per day.

Petitioners first argued that substantial evidence did not support the finding that the Project would only result in 410 pounds of ROG emissions per day. The court of appeal found this was immaterial because the Project was conditioned upon a 410 pound per day limit of ROG emissions, and there were adequate measures in place for detecting and reporting emissions and for enforcing emission limits.

Petitioners also took issue with the District's finding that air quality impacts would be significant and unavoidable, asserting that this required the District to adopt additional

mitigation. Specifically, Petitioners asserted feasible mitigation measures were available, and the District abused its discretion by failing to adopt those measures. Petitioners presented two potential mitigation measures in their public comments on the EIR. The District, however, did not adequately respond to these comments, or explain why the proposed measures were infeasible. As such, the court of appeal found the District failed to provide a good faith reasoned analysis for not adopting the mitigation measures, and violated CEQA by failing to do so.

Petitioners also argued the County of Mono (County), and not the District, was the proper lead agency because it was the "agency with general governmental powers . . . rather than an agency with a single or limited purpose such as an air control district . . . ." The court of appeal, however, disagreed. The Project was located on federal land and federal agencies have jurisdiction over the surface and subsurface impacts. As a result, the only agency with any permit authority over the Project was the District. The court stated the County was only required to approve a conditional use permit for a small portion of the Project, and thus the District held the most discretionary power over the Project.

Communities for a Better Environment v. South Coast Air Quality Management District (2020) 47 Cal.App.5th 588

Summary: For an expansion project, the air district did not abuse its discretion by using an environmental baseline that comprised of "peak" or "near-peak" conditions, as opposed to average conditions. In addition, persons seeking to challenge a project on a particular ground must raise the "exact issue" before the lead agency before subsequently raising the issue in litigation.

Discussion: After three years of analyzing impacts to air quality, hazardous materials, water quality, noise, waste, transportation, and greenhouse gas emissions, the South Coast Air Quality Management District (District) certified an environmental impact report (EIR) for the change of the thermal operation limit of a heater in an oil refinery. Communities for a Better Environment (CBE) challenged the EIR. After the trial court found the EIR was adequate under CEQA, CBE appealed.

On appeal, CBE first argued the District relied on the wrong environmental "baseline," which was based on its "98th percentile" or "near-peak" capacity, as opposed to average capacity. The court of appeal disagreed, finding the lead agency had the discretion to how best measure existing conditions, and the District's use of a near-peak baseline was supported by substantial evidence. The court rejected CBE's request that the District use an "average" baseline, asserting the concept of a baseline is an artificial construct designed to assist an agency measure an impact, with the agency being afforded deference as to what it seeks to measure.

CBE also argued the EIR did not fulfill CEQA's informational objectives because those who did not participate in the administrative process would not understand that one of the Project's components could result in an increase of 6,000 barrels per day in throughput. Following a line of cases stating a petition must raise the "exact issue" before the administrative body to preserve an argument under CEQA's exhaustion of administrative remedies principles articulated in Section 21177 of the Public Resources Code, the court of appeal found this argument was forfeited.

CBE also claimed the EIR did not disclose the existing volume of crude oil the refinery processed as a whole or the refinery's unused capacity. The court of appeal rejected this argument because the EIR included an explanation as to why the Project would not increase the overall volume of the facility.

Citizens for a Responsible Caltrans Decision v. Department of Transportation (2020) 46 Cal.App.5th 1103

Summary: Court of Appeals rejected California Department of Transportation's efforts to rely upon an exemption from CEQA contained in Section 103 of the Streets and Highways Code, finding that provision applied only to the California Coastal Commission.

Discussion: In 2017, California Department of Transportation (Caltrans) certified an environmental impact report (EIR) for the construction of two freeway interchange ramps connecting Interstate 5 and State Route 56 (Project). The Project was one of multiple

proposed projects by Caltrans to improve vehicle and railroad transportation in the 27-mile La Jolla-Oceanside corridor, a program collectively known as the North Coastal Corridor (NCC) project.

Following certification of the EIR, Caltrans did not file a notice of determination (NOD) for the EIR, as is typically the case. Rather, Caltrans filed a notice of exemption (NOE), stating the Project was exempt from CEQA pursuant to Section 103 of the Streets and Highways Code. Section 103 was adopted in 2012 to afford the California Coastal Commission (CCC) the ability to expedite and streamline its review of Public Works Plans (PWP) for the NCC.

After the NOE was filed, Citizens for a Responsible Caltrans Decision (CRCD) filed a petition for writ of mandate against Caltrans, alleging it erroneously claimed that their highway interchange construction project was exempt from CEQA under Section 103.

The court of appeal rejected Caltrans' reliance on Section 103 to find the Project exempt from CEQA. The court determined the CEQA exemption contained in Section 103 only applied to approval of projects by the CCC as part of its PWP. The court explained that, under Section 103(d)(3), the Legislature intended to treat PWPs as a "long range development plan" that could be approved under a certified regulatory program, pursuant to Sections 21080.09 and 21080.5 of the Public Resources Code. Nothing in the plain language of Section 103 expressed any intent to exempt *Caltrans* from CEQA's requirement to prepare an EIR for the Project. The court explained that, had the Legislature intended to provide Caltrans with a CEQA exemption for a specific highway or freeway project, it could easily have done so by expressly mentioning Caltrans in the legislation, as it had done elsewhere. Thus, except as otherwise provided, the court found CEQA's provisions apply to all discretionary projects proposed to be carried out or approved by public agencies.

Save the Agoura Cornell Knoll v. City of Agoura Hills (2020) 46 Cal.App.5th 665

Summary: Mitigated Negative Declaration for a Mixed-Use Project in an area with sensitive cultural and biological resources was overturned because the record included substantial evidence, including expert opinion, of a fair argument that the mitigation measures deferred mitigation or were insufficient to avoid potentially significant impacts.

Discussion: The City of Agoura Hills (City) prepared a mitigated negative declaration (MND) for the Cornerstone Mixed-Use Project (Project). The Project site comprised of undeveloped hillside, mostly covered with grasses and scattered oak trees. The site contained native plant species considered rare and endangered. The site was also known to have been settled by a Native American group called the Chumash, and was considered as significant heritage resource under CEQA.

The City approved the Project and adopted the MND, finding there was no substantial evidence the Project would have a significant effect on the environment because the Project incorporated feasible mitigation measures, reducing any potential environmental impact to a less than significant level.

Save the Agoura Cornell Knoll (Petitioner) filed suit, arguing the record included substantial evidence to support a fair argument that the Project may have significant environmental impacts on cultural resources, sensitive plant species, oak trees, and aesthetic resources. Petitioner also argued the MND's proposed mitigation measures were inadequate to reduce the impacts to less than significant. The trial court agreed, issuing a writ of mandate requiring the City to set aside its approval of permits for the Project, and to prepare an environmental impact report (EIR).

The court of appeal affirmed, first rejecting several procedural argument raised by the City. The court rejected the argument that Petitioners were required to separately establish exhaustion of administrative remedies under Section 21177 of the Public Resources Code—an affirmative defense—in their briefing in the trial court. The court also rejected the City's claim that Petitioner's amended petition was filed beyond the statute of limitations, due to the fact that the City failed to plead statute of limitations as an affirmative defense.

The court of appeal also affirmed the trial court on substantive grounds, first finding the MND impermissibly deferred mitigation. The mitigation measure was not designed to ensure avoidance of cultural resources, but merely called for monitoring of ground-disturbing work and stopping work to take "appropriate actions" if resources were found. The MND also did not contain any analysis of whether impacts to cultural resources could be avoided. The record also contained expert opinion that avoidance was infeasible, constituting substantial evidence of a fair argument that the Project would have a potentially significant impact on cultural resources.

The court of appeal also found the City deferred mitigation relating to impacts on sensitive plant species, as the mitigation measure called for a setback unless avoidance of impacts was infeasible or an "active maintenance plan" was implemented. The court also relied upon comments from the California Department of Fish & Wildlife to find that a 10-foot buffer for sensitive species during fuel modification activities was inadequate due to infeasibility. Moreover, because a mitigation measure providing for an oak tree preservation program was aimed primarily at protecting trees from grading and construction encroachment, and not long-term survival or the risk of water deficit, the court found the mitigation measure was insufficient.

Environmental Council of Sacramento v. County of Sacramento (2020) 45 Cal. App.5th 1020

Summary: Environmental impact report (EIR) for a master planned community was not required to address environmental impacts associated with the possibility that one component of the Project—a proposed university—would not be built.

Discussion: In 2013, the County of Sacramento (County) approved an EIR for the development of the 2,669-acre Cordova Hills master planned community (Project). The Project's uses include residential, office, retail, and a university campus. After the County approved the EIR, the Environmental Council (Petitioner) filed a petition for writ of mandate challenging the Project, asserting that the project description was inadequate because it failed to address the possibility the university would not be built. Petitioner also asserted the Project would result in significant air quality, climate change, and traffic impacts. The trial court denied the petition.

Although the university that was originally contemplated to occupy the project site (the University of Sacramento) had withdrawn from the Project, the court of appeal rejected the argument that the City was required to evaluate the possibility that the university might not be built, as the Petitioner failed to present substantial and credible evidence to support the assertion that this would actually occur. As such, the court found the Project Description was legally adequate.

The court of appeal also found the County was not required to address air quality, climate change, and traffic impacts under a scenario where the university was not built. For example, the court found the County was not required to recirculate the EIR after revisions to an air quality mitigation measure, because the revisions would not increase potential environmental impacts. The court also found that, under either future scenario, mitigation measures would not exceed climate change/greenhouse gas emissions thresholds. The court likewise rejected Petitioner's traffic arguments because, in the event the university was not built, there would be nearly 9,000 less daily trips, thereby reducing any traffic impacts.

Petitioner also argued the EIR should have considered phasing the Project as mitigation to ensure no impacts would occur in the event a university was not built. While Petitioner claimed that phasing of the Project was feasible, they did not provide any evidence to support this contention.

King and Gardiner Farms, LLC v. County of Kern (2020) 45 Cal.App.5th 814

***Summary*:** Environmental impact report (EIR) assessing impacts of County ordinance intended to streamline permitting of oil and gas wells properly addressed regional impacts because analysis of local impacts was infeasible, but violated CEQA by, among other things, deferring the formulation of mitigation to reduce water supply impacts.

***Discussion*:** In November 2015, the County of Kern (County) approved an ordinance to streamline the permitting process for new oil and gas wells (Ordinance) and certified an EIR assessing the impacts associated with that action.

King and Gardiner Farms, LLC and others (Petitioners) filed suit, alleging violations of CEQA. The trial court found the EIR violated CEQA because it did not analyze the Ordinance's impacts to rangeland, or the environmental effects associated with a road paving mitigation measure intended to reduce air quality impacts. The trial court rejected the remaining claims, and Petitioners appealed.

In the published portion of the opinion, the court of appeal first addressed water supply impacts, and Petitioners' argument that the EIR only analyzed regional impacts and disregarded local water supply impacts. The County argued that localized impacts were speculative, due to uncertainty surrounding implementation of the Sustainable Groundwater Management Act (SGMA), while several oil associations (Associations) argued the industry's produced water would exceed its municipal and industrial (M&I) demand, yielding a positive impact by 2035. Ultimately, the court agreed that the EIR performed the analysis to the degree that was "reasonably possible," and that a localized analysis would be speculative, in light of SGMA and other factors.

Petitioners also argued the EIR violated CEQA because it did not meaningfully address California's water supply shortage caused the historic four-year drought from winter of 2012 through winter of 2015. Because the Notice of Preparation for the EIR was published in 2013, the EIR was only required to use the information available at that time, when the drought was in its nascent stages. The court also explained the EIR sufficiently addressed environmental impacts, and facilitated informed agency decision making and informed public participation. The EIR described the potential impacts of the Ordinance, future water supply and demand, and the uncertainty the drought had caused concerning California groundwater. The court thus held the EIR discussed the drought in sufficient and did not violate CEQA.

The court of appeal also addressed Petitioners' argument that the Ordinance would have a significant and unavoidable impact on the County's municipal and industrial water supplies. The EIR proposed several mitigation measures, including a requirement that oil and gas wells increase or maximize the re-use of "produced water," which is water that is extracted when oil or gas is pumped. The court found this mitigation measure was inadequate because it was merely a generalized goal, and did not set specific performance standards.

The EIR also sought to mitigate water supply impacts through a requirement that the five largest oil industry users of municipal and industrial water work together to develop and implement a plan to identify new measures to reduce municipal and industrial water use by 2020. The court of appeal held this provision violated CEQA because it deferred formulation of mitigation, and did not set specific performance standards.

The County's EIR reported that the area of this project included 2.1 million acres of land zoned for agriculture use. The EIR estimated annual land disturbances associated with future oil and gas exploration and production would result in the conversion of 298 acres of agricultural land annually, a potentially significant impact. The court of appeal found that several of the mitigation measures identified in the EIR to reduce this impact were infeasible, including a conservation easement where one acre of agricultural land would be conserved for every one-acre converted to non-agricultural uses. The court held these types of easements are not appropriate for mitigation because they do not create new agricultural land, but merely prevent the future conversion of the agricultural land.

Golden Door Properties, LLC v. County of San Diego (2020) __ Cal.App.5th __ (WL 3119041)

Summary: Mitigation measure in County's climate action plan allowing mitigation of greenhouse gas emissions and climate change impacts through the purchase of "worldwide" emissions reduction credits was improper, as some of the authorized registries did not apply the State of California's "gold-standard" protocols to ensure the offsets are enforceable, verifiable, permanent, and additional.

***Discussion*:** AB 32, signed in 2005, established greenhouse gas (GHG) reduction targets to 1990 levels by 2020 as a statewide goal. The cap-and-trade program is one strategy the California Air Resources Board (CARB) has utlized to reduce GHG emissions. To implement AB 32, and to serve as mitigation to reduce GHG emissions associated with buildout under its 2011 General Plan Update (GPU), the County of San Diego (County) adopted a Climate Action Plan (CAP). "[T]o the extent a project is consistent with [the] land use allowed under the GPU, the project applicant must mitigate GHG emissions with CAP GHG reduction measures."

The CAP establishes a GHG emissions inventory against which to measure future reductions, with a 2014 baseline. The CAP also projects future GHG emissions for development consistent with CPU allowed land use, which are called "business-as-usual" projections. These projections assume no additional local GHG reductions and efforts will be undertaken, and that population, housing, employment, and transportation will grow consistent with current projections. To meet the GHG reduction targets established by AB 32, the CAP developed 26 GHG reduction measures for local projects.

One of the reduction measures was identified as measure T-4.1, under whiuch the County may make "direct investments in local projects to offset carbon emissions." These projects are specific actions that reduce, avoid, or sequester GHG emissions, such as urban tree planting and weatherization projects that reduce hearing and cooling expenses. Using this reduction measure, the County would not purchase carbon offset credits, but would instead track carbon offsets achieved through the County's direct investment projects to help meet its AB 32 targets.

In connection with its approval of the CAP, the County established thresholds of significant for climate change impacts and GHG emissions. The County determined that a project that is consistent with the CAP woul have less than significant cumulatively considerable contribution to climate change impacts, while projects inconsistent with the CAP would have singificant impacts. Consistency review is determined by comparing the Project to a checklist of CAP GHG reduction measures.

After several successful lawsuits challenging the CAP and the GPU, the County circulated a Supplemental EIR (SEIR), which, among other things, acknowledged the City would process general plan amendments (GPAs). Under the SEIR, GPAs would be required to comply with a mitigation measure called "M-GHG-1," under which projects that seek to increase land use density would first need to mitigate GHG emissions through all feasible onsite design features before purchasing offset credits from projects "anywhere in the world."

Plaintiffs made several objections to the CAP and SEIR, including that M-GHG-1 violated CEQA by allowing in-County emissions from in-process and future GPAs to increase with new projects, but also allowing the proponents to purchase offsite credits that would not benefit the County, and without demonstrating that the offsets will be fully enforceable, verifiable, permanent, and additional.

The court of appeal agreed, holding that M-GHG-1 violated CEQA because its performance standard was unenforceable. Specifically, M-GHG-1 allows project proponents to purchase offset credits from certain registries anywhere in the world; however, not all registries apply CARB's gold-standard protocols, meaning that they do not have the strict standards to ensure the offsets are enforceable, verifiable, permanent, and additional. Moreover, nothing prevented a project proponent from receiving 100 percent of its GHG emission reductions through essentially unverified offset credits, rather than the 8 percent maximum under cap-and-trade. M-GHG-1 also did not require that offsets be "additional," *i.e.*, not in addition to "any greenhouse gas emission reduction otherwise required by law or regulation, and any other greenhouse gas emission reduction that otherwise would occur." The court thus invalidated the CAP to the extent it relies on M-GHG-1 to reduce GHG emissions.

The court of appeal also held that the SEIR was deficient because (i) it did not analyze reasonably foreseeable cumulative impacts from the in-process GPAs, even though it had access to those environmental documents and relevant GHG data; (ii) M-GHG-1 was inconsistent with the San Diego Area Regional Transportation Plan; and (iii) the SEIR did not analyze a project alternative addressing reduced vehicle miles traveled (VMT).

In an effort to prevent another appeal, the court of appeal suggested another GHG-reduction measure in the CAP which was not objected to by the plaintiffs: T-4.1. T-4.1 was designed to offset in-County GHG, by allowing the County to make direct investments in local projects. In addition, T-4.1 required (i) that the investment projects be compliant with CARB Protocols; (ii) public review; (iii) that the project GHG reductions must be additional to "business-as-usual"; and (iv) an independent third-party to verify the GHG reduction achieved.

Willow Glen Trestle Conservancy v. City of San Jose (2020) 49 Cal.App.5th 127

***Summary*:** City's notification of streambed alteration and acceptance of a new streambed alteration agreement did not constitute a new project approval on the part of the City, and thus did not trigger the need to assess whether further environmental review was necessary under Section 21166 of the Public Resources Code and Section 15162 of the CEQA Guidelines

***Discussion*:** Willow Glen Railroad Trestle (Trestle) is a wooden railroad bridge that was constructed in 1922. The City of San Jose (City) proposed a project in 2014 to demolish the Trestle and replace it with a new steel pedestrian bridge to serve as a link in City's trail system (Project). Prior to approving the Project, the City adopted a mitigated negative declaration (MND), which found the bridge was not an historical resource.

The Willow Glen Trestle Conservancy (Conservancy) filed suit, challenging the City's determination that the Trestle was not an historical resource. The City prevailed in that action. Prior to the conclusion of that proceeding, however, the City's 2014 Streambed Alteration Agreement (SAA) with the California Department of Fish and Wildlife (CDFW) for temporary diversion of the stream below the Trestle during demolition expired. As a result, in 2018, City submitted a Notification of Lake or Streambed Alteration to CDFW, which resulted in another SAA in which CDFW found that "the project would not have any significant impacts on fish or wildlife 'with the measures specified in the 2014 MND and the [SAA].'"

