Case No. C064919

In The Court Of Appeal

OF THE

State Of California

THIRD APPELLATE DISTRICT

DIAMOND SPRINGS/EL DORADO FIRE PROTECTION DISTRICT AND JACKYE PHILLIPS
PLAINTIFFS AND APPELLANTS,

v.

EL DORADO FIRE PROTECTION DISTRICT, et al.
DEFENDANTS AND RESPONDENTS,

On Appeal from the Judgment of the Superior Court of the State of California, County of Sacramento
(Superior Court Case No. 34200980000276)
The Honorable Timothy Frawley, Judge Presiding

PLAINTIFFS AND APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Third APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: C064919
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): LAW OFFICES OF WILLIAM D. ROSS — WILLIAM D. ROSS, ESQ. Cal. Bar No. 64538 KYPROS G. HOSTETTER, ESQ. Cal. Bar. No. 228865 ISABEL BIRRUETA, ESQ. Cal. Bar. No. 223485 TELEPHONE NO. 213-892-1592 FAX NO (Optional): 213-892-1519 E-MAIL ADDRESS (Optional) ATTORNEY FOR (Name): Diamond Springs/El Dorado FPD & Jackye Phillips	Superior Court Case Number: 34200980000276 FOR COURT USE ONLY
APPELLANT/PETITIONER: Diamond Springs/El Dorado FPD et. al. RESPONDENT/REAL PARTY IN INTEREST: El Dorado Fire Protection District, et al	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Diamond Springs/El Dorado FPD & Jackye Phillips

2. a ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: October 26, 2010

William D. Ross
(TYPE OR PRINT NAME)

▶ William D. Ross
(SIGNATURE OF PARTY OR ATTORNEY)

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STATEMENT OF APPEALABILITY

Judgment was entered on March 4, 2010, after sustaining of the demurrer of El Dorado Fire Protection District ("El Dorado") and its Board of Directors (collectively, "Respondents"). 2CTA00425-00428.[1] El Dorado served notice of entry of judgment on April 7, 2010. 2CTA00429-00430. Appellants timely filed their notice of appeal on May 3, 2010. 2CTA00435-00441 This court has jurisdiction to hear an appeal of a judgment of dismissal after an order sustaining a demurrer Code of Civ. Proc. § 904.1(a)(1). Cal. Rules of Court ("CRC"), Rule 8.104(a); *Bledsoe v. Informative Research* (1967) 247 Cal.App.2d 684, 684.

I. INTRODUCTION

Here, Respondents avoided the jurisdiction the Legislature conferred upon a local agency formation commission ("LAFCO") to control the orderly extension of local government services by extending their fire protection services outside their existing jurisdictional boundaries without prior LAFCO approval by entering into the "Agreement For Fire Protection Services Between The El Dorado County Fire District And The Shingle Springs Band of Miwok Indians," with the Shingle Springs Band of Miwok Indians, a federally recognized Indian Tribe ("Tribe"), dated July 30, 2008

[1] As used herein: "CTA" refers to the Clerk's Transcript On Appeal, lodged with the Court on September 9, 2010; "RTA" refers to the Reporter's Transcript.

("Agreement"). The Agreement called for El Dorado to provide fire protection services to the area of trust land, which is entirely within the existing boundaries of Appellant Diamond Springs/El Dorado Fire Protection District ("Diamond Springs"), that is owned by the United States which the Tribe uses as beneficiary, entitled the Shingle Springs Rancheria (the "Affected Area"). Thus, through the Agreement El Dorado is paid to provide fire protection services to the Tribe in a territory that is within the service boundaries of another public entity, Diamond Springs.

Respondents did ***not*** seek approval from the El Dorado County LAFCO prior to extending their services, in violation of the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Gov. Code § 56000 *et seq.*, "CKH"), and El Dorado's limited legislatively granted powers. When the Appellants Diamond Springs and Jackye Phillips (collectively, "Appellants") brought suit to protect their rights and responsibility to provide fire protection and life safety services within the long established Diamond Springs boundaries, Respondents demurred, arguing that El Dorado's principal act, the Fire Protection District Law of 1987 (Health & Saf. Code § 13800 *et seq.*, the "Act"), required the application of a 60 day statute of limitations of the Validation Statutes, and that the failure to join the Tribe required the lawsuit to be dismissed.

The Sacramento County Superior Court ("Trial Court") agreed, entering a March 4, 2010 judgment of dismissal after an order sustaining a

demurrer to Appellants' First Amended Petition For Writ Of Ordinary Mandamus, Complaint For Declaratory Relief, And Permanent Injunction ("Amended Petition") by ruling that: 1) the Act, under Health and Safety Code section 13806, applied the 60 day statute of limitations governing Validation Actions, Code of Civil Procedure ("CCP") section 860 *et seq.* ("Section 860") (or the "Validating Statutes"), to the Diamond Springs challenge to the Agreement, as the Court held that a lawsuit challenging "any action" of El Dorado is subject to the Validating Statutes. 2CTA00417. As Appellants had not brought suit within the Validation Statutes statute of limitations, and because the Trial Court found that Appellants had failed to adequately plead facts to establish equitable estoppel, the Trial Court ruled that the Amended Petition be dismissed. 2CTA00403-00405. Additionally, the Trial Court, although noting that it was unnecessary to its decision, stated that even if the Amended Petition were not subject to the Validation Statutes, there would seem to be no reason to depart from the principle that a party to a contract (here the Tribe) is an indispensable party to a suit to set aside that contract. 2CTA00418.

This appeal presents three legal issues:

> (1) may El Dorado ignore the CKH, the enabling legislation for a fire protection district's extension of services outside its jurisdictional boundaries, and instead rely upon its principal act to avoid LAFCO jurisdiction and procedures to extend its fire protection services?;

(2) if so, does the Act apply the Validation Statutes' 60 day statute of limitations to the challenge of ***any*** of Respondents' actions, including Respondents' execution of the Agreement?; and

(3) should El Dorado be allowed to invoke the sovereign immunity of a Federally Recognized Indian Tribe to shield its unauthorized Agreement from State Court review even if El Dorado lacks authority under California law to enter into the Agreement in the first place?

Here, Respondents lacked the authority to enter the Agreement in the first instance, as neither CHK, nor the Act permit Respondents to enter into the Agreement without first receiving approval from LAFCO under a portion of the CKH, Government Code section 56133 ("Section 56133").

Further, Respondents negotiated the unauthorized Agreement with counsel that concurrently represented Appellants, without that counsel obtaining a waiver from Diamond Springs for that negotiation or informing Appellants he was negotiating an Agreement that would conflict with the fire protection services Appellants were already providing and would create a needless duplication of fire protection services and waste of public funds. The failure to inform Diamond Springs of this conflict delayed Diamond Springs' discovery of the unauthorized Agreement.

Appellants will show that the claimed statute of limitations does not apply as El Dorado was required to apply to LAFCO under Section 56133 for the extension of its fire protection services by agreement, and that the Validation Statutes do not apply to Section 56133. Even if the Validation

Statutes' 60 day statute of limitations applies, the Trial Court should have exercised its equitable powers to estop Respondents from relying on that statute of limitations due to the untimely disclosure of the conflicting representation of their counsel. Resolution of these issues should have been accomplished by the Trial Court without the Tribe, as under applicable authority, it is not a necessary nor indispensable party.

The Trial Court's Judgment of Dismissal following its Order Sustaining the Demurer to Appellants' Amended Petition should be reversed, with an order to allow the Amended Petition to be heard on its merits as: Respondents lacked the legal authority to enter into the Agreement in the first instance and the Tribe need not be joined.

II. STATEMENT OF THE FACTS

A. Respondents Negotiate the Agreement Without Notifying Appellants

On or before April 2008, El Dorado met with the Tribe regarding El Dorado providing fire protection services to the Red Hawk Casino, despite the fact that the Casino is located within the existing boundaries of Diamond Springs, which in the Amended Petition is referred to as the "Affected Area." 1CTA00180, 2CTA00359; Amended Petition, 23.

El Dorado did not inform Diamond Springs about these meetings and their intent to provide services in the Affected Area, despite the fact

that they were negotiating to provide services in territory within the Diamond Springs' fire protection service area boundaries. 2CTA00359.

On April 17, 2008, the El Dorado Board approved a committee to pursue formal negotiations for contracting services to the Tribe, without notifying Appellants. 1CTA00180, 2CTA00359; Amended Petition, 24; Respondents' Request for Judicial Notice In Support of Demurrer ("Respondents' RFJN"), Exhibit A;1CTA00034-00042. Counsel for El Dorado, who was concurrently counsel for Diamond Springs, participated in these negotiations, advising and representing El Dorado, without obtaining a waiver of conflict of interest from Appellants. 1CTA00180, 2CTA00359; Amended Petition, 24. These negotiations took place on or about June 1, 2008, June 9, 2008, June 19, 2008, June 25, 2008, July 17, 2008, July 22, 2008 and July 24, 2008. 1CTA00180, 2CTA00359; Amended Petition, 25. These and other communications and negotiations between El Dorado and the Tribe resulted in the Agreement. 1CTA00180; 2CTA00359; Amended Petition, 25.

B. Respondents Enter Into the Agreement With the Tribe Without Informing Appellants

On July 30, 2008, the El Dorado Board held a special meeting, in part to discuss, review and consider approval of the Agreement. 1CTA00180; 2CTA00359-00360; Amended Petition, 26; Respondents' RFJN, Exhibit C. The El Dorado Board discussed and approved the

Agreement, which was agendized as a Memorandum of Understanding ("MOU"), a term used interchangeably with "Agreement" in the Agreement. 1CTA00180; 2CTA00360; Amended Petition, 27; Respondents' RFJN, Exhibit C.

C. Respondents Ignored the CKH and the Act In Agreeing to Provide Fire Protection Services In The Affected Area

Respondents failed to comply with the CHK and the Act by failing to obtain LAFCO approval prior to entering into the Agreement to extend fire protection services into the Affected Area. The Affected Area is outside the legally designated area of the logical extension of El Dorado's services, known as Sphere of Influence ("SOI") and is within the Appellants' Service Area and jurisdictional boundaries. Nor did Respondents apply for and obtain a boundary change by amendment of its SOI and a subsequent, or concurrent, change of organization detaching the Affected Area from Diamond Springs and annexing territory consistent with an amended SOI to El Dorado. 1CTA00180, 2CTA00360 Amended Petition, 28.

D. Respondents Failed to Notify Appellants of the Agreement Despite the Fact Their Counsel Was Concurrently Representing Diamond Springs

Respondents failed to inform Diamond Springs that they had executed the Agreement by which El Dorado would provide fire protection services for the Affected Area, which again is inside the existing

jurisdictional boundaries of Diamond Springs and outside of the El Dorado SOI. 1CTA00181, 2CTA00360; Amended Petition, 31. Respondents further failed to inform Appellants that the Agreement was negotiated by Respondents' counsel who also was Appellants' counsel at the same time Respondents were negotiating the Agreement. 1CTA00181, 2CTA00360; Amended Petition, 32. Respondents' counsel did later request approval by Diamond Springs to negotiate a contract on behalf of Respondents with the Tribe, which Diamond Springs approved on the condition that Respondents' counsel also represent its interests. 1CTA00181, 2CTA00360; Amended Petition, 33. But, despite Diamond Springs specific direction to represent its interests, Respondents' counsel failed to disclose to Diamond Springs that the Agreement would provide for El Dorado to extend its fire protection services outside its jurisdictional boundaries and within Diamond Springs' boundaries. 1CTA00181, 2CTA00360; Amended Petition, 34.

E. Diamond Springs Discovers Existence and Nature of The Agreement

Relying on Respondents' counsel, it was not until January 9, 2009, that Diamond Springs first became aware that Respondents had executed the Agreement. 1CTA00181; 2CTA00360, Amended Petition, 35. Diamond Springs then diligently inquired from Respondents to discover

how the Agreement affected their rights. 1CTA00181; Amended Petition, 36.

