LAND USE AND CEQA LITIGATION UPDATE
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Cases From March 23, 2022
through August 4, 2022

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City of Austin, Texas v. Reagan National Advertising of Austin, LLC (2022) 142 S.Ct. 1464.

BACKGROUND: Owners of billboards advertising off-premises products or services, *i.e.*, off-premises signs, filed a state court lawsuit for declaratory judgment that a city's sign ordinance, which distinguished between on-premises and off-premises signs, violated their First Amendment free speech rights after the city denied their applications for permits to digitize grandfathered off-premises signs. After removal and bench trial, the United States District Court for the Western District of Texas, entered judgment for the city. Plaintiffs appealed. The United States Court of Appeals for the Fifth Circuit reversed and remanded. Certiorari was granted.

HOLDING: In a 6-3 opinion authored by Justice Sotomayor, the United States Supreme Court reversed and remanded the holding of the Court of Appeals for the Fifth Circuit, holding that a regulation of signs is not automatically content based—thereby triggering strict scrutiny for a violation of First Amendment free speech rights—merely because, to apply the regulation, a reader must ask who is speaking and what the speaker is saying. This case abrogates *Thomas v. Bright* (6th Cir. 2019) 937 F.3d 721. Justice Breyer filed a concurring opinion. Justice Alito filed an opinion concurring in the judgment in part and dissenting in part. Justice Thomas filed a dissenting opinion, in which Justices Gorsuch and Barrett joined.

Key FACTS & ANALYSIS: The City of Austin, Texas (City), specially regulates signs that advertise things that are not located on the same premises as the sign, as well as signs that direct people to offsite locations, generally defined as off-premises signs. The City's sign code at the time of this dispute prohibited construction of new off-premises signs. Grandfathered off-premises signs could remain in their existing locations as "nonconforming signs," but could not be altered in ways that increased their nonconformity.

Petitioners, billboard owners, owned off-premises signs and sought permits to digitize them. Upon the City's denial of the application, Petitioners filed suit arguing that the City's prohibiting the digitizing off-premises signs, but permitting the digitizing on-premises signs, violated the First Amendment. The District Court found that the provision was content-neutral, and that the distinction satisfied intermediate scrutiny. The Court of Appeals for the Fifth Circuit reversed, finding the distinction based on content, and finding that it failed to meet strict scrutiny.

The issue before the United States Supreme Court was whether the distinction was facially content-neutral under the First Amendment. It found that it was.

The Court relied primarily on *Reed v. Town of Gilbert, Ariz.* (2015) 576 U.S. 155, which held that a regulation of speech is content based under the First Amendment if it "target[s] speech based on its communicative content," *i.e.*, if it applies to particular speech because of the topic discussed or the idea or message expressed. In *Reed*, the town adopted a comprehensive sign code that applied distinctive size, placement, and time restrictions to 23 different categories of signs, giving more favorable treatment to some categories (such as ideological signs or political signs) and less favorable treatment to others (such as temporary directional signs relating to religious events, educational events, or other similar events). The Court in that case rejected the contention that the

restrictions were content neutral because they did not discriminate on the basis of particular viewpoints, reasoning that a speech regulation which targets a specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.

In this case, the Court found that, unlike the sign code in *Reed*, the City's sign ordinances did not single out any topic or subject matter for differential treatment. A sign's message mattered only to the extent that it informed the sign's relative location. Thus, the on-/off-premises distinction was more like ordinary time, place, or manner restrictions, which do not require the application of strict scrutiny.

After determining that the distinction was content-neutral, the Court remanded to the Court of Appeals to apply intermediate scrutiny.

JUSTICE BREYER'S CONCURRENCE: Justice Breyer agreed that *Reed* was binding precedent for the case, but he disagreed with the Court's reasoning in that decision.

JUSTICE ALITO'S CONCURRENCE IN PART, DISSENT IN PART: Justice Alito concurred with the judgment on the ground that the Court of Appeals did not apply the proper test to determine whether the law was facially unconstitutional. Justice Alito dissented with the Court's finding that the code provisions did not discriminate based on content, and asserted that they should be evaluated by the lower court.

DISSENT: Justice Thomas filed a dissenting opinion, in which Justices Gorsuch and Barrett joined, arguing that the Court's majority misinterpreted the rule from *Reed.* The dissenters argued that applying the distinction required an assessment of the content of the sign, because it required an evaluation of whether a message was an "on-premises" or "off-premises" message.

* * *

California State Water Resources Control Board v. Federal Energy Regulatory Commission (9th Cir., Aug. 4, 2022) -- F.4th ---, 2022 WL 3094576.

BACKGROUND: California Water Resources Control Board (Board) and multiple environmental organizations petitioned for review of orders of the Federal Energy Regulatory Commission (FERC), which orders determined that the Board waived its authority under the Clean Water Act (CWA) to impose conditions on federal licenses for hydroelectric projects based on purported coordination between the Board and project operators with respect to the operators' practice of repeatedly withdrawing and resubmitting requests for water quality certifications to avoid denial of requests by the Board.

HOLDING: The Ninth Circuit Court of Appeals held that substantial evidence did not support FERC's findings of coordination between the Board and operators.

KEY FACTS & ANALYSIS: Section 401 of the CWA gives states the authority to impose conditions on federal licenses for hydroelectric projects to ensure that those projects comply with state water quality standards. As relevant here, Section 401, "requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any

discharge into intrastate navigable waters." In furtherance thereof, the Board requires a CEQA analysis to occur prior to providing its certification.

In consolidated cases, the Ninth Circuit considered several petitions for review of decisions by FERC holding that the Board waived that authority for certain hydroelectric projects in federal relicensing proceedings. FERC found that the Board had engaged in coordinated schemes with the Nevada Irrigation District (NID), the Yuba County Water Agency, and the Merced Irrigation District (collectively, the Project Applicants) to delay certification and to avoid making a decision on their certification requests. FERC held that, because of that coordination, the Board had "failed or refused to act" on the requests and had therefore waived its certification authority under the CWA.

As explained by the Ninth Circuit, water districts had a practice of filing and withdrawing applications for license renewals because the Board required CEQA review, which usually was not completed in the one-year license period. The Board would acknowledge receipt and state that certification was pending CEQA review.

In 2019, however, the U.S. Court of Appeals for the District of Columbia Circuit held that California and Oregon waived their certification authority by entering a formal contract with a project applicant to delay federal licensing proceedings through the continual withdrawal-and-resubmission of the applicant's certification requests. (*Hoopa Valley Tribe v. FERC* (D.C. Cir., 2019) 913 F.3d 1099.) The D.C. Circuit held the states' engagement in a "coordinated withdrawal-and-resubmission scheme" constituted a "failure" or "refusal" to act under the meaning of Section 401. In response to *Hoopa Valley*, FERC concluded that states had waived their Section 401 certification authority by coordinating with project applicants on the withdrawal-and-resubmission of Section 401 certification requests, even in the absence of an explicit contractual agreement to do so.

FERC argued that the Board "coordinated" with the Project Applicants to avoid deciding the request in the statutory deadline by commenting on project documents that CEQA review had not yet begun and that it was likely the applications would be withdrawn and resubmitted. The Ninth Circuit found no evidence that the Board coordinated for the withdrawals of the applications; rather, at most, it showed that the Board acquiesced to them by allowing them to withdraw and resubmit rather than deny the application.

The Ninth Circuit observed that for all three projects at issue, the Board had commented or observed that withdrawal and resubmission was possible in order to avoid denial of the application. However, it was the Project Applicants who delayed CEQA review, not the Board. The Ninth Circuit found that these unilateral withdrawals were not imputed by the Board, and accordingly, the Board's authority over the licenses was not waived. Therefore, the Ninth Circuit held that FERC's findings of coordination were unsupported by substantial evidence and vacated FERC's orders.

* * *

California River Watch v. City of Vacaville (9th Cir. 2022) 39 F.4th 624.

BACKGROUND: An environmental organization filed a citizen suit alleging that a city was generating and transporting hexavalent chromium, a human carcinogen, through its potable water system and distributing that water to its customers for consumption, in violation of the federal Resource Conservation and Recovery Act (RCRA). The United States District Court for the Eastern District of California granted summary judgment for the city. The organization appealed.

HOLDING: The Court of Appeals held that: (1) a genuine issue of material fact existed as to whether hexavalent chromium was a discarded material qualifying as solid waste under RCRA, but (2) the city was not contributing to past or present "transportation" of hexavalent chromium under the RCRA. The judgment was affirmed.

Key FACTS & ANALYSIS: RCRA seeks to minimize the dangers accompanying hazardous waste disposal. (*See,* 42 U.S.C. § 6902(b).) To that end, RCRA enables any person to sue any entity that is contributing to the transportation of dangerous solid waste.

In this case, nonprofit California River Watch (CRW) claimed the City of Vacaville, California (City) was violating RCRA because the City's water wells were contaminated by hexavalent chromium, a known carcinogen. CRW claimed that the carcinogen was in turn transported to the City's residents through its water-distribution system. The case assessed whether the City could be found liable for violating RCRA under that theory.

Relevant to this inquiry: From about 1972 to 1982, companies like Pacific Wood Preserving and Wickes Forest Industries, Inc., operated wood treatment facilities in Elmira, California, a small community adjacent to Vacaville. It was common for waste products from these companies to contain hexavalent chromium. In particular, Wickes is known to have dumped a massive amount of hexavalent chromium in the ground near Elmira, resulting in Vacaville's municipal wells being contaminated with hexavalent chromium.