The Conservancy filed a second action to prevent demolition of the Trestle, claiming the City was required to perform further environmental review under Section 21166 of the Public Resources Code and Section 15162 of the CEQA Guidelines. The City, however, argued that its acceptance of a new SAA did not constitute a further "approval on th[e] project" on the part of the City, and thus it need not perform an evaluation due to Section 15162, subdivision (c), which states that "[o]nce a project has been adopted, the lead agency's role in the project approval is completed, unless further discretionary approval on that project is required."

The court of appeal found the City's submission of a notification to CDFW in order to obtain a new SAA, and its acceptance of the new SAA was not an "approval" on the "project" *by the City*. The court explained that the City's act of seeking and accepting the SAA was not a "further discretionary approval," but rather a necessary step towards implementing the project after its prior approval. As the court explained, "[i]f every action had to be considered an 'approval,' each and every step that City took toward implementing an approved project would necessarily constitute another 'approval on' the project, thereby endlessly reopening City's long-final consideration of the project's environmental impacts."

The court of appeal also explained that the application to CDFW was not an "approval" because it was a "Notification." The City was not approving anything it had not already received in 2014 pursuant to the MND. The court noted the CDFW would have been the appropriate responsible agency for granting approval, and not City, but Conservancy did not object to CDFW's actions regarding the SAA. As a result, the court affirmed the trial court's decision denying Conservancy's petition, and found the City was not required to assess whether further environmental review was necessary.

NEPA Cases

Bark v. U.S. Forest Service (9th Cir. May 4, 2020)

Summary: USFS was required to prepare an environmental impact statement, as opposed to an

environmental assessment, for a forest management and timber sales project that sought forest thinning for fire suppression purposes, where (i) expert opinion demonstrated the effects of the Project were highly controversial and uncertain, and (ii) the agency failed to meaningfully assess the cumulative impacts of the project's identified in the cumulative impacts analysis.

Discussion: Bark, Cascadia Wildlands, and Oregon Wild (Plaintiffs) brought claims under NEPA and the National Forest Management Act (NFMA), challenging the Crystal Clear Restoration Project (Project), based on an alleged failure on the part of the U.S. Forest Service (USFS) to prepare an environmental impact statement (EIS) to assess the Project's environmental effects. The Project included forest management and timber sales affecting 11,742 acres in the Mr. Hood National Forest. USFS undertook the Project, in part, to minimize the impact of wildfires. The District Court granted summary judgement in favor of the USFS, which Plaintiffs appealed.

The Ninth Circuit reversed the District Court's decision, finding the decision to not prepare an EIS was arbitrary and capricious for two reasons. First, the Ninth Circuit found that the effects of the Project were highly controversial and uncertain, thus mandating the creation of an EIS under 40 C.F.R. § 1508.27(b)(4) & (5). In support, the Ninth Circuit explained that the primary purpose of the Project is to reduce the risk of wildfires, but the Plaintiffs introduced considerable scientific evidence showing that the variable density thinning proposed by USFS would not achieve this result. Further, the effects analysis in the environmental assessment (EA) did not engage with this contrary scientific and expert opinion, but rather drew general conclusions. Based on this substantial dispute, the Ninth Circuit found the effects to be controversial and uncertain.

The Ninth Circuit also found an EIS was required due to USFS's failure to identify and meaningfully analyze the cumulative impacts of the Project. NEPA requires an agency to provide quantified and detailed information about the project, not just general statements about the potential effects that may be felt. The EA, however, only included a table of other projects that were "considered," yet there was "no meaningful analysis of any of the identified projects."

The Ninth Circuit thus reversed the District Court's ruling, and required USFS to prepare an EIS.

Stand Up for California! v. U.S. Dept. of Interior (9th Cir. May 27, 2020)

Summary: NEPA applies to the tribal gaming compact approval under the Secretarial Procedures contained in the Indian Gaming Regulatory Act (IGRA).

Discussion: The North Fork Rancheria for Mono Indians (North Fork) submitted a "fee-to-trust" application for the United States Department of Interior (DOI) to take 305 acres of land that it owned into trust for the benefit of the tribe to be developed into a hotel and casino. In reviewing the application, the DOI prepared an environmental impact statement EIS under NEPA. North Fork and the State of California (California) began negotiating a Tribal-State compact to govern gaming activities on the land. However, before it could take effect, California voters vetoed the Tribal-State compact through a statewide referendum, leading North Fork to file an action to compel the state to negotiate in good faith. District Court granted North Fork's motion, and ordered California and North Fork to agree upon a compact within 60-days. When no agreement was reached, the District Court appointed a mediator to select the best offer between the parties. The mediator adopted North Fork's proposed compact, and when California did not consent to the proposed compact, the mediator submitted the proposed compact to the Secretary to the Interior to prescribe Secretarial Procedures consistent with the mediator-selected compact.

Stand up for California! (Stand Up!) brought suit against the DOI, claiming the use of the Secretarial Procedures violated NEPA. The District Court granted DOI's motion for summary judgment, finding the Secretary, when it issued the Secretarial Procedures, was not required to comply with NEPA. The District Court also ruled that, under the IGRA, the Secretary lacks discretion to consider any other applicable federal laws besides IGRA, excusing the Secretary from completing an EIS under NEPA. Stand Up! Appealed, and the Ninth Circuit reversed the district court's decision.

On appeal, the Ninth Circuit held that "the Secretarial Procedures have no such *per se* exemption from the environmental laws." NEPA was enacted to "provide the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions." The Ninth Circuit found the Secretary is given some discretion under the IGRA, and the IRGA does not foreclose all considerations of applicable federal laws by the Secretary when issuing Secretarial Procedures. The Ninth Circuit found there is no irreconcilable and fundamental conflict between IGRA and NEPA, and thar IGRA does not displace NEPA, since it contains no comparable process for ensuring environmental protection. The Ninth Circuit thus remanded the matter to the district court to consider whether the Secretarial Procedures were a major federal action triggering NEPA requirements; and if so, whether the Secretary could rely on the prior EIS for present purposes. If the Secretary could not do so, the Ninth Circuit directed the District Court to remand the matter to the Secretary to comply with NEPA by supplementing the prior EIS.

3 // Government

Fees, Rates & Charges

Zolly v. City of Oakland (2020) 47 Cal. App.5th 73

Summary: A franchise fee imposed by a city must be reasonably related to the value of the franchise received from the government and constitutes a tax under Proposition 26 if it is not reasonably related to that value.

Discussion: The City of Oakland (City) entered into a contract with a waste management contractor that included a total franchise fee of $25,034,000, which included $3.24 million that was redesignated as a fee related to the City's implementation of the Alameda County Integrated Waste Management Plan and was subject to annual inflation increases. Three plaintiffs filed a lawsuit against the City, alleging the waste management franchise fee was excessive and violated article XIII C, section 1 of the California Constitution, enacted by Proposition 26, as a tax levied without voter approval.

The trial court sustained the City's demurrer to the plaintiff's second amended complaint and dismissed the complaint. The trial court ruled the franchise fee was permissible and distinguished the holding in Jacks v. City of Santa Barbara (2017) 3 Cal.5th 248 ("Jacks"), in which the California Supreme Court ruled a franchise fee collected through direct pass-throughs to the ratepayers violated article XIII D, section 6 of the California Constitution, enacted as part of Proposition 218. The plaintiffs appealed.

The plaintiffs contended that under the Supreme Court's holding in Jacks, a franchise fee must be reasonably related to the value of the property interests transferred, regardless of whether the franchise fee is directly imposed on ratepayers. The plaintiffs alleged the City's franchise fee was not reasonably related to the franchise's value and therefore constituted a tax that required voter approval. The City disagreed and argued Jacks' holding is applicable only where the franchise fee is directly placed on customers' bills.

The appellate court analyzed the exemptions set forth in Proposition 26, particularly subdivision (e)(4) of article XIII C, section 1. That exemption applies to charges imposed for entrance to or use of local government property. Although that subdivision does not include a reasonableness component, the broader language elsewhere in subdivision (e) requires the amount of a fee to be reasonable in relation to the governmental activity. Based on that reasonableness requirement, the appellate court concluded a franchise fee must be reasonably related to the value of the franchise, and only the portion of the franchise fee that is reasonably related to the franchise's value is not a "tax" and therefore is exempt from voter approval. The amount of the franchise fee that lacks the reasonable relationship constitutes a tax that must be approved by the voters to be valid. The appellate court therefore reversed the trial court's ruling as to the validity of the franchise fee.

The Court of Appeal affirmed the trial court's granting of the City's demurrer as to that portion of the plaintiffs' challenge regarding the redesignated portion of the franchise fee, as the plaintiffs had not yet incurred any harm from the proposed future inflation increases and the challenge therefore was not yet ripe.

Mendocino Redwood Company, LLC v. County of Mendocino (2019) 42 Cal. App.5th 896

Summary: A lawsuit that sought a tax refund for parcels improperly assessed was not an action challenging the validity of the underlying initiative tax measure and therefore was not subject to a 60-day statute of limitation applicable to a reverse validation action.

Discussion: The Albion-Little River Fire Protection District (district) is a public volunteer fire district that provides fire protection service to its residents. The entire

district lies within a state responsibility area. In 2014, the district's voters passed an initiative measure that imposed a special parcel tax to help fund the district.

The plaintiff is a commercial timberland operator that owns 63 parcels within the district. The plaintiff paid its parcel taxes under protest and filed claims for refunds of those tax payments, contending it was not subject to the parcel tax because it was exempt under Health and Safety Code section 13811. That statute provides that commercial timberlands are not included in a fire protection district if the district is within a state responsibility area. The county of Mendocino (county) denied plaintiff's claims and plaintiff sued the county and the district, as a real party in interest, seeking a refund of its tax payments.

The trial court ruled in favor of the plaintiff. The district had contended the plaintiff's action amounted to a challenge to the initiative that enacted the special tax, and was untimely because it was not brought as a reverse validation action within 60 days after the initiative was passed. The trial court found Health and Safety Code section 13811 applied to the case and the plaintiff's parcels were not to be included in the district, as the state retained responsibility for fire suppression and prevention on those commercial parcels. The trial court further concluded the plaintiff's action did not seek to invalidate the district's initiative, but was concerned only with the application of that measure to the plaintiff's parcels. The court therefore awarded plaintiff judgment in the amount of $60,708.08, with interest. The district appealed.

The Court of Appeal affirmed the trial court's judgment. The appellate court agreed this case was not one involving a challenge to the validity of the district's initiative, but merely sought a refund of taxes improperly assessed against the plaintiff. Thus, the 60-day statute of limitations for a reverse validation action did not apply and plaintiff's action was timely filed. The trial court therefore was correct in ruling for the plaintiff.

County of El Dorado v. Superior Court (2019) 42 Cal.App.5th 620

Summary: A one year limitation period, for a penalty or forfeiture, applies to a claim for a refund of impact fees under the Mitigation Fee Act.

Discussion: Several citizens in El Dorado County (County) filed a lawsuit seeking to recover development impact fees under the Mitigation Fee Act (Government Code sections 66000 et seq.; the act) for the County's failure to make the required "nexus" findings to justify the continuing need for the County to hold unexpended monies generated from development fees assessed by the County and its special districts. The trial court denied the County's demurrer on the statute of limitations issue, but sustained that demurrer on the County's contention the plaintiffs failed to name indispensable parties. The County filed an immediate appeal through a petition for writ of mandate filed with the Court of Appeal.

On appeal, the County contended a one year limitations period for penalties and forfeiture applied; and that the plaintiffs had failed to allege prejudice, as required under Government Code section 65010. The Court of Appeal agreed with the county that a one year statute of limitations applied to the plaintiffs' claims, as the mandatory damages the plaintiffs sought were in addition to any actual injury the plaintiffs suffered and thus were a penalty subject to the one year limitations period under Code of Civil Procedure section 340(a).

However, the appellate court rejected the county's argument that the trial court's decision resulted in the invalidation of the county's fees and thus was not permissible. The court held the lawsuit did not seek to invalidate the fees, but instead sought to obtain a refund of fees in the absence of the required findings showing the continuing need to retain those funds. The court further held that the ongoing accrual of the plaintiffs' cause of action with each breach by the county on its five-year obligation to make the required findings barred a demurrer to that cause of action because the plaintiffs could recover the fees during the one year period preceding each breach. In other words, the statute of limitations did not bar the action entirely, but did limit the amount recoverable.

The appellate court also ruled the plaintiffs were not required to plead prejudice in connection with its claims, as that requirement under Government Code section 65010 was not applicable to plaintiffs' claim under section 66001. The Court of Appeal therefore denied the county's petition for writ of mandate.

Davis v. Mariposa County Board of Supervisors (2019) 38 Cal.App.5th 1048

Summary: A lawsuit to challenge a fire suppression assessment was subject to a 30 day period in which to file an appeal under applicable statutes.

Discussion: The Mariposa County (County) Board of Supervisors adopted a resolution to impose an $80 per parcel assessment on properties to fund firefighting expenses. Such fire suppression assessments are authorized under Government Code section 50078. The County auditor filed a lawsuit challenging the resolution that enacted the assessment, contending the $80 levy did not confer a special benefit and did not satisfy the proportionality requirements under article XIIID of the California Constitution. The auditor therefore alleged the $80 levy was a special tax that required voter approval and was invalidly imposed by the County.

The case went to trial and the County prevailed. The auditor filed a notice of appeal 56 days after notice of entry of the trial court's judgment. The County moved to dismiss the auditor's appeal because the appeal was required to be filed within 30 days after notice of entry of the underlying judgment pursuant to Government Code section 50078.17 and Code of Civil Procedure section 870(b). Section 50078.17 governs judicial proceedings concerning a resolution adopted under section 50078 and, in addition to having its own 30 day appeal period, requires that any litigation to challenge such a resolution be brought in accordance with the validation statutes set forth in Code of Civil Procedure sections 860 through 870.5.

The auditor argued that its action was not challenging the resolution under section 50078, but was instead challenging the resolution as a special tax for failure to comply with article XIIID. The appellate court rejected that argument and stated the gravamen of the auditor's complaint was the validity of the resolution expressly adopted under section 50078. Therefore, section 50078.17's 30 day appeal period and the 30 day appeal period provided under the validation statutes applied. The Court of Appeal therefore granted the County's motion to dismiss because the auditor's appeal was untimely and the appellate court therefore lacked jurisdiction to review the trial court's judgment.

Public Contracting

Hensel Phelps Construction Co. v. Department of Corrections and Rehabilitation (2020) 45 Cal.App.5th 679

Summary: A contractor whose public works contract was invalidated, in part, because of its own errors could not recover its project costs under Public Contract Code section 5110 because the invalidation of the contract did not result from defects in the bidding process caused solely by the awarding public agency.

Discussion: Hensel Phelps Construction Company (Hensel Phelps) was the low bidder on an $88 million construction contract awarded by the Department of Corrections and Rehabilitation (department). Another bidder successfully challenged the award of the contract to Hensel Phelps and the court in that case invalidated the contract because math and typographical errors in Hensel Phelps' bid were non-waivable and rendered Hensel Phelps' bid non-responsive.

Hensel Phelps then sued the department under Public Contract Code section 5110, seeking to recover the costs it incurred on the project. Section 5110 provides for the recovery of such costs where a contract is determined to be invalid due to a defect in the competitive bidding process caused solely by the public agency. Hensel Phelps alleged the department's failure to find its bid non-responsive in response to the bid protest solely led to the ruling that invalidated the contract. The trial court agreed with Hensel Phelps and concluded, in denying the department's motion for judgment on the pleadings, the ruling in the initial trial resulted from a defect in the bidding process caused solely by the department. The trial court entered judgment for Hensel Phelps in the amount of almost $3 million and gave the department nothing on its cross-complaint that sought recovery of the $3.5 million it had already paid Hensel Phelps. The department appealed.

The Court of Appeal reversed the trial court and remanded the matter to the trial court to vacate its denial of the department's motion for judgment on the pleadings and to enter an order granting that motion. The appellate court based its decision on the interpretation

that section 5110 applies to the reason why the contract was invalidated. Here, that reason was because of Hensel Phelps' non-waivable errors and not because of the department's failure to reject Hensel Phelps' bid due to those errors. The court found, at a minimum, the invalidation resulted from a combination of errors attributable to both Hensel Phelps and the department, but not "solely" to the department's errors. Thus, Hensel Phelps could not recover under section 5110.

As to the department's cross-complaint, the appellate court ruled the department was not entitled to judgment on that cross-complaint because it did not properly challenge the trial court's ruling on the cross-complaint.

A.J. Fistes Corp v. GDL Best Contractors, Inc. (2019) 38 Cal.App.5th 677

Summary: An unsuccessful bidder had standing to challenge a school district's contract award as a taxpayer under Code of Civil Procedure section 526a even though the bidder did not pay taxes directly to the school district.

Discussion: Plaintiff A.J. Fistes Corporation (Fistes) alleged it was the low bidder on a school construction project awarded by Montebello Unified School District (district) and that the district's award of the contract for that project to GDL Best Contractors, Inc. (GDL) was void due to violations of the Public Contracts Code and Government Code section 1090. Fistes' bid on that project was $1,127,900, as compared to GDL's bid of $2,555,000, but Fistes' bid was deemed nonresponsive because it failed to include required financial statements and Fistes' corporate seal.

Fistes sued the district (which was later dismissed from the case), GDL and GDL's principals. The defendants filed a demurrer to Fistes' third amended complaint, contending Fistes lacked standing to sue GDL and its principals. Fistes opposed the demurrer, arguing it had standing as a disappointed bidder acting in the public interest under Code of Civil Procedure section 526a. The trial court sustained that demurrer based on Fistes' lack of standing to bring a lawsuit against GDL and its principals because Fistes did not allege it was a taxpayer in the district, but rather only that it was a taxpayer in the state. The trial court therefore dismissed the case. Fistes appealed.

The Court of Appeal focused on the requirements for standing under Code of Civil Procedure section 526a, which provides a mechanism for actions to contest illegal contracts or wasteful actions by government officials. Under section 526a, a cause of action exists to recover public money illegally paid from the person who receives such money, independent of any other statute. As amended in 2018, section 526a provides standing to a person who has paid a tax (e.g., income taxes, sales and use taxes or property taxes) that funds the defendant local agency.

On the appeal, Fistes contended that its payment of state taxes that were used to fund the district's payments to GDL under state school construction programs was sufficient to provide standing under section 526a. GDL argued that Fistes needed to instead pay taxes directly to the district that funded the project at issue. The appellate court ruled in favor of Fistes, holding the plain language of section 526a requires only that the tax fund the local agency, not the specific challenged agency action. The court therefore found Fistes had standing to sue to restrain the alleged illegal expenditure of public funds by the district and reversed the trial court's decision and remanded the case.