F. Diamond Springs Requests To Have Respondents Void the Agreement

Thereafter, on March 13, 2009, after seeking information from Respondents, Diamond Springs formally demanded that the El Dorado Board void the Agreement as it was adopted without legal authority because: (1) the Act does not authorize such an agreement, especially under Health and Safety Code section 13863, as it is not a "mutual aid" agreement, among other things; and, (2) without LAFCO approval to provide fire services by contract outside the El Dorado boundaries or amending the El Dorado SOI, and subsequently detaching the Affected Area and annexing the Affected Area to El Dorado, El Dorado cannot extend fire services beyond its present district boundaries under the CKH or contract to do so. 1CTA00181-00182, 2CTA00360-00361; Amended Petition, 36(a) and (b).

Receiving no response to its March 13, 2009 demand, the Diamond Springs Board of Directors authorized the initiation of this action as Respondents continued to refuse to void the Agreement. 1CTA00182, 2CTA00361; Amended Petition, 37-38.

G. The Provisions of the Agreement

The Agreement ***does not*** provide for payment in advance as required by a portion of the Act, Health and Safety Code section 13878, to be considered a contract to provide district services for an area outside the district. 2CTA00361. The Agreement ***does not*** provide that LAFCO approval must be obtained or was obtained to authorize the Agreement. The Agreement calls for the Tribe to provide for both operational and capital expenditures of El Dorado, including: (i) in Section A, that the Tribe pay $450,000.00 per year which increases by five (5) percent each year of the Agreement and that requires a one time payment to El Dorado of $250,000.00 to be used for the expansion of El Dorado Station 28; and, (ii) in Section G, that calls for the Tribe to fund the acquisition of an El Dorado ladder truck, costing approximately $1,000,000.00. 1CTA00180-00181; Amended Petition, 29.

The Agreement, Recitals Section 7, alleges that Health and Safety Code section 13863 authorizes Respondents to contract with the Tribe to provide fire protection services, despite the fact that the Agreement is not a mutual aid agreement, but an agreement for consideration for fire services. 1CTA00181; Amended Petition, 30.

III. STATEMENT OF THE CASE

This appeal arises out of a judgment after an order sustaining a demurrer.

On April 30, 2009, Appellants filed in the El Dorado County Superior Court, a Petition for Writ of Ordinary Mandamus and Complaint for Declaratory Relief ("Petition"), seeking to invalidate the Agreement. 1CTA00002-00013.

On June 15, 2009, the El Dorado County Superior Court ordered the matter transferred to Sacramento County Superior Court (the "Trial Court") pursuant to stipulation. 1CTA00026-00029.

On July 15, 2009, Respondents filed a Notice of Demurrer and Demurrer to the Petition 1CTA00059-00081. Before the hearing on the Demurrer, on September 17, 2009, the Appellants filed the Amended Petition, included new allegations and added an additional Petitioner, Plaintiff, Jackye Phillips. Also Appellants added an additional Cause of Action for Permanent Injunction under CCP section 526a, to which on October 13, 2009 Respondents demurred. 1CTA00174-00190, 1CTA00194-00219.

On October 13, 2009, Respondents filed a demurrer to the Amended Petition. 1CTA00194-00219.

On December 3, 2009, the Trial Court sustained the demurrer to the Amended Petition [2CTA00396-00399], which became the ruling of the Court on December 11, 2009. 2CTA00400-00405.

On March 4, 2010, the Trial Court Judge executed the parties' stipulation for a judgment of dismissal after sustaining of demurrer.

2CTA00431-00434. On April 7, 2010, Respondents served the Notice of Entry of Judgment [2CTA00429-00430] and on May 3, 2010, Appellants filed a Notice of Appeal. 2CTA00435-00441.

IV. ARGUMENT

A. The Validating Statutes Do Not Apply To A Challenge To Respondents' Authority to Enter Into The Agreement

1. The Trial Court Erred In Applying Health And Safety Code Section 13806

i. Standard of Review for Sustaining a Demurrer

When a demurrer is sustained, the Court of Appeal assumes the truth of all facts properly pleaded by the plaintiff-appellant, but it does not admit contentions or conclusions of law. *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 5 ("*Evans*"); *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.

The Court of Appeal also assumes as true all facts that may be implied or inferred from those expressly alleged [*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403] and considers all evidentiary facts found in recitals of exhibits attached to the complaint. *Satten v. Webb* (2002) 99 Cal.App.4th 365, 375. The Court may treat relevant matters that were properly the subject of judicial notice at the Trial Court as having been pled. [*See Evans, supra*, 38 Cal.4th at 5; *Schifando, supra*, 31 Cal.4th at 1081], and may itself take judicial notice of the same

matters. *Sacramento Brewing Co. v. Desmond, Miller & Desmond* (1999) 75 Cal.App.4th 1082, 1085, fn. 3.

In ruling on a demurrer, the Court of Appeal is required to construe the petition liberally, reading it as a whole, with a view to achieving substantial justice between the parties; the fundamental question for a trial court is whether *any* cause of action is framed by the facts alleged in the petition. CCP § 452; *Wilson v. Household Finance Corp.* (1982) 131 Cal.App.3d 649, 655.

ii. Standard of Review For Statute of Limitations Applicability

The Court of Appeal exercises its independent judgment when reviewing the applicability of a statue of limitations. *McLeod v. Vista Unified School Dist.* (2008) 158 Cal.App.4th 1156, 1164.

iii. The Trial Court Incorrectly Looked to the El Dorado's Principal Act Rather Than The CHK To Determine The Applicable Legislation And Statute of Limitations

As noted, the Trial Court agreed with Respondents that the express language of Health and Safety Code section 13806 applied the statute of limitations governing Validation Actions, Section 860 (also known as the "Validating Statutes"), to the Diamond Springs challenge to the Agreement, as the Court believed "any action" of the Respondents is subject to the Validating Statutes. 2CTA00417. The Trial Court erroneously concluded

that the Amended Petition must be dismissed for Appellants' failure to comply with the Validating Statutes' 60-day statute of limitations, based on the Health and Safety Code text:

> Any action to determine the validity of the organization or of any action of a district shall be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure.

Health & Saf. Code § 13806.

However, the Validating Statutes *do not* apply to Diamond Springs' challenge, as Health and Safety Code section 13806 ***does not*** govern the extension of El Dorado's fire protection services outside its jurisdictional boundaries.

The Trial Court conclusion is in error as it limited its statute of limitations analysis to the general provision of Health and Safety Code section 13806 [2CTA00417], rather than look to the express and more specific language, purpose and intent of the CKH, including the CKH provision governing the specific instances where the Validation Statutes apply to actions required to be taken under CKH [Gov. Code § 56103], to determine whether the Validation Statues bar Diamond Springs' challenge to the El Dorado authority to enter into the Agreement. As set forth, *infra*, because the CKH statutory scheme applies to El Dorado's extension of fire protection services outside its jurisdictional boundaries, the CKH is the

applicable statutory scheme for a response to whether the Validation Statutes bar Diamond Springs' challenge to the Agreement.

(a) The CKH Governs El Dorado's Expansion Of its Services Outside Its Boundaries

Modesto Irrigation District v. Pacific Gas and Electric Company (2004) 309 F.Supp.2d 1156, 1166 ("*Modesto*")[2] clarifies that Section 56133, a CKH provision, expressly authorizes where and when a district may extend its services outside of its jurisdictional boundaries. *See, Id. at* 1166.

In *Modesto*, the court examined the CKH to determine whether the Modesto Irrigation District ("MID") could lawfully enter into agreements with the City of Pittsburg to extend its electric distribution service outside its jurisdictional boundaries without seeking prior LAFCO approval [*Id.* at 1161], concluding that MID *could not* ignore LAFCO by agreeing to provide services outside its boundaries and clarified that *only* LAFCO approval authorizes such contractual expansion:

> The [CKH] makes plain that were a [district] wishes to 'extend its services by ***contract or agreement*** outside its jurisdictional boundaries" the district ***must first*** request and

[2] Decisions of the Federal District Courts interpreting State law, although not binding are highly persuasive. *People v. Superior Court* (1996) 50 Cal.App.4th 1202, 1211. A copy of the federal authority is provided as Attachment A.

> receive written approval from LAFCO in the affected county. *Citing* Cal. Gov't Code § 56133. (emphasis added).

See, Id., at 1166; *Tillie Lewis Foods, Inc. v. City of Pittsburg* (1975) 52 Cal.App.3d 983, 995.

Modesto clarified that the "pertinent enabling legislation" for a district such as El Dorado's ***expansion of its services outside its jurisdictional boundaries*** is the CKH and ***not*** the Act:

> . . . the ***pertinent*** 'enabling legislation' ***in this context*** (viz the [CKH]) expressly defines [districts] as district[s] of ***limited*** powers... assuring that individual districts are ***confined*** to circumscribed service area and 'spheres of influence.'

Id., at 1166 (citing Gov. Code § 56037) (emphasis added).[3]

El Dorado, like MID, is a special district[4] of ***limited*** powers with a ***circumscribed*** geographic and "sphere of influence"[5] boundaries. *See, Modesto, supra,* 309 F.Supp.2nd at 1159. As a district of limited powers, El Dorado is subject to the CKH, here Section 56133. *Id. at* 1161. And Section 56133 expressly and specifically requires El Dorado to seek

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[3] *County of Fresno v. Malaga County Water District* (2002)100 Cal.App.4th 937, 944 ("*Fresno*") ("As a district of limited powers, [the District's] authority is restricted to those powers expressed and implied in its enabling act.").

[4] Government code section 56036 defines a "special district" or "district" as: an agency of the state, formed pursuant to general law or special act, for the local performance of governmental or propriety function within limited boundaries.

[5] Government Code section 56076 defines "sphere of influence" as a "plan for the probable physical boundaries and service area of a local agency .. ."

LAFCO written approval prior to entering into an agreement to extend its fire protection services outside its jurisdictional boundaries:

> A city or district may provide new or ***extended services by contract*** or agreement ***outside its jurisdictional boundaries only if*** it first requests and receives written approval from [LAFCO].

(b) The CKH Purpose And Legislative History Support Its Exclusive Governance Of Respondents' Actions

The purpose of the Legislature's enactment of Section 56133 is to prohibit public agencies from providing new or extended services outside their jurisdictional boundaries without prior LAFCO written approval. Indeed, the legislative digest to Chapter 1307 of the 1993 Chaptered Statutes,[6] adding Section 56133 to the Government Code, provides:

> This bill would, with specified exceptions, ***prohibit a city or district from providing new or extended services outside its jurisdiction without prior written approval of [LAFCO].*** This bill would permit [LAFCO] to authorize a city or district to provide new or extended services outside its jurisdiction but within its sphere of influence in anticipation of a later change of organization.

Stats 1993, ch 1307 § 2 (AB 1335). (emphasis added.)

The Legislative Digest also noted that Section 56133 ***"plugged [the] loophole"*** that permitted public agencies to bypass the LAFCO procedures

[6] The Courts look to the Legislative Counsel's Digest to shed light on legislative intent. *Crowl v. Commission on Professional Competence* (1990) 225 Cal.App.3d 334, 347.

(emphasis added). *Modesto, supra*, 309 F.Supp.2nd at 1166 *citing* Stats 1993, ch 1307 § 2 (AB 1335).

Because the Legislature expressly declared its intent, the Trial Court should have accepted its declaration to prohibit local agencies, including special districts, from unilaterally extending their services without the adhering to the CKH procedures. *Rideout Hospital Foundation, Inc. v. County of Yuba* (1992) 8 Cal.App.4th 214, 221.

Further, the express requirements of Section 56133 are consistent with the Legislature's broader intent to charge LAFCO with the ***sole and exclusive authority*** to determine which local agencies can best provide government services to communities "by weighing the total community service needs against the total financial resources available for securing community services" and encourage local agencies to efficiently provide government services. *See* Gov. Code §§ 56001, 56301. Government Code section 56001 provides:

> The Legislature also recognizes that when areas become urbanized to the extent that they need the full range of community services, ***priorities are required to be established*** regarding the type and levels of services that the residents of an urban community need and desire; ***that community service priorities be established by weighing the total community service needs against the total financial resources available for securing community services***; and that those community service priorities are required to reflect local circumstances, conditions, and limited financial resources. (emphasis added.)

Also, Government Code section 56301 provides:

> Among the purposes of [LAFCO] are . . . encouraging the ***efficiently providing government services, and encouraging the orderly formation and development of local agencies based upon local conditions and circumstances***. One of the objects of [LAFCO] is ***to make studies*** to obtain and furnish information which will contribute to the local and reasonable development of agencies in each county and to shape the development of local agencies so as to advantageously provide for the present and future needs of each county and its communities. (emphasis added.)