Before reaching the merits, the Ninth Circuit determined that CRW did not forfeit its argument that hexavalent chromium was "discarded material" from the Wickes site because that issue was not raised at the district court. CRW had consistently maintained that the contamination was caused by humans, and specifically highlighted the Wickes site as one of the sources although the exact origin was unknown at the time.

On the merits, the Ninth Circuit determined that hexavalent chromium meets RCRA's definition of "solid waste"; however, the Court also determined that the City was not "transporting" that waste as that term is used in RCRA. Rather than use the dictionary definition of "solid waste," the Ninth Circuit looked at how the term was used in RCRA, which was restricted to the waste disposal process. Finding no direct connection between the City's movement of hexavalent chromium and the City's waste disposal process, the Ninth Circuit concluded that the City was not "transporting" the hexavalent chromium for the purposes of RCRA.

CONCURRENCE: Judge Tashima concurred in the judgment only, but argued that the judgment should have been based on the absurdity canon of construction rather than the statutory text. As

the concurring opinion noted, CRW conceded that the City was the victim and had no involvement "whatsoever" in the waste disposal process.

* * *

Environmental Defense Center v. Bureau of Ocean Energy Management (9th Cir. 2022) 36 F.4th 850.

BACKGROUND: Environmental groups, the State of California, and the California Coastal Commission (collectively, "Plaintiffs") brought action alleging that the federal Bureau of Ocean Energy Management (BOEM) and Bureau of Safety and Environmental Enforcement (BSEE) (collectively, "Defendants" or "Bureaus") violated the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), and Coastal Zone Management Act (CZMA) with respect to a federal proposal to allow oil well stimulation treatments, including fracking, off the coast of California. The United States District Court for the Central District of California granted summary judgment to the Defendants on the NEPA claims and to Plaintiffs on the ESA and CZMA claims. All parties appealed.

HOLDING: The Court of Appeals held that: (1) the Bureaus' programmatic environmental review was final agency action; (2) procedural challenges under NEPA and CZMA were ripe for review; (3) the environmental assessment (EA) was inadequate as lacking a "hard look" under NEPA; (4) the EA violated NEPA due to lack of consideration of reasonable alternatives; (5) an environmental impact statement (EIS) was warranted; (6) the ESA's consultation requirement was triggered; and (7) a consistency review under CZMA was needed. The judgment was affirmed in part, reversed in part, and remanded with instructions.

Key FACTS & ANALYSIS: This appeal concerns the federal government's authorization of unconventional oil drilling methods upon offshore platforms in the Pacific Outer Continental Shelf. These unconventional oil drilling methods are known within the oil and gas industry as "well stimulation treatments" (or "WSTs") and encompass, among other techniques, what is known colloquially as "fracking." Well stimulation treatments prolong drilling operations by enabling oil companies to extract oil otherwise unreachable using conventional drilling methods. Plaintiffs argued that these stimulation treatments pose unknown risks because their environmental impacts have not been fully studied.

For offshore oil and development activities, federal agencies are to conduct environmental review of proposed activities before approving permits authorizing private companies to conduct such activities. Here, however, environmental groups learned through Freedom of Information Act (FOIA) requests that agencies within the U.S. Department of the Interior had authorized permits for offshore well stimulation treatments without first conducting the normally required environmental review. The Defendants/Bureaus in this case agreed to conduct an environmental review only after being sued by, and reaching settlement agreements with, the environmental groups involved in this litigation. Pursuant to the settlements, the Defendants/Bureaus issued an EA evaluating the use of offshore well simulation treatments and did not prepare a full EIS. The agencies ultimately concluded that the use of these treatments would not pose a significant environmental impact and issued a Finding of No Significant Impact (FONSI).

The environmental groups considered the agencies' environmental review to be inadequate and sued once again. In this litigation, they asserted claims under NEPA and ESA. The State of California and the California Coastal Commission (collectively, "California") also sued, alleging that the agencies violated NEPA and CZMA by not reviewing the use of well stimulation treatments for consistency with California's coastal management program.

Final Agency Action Under the APA

As a preliminary matter, the Ninth Circuit found that the ESA and FONSI marked the end of the Bureaus' decision-making process for the purposes of NEPA and CZMA, and that the Bureaus' review of well stimulation treatments was complete. Accordingly, the action was a "final" agency action reviewable by the Court under the federal Administrative Procedure Act (APA).

Ripeness of Procedural Challenges

The Bureaus also contested the ripeness of the NEPA and CZMA claims on the grounds that they had not yet issued a formal plan for well stimulation or acted on site-specific permits. The Ninth Circuit determined that the final NEPA documents were ripe for review, and site-specific action was merely a factual consequence of the NEPA documents being applied over a specific area offshore from the coast.

NEPA

The District Court granted summary judgment to the Defendants on the NEPA claim, concluding that the Bureaus reasonably decided to conduct an EA rather than an EIS and took a sufficiently hard look at the environmental impacts of allowing well stimulation treatments. The Ninth Circuit reversed after considering three claims under NEPA.

First, Plaintiffs alleged that the Bureaus' EA was inadequate and violated NEPA because the agencies relied upon erroneous assumptions instead of taking the requisite "hard look" at the potential environmental effects of authorizing well stimulation treatments offshore from California. To take the requisite hard look, an agency "may not rely on incorrect assumptions or data" in arriving at its conclusion of no significant impacts. The Ninth Circuit agreed with Plaintiffs that the Bureaus relied on incorrect assumptions, based on questionable and inconclusive records, that well stimulation treatments would be infrequent, and on an assumption that compliance with a national pollution discharge elimination system general permit (NPDES) issued by the federal Environmental Protection Agency, which did not specifically address impacts of a project, would render the impacts insignificant. The EA was therefore inadequate for failing to take the requisite "hard look."

Second, Plaintiffs alleged the EA violated NEPA because the agencies failed to consider a reasonable range of alternatives and relied upon too narrow a statement of "purpose and need" in the EA. NEPA requires agencies to consider alternatives to their proposed action. Here, the EA explained the purpose of the proposed action (*i.e.*, use of certain WSTs, such as fracking) is to enhance the recovery of petroleum and gas from new and existing wells on the Pacific Outer Continental Shelf, beyond that which could be recovered with conventional methods, and that the

need is for "the efficient recovery of oil and gas reserves" from the Pacific Outer Continental Shelf. California contended that by defining the purpose of the EA in terms of the proposed action, the Bureaus predetermined the outcome. The purpose and need statement was largely constrained by the settlement agreements, and the Ninth Circuit did not agree with California that it unduly constrained consideration of alternatives. However, the Ninth Circuit found that the Bureaus failed to give meaningful consideration to viable alternatives. The Bureaus did not consider an alternative of limiting the number of treatments per year, summarily dismissing a number of alternatives without explanation. This failure by the Bureaus did violate NEPA.

Third, Plaintiffs challenged the decision not to prepare an EIS as a separate violation of NEPA. In challenging an agency decision not to prepare an EIS, a plaintiff need not prove that significant environmental effects will occur; rather, a plaintiff need only raise a "substantial question" that they might. Here, the environmental impacts of extensive offshore fracking were largely unexplored, making it *terra incognita* for NEPA review. For this reason, among others, the Ninth Circuit held that the important issues here warranted a full NEPA analysis in an EIS, and that the Bureaus acted arbitrarily and capriciously by not preparing an EIS and by limiting their assessment to an EA that did not fully evaluate the environmental impacts of fracking. The Ninth Circuit observed that Plaintiffs successfully met NEPA's significance factor with regard to the impact on endangered or threatened species, unique geographic areas, and unknown impacts of extensive offshore fracking.

ESA

Plaintiffs alleged that the Bureaus violated ESA's consultation requirement. The ESA provides protections for listed species, such as prohibiting unauthorized taking of the species, preserving necessary habitat for a species survival, and, as pertinent here, requiring consultations with expert wildlife agencies about the risks to wildlife species from any proposed federal action. ESA Section 7(a)(2) requires agencies to consult with expert wildlife agencies to ensure that any agency action "is not likely to jeopardize" any endangered or threatened species or result in the "adverse modification" of their habitats. Here, the Bureaus did not engage in consultation before issuing the EA. In fact, after being sued over the lack of consultation, and a week before filing their motion to dismiss, the Bureaus initiated the ESA consultation process by sending biological assessments to the expert wildlife agencies. In the biological assessment sent to the National Marine Fisheries Service, the Bureaus determined that no species would likely be adversely affected by the use of well stimulation treatments.

Determination of whether an action qualifies as agency action under the ESA, triggering the consultation requirement, involves a consideration of whether the agency affirmatively authorized, funded, or carried out the underlying activity, and if this standard is met, whether the action was discretionary. The Bureaus' action in approving offshore well stimulation without restriction met the definition of "agency action." Accordingly, the Ninth Circuit affirmed the judgment of the District Court granting summary judgment to Plaintiffs.

CZMA

Congress enacted the CZMA to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations. When a federal agency "activity" affects the coastal zone of a state, the CZMA requires the federal agency to review the proposed activity and determine whether it is consistent with the affected state's coastal management program.