General Government

McGee v. Torrance Unified School District (2020) 49 Cal.App.5th 814

Summary: A lease-leaseback agreement is a contract subject to validation under the validation statutes and a Government Code section 1090 conflict of interest claim related to such a contract becomes moot when the underlying public works project is completed.

Discussion: James McGee (McGee) filed three separate lawsuits challenging various lease-leaseback agreements that Torrance Unified School District (District) entered into with Balfour Beatty Construction for the construction of school facilities. In this case, the third of the three lawsuits, McGee filed his complaint, which included a cause of action for a conflict of interest in violation of Government Code section 1090, as a reverse validation action and followed the unique procedural requirements for that *in rem* type of action. In 2019, the trial court dismissed McGee's complaint, finding it moot because the District

had completed the challenged projects. McGee appealed, arguing the trial court could have ordered disgorgement as a remedy even though the projects were finished.

The Court of Appeal affirmed the trial court's dismissal. The appellate court found the District's contracts with the contractor were subject to the validation statutes pursuant to Government Code section 53511 because they involved financial obligations and were financed by bond proceeds. The court also cited McGee's prior arguments in a law and motion matter in the case where he admitted the agreements were subject to validation. The court then pointed out existing law that recognizes the completion of a public works project moots challenges to the validity of contracts under which the project was carried out. The court applied that principle here, where McGee filed his first complaint in 2013 and took no action in the intervening six years to stop the District's projects from moving forward.

The appellate court rejected McGee's argument that his conflict of interest cause of action was not subject to validation because it was an *in personam* taxpayer claim. The court emphasized that the gravamen of McGee's complaint was the invalidity of the lease-leaseback agreements and that the result of his conflict of interest cause of action would be to have the court find those agreements void and therefore invalidated. The court also ruled that because McGee's conflict of interest claims are subject to validation, he cannot obtain effective relief through disgorgement because such relief would be contrary to the intent of validation actions to promptly settle all questions about the validity of an agency's action.

Ruiz v. County of San Diego (2020) 47 Cal. App.5th 504

Summary: A privately owned storm drain located on private property does not become a public improvement just because water from public drains drain through it.

Discussion: The plaintiffs owned a residence in unincorporated San Diego County (County), under which a private storm drain pipe was located that served their development, as well as other public drainage facilities. The storm drain pipe was constructed in 1959, when the development was built and at that time, the County did not accept an offer for dedication of the storm drain pipe. In 2014 and 2016, the plaintiffs' property was flooded during rainstorms because the bottom of the pipe had rusted away. The plaintiffs sued the County for trespass, nuisance and inverse condemnation based on the fact the County allegedly acted unreasonably in discharging water through the pipe and took an implied easement through its use of the pipe.

The trial court ruled in favor of the plaintiffs on the inverse condemnation cause of action, concluding the County caused public water from its drains to move through the plaintiff's pipe, which caused that pipe to fail. The court awarded the plaintiffs damages of $328,033 and attorneys' fees of $529,540.40. The County appealed.

The Court of Appeal reversed the trial court. The appellate court focused on whether the County impliedly accepted dedication of an easement for the plaintiffs' pipe. The appellate court determined the County did not impliedly accept that dedication. The court relied on the California Supreme Court decision in Locklin v. City of Lafayette (1994) 7 Cal.4th 327, 370, where the Supreme Court set forth the test that a governmental agency must exert control over and assume responsibility for maintenance of a watercourse if it is to be liable for resulting damage on a theory the watercourse has become a public work.

In the present case, there was no evidence the County exerted any control over the plaintiff's pipe or that the County ever maintained that pipe. The court ruled that a privately-owned drain pipe located on private property, for which a public entity has expressly rejected an offer of dedication, does not become a public work merely because "public water" drains through it. The public entity must do more to impliedly accept an offer of dedication that it previously rejected. Here, the County did nothing to demonstrate any dominion or control of the plaintiffs' pipe. Thus, the County's use alone was not legally sufficient to constitute implied acceptance of the dedication of a drainage easement.

In reaching its conclusion, the appellate court rejected the plaintiffs' contention that inverse condemnation liability applies to a public work or improvement even where no public use is present. The court also rejected plaintiffs' argument that the County acted unreasonably, holding there was no evidence of any such unreasonable conduct.

County of Kern v. Alta Sierra Holistic Exchange Service (2020) 46 Cal.App.5th 82

Summary: A county can reenact a previously repealed ordinance if circumstances have materially changed between the time of the repeal and the later reenactment.

Discussion: In 2009, Kern County (County) adopted an ordinance allowing medical marijuana dispensaries in commercially zoned properties. In 2011, the County adopted a new ordinance effectively banning dispensaries and declaring them a public nuisance. Proponents of medical marijuana dispensaries submitted a protest to the 2011 ordinance and, in response, the County repealed both the 2009 and 2011 ordinances.

In a prior decision (*County of Kern v. T.C.E.F, Inc.* (2016) 246 Cal.App.4th 301), the Fifth District Court of Appeal held the repeal of the 2009 ordinance was invalid, as that repeal was, in practical effect, a reenactment of the ban on dispensaries set forth in the protested 2011 ordinance. The County subsequently enacted a new ordinance in May 2016 that placed a moratorium on new medical marijuana dispensaries in the County. A further ordinance was adopted in 2017 that banned commercial medicinal and recreational marijuana businesses of all kinds and declared such property use to be a public nuisance.

The defendant in the case opened a marijuana dispensary in the County. In October 2016, the County filed a nuisance abatement action against the defendant relative to its dispensary. The trial court ruled for the County, declaring the defendant's business was a public nuisance under the 2016 ordinance and issuing a permanent injunction against the defendant. The defendant appealed, contending the County did not wait a long enough period of time before enacting its 2016 ordinance after the 2011 ordinance was repealed and therefore the 2016 ordinance was invalid.

The Court of Appeal affirmed the trial court's judgment, finding there was a public nuisance under the 2016 ordinance and that the 2016 ordinance was valid. The appellate court concluded that an ordinance that was repealed could be reenacted if there was a material change in circumstances between the time of the repeal and the time of the reenactment. The change in circumstances is determined based on the totality of the circumstances and the agency seeking the ordinance's reenactment has the burden of proof regarding the materiality of the changed circumstances.

In the present case, the court found that between 2012, when the 2011 ordinance was repealed, and 2016, circumstances regarding the regulation of marijuana dispensaries materially changed. The court mentioned a variety of changes over that time period, including data developed from the legalization of marijuana in Colorado that demonstrated increases in criminal activity near dispensaries, decreased traffic safety, increases in underage use of marijuana and increase in marijuana-related hospitalizations. The court concluded the 2012 repeal did not bar adoption of the 2016 ordinance under which the defendant was cited.

The appellate court therefore affirmed the public nuisance judgment, but reversed the trial court's permanent injunction because there was insufficient evidence to support the defendant's intent to operate a dispensary in the future.

Lateef v. City of Madera (2020) 45 Cal. App.5th 245

Summary: A city ordinance requiring a five-sevenths city council vote to overturn a planning commission decision is determined by the entire number of city council seats and not the number of seats currently filled.

Discussion: The city of Madera's (City) Municipal Code requires a five-sevenths vote of the city council to overturn a decision of its planning commission. A resident sought to overturn a planning commission decision regarding a denial of his application for a conditional use permit. At the time the matter came before the city council, which consists of seven council members, there was one vacancy and the mayor had recused himself from voting on the matter due to his prior stated opposition to issuing the conditional use permit. The city council voted to overturn the planning commission's denial by a four to one vote, which was insufficient to meet the five votes needed to overturn the denial under the applicable code provision. The resident sued the City, alleging the eighty percent vote in favor of overturning the denial exceeded the five-sevenths vote requirement.

The trial court ruled in favor of the City, finding the "whole of the Council" used in the Municipal Code meant all seven of the members of the city council, regardless of any vacancies or recusals. The trial court also reasoned that the resident could have requested a continuance of the matter until such time as the vacancy on the city council was filled. The resident appealed.

The Court of Appeal affirmed the trial court. The appellate court found the Municipal Code provision regarding five-sevenths of the "whole of the Council" to be straightforward and unambiguous and that applying the resident's interpretation would read the word "whole" out of the code provision. The court cited *Price v. Tennant Community Services District* (1987) 194 Cal.App.3d 491, 496-497, as authority that a vacant board seat is included in determining a quorum. The appellate court therefore concluded from the plain language of the subject provision that "whole of the Council" means the entire city council, or all seven members and the City properly denied the appeal of the planning commission's decision based on the City council's four to one vote.

Atwell Island Water District v. Atwell Island Water District (2020) 45 Cal.App.5th 624

Summary: A water district election that took place the day after a state holiday was invalid and actions taken by the district's board of directors elected at that election were not valid.

Discussion: A dispute took place between competing directors on the board of directors of the Atwell Island Water District (District) regarding which persons were the true members of the board. The dispute arose from a mailed ballot election that occurred on January 17, 2017, the day after the Martin Luther King, Jr. holiday, in which two board members were to be elected to replace members whose terms were ending. One faction of directors (the valid election faction) contended that election was valid and the subsequent engagement of legal counsel by the board was therefore valid. The other faction (the void election faction) contended the election was not valid and the engagement of new legal counsel was void because the meeting at which the counsel was engaged violated the Brown Act (Government Code sections 54950 et seq.) because no quorum of directors was present.

The trial court agreed with the void election faction and granted that faction's motion to strike pleadings filed by the putative District legal counsel. The valid election faction appealed the trial court's order granting the motion to strike, contending the trial court abused its discretion by relying on extraneous declarations in making its ruling.

The Court of Appeal agreed that the trial court abused its discretion in relying on the truth of the declarations of which it took judicial notice. However, the Court of Appeal affirmed the trial court's order because the January 17, 2017 election was void as it was held the day after a state holiday. Under Election Code section 1100, elections may not be held the day after a state holiday and Martin Luther King, Jr. Day is a recognized state holiday. Thus, the election that occurred was not valid, the directors elected in that election were not validly seated and the action those directors took in retaining legal counsel was not valid because only one rightfully seated director was in office and he alone did not constitute a quorum who could take valid action. Thus, the putative legal counsel did not have proper authority to act on the District's behalf in filing any pleadings and the trial court properly granted the motion to strike the District's pleadings.

City of Oroville v. Superior Court (California Joint Powers Risk Management Authority) (2019) 7 Cal.5th 1091

Summary: A city was not liable for inverse condemnation resulting from a sewage backup where the city's sewer system did not substantially cause plaintiff's damages.

Discussion: The plaintiff dental practice suffered damage when sewage began spewing from toilets, sinks and drains in its offices. The plaintiff sued the city of Oroville (City) for inverse condemnation as a result of the failure of the City's sewer system to function as intended. The City contended the damage occurred because the plaintiff's building failed to install a backwater valve required under the City's Municipal Code that would have prevented the sewage from entering the building. The trial court found the City liable, and the City appealed. The Court of Appeal affirmed the trial court's judgment for the

plaintiff, and the City sought review by the California Supreme Court, which granted review.

The Supreme Court stated its review was to determine whether a City is liable in inverse condemnation where sewage backs up onto private property because of a blockage in the City's sewer main and the absence of a backwater valve that the affected property owner was legally required to install and maintain. In analyzing that issue, the Court stated a court assessing inverse condemnation liability must find more than just a causal connection between the public improvement and the damage to private property. The Court held the damage to private property must be substantially caused by an inherent risk presented by the deliberate design, construction or maintenance of the public property. The Court further stated the injury to private property must be an "inescapable or unavoidable consequence" of the public improvement as planned and constructed. The Court thus established a two-part test on that causation issue: (i) the plaintiff must link its injury to an inherent risk of the public project; and (ii) that inherent risk must be a substantial cause of the damage.

As applied to the present case, the Supreme Court concluded the City was not liable for inverse condemnation because the plaintiff's damage was not substantially caused by the City's sewer system where the plaintiff and its predecessors failed to fulfill their responsibility to install the backwater valve, and that reasonable requirement would have prevented or substantially diminished the risk of the mishap that spawned the case. The Supreme Court therefore reversed the Court of Appeal's judgment and directed the Court of Appeal to remand the case to the trial court.

Gates v. Blakemore (2019) 39 Cal.App.5th 32

Summary: Proposed initiatives were invalid, and a county counsel was excused from her duty to prepare ballot titles and summaries, where the initiatives impermissibly intruded on functions exclusively delegated to a county board of supervisors.

Discussion: Citizens of San Bernardino County (County) submitted nine proposed initiatives to the county counsel to prepare ballot titles and summaries. The county counsel prepared ballot titles and summaries for two of the initiatives and a third initiative was withdrawn. Several of the six remaining initiatives intruded on areas the California Constitution expressly reserves for the County's governing board (such as, budgetary matters and setting the number of county employees and their duties and compensation) and are therefore excluded from the initiative power. Several of the other initiatives would restructure county government in a manner that would violate the Government Code's County Budget Act provisions, Government Code sections 29000 set seq., by requiring the chair of the board of supervisors, rather than the county administrative officer or auditor, to review budget requests and prepare the County's budget. Based on the impact of the initiatives on those subject areas, the county counsel refused to act on those six initiatives, and filed a complaint for declaratory relief from the court to confirm that refusal was justified. The citizens filed a separate writ of mandate to compel the county counsel to prepare the ballot titles and summaries.

The trial court ruled for the County and excused the county counsel from her duty to prepare ballot titles and summaries because each of the subject initiatives was invalid and could not be placed on the ballot. The citizens appealed.

Pre-election challenges are disfavored, as it is usually more appropriate not to disrupt the electoral process and to allow the exercise of the people's franchise. Here, though, the Court of Appeal found the pre-election review was appropriate where the validity of the initiatives was in serious question, and the matter could be resolved as a matter of law before incurring unnecessary expenditures of time and effort on a futile election campaign.

The appellate court then turned to the substance of the initiatives. The court ruled that each of the six initiatives at issue was invalid because it exceeded the power of the electorate by intruding on matters exclusively within the county board of supervisors' authority. The Court of Appeal therefore affirmed the trial court's judgment for the County.

City of Hesperia v. Lake Arrowhead Community Services District (2019) 37 Cal. App.5th 734

Summary: A community services district's proposed solar project was subject to a city's zoning ordinance because no exemption under Government Code sections 53091 or 53096 applied.

Discussion: The Lake Arrowhead Community Services District (district) sought to construct a solar power project on land it owned in the City of Hesperia (City). The land the district owned was not properly zoned for use to generate and transmit power and the City therefore objected to the project. The district contended its project was exempt from the City's zoning requirements under an absolute exemption provided by Government Code section 53091(e), or under a qualified exemption provided by Government Code section 53096. Section 53091(e) provides that a city or county's zoning requirements do not apply to a local agency's facilities that produce or generate electrical energy or water, but that exemption does not apply if the facilities are for the storage or transmission of electricity. Section 53096 provides an exemption from zoning requirements for facilities that store or transmit electricity or water if the agency's governing body adopts a resolution by at least a four-fifths vote that finds there is no feasible alternative to the proposal.

The district contended the City's zoning ordinance did not apply because the proposed facilities would produce electricity and any transmission of that electricity was incidental to the energy production. Alternatively, the district contended the qualified zoning exemption under Government Code section 53096 applied because the facilities would transmit electricity and there was no feasible alternative to the district's proposal. The district's board of directors had adopted a resolution that made findings concerning the lack of a feasible alternative and the district therefore sought to move forward with its project. The City sued the district to halt the project for failing to comply with the City's zoning requirements.

The trial court ruled for the City, and the district appealed. The Court of Appeal affirmed the trial court. The appellate court found the exemption under section 53091(e) did not apply to the district's project because the project included the transmission of electricity, which was supported by the fact the project description included the export of electricity from the project. The court concluded that export constituted "transmission" that renders the exemption under section 53091(e) inapplicable.

The appellate court also found the district's board's finding that there was not a feasible alternative to the project was not supported by substantial evidence in the administrative record. The court stated the administrative record did not contain any evidence that the district considered any alternative locations, or that the district's board of directors considered economic, environmental, social or technological factors associated with the project site and alternative locations. Thus, the qualified exemption under section 53096 did not apply because the district's board's finding that there was no feasible alternative was not supported by substantial evidence.

Government Claims Act/Public Agency Liability

Wills v. City of Carlsbad (2020) 48 Cal. App.5th 1104

Summary: A police officer's retaliation claims against a city were limited to events that occurred within the six months before he filed a Government Claims Act claim with the city.

Discussion: A police officer in the City of Carlsbad (City) experienced alleged workplace retaliation starting in January 2013 that resulted in an impermissible e-mail he sent under a false name in June 2012. In December 2015, he filed a complaint with the Labor Commissioner and filed a claim with the City under the Government Claims Act regarding the alleged retaliatory actions. The City denied his claim and the officer sued the City.

At the trial court, the City contended that under Government Code section 911.2, the officer's retaliation claim could relate only to actions that occurred within the six months preceding the date of the claim; that is, to incidents occurring after June 29, 2015. The City therefore moved to strike the allegations in the officer's complaint concerning any incidents that occurred

before June 29, 2015. The officer contended his claim should include the retaliation events that went back to 2013 based on the continuing violation doctrine or, alternatively, that his Labor Commissioner complaint had equitably tolled the Government Claims Act filing period. The trial court disagreed and granted the City's motion. The case proceeded to trial and the jury found for the City, determining the City had legitimate non-retaliatory reasons to deny the officer the promotions he had sought. The officer appealed.

The Court of Appeal affirmed the trial court's judgment. The appellate court ruled that because the claim filing deadline under section 911.2 is not a statute of limitation, the doctrine of equitable tolling cannot be invoked to suspend that statute's six-month filing deadline. The court reasoned that applying tolling to the claims presentation deadline would undercut the public policies and purposes that require that deadline to be strictly applied.

With respect to the officer's continuing violation argument, the appellate court applied the test established by the California Supreme Court in *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823, of: (1) were the employer's actions sufficiently similar in kind; (2) did the employer's actions occur with reasonable frequency; and (3) did the employer's actions lack a degree of permanence. The court focused on the third factor and ruled the City's actions in putting different applicants in the positions the officer sought acquired a degree of permanence when each applicant was hired for the respective position. Therefore, because the City's employment actions acquired a degree of permanence, the continuing violation doctrine did not apply and the trial court correctly rejected the officer's retaliation claims that occurred more than six months before he filed his Government Claims Act claim with the City. The appellate court thus affirmed the trial court's judgment for the City.

Reed v. City of Los Angeles (2020) 45 Cal. App.5th 979

Summary: A city was not liable for a dangerous condition of public property based on trail immunity where a bike rider rode his bicycle into a rope attached to a badminton net stretched across a path in a city park.