(c) Allowing Respondents To Bypass The CKH Leads To Absurd And Illogical Results

The Trial Court's determination that the Act, through its application of Health and Safety Code section 13806, bars Diamond Springs' challenge to the Agreement is erroneous because it would lead to an illogical and confusing statutory scheme.[7] Here, the Trial Court's determination creates an illogical and confusing scheme in which ***any*** special district can ignore the intent and purpose of the CKH to extend its services outside its jurisdictional boundaries into another special district to derive additional income without having to comply with the LAFCO procedures to allow LAFCO to exercise the authority and discretion that the Legislature granted LAFCO.

[7] Courts are also reluctant to attribute to the Legislature an intent that creates "an illogical or confusing scheme." *Landrum v. Superior Court* (1981) 30 Cal.3d 1, 9.

The Trial Court's determination would illogically permit any fire district to extend its fire protection services outside of its jurisdictional boundaries and into the boundaries of another fire district to derive income simply by unilaterally entering into an agreement with a third party and then merely using the Validating Statutes to validate its own action within 60 days of the agreement's execution, or hope that an interested person fails to become aware of the agreement and challenge the agreement within 60 days of its execution, so that it can bypass the Section 56133 procedural requirements and limitations, *which does not contain a* 60 day statue of limitations. Such a determination is contrary to Section 56133, which the Legislature enacted prevent local agencies to bypass LAFCO procedures when extending their services outside their jurisdictional boundaries.

The purpose of Section 56133 is to charge LAFCO with ***the sole and exclusive authority*** to authorize a district's extension of services outside its jurisdictional boundaries onto the boundaries of another city or district. *See,* Gov. Code § 56100. Without LAFCO's sole and exclusive oversight, districts and cities across the state would be able to arbitrarily and unilaterally extend their services outside their jurisdictional boundaries to derive additional income without complying with the CKH procedures and obligations. For example, many public entities, like El Dorado in this case would elect not to provide LAFCO the required documentation for LAFCO to determine whether proposed expansions of services outside their

jurisdictional boundaries meet the Section 56133 procedural requirements and limitations in order to bypass LAFCO's scrutiny. *See* Gov. Code § 56133 (c)(2) (an "entity applying for the contract approval" *must* provide LAFCO with "documentation of a threat to the health and safety of the public or affected residents" to extend its services outside its jurisdictional boundaries and outside its sphere of influence.).

Further, the Trial Court's determination precludes LAFCO from carrying out its responsibility of ensuring the "reasonable development of agencies in each county and to shape the development of local agencies so as to advantageously provide for the present and future needs of each county and its communities." *See* Gov. Code § 56001. Nor would the Trial Court's determination encourage public agencies to efficiently provide government services. *See. Id.*

(d) Specific CKH Provisions Override The General Act Provisions

Here, the Trial Court concluded its analysis with Health and Safety Code section 13806 rather than examining the CKH to determine whether the Validation Statues apply to a public agency agreement that seeks to extend a public agency's governmental services outside its current jurisdictional boundaries. The Trial Court conclusion ignores the LAFCO role in overseeing the subject matter of the Agreement, the expansion of El Dorado services outside its boundaries. *See, Modesto, supra*, 309

F.Supp.2nd at 1161. The only way in which the statute of limitations of Health and Safety Code section 13806 could govern would be if the Act was the statutory scheme of specific application rather than general application, an issue not addressed by the Trial Court Order.

Section 56133 relates specifically to the subject of the Agreement (*i.e.* a district's extension of services by contract outside its jurisdictional boundaries) while no Act provision authorizes the subject matter of the Agreement. [1CTA00016-00021, 1CTA00182] A specific provision relating to a particular subject prevails over a general provision even where the general statute is broad enough to encompass the subject of the particular legislation. Civ. Code § 3534; *RRLH, Inc. v. Saddleback Valley Unified School Dist.* (1990) 222 Cal.App.3d 1602, 1611.("*RRLH*") Accordingly, the Trial Court should have looked to the CKH, the "enabling legislation", and CKH corresponding provisions relating to the applicability of the Validation Statutes, to determine whether the Validation Statues bar the Diamond Springs' challenge to the El Dorado authority to enter into the Agreement.

Although El Dorado is authorized to conduct formation proceedings consistent with its principal act, here the Act, El Dorado cannot bypass the CKH when it seeks to extend fire protection services by Agreement outside its jurisdictional boundaries and into the jurisdiction of Diamond Springs. *See Modesto, supra*, 309 F.Supp.2nd at 1170. Indeed, Government Code

section 56100 expressly provides that if there is a conflict between the procedural requirements of a district's principal act and CKH, the CKH procedural requirements prevail:

> This division provides the ***sole and exclusive authority and procedure*** for the initiation, conduct, and completion of changes of organization and reorganization for cities and districts. . .Notwithstanding any other provisions of law, proceedings for the formation of a district shall be conducted as authorized by the principal act of the district proposed to be formed, ***except that [LAFCO] shall serve as the conducting authority and the procedural requirements of this division shall apply and shall prevail in the event of a conflict*** with the procedural requirements principal act of the district. In the event of such conflict, [LAFCO] shall specify the procedural requirements that apply, consistent with the requirements of this section. (emphasis added.)

When statutes touch upon a common subject (here, the powers of a district) a court must harmonize the statutes, both internally and with each other to the greatest extent possible. *Fresno, supra,* 100 Cal.App.4th at 941 (*citing Barajas v. Oren Realty & Development Co.* (1997) 57 Cal.App.4th 209, 216-217). Here, the Trial Court failed to harmonize the Act and CKH provisions to determine whether the Validation Statutes apply to Diamond Springs' challenge to the Agreement. If it had done so, it would have determined that the CKH is applicable enabling legislation as it specifically governs where and when a district may extend its services though the requirements of Section 56133. The Trial Court incorrectly limited its analysis to the ***earlier***, general language of Health and Safety Code section 13806 to find the Validation Statutes' 60-day statute of limitations

applicable to Appellants' challenge. Instead, the Trial Court should have found that the later enacted and specific statutory requirement of Section 56133 required LAFCO to review the Agreement.

The Legislature enacted Section 56133 (Stats 1993 ch 1307), a specific statute, in 1993, ***after*** it had enacted the general Health and Safety Code section 13806 in 1987 (Stats 1987 ch. 1013). It is well established that a later, more specific statute controls over an earlier general statute. CCP § 1859; *Woods v. Young* (1991) 53 Cal.3d 315, 324; ("*Woods*"); *Patrick Media Group, Inc. v. California Coastal Comm.* (1992) 9 Cal.App.4th 592, 604. ("When a general and particular provision [in a statute] are inconsistent, the latter is paramount to the former."); *Rose v. State* (1942)19 Cal.2d 713, 723-724. This is true even when the statutes appear in different codes. *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors* (1968) 263 Cal.App.2d 41, 54 ("*Sacramento*").

By ignoring the express language of CKH and its procedures, the Trial Court failed to acknowledge that the Legislature enacted CKH, including Section 56133, to govern when and where a public agency can extend its public services outside its jurisdictional boundaries.[8]

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[8] A court *cannot* presume that the Legislature performs idle acts or construe statutory provisions so as to render them superfluous. *Larson v. State Personnel Bd.* (1994) 28 Cal.App.4th 265, 277.

iv. The CKH Does Not Apply The Validating Statue To Diamond Springs' Challenge.

As discussed, *supra*, the "pertinent enabling legislation" for El Dorado's expansion of fire protection services ***outside*** its jurisdictional boundaries is the CKH. Accordingly, the Trial Court should have looked to the express and specific language of the CKH, to determine whether the Validation Statutes proceedings bar Diamond Springs' challenge to the Agreement. The CKH answers this question. Government Code section 56103 ***specifically limits*** the applicability of the Validation Statutes to determine the validity: (1) of any change of organization; (2) reorganization[9]; or (3) sphere of influence determination:

> An action to determine the validity of any change of ***organization, reorganization, or sphere of influence*** determination completed pursuant to this division ***shall*** be brought pursuant to the [Validation Statutes]. ("emphasis added.)

CKH defines a "change of organization" as:

> (a) A city incorporation.
> (b) A district formation.
> (c) An annexation to, or detachment from, a city or district.
> (d) A disincorporation of a city.
> (e) A district dissolution.
> (f) A consolidation of cities or special districts.
> (g) A merger or establishment of a subsidiary district.
> (h) A proposal for the exercise of new or different functions or classes of services, or divestiture of the power to provide

[9] A reorganization is defined as: "two or more changes of organization initiated in a single proposal." Gov. Code § 56073.

> particular functions or classes of services, ***within all or part of the jurisdictional boundaries*** of a special district.

Gov. Code § 56021. (emphasis added.)

Here, the El Dorado Agreement to extend fire protection services ***outside of its jurisdictional boundaries*** does not meet the definition of a "change of organization" in Government Code section 56021. The enumeration of acts or things as coming within the operation of a statute precludes the inclusion of implication of other acts or things not listed. *Elysian Heights Residents Assn. v. City of Los Angeles* (1986) 182 Cal.App.3d 21, 29. Necessarily, the service extension by agreement outside of a local agency's jurisdictional boundaries is not included.

Nor does the expansion of El Dorado's fire protection services outside its existing jurisdictional boundaries meet the definition of a "sphere of influence determination" as CKH defines "sphere of influence determination" as: "a plan for the probable physical boundaries and service area of a local agency, as ***determined by [LAFCO].***" (emphasis added). If the Legislature has provided an express definition of a term, that meaning is binding on the courts. *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 804. As the Validation Statutes do not apply to an act governed by Section 56133, it follows that the three year statute of limitations, as pled by Appellants at the Trial Court, must apply. *See* Code Civ. Proc. Section 338(a); 1CTA00179; Amended Petition, ¶ 21.

Moreover, CKH's exclusion of actions to invalidate an agency's unilateral expansion of its services ***outside*** its jurisdictional boundaries from the Validation Statutes' proceedings is consistent with the Legislature's intent for enacting Section 56133, to prohibit public agencies from extending governmental services outside of their jurisdictional boundaries without prior LAFCO approval. "The fundamental task of a court in construing a statute is to ascertain and effectuate the intent of the Legislature." *See, Fresno, supra*, 100 Cal.App.4th at 941. If the Legislature had intended to apply the Validation Statutes to an action to validate or invalidate a contractual expansion a public agency's services outside its jurisdictional boundaries without LAFCO approval, it would have included language to that effect. Indeed, the fundamental rules of statutory construction prohibit adding words to a statute. *Burden v. Snowden* (1992) 2 Cal.4th 556, 562, *modified*, 2 Cal.4th 758 ("Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from the legislative history").

Because the Validation Statutes ***do not*** apply to Diamond Springs' challenge of the Agreement, the Trial Court incorrectly determined that Health and Safety Code section 13806 requires the application Validation Statutes' 60-day statute of limitations to bar Diamond Springs' challenge to the Agreement.

v. Alternatively, Even If The Section 56133 Statute Of Limitations Was Inapplicable, The Validation Statues Do Not Apply to a Challenge to Respondents' Authority to Enter Into The Contract

Health and Safety Code section 13806 does not apply to *all* actions of Respondents. No case law has applied the Health and Safety Code section 13806 language: "Any action to determine the validity of the organization or of any action of a district shall be brought" pursuant to Section 860, to the challenge of authority for entering into public agency contracts.

In fact, Government Code section 53511 ("Section 53511"), legislation enacted later than Section 860, provides the *specific* statutory authority for a *permissive* application of the Validating Statutes to the challenge of "local agency" contracts[10]:

> (a) A local agency *may* bring an action to determine the validity of its bonds, warrants, contracts, obligations or evidences of indebtedness pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure.
>
> (b) A local agency that issues bonds, notes, or other obligations the proceeds of which are to be used to purchase, or to make loans evidenced or secured by, the bonds, warrants, contracts, obligations, or evidences of indebtedness of other local agencies, may bring a single action in the superior court of the county in which that

[10] It is undipsuted that El Dorado is a "local agency," for purposes of Section 53511. Gov. Code § 53510 (including in its definition of "local agency," "public district",and "public agency or public authority." 1CTA00178; Amended Complaint, ¶ 10.

> local agency is located to determine the validity of the bonds, warrants, contracts, obligations, or evidences of indebtedness of the other local agencies, pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure.