California alleged that the Bureaus violated the CZMA because they did not conduct a consistency review to determine whether the use of offshore well stimulation treatments is consistent with California's coastal management program. The proposed action in the EA and FONSI was each a federal agency "activity" for the purpose of CZMA, and, therefore, the Bureaus were required to conduct a consistency review with California's coastal management program.

In conclusion, the Ninth Circuit reversed the grant of summary judgment for Defendants/Bureaus on the NEPA claim, and affirmed the grant for Plaintiffs on the ESA and CZMA claims.

* * *

Seider as Trustee of Seider Family Trust v. City of Malibu (9th Cir., June 1, 2022, No. 21-55293) -- F.4th ---, 2022 WL 1769793.

BACKGROUND: Plaintiffs Dennis and Leah Seider (Plaintiffs) sued Defendant the City of Malibu (City), challenging as unconstitutional certain provisions of the City's Local Implementation Plan (LIP) adopted pursuant to the California Coastal Act, namely: the provision that forbids signs that "purport to identify the boundary between State tidelands[ ] and private property," the provision that establishes criteria for the City to apply when making permitting decisions, and the provision that requires an applicant to agree to indemnify the City should a third party sue the City for its decision to approve the application. The district court dismissed the sign-related claims for failure to join the California Coastal Commission (Commission) as a necessary party, and dismissed the indemnification-related claims for lack of ripeness.

HOLDING: In a memorandum decision, the majority of the panel from the Ninth Circuit affirmed the decision on the indemnification claims, but vacated and remanded the first two claims on the ground that the Commission was required to be joined as a necessary party pursuant to Federal Rule of Civil Procedure, Rule 19(A).

Key FACTS & ANALYSIS: The Commission had primary jurisdiction over the first two claims but was not joined in the action. Federal Rule of Civil Procedure, Rule 19(A) required that, if the Commission was not joined, the district court must order that the Commission be made a party. Accordingly, the Ninth Circuit vacated the dismissal and remanded to the district court to require the Commission be joined as a defendant.

The Ninth Circuit affirmed on the indemnification counts. The indemnification provisions would only arise if the City were the entity to rule on the permit application. The Commission had primary permitting authority in the case, and the claims were thus correctly dismissed.

DISSENT: Circuit Judge Collins dissented and would have remanded for further proceedings to address the merits of the claims that the City, and not the Commission, has original permitting authority pursuant to its local coastal plan (LCP), at least with respect to the sign provision.

* * *

San Francisco Herring Association v. U.S. Department of the Interior
(9th Cir. 2022) 33 F.4th 1146.

BACKGROUND: An association representing herring fishermen brought action against the United States Department of the Interior (Department), National Park Service (Park Service), and agency officials challenging the Park Service's authority to prohibit commercial herring fishing in Golden Gate National Recreation Area (GGNRA). The United States District Court for the Northern District of California granted the Department's motion for summary judgment, and the association appealed. The Ninth Circuit Court of Appeals vacated and remanded that decision, and on remand, the District Court dismissed the complaint and denied the association's motion for leave to file a second amended complaint. The association again appealed. The Ninth Circuit affirmed in part, reversed in part, and remanded. On remand, the District Court entered summary judgment in the government's favor, and the association appealed.

HOLDING: The Ninth Circuit held that the Park Service had statutory authority to enforce its generally applicable commercial fishing prohibition in GGNRA's waters. The judgment was affirmed.

Key FACTS & ANALYSIS: In 1972, Congress created the GGNRA, establishing a portion of San Francisco Bay as part of the National Park System. Congress included within the geographic boundaries of the GGNRA certain navigable waters that were already subject to the jurisdiction of the United States. The question in this case was whether the Park Service may enforce in these offshore waters a prohibition on commercial fishing that applies generally in national parks. The answer to that question turned on whether Congress in the GGNRA's enabling act gave the Park Service statutory authority to administer the disputed waters of San Francisco Bay. The Ninth Circuit found that it did.

In 1916, Congress enacted the National Park Service Organic Act (Organic Act), ordering the Secretary of the Interior, through the Director of the National Park Service, to administer the National Park System "to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of [the same] in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." (54 U.S.C. § 100101.) Pursuant to the Organic Act, the Park Service adopted a series of regulations, including regulations related to navigable waters, but these regulations do not typically apply to non-federally owned lands and waters.

The San Francisco Herring Association (Association) is a California-based nonprofit organization composed of small business owners who fish in the Bay Area. Suing on behalf of its members, the Association sought to prevent the Department, Park Service, and various agency officials from enforcing in the GGNRA a commercial fishing prohibition that applies generally in national park units. The Association alleged that the Park Service lacked the statutory authority to prohibit

commercial herring fishing in the GGNRA. The District Court disagreed and granted summary judgment for the government.

In two previous appeals, the Ninth Circuit held, first, that the District Court lacked subject matter jurisdiction over the case because the Association had failed to identify any final agency action under the Administrative Procedure Act (APA), (*see San Francisco Herring Ass'n v. U.S. Dep't of Interior* (9th Cir. 2017) 683 F.Appx. 579, 580 (*Herring I*)), and, second, that the Association had later sufficiently alleged final agency action based on new allegations of specific enforcement efforts against individual fishermen (*see San Francisco Herring Ass'n v. U.S. Dep't of Interior*, (9th Cir. 2019) 946 F.3d 564, 576–77 (*Herring II*)). On remand from *Herring II*, the District Court then granted summary judgment to the Park Service, essentially reinstating its original decision that led to *Herring I*. The Association's third appeal was on the merits.

The Ninth Circuit found that the Park Service had the authority to administer the navigable waters within the GGNRA's drawn geographic borders. The Ninth Circuit rejected the Association's argument that the Park Service needed a property interest in the disputed water in order to administer the navigable waters, and regulations relating thereto.

The Ninth Circuit also reviewed the Alaska National Interest Lands Conversation Act (ANILCA) relating to certain federal lands in Alaska. In that statutory scheme, "public lands" was defined as lands in which the United States had *title*. This definition was not present in the Congressional Act establishing the GGNRA (GGNRA Act). Therefore, the Ninth Circuit observed that when Congress wants to disallow the Park Service from exercising its usual authority over navigable waters falling within the drawn boundaries of a national park system unit, Congress makes that intention clear. Finding no such definition in the GGRNRA Act, the Ninth Circuit concluded that the Park Service could administer the navigable waters of San Francisco Bay within the GGNRA, with the consequence that it may enforce its commercial fishing rules in those waters.

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STATE CASES

County of Butte v. Department of Water Resources (Cal. Sup. Ct., Aug. 1, 2022)
-- P.3d ---, 2022 WL 3023670.

BACKGROUND: Counties filed writ petitions challenging sufficiency of an environmental impact report (EIR) prepared by the California Department of Water Resources (DWR) pursuant to the California Environmental Quality Act (CEQA) in connection with the DWR's application for renewal of its license to operate hydroelectric projects. The superior court entered judgment in favor of DWR. Counties appealed. The Third District Court of Appeal dismissed the appeal based on preemption and prematurity. Counties petitioned for review, which was granted.

HOLDING: The California Supreme Court held that: (1) the Federal Power Act (FPA), setting out the licensing scheme to facilitate construction and operation of dams and hydroelectric power plants, did not categorically preempt application of CEQA as part of the state's exercise of authority over its own subdivision's license application for operation of hydroelectric project; (2) the counties' challenge to terms of settlement agreement reached by DWR under the federal

alternative licensing process (ALP) scheme was preempted by FPA; and (3) the counties' petition for writ of mandate setting aside certification of EIR as adequate was not preempted by the FPA. The judgment was affirmed in part, reversed in part, and remanded for consideration of the CEQA challenges to the EIR.

KEY FACTS & ANALYSIS: Operation of a dam, reservoir, or hydroelectric power plant requires a license from the Federal Energy Regulatory Commission (FERC). For decades, California has required public entities seeking licensing of state-owned and state-operated hydroelectric projects to conduct CEQA environmental review. In this case, DWR prepared an EIR in connection with its application for renewal of its 50-year license to operate the "Oroville Facilities," an interrelated group of public works operated by DWR in Butte County. Butte and Plumas Counties (the Counties) filed writ petitions challenging the sufficiency of the EIR. The Counties challenged both DWR's CEQA analysis and the settlement agreement entered into as part of the FERC ALP process.

Under preemption principles, the California Supreme Court decided: (1) whether the FPA preempted CEQA when the state is acting on its own behalf and exercising its discretion in pursuing relicensing of a hydroelectric dam, and (2) whether the FPA preempted CEQA challenges to an EIR related to a hydroelectric dam subject to a FERC license.

First, the Supreme Court found that there was no evidence that the FPA categorically preempted CEQA with regard to local dams and hydroelectric plants. Without evidence of categorical field preemption, CEQA could still apply to FPA licensed projects.

Second, however, the Supreme Court found that the Counties' ability to challenge a settlement agreement which established the basis for DWR's FERC license was preempted by the FPA. The settlement agreement was entered as a part of FERC's ALP process with input of many jurisdictions. The ALP process combines into a single process the pre-filing consultation process of the traditional licensing procedure, the environmental review process under the National Environmental Policy Act of 1969, and administrative processes associated with the federal Clean Water Act, and other statutes. (*See,* 18 C.F.R. § 4.34(i)(2)(i) (2022).)