Discussion: The plaintiff rode his bicycle into a rope attached to a badminton net stretched across a paved path in MacArthur Park in the City of Los Angeles (City). The plaintiff sued the City for his injuries, alleging a dangerous condition of public property and public employee negligence. The City filed a motion for summary judgment based on trail immunity under Government Code section 831.4, which provides immunity to government agencies for injuries caused by trails used for recreational or scenic purposes. The trial court agreed with the City and granted the City's motion for summary judgment, ruling plaintiff's claims were barred by the trail immunity doctrine. The plaintiff appealed.

On appeal, the plaintiff contended trail immunity did not apply because his injury was caused by a dangerous condition adjacent to the trail that was unrelated to the trail's purpose. The Court of Appeal rejected the plaintiff's contention and concluded the danger presented by the badminton net in the case was inherently connected to and existed only because of its connection with the trail. The Court of Appeal therefore held trail immunity applied and affirmed the trial court's judgment in favor of the City.

Lincoln Unified School District v. Superior Court (2020) 45 Cal.App.5th 1079

Summary: An applicant for relief from the Government Claims Act claim filing requirement cannot present different grounds to the court than she presented to the public agency when she sought relief to file a late claim.

Discussion: A high school football player collapsed during tryouts and suffered serious injuries from that incident. His mother engaged an attorney to file a claim on his behalf under the Government Claims Act (Government Code section 810 et seq.), and that claim was timely filed. The mother subsequently filed a late claim application on her own behalf relating to the impact of her son's injuries on her. In that application, she alleged she initially had been unaware of the nature and extent of her son's injuries and had only recently become aware of the seriousness of those conditions. The application included only a brief statement regarding excusable neglect, one of the statutory grounds that possibly justify filing a late claim. The Lincoln Unified School District (District) took no

action on that application and it was deemed rejected after 45 days passed. The mother then filed a petition with the San Joaquin County Superior Court for relief from the claim presentation requirement. The District opposed the petition, arguing the mother had not established excusable neglect. At the hearing on the application, the mother's attorney stated the reason for the mother's delay in filing her claim was his office's error in handling that claim. The trial court granted the mother's application, despite the credibility issue arising from the changed reason for the lateness of her claim. The District appealed.

The Court of Appeal reversed the trial court. Although the appellate court acknowledged the policy favoring trial on the merits, the court stated that policy does not justify approval of a petition that is not credible and does not demonstrate a right to relief by a preponderance of the evidence. In addition to the conflicting reasons for the late claim, the court pointed to the District's evidence of social media postings made shortly after the initial injury, including a Go Fund Me page, and television interviews where the mother discussed the significant impact the injuries were having on her. The court further found the mere recital of mistake, inadvertence, surprise or excusable neglect is not sufficient to warrant relief, particularly because such a recital, without detail of "the" reason for the late filing, defeats the legislative purpose of allowing an agency to determine whether "the" reason is meritorious. The court also found the mother's attorney's declaration was not credible.

In conclusion, the appellate court ruled the mother could not advance a factual theory of excusable neglect where it was entirely different from the one she previously presented to the public agency. The court found the trial court abused its discretion and directed the trial court to vacate its order and enter a new order denying the mother relief from the claim presentation requirement.

Thimon v. City of Newark (2020) 44 Cal. App.5th 745

Summary: A city was not liable for a dangerous condition of an intersection where a negligent driver caused the plaintiff's injuries and no triable facts evidenced that alleged dangerous condition.

Discussion: A 14-year old girl was seriously injured when a vehicle collided with her in a crosswalk at a busy, uncontrolled intersection in the City of Newark (City). The driver of the vehicle could not see the victim because of glare and the driver was not wearing his prescription glasses or sunglasses. The plaintiff sued the City on the basis of the alleged dangerous condition of the intersection.

The City filed a motion for summary judgment on the ground the plaintiff could not establish a defect in property constituting a dangerous condition. The undisputed facts included, among other things, that no similar pedestrian incident had occurred at that intersection in the prior 10-year period, which consisted of over a million vehicle trips, and that the applicable uniform traffic manual did not require a traffic signal at the intersection. The plaintiff opposed that motion with its expert witness' opinion that concluded the intersection constituted a dangerous condition. The trial court granted the City's motion and entered judgment for the City. The plaintiff appealed.

The Court of Appeal affirmed the trial court. The appellate court cited Government Code section 830, which defines a dangerous condition as a condition that creates a substantial risk of injury when the property, or adjacent property, is used with due care in a manner in which it is reasonably foreseeable that it will be used. The court therefore stated the City only needed to show that the intersection was safe for reasonably foreseeable careful use. The court concluded the intersection was not "dangerous" where the risk of harm is created only when foreseeable users fail to exercise due care. Here, the driver's negligence (i.e., failure to exercise due care) was the cause of the plaintiff's injuries and no evidence established the intersection was a dangerous condition. The appellate court also rejected the plaintiff's reliance on its expert opinion, ruling that the proffer of an expert declaration opining that a condition is dangerous is not determinative and does not necessarily raise a triable issue of fact to preclude summary judgment.

Hedayatzadeh v. City of Del Mar (2020) 44 Cal.App.5th 555

Summary: A city was not liable for a dangerous condition of public property where the city failed to erect barriers to prevent a pedestrian from willfully accessing railroad tracks located on an adjacent property.

Discussion: The plaintiff's 19 year old son was killed when he was struck by a train on property located adjacent to property owned by the City of Del Mar (City). The son had driven his car to the end of a city street and then walked around a guardrail and down a dirt embankment to access the train tracks, which were located on property that was not owned by the City. After smoking marijuana, the son was killed while attempting to take a "selfie" with an oncoming freight train while he was standing near the train tracks. The plaintiff sued the City for a dangerous condition of public property because its property was adjacent to the train tracks and the City did not adequately prevent access to the tracks. The City moved for summary judgment on several grounds, including that its own property was not in a dangerous condition, that the alleged dangerous condition of its property was not a proximate cause of the son's death, and that recovery is barred by assumption of risk based on the son's actions.

The trial court granted the City's motion for summary judgment, ruling the plaintiff failed to present evidence showing the condition of the City's property increased or enhanced the risk of injury which arises from the train tracks being located on the adjacent property. The plaintiff appealed.

The appellate court affirmed the trial court. The appellate court found no case authority that extends public agency liability to circumstances in which the public agency has merely failed to erect a barrier to prevent users of the public property from leaving the public property and willfully accessing a hazard on adjacent property. Thus, as a matter of law, the City was not liable for failing to erect that barrier and its failure to do so did not create a dangerous condition of its property.

Loeb v. County of San Diego (2019) 43 Cal. App.5th 421

Summary: A county was not liable for a dangerous condition of public property where a pedestrian tripped on a concrete pathway in a county park, because the county had trail immunity.

Discussion: The plaintiff tripped on an uneven concrete pathway in a county park, while she was walking from a campground to a restroom. The plaintiff sued the County of San Diego (County) for her injuries, alleging a dangerous condition of public property and violation of mandatory duties. The County filed a motion for summary judgment based on trail immunity under Government Code section 831.4, which provides immunity to government agencies for injuries caused by trails used for recreational or scenic purposes. The trial court initially found disputed facts and denied the County's motion for summary judgment. However, while discussing jury verdict forms, the plaintiff subsequently conceded the pathway was used in part for recreational purposes. The trial court then granted non-suit in favor of the County and the plaintiff appealed.

On appeal, the plaintiff contended the trial court erred in ruling that because the pathway was partially used for recreational purposes, the County was entitled to trail immunity. The Court of Appeal rejected the plaintiff's contention and concluded as a matter of law that the pathway constituted a trail for purposes of trail immunity, because pertinent case authorities establish that where a path is used for both recreational and non-recreational purposes, trail immunity applies. In this case, the plaintiff admitted the pathway at issue exists for the use of people using the 33 campsites at the park's campground. The appellate court also rejected the plaintiff's argument that because the County charged an admission fee to the park, it was a commercial enterprise not entitled to immunity. The Court of Appeal therefore affirmed the trial court's judgment in favor of the County.

Dobbs v. City of Los Angeles (2019) __ Cal.App.5th ____ [still no publication information]

Summary: A city was not liable for a dangerous condition of public property where a pedestrian walked into a bollard, because the city had design immunity.

Discussion: The plaintiff walked into a bollard outside of the Los Angeles Convention Center. The plaintiff sued the City of Los Angeles (City) for her injuries, alleging the bollard constituted a dangerous condition of public property. The City filed a motion for summary judgment based on design immunity. The trial court

granted summary judgment in favor of the City and the plaintiff appealed.

The Court of Appeal affirmed the trial court. The appellate court found the City met the required three elements for design immunity to apply, only two of which were disputed. The court found the City, under the second element, had discretion to approve the design before construction and that testimony regarding that discretionary approval by someone who was not personally involved in the design approval process was acceptable.

As to the third element, the court found the City presented substantial evidence regarding the reasonableness of its approval of the design. The court stated the evidence of reasonableness need not be undisputed, but only needs to be substantial, even if it is contradicted. Here, the court found the bollard was designed to stop a car and was obvious to pedestrians who looked where they were going. The court therefore concluded it was reasonable for the City to approve the design of the bollards. To summarize its decision, the appellate court stated, "When one walks into a concrete pillar that is big and obvious, the fault is one's own."

Fuller v. Department of Transportation (2019) 38 Cal.App.5th 1034

Summary: CalTrans was not liable under a dangerous condition of public property theory where the dangerous condition did not create a foreseeable risk of the particular type of injury. Thus, a reckless driver's actions did not subject CalTrans to liability for the dangerous condition of a highway.

Discussion: The plaintiff was severely injured and his wife was killed in an automobile accident when another driver recklessly tried to pass a tour bus on a two-lane section of Highway 1 near San Simeon. The plaintiff sued the Department of Transportation (CalTrans) for the dangerous condition of the highway. At trial, the jury found that although a dangerous condition of public property existed, that condition did not create a reasonably foreseeable risk of that kind of incident; i.e., a head-on collision. The trial court therefore entered judgment in favor of CalTrans. Plaintiff appealed, based in part on the fact the jury's special verdict was inconsistent.

Government Code section 835 provides a public entity is not liable for an injury caused by a dangerous condition of public property unless the injury was proximately caused by the dangerous condition and the dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred. The appellate court criticized the plaintiff's position, which essentially sought to impose liability on CalTrans once a dangerous condition of the highway was established. The court found that would render superfluous the remaining provisions of section 835 regarding proximate cause and foreseeable risk of the particular kind of injury. In addition, the appellate court found substantial evidence in the record supported the jury's finding that the dangerous condition did not create a reasonably foreseeable risk of the particular kind of injury. The court rejected the plaintiff's expert's testimony regarding the dangerous condition, which focused on a t-bone collision for a person leaving a nearby vista point, because such a t-bone collision did not occur in the case. Instead, the incident involved a head-on, passing related collision.

Lastly, the appellate court found the other driver's conduct was reckless and thus was unforeseeable. The court stated a public entity is only required to provide roads that are safe for reasonably foreseeable careful use, and the entity is not charged with anticipating that a person will use the property in a criminal way.

Based on the foregoing, the Court of Appeal affirmed the trial court's judgment in favor of CalTrans.

Lee v. Department of Parks and Recreation (2019) 38 Cal.App.5th 206

Summary: A stairway leading to a campground constitutes a trail to which governmental immunity is provided under Government Code section 831.4.

Discussion: Michele Lee (plaintiff) slipped while walking on a stairway leading to a campground operated by the California State Department of Parks and Recreation (Department) and broke her ankle. She sued the Department, alleging premises liability related to the alleged dangerous condition of the stairway that caused her injury.

The Department filed a motion for summary judgment based on the trail immunity provided by Government Code section 831.4. The Department also filed a motion for defense costs on the basis that plaintiff's lawsuit was unreasonable as a matter of law. Plaintiff opposed both motions, arguing the stairway was not a "trail" and that her lawsuit was filed in good faith and was reasonable.

The trial court granted both motions. The trial court stated the stairway was part of a trail and provided access to a recreational area. As such, the section 831.4 immunity applied. The court also ruled the plaintiff's lawsuit was unreasonable because the section 831.4 immunity "conclusively" applied. However, the court awarded the Department only fifty percent of the $44,043.50 in defense costs it sought. Plaintiff appealed both rulings.

The Court of Appeal ruled the stairway was subject to the section 831.4 trail immunity because it was designed and used to provide access to recreational areas and recreational activities. In addition, cases have applied trail immunity to paths, regardless of whether they are paved or unpaved. The court also focused on the purpose of section 831.4, which is to keep recreational areas open to the public by preventing burdens and costs on public agencies. Denying immunity would impose on the Department the burden of inspecting and repairing every path in every park in the state that contains steps and defending litigation similar to the present case. That could result in the state declining to build such stairways in the future, which could make parks less safe. The appellate court therefore affirmed the trial court on the immunity issue.

With respect to the defense costs, the appellate court reversed the trial court. The appellate court concluded the plaintiff's lawsuit was not frivolous because she had reasonable cause to file her action. The court agreed with the plaintiff that prior to this case, no case law had previously addressed whether stairways are trails for purposes of applying section 831.4 immunity. Thus, plaintiff was justified in filing and maintaining her lawsuit against the Department and an award of defense costs to the Department was not proper.

Wilson v. County of San Joaquin (2019) 38 Cal.App.5th 1

Summary: Governmental immunity for fire protection or firefighting services under Government Code section 850.6 does not apply to emergency medical services provided by firefighters.

Discussion: The plaintiffs sued the County of San Joaquin (County) for alleged negligence on the part of two firefighters who provided emergency medical services to the plaintiffs' infant son during the infant's transportation to a hospital after he was found unconscious and non-responsive at the plaintiffs' home. Despite the efforts to revive the infant, he died 10 days later. Eventually, the father, who was one of the plaintiffs, pleaded no contest to felony child abuse in connection with the infant's injuries.

At the trial court level, the County moved for summary adjudication based on the immunity provided by Government Code section 850.6 for fire protection and firefighting services. The plaintiffs opposed the County's motion, arguing the immunity does not apply to emergency medical services rendered by firefighters. The trial court found the section 850.6 immunity applied to the emergency medical services that were provided by firefighting personnel and granted the County's motion. The plaintiffs appealed.

The appellate court's analysis focused on the proper interpretation of section 850.6. The court emphasized a comment from the Law Revision Commission, which drafted section 850.6, which stated the intent of that statute was to apply to services related to "fighting a fire." The County did not present any authority to demonstrate the Legislature's intent that section 850.6 immunity was to include emergency medical services unrelated to fighting a fire.

The appellate court then reviewed Health and Safety Code section 1799.107, which provides qualified immunity applicable to emergency medical services, unless the services were performed in bad faith or in a grossly negligent fashion. However, the County did not bring its summary adjudication motion under that statute

and the factual issue regarding bad faith or negligence was not determined in the trial court. Therefore, the Court of Appeal could not apply that statute.

The Court of Appeal reversed the trial court because the emergency medical services at issue in the case were not fire protection or firefighting services for the immunity under Government Code section 850.6 to apply.

Huckey v. City of Temecula (2019) 37 Cal. App.5th 1092

Summary: A 9/16ths of an inch to approximately one inch height differential in a sidewalk, which was not obstructed from view, did not constitute a dangerous condition of public property that subjected a city to possible liability.

Discussion: The plaintiff tripped on an uneven sidewalk and sued the City of Temecula (City) on the basis that the sidewalk constituted a dangerous condition of public property under Government Code section 830 et seq. The City filed a motion for summary judgment on the ground the sidewalk defect was trivial as a matter of law, as the sidewalk elevation differential ranged from only 9/16ths of an inch to approximately one inch. The trial court granted the City's motion for summary judgment and plaintiff appealed, contending the trial court erred in determining the sidewalk height differential was trivial.

The Court of Appeal began its analysis by reviewing the requirements for liability for a dangerous condition of public property. The court stated that for a condition of public property to be dangerous, it must create a substantial risk of injury, as distinguished from a minor, trivial or insignificant risk of injury. In determining whether a defect is trivial as a matter of law, a court must examine all circumstances that might have rendered the defect a dangerous condition at the time of the accident, and not just the size of the defect.

As applied to the present case, the appellate court stated that prior appellate opinions have generally held that sidewalk elevation differentials ranging from three-quarters of an inch to one and a half inches have been held trivial as a matter of law. In reviewing the other applicable circumstances in the present case, the court noted there were no broken or jagged concrete pieces of the sidewalk, the City had not been notified of any trip and fall accidents at that location and there was no evidence that anything, such as dirt or debris, obstructed the plaintiff's view of the sidewalk's height differential.

Based on the size of the height differential and lack of any evidence demonstrating the height differential would not have been in plain sight, the appellate court affirmed the trial court's judgment for the City.

Quigley v. Garden Valley Fire Protection District (2019) 7 Cal.5th 798

Summary: Fire protection immunity under Government Code section 850.4 does not deprive a court of fundamental jurisdiction, but rather operates as an affirmative defense to liability.

Discussion: Rebecca Quigley (plaintiff) was a firefighter who was run over by a water truck while she was sleeping in a base camp while fighting a forest fire. She sued two fire protection districts (districts), alleging negligence and that they had created a dangerous condition of public property by allowing firefighters to sleep in the base camp without roping off the area or posting signage to prohibit vehicles from entering that area. In response to plaintiff's complaint, the districts included 38 affirmative defenses, including 17 that asserted various immunities. Those immunity defenses included one catch-all that referenced all defenses and rights under Government Code sections 810 through 996.6. The districts' answer did not include an affirmative defense that specifically raised Government Code section 850.4, which provides a public agency with immunity from liability for any injury resulting from the condition of fire protection or firefighting equipment or facilities.

At trial, after plaintiff's counsel had finished his opening statement, the districts moved for non-suit based on section 850.4 immunity. Plaintiff objected, contending the districts waived the defense under section 850.4 by failing to invoke the immunity in their answer. The trial court granted the defendants' motion for non-suit, ruling section 850.4 governmental immunity is jurisdictional and cannot be waived and also that the districts' catch-all affirmative defense was sufficient to invoke section 850.4 immunity. Plaintiff appealed, and the Court of Appeal

affirmed the trial court, issuing a ruling that conflicted with the prior appellate court decision in *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal. App.3d 683, which held that section 850.4 provided an affirmative defense that could be waived if it was not pleaded. Plaintiff then sought review from the California Supreme Court, which granted the request for review.

The Supreme Court began its analysis by acknowledging the presumption that statutes do not limit courts' fundamental jurisdiction absent a clear indication of legislative intent to do so. The Court found that section 850.4 contains no such clear indication to limit a court's jurisdiction, and that other statutory immunities (e.g., section 850.6 for plan or design immunity) have been held to be affirmative defenses to liability. The Court rejected the Court of Appeal's distinction between section 850.4 providing absolute, rather than qualified, immunity, as cases have held that even absolute immunity constitutes an affirmative defense and not a limitation on jurisdiction.