As Section 53511 is a *specific* provision relating to challenging public agency contracts like the Agreement, it will prevail over a general provision like Health and Safety Code section 13806 even where the general statute is broad enough to encompass the subject of the particular legislation, and even where the statutes appear in different codes. Civ. Code § 3534; CCP § 1859; *RRLH, supra,* 222 Cal.App.3d at 1611; *Sacramento, supra,* 263 Cal.App.2d at 53. As Section 53511 is permissive only with respect to a validation action being brought, it cannot be maintained that there is an absolute 60 day statute of limitations to bar Appellants.

Consistent with this theme, it is significant that Section 53511 was amended in 2004 without the Legislature amending or redefining the limited definition of public agency contracts subject to the Validating Statutes, originally limited in *Ontario v. Superior Court of San Bernardino County* (1970) 2 Cal.3d 335, 343, or excluding Act Fire Protection Districts from its provisions. Since, this amendment was enacted well after Health and Safety Code section 13806 was enacted in 1987, it must be presumed that the Legislature did not so intend, as the Legislature is presumed to be

aware of existing statutes when enacting new legislation. *Shapero v. Fliegel* (1987) 191 Cal.App.3d 842, 847.

A further limitation on the permissive method of challenging the Agreement is the holding of *Kaatz, supra,* 143 Cal.App.4th at 42, which limited the applicability of the term "contracts" in Section 53511 to the issuance of *bonds, warrants or other evidence of indebtedness* or a transaction in which the local agency borrowed funds for a specific purpose. *Accord, California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1430 ("*California Commerce Casino*").[11]

Indeed, *Kaatz* also noted that Health and Safety Code section 13806 applies *specifically* to the formation (one type of a "change of organization") of fire districts, one of the categories where Validating Statutes apply. *Kaatz, supra,* 143 Cal.App.4th at 38. Accordingly, it is clear that Health and Safety Code section 13806, applying the Validating Statutes to District formation (and potentially the other enumerated changes of organization), cannot apply to the alternative method of entering into an Agreement to extend government services. Further, although Section 53511

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[11] Specifically, the *Kaatz* Court held that "If Government Code section 53511were construed to authorize validating proceedings for *any* contract constituting an obligation and or financial obligation of a public agency, its scope would be unrestricted." (*emphasis added*) The *Kaatz* Court also noted that the Section 53511 limitation is consistent with the purpose of the Validating Statutes, which consolidate previous legislation applying validation actions to specified and limited subjects, typically pertaining to actions testing the validity of: (1) bonds; (2) assessments; (3) assessments (footnote continued)

provides that the Validation Statutes ***may*** apply to challenge a "contract", the Courts have determined such a "contract" challenge is limited to issuance of bonds, warrants or other evidence of indebtedness.

Here, the Agreement obviously *did not* provide for the issuance of bonds or warrants, but called for Respondents to provide fire protection services to the Affected Area, outside their jurisdictional boundaries. 2CTA00359. Also, the Agreement provided for El Dorado to *receive* money and, thus, did not involve any evidence of indebtedness. Accordingly, under Section 53511 and interpreting authority, the original Petition (and Amended Petition) did not meet any of the categories required to permissibly apply its challenge to the Validating Statutes.

2. The Trial Court Incorrectly Ruled Health and Safety Code Section 13806 Overrides Section 53511

The Trial Court, citing *Kaatz*, found Section 53511 inapplicable as Health and Safety Code section 13806 governed the challenge to *any* action of Respondents:

> As the Court acknowledged in *Kaatz v. City of Seaside*, section 13806 expressly provides for proceedings under the validation statutes to determine the validity of "any action" by the public agency. (*See Kaatz v. City of Seaside* (2006) 143 Cal. App. 4th 13, 41-42

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or warrants; or (4) the existence of a governmental district or agency. *Kaatz, supra*, 143 Cal.App.4th at 37-38.

> distinguishing the broad scope of Section 13806 (among other statutes) from the more limited scope of Government Code section 53511). All of the causes of action alleged In the Petition seek to determine the "validity" of Respondents' action to approve the Agreement with the Tribe, and therefore fall within the express terms of Section 13806.

2CTA00416-00417; Ruling After Hearing on Demurrer, pp. 3-4 ("Demurrer Ruling"). Even though *Kaatz* notes Health and Safety Code section 13806 as one of a number of statutes with broad application to any fire district action:

> Moreover, it is clear that the Legislature knows how to draft language that clearly provides a broad scope for matters embraced by the validation statutes. [. . .] For example, a number of statutes expressly provide for proceedings under the validation statutes to validate any action by the public agency. (*See, e.g.*, . . . 13806....) Likewise, various statutes refer to the validation statutes to permit proceedings to determine the validity of any contract. (*citations*) And, significantly, some of the statutes authorizing the testing of "any contract" by an action brought pursuant to the validation statutes were enacted before the 1963 enactment of Government Code section 53511. (*citations*)

[*Kaatz, supra,* 143 Cal.App.4th at 41-42 (alterations added)], this *Kaatz* quotation, however, is unpersuasive as: 1) it is *dicta*; and, 2) it is contradicted in *Kaatz*.

i. The *Kaatz* Court Reference To The Broad Applicability Is Dicta And Should Be Disregarded

The difference between the holding of a case and *dicta* is clear:

> The *ratio decidendi* is the principle or rule which constitutes the ground of the decision, and it is this principle or rule which has the effect of a precedent. It is therefore necessary to read the language of an opinion in the light of its facts and the issues raised, to determine (a) which statements of law were necessary to the decision, and therefore binding precedents, and (b) which were arguments and general observations, unnecessary to the decision, *i.e,* dicta, with no force as precedents.

Bunch v. Coachella Valley Water Dist. (1989) 214 Cal.App.3d 203, 212.

This *Kaatz* discussion clearly fits the definition of *dicta*, as the Court used the referenced discussion to illustrate examples of how the Legislature knows how to draft statutes that apply a broad scope for matters embraced by the Validation Statutes, to justify and juxtapose the Court's more narrow interpretation of the term "contracts." *Kaatz, supra*, 143 Cal.App.4th at 41-42. Stated differently, *Kaatz* cites Health and Safety Code section 13806 as one example of many broad statutes, and as such is an observation of the nature of broad statutes versus narrow statutes, unnecessary to the Court's actual *ratio decidendi* for the discussion – namely to limit the Section 53511 definition of contracts. *Id,* at 42. Thus, the Trial Court erred in replying on *Kaatz* dicta.

ii. Even if the Trial Court Referenced *Kaatz* Language Is Not *Dicta*, It Should Be Disregarded As Conflicting With Another *Kaatz* Health and Safety Code Section 13806 Reference

The Trial Court cited one *Kaatz* reference to Health and Safety Code section 13806, but failed to reconcile the other, which directly refutes the conclusion that *Kaatz* places Health and Safety Code section 13806 over Section 53511. The *Kaatz* Court also discussed Health and Safety Code section 13806 in the context the purpose of the Validating Statues, and specifically noted that statutes incorporating the procedures of the Validating Statutes were interested in determining the validation of (1) bonds; (2) assessments; or (3) the creation of districts [*Kaatz, supra*, 143 Cal.App.4th at 38]; and cited Health and Safety Code section 13806 as an example of a statute governing the creation of a district. *Id.* at 38, n.33.

This latter interpretation of Health and Safety Code section 13806 applies it to the formation of a district, and not to the over-broad interpretation urged by the Trial Court. Thus, if the Trial Court's interpretation is accepted, the other *Kaatz* Health and Safety Code section 13806 reference must be accepted; but they both are contradictory, and this Court would not be required to follow that holding. *See, Ball v. Rodgers* (1960) 187 Cal.App. 2d 442, 449 (Courts of Appeal will not follow *stare decisis* where it will persist an absurdity or perpetuate a manifest error). Since no case law has construed Health and Safety Code section 13806

with respect to challenging the authority for entering into public agency contracts, the referenced *Kaatz* Court's contradictory statements should be ignored. Because *Kaatz* does not constitute precedent that Health and Safety Code section 13806 overrules Section 53511, Section 53511 governs this matter, and the Trial Court's ruling thereupon should be overruled.

Accordingly, as the Validating Statutes do not apply to this matter, the 60 days statute of limitations also do not apply and the Trial Court's order sustaining the Demurrer to the Amended Petition on this basis should be overturned.

B. Even If The Validation Statutes Apply to the Amended Petition Filing, Diamond Springs Has Properly Pled the Doctrine of Equitable Estoppel

The Trial Court erroneously ruled that Appellants failed to adequately plead facts to establish equitable estoppel, because Diamond Springs allegedly failed to allege and establish that Respondents had any duty to inform Diamond Springs of the Agreement or to disclose conflicts of interest of Respondents' Counsel. 2CTA00418; Demurrer Ruling, p. 5.

The standard for pleading equitable estoppel dictates otherwise. The elements of equitable estoppel that must be pled are:

> (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.'

Honeywell v. Workers' Comp. Appeals Bd. (2005) 35 Cal.4th 24, 37 ("*Honeywell*"). Further,:

> It is well settled that negligence, that is, careless and culpable conduct, is as [a] matter of law equivalent to an intent to deceive and will satisfy the element of fraud necessary to an estoppel. Of course, the neglect, to operate as an estoppel, must be in respect to some duty owing to the party asserting it.

Id.

1. El Dorado Was Apprised Of The Facts

Appellants have pled facts sufficient to establish that standard. First, it is a well known truism that an attorney's knowledge is imputed to his client.. Civ. Code §§ 2230, 2232; *Lazzarevich v. Lazzarevich* (1952) 39 Cal.2d 48; *Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1231. The relevant Amended Petition allegations present facts that the counsel negotiating on behalf of Respondents for an Agreement against Appellants' interests failed to inform or protect the Appellants' interests or to obtain a waiver therefore: Amended Petition, paragraphs 1, 2(d), 3(c), 23-25, 31-39, and 42-45; 1CTA00174, 1CTA00176, 1CTA00179-00180, 1CTA00181-00184.

These facts plead the deception of Respondents' attorney at the time, who actively concealed the existence of and nature of the contract he was negotiating for Respondents (while concurrently representing Appellants)-

one that would provide payment to Respondents for services that are within the jurisdictional boundaries of the Diamond Springs Service Area and which services Diamond Springs must legally provide and have provided. 1CTA00183.

Thus, El Dorado, through their counsel, was apprized of the facts, that their counsel was actively concealing the fact that El Dorado was negotiating a contract against Diamond Springs interests and responsibilities.

2. Respondents Intended That Its Conduct Be Acted Upon

Appellants have pled that the counsel even requested that he be allowed to negotiate an agreement with the Tribe on behalf of Respondents to which Diamond Springs gave approval for *as long* as Respondents' Counsel also represented their interests. 1CTA00181; Amended Petition, ¶¶ 33-34. By requesting permission to negotiate a agreement, it is reasonable to assume, that Diamond Springs, as his client, would rely on full disclosure of the impact of the negotiated agreement on Diamond Springs. Stated differently, why would Diamond Springs separately investigate a seemingly innocuous agreement when their own attorney had full knowledge of its impact.

3. Appellants Pled They Were Ignorant Of The Facts Of The Agreement For Estoppel Purposes

The Amended Petition alleges that Appellants did not know that Respondents' counsel was negotiating the Agreement or the nature of the Agreement and did not discover the execution of the Agreement until January 2009. 1CTA00181. Additionally, Appellants have pled facts demonstrating their ignorance of the facts as evidenced by the Amended Petition allegation that after discovering the nature of the Agreement on January 9, 2009, Appellants attempted for a number of months to obtain information from Respondents regarding the Agreement, and only then filed suit. 1CTA00181-00182. Indeed, without knowing the details of the Agreement, they could not have known that El Dorado lacked the authority to enter into the Agreement. Thus, Appellants pled the third element of equitable estoppel.

4. Appellants Pled That They Relied On The Respondents' Counsel, Which Led To Their Forbearance From Filing a Lawsuit As They Were Not Informed Of The Nature Of The Agreement.