Here, the ALP process consumed five years with participants that included representatives from 39 organizations: five federal agencies, five state agencies, seven local government entities, five Native American tribes, four local water agencies, and 13 nongovernmental organizations. From late 2000 through 2004, the six working groups formed to conduct the ALP each met at least monthly, eventually logging an estimated 1,500 hours of meeting time. While the EIR characterized the project under CEQA review as implementation of the settlement agreement, FERC had exclusive jurisdiction over the terms of the license and the settlement agreement per federal law. Thus, the Supreme Court concluded that allowing such a challenge would interfere with the federal statute.

Third, and finally, review of the EIR itself did not interfere with FERC's jurisdiction. DWR could undertake CEQA review to assess its options to proceed under the terms of its license without conflicting with federal authority. The Counties challenged the sufficiency of the EIR. The Supreme Court observed that, while certain mitigation measures could be preempted to the extent

they conflicted with the settlement agreement or license, the EIR could also contain mitigation measures outside of FERC's jurisdiction which could be subject to review. The Supreme Court therefore held that the CEQA challenges to the sufficiency of the EIR could stand without encroaching on federal licensing authority.

NOTABLE CONCURRENCE IN PART AND DISSENT IN PART: Chief Justice Cantil-Sakauye concurred in part, dissented in part, and filed an opinion in which Justice Corrigan joined. The concurring/dissenting opinion concluded that CEQA was fully preempted by the FPA for FPA-licensed projects due to the mandatory imposition of mitigation measures and the avenue for private enforcement. The concurring/dissenting opinion also concluded that application of CEQA would undermine the accomplishment of the FPA's objectives to facilitate hydroelectric facilities and dams.

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Parkford Owners for a Better Community v. Windeshausen (2022) 81 Cal.App.5th 216.

BACKGROUND: A community organization brought an action to challenge a county's issuance of a business license for a self-storage facility. The superior court stayed the action pending the outcome of an appeal in related action challenging the issuance of a building permit, and, after the appeal in that action was dismissed as moot, granted defendants' motion for judgment on the pleadings based on *res judicata* grounds. The organization appealed.

HOLDING: The Third District Court of Appeal held that dismissal of the appeal in the related action was not a final judgment on the merits. The judgment was reversed and remanded.

Key FACTS & ANALYSIS: This case involved the second appeal arising out of a dispute over the operation of a commercial self-storage facility (Treelake Storage) within a planned unit development in Granite Bay (Treelake Village). Real party in interest, Silversword Properties, LLC (Silversword) owned the property upon which real parties in interest K.H. Moss Company and Moss Equity (Moss) operated Treelake Storage.

In a separate but related lawsuit filed in 2017, Parkford Owners for a Better Community (Parkford) challenged Placer County's (County) issuance of a building permit for the construction of an expansion of Treelake Storage, asserting that the County failed to comply with both the California Environmental Quality Act (CEQA) and the Planning and Zoning Law. The trial court concluded: (1) the County's issuance of the building permit was ministerial rather than discretionary, and therefore CEQA did not apply; and (2) Parkford's challenge under the Planning and Zoning Law was barred by the statute of limitations. Parkford appealed, challenging each of these conclusions.

In August 2020, the Court of Appeal dismissed the appeal in a published opinion, concluding that completion of the challenged expansion of Treelake Storage prior to entry of judgment rendered moot Parkford's challenge to the County's issuance of a building permit authorizing construction of the expansion. (*Parkford Owners for a Better Community v. County of Placer* (2020) 54 Cal.App.5th 714 (*Parkford I*).)

Nearly a year later, in June 2021, the trial court concluded that the present lawsuit, which was filed by Parkford in 2018 and challenged the County's issuance of a business license for the operation

of Treelake Storage, was barred by both aspects of the doctrine of *res judicata*--claim and issue preclusion. This appeal followed.

The Court of Appeal held that *Parkford I* did not constitute a final judgment "on the merits" for the purposes of preclusion, and *res judicata* did not bar the lawsuit. Because *Parkford I* decided the case solely on the basis of mootness, the case was not "on the merits" on either the CEQA or statute of limitations issues. Therefore, neither claim nor issue preclusion applied.

* * *

City of Coronado v. San Diego Association of Governments (2022) 80 Cal.App.5th 21.
BACKGROUND: Cities filed a combined petition for writ of administrate mandate and complaint for injunctive and declaratory relief against the regional council of governments and its board of directors, alleging the regional council and its board denied them a fair hearing when deciding the cities' administrative appeals on their allocations under the regional housing needs assessment (RHNA). The superior court sustained SANDAG's demurrer without leave to amend and entered judgment in its favor. The cities appealed.

HOLDING: The Fourth District, Division One, Court of Appeal held that: (1) the trial court lacked jurisdiction to adjudicate claim, and (2) the Court of Appeal would not limit *City of Irvine v. Southern California Assn. of Governments* (2009) 175 Cal.App.4th 506 ("*City of Irvine*"). The judgment was affirmed.

Key FACTS & ANALYSIS: The Legislature enacted the RHNA procedure to address the state's shortage of affordable housing. As a component of this process, regional councils of governments, in conjunction with the cities and counties within their jurisdictions and the California Department of Housing and Community Development (HCD), devise methods for distributing existing and projected housing needs within their regions and for allocating a share of the regional housing needs to each local jurisdiction.

In *City of Irvine*, the Division Three of the Fourth District Court of Appeal concluded that that administrative procedure established by Government Code section 65584 *et seq.*, covering the RHNA methodology and process, was the exclusive remedy to challenge RHNA allocations, thereby precluding judicial review.

In this action, the Cities of Coronado, Imperial Beach, Lemon Grove, and Solana Beach (collectively, "the Cities") filed a combined petition for writ of administrative mandate and complaint for injunctive and declaratory relief (Petition) against the San Diego Association of Governments and its board of directors (collectively, SANDAG). In their Petition, the Cities argued that SANDAG denied them a fair hearing when deciding the Cities' administrative appeals of SANDAG's RHNA allocations.

The Cities alleged SANDAG unfairly used a "weighted vote" procedure, in which member jurisdictions cast votes based on their respective populations rather than a "tally vote" in which each member jurisdiction has a single, evenly-weighted vote. The Cities claimed that, in ruling on the Cities' administrative appeals, SANDAG had acted in a "quasi-judicial capacity" and that the use of weighted voting in this context violated fundamental tenets of procedural due process,

fairness, and equity. The Cities further alleged that certain members of the Board were biased against the Cities and that their decision to deny the Cities' administrative appeals was predetermined and therefore invalid. In their prayer for relief, the Cities requested that the trial court enter a judgment rescinding the RHNA allocation. SANDAG demurred on the ground that the trial court lacked jurisdiction based on *City of Irvine*. The trial court sustained the demurrer on that ground.

On appeal, the Cities argued that *City of Irvine* did not preclude the action on the grounds that *City of Irvine* involved a substantive challenge to the RHNA allocation, whereas the Cities' challenge was a procedural one. The Cities also argued that the action should not be barred merely because the "end result" of their success would be recission of the RHNA allocation.

The Court of Appeal disagreed, finding *City of Irvine* controlling. First, it found that *City of Irvine* did not distinguish between procedural and substantive challenges, and that there was no suggestion that the judgment was limited to substantive challenges. Second, the Court of Appeal found that all of the rationale in *City of Irvine* for precluding judicial review applied: The ultimate relief sought was recission of the RHNA allocation, government entities have no vested rights in administration of intergovernmental programs, the RHNA administrative appeals process presented an avenue for relief for the Cities, the Legislature showed intent not to provide judicial review of RHNA allocations by removing a statutory provision authorizing that review, and, finally, there was no premise in *City of Irvine* to focus on the substantive expertise of the reviewing body.

The Court of Appeal dismissed the City's remaining arguments as unpersuasive. These arguments were that *City of Irvine* did not apply when the administrative process itself was the subject of the writ, that under the Court of Appeal's reasoning, no procedural defect would trigger judicial review, and that the Legislative deletion of a provision authorizing judicial review of RHNA allocations was not determinative.

* * *

Reznitskiy v. County of Marin (2022) 79 Cal.App.5th 1016.

BACKGROUND: Prospective builders of a single-family residence filed a petition for writ of administrative mandamus challenging the county's denial of their building project. The superior court affirmed. The prospective builders appealed.

HOLDING: The First District Court of Appeal held that, as a matter of first impression, the Housing Accountability Act (HAA) does not apply to projects to build individual single-family homes. The judgment was affirmed.

KEY FACTS & ANALYSIS: In 2016, Aleksandr Reznitskiy and Cecily Rogers (Plaintiffs) applied to build a single-family home and accessory dwelling unit (ADU) totaling over 5,000 square feet on a lot they owned in San Anselmo. Pursuant to comments from the planning division of Marin County's Community Development Agency, the Plaintiffs revised their project to a floor plan of just under 4,000 square feet, and the planning division approved of the project. The neighbors appealed the decision to the Marin County Planning Commission (Commission), arguing that the

project was incompatible with the neighborhood and that it would have a negative environmental impact. The Commission agreed and denied the plaintiffs' project. The Plaintiffs then appealed the Commission's decision to the County Board of Supervisors (Board), arguing that further downsizing was unnecessary and that the denial violated the Housing Accountability Act (HAA). The Board voted to uphold the Commission's decision denying the project. The Plaintiffs then filed a petition for a writ of administrative mandamus in the trial court to challenge the County's denial of the project, which the trial court denied.