The Supreme Court therefore concluded section 850.4 immunity is to be raised as an affirmative defense that can be waived, and reversed the Court of Appeal's decision. The Court remanded the case to the Court of Appeal, with instructions to remand the case to the trial court to determine whether the section 850.4 immunity was adequately raised by the districts' catch-all affirmative defense.

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California Public Records Act

Steinle v. City and County of San Francisco (9th Cir. 2019) 919 F.3d 1154

Summary: A "detainer request" from United States Immigration and Customs Enforcement ("ICE") to a sheriff's department ("Department"), asking the Department to notify ICE of the date an undocumented immigrant is to be released from custody and to detain the alien until ICE can take custody, is not a request for a public record under the California Public Records Act ("CPRA").

Discussion: In 2015, the San Francisco County Sheriff issued a memorandum to Department employees directing them not to provide non-public information to ICE, including the dates or times that inmates would be released from Department custody. After issuing the memorandum, the Department received a detainer request for an undocumented alien convicted of multiple felonies, who was in Department custody and set to be released. The Sheriff released the inmate without responding to the detainer request. Shortly after release, the inmate stole a firearm and fatally shot the decedent, Kathryn Steinle. The decedent's parents sued San Francisco and the Sheriff for negligence, claiming that the Sheriff's issuance of the memorandum and the Department's implementation of it stopped ICE from deporting the inmate and preventing the killing.

Among other claims, Plaintiffs asserted that the Sheriff's failure to respond to the detainer request violated the CPRA. The Court disagreed, holding that the detainer request was a request to perform two tasks—give notice and detain the alien—and not a request for a public record. The Court further held that, even if the detainer request could be interpreted as a request for a public record reflecting the release date, there was no violation of the CPRA because there was no allegation that such a record existed at the time of the detainer request and was withheld.

City of Los Angeles v. Metropolitan Water Dist. of Southern Calif. (2019) 42 Cal. App.5th 290

Summary: Under Code of Civil Procedure section 1021.5 and the California Public Records Act ("CPRA"), a party that prevails on a cross-petition to compel disclosure in a reverse-CPRA action may be entitled to attorney's fees against a public agency that brought the reverse-CPRA action to prevent disclosure.

Discussion: In 2014, following then-Governor Brown's declaration that California was in a drought and that lawns and ornamental turf should be replaced with drought tolerant landscapes, Metropolitan Water District of Southern California (MWD) began a Turf Removal Rebate Program. In May of 2015, a reporter for the San Diego Union Tribune (Union) made a request under the PRA to MWD for information about the participants in the turf program, including their names, addresses, and rebate amounts. Ultimately, MWD released only generalized block numbers and MWD's share of the rebate amount, redacting the rest of the information. MWD did not provide any justification for its redactions. Union objected to the redactions and MWD's failure to provide written justification for them.

In July of 2015, Los Angeles Department of Water and Power (DWP) filed this "reverse-CPRA" action against MWD, seeking to enjoin MWD from releasing information about anyone who participated in the turf rebate program, regardless of whether they were DWP customers. Union sought and obtained leave to intervene in the action. At the same time, Union filed a CPRA cross-petition against MWD to compel disclosure of the names and addresses of turf program recipients. At Union's request, the trial court limited its temporary restraining

order, which temporarily prevented disclosure, to DWP customers only. Thereafter, other utilities intervened, seeking their own temporary restraining orders.

Union argued that MWD and DWP, by suing each other, had colluded to deny Union the opportunity to file a CPRA petition and to circumvent the judicial bar on public agencies filing declaratory relief actions under the CPRA. The trial court rejected Union's collusion arguments and found that DWP, as co-custodian of the requested records and a joint venturer with MWD, had standing to assert the privacy rights of DWP's customers. The court denied DWP's petition for a writ of mandate and granted Union's CPRA cross-petition for disclosure.

The court awarded Union $25,319 in attorney fees against MWD under the CPRA for Union's work on the CPRA cross-petition up until the point where MWD agreed it would produce complete customer names and addresses. For its work opposing the mandamus petition, Union received $136,645.82 in attorney fees under CCP section 1021.5 against DWP and the other utility intervenors, jointly and severally.

The Court of Appeal only considered the issue of the availability of attorney fees in reverse-CPRA actions. CPRA provides a trial court "shall award court costs and reasonable attorney[ ] fees" to a requesting party who prevails in an action to compel disclosure. All that it is required for an award of attorney fees under section 1021.5, is "that the party against whom such fees are awarded must have done or failed to do something, in good faith or not, that compromised public rights." DWP sought to block the public's access to records necessary to monitor and assess the use and alleged misuse of public funds, and potentially to shield its customer information from disclosure in all circumstances. That is sufficient. Although Union did not prevail on the collusion and standing claims, that does not disqualify them as the prevailing party or prevent an award of attorney fees. Here, the Court of Appeal found that Union enforced an important right affecting the public's right to know how the government uses public money and was entitled to attorney fees.

Becerra v. Superior Court (2020) 44 Cal. App.5th 897

Summary: The California Public Records Act (CPRA) required disclosure of all responsive records in the possession of the California Department of Justice (DOJ), regardless of whether the records pertained to officers employed by DOJ or whether DOJ created the records. DOJ could not invoke the CPRA's "catch-all" exemption based on undue burden based on a declaration not supported by expert opinion and not providing sufficient information to determine the burden.

Discussion: California statute generally provides for the confidentiality of peace officer personnel records. (Gov. Code, §§ 832.7, 832.8.) In 2018, Senate Bill 1421 was enacted, which expressly provides that certain records pertaining to the use of force or officer misconduct related to sexual assault or perjury-related offenses are subject to disclosure under the CPRA. In 2019, the nonprofit First Amendment Coalition and public broadcasting station KQED made CPRA requests to the DOJ for the categories of officer-related records addressed in Senate Bill 1421. DOJ partially denied the request, agreeing to produce only those records that pertained to peace officers employed by DOJ, not records pertaining to other officers. The First Amendment Coalition and KQED brought a writ of mandate to compel disclosure, which the trial court granted.

The Court of Appeal affirmed the trial court's ruling. Looking to the plain language of Senate Bill 1421 and the CPRA, the Court concluded that there was no statutory basis for DOJ's partial denial. The CPRA compels disclosure of all documents within an agency's possession, regardless of whether the documents were created within the agency. The Court noted that, if the Legislature intended to limit the scope of Senate Bill 1421 to records created or maintained by an officer's employing agency, it easily could have done so.

DOJ also asserted that providing all the requested records would impose an undue burden, proffering the declaration of a Senior Assistant Attorney General to the effect that DOJ's records on some matters were

voluminous and would require significant attorney time to review. The Court affirmed the trial court's finding that DOJ failed to make the required showing, because the declaration did not include sufficient detail to determine the extent of the burden.

Amgen, Inc. v. Health Care Services (2020) 47 Cal.App.5th 716

Summary: The "price increase notice" that pharmaceutical manufacturers must provide to certain prescription drug purchasers is not a privileged trade secret under Evidence Code section 1060 and is therefore not exempt from disclosure under the California Public Records Act (CPRA).

Discussion: Pharmaceutical manufacturers are required to provide 60-day notice of a planned increase in drug prices to certain statutorily defined customers, including state purchasers. Drug manufacturer Amgen, Inc. (Amgen) issued a price increase notice to the California Correctional Health Care Services (CCHC), a public agency. Approximately one month later, CCHC informed Amgen it had received a CPRA request from Reuters News for the price increase notices. Amgen filed a reverse-CPRA suit based on Government Code section 6254(k), seeking declaratory and injunctive relief preventing disclosure of the notices until after the actual implementation of the price increases. Amgen argued the price increase notice constituted a trade secret and was therefore exempt from disclosure under the CPRA. The trial court granted a preliminary injunction on these grounds and CCHC appealed.

The Court of Appeal held that the price increase notices were not a trade secret, defined under Civil Code section 3426.1 as information that derives economic value from not being known to the public. Amgen provided no evidence that the purchasers notified of the price increase pursuant to state law were under any legal obligation to keep the notices confidential. The Court further noted that the drug purchasers who were statutorily entitled to advance notice of price increases could *themselves* use that information to negotiate advantageous agreements with Amgen competitors. Because the very purpose of the notice statute was to provide Amgen's customers this opportunity for negotiation, the Court reasoned that public disclosure of the price increase notices would not result in the harm Amgen claimed.

Carlsbad Police Officers Assn v. City of Carlsbad (2020) 49 Cal.App.5th 135

Summary: Police officer associations sought to prevent release of certain records under the California Public Records Act (CPRA). Where media and civil rights group sought leave to intervene in this reverse-CPRA action, it was an abuse of discretion for the trial court to condition their intervention, as of right, on not bringing a request for attorney's fees under Code of Civil Procedure section 1021.5.

Discussion: Several police officer associations filed a "reverse-CPRA" action against several cities and other public agencies seeking to prevent release of, under Senate Bill 1421, use of force records from prior to the bill's effective date, January 1, 2019. The associations argued that would be impermissible retroactive application of the statute. Media and civil rights groups sought leave to intervene, asserting causes of action under the CPRA to force the agencies to release the records over the associations' objections. The trial court granted leave to intervene as of right, finding the agencies were unlikely to adequately protect intervenors' interests, but only on the condition that intervenors strike their requests for attorneys' fees under Code of Civil Procedure section 1021.5, which it held would inappropriately enlarge the issues in the case. The intervenors struck their requests for attorney's fees and intervened. Eventually the trial court entered judgment for the intervenors on their substantive claims. They then appealed the condition imposed on their intervention.

The Court of Appeal held that a trial court's discretion to place restrictions on intervention is more limited where the intervention is of right. The Court stated, in dicta, that it did not see a valid reason that a trial court could condition even permissive intervention on striking a request for attorney's fees, because an intervenor joins the action on the same footing as the original parties. It would also be inconsistent with the purpose of section 1021.5, which is to encourage litigation in the public interest. However, the Court did not decide the broader question of whether such a condition could be imposed on *any* intervention. Instead, it held that where intervention is

of right, such a condition is an abuse of discretion. The Court reversed the order imposing the condition and remanded to allow intervenors to make their motions for attorney's fees.

National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward (2020) 9 Cal.5th 488

Summary: Under the California Public Records Act (CPRA), requesters cannot be charged for the time spent editing videos to redact exempt, but otherwise producible, data.

Discussion: The National Lawyers Guild (Plaintiff) submitted a request under the CPRA to the City of Hayward (City), seeking 11 categories of records relating to the Hayward Police Department's actions in policing the 2014 Berkeley protests. The City collected text-based electronic records, such as written reports, logs, operational plans, and e-mails, and sent them to Plaintiff. The City also collected approximately 6 hours of video to send to Plaintiff, but city staff spent 35.3 hours editing that video to remove exempt audio and video. The City told Plaintiff that before the video could be picked up, Plaintiff would have to pay the City's costs to produce the video. Soon after, Plaintiff requested additional videos and, similarly, was invoiced for the City's costs to redact them. Plaintiff filed a petition for declaratory and injunctive relief and a writ of mandate against the City and relevant City officials. Plaintiff sought a refund of the money it had paid to receive the first set of videos and a writ of mandate or injunction requiring immediate production of the second set of videos without costs beyond those necessary to copy the videos.

Later, after paying for and receiving the second set of videos, Plaintiff moved for a peremptory writ of mandate, arguing that the City's charges were excessive, and seeking a refund of the money it had paid beyond the direct costs of duplicating the videos. The City argued in response that the invoiced costs were justified under the CPRA, because the City's staff had performed data extraction and compilation, as defined in Government Code section 6253.9(b)(2). The trial court found that Hayward's charges were unjustified and granted the petition for writ of mandate, directing the City to refund to Plaintiff the charges for the City's staff time. The Court of Appeal reversed, agreeing with the City that section 6253.9(b)(2) entitled the City to recover its costs for redacting the videos as an "extraction" of data necessary to produce the record.

The California Supreme Court held that the term "extraction" does not cover every process that might be colloquially described as "taking information out." It does not, for example, cover time spent searching for responsive records in an e-mail inbox or a computer's documents folder. Just as agencies cannot recover the costs of searching through a filing cabinet for paper records, they cannot recover comparable costs for electronic records. Nor, for similar reasons, does "extraction" cover the cost of redacting exempt data from otherwise producible electronic records. The Court held that section 6253.9(b)(2), as presently written, does not provide a basis for charging requesters for the costs of redacting government records kept in an electronic format, including digital video footage. The Court of Appeal's decision was reversed, and the City was disallowed from charging Plaintiff for the time city staff spent responding to Plaintiff's requests.

California Gun Rights Foundation v. Superior Court (2020) 49 Cal.App.5th 777

Summary: Government Code section 6259, which provides for enforcement of the California Public Records Act (CPRA) by means of "a verified petition the superior court of the county where the records or some part thereof are situated," is a venue statute and does not limit the jurisdiction of other superior courts over CPRA. Under Code of Civil Procedure section 401, an action against the state under the CPRA that may be brought in Sacramento County may be brought in any county in which the Attorney General has an office.

Discussion: The California Gun Rights Foundation (Petitioner) requested records from the California Department of Justice (State) under the CPRA. Petitioner filed an action under the CPRA in Los Angeles County Superior Court, alleging that the State denied or unreasonably delayed its request.

The State filed a motion to transfer the action to Sacramento County Superior Court, claiming that under Government Code section 6259, which provides for the filing of a "verified petition the superior court of the county where the records or some part thereof are situated," the Los Angeles County Superior Court did not have jurisdiction to hear the CPRA claim, because the records sought were located in Sacramento and all the persons responsible for these records under the CPRA worked in Sacramento. Petitioner argued that the trial court had jurisdiction under Code of Civil Procedure section 401, which allows suits against the State that must or may be brought in Sacramento to be brought in any city or county in which the Attorney General has an office. The trial court granted the motion to transfer the action, concluding that the Petitioner would only be entitled to bring the suit in Los Angeles County if another statute expressly required the action be commenced in Sacramento County.

The Court of Appeal reversed, holding that Government Code section 6259 is a venue statute, not a jurisdictional one. Section 6258 states that a proceeding to enforce the right to inspect public records may be adjudicated "in any court of competent jurisdiction." Section 6259 does not limit that jurisdiction. The State argued that, if section 6259 is a venue statute, then it controls rather than Code of Civil Procedure section 401, because it is more specific. The Court disagreed. Under existing case law, section 401 is applied broadly according to its plain meaning. The legislature was presumably aware of section 401 and that case law when it Government Code section 6259, therefore the two statute must be harmonized unless there is no rational basis for doing so. Thus, an action under the CPRA that would be brought in Sacramento County under Government Code section 6259 may be brought in any county in which the Attorney General has an office, including Los Angeles County.

Freedom of Information Act

Sierra Club, Inc. v. United States Fish and Wildlife Service (9th Cir. 2019) 925 F.3d 1000

Summary: Internal drafts generated by the United States Fish and Wildlife Service and the National Marine Fisheries Service (the Services) as part of a Section 7 consultation with the United States Environmental Protection Agency (EPA) regarding a proposed rule on cooling water intake structures were not necessarily exempt from disclosure under the Freedom of Information Act (FOIA).

Discussion: In April 2011, the EPA proposed new regulations for cooling water intake structures. As part of the rule-making process, EPA consulted with the Services pursuant to Section 7 of the Endangered Species Act. Section 7 requires the Services to prepare a written "biological opinion" finding either "jeopardy" or "no jeopardy" to the continued existence of a listed species or critical habitat. If the biological opinion concludes that the agency action causes "jeopardy," the Services must propose "reasonable and prudent alternatives" (RPAs) to the proposed action.

The Sierra Club, under FOIA, requested certain documents related to this consultation process. The Services withheld certain draft biological opinions and draft RPAs, citing FOIA's Exemption 5, which covers "interagency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency…." (5 U.S.C. § 552(b)(5).) Courts have interpreted this privilege as coextensive with privileges applicable in civil discovery. Here, the Services invoked the "deliberative process privilege," which permits agencies to withhold certain documents to avoid inhibiting frank written discussion of legal or policy matters within the agency.

The trial court ordered the Services to disclose some of the withheld documents, and the Ninth Circuit affirmed in part and reversed in part, generally taking a narrow view of the deliberative process exemption. The Court underscored that a document's characterization as an "interagency" memorandum satisfies only the threshold step of FOIA's Exemption 5 analysis, and that the document's substance and the context in which it was created are dispositive, rather than its mere characterization as a draft. For the privilege to apply, a document must be both "pre-decisional" and "deliberative."

The Court held that a draft jeopardy opinion prepared and circulated within NMFS and later revised was pre-

decisional, but two draft jeopardy opinions that were finalized and ready for signature were not pre-decisional even though the draft regulations were changed and the opinions were never released publicly. Those draft jeopardy opinions represented the Services' final opinion on the EPA rule as it was then proposed. By contrast, the Ninth Circuit held that the draft RPAs were pre-decisional because they did not represent the Services' final opinion on what changes to the then-proposed rule would be necessary to comply with the Endangered Species Act. The Court also held that disclosure of the finalized draft opinions would not expose any deliberative processes, as they did not include comments and could not be compared against subsequent drafts, unlike the internal draft opinion and the RPAs.

Food Marketing Institute v. Argus Leader Media (2019) 139 S.Ct. 2356

Summary: Where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is "confidential" under the Freedom of Information Act (FOIA) exemption for confidential commercial information.

Discussion: Plaintiff made a FOIA request to the United States Department of Agriculture (USDA), requesting food stamp redemption data for each store registered under the Supplemental Nutrition Assistance Program (SNAP Data). USDA decline to produce store-level data, citing 5 U.S.C. § 552(b)(4) (Exemption 4), which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Plaintiff sued to compel disclosure, and after a bench trial the District Court entered judgment for the Plaintiff. The Court of Appeals for the Eighth Circuit affirmed.

The United States Supreme Court held that Exemption 4 allows federal agencies to withhold confidential commercial or financial information obtained from a person at least where that information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy. In reaching this result, the Court overruled a long-standing and widely followed judicial interpretation of Exemption 4 requiring an additional showing that disclosing the records would result in "substantial competitive harm." The Court reasoned that the dictionary definition of "confidential" does not support this judicially created requirement. The majority did not reach the question whether the exemption would apply if the owner keeps the information private, but shares it with a federal agency without a promise to keep it from disclosure.