Appellants have pled that Respondents' Counsel requested approval by Diamond Springs to negotiate a contract on behalf of Respondents with the Tribe, to which Diamond Springs gave approval for *as long as* Respondents' Counsel also represented their interests. 1CTA00181. Despite Diamond Springs' specific direction to represent its interests, Respondents' counsel failed to disclose to Appellants the details of the Agreement negotiated with the Tribe despite its encroachment on

Appellants' interests. 1CTA00181; Amended Petition, 34. Thus, relying on Respondents' counsel, which also represented Appellants; it was not until January 9, 2009, that Appellants first became aware that Respondents had executed the Agreement. 1CTA00181; Amended Petition, 35. Appellants then diligently inquired from Respondents to discover how their rights were affected. 1CTA00181; Amended Petition, 36. Thereafter, on March 13, 2009, after seeking information from Respondents regarding the Agreement, Appellants formally demanded that the El Dorado Board, void the Agreement. 1CTA00181. Finally, Appellants have pled that after receiving no response to their formal demand to Respondents to unwind the Agreement, filed this suit, approximately one month after the formal demand was made. 1CTA00182.

This pled factual background depicts how Diamond Springs relied upon the Counsel to represent its interests, while being mislead by him, and through him, by El Dorado. This misrepresentation is clear by the efforts Appellants took to investigate the impacts of the Agreement to Diamond Springs when it discovered the content of the Agreement, and filed a lawsuit only one month after a formal demand to Respondents to unwind the Agreement. The decisive action that Appellants took to protect their interests once they discovered the harm, of seeking information from El Dorado and formally demanding the Agreement be voided, demonstrates that it was Respondents' Counsel's deception that prevented the Appellants

from taking earlier action. Thus, Appellants sufficiently pled the fourth element of equitable estoppel.

C. The Tribe Is Not An Indispensable Party To The Litigation

Although unnecessary to its decision, the Trial Court nevertheless opined that the Amended Petition would be barred by Appellants' failure to join the Tribe as an indispensable party to the litigation, as it erroneously found "no reason" to depart from the 'deeply imbedded' principle that a party to a contract is an indispensable party to a suit to set aside that contract." 2CTA00404; Demurrer Ruling, p. 5. In fact, there *is* a good reason - the "public right" exception to dismissing a case for inability to join a party to a contract. This matter implicates a "public right."

1. This Court Should Adjudicate Whether The Tribe Is An Indispensable Party As It Is An Important Issue Which May Result In Further Litigation, And Is Of Public Interest

i. Because Dismissing The Lawsuit For Failure To Join The Tribe Would Place Respondents Above The Law, And Would Permanently Impair The Logical And Efficient Extension Of Local Services, The Court Should Adjudicate This Matter.

Although the Courts of Appeal generally do not review issues that the Trial Court found unnecessary to disposition of the matter [*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65] the Courts of Appeal may

address such issues that are "of great importance to the parties which may serve to avoid future litigation when the issue presented is one of continuing public interest and is likely to recur." *Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 332 (citing text).

There are important public rights involved with this matter, whether Respondents can unilaterally enter into an Agreement to extend fire protection services outside its exiting jurisdictional boundaries, without legal authorization. Such an agreement would abrogate the rights of Appellants to provide those same fire protection services they are legally required to provide [1CTA00183; Amended Petition, 43] and would permanently impair the logical and efficient extension of local services, which is the purpose of LAFCOs. Gov. Code § 56001.

The purported ability of a public entity to enter into an unauthorized agreement and avoid judicial review simply by contracting with a federally recognized Indian Tribe is a matter of public interest and is likely to reoccur as cash strapped public entities look for further revenue streams, as providing contract fire protection services. If this matter were to be remanded back to the Trial Court, the Trial Court has already indicated it will dismiss the action for failure to join the Tribe so in the interest of judicial economy the issue of joinder of the Tribe should be reviewed and resolved.

Addressing the issue of the failure to join the Tribe is directly related to deciding the precedential value of *People ex rel. Lungren v. Community Redevelopment Agency* (1997) 56 Cal.App.4th 868 ("*Lungren*"), which provides an ***exception*** from the general rule that parties to a contract are necessarily indispensable parties, where a public right is implicated. The Trial Court incorrectly ruled that this exception was limited to *in rem* cases.

ii. *Lungren* Upholds That California Courts Have The Authority To Adjudicate Challenges To Contracts With Tribes[12]

Lungren, supra, confirms the authority to adjudicate the litigation without the Tribe. In *Lungren*, the State Attorney General sought review of a trial court order dismissing a claim against defendant community redevelopment agency. Defendant contended that dismissal was required because an Indian tribe, which defendant claimed to be an indispensable party, was immune to suit under sovereign immunity and could not be joined under CCP section 389 ("Section 389"), the law governing compulsory joinder.

The Court of Appeal found that the dismissal was an abuse of discretion. The court noted that while the lower court could not exercise jurisdiction over the tribe, it had jurisdiction over other parties and power to

[12] Although the Trial Court did not address the issue of Tribal Sovereign Immunity, Appellants address it here, as the Court of Appeal authority to rule despite the Sovereign Immunity is necessary to establish that the Tribe (footnote continued)

enter judgment affecting their interests. Relying on Section 389, the *Lungren* Court held that a balancing of competing interests was needed; that complete relief could be accorded among existing parties; that the tribe's interests were adequately protected by defendant; that there was little risk either of inconsistent obligations or resulting prejudice; that a fully adequate judgment could be rendered in the tribe's absence; and that if the case was dismissed, plaintiff had no other remedy and would be foreclosed from raising important public issues. *Lungren, supra,* 56 Cal.App.4th at 876-885.

The *Lungren* Court clarified that under Section 389:

> failure to join a party who may be regarded as 'indispensable' is not, under section 389, a jurisdictional defect in the technical sense. . . . It is for discretionary and equitable reasons, not for any want of jurisdiction, that the court may decline to proceed without the absent party.

Id. at, 875-876.

(a) The Tribe Is Not A Necessary Party Under Section 389(a)

Section 389(a) provides that:

> (a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect

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need not be joined. Appellants also anticipate Respondents will raise the issue consistent with their Trial Court arguments. 2CTA00390-00391.

> that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

Here, under Section 389(a)(1), adjudicating this action would give complete resolution to the already existing parties (which *Lungren* found sufficient to continue without joining the tribe in that matter). A determination that Respondents had the authority to enter into the Agreement would allow the Agreement to be performed as Respondents wish; a determination that Respondents lacked the power would void the Agreement as Appellants seek.

Under Section 389(a)(2)(i), the absence of the Tribe from this action will not, as a practical matter, impair or impede the Tribe's ability to protect its interests as this matter challenges the legality of Respondents contracting to provide fire protection services outside its SOI and service area within the boundaries of another fire protection district—Diamond Springs. No actions *of the Tribe* are challenged. 1CTA00178; Amended Petition, ¶ 14. The Tribe's ability to protect its own interests in this matter would be limited to arguing that Respondents' actions were authorized by California law. Thus, although the Tribe and Respondents' interests under the Agreement are not identical, the Tribe's object in the present litigation--establishing that Respondents acted lawfully in entering into the

Agreement--would duplicate that of Respondents and would be adequately represented by Respondents in this litigation.

As noted, *Lungren* provides an exception to the general authority the Trial Court cited [2CTA00419] -- that *any party* to a contract is considered a necessary party holding that where "a ruling in the present case . . . would primarily address the scope of the Agency's authority and only incidentally would adjudicate the interests of the Tribe in the contract. . .. [a]t the threshold, tribal immunity does not extend to barring suit against a third, non-immune party solely because the effect of a judgment against the third party will be felt by the tribe." *Lungren, supra,* 56 Cal.App.4th at 879. The *Lungren* Court distinguished cases where the purpose of the lawsuit was to frustrate the purposes of the tribe, as opposed to a challenge to the other party's authority to enter into an agreement with the tribe.

The Amended Petition allegations demonstrate that the Appellants do not bring this suit to frustrate the Tribe's ability to receive fire and life safety services, but instead challenge Respondents' lack of authority to enter into the Agreement in the first instance. 1CTA00178; Amended Petition, ¶ 14. Indeed, should Appellants' litigation be successful, Appellants have pled that they are required to provide fire protection services in the Affected Area, and do so. 1CTA 00187; Amended Petition,

¶ 43. Thus, under *Lungren*, the Tribe is not automatically a necessary party, where the action challenges *Respondents'* authority.[13]

(b) Even If the Tribe Is A Necessary Party, It Is Not An Indispensable Party Under Section 389(b)

Section 389(b) sets forth:

> (b) If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder.

With respect to Section 389(b)(1), *Lungren* recognizes a "public right" exception to dismissing a case for inability to join a party to a contract, where "the public right [is] vindicated by restraining the unlawful actions of the defendant even though the restraint prevent[s] his

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[13] *Lungren* also addressed Section 389(a)(2)(ii). *Lungren, supra,* 56 Cal.App.4th at 879, fn. 7. Here like *Lungren*, the Tribe will not be subject to inconsistent obligations, because should the Agreement be voided as having exceeded the authority of Respondents, Respondents would have a defense of legal impossibility to any action brought by the Tribe to enforce the Agreement. Indeed, practically, as is evident from the Amended Petition allegations, any action to enforce the Agreement would be unlikely because the Tribe could simply obtain fire protection services from (footnote continued)

performance of the contracts.[citation]" and where the "decision did not adjudicate the rights of the parties not before the court." *Lungren, supra,* 56 Cal.App.4th at 882. *Lungren* found a public right in the State providing *some* review of an unlawful contract, even if the party not joined had interests in the matter that may be prejudiced. *Id.*

In this matter, there are important public rights to be adjudicated with respect to, as previously stated, the unlawful actions of Respondents, which would allow Respondents to perform an Agreement without legal authorization. There is no Record evidence that Appellants will not continue to effectively provide fire and life safety services to the Affected Area that they are legally required to provide, *e.g.* there is absolutely no claim that Appellants have or would inadequately provide fire protection services to the Affected Area. Any prejudice the Tribe might face for payments already submitted to Respondents under the Agreement does not outweigh the public right exemption. *See, Lungren, supra,* 56 Cal.App.4th at 881-882.

Further, like *Lungren* [*see, Lungren, supra,* 56 Cal.App.4th at 883], here a judgment rendered without the Tribe would be completely adequate. § 389(b)(3). The only real issue to be considered by the Trial Court is whether Respondents had the power to enter into the Agreement. The

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Appellants, who are legally obligated to provide such services, and have (footnote continued)

presence of the Tribe does not have any direct impact on resolution of that legal issue, as it cannot grant El Dorado that power.

If this lawsuit is dismissed for failure to join the Tribe, Appellants are left without a remedy, impermissible under applicable law. § 389(b)(4); *see also*, Civ. Code § 3523 ("For every wrong there is a remedy."). Appellants have the right and obligation to provide fire protection services to the Affected Area, and to accrue any funds generated by providing those services. If left without a remedy, Respondents' illegal usurpation of Appellants' rights harms the funds available to Appellants and establishes a situation where it is required to also respond to emergency calls that are in the Affected Area, but only Respondents will be paid for the response.

Accordingly, as not every party to a contract is a necessary and indispensable party, like in *Lungren,* this Court should rule that the Tribe is neither a necessary or indispensable party.

2. The *Lungren* Exception Is Not Limited to *In Rem* Validation Cases

The Trial Court opined that the only cases departing from the principle that a party to a contract is an indispensable party to a suit to set aside that contract are *in rem* validation cases, and cited *Lungren*, and *Planning & Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892, 920 ("*Planning & Conservation League*").

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done in the past. Amended Petition, ¶ 43.

Planning & Conservation League did involve an *in rem* validation action.. *Planning & Conservation League* involved two citizens groups and a public agency's mandate and validation challenges to revisions to long-term contracts governing the supply of water under the State Water Project. *Id., at* 897-898. The Trial Court dismissed the validation actions for failure to serve all the individual water supply contractors. *Id., at* 903. *Planning & Conservation League* reversed the dismissal of the validation actions on the premise that in a validation proceeding, there are no indispensable parties beyond the public agency whose action is challenged:

> The question thus posed is what impact does the failure to personally serve the water contractors have on the viability of the validation action? Defendants contend that these contractors are indispensable parties within the meaning of section 389 of the Code of Civil Procedure, even though a validation proceeding is an action in rem. Emphasizing the in rem nature of the validation proceeding, plaintiffs contend there are no indispensable parties beyond the public agency whose action is challenged. We agree.