As the Court of Appeal recounted, the HAA was intended to address the lack of housing in California. Under Government Code section 65589.5(j), "when a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards," the local agency cannot "disapprove the project or … impose a condition that the project be developed at a lower density," unless (1) the project would have an adverse impact on public health or safety, and (2) there is no feasible way to mitigate that adverse impact.

The main issue in the case was whether the single-family home qualified as a "housing development project" under 65589.5(j). No decision had previously addressed whether a project to build a single residential unit (even without an ADU) counts as a "housing development project" under the HAA. The Court of Appeal noted that the provision does not define "housing," "development," or "project" either individually or collectively. Given that the statute did not expressly define this term, the court turned to the broader meaning of "housing development project" in California zoning law more generally.

In the published portion of the opinion, the Court of Appeal determined that the phrase, "housing development project" in the HAA uses "development" as a concrete noun to mean a project to build a housing development, referring to a *group* of housing units. Other parts of the HAA use "development" as a concrete noun in this way. Moreover, the legislative history supports the conclusion that "housing development project" refers to a project to build a housing development. Finally, this interpretation of "housing development project" would not undermine the HAA's purpose of encouraging more housing. Thus, the First District concluded that the project was not covered by the HAA.

In the unpublished portion of the opinion, the Court of Appeal rejected Plaintiffs' equitable estoppel argument and their assertion that the County lacked substantial evidence to support its finding that the project was out of scale with surrounding homes.

* * *

Tiburon Open Space Committee v. County of Marin (2022) 78 Cal.App.5th 700.

BACKGROUND: A property owner and a private committee (Petitioners) filed a petition for writ of mandate against a county under the California Environmental Quality Act (CEQA), challenging the county's certification of environmental impact report (EIR) and approval of a development project on a mountaintop, pursuant to the county's settlements with a developer in prior federal actions. The trial court granted a town leave to file a petition in intervention. The superior court denied the petitions. The Petitioners and town appealed.

HOLDING: The First District Court of Appeal held that: (1) the mitigation measures or alternatives involving construction of fewer housing units than required under prior settlements were legally infeasible under CEQA; (2) prior settlements did not preclude the county from exercising "independent judgment" when certifying an EIR; (3) the draft EIR adequately described project; (4) the traffic mitigation measures requiring town's approval were not illusory; (5) sufficient evidence supported the county's findings regarding the project's traffic impacts; (6) the EIR's mitigation measures directed at protecting threatened frog species did not constitute improperly deferred mitigation; and (7) the EIR's mitigation monitoring program for fire flow within the completed project was reasonably feasible. The judgment was affirmed.

Key FACTS & ANALYSIS: The Martha Company (Martha) owns the largest undeveloped parcel of real property in the vicinity of the Town of Tiburon (Town). The property is comprised of 110 acres on top of a mountain overlooking much of the Town. One county supervisor described the site as "the last remaining undeveloped ridgeline on the Tiburon peninsula," and, as such, "it's treasured by residents and visitors." Another supervisor called it "amazing," "unique," and "an absolute treasure," while a third termed it a "jewel." For decades, Martha tried to get approval from Marin County (County) to develop the property. Local opposition has also been intense.

In 1974, the County adopted a re-zoning measure that reduced the number of residences Martha could build on the site from a minimum of 300 units to a maximum of 34. The re-zoning also precluded Martha from building on certain areas. In response, Martha sued the County in federal district court, seeking $6 million on the theory that the re-zoning effected a regulatory taking of property. In December 1976, Martha and the County settled the federal lawsuit by a stipulated judgment (the 1976 Judgment), which provided in part that Martha could develop no fewer than 43 single-family homesites on minimum one-half acre lots and could build on the formerly prohibited areas with certain conditions. Martha applied in the following years to both the County and Town to develop the area. Neither rendered a decision, delaying review through conducting studies.

In 2005, the County sued in federal district court asking to be relieved from the judgment. The County alleged that the 1976 Judgment was void and unenforceable because, *inter alia*, environmental laws have changed in the 30 years since the 1976 Judgment, and while the limits of the County's authority to contract away its discretion over certain environmental land use issues was not clear in 1976, it is now clear that it was illegal for the County to have contracted away its authority to evaluate the minimum density provisions of the proposed development without conducting a full environmental review as required by CEQA. Property owners also sued the County, Martha, and the Town, asserting that the 1976 judgment violated their federal due process rights because they were not provided notice and an opportunity to be heard.

After the district court dismissed the County's complaint and the property owners' counterclaims, the County and Martha again drafted and submitted a Stipulation for Entry of Judgment and Procedures for Enforcing Judgment Entered in the first action. The 2007 judgment required the County to approve the 43 homesites and the County acknowledged that a mitigation measure, which does not allow it to approve the 43 homesites, would be legally infeasible. Still, no decision was made until 2017 when the County certified the EIR.

Compliance with CEQA when a Federal Judgment Exists

In its analysis, the Court of Appeal first decided that the County's compliance with CEQA was not abdicated by the federal judgments. The Court stated that the stipulated judgments did not excuse the County's requirement to comply with CEQA. The Court of Appeal characterized the project as one single project with a set of attending circumstances, one of which was the previous judgment. The fact that the judgments included language that any alternative that would not afford Martha its rights under the 1976 judgment would be legally infeasible did not change the County's CEQA responsibilities. The County was required to, and did, prepare a full-scale EIR to address the environmental issues. The Court noted that CEQA's purpose is to disclose to the public the reasons for approving a project in a certain matter. The draft EIR did that and explained the impact of the judgments in the analysis. Some members of the Board of Supervisors clearly felt they had been maneuvered into approving the project, but the means of the maneuver were on the record, in the EIR, and clearly a matter of common knowledge. The Court essentially noted that not liking the deal struck in 1976 and again in 2007 was not a ground for repudiating it.

Project Description

The Court of Appeal next evaluated the private plaintiffs' argument that the project description was inadequate because the Board was operating with a reduced scope of its normal discretion under CEQA. It was clear to the Court of Appeal that this argument was instead geared to address the County's "abdication" of its responsibilities by complying with the judgments. Having already rejected that argument, the Court of Appeal rejected the argument that the project description was inadequate.

Analysis of Reasonable Alternatives

The Court of Appeal then decided that the County's rejection of a 32-unit alternative on the grounds that it was inconsistent with the federal judgments was not an abuse of discretion. With the County legally bound to a 43-unit minimum, any alternative with fewer units would, as already shown, be legally infeasible. It was not an abuse of discretion for the County not to choose a legally infeasible alternative.

Findings that Certain Significant Impacts Could be Mitigated

Part of the EIR found that the project's impacts on traffic safety in the Town could be mitigated by making changes to the Town's municipal code. The Court of Appeal considered the particular circumstances of the narrow streets in the Town and the County's proposed mitigation measures, which the Court considered a comprehensive approach to the problem. The EIR was only required to have a reasonable plan for mitigation, which the Court found to exist considering the circumstances. The Court decided similarly with regard to mitigation of pedestrian safety, observing that in this hillside town, neither the issue of traffic nor pedestrian safety had flown under the radar locally. The EIR candidly disclosed the existing traffic and pedestrian issues, and that they would be increased by the project.

The County also found substantial evidence supporting the County's analysis of traffic density impacts through a level of service methodology, which was industry standard. The EIR was not required to include every possible study.

The Court of Appeal then turned to mitigation measures for impacts on the California Red-Legged Frog. The measures required best management practices (BMPs) to maintain water quality, development of resource management plans (RMPs) for all sensitive habitats, preparation of stormwater pollution prevention plan, and other steps to reduce project's impact on the frog. The Court concluded that these measures did not constitute improperly deferred mitigation because they were accepted by developer as conditions of project approval, the BMPs were already in existence, and the mitigation measures that were not yet existent were subject to approval by all applicable agencies, essentially requiring the developer to comply with existing regulations and standards. The Court found the County's mitigation measure relevant to redirecting runoff to avoid an adjoining property in which frogs breed to be a comprehensive attempt to deal with the problem, given the constraints that the neighboring property owner was not a party to the project as that owner refused to cooperate.

The Court of Appeal also found the water tank and fire flow analysis to be sufficient. This analysis was vetted by relevant water and fire districts, and involved in part the relevant public agencies to develop a water supply plan with the developer. Plaintiffs insisted that nothing required Martha to "actually implement any mitigation." This may be literally true, but the Court found it ignored logic and defied common sense. If Martha did not work with—and satisfy—the local water and fire authorities, the County would not issue the required permits. The Court observed, "This carrot-and-stick approach is established and accepted."

Finally, the Court of Appeal found that the EIR's analysis of the temporary construction access, which included a 25% maximum grade road for construction for emergency access, to be legally sufficient under CEQA. There was no evidence that use of the road would increase the existing hazards of the steep terrain, and in fact, the developer had adopted procedures to lessen the safety risks when workers were present. The safety risk only impacted workers and would dissipate when construction was complete.

It should be noted that the Court of Appeal took exception to other local governments opposing the project under CEQA, when the County had complied with the law, including the accounting for the prior settlements to which it was bound.

* * *

Department of Water Resources Environmental Impact Cases (2022) 79 Cal.App.5th 556.
BACKGROUND: Counties, city, water agencies, advocacy organizations, and others (Plaintiffs) filed petitions against the Department of Water Resources (DWR) to challenge a proposal to improve the state's water supply infrastructure by constructing two tunnels that would convey fresh water from the Sacramento River to pumping stations in the southern Sacramento–San Joaquin Delta. Plaintiffs sought to compel DWR to rescind approvals, decertify the environmental impact report (EIR), and suspend activities related to the project until DWR complied with applicable laws. Following dismissal of all pending actions due to DWR's decertification of the EIR and rescission

of project approvals, the superior court denied Plaintiffs' motions for attorney's fees under the private attorney general statute. Plaintiffs appealed.