It is unclear what, if any, impact the case may have on judicial interpretations of the California Public Records Act, because there is no exemption directly analogous to FOIA Exemption 4. Instead, the official information, public interest, and trade secret exemptions all require more than just showing the private owner keeps the information private and shares it with a public agency under a promise not to disclose it. (See Gov. Code, §§ 6254, subd. (k) [exempting from disclosure records exempted from disclosure under federal or state law, including Evid. Code, §§ 1040 (privilege for official information) and 1060 (privilege to protect trade secret)]; 6255 [public interest balancing test exemption applies where the public's interest in non-disclosure clearly outweighs its interest in disclosure].)

Animal Legal Defense Fund, et al. v. U.S. Dept. of Agriculture (2019) 935 F.3d 858

Summary: Under the Freedom of Information Act (FOIA), a District Court has jurisdiction to enjoin agencies from continued violations of section 552(a)(2), the reading room provision, by requiring an agency to post certain categories of documents in online reading rooms.

Discussion: Under 5 USC 552(a)(2), FOIA's so-called "reading room" provision, as amended by the 1996 amendments to FOIA, federal agencies must make certain agency records available for public review in an electronic format. In February of 2017, the Animal and Plant Health Inspection Service ("APHIS") took down from its website various compliance and enforcement records related to the Animal Welfare Act, based on concerns that its review and redaction procedures were insufficient to protect personal privacy.

The Animal Legal Defense Fund (ALDF) brought this suit alleging that APHIS's action violated FOIA's reading room provision and seeking an injunction prohibiting APHIS from withholding the records from the public and requiring it to post the records in the online reading room. The District Court, concluding that FOIA does not allow courts to compel agencies to publish records in online reading rooms, dismissed the action for lack of subject matter jurisdiction. ALDF appealed.

Under 5 U.S.C. § 552(a)(4)(B), a District Court has "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." The Ninth Circuit looked to the plain language and structure of the statute and determined that its provisions do grant a District Court jurisdiction to enjoin an agency to make its records available under the reading room provision. In doing so, it disagreed with the D.C. Circuit, which held in *Citizens for Responsibility and Ethics in Washington v. United States Department of Justice* (D.C. Cir. 2017) 846 F.3d 1235 that an injunction enforcing the reading room provision is beyond the scope of this jurisdiction because the records are not "withheld from the complainant" by from the public.

Accordingly, the Ninth Circuit remanded the case for further proceedings.

Brown Act

Fowler v. City of Lafayette (2020) 45 Cal. App.5th 68

Summary: An agency holding a closed session based on a threat of litigation made outside of a public meeting must make a record of that threat and include that record in the board packet made available to the public upon request. Where a City failed to meet this requirement, but the issue was extensively discussed in open sessions, no prejudice was shown and the decision was not subject to nullification under the Brown Act.

Discussion: The City of Lafayette's Planning Commission approved residential property owners' application to build a tennis cabaña. Plaintiffs, the neighbors of the property owners, appealed to the City Council, arguing the approval was inconsistent with the neighborhood and too close to an adjacent home. The appeal was considered at four City Council meetings, and the Planning Commission's decision was upheld. Plaintiffs discovered later that the property owners' attorney threated to sue the city if the project application was denied, and the City Council discussed the threat of litigation during closed sessions prior to their open meetings. Plaintiffs sought a writ of mandate under the Brown Act to set aside the denial of their appeal, alleging that the City violated the Brown Act by discussing the application in closed session and that Plaintiffs were deprived of their right to a fair hearing. The trial court rejected all of Plaintiff's claims, denied the petition, and entered judgment for the City.

The Court of Appeal affirmed the judgment, but it disagreed with the trial court on whether the City complied with Government Code section 54956.9, which provides for closed sessions to discuss potential litigation. The Court held that, because subsection (e)(5) specifically addresses situations involving a "statement threatening litigation made by a person outside an open and public meeting," that provision controlled rather than the more general language of subsection (e)(2). Subsection (e)(5) requires that agency staff "make[] a contemporaneous or other record of the statement prior to the meeting, which record shall be available for public inspection pursuant to Section 54957.5." In this case, the threat was made orally and noted in the City's computer system, and it was conveyed orally to the city council as the basis for the closed session. The City argued that the notation in its database was subject to the Public Records Act and thus "available for public inspection." The Court rejected this argument and held that a closed session based on subsection (e)(5) requires that the record of the statement threatening litigation be included in the agenda packet made available upon request prior to the meeting. It was not enough to simply enter the information into the City's database, because an interested person would not know the questions to ask to find that information.

However, the Court affirmed the judgment, holding that since the approval of the project was discussed and debated exhaustively in multiple open sessions, and no prejudice was shown resulting from the Brown Act violation, the approval of the project should not be nullified.

Lateef v. City of Madera (2020) 45 Cal. App.5th 245

Summary: Where a Municipal Code required a "five-sevenths vote of the whole of the council" to grant an appealed application, the "whole of the council" meant the entire seven member council, even though one seat was vacant and one member was recused.

Discussion: In 2015, Plaintiff Lateef applied to the City of Madera's Planning Commission (Commission) for conditional use permits for the sale of alcohol and tobacco products in a neighborhood convenience store. The Commission denied Lateef's application, and Lateef appealed to the City Council.

At the time of the appeal, the City's Municipal Code required the City Council to set a public hearing date and decide appeals within 60 days of filing. It also required a "four-fifths vote of the whole of the council" to grant an application denied by the Commission. The City was in the process of amending the Municipal Code to change the four-fifths requirement to reflect the City's recent change from a five-person council to a seven-person council. Lateef agreed to continue the hearing and waive the deadlines while the amendment was finalized. In its amended form, the Municipal Code now requires "a five-sevenths vote of the whole of the council."

At the hearing on Lateef's appeal, one council seat remained vacant while another Councilman recused himself from the vote. The remaining five members voted 4-1 to grant Lateef's application, and the chair declared the motion defeated because it did not receive the required five votes. Lateef sought a writ of mandate to vacate the decision, arguing that the Municipal Code required a 71% majority of those voting.

The Court of Appeals rejected Lateef's contention and held that under the plain meaning rule the five-sevenths requirement applied to "the whole of the council," meaning the full seven-person council. The Court also rejected Lateef's argument he was denied a fair hearing because the vacant seat and recused member were counted for purposes of determining the required number of votes. The Court reasoned that including the vacant seat and recused member in the "whole of the council" was appropriate, because they are also included for purposes of determining whether a quorum exists.

Conflicts of Interest

A.J. Fistes Corp v. GDL Best Contractors, Inc. (2019) 38 Cal.App.5th 677

Summary: A corporation that has paid taxes within the state of California meets the requirements of CCP § 526a. Furthermore, demurrers for uncertainty are disfavored and should only be granted if the pleading is so incomprehensible that the defendant cannot reasonably respond.

Discussion: A school district sought bids for "Exterior Environmental Remediation and Painting at Various Sites," which included painting, improvements, and the removal of hazardous materials at multiple elementary school sites. Plaintiff AJ Fistes Corp (Fistes) and Defendant GDL Best Contractors, Inc. (GDL) both submitted bids for the contract, Fistes for $1.12 million and GDL for $2.55 million. The school district rejected Fistes' bid as "nonresponsive," because it did not include certain required documentation. GDL was subsequently awarded the contract.

Fistes filed suit against the school district and GDL, alleging that the contract was void due to violations of the Public Contract Code and the Government Code. Specifically, Fistes alleged the school district improperly awarded the contract to GDL despite GDL's failure to prequalify under Public Contract Code sections 20111.5(d) and 20111.6 and despite a conflict of interest under Government Code section 1090. Fistes sought to impose a constructive trust on the funds paid to GDL in favor of the school district. The trial court sustained a demurrer without leave to amend based on lack of standing under Code of Civil Procedure section 526a, which provides any person that pays "a tax that funds the defendant local agency" with standing to enjoin "illegal expenditure of, waste of, or injury to" the agency's public funds.

Prior to the 2018 amendments to section 526a, it read "a tax therein" instead of "a tax that funds the defendant local agency." In *Weatherford v. City of San Rafael* (2017)

2 Cal.5th 1241, the California Supreme Court held that the statute did not require that the plaintiff pay a property tax to the defendant local agency to establish standing. It was sufficient that the plaintiff was liable for any tax payable to the local agency. Chief Justice Cantil-Sakauye, in concurrence, encouraged the legislature to clarify the scope of taxpayer standing conferred by section 526a. The 2018 amendments were made in response to that recommendation.

The Court of Appeal held that the amended section 526a clearly conferred standing on any person who within the past year has paid a tax that, directly or indirectly, provides funds to the local agency, regardless of whether it is paid directly to the local agency. Because school districts receive their primary funding from the state, including appropriations from the general fund. Therefore, because Fistes paid state taxes it had standing under section 526a.

Howard Jarvis Taxpayers Assn. v. Newsom (2019) 39 Cal.App.5th 158

Summary: Legislation allowing public funding of campaigns under certain circumstances directly conflicts with a primary purpose of voter-approved amendments to the California Political Reform Act (CPRA), which prohibited public funding of political campaigns.

Discussion: The CPRA provides for two methods by which the CPRA can be amended or repealed: a statute "to further [the CPRA's] purposes," passed in both the State Assembly and State Senate by a two-thirds vote and signed by the Governor (Gov. Code, § 81012(a)), or by a statute that takes effect only upon voter approval. Since its passage in 1974, the CPRA has been amended four times by voter initiative. As amended by these various voter initiatives, the CPRA expressly prohibited the use of public funding for political campaigns.

In 2016, the California Legislature passed Senate Bill 1107, which eliminated the prohibition on public funding of political campaigns in cases where a state or local jurisdiction created a dedicated fund for that purpose and established criteria for candidate qualifications. The Howard Jarvis Taxpayers Association brought an action challenging Senate Bill 1107 on the grounds that it was inconsistent with and did not further the purposes of the CPRA, as amended by voter initiative. After analyzing the stated purposes of the CPRA and each of the voter-enacted amendments, the Court of Appeal held that indeed one purpose of the CPRA was to prohibit the public financing of political campaigns, and Senate Bill 1107 was therefore an improper legislative amendment that did not further the statute's purposes.

California Taxpayers Action Network v. Taber Construction, Inc. (2020) 42 Cal. App.5th 824

Summary: A construction company that is selected to perform pre-construction planning and design services for a project for a public agency under one contract and then enter a lease-leaseback contract for the same project, both as part of a design-build arrangement, is not "contracting on behalf of" the public agency and thus is not barred by Government Code section 1090 from entering the lease-leaseback contract.

Discussion: A school district issued requests for qualifications and proposals for an HVAC modernization project that would include two contracts, one for pre-construction design and planning (preconstruction contract), the other for construction services (lease-leaseback contract). The school district selected Defendant Taber Construction (Taber) for the project. The preconstruction contract provided that the school district would enter into the lease-leaseback contract with Taber upon completion of the preconstruction contract. The school district and Taber entered into the preconstruction contract and completed performance. Four months later they entered into the lease-leaseback agreement. Plaintiff sued, asserting a number of theories, and after a prior appeal only one theory remained: that the lease-leaseback contract was prohibited by Government Code section 1090, which prohibits public officials from making contracts in their official capacity in which they are financially interested. Given increased outsourcing of government services, section 1090 has been extended to cover independent contractors who are "entrusted to transact on behalf of the government."

The trial court rejected plaintiff's assertion that the preconstruction contract created an opportunity for Taber

to use its position to obtain the lease-leaseback contract. Instead, it credited Taber's argument that the school district intended to create one contract in two phases though "one fluid transaction process." It found that the provision of preconstruction services was not evidence of a conflict but was the "precise intent" of the school district, which wanted a design-build arrangement and that the timing of the contracts showed they were not "meaningfully separate." The trial court granted summary judgment in Taber's favor.

The Court of Appeal affirmed, holding that the lease-leaseback contract was not void under Government Code section 1090, because there was no evidence that Taber was "transacting on behalf of" the school district. Rather, it was providing services as a contractor. And Taber had been selected for both contracts at the same time based on the requests for proposals and qualifications, which it was not involved in preparing.

San Diegans for Open Gov't. v. Public Fac. Finan. Auth. Of City of San Diego (2019) 8 Cal.5th 733

Summary: Government Code section 1092 does not create a private right of action to invalidate a contract where the plaintiff was not a party to the contract.

Discussion: The City of San Diego (City) passed a resolution authorizing the issuance of new bonds to refinance the remaining debt from the construction of Petco Park. Plaintiffs sued the City, alleging among other things violations of Government Code section 1090, which prohibits public officials from being "financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." Government Code section 1092 provides that such contracts "may be avoided at the instance of any party except the officer interested therein." The City argued that Plaintiffs lacked standing, since they were not parties to the contracts at issue. The trial court agreed and dismissed the case. The Court of Appeal reversed, holding that "any party" in section 1092 means "any litigant with an interest in the subject contract sufficient to support standing" and that Plaintiffs possessed such an interest.

The California Supreme Court reversed, holding that the most natural reading of the phrase "any party" in section 1092 is "any party *to the contract*" referenced in section 1090. The Court noted that a statute will not be held to create private rights of action unless the legislature expresses a clear intent to do so, and no such clear intent is expressed in section 1092. The Court also cited other instances in which the legislature has used the term "party" in a statute referencing a contract, noting it typically means a party to that contract.

The Court reversed the judgment of the Court of Appeal, but it remanded for further proceedings on an issue not reached by the Court of Appeal: whether Plaintiffs have standing under Code of Civil Procedure section 526a, which confers standing on certain taxpayers to enjoin "illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a local agency."

People ex rel. Jackie Lacey v. Albert Robles (2020) 44 Cal.App.5th 804

Summary: The office of Director of an agency that imposes an assessment and that of Councilmember or Mayor of a city that indirectly pays the assessment are incompatible under Government Code section 1099. The exception to section 1099 for the simultaneous holding of offices "compelled or expressly authorized by law" does not include local ordinances. A District Attorney qualifies as a "private party" who can serve as the relator in a quo warranto action under Code of Civil Procedure section 811.

Discussion: Defendant Robles served on the board of directors of the Water Replenishment District of Southern California (WRD) beginning in 1992. In 2013, Robles was elected as a member of the City Council of Carson, California (City), which lies within WRD's boundaries, and in 2015 he became the mayor. The water companies providing water to the City are subject to the "replenishment assessment" imposed by WRD, a charge per acre-foot of water pumped within WRD's boundaries, and pass that cost along to the City.

In 2014, the Los Angeles County District Attorney informed Robles that these two offices were incompatible under Government Code section 1099, which makes it

unlawful to simultaneously hold offices for which there is a possibility of a significant clash in duties or loyalties based on the powers and jurisdiction of each office. When Robles refused to relinquish his position on the WRD board, the District Attorney obtained the Attorney General's leave to bring a writ of quo warranto against Robles. Despite the fact that WRD and the City passed resolutions purporting to authorize Robles' dual office-holding while the quo warranto was pending, the trial court concluded that Robles' two positions were indeed incompatible, based on the conflict between his role as a rate-maker as a member of the WRD board and as a rate-payer as a member of the City Council. The trial court entered judgment removing Robles from the WRD board.

On appeal, Robles' argued that the quo warranto was not properly brought "upon a complaint of a private party" under of Code of Civil Procedure section 803, because the District Attorney is not a "private party." The Court of Appeal rejected this argument, holding that a public official may serve as a relator under section 803. On the merits, the Court affirmed the judgment and held that the offices were incompatible based on Government Code section 1099(a)(2), as there is a "possibility of a significant clash of duties or loyalties between the offices." The Court affirmed the trial court's holding that such a possibility necessarily arose from the WRD board's responsibility for setting the rates of the replenishment assessment and the City Council's obligation to protect the consumers within the City, including by bringing challenges to such rate-making if necessary. The Court also rejected Robles' argument, based on the resolutions passed during the pendency of the quo warranto, that holding both offices was "compelled or expressly authorized by law," a recognized exception to section 1099. The Court held that "by law" in the statute means state law, not local ordinances.

Finally, the Court also rejected Robles' argument that the District Attorney's authority to sue granted by the Attorney General lapsed after Robles' re-election in 2016. The Court held that the continuous occupation of both offices was the violation of section 1099 and that judgment could be entered if the defendant still occupied both offices at the time of judgment.

Petrovich Development Company, LLC v. City of Sacramento (2020) 48 Cal.App.5th 963

Summary: Where a City Council, in a quasi-judicial capacity, heard the appeal of a conditional use permit granted by the Planning Commission, a Councilmember who organized the opposition to the permit by soliciting votes and crafting talking points for use at the hearing demonstrated an unacceptable probability of actual bias and should have recused himself from the decision-making process.

Discussion: The City of Sacramento's Planning Commission approved the conditional use permit for a Safeway gas station by a vote of 8-3. A neighborhood association appealed, arguing the gas station was inconsistent with the spirit of development guidelines encouraging infill and public transportation. A local union leader wrote the City Attorney, noting that City Councilmember Jay Schenirer had been quoted in a neighborhood association newsletter as saying, "I don't think a gas station fits in with what was originally proposed." The City Attorney concluded that Mr. Schenirer's comments did not establish the "unacceptable probability of actual bias" that would require his recusal.

Text and email messages indicated that Mr. Schenirer had actively sought to assist opponents of the project and marshal votes for the appeal prior to the City Council's deliberations. In particular, he sent an email to the then-mayor and his aide with a list of "talking points" in opposition to the project and communicated with the neighborhood association president and project opponent about the sequencing of comments at the hearing and related strategy. The City Council, including the then-mayor, voted to deny the conditional use permit. The project applicant sough a writ of mandate and declaratory and injunctive relief challenging the denial of the conditional use permit on the grounds that Mr. Schenirer had failed to act as an unbiased and neutral decision maker, as required for a quasi-judicial decision.

The trial court granted the petition and ordered the City Council to hold a new hearing, with Mr. Schenirer recused. The Court of Appeal affirmed. The Court held that Mr. Schenirer's comments quoted in the

neighborhood association newsletter alone would not have given rise to an unacceptable probability of actual bias. But the fact that Mr. Schenirer took affirmative steps to assist opponents of the conditional use permit and organized the opposition at the hearing, actively soliciting votes for his position and creating a list of talking points in advance of the hearing, showed that the he acted as an advocate rather than a neutral and impartial decision maker and should have recused himself.

McGee v. Torrance Unified School District (2020) 49 Cal.App.5th 814

Summary: Plaintiff's claims that lease-leaseback agreements were invalid under Government Code section 1090 was effectively an *in rem* claim under Government Code section 863 (Validation Statute). Therefore, those claims were moot where the facilities financed under the agreements had already been fully constructed.

Discussion: Plaintiff brought several actions challenging the validity of Torrance Unified School District's (School District) lease-leaseback agreements, based on a number of theories. The plaintiff pleaded each of the cases as *in rem* "reverse validation" actions under the Validation Statute, and in prior trial court proceedings he argued that his claims were *in rem*, meaning they challenged the validity of the lease-leaseback contracts. After several appeals, the only remaining theory was that the agreements violated Government Code section 1090. When the public school facilities financed under the agreements were completed, the School District moved to dismiss the actions as moot. After a bench trial solely on the issue of mootness, the trial court dismissed the cases as moot.