Id., at 924-925. There, the Court's analysis was clearly rooted in the nature of validation actions, in that it found that since the Validation Statutes establish notice procedures, if those procedures are met, jurisdiction is established over the *res*, and the public agency whose action is challenged is the only indispensable party *Id.*

Lungren, however, relies upon a *different* premise-the "public right" exception [*See, supra,882*] to the general rule that all parties to a contract

are indispensable parties based on a policy recognized by the United States Supreme Court and followed by the federal Court of Appeals for the Ninth Circuit: " 'the public right [is] vindicated by restraining the unlawful actions of the defendant even though the restraint prevent[s] his performance of the contracts.'" *Lungren, supra*, 56 Cal.App.4th at 881-882 .

Nowhere does *Lungren* discuss validation actions, nor did *Planning & Conservation League* reference *Lungren*. The issue in *Lungren* was to allow State Court's *some* review over the authority of a public agency to enter into a contract with a tribe. *Lungren, supra*, 56 Cal App 4th at 878-879. This interest was sufficient to warrant the referenced exception. Indeed, the *Lungren* Court pointed out that "At the threshold, tribal immunity does not extend to barring suit against a third, non-immune party solely because the effect of a judgment against the third party will be felt by the tribe." *Id.*, at 879 (*citing Wichita and Affiliated Tribes of Oklahoma v. Hodel*, (1986), 788 F.2d 765,. 771.)[14] *Lungren* affirmed a preexisting exception to the non-joinder rules, and did not rely the nature of a validation action. *Lungren* prevents the unacceptable premise that a California public agency may be exempted from the laws governing its own

[14]It should be noted that at the Trial Court, Respondents argued that *Lungren* was an outlier; the policy which it sets forth is not followed by any other cases, and thus should be disregarded. 2CTA00387-00389 They are wrong. As the *Lungren* Court noted, it was based on a policy recognized by the U.S. Supreme Court as far back as 1940, and followed more recently (footnote continued)

contracting authority as long as it contracts with an Indian tribe. Since the public has a significant interest in ensuring its public agencies follow the law, this is a public right and *Lungren* should control here.

D. As A Matter Of Law, El Dorado Cannot Extend Its Services Outside Its Existing Jurisdictional Boundaries Without LAFCO Approval.

Appellants respectfully request this Court find that El Dorado cannot extend its fire protection services outside its jurisdictional boundaries without prior LAFCO approval to avoid future litigation and because it is an issue of continuing public interest and is likely to recur. *Keitel, supra,* 103 Cal.App.4th at 332.

As a matter of law, El Dorado unlawfully entered into the Agreement to extend its services outside its jurisdictional boundaries because it did not receive written approval from LAFCO and, thus, the Agreement is void. *See Modesto, supra,* 309 F.Supp.2nd at 1166. This conclusion is consistent with *Modesto,* which provided that a matter of law a district ***cannot*** extend its services outside its jurisdictional boundaries because it failed to comply with the Section 56133 requirements, the enabling legislation to extend the district services. *Id.* at 1166.

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in the Ninth Circuit in 1988. *Lungren* thus confirms long standing policy and it not an outlying case.

Specifically, *Modesto* provided that a district unlawfully extended its services outside its jurisdictional boundaries because it did not meet the ***limited*** authorizations and exceptions found in Section 56133. *Id.* The court reviewed applicable authorizations and exceptions and noted that Subsection (b) of section 56133 "applies only where a district attempts to expand 'within [that district's] sphere of influence in anticipation of a later change of organization'. . ." *Modesto, supra,* 309 F.Supp.2nd at 1168.

The Court further noted that Subsection (c) of section 56133:

> applies only where a district expands in response to an 'existing or impending threat to public health or safety' and even then only where proper 'documentation' and notice are provided.
>
> *Id. citing* 56133 (c).

Because *Modesto* found that none of the Section 56133 ***limited*** authorizations or exceptions applied to the irrigation district's conduct, the court concluded that:

> [the district] possesses neither the legal right nor the LAFCO permission to expand its services into [the City of Pittsburg] unilaterally, thereby contravening controlling state law and attempting to derive income without attendant 'legal right' . . .[the district's] conduct was unlawful by its own terms

Id. at 1170.

Here, like *Modesto,* Section 56133 subsection (b) does not excuse El Dorado's unauthorized expansion of its fire protection services into the Affected Area because El Dorado through the Agreement is providing services ***outside*** its "sphere of influence." *See Modesto, supra,* 309 F.Supp.

at 1168. The Agreement states that El Dorado will provide fire protection services to the Affected Area, which area is outside its "sphere of influence" and entirely within the existing boundaries of the Diamond Springs Service Area.

Nor does Section 56133 subsection (c) excuse El Dorado's unauthorized expansion of its fire protection services into the Affected Area because it did ***not*** extend its fire protection services outside its sphere of influence to ***respond*** to "an ***existing or impending threat to the public health or safety of the residents of the affected territory***. . .." Even if El Dorado had extended outside its sphere of influence to respond to such a threat, El Dorado was also required to prove that it responded to that type of threat by providing LAFCO "with documentation of a threat to the health and safety of the public or the affected residents" and was also required to demonstrate that LAFCO "has notified any alternative service provider . . .that has filed a map and statement of its service capabilities with [LAFCO]." *Id.* Nowhere in the Administrative Record does it provide that El Dorado met these requirements.

Finally, Section 56133 subsection (e) does ***not*** excuse El Dorado's unauthorized expansion of its fire protection services into the Affected Area because the series of exceptions listed in Subsection (e) are inapplicable in this case. The exceptions of Subjection (e) only apply to contracts or agreements involving solely public agencies; contracts for the transfer of

nonpotable or nontreated water; contracts or agreements solely involving the provision of surplus water to agricultural lands and facilities; and local publicly owned electric utilities. *See Id.* The Agreement here does not involve any of these types of matters. Accordingly, even if El Dorado had requested LAFCO approval for its expansion into the Affected Area, LAFCO would have likely denied its approval because the Agreement to extend El Dorado's fire protection services outside its existing boundaries does ***not*** meet any of the limited authorizations and exceptions found in Section 56133. For this reason, El Dorado likely ignored the CKH requirements.

Because the Administrative Record does not demonstrate that El Dorado met a Section 56133 ***limited*** authorization or exception and received LAFCO approval prior to entering into the Agreement, El Dorado unlawfully entered into the Agreement to extend its fire protection services outside its jurisdictional boundaries and within Diamond Springs' jurisdictional boundaries. Accordingly, Respondents lacked the authority to enter into the Agreement as a matter of law.

This issue is one of continued public interest, and is likely to be litigated in the future as local agencies continue to look for additional revenue streams in a continued Statewide recession and diminishing local government revenues. Accordingly, the Courts of Appeal should clarify for all local entities that CKH, not individual agreements, govern the extension

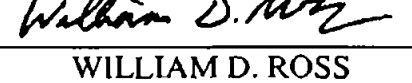
of local government services outside their existing jurisdictional boundaries.

V. CONCLUSION

The Trial Court's Judgment of Dismissal following its Order Sustaining the Demurer to Appellants' Amended Petition should be reversed, with an order to allow the Amended Petition to be heard on its merits as: (1) Respondents lacked the legal authority to enter into the Agreement in the first instance; and (2) the Tribe need not be joined.

Dated: October 26, 2010

LAW OFFICE OF WILLIAM D. ROSS

By 

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that the foregoing Appellants Opening Brief is proportionately spaced, has a typeface of 13 points, and contains 12,422 words, including footnotes, according to the word count of the word processing program with which it was prepared.

Dated: October 26, 2010

LAW OFFICE OF WILLIAM D. ROSS

By 
WILLIAM D. ROSS

Attorneys for Plaintiffs and Appellants
Diamond Springs/El Dorado Fire Protection District
and Jackye Phillips

ATTACHMENT A

LEXSEE 309 F.SUPP.2D 1156

MODESTO IRRIGATION DISTRICT, Plaintiff, v. PACIFIC GAS AND ELECTRIC COMPANY, Defendant.

No. C-98-3009 MHP

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

309 F. Supp. 2d 1156; 2004 U.S. Dist. LEXIS 4225; 2004-1 Trade Cas. (CCH) P74,359

March 18, 2004, Decided

SUBSEQUENT HISTORY: Affirmed by *Modesto Irrigation Dist. v. PG&E Co., 2005 U.S. App. LEXIS 27558 (9th Cir. Cal., Dec. 12, 2005)*

PRIOR HISTORY: *Modesto Irrigation Dist. v. Pac. Gas & Elec. Co., 54 Fed. Appx. 882, 2002 U.S. App. LEXIS 25172 (2002)*

DISPOSITION: [**1] Defendant's motion for summary judgment GRANTED.

COUNSEL: For MODESTO IRRIGATION DISTRICT, Plaintiff: Maxwell M. Blecher, Donald R. Pepperman, Blecher & Collins, P.C., Los Angeles, CA.

For MODESTO IRRIGATION DISTRICT, Plaintiff: Scott T. Steffen, Modesto Irrigation Dist, Modesto, CA.

For PACIFIC GAS & ELECTRIC COMPANY, defendant: Marie L. Fiala, Kirk G. Werner, M. Fehrenbacher Claire, Heller Ehrman White & McAuliffe, Clifford J. Gleicher, Pacific Gas And Electric Company, San Francisco, CA.

JUDGES: MARILYN HALL PATEL, Chief Judge, United States District Court, Northern District of California.

OPINION BY: MARILYN HALL PATEL

OPINION

[*1158] **MEMORANDUM AND ORDER**

Motion for Summary Judgment

On August 3, 1998, plaintiff Modesto Irrigation District ("MID") filed a complaint in this court against defendant Pacific Gas and Electric Company ("PG&E"). [1] In pertinent part, MID's complaint alleges that PG&E violated the *Sherman Act, 15 U.S.C. §§ 1,2*, and related provisions of state law when it attempted to prevent MID from offering electric services in Pittsburg, California. On February 2, 1999, this court dismissed MID's clams under *Federal Rule of Civil Procedure 12(b)(6)* [**2] , granting MID leave to amend. See *Modesto Irrigation Dist. v. Pacific Gas & Elec. Co., 1999 U.S. Dist. LEXIS 14944, No. C 98-3009 MHP, slip op. at 12-13 (N.D. Cal. 1999)*. MID filed its first amended complaint on March 4, 1999, and this court again dismissed the action under *Federal Rule of Civil Procedure 12(b)(6)*. See *Modesto Irrigation Dist. v. Pacific Gas & Elec. Co., 61 F. Supp. 2d 1058 (N.D. Cal. 1999)* (denying leave to amend). In an unpublished disposition, the Ninth Circuit reversed. *Modesto Irrigation Dist. v. Pacific Gas & Elec. Co., 54 Fed. Appx. 882 (9th Cir. 2002)*.

1 MID's complaint also identified Dynergy Power Services, Inc. ("Dynergy") as a defendant. Dynergy is the successor to Destec Power Services, Inc., a significant player in MID's attempt to grow into Pittsburg, California. MID has since settled its claims against Dynergy. For simplicity's sake, the court will refer to the company as "Dynergy" throughout this order.

Two weeks after the [**3] Ninth Circuit entered its decision, MID filed a second amended complaint in this

court. The parties subsequently agreed that resolution of PG&E's eleventh affirmative defense (viz., that MID failed to comply with particular provisions of California law, thus eliminating the prospect of cognizable antitrust injury) might dispose of the action in its entirety; the parties also agreed that a summary judgment motion regarding PG&E's eleventh affirmative defense could be adequately briefed on stipulated facts and considered without additional discovery. Now before the court is PG&E's motion for summary adjudication of its eleventh affirmative defense. The court has considered the parties arguments fully, and for the reasons set forth below, the court rules as follows.