HOLDING: The Third District Court of Appeal held that: (1) the trial court abused its discretion in assessing the causation element for awarding of attorney fees by treating Governor Newsom's (the Governor) policy directive as an external, superseding cause of relief; (2) the trial court's assumption that DWR's EIR decertification and rescission of bond resolutions was to be expected was not supported by the law or the facts; and (3) the Governor's Executive Order (EO) directing DWR to inventory and assess current planning to modernize water conveyance with a new single tunnel project did not compel DWR to decertify the EIR or rescind bond approvals. Reversed and remanded with directions.

Key FACTS & ANALYSIS: Plaintiffs appealed from post-dismissal orders denying their motions for attorney's fees under Code of Civil Procedure 1021.5, the private attorney general statute. In 2017, Plaintiffs filed petitions against DWR challenging the California WaterFix (WaterFix), a proposal to improve California's water supply infrastructure by constructing two 35-mile long tunnels that would convey fresh water from the Sacramento River to pumping stations in the southern Sacramento-San Joaquin Delta (Delta). The lawsuits sought to compel DWR to rescind the WaterFix approvals, decertify the EIR, and suspend activities related to the project until DWR complied with applicable laws. Most of the plaintiffs also filed answers opposing a separate action filed by DWR to validate the project's bond financing. Plaintiffs' lawsuits were coordinated for trial with other lawsuits and with DWR's validation action. Several years later, the Governor announced that he did not support WaterFix's dual tunnel proposal and directed DWR to instead pursue a single tunnel conveyance. Shortly thereafter, DWR decertified the EIR and rescinded the project approvals. Subsequently, all pending actions, including the validation suit, were dismissed.

After dismissal of the cases, Plaintiffs filed motions for attorney's fees, asserting that they were "successful" parties under the catalyst theory because the litigation motivated DWR to voluntarily provide the relief sought in their petitions and answers. The trial court denied their motions, determining that, although plaintiffs may have received the primary relief sought, the lawsuits did not cause DWR to provide that relief. The Court of Appeal ultimately reversed and remanded for redetermination of the issue, concluding that the trial court failed to apply the correct legal standard and thus failed to consider all relevant evidence in the record.

On appeal, Plaintiffs argued that the trial court failed to apply the correct legal standard in determining there was no causal connection between the litigation and the relief obtained. Specifically, plaintiffs contended that the trial court erred by (1) requiring plaintiffs to show the lawsuits were "the" cause of DWR's actions, rather than "a" substantial contributing factor; (2) improperly relying on DWR's subjective opinion of the merits of the lawsuits; (3) failing to consider how DWR modified its behavior in response to the litigation; and (4) treating the Governor's policy directive as an external, superseding cause.

Though the Court of Appeal rejected most of Plaintiffs' aforementioned contentions, the Court agreed that the trial court erred in treating the Governor's policy directive as an external, superseding cause. The Court focused on the evidence Plaintiffs presented, and the evidence suggested that the Governor's decision may have been influenced—at least in part—by the

WaterFix litigation. Specifically, Plaintiffs presented evidence that the Governor expressed general concerns about the litigation before he took office. The Court recognized that the trial court should have considered this evidence in deciding whether the WaterFix litigation was a catalyst in the state's decision to cancel the WaterFix project. By treating the Governor's policy change as an intervening cause that was separate from the litigation, the Court found that the trial court based its decision on improper criteria and failed to consider all of the relevant evidence presented.

Additionally, the Court of Appeal recognized that the trial court also erred by assuming that it was "expected" that the DWR would decertify the WaterFix EIR and rescind WaterFix bond resolutions after receiving the Governor's directive to shift from two tunnels to one. The Court determined that this assumption lacked support, as nothing in CEQA required DWR to decertify the WaterFix EIR. Furthermore, the Court noted that the Governor's directive did not compel DWR to decertify the EIR or rescind the bond approvals. Finally, the Court reasoned that DWR's own statements and conduct contradicted the trial court's assumption that decertification of the EIR was "expected." Specifically, DWR's attorneys advised that DWR had options as to how to proceed under CEQA, including a subsequent or supplemental EIR.

* * *

Committee for Sound Water and Land Development v. City of Seaside (2022) 79 Cal.App.5th 389.
BACKGROUND: A nonprofit organization filed a petition for writ of mandate challenging City of Seaside's (City) certification of environmental impact report (EIR) and approval of a development project on a former military base under California Environmental Quality Act (CEQA) and contending that the Fort Ord Reuse Authority (FORA) violated due process by failing to provide adequate notice of a hearing to determine whether the project was consistent with reuse plan. The Developer, as real party in interest, demurred on limitation and mootness grounds. The City demurred on grounds of a sham pleading and laches. The superior court sustained the demurrers. The organization appealed.

HOLDING: The Sixth District Court of Appeal held that: (1) the Judicial Council's COVID-19 emergency rule of court tolling limitations periods applied to claims under CEQA; (2) the amendment of the emergency rule did not deprive organization of reasonable period of time in which to bring CEQA claims; (3) the dissolution of FORA and its statutory obligation to ensure the development's consistency with the reuse plan rendered the petitioner's due process claim moot; and (4) the proposed amendment of due process claim did not present a current controversy. The judgment was affirmed.

KEY FACTS & ANALYSIS: The Committee for Sound Water and Land Development (Committee) appealed the judgment entered after the trial court denied their petition for writ of mandate challenging a decision by the City to certify an EIR by KB Bakewell Seaside Venture II (KB Bakewell) for a project called Campus Town, to be developed on the former Fort Ord military base. FORA held a public hearing on June 6, 2020 where it determined that Campus Town was consistent with the Fort Ord Reuse Plan.

The Committee filed a first writ petition, for which they filed a request for dismissal on August 4, 2020. Their second writ petition was filed on September 1, 2020, and included 11 causes of action

alleging the EIR violated CEQA and a 12th cause of action alleging that FORA's failure to provide the Committee notice of the hearing for the project violated their right to due process.

The City demurred to the writ on the grounds that it was barred under the sham pleading doctrine and should be dismissed under the defense of laches, but since the Court of Appeal reached a conclusion on the face of the writ and matters subject to judicial notice, it did not address the trial court's ruling on this issue.

KB Bakewell demurred to the writ on the grounds that the CEQA causes of action were time-barred and the due process cause of action was moot. There is a 30-day limitations period provided in CEQA (Public Resources Code section 21167(c), specifically) for an action alleging that an EIR does not comply with CEQA. KB Bakewell contended, and the trial court agreed, that the period began to run on March 6, 2020, the date the City posted the notice of determination (NOD) for the Campus Town Project.

KB Bakewell also argued that the Judicial Council's Emergency Rule 9, as amended, tolled the limitations period from April 6, 2020 to August 3, 2020. The Judicial Council's emergency rule was adopted as part of measures taken during the COVID-19 pandemic, and provided in relevant part, "Tolling statutes of limitations for civil causes of action [¶] Tolling statutes of limitations of 180 days or less [¶] Notwithstanding any other law, the statutes of limitations and repose for civil causes of action that are 180 days or less are tolled from April 6, 2020, until August 3, 2020."

The Court of Appeal agreed with KB Bakewell, affirming the judgment and citing to the CEQA guidelines, which state that CEQA provides "unusually short" limitations periods. As for the Judicial Council's amendment to Emergency Rule 9, it expressly states that the statutes of limitations and repose for civil causes of action that are 180 days or less were tolled from April 6, 2020, until August 3, 2020.

KB Bakewell argued that the 12th cause of action pertaining to due process was moot because FORA no longer exists. The trial court agreed, and additionally stated it was moot because FORA does not have any obligation to resolve deficiencies in the notice provided for consistency obligations in the FORA Reuse Plan that occurred before FORA dissolved and because the legislation requiring notice was repealed. The Court of Appeal affirmed the trial court's dismissal on those grounds.

* * *

AIDS Healthcare Foundation v. City of Los Angeles (2022) 78 Cal.App.5th 167.

BACKGROUND: Citizen groups filed a petition of mandate seeking to force the City of Los Angeles (City) to set aside and vacate its approval of a mixed-use commercial and residential project that allegedly failed to comply with a fifteen percent (15%) low- and moderate-income set-aside requirement from the Community Redevelopment Law. The superior court denied the petition and entered judgment for the city. The citizen groups appealed.

HOLDING: The Second District Court of Appeal held that the 15% set-aside for dwelling units from the Community Redevelopment Law was rendered inoperative by the Redevelopment Dissolution Law. The judgment was affirmed.

KEY FACTS & ANALYSIS: In 1986, the former Community Redevelopment Agency of the City of Los Angeles (CRA-LA) established the Hollywood Redevelopment Plan in accordance with the Community Redevelopment Law. (Health & Saf. Code, § 33000 *et seq.*) The Community Redevelopment Law (CRL) has certain housing affordability provisions, including the 15% low- and moderate-income housing requirement, which sets a 15% affordability threshold for all new and substantially rehabilitated dwelling units. In 2011, the Legislature enacted what is known as the Redevelopment Dissolution Law (*id.,* § 34170 *et seq.*), which dissolved redevelopment agencies (*id.,* § 34172(a)(1)) and rendered inoperative any provisions of the CRL that depended upon the "tax increment" method of financing redevelopment agency activities (*id.,* § 34189(a)).