The Court of Appeal affirmed, citing *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1579 for the proposition that completion of public works projects moots challenges to the validity of the contracts under which the projects were carried out because the court cannot provide the plaintiff the relief sought, i.e., a judgment invalidating the contracts. Plaintiff argued that the lease-leaseback contracts were not subject to validation, and his conflict of interest claims under Government Code 1090 were *not* pleaded as *in rem* reverse-validation claims attacking the validity of the contracts, but were alleged *in personam* against the private construction company that built the schools as taxpayer challenges under Code of Civil Procedure section 526a.

The Court rejected both arguments. First, the lease-leaseback contracts were contracts funded by a general obligation bond and therefore were "contracts" within the meaning of Government Code section 53511(a) and subject to the Validation Statute. Second, the gravamen of the complaint and the nature of the right sued upon showed that to prevail on his section 1090 conflict claims would require a finding that the agreements were invalid. Thus, while not every section 1090 cause of action falls within the validation statutes, Plaintiff's claims did, and therefore they were moot.

5 // Employment

Bostock v. Clayton Cty. (2020) ___U.S.___ [140 S.Ct. 1731, 207 L.Ed.2d 218]

Summary: Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees based upon their sexual orientation or gender identity.

Discussion: Individual employees alleged, in their own separate cases against their respective employers, unlawful termination because of discrimination on the basis of sex under Title VII (42 U.S.C. § 2000e-2(a)). Under Title VII, it is unlawful for an employer to discriminate against an individual because of his/her sex.

Each of the cases made their way through the respective district and appellate courts, with varying outcomes. The Eleventh Circuit determined that Title VII did not prohibit employment discrimination based upon an employee's sexual orientation. (*Bostock v. Clayton Cty. Bd. of Comm'rs* (11th Cir. 2018) 723 F.App'x 964.) The Second Circuit ruled that Title VII prohibited employment discrimination based upon sexual orientation. (*Zarda v. Altitude Express, Inc.* (2d Cir. 2018) 883 F.3d 100.) The Sixth Circuit determined that Title VII protected against employment discrimination based upon gender identity. (*EEOC v. R.G.* (6th Cir. 2018) 884 F.3d 560.) Each case was appealed to the Supreme Court of the United States and review was granted.

The Supreme Court interpreted the meaning of discrimination on the basis of "sex" as used in Title VII. The Majority concluded that an employer cannot discriminate against an employee's sexual orientation or gender identity without simultaneously discriminating against that employee's "sex." The Court used the following examples to illustrate this conclusion. If an employer with two employees (one male and one female) fires the male employee for no reason other than his attraction to men, that employer discriminates against the male employee for traits or actions that it otherwise tolerates from the female employee. Alternatively, if an employer with two employees (one of whom identifies as a member of the opposite sex than what was assigned at birth [i.e., identifying as transgender] and the other who identifies as a member of the same sex as assigned at birth) fires the transgender employee for no reason other than that individual's gender identity, the employer discriminates against the individual for traits or actions that it otherwise tolerates in the employee who identifies with the sex assigned at birth. The Court determined that in both instances, the employee's "sex" is the "but-for" cause of the discriminatory conduct.

The Court also analyzed whether Congress intended Title VII to include homosexual and transgender traits as a "statutorily protected characteristic." The Majority reasoned that while Congress may not have anticipated the word "sex" to include sexual orientation or gender identity, it likely was not "thinking about many of Title VII's consequences that have become apparent over the years," which now include prohibiting discrimination on the basis of motherhood, or prohibiting sexual harassment of male employees.

Comcast Corp. v. Nat'l Ass'n of African American-Owned Media (2020) 140 S.Ct. 1009

Summary: The but-for causation standard applies to claims of racial discrimination raised under section 1981 of title 42 of the United States Code (Section 1981). The requirement to establish "but-for" causation applies regardless of the stage of the lawsuit.

Discussion: Entertainment Studios Network, an African-American-owned television network operator and the National Association of African American-Owned Media (collectively, "ESN") sued Comcast Corporation (Comcast) after negotiations to have Comcast carry ESN's channels failed. ESN sought billions of dollars in damages, claiming that Comcast's systemic disfavoring of 100-percent African-American-owned media companies violated Section

1981. Section 1981 guarantees all persons the same right enjoyed by white citizens to make and enforce contracts and does not expressly limit the type of contract to which it applies. ESN did not dispute that Comcast had identified legitimate business reasons for refusing to carry ESN's channels; however, ESN claimed that these reasons were offered to conceal its true discriminatory intentions.

The trial court granted Comcast's motion to dismiss the case, concluding that ESN's complaint failed to show that, but for racial animosity, Comcast would have entered into a contract with ESN. ESN appealed the case to the Ninth Circuit Court of Appeals. On appeal, the court concluded that the "but-for" causation standard was the wrong standard; instead, ESN only needed to argue facts plausible to show that race played "some role" in Comcast's decisionmaking process. ESN was not required to prove that race was the sole reason the negotiations failed.

The Ninth Circuit was one of several federal circuit courts that applied a less stringent standard that allowed complaints alleging Section 1981 violations to continue. Other circuits, such as the Seventh Circuit, applied the more strict "but-for" standard. The Supreme Court of the United States granted certiorari to resolve the circuit split.

At the Supreme Court, ESN conceded that generally a plaintiff has to prove "but-for" causation at trial, but argued that a plaintiff should be able to overcome a motion to dismiss if it alleges facts showing race was a motivating factor. The Court examined prior cases and similar statutes, before concluding that Section 1981 follows the general principles that a plaintiff has to prove "but-for" causation, and that this standard applies from the beginning of the lawsuit to the end. The Supreme Court reversed the Ninth Circuit, holding that a plaintiff has to prove that, but-for the defendant's racial animosity, the plaintiff's alleged injury from the failure to contract would not have occurred, and that this "but-for" proof remains constant despite the stage of the lawsuit.

Herrera v. Zumiez, Inc. (9th Cir. 2020) 953 F.3d 1063

Summary: An employer's "call-in" policy requiring employees to call the manager 30 to 60 minutes before the employee's shift constitutes "reporting for work," thereby qualifying the employee for compensation under Industrial Welfare Commission Wage Order 7-2001(5)(A) as reporting time pay.

Discussion: Zumiez, Inc. (Zumiez) maintained a policy of "show up" and "call-in" shifts. In the former, employees were required to arrive for work at the scheduled time of their shift. In the latter, employees who did not work a "show up" shift directly before a "call-in" shift were required to call their manager 30 to 60 minutes before their "call-in" shift began. Over the course of a five- to 15-minute telephone call, the manager would determine whether the employee would be permitted to work the shift. While the shift was not guaranteed to the employee, employees were subject to disciplinary action if they were unable to work. If the manager determined that the employee would not work the shift, the employee was not paid.

An employee filed a class action alleging that Zumiez failed to pay reporting time pay for the "call-in" shifts as required under Industrial Welfare Commission 7-2001(5)(A) (Wage Order 7). Pursuant to Wage Order 7, for each workday an employee is required to report to work or reports to work, but is not put to work for at least half of the scheduled shift, the employee is entitled to compensation for half of the usual or scheduled shift. Wage Order 7 further imposes a minimum of two and a maximum of four hours of pay per shift. The district court determined that "reporting for work" may be accomplished telephonically, and that employees were subject to their employer's control during telephone calls. Zumiez appealed to the Ninth Circuit Court of Appeals.

While Zumiez's appeal was pending in federal court, the California Second District Court of Appeal decided *Ward v. Tilly's, Inc.*, in which the court held that a similar "call-in" policy triggered compensation under Wage Order 7. The Ward court concluded that while the plain text of Wage Order 7 was not determinative of whether "reporting for work" required physical presence at the workplace, the purpose of the wage order extended to protect employees from unpaid "call-in" reporting time.

After determining that Ward should not be disregarded, the Ninth Circuit reasoned that employees are due minimum wages for hours "worked." This is the time

during which the employee is under their employer's control. Zumiez's employees were entitled to compensation under Wage Order 7 because the call-in shifts were scheduled, mandatory, lasted five to fifteen minutes, three to four times a week, and employees could be disciplined for violating the policy.

Rizo v. Yovino (9th Cir. 2020) 950 F.3d 1217

Summary: Under the federal Equal Pay Act, an employee's rate of pay at a previous job alone does not qualify as a factor allowing an employer to pay a female employee less for performing the same work as her male counterparts.

Discussion: The Equal Pay Act (EPA), enacted by Congress in 1963, requires women be paid at the same rate as men for performing the same work. However, the EPA allows employers to justify disparate rates of pay for employees of the opposite sex based on job-related factors and "any other factor than sex."

The Fresno County Office of Education (County) hired Aileen Rizo as a math consultant in October 2009. The County set new employee salaries, including Rizo's, according to a pay schedule that relied on the employees' prior wages as a baseline. Three years after starting work for the County, Rizo realized that she was the only female math consultant at the County, and that all of her male colleagues were paid more than she was, even though she had more education and experience. Rizo expressed concern about this pay disparity, but was assured that the policy applied across the board, regardless of the employee's sex.

Rizo sued the County for violation of the EPA. The County argued that Rizo's pay was the result of its salary calculation policy, and that this policy, which was based solely on its employees' prior pay, was a "factor other than sex" that defeated Rizo's EPA claim. The district court held that a pay structure based exclusively on prior wages is "so inherently fraught with the risk that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a legitimate nondiscriminatory business purpose."

In 2018, an en banc panel of the Ninth Circuit Court of Appeals issued a closely-divided opinion in this case. However, the opinion's author died 11 days before the court issued the opinion, thus invalidating his vote. Without counting the vote of the deceased judge, only five of the 10 judges would have approved of the opinion – one short of the required majority. This issue sent the case to the United States Supreme Court, which held that the Ninth Circuit erred in counting the deceased judge's vote, remanding the case.

Back before the Ninth Circuit, the County restated its argument that its policy of setting employees' wages based on their prior pay is premised on a factor other than sex. Rizo responded that the use of prior pay to set prospective wages, by its nature, would perpetuate the gender-based pay gap indefinitely. Rizo argued, and the court determined, that the EPA's "any factor other than sex" was limited to job-related factors, similar to the EPA's enumerated exceptions – job experience, job qualifications, and job performance. Prior pay may possibly serve to reflect job-related factors pertaining to former employment, which could serve as a proxy for job-related factors related to a present job. However, the court observed that in this specific case, the County had not explained why or how Rizo's prior pay was indicative of her ability to perform the job she was hired to do, allowing her claim to succeed.

Valtierra v. Medtronic Inc. (9th Cir. 2019) 934 F.3d 1089

Summary: An employee cannot establish disability discrimination without a causal relationship between the alleged impairment and the employee's termination. Without such causal relationship, the Ninth Circuit did not reach the question of whether obesity alone constitutes a "physical impairment" under the Americans with Disabilities Act.

Discussion: The Americans with Disabilities Act (ADA) defines "disability" as a "physical or mental impairment that substantially limits one or more major life activities." (42 U.S.C. § 12102(1)(A).) The Equal Employment Opportunity Commission (EEOC) regulations define "physical impairment" as: "Any physiological disorder

or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine[.]" (29 C.F.R. § 1630.2(h)(1).)

Valtierra worked as a medical device repair and maintenance technician for Medtronic Inc. (Medtronic) and had a condition commonly known as morbid obesity. He brought an ADA action against Medtronic claiming his former employer terminated him on account of his morbid obesity. Medtronic responded that the reason for Valtierra's termination was not his obesity, but his falsification of business records. The district court granted summary judgment in favor of Medtronic, holding that morbid obesity is not a physical impairment under the relevant EEOC regulations. Valtierra appealed.

On appeal, the Ninth Circuit upheld the district court's dismissal of the disability discrimination claim. However, the court did not reach the question of whether morbid obesity itself is an "impairment" under the ADA. Instead, the court held that even assuming that morbid obesity is that impairment, the employee would still have to show some causal relationship between such an impairment and the employee's termination. The court determined that the employee was unable to show this causal relationship. After all, Valtierra admitted to falsifying business records, and there was no basis for concluding that he was terminated for any other reason. The Ninth Circuit did not issue a holding regarding whether obesity itself may constitute an "impairment" under the ADA.

Murray v. Mayo Clinic (9th Cir. 2019) 934 F.3d 1101

Summary: Wrongful termination claims under the Americans with Disabilities Act are subject to the "but-for" causation standard.

Discussion: Plaintiff Dr. Murray filed suit alleging wrongful termination in violation of the Americans with Disabilities Act (ADA). Murray alleged that he was discharged from employment due to his diagnoses of PTSD, depression, anxiety, and ADHD.

During trial, the parties disagreed on the appropriate jury instruction for Dr. Murray's ADA claim. Dr. Murray requested that the court instruct the jury that he should prevail if he established that his disability was a "motivating factor" in defendants' decision to terminate his employment. The court denied this request and instead the jury was instructed that Dr. Murray was required to prove he "was discharged because of his disability." The jury applied the "but-for" causation standard and ruled in favor of the defendants.

Dr. Murray appealed to the Ninth Circuit Court of Appeals. Dr. Murray argued that the motivating factor causation standard applied by the Ninth Circuit in *Head v. Glacier Northwest, Inc.* (*Head*) was the correct standard to be applied in his case. However, the appellate court determined that the U.S. Supreme Court's rulings in *Gross v. FBL Financial Services, Inc.* (*Gross*) and *University of Texas Southwestern Medical Center v. Nassar* (*Nassar*) overturned the "motivating factor" standard from *Head*.

In *Gross*, the Supreme Court declined to extend the motivating factor standard to an employment discrimination case brought under the Age Discrimination in Employment Act. Instead, the Court held that the plaintiff had to establish that age was the "but-for" cause of the employer's adverse employment decision. In *Nassar*, the Court concluded that a plaintiff must prove but-for causation with regard to retaliation claims under Title VII of the ADA. The Ninth Circuit panel noted the circuit courts retreat from the motivating factor standard following these decisions. The court therefore joined the Second, Fourth, and Seventh Circuits in finding that ADA discrimination claims asserted under Title I must be evaluated under a "but-for" causation standard.

McPherson v. EF Intercultural Foundation, Inc. (2020) Cal. App. LEXIS 267.

Summary: Labor Code section 227.3 may require payment of accrued vacation time for employees with informal unlimited vacation policies.

Discussion: Plaintiffs sued their prior employer, EF Intercultural Foundation, Inc. (EF), for several claims arising from their respective employment terminations,

including violation of Labor Code section 227.3 (Section 227.3). Section 227.3 requires employers that provide paid vacation leave to pay out a pro-rata share of vested, unused vacation days to employees upon departure from employment. If an employer's policy or employee contract provides paid vacation, then vacation days vest as labor is rendered. Under Section 227.3, employers may not adopt "use it or lose it" policies, although they may limit accrual of vacation time after a ceiling is reached.

Plaintiffs were employed as full-time, exempt, salaried employees in managerial positions. EF's Employee Handbook contained a vacation policy applicable to all salaried employees, except "area managers" or the "west coast manager" – positions held by plaintiffs. This policy allowed a maximum of ten vacation days to accrue and carry over from one year to the next. Managers were permitted to take paid time off upon request, although EF encouraged mangers not to do so during the corporation's "peak season." The trial court held that Section 227.3 required EF to pay wages, which included vested, unused vacation days, upon termination. EF appealed.

The appellate court first held that the trial court properly concluded EF owed plaintiffs vacation wages under Section 227.3, reasoning that the vacation policy was neither unlimited in practice, nor in description. Instead, plaintiffs' schedules permitted approximately two weeks of vacation per year, which could typically not occur during EF's peak season. Further, plaintiffs were not informed that they did not, in fact, accrue vacation days. Accordingly, the court held that if EF intended for plaintiffs to have an unlimited vacation policy, it must be clear and express.

The appellate court did conclude that Section 227.3 does not apply to truly unlimited vacation policies. Specifically, Section 227.3 is not triggered if the vacation policy, which is in writing: (1) clearly provides that paid time off is not a form of wages for services rendered; (2) includes rights and obligations of both the employer and employee and the consequences of failing to schedule vacation time; (3) practically allows sufficient opportunity for time off, or to work fewer hours in lieu of time off; and (4) is administered fairly so it does not become a "use it or lose it" policy, or result in inequities.

Bingener v. City of Los Angeles (2019) 44 Cal.App.5th 134

Summary: Under the "going-and-coming" rule, employers are generally not liable for an employee's tortious conduct while the employee commutes to work, unless the employer knew, or should have known, about associated risks arising from or related to the employee's work.

Discussion: An employee of the City of Los Angeles (City) struck and killed a pedestrian while driving to work in his own car. The employee was driving to the Hyperion Treatment Plant – a City wastewater treatment facility – where he worked in the plant's water quality lab. The employee's job did not require him to work in the field, and the City did not require him to use his car at work. Additionally, the employee was not compensated for his commute time. At the time of the accident, the employee was receiving treatment for chronic health problems, including neuropathy in his feet, a tremor, and occasional seizures. The employee's physicians had previously prescribed various work restrictions upon the employee's return to work after he experienced a fall at work that preceded the accident; however, there were no restrictions on his driving.

The decedent's brothers sued the employee and the City for negligence. Plaintiffs alleged that the City was vicariously liable for the employee's negligence because of the "work-spawned risk" exception under the going-and-coming rule. The going-and-coming rule generally provides that an employer is liable for the torts of its employees when those torts are committed "within the scope" of the employee's employment. The work-spawned risk exception to the going-and-coming rule applies if an employee endangers others with a risk arising from, or related to, their employment. Plaintiffs claimed that the employee's driving to work was a foreseeable risk arising from his employment.

The City moved for summary judgment, arguing that the going-and-coming rule insulated it from liability. The trial court agreed, relying on the employee's deposition testimony stating that none of his aforementioned conditions or medications neither interfered with his ability to operate a vehicle nor contributed to the accident

in any way. Instead, the employee testified that he felt "great" on the morning of the accident and had not taken any medication. Moreover, the absence of driving restrictions from the employee's doctor following his return to work supported the City's motion. Accordingly, the court determined that there was no evidence that the City knew, or should have known, that the employee was a dangerous commuter.

Plaintiffs appealed, and the appellate court affirmed the trial court's grant of summary judgment to the City. The appellate court held that plaintiffs failed to provide sufficient facts upon which they could establish a triable issue for their claim that the employee's accident was a foreseeable event arising from, or relating to, his employment for the City. The court stated that nothing about the enterprise for which the City employed the employee (water quality testing) made his hitting a pedestrian while commuting to work a foreseeable risk of that enterprise.