BACKGROUND [2]

2 Unless otherwise noted, all facts in this section have been culled from the parties' moving papers.

Pacific Gas & Electric Company, a California corporation, is authorized by the California Public Utilities Commission (PUC) [**4] to provide electric services to certain parts of California. [3] See Second Am. Compl., PP 3-12 (noting, *inter alia*, that PG&E is the predominate wholesaler and retailer of electric power in Northern and Central California, controlling most of the related facilities). An investor-owned utility ("IOU"), PG&E owns and operates facilities for the generation, transmission, and distribution of electric power throughout [*1159] much of Northern and Central California, including, notably, the City of Pittsburg. See Request for Judicial Notice, Exh. 8 at p. 3. As an IOU, PG&E is required to obtain a Certificate of Public Utilities Convenience and Necessity ("CPUCN") from PUC before it may develop or extend electricity-related facilities in specific service territories. See *Cal. Pub. Util. Code § 1001*; see generally *Greyhound Lines, Inc. v. Pub. Utilities Comm'n, 68 Cal. 2d 406, 412, 67 Cal. Rptr. 97, 438 P.2d 801* & n.3, (1968) (noting that this certification process prevents waste of resources and protects IOUs against improper competition). During the period at issue in this litigation, PG&E held a CPUCN that permitted it to distribute electricity to [**5] all residents of Pittburg, California. See Stip. of Facts, P 8. All residential and commercial residents of Pittsburg wishing to receive electric services did, in fact, receive electric services from PG&E. See id. at P 7. Praxair, Inc., a manufacturer of industrial gases and a large consumer of electric power, is located in Pittsburg; like all other Pittsburg residents, Praxair receives its electric services from PG&E. Id. at P 5.

3 It is perhaps a bit of an oversimplification to say that PG&E merely provides electric distribution services. PG&E, to be precise, sells and delivers electric power to both "retail" and "wholesale" customers, the latter under a system referred to as "wheeling." The distinction between "retail" and "wholesale" services is important to understanding the contours of PG&E's relationship with Dynergy and the type of service MID hoped to offer Praxair, but it is not central to resolution of the motion before the court. The court will thus leave the distinction mostly unelaborated.

[**6] Modesto Irrigation District is a state-recognized irrigation district organized pursuant to California Irrigation District Law. See *Cal. Water Code §§ 20500, et seq.* Among its utility-related ventures, MID owns and operates facilities for the generation, transmission, and distribution of electric power in a portion of Stanislaus County, California. As its name suggests, MID is a "district" under California law, see *Cal. Gov't Code § 56036* (defining "district" as an "agency of the state ... for the local performance of governmental or proprietary functions within limited boundaries ..."); as such, MID is an entity of limited powers, and it has specifically circumscribed geographic and "sphere of influence" [4] boundaries. See Stip. of Facts, PP 9 & 12. [5] No part of Contra Costa County, California--in which Pittsburg sits--falls within MID's existing service area or "sphere of influence." Id. at P 15.

4 *Section 56076* defines "sphere of influence" as a "plan for the *probable* physical boundaries and service area of a local agency ...." *Cal. Gov't Code § 56076* (emphasis added). In this sense, a "sphere of influence" is a prospective measure, charting what a city's or a district's boundaries might be at some future point. Id. A district's "sphere of influence" is not necessarily coextensive with its existing service area.

[**7]

5 Within MID's current boundaries sits the area between the San Joaquin River on the east, the Tuolumne River on the north, and the Stanislaus River on the south. Id.

I. The Contracts and MID's Plan

In 1994, PG&E entered a Control Area and Transmission Service Agreement with Dynergy Power Services, Inc., a power marketer and a wholesaler of electricity. See Stip. of Facts, P 16; Mayer Decl., Exh. B. Approved by the Federal Energy Regulatory Commission ("FERC"), [6] the agreement permitted Dynergy to use PG&E's transmission lines for wholesale electricity customers, but it did not authorize Dynergy to serve any of PG&E's retail (or "end-user") customers. Id. [7] In early 1996--at a time roughly contemporaneous with a legislative effort to revamp California's [*1160] retail electricity industry--MID and Dynergy developed a complicated business plan to provide electric distribution service to

one or more retail customers in Pittsburg. Id. at P 1. The plan involved a series of contracts between MID, the City of Pittsburg, Dynergy, and others; [5] and it depended on MID's acquisition [**8] of a Praxair substation, through which MID hoped to distribute power (at a retail rate) to Praxair itself. See id. at PP 17-19; see also Second Am. Compl., PP 15-18 (noting that a "substation" is a facility that receives high-voltage electric power, converting that power into lower, usable voltages for distribution to consumers); Mayer Decl., P 9 (identifying the "Linde" substation as the one targeted--and as one of multiple Praxair sites); id. at Exhs. C & D (Permission Agreement and Equipment Sales Agreement). [6]

6 Consistent with the *Federal Power Act*, see *16 U.S.C. § 824d(c)*, the Dynergy--PG&E agreement was submitted to FERC for approval. The agreement became effective on April 14, 1995, making Dynergy and PG&E competitors in the *wholesale* power market, not in the *retail* one.

7 The relevant portion of the agreement reads:

> [Dynergy] may not use service under this Agreement to sell electricity to a retail customer located within the PG&E utility service territory. [Dynergy] may not designate retail loads within PG&E's utility service territory as Transaction Points nor may [Dynergy] schedule to any retail loads within PG&E's service territory as [Dynergy] Loads.

See Stip. of Facts, Exh. C.

[**9]

8 These contracts and agreements included a Permission Agreement with Pittsburg allowing MID to utilize City rights of way in the provision of retail electric services, an Equipment Sales Agreement with Praxair, and a Power Sales Agreement with Dynergy. See Stip. of Facts, PP 17-19; Mayer Decl., Exhs. C-D. Most segments of these agreements are inapposite to the court's consideration of this motion, and they need not be elaborated in detail here.

9 Under the permission agreement between MID and Pittsburg, approximately one-half of the Praxair substation's capacity would have been devoted to Praxair itself; the remaining portion was supposedly to be distributed among to-be-acquired commercial and residential accounts in Pittsburg, all of which PG&E then held.

With these complex contractual arrangements in place, Dynergy and MID asked PG&E to enter an "interconnection agreement" which would require PG&E to commence delivery of power to the Praxair substation. See Second Am. Compl., P 24; see also First Am. Compl. (alleging that PG&E had agreed to a similar agreement--with [**10] Dynergy--regarding provision of service and resale opportunities in the Port of Oakland). PG&E refused. Id.

II. FERC Petitions and the Statutory Framework

A round of petitions to FERC followed. PG&E filed the first petition with FERC, alleging, *inter alia*, that MID's plan with Dynergy constituted a "sham wholesale" transaction designed to allow MID to select (and to serve) only those retail customers that would be particularly profitable to MID. See, e.g., Req. for Judicial Notice, Exhs. 3 & 6. [10] Both Dynergy and MID opposed PG&E's petition, and MID later filed its own application with FERC, asking that PG&E be compelled to interconnect the Praxair substation. See id. at Exhs. 4 & 5. PUC later intervened on PG&E's behalf, concurring with PG&E that MID's business plan contravened the terms of applicable California law, particularly the *Cortese-Knox Local Government Reorganization Act*. See id. at Exh. 6. [11]

10 Dynergy also sought to compel arbitration under its agreement with PG&E. PG&E filed suit in federal court to enjoin any arbitration proceedings, though no order issued. The two have since settled their portion of the dispute.

[**11]

11 After PUC sought to intervene in the FERC proceeding, MID stayed its interconnection request; to the court's knowledge, it has yet to reactivate that request.

The Cortese-Knox Local Government Reorganization Act, see *Cal. Gov't Code §§ 56000, et seq*, ("the Act"), [12] is a detailed [*1161] statutory scheme governing, *inter alia*, control of urban sprawl. See, e.g., *City of Shasta Lake v. County of Shasta, 75 Cal. App. 4th 1, 6, 88 Cal. Rptr. 2d 863 (Cal. App. 1999)*. To facilitate local resource management, the Act contemplates the creation of local agency formation commissions ("LAFCOs") [13] in each county of California, see *Cal. Gov't Code § 56325*, and it empowers LAFCOs to make decisions on a variety of urban planning issues. See, e.g., id. at *§§ 56001* (noting that LAFCOs are "single multipurpose governmental agencies" charged with controlling "the process of municipality expansion"), 56375, 56021. Decisions regarding the scope and potential extension of utility services (e.g., electric services), for example, fall within a county [**12] LAFCO's purview. See *Cal. Gov't Code §§ 56133, 56375*; see also *Tillie Lewis Foods, Inc. v. City of Pittsburg, 52 Cal. App. 3d 983, 995, 124 Cal. Rptr. 698 (Cal. App. 1975)*.

12 Effective January 1, 2001, the Cortese-Knox-Hertzberg Local Government Reorganization Act replaced the 1985 Cortese-Knox Act. The new law is not retroactive; as a result, it is not applicable to this action. See *County of Fresno v. Malaga County Water Dist., 100 Cal. App. 4th 937, 939, 123 Cal. Rptr. 2d 239 (Cal. App. 2002).*

13 LAFCOs typically consists of five members, two selected by the relevant county, two selected by the germane cities, and one selected by the other four members. See *Cal. Gov't Code § 56325.*

Many of the Act's provisions delineate LAFCO and utility-provider rights and obligations. Id. *Section 56133 of the Act, for* example, discusses where and when a city or district may expand the electric services it provides:

> A city or district [**13] may provide new or extended services by contract or agreement outside its jurisdictional boundaries only if it first requests and receives written approval from the [LAFCO] in the affected county.

Cal. Gov't Code § 56133(a). Subsections *(b)* and *(c) of section 56133* posit the limited contexts in which a LAFCO *may* authorize a city or district to provide new or extended services outside its jurisdictional boundaries: Subsection (b) allows such authorization only where the desired extension would fall "within [a district's] sphere of influence in anticipation of a later change of organization"; subsection (c) permits such authorization where the relevant extension is intended "to respond to an existing or impending threat to the public health or safety of the residents of the affected territory ...." Id. at *§ 56133(b)-(c)* (adding, for subsection (c), that the entity applying for the contract must provide "documentation of a threat to the health and safety of the public or the affected residents" and ensure that the committee has notified "any alternate service provider ... that has filed a map and a statement of its service capabilities with [**14] the commission"). Subsection (e) of *section 56133* denotes a handful of contexts in which the mandates of *section 56133* do not control *ex ante.*

When MID attempted to distribute electricity to Contra Costa County (that is, to Pittsburg), it did not request or receive approval from Contra Costa County's LAFCO. See Stip. of Facts, PP 22-23. Instead, MID believed that *section 56133* did not apply to its electricity-distribution activities at all, so LAFCO preapproval was neither required nor sought. Id. at P 24. The validity of MID's interpretation of *section 56133* is the legal question at the core of this action.

III. Procedural Posture and Analogous Litigation

An identical legal question--based on an identical MID theory--spurred a brief round of state court litigation, albeit on minimally different facts. See PG&E v. MID, Stanislaus County Superior Court, No. 227034. In the late 1990s, MID expanded [*1162] its electricity-distribution services into the so-called "Four Cities Area" of California. [14] MID did so without seeking or securing LAFCO preapproval. In fact, MID expanded into the Four Cities Area without complying with any of the terms of *section 56133*, growing [**15] outside its established "sphere of influence" boundaries into an area already served by PG&E--precisely like the move into Pittsburg.

14 The "four cities" are Ripon, Esealon, Oakdale, and Riverbank. There is no geographic overlap between the "Four Cities Area" and Pittsburg, California.

PG&E believed that MID's Four Cities Area expansion contravened state law (viz., *section 56133*), and, seeking to prevent the move, PG&E filed an action against MID in Stanislaus County Superior Court. The state trial court agreed with PG&E's interpretation of *section 56133*, finding that *section 56133* applies to MID and that MID is not otherwise excused from the section's procedural mandates. See Req. for Judicial Notice, Exhs. 1 & 2. MID appealed. During the pendency of that appeal, the California legislature enacted *California Public Utilities Code sections 9610and 9611*, which, taken together, grant MID express--and expressly limited--authority to serve customers in the Four Cities Area [**16] *without* LAFCO pre-approval. See *Cal. Pub. Util. Code §§ 9610, 9610.* California's Court of Appeal held that this intervening legislative act mooted the Four Cities Area controversy between MID and PG&E, and the appellate court reversed the trial court's decision. See Req. For Judicial Notice, Exh. 8 (opinion filed January 7, 2003). The state appellate court's decision did not reach the substance of the *section 56133* question. See id.