AIDS Healthcare Foundation and Coalition to Preserve LA (CPLA) (collectively, Appellants) filed a petition for writ of mandate in the superior court challenging the approval by the City of a development project (the project) proposed in an area covered by the Hollywood Redevelopment Plan. Appellants argued that the City's approval of the project violated the CRL's 15% inclusionary requirement because it did not commit 15% of the residential units for affordable housing. The trial court denied the petition and entered judgment for the City and the real party in interest, 6400 Sunset, LLC (the real party). The Court of Appeal affirmed, finding that the Dissolution Law rendered the 15% requirement invalid, specifically noting that Health & Safety Code sections 33131(a) and 33670(a) and (b) were held no longer operative or valid. The Court also noted that, even assuming the 15% inclusionary requirement under either the CRL or the Hollywood Redevelopment Plan still applied, its application is in the aggregate; as such, the real party was not required to fulfill the terms of that requirement with respect to its individual case of development.

POSTSCRIPT: The California Supreme Court denied a petition for review (July 27, 2022).

* * *

We Advocate Through Environmental Review v. County of Siskiyou (2022) 78 Cal.App.5th 683.
BACKGROUND: An environmental advocacy group and Winnehem Wintu Tribe (Petitioners), filed a petition for writ of mandate and complaint pursuant to the California Environmental Quality Act (CEQA), challenging a county's environmental review for a water bottling facility. The superior court denied the petition and complaint, and the petitioners appealed.

HOLDING: The Third District Court of Appeal held that: (1) the project objectives in the environmental impact report (EIR) were impermissibly narrow; (2) the county's error in stating impermissibly narrow project objectives in the EIR was prejudicial; (3) the evidence was sufficient to support the county's findings in the EIR that, without the project, existing facilities within the project site would remain vacant and non-operational, and that the existing facilities and infrastructure would not be used to the extent possible; (4) the county's stated reasons in the EIR for rejecting the no-project alternative were tied to the stated project objectives; (5) the difference in the increase in projected greenhouse gas emissions in the draft EIR and final EIR required recirculation of the EIR; and (6) the county, in the EIR, was not required to account for the greenhouse gas emissions associated with the production of unblown bottles. The judgment was reversed and remanded with directions.

Key FACTS & ANALYSIS: From 2001 to 2010, a water bottling company operated a plant in Siskiyou County (County) that extracted groundwater and then used it to produce bottled water. A few years after the plant closed, Crystal Geyser Water Company (Crystal Geyser) bought the facility and sought to revive it. To that end, Crystal Geyser requested, among other things, a permit from the County to build a caretaker's residence for the bottling plant and a permit from the City of Mount Shasta (City) to allow the plant to discharge wastewater into the City's sewer system. Both the County and the City ultimately granted Crystal Geyser the permits it sought.

This appeal concerns one of two lawsuits challenging these approvals, both of which involve CEQA. In one suit, Petitioners alleged that the County's environmental review for the bottling facility was inadequate under CEQA, as the County was the lead agency in preparing the EIR. In another suit, Petitioners alleged that the City's decision, as a responsible agency, to issue the wastewater permit for the bottling plant, which relied on the County's environmental review for the facility, was also improper under CEQA. This appeal concerns the first challenge. (The summary of the second challenge on appeal is below.)

Published Portion of the Opinion

Project Objectives

In the published portion of the decision, the Court of Appeal determined that the EIR's project objectives were too narrow. Here, the EIR stated that Crystal Geyser had eight objectives for the proposed project: (1) to "operate a beverage bottling facility and ancillary uses to meet increasing market demand," (2) to "site the proposed facility at the Plant previously operated by [Dannon], to take advantage of the existing building, production well, and availability and high quality of existing spring water on the property," (3) to "utilize the full production capacity of the existing Plant building based on its current size," (4) to "initiate operation of the Plant as soon as possible to meet increasing market demand," (5) to "minimize environmental impacts . . . by utilizing existing facilities and infrastructure to the extent possible," (6) to "modify the existing facilities at the Plant in a manner that incorporates sustainable building and design practices, recycling efforts, and other conservation methods, in order to reduce water use," (7) to "withdraw groundwater in a sustainable manner that does not result in negative effects on nearby springs or wells, the underlying shallow or deep aquifers, or the surrounding environment," and (8) to "create new employment opportunities for the local and nearby communities, promote sustainable economic development, provide for adequate services and infrastructure to support the project, and contribute to the County's tax base." The EIR elsewhere defined the term "Plant" to mean the "former bottling plant in unincorporated Siskiyou County."

According to the Court of Appeal, this project description was so narrow that it ensured the results of the alternatives analysis would be a foregone conclusion. As such, the Court viewed this error as prejudicial because it caused the County to dismiss anything other than the proposed project. The Court also agreed with the Petitioners that the EIR failed to adequately demonstrate that the "no project" alternative was infeasible because it was based on the unreasonably narrow project objective.

Impacts Analysis

The Court of Appeal agreed with the Petitioners' claim that the County was required to recirculate the EIR based on "significant new information" when the initial estimate of greenhouse gas emissions increased by almost double. However, the Court agreed with the County that the EIR was not required to account for greenhouse gas emissions associated with unblown bottles. The Court rejected the Petitioners' argument that the County wrongly assumed that the HVAC system would run two hours a day, 160 days annually. The Court observed that this was revised to be 18 hours a day, for 6 months of the year. The Court also rejected the claim that the County's mitigation measures were not enforceable, as the EIR required a program to achieve a quantifiable reduction in greenhouse gas emissions. The Court also rejected Petitioners' remaining arguments with regard to climate change impacts, finding that the County complied with CEQA or that the Petitioners lacked evidence to support their claims.

Consistency with County and City General Plans

Finally, the Court of Appeal rejected Petitioners' argument that the project was inconsistent with the County and City general plans. The evidence showed a substantial increase in noise, but not in conflict with the applicable general plans' allowances for the use proposed by the project.

Unpublished Opinion

Project Objectives

In the unpublished portion of the opinion, the Court of Appeal rejected Petitioners' assertion that the EIR should have focused on the caretaker's residence rather than on the bottling facilities. The Court also disagreed with Petitioners' claims that the project description was inadequate for failing to disclose that the County had no control over groundwater extraction or bottling activities, and that the project description improperly estimated the amount of groundwater that could be extracted. The Court found that Petitioners waived their claim that insufficient evidence supported the County's estimates on groundwater used because they failed to acknowledge the evidence favorable to the County and explain why it was lacking. The Court dismissed other arguments as highly speculative, or forfeited by failing to include them under a separate heading to their other objections to the project description.

Impacts Analysis

Also in the unpublished portion of the opinion, the Court of Appeal rejected Petitioner's arguments regarding the aesthetic impact of the project, discussion of air quality impacts, discussion of noise impacts, and hydrology.

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We Advocate Through Environmental Review v. City of Mount Shasta (2022) 78 Cal.App.5th 629.
BACKGROUND: Companion case to *We Advocate Through Environmental Review v. County of Siskiyou* (2022) 78 Cal.App.5th 683 (*"We Advocate/County"*) (summarized above; defined terms are the same). Petitioners filed a petition for writ of mandate to contest a wastewater permit which

the City issued for a water bottling recycling facility project. The superior court rejected the petition, and Petitioners appealed.

HOLDING: The Third District Court of Appeal held that: (1) any error by trial court in refusing to take judicial notice of two letters which were part of the administrative record was not reversible error, and (2) the City's determination, which was that there were "no unmitigated adverse environmental impacts relating to the alternate waste discharge disposal methods," was insufficient to comply with the California Environmental Quality Act (CEQA). The judgment was reversed and remanded with instructions.

Key FACTS & ANALYSIS: From 2001 to 2010, a water bottling company operated a plant in the County that extracted groundwater and then used it to produce bottled water. A few years after the plant closed, Crystal Geyser bought the facility and sought to revive it. To that end, Crystal Geyser requested, among other things, a permit from the County to build a caretaker's residence for the bottling plant and a permit from the City to allow the plant to discharge wastewater into the City's sewer system. Both the County and the City ultimately granted Crystal Geyser the permits it sought.

This appeal concerns one of two lawsuits challenging these approvals, both of which involve CEQA. In one suit, Petitioners alleged that the County's environmental review for the bottling facility was inadequate under CEQA. In another suit, Petitioners alleged that the City's decision to issue the wastewater permit for the bottling plant, which relied on the County's environmental review for the facility, was also improper under CEQA. This appeal concerns the second challenge. (The summary of the first challenge on appeal is above.)

For this appeal, it is noteworthy that, shortly after preparing the administrative record for the trial court, Petitioners noticed that two letters had inadvertently been omitted. Petitioners then requested judicial notice of the letters, along with the "complete administrative record of proceedings lodged" in the related *We Advocate/County* case. They argued that all of these records should have been judicially noticed under Evidence Code section 452 because they are County records. The Court of Appeal found no prejudice based on exclusion of the letters, which the trial court excluded because "[t]he documents proposed are not helpful to the court in determining the facts of this case and include confidential information." Moreover, the Court of Appeal noted Section 452 is a permissive grant of authority, whereby a court *may* take judicial notice. The Court found no reversible error because there was no prejudice suffered by not including the letters.