Glynn v. Superior Court (2019) 42 Cal. App.5th 47

Summary: An employer who mistakenly believes that a disabled employee is unable to work with or without reasonable accommodation and discharges that employee under long-term disability, may be liable for disability discrimination, even if the mistake was reasonable and made in good faith without discriminatory animus.

Discussion: Allergan, Inc. (Allergan), mistakenly believed that one of its pharmaceutical sales representatives had transitioned from short-term disability to long-term disability, and was unable to work with or without some reasonable workplace accommodation. Allergan terminated the employee on this basis. The employee then filed suit, alleging numerous causes of action against Allergan, including disability discrimination. The trial court granted summary adjudication of the disability discrimination claim, in favor of Allergan. The employee appealed.

The appellate court disagreed with the trial court, determining that termination of an employee due to a mistake as to the employee's medical condition constituted direct evidence of disability discrimination, which was sufficient to defeat a motion for summary adjudication. The court explained that even if one assumed that Allergen's mistakes regarding the employee's disability status were reasonable and made in good faith, a lack of animus does not preclude liability for a disability discrimination claim. The law protects employees from an employer's erroneous or mistaken beliefs about the employee's physical condition, and does not require the employee to prove that the employer's adverse employment action was motivated by animosity or ill will. The consequences of an employer's mistaken belief that an employee is unable to safely perform a job's essential functions are borne by the employer, not the employee.

Jimenez v. U.S. Continental Marketing, Inc. (2019) 41 Cal.App.5th 189

Summary: For claims brought under the California Fair Employment and Housing Act (FEHA) the existence of an employment relationship is determined by the extent of direction and control possessed and/or exercised by the employer over the employee.

Discussion: For five years prior to termination, Elvia Jimenez worked for U.S. Continental Marketing, Inc. (USCM), a manufacturing company, which relied upon a contracted, temporary workforce staffed through Ameritemps. Jimenez was contracted to work for USCM through this arrangement. Ameritemps paid Jimenez, provided her benefits, and tracked her time worked. USCM retained the right to terminate her (and other similarly contracted workers) from working for USCM. However, USCM did not have authority to terminate the relationship between Jimenez and Ameritemps. USCM's employee handbook and company policies applied to both "direct hires" and temporary contracted workers, like Jimenez. After a disciplinary investigation, conducted by both USCM and Ameritemps, USCM terminated Jimenez's services. Shortly thereafter, Ameritemps terminated Jimenez's employment. As a result of her termination, Jimenez filed a complaint against USCM, alleging five claims under FEHA and a common law claim for wrongful termination.

For a FEHA claimant to be entitled to relief, the claimant must first demonstrate that he/she meets the classification

of an "employee," which is undefined in FEHA. At trial, the jury found that Jimenez was not an employee of USCM, among other special findings. Jimenez appealed.

The appellate court granted review to determine whether Jimenez was an employee of USCM for purposes of her FEHA and common law claims. The court determined that the facts regarding the relationship between Ameritemps and USCM and their control over Jimenez's work duties were undisputed. This left only the legal question of whether Jimenez was an employee.

The court applied the definition of "employee" used by the Fair Employment and Housing Commission – the agency tasked with interpreting FEHA. The court decided that the determinative factor in establishing an employment relationship is the extent of the exercise of direction and control the employer holds over the individual. However, an individual may have more than one employer, and the relationship need not be direct for the individual to be an "employee" under FEHA.

Using this standard, the appellate court determined that Jimenez was in fact an employee of USCM for purposes of her FEHA and common law claims. The court determined that USCM exercised significant direction and control over Jimenez's work performance because she was subject to USCM policies, training, and disciplinary procedures. Moreover, she reported directly to USCM supervisors. Accordingly, the appellate court reversed the trial court judgment, determining that under the "totality of the circumstances through the lens of a temporary staffing" contract, Jimenez presented substantial evidence of an employment relationship, which USCM was without facts to rebut.

Ferra v. Loews Hollywood Hotel, LLC (2019) 40 Cal.App.5th 1239

Summary: Employers must pay employees meal or rest period wages equal to the employee's "regular rate of compensation" (i.e., base hourly wage), and a facially neutral rounding policy that does not undercompensate employees over time is lawful.

Discussion: A hotel employee challenged, first, the lawfulness of the hotel's calculation of premium wages when the hotel failed to provide her with statutorily-required meal and rest breaks and, second, the lawfulness of the hotel's use of an electronic timekeeping system that automatically rounded employee time entries up or down to the nearest quarter hour.

The employee's first claim was brought under Labor Code Section 226.7, subdivision (c). That provision states that an employer must pay an employee an additional hour of pay at the employee's "regular rate of compensation" for each work day that the employer fails to provide an employee with a meal period, or rest or recovery period in accordance with state law. The phrase "regular rate of compensation" is not defined in statute or case law. However, Labor Code Section 510, subdivision (a), provides for compensation for overtime work based on the employee's "regular rate of pay." In the overtime context, the "regular rate of pay" is calculated at more than the employee's normal hourly rate. It includes adjustments to the time rate, reflecting shift differentials and the per-hour value of non-hourly compensation the employee has earned, such as a nondiscretionary quarterly bonus.

The hotel employee argued that "regular rate of compensation" is synonymous to "regular rate of pay," and the hotel incorrectly paid employees' meal and rest periods at the employees' hourly wages without additional compensation to reflect shift differential and per-hour value of non-hourly compensation. The trial court granted the employer hotel's motion for summary adjudication, finding no triable issue of fact and basing its decision on the legal conclusion that the terms "regular rate of compensation" and "regular rate of pay" are not interchangeable. Accordingly, the court concluded that rest and meal period wages under Section 226.7 need only be paid at the base hourly rate.

On appeal, the court affirmed the trial court's decision, taking into consideration the difference in the plain language of the statutes, the legislative history of the two phrases, and persuasive federal opinions in construing the phrases differently. The dissent reached the opposite conclusion by similarly relying on judicial construction of statutory language, but emphasizing the liberal construction of labor laws in favor of worker protection.

As to the employee's second claim, California law allows an employer to use a "rounding policy" for clocking in and out of work if the policy is fair and neutral on its face and its use will not, over time, result in a failure to properly compensate employees for time actually worked. (*See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 907.) The employee argued that the hotel's practice of automatically rounding time entries systematically undercompensated employees based on a sample of punch record data.

The trial court granted summary judgment in favor of the hotel, concluding that the employer's rounding policy is neutral on its face and, as applied, and did not fail to compensate employees for hours worked. The appellate court upheld the trial court's decision, finding that data showing a slight majority (approximately 55 percent) of employees that lost time over a defined period due to the rounding system was not sufficient to invalidate an otherwise neutral practice. Instead, the court noted that it would be expected over any given time period to have some net overcompensation and some net undercompensation.

Gonzales v. San Gabriel Transit, Inc. (2019) 40 Cal.App.5th 1131

Summary: The "ABC" test for determining whether a worker is an independent contractor, adopted by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*), is retroactively applicable to pending litigation on wage and hour claims. In addition, the "ABC" test articulated in *Dynamex* applies to equivalent or overlapping nonwage order allegations arising under the Labor Code.

Discussion: Gonzales, a former driver for San Gabriel Transit, Inc. (SGT), filed a class action lawsuit seeking to represent over 500 drivers engaged by SGT as independent contractors. Gonzales alleged that SGT violated several provisions of the Labor Code and the Industrial Welfare Commission's (IWC) wage orders, by misclassifying drivers as independent contractors. The lawsuit involved SGT's failures to pay: (1) unpaid wages; (2) minimum wage; and (3) overtime compensation. Addressing the complaint as a whole, the trial court determined that Gonzales failed to demonstrate the requisite "community of interest" or "typicality" among the drivers, denying the motion for class certification. Gonzales appealed.

While the appeal was pending, the California Supreme Court decided *Dynamex*, adopting the "ABC test" for analyzing the distinction between employees and independent contractors for purposes of wage order claims. Significantly, the ABC test is conjunctive, and the hiring entity's failure to establish *any* of the following three factors precludes a finding that the worker is an independent contractor: "(A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed."

Accordingly, the appellate court in *Gonzales* reversed the trial court's decision, remanding it for reconsideration because the trial court did not have the benefit of the *Dynamex* decision when it considered certifying Gonzales's class. The appellate court concluded that the ABC test adopted in *Dynamex* retroactively applies to pending litigation regarding wage and hour claims, explaining that *Dynamex* did not establish a new standard, but rather streamlined an existing complex multifactor wage order analysis. In addition, the appellate court concluded that the ABC test, applicable in *Dynamex* to wage order claims, applies equally to Labor Code claims seeking to enforce the same "fundamental protections." Because most of the statutory claims Gonzales alleged were rooted in wage order protections and requirements, the ABC test must be applied to those claims to resolve the employee/independent contractor issues.

The appellate court also explained that Dynamex did not reach the question of whether the ABC test applies to non-wage order related Labor Code claims, determining that the Borello test, referring to *S.G. Borello and Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399 (Borello), remains

appropriate. However, the ABC test does apply to "equivalent or overlapping non-wage order allegations arising under the Labor Code."

The California Supreme Court granted review of this case. Further action by the California Supreme Court on the case has been deferred pending consideration and disposition of a related issue in *Vazquez v. Jan-Pro Franchising International, Inc., S258181, or pending further order of the Court.*

Nejadian v. County of Los Angeles (2019) 40 Cal.App.5th 703

Summary: An employee who refuses to violate guidelines may not seek whistleblower protection under Labor Code section 1102.5(c) because guidelines are not statutes, rules, or regulations.

Discussion: Patrick Nejadian worked as the Chief Environmental Health Specialist for Los Angeles County's (County) Department of Public Health's (Department) land use program, supervising health inspectors who inspected restaurants, swimming pools, and apartment buildings. Nejadian's responsibilities also included overseeing private wells and on-site water treatment systems for properties without existing public water or sewer systems. On his own initiative, Nejadian developed guidelines he referred to as "the code" that "standardized" the requirements for septic systems and wastewater treatment systems in the County.

After the Station Fire destroyed parts of Los Angeles County in 2010, Nejadian's supervisors instructed him to disregard several requirements in "the code" and sign off on a contractor's septic plans. Nejadian declined to do so. Ultimately, the contractor's plans were approved by Nejadian's supervisors.

Years later, after several requests for transfer to a different department and promotion denials, Nejadian sued the County. He alleged multiple causes of action, including whistleblower retaliation in violation of California Labor Code Section 1102.5, subdivision (c) (Section 1102.5(c)), which prohibits an employer from retaliating against an employee for "refusing to participate in an activity that would result in a violation of a state or federal statute, or a violation of or non-compliance with a local, state, or federal rule or regulation." Nejadian alleged that he was retaliated against for refusing to participate in the County's conduct (e.g., approving septic plans that failed to meet "the code" requirements), which, he argued, would have violated state and local regulations. The County responded that Nejadian failed to present evidence that his refusal to participate in such conduct would result in a violation of any specific state, federal, or local statute, rule, or regulation. The jury found in favor of Nejadian on his whistleblower claim, awarding him damages. The County filed a motion for new trial alleging juror misconduct and excessive damages, which the trial court denied. The County appealed.

The court reversed on appeal, determining that Nejadian had failed to provide sufficient evidence that his supervisors' instructions to violate "the code" would have resulted in an actual violation of or noncompliance with a local, state, or federal statute, rule, or regulation, as required by Section 1102.5(c), because guidelines are not statutes, rules, or regulations. The court distinguished the burdens of proof for claims under Labor Code section 1102.5, subdivision (b) (Section 1102.5(b)) and Section 1102.5(c). Section 1102.5(b) only requires an aggrieved party to reasonably believe there was a violation of a statute, rule, or regulation; by contrast, Section 1102.5(c) requires a showing that the activity in question actually would result in a violation or noncompliance with a statute, rule, or regulation.

Hawkins v. City of Los Angeles (2019) 40 Cal.App.5th 384

Summary: A court may award private attorney general fees to a party who successfully alleges whistleblower retaliation under Labor Code section 1102.5 (Section 1102.5).

Discussion: Todd Hawkins worked as a traffic violation hearing officer at the City of Los Angeles (City) Department of Transportation. Hawkins reported to management that he and other hearing officers were being pressured by their supervisor to change their initial decisions in traffic hearings from finding the violator "not liable" to "liable." That is, people who challenged traffic tickets would not be refunded the citation fees they paid,

despite the hearing examiners' determination that refunds were proper. Hawkins then reported the issue to the City's Ethics Commission and members of the City Counsel. He was fired thereafter.

Hawkins sued the City for whistleblower retaliation under Section 1102.5, subdivision (b), and also sought attorneys' fees for his claim under the Private Attorney General Act. Section 1102.5 prohibits an employer from retaliating against an employee for disclosing a violation of state or federal statutes to a government or law enforcement agency. (Lab. Code, § 1102.5, subd. (b).) To properly assert a case of retaliation, the employee must show that: (1) the employee engaged in protected activity; (2) the employer subjected the employee to an adverse employment action; and (3) the existence of a causal link between the two. Hawkins prevailed in the jury trial, receiving damages and over $1 million in attorneys' fees.

On appeal, the court upheld the trial court's decision. The court evaluated the City's argument that Hawkins did not engage in a protected activity, but rather that his complaints to management were mere "personal grievances" about the supervisor's management style. The court was unmoved, concluding that disclosing management pressuring hearing examiners to change their decisions, in violation of the Vehicle Code, was both illegal and a protected activity within Section 1102.5. The court concluded that the City's termination of Hawkins employment was an "adverse employment action," and that the close temporal proximity between Hawkins' complaint to management and his subsequent firing established the requisite causal link between the protected activity and the adverse employment action. The court noted, however, that even if a longer period had elapsed between the two events, the City still engaged in a pattern of conduct consistent with a retaliatory intent.

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Elizabeth Leeper	El Dorado ID	Region 3
Molly MacLean	City of Santa Rosa – Water Dept.	Region 1
Roger Masuda	Turlock ID	Region 4
Andrew McClure	Richvale ID	Region 2
Wes Miliband	City of Sacramento – Dept. of Utilities	Region 4
Amelia Minaberrigarai	Kern County WA	Region 7
Patrick Miyaki	Alameda County WD	Region 5
Scott Morris	Reclamation District #2035	Region 4
Cory O'Donnell	Sonoma Water	Region 1
Julie Riley	Los Angeles Department of Water & Power	Region 8
Jon Rubin	Westlands WD	Region 6
Scott Shapiro	Reclamation District #2068	Region 4
Alfred Smith	Main San Gabriel Basin Watermaster	Region 8
Joanna Smith Hoff	Imperial ID	Region 9
Jacobus Vollebregt	Moulton Niguel WD	Region 10
Walt Wendelstein	Calleguas Municipal WD	Region 8
Nicholas Whipps	San Francisco Public Utilities Commission	Region 5
Jeanne Zolezzi	Stockton East WD	Region 4

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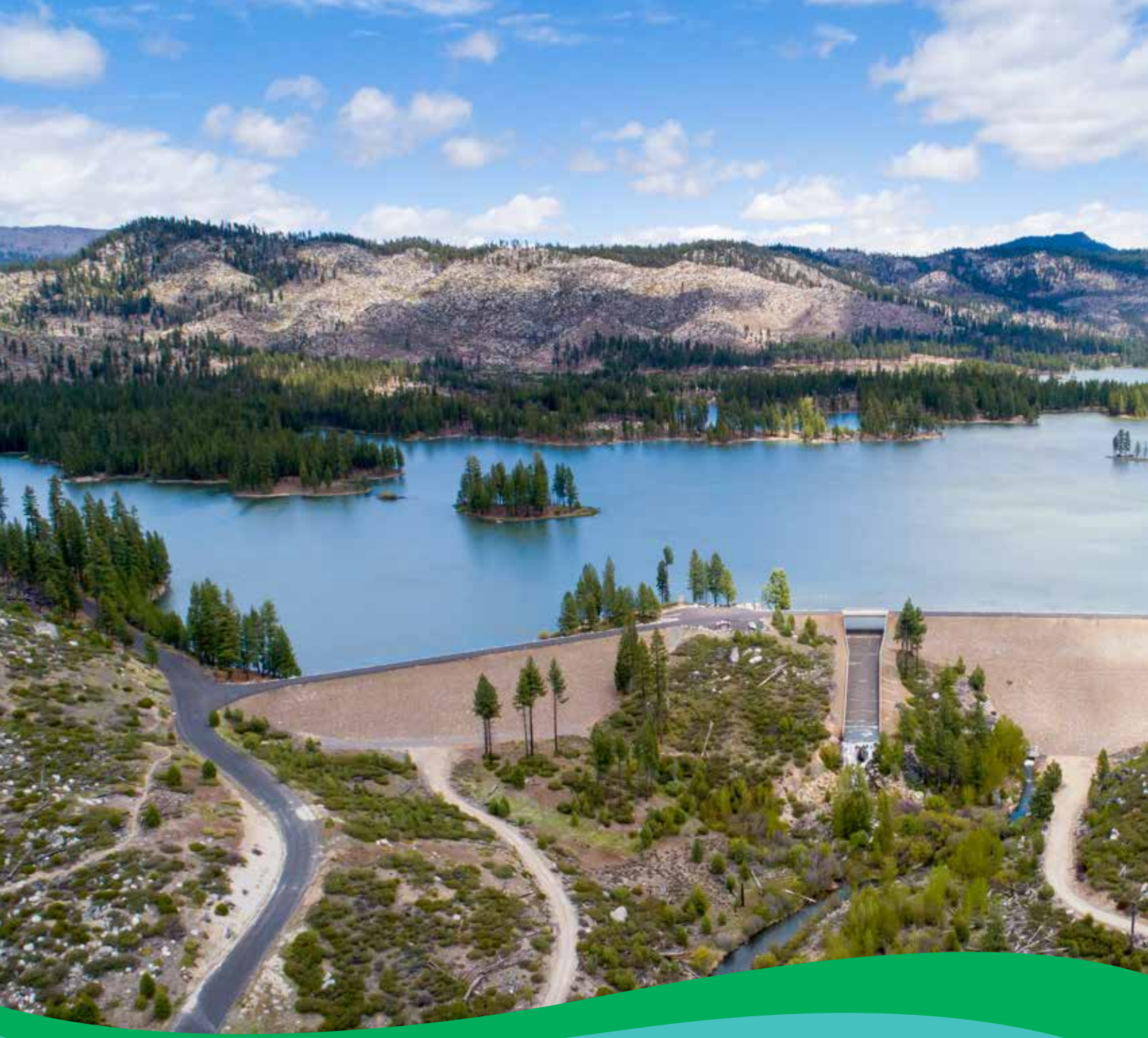

ACWA is a non-profit statewide association of more than 455 public agencies that are responsible for about 90% of the water deliveries in California.

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