As the parties litigated the Four Cities Area matter in state court, MID filed a complaint against PG&E and Dynergy in this court. In relevant part, MID's complaint alleges that PG&E's efforts to prevent MID's expansion into Pittsburg were unlawfully anti-competitive and monopolistic under the Sherman Act, *15 U.S.C. §§ 1,2*, and related provisions of state law. PG&E filed a timely answer, raising a number of affirmative defenses. On February 2, 1999, this court dismissed MID's clams under *Federal Rule of Civil Procedure 12(b)(6)*, granting MID leave to amend. See No. C 98- *Modesto Irrigation Dist. v. Pacific Gas & Elec. Co., 1999 U.S. Dist. LEXIS 14944, No. C 98-3009 MHP, slip op. at 12-13 (N.*

[**17] *D. Cal. 1999)*. MID filed a first amended complaint on March 4, 1999, and this court again dismissed the action under *Federal Rule of Civil Procedure 12(b)(6)*, this time denying leave to amend. See *Modesto Irrigation Dist. v. Pacific Gas & Elec. Co., 61 F. Supp. 2d 1058 (N.D. Cal. 1999)*. In an unpublished disposition, the Ninth Circuit reversed, see *Modesto Irrigation Dist. v. Pacific Gas & Elec. Co., 54 Fed. Appx. 882 (9th Cir. 2002)*, and MID promptly filed a second amended complaint in this court. The parties subsequently agreed that court resolution of PG&E's eleventh affirmative defense (viz., that MID failed to comply with particular provisions of California law, thus eliminating the prospect of cognizable antitrust injury) could dispose of the action in its entirety; the parties also agreed that a summary judgment motion regarding PG&E's eleventh affirmative defense could be adequately briefed on stipulated facts and considered without additional discovery. PG&E bas now filed a motion for summary judgment on its eleventh affirmative defense.

LEGAL STANDARD

Under *Federal Rule of Civil Procedure 56* [**18] , summary judgment shall be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the [*1163] burden of proof at trial [degree]... since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; *Fed. R. Civ. P. 56(c)*. When making a summary judgment motion, the moving party bears the initial burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. To discharge this burden, the moving party must show that the nonmoving party has failed to disclose the existence of any "significant probative evidence tending to support the complaint." *First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 290, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)*. If the moving party satisfies this initial hurdle, the burden then shifts to the nonmoving party to "go beyond the pleadings, and by her own affidavits, or by the 'depositions, answers [**19] to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp., 477 U.S. at 324* (citations omitted).

Not all disputes that arise in the course of litigation constitute genuine issues of material fact. A dispute about a material fact is genuine--and thus adequate to survive a motion for summary judgment--"if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. When considering motions for summary judgment, the court views the facts--and the inferences drawn therefrom--in the light most favorable to the party opposing the motion. See *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractor's Ass'n, 809 F.2d 626, 631 (9th Cir. 1987)*. In this process, the court does not make credibility determinations. See *Anderson, 477 U.S. at 249*.

When interpreting a statute, the court must start with the statutory language itself, see *Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 56, 98 L. Ed. 2d 306, 108 S. Ct. 376 (1987)*, reading that [**20] language in appropriate context and adhering to ordinary meaning unless the statute itself indicates otherwise. See *FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 146 L. Ed. 2d 121, 120 S. Ct. 1291 (2001)*; *Perrin v. United States, 444 U.S. 37, 42, 62 L. Ed. 2d 199, 100 S. Ct. 311 (1979)*; *United States v. Lewis, 67 F.3d 225, 228-29 (9th Cir. 1995)* (adding that statutory phrases must be "construed in light of the overall purpose and structure of the whole statutory scheme").

DISCUSSION

To resolve PG&E's motion for summary adjudication, the court must decide whether or not MID is subject to the terms and requirements of *California Government Code section 56133*. This question is, in many ways, a straightforward one, but before the court can answer it, the court must first address a series of ancillary issues. The court must determine what status MID retains as an electricity provider in California; the court must decide what statutes apply to MID as a matter of state law, assessing whether MID's rights under California law are too inconsistent to coexist; the court must resolve whether any of *section 56133*'s exceptions or [**21] related provisions shield MID's conduct; and, finally, the court must decide whether, in light of the court's other conclusions, MID can possibly prove antitrust injury. The court addresses each of these questions below.

I. MID's Status, the California Constitution, and the Threshold Applicability of *Section 56133*

For nearly a century, irrigation districts in California have been permitted to [*1164] produce, to distribute, and to sell electricity. See *Turlock Irrigation Dist. v. Hetrick, 71 Cal. App. 4th 948, 951, 84 Cal. Rptr. 2d 175 (Cal. App. 1999)* (recounting at length the history of California's irrigation districts; citing Stats. 1919, ch. 370, § 1, p. 788). During this time, California's courts have struggled to delimit the "exact legal nature of districts" like MID. Id. (attributing this difficulty in part to "the hopelessness of confining districts, public corporations, or municipal corporations within [a] neat box of definition" and in part to the many roles districts play) (internal quotation marks omitted). As a consequence,

California's courts have not formulated a "general rule"--or derived a standard label--for entities like MID. Id. Instead, California's courts [**22] have looked to the nature of the entity at issue, eschewing wholesale reliance on labels. Id.; see also *California Apartment Assn. v. City of Stockton, 80 Cal. App. 4th 699, 707, 95 Cal. Rptr. 2d 605 (Cal. App. 2000)*; *Cucamonga County Water Dist. v. Southwest Water Co., 22 Cal. App. 3d 245, 257, 99 Cal. Rptr. 557 (Cal. App. 1971)*.

Still, perhaps because the state courts have crafted no "general rule," irrigation districts persist in arguing that they are "municipal corporations" under California's constitution, equipped, as such, with the authority and the unfettered right to provide utility service state-wide. See *id. at 950-51*; see also *County of Fresno v. Malaga County Water Dist., 100 Cal. App. 4th 937, 944, 123 Cal. Rptr. 2d 239 (Cal. App. 2002)*; *Cal. Const. Art. XI, § 9(a)*. MID made precisely that claim in the analogous Four Cities Area state court litigation, and it restates precisely that claim here.

It is no great mystery why MID would prefer to be categorized outright as a "municipal corporation" [14] under the *California Constitution, Article XI, section 9(a)* of the California Constitution allows "municipal corporation[s] [to] establish, purchase, and operate [**23] public works to furnish its inhabitants with light, water, [and] power," and it permits municipal corporations to "furnish those services *outside [district] boundaries* ...." *Cal. Const. Art. XI, § 9(a)* (emphasis added). Were MID a true and unqualified "municipal corporation" under *Article XI, section 9(a)*, MID's "jurisdiction" would be coextensive with California's state borders. Its unilateral expansion into Pittburg (or the Four Cities Area), thus, would be a lawful exercise of MID's state constitutional power--not a violation of state *statutory* law.

> 15 It is likewise obvious why MID opted not to comply with the procedures set forth in *section 56133*. Nearly a century ago, the state legislature passed the *Raker Act*, authorizing San Francisco to dam the Hetch Hetchy Valley. As *quid pro quo* for this authorization, the legislature conditionally preserved the pre-existing water rights of two irrigation districts--viz., MID and MID's sister irrigation district in Turlock--jointly entitling the two to a particular portion of Tuolumne River water. See 38 Stat. 242, 246. Pursuant to the Raker Act, these water rights held firm only if the area included in the two districts did not "in the aggregate ... exceed three hundred thousand acres of land." Id. Between them, the Modesto and Turlock irrigation districts currently include almost--but not quite--300,000 acres, bringing the two very near the threshold of the Raker Act limit. Proper annexation of additional area under *section 56133* (whether of Pittsburg or of the Four Cities Area) would push the districts' aggregate coverage over the 300,000 acre threshold, violating the Raker Act bargain and putting at risk the districts' attendant water rights in the Tuolumne River. See Req. for Jud. Notice, Exh. 22 at p. 241. Only through non-annexation-like (i.e., non-*section 56133*) acquisition, then, can MID expand its area of coverage without paying a substantial attendant price. Id.

[**24] But what MID's attempt to declare itself a "municipal corporation" ignores is as significant as what it concedes. California's courts have long assured that the "municipal [*1165] corporation" label is neither talismanic nor particularly instructive in this context. See, e.g., *Turlock Irrigation Dist. v. Hetrick, 71 Cal. App. 4th at 951* (adding that "irrigation districts are sometimes referred to as municipal corporations, but it seems that they are not municipal corporations in the strict or proper sense of that term ....") (citing, e.g., *Whiteman v. Irrigation District, 60 Cal. App. 234, 237, 212 P. 706 (1922)*) (internal quotation marks omitted). Indeed, state courts have repeatedly rejected arguments effectively identical to the one MID reposits here, see, e.g., *County of Fresno, 100 Cal. App. 4th at 944*; in the Four Cities Area action, in fact, a state court rejected an identical argument on nearly identical facts. For years, California's courts have interpreted *Article XI, section 9(a) not* to "preclude the Legislature from otherwise regulating municipal public utilities" like MID. See, e.g., *California Apartment Assn., 80 Cal. App. 4th at 707*; [**25] *Cucamonga County Water Dist., 22 Cal. App. 3d at 257*. It is the nature of the entity at issue that matters, the state courts have repeatedly reminded, not otherwise meaningless appellations--whether "municipal corporation" or otherwise. *Id.*

This is particularly true for irrigation districts like MID. "Regardless of the legal nature of an irrigation district," the California Court of Appeals has observed, "it is *universally recognized* that an irrigation district has *only those powers granted to it under the enabling legislation.*" *Turlock, 71 Cal. App. 4th at 952-53* (emphasis added). Irrigation districts like MID simply are not pure "municipal corporations" under *Article XI, section 9(a)*, and they are not empowered as such. [15] Id.; see also *DeVita v. County of Napa, 9 Cal. 4th 763, 797, 38 Cal. Rptr. 2d 699, 889 P.2d 1019 (Cal. 1995)*; *Embarcadero Municipal Improvement Dist. v. County of Santa Barbara 88 Cal. App. 4th 781, 786, 107 Cal. Rptr. 2d 6 (Cal. App. 2001)*; *Baldwin v. County of Tehama, 31 Cal. App. 4th 166, 178, 36 Cal. Rptr. 2d 886 (Cal. App. 1994)* ("Local districts established by statute inherently differ in kind from municipal corporations. They draw their [**26] authority from the enactments which create them.

They are created for limited purposes[and] exercise limited powers ...."); *Bottoms v. Madera Irr. Dist., 74 Cal. App. 681, 694, 242 P. 100 (Cal. App. 1925)* ("... such agency has only such powers as are given to it by the act of the Legislature under and by virtue of which it exists ..."); Req. for Jud. Notice, Exh. 21 (Assembly Committee on Utilities and Commerce Notes) ("In that irrigation districts have not definitively been declared [to be] municipal corporations, and the Legislature has not been precluded from regulating municipal public utilities, the Legislature's authority in this matter does not appear to have been precluded by the Constitution."). [17]

16 In arguing to the contrary, MID relies on factually and legally distinct doctrine, often misquoting that doctrine as well. See, e.g., *County of Mariposa v. Merced Irrig. Dist., 32 Cal. 2d 467, 196 P.2d 920 (1948).*

17 In declaring irrigation districts subject to germane statutory limits, California's courts have not read the word "jurisdiction" out of the relevant statutes. The courts have simply construed "jurisdiction" to denote precisely what it generally means in this context, viz., the political boundaries of the district in which the irrigation agency sits. Portions of California statutory and case law confirm as much. See, e.g., *Cal. Gov't Code § 53118* (using the term "jurisdictional boundary" to refer to a particularized geographic and / or political area); *Cal. Election Code §§ 12262*, 17499(b) (same); *County of San Francisco v. County of San Mateo, 10 Cal. 4th 554, 559, 41 Cal. Rptr. 2d 888, 896 P.2d 181 (Cal. 1995).* What Indiana and Ohio law suggest, however heavily MID relies on them, is simply immaterial.

[**27] [*1166] Irrigation districts, rather, are empowered by and through particularized "enabling legislation." Id. The pertinent "enabling legislation" in this context (viz., the Cortese-Knox Act) expressly defines irrigation districts as "district[s] of *limited* powers," see *Cal. Gov't Code § 56037* (emphasis added), assuring that individual districts are confined to circumscribed service areas and "spheres of influence." Id. at *§ 56036*; see also *County of Fresno, 100 Cal. App. 4th at 944* ("As a district of limited powers, Malaga's authority is restricted to those powers expressed and implied in its enabling