The Court of Appeal then turned to Petitioners' arguments that the City failed to make the requisite findings under CEQA before approving the wastewater permit. The City considered the environmental impact report (EIR) prepared by the County, which including significant impacts associated with discharge into the City's sewer system that would be addressed with mitigation measures. However, the City simply observed that it considered the EIR and found no unmitigated adverse environmental impacts relating to alternate waste discharge disposal methods. The Court of Appeal concluded that the City violated CEQA's procedural requirements for responsible agencies, which required it to make written findings regarding mitigation of the identified significant effects. As such, the Court held the City violated CEQA.

The Court of Appeal then addressed Petitioners' arguments that the City failed to adopt mitigation measures identified in the EIR for sewer improvements into a mitigation and monitoring plan. While Petitioners failed to provide legal support for this argument, the Court agreed with the petitioners that the City should have either adopted the mitigation measures or made findings regarding the agency responsible for the mitigation (in this case, the County). CEQA did not require the City to adopt mitigation measures if the City found that the County was exclusively responsible for their implementation and enforcement. Here, as noted above, however, the City did not make written findings regarding mitigation of the identified significant effects.

Finally, the Court of Appeal rejected Petitioners' arguments that the City was required to perform additional environmental review based on boiler blowdown water and cooling tower blowdown water. Petitioners failed to identify a legal basis for their claims.

* * *

Keen v. City of Manhattan Beach (2022) 77 Cal.App.5th 142.

BACKGROUND: An owner of property that had been rented on a short-term basis petitioned for writ of mandate to enjoin the City of Manhattan Beach (City) from enforcing zoning ordinances prohibiting short-term rentals. The superior court enjoined the ban on short-term rentals, pending approval of zoning ordinances by the California Coastal Commission (Commission). The City appealed.

HOLDING: The Second District Court of Appeal held that: (1) the City's residential zoning ordinances always permitted short- and long-term rentals, and thus the ban on short-term rentals was an amendment to the City's local coastal program (LCP) requiring approval by the Commission; (2) short-term residential rentals did not fall within definition of "hotels, motels, and time-share facilities"; and (3) the Court of Appeal would not take judicial notice of a decades-old definition of "hotel." The judgment was affirmed.

Key FACTS & ANALYSIS: The Commission enforces the priority of coastal access by reviewing amendments to municipal codes of cities within the Coastal Zone. Municipal code amendments require Commission approval. The issue in this case was whether there was an amendment.

In 1994, the City enacted zoning ordinances, which the Commission then certified. The City's old ordinances did permit short-term rentals (rentals for less than 30 days). The old ordinances made no distinction between short and long term rentals, and therefore permitted both. The Court of Appeal found that the City could not therefore assert that it disallowed short term rentals in the past. The Court also found that the City's definition of "Single Family Residential" and "Multi-Family Residential" did not state who could live there, and by implication, owners, renters, or short-term renters, could reside in those residences. The City argued that short term rentals were more like "Hotels, Motels, and Time-Share Facilities," but the Court observed that the short-term rentals at issue were single and multifamily homes.

The Court of Appeal also rejected the City's request to take judicial notice of a 1964 definition of "hotel" in a manner that would be different than the construction in its LCP. The Court considered the old definition irrelevant in light of the newer definition.

The Court of Appeal also rejected the City's remaining arguments based on permissive zoning, the City's interpretation of its own ordinances, characterizations by recent statutes of short-term rentals as commercial uses, and on interpretation of the Coastal Act. Because the City's former code allowed short-term rentals, and it was seeking to disallow them, the Court agreed with the trial court that there had been an amendment to the City's municipal code, requiring Commission approval, which the City did not obtain. Accordingly, the Court affirmed the judgment of the trial court enjoining the restriction pending Commission approval.

POSTSCRIPT: The California Supreme Court denied a petition for review (June 29, 2022).

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Save the Hill Group v. City of Livermore (2022) 76 Cal.App.5th 1092.

BACKGROUND: An organization representing opponents of a residential housing development project petitioned for a writ of mandate that would set aside the city's approval of the project and its certification of a reissued final environmental impact report (RFEIR) under the California Environmental Quality Act (CEQA). The superior court denied the petition. The organization appealed.

HOLDING: The First District Court of Appeal held that: (1) the organization exhausted its administrative remedies; (2) the RFEIR's no-project alternative analysis was inadequate under CEQA; (3) the RFEIR adequately analyzed mitigation of loss of critical habitat for the threatened vernal pool fairy shrimp; (4) the RFEIR analyzed the project's hydrological impacts on a downstream alkali sink; (5) the RFEIR's requirement that the developer provide offsite compensatory mitigation for permanent loss of roughly 32 acres of sensitive habitat was adequate under CEQA; and (6) the organization lacked standing to argue that the city violated CEQA when the city failed to pursue the possibility of preserving the project site in order to meet the city's obligations under particular settlement agreements, to which the organization was not a party. Reversed and remanded with instructions.

Key FACTS & ANALYSIS: A private group of concerned residents comprising the Save the Hill Group (Save the Hill) appealed the judgment entered after the trial court denied their petition for a writ of mandate, challenging a decision by the City of Livermore (City) to approve a residential housing development project in Garaventa Hills (the Project). In addition to the decision to approve the Project, Save the Hill sought to set aside the City's decision to certify a RFEIR under CEQA and wanted the City to prepare a legally adequate environmental impact report (EIR). In its petition for writ of mandate, Save the Hill asserted causes of action for, among other claims, failure to consider significant environmental impacts, adequately investigate and evaluate the no-project alternative to the Project, and mitigate significant environmental impacts. The Court of Appeal reversed and remanded, finding that Save the Hill raised a challenge to the adequacy of the RFEIR's analysis of the no-project alternative that was both preserved for appeal and meritorious.

In challenging the City's approval, Save the Hill contended that the trial court erred by finding Save the Hill failed to exhaust administrative remedies before raising a challenge to the adequacy of the RFEIR's evaluation of the possibility of having no project as a reasonable alternative to the Project. The Court of Appeal ultimately declined to apply the exhaustion of remedies doctrine as a bar to Save the Hill's no-project challenge, as the Court determined from the record that Save

the Hill's objections during the administrative process fairly apprised the City of the RFEIR's failure to adequately flesh out the feasibility of not going forward with the project.

Additionally, Save the Hill argued that the City violated CEQA by certifying a RFEIR that failed to adequately evaluate the no-project alternative. The Court of Appeal agreed with Save the Hill, as the Court found that the RFEIR failed to disclose and analyze information regarding the availability of funding sources that could have been used to purchase and permanently conserve the intended area of the Project (Project Site). In particular, the Project Site was eligible for conservation funding under two settlement agreements to which the City is a party: the Dougherty Valley Settlement Agreement (DVSA) and the Altamont Landfill Settlement Agreement (ALSA).

Save the Hill made additional arguments, but the Court of Appeal did not agree with them. First, the Court rejected Save the Hill's argument that the RFEIR did not provide adequate mitigation measures for a potentially significant impact of permanent loss of wetland that could be occupied by vernal pool fairy shrimp (VPFS), a species found in Garaventa Hills. The Court found that, though the mitigation measures were conditioned on the existence of VPFS found at the Project Site, the measures were adequate. The Court noted that the City assumed for the purposes of the RFEIR that VPFS were present when adopting these measures. Additionally, the Court recognized that CEQA allows for an agency to defer to a future date the adoption of more detailed mitigation measures.

Save the Hill also contended that the RFEIR failed to analyze foreseeable significant hydrological impacts to the Springtown Alkali Sink, an environmentally sensitive landform downstream from the Project Site. In rejecting this argument, the Court of Appeal recognized that Save the Hill did not dispute the RFEIR's finding, based on an expert's hydrological study, that the Project would not cause significant hydrological impacts to the Garaventa Wetlands Preserve—an area adjacent to the Project Site. Ultimately, the Court found that the hydrological expert's report constituted substantial evidence to support the City's finding of no significant hydrological impacts as a result of the Project.

Furthermore, Save the Hill argued that a proposed site for a compensatory mitigation measure—as required by the RFEIR—for permanent loss of sensitive habitat was inadequate, as the site was already protected open space under local law, as a provision in the City's general plan, and could not make up for the lost habitat. The Court of Appeal rejected this argument, noting that the proposed site contained sensitive habitat that housed a variety of animal and plant species. Moreover, the Court recognized that the general plan provision was merely aspirational and did not accomplish what the RFEIR's compensatory mitigation measure did—allow for the protection of the proposed site under a conservation easement.

Lastly, Save the Hill argued that the City violated CEQA by failing to pursue the possibility of preserving Garaventa Hills to meet its obligations under the DVSA and ALSA to acquire environmentally important properties as compensatory mitigation for offsetting the environmental harms of other City Projects. The Court of Appeal determined that Save the Hill forfeited review of this issue, as Save the Hill did not raise the issue at any point prior to the appeal. Regardless, the Court pointed out that Save the Hill was not a party to the DVSA or ALSA and thus lacked standing to enforce any obligation arising from those agreements against the City.

* * *

Notes on the Summaries:
"BACKGROUND" and "HOLDING" for cases are from the WestLaw Synopses.
"KEY FACTS & ANALYSIS" for cases are from the text of cases and, occasionally, from published on-line analyses.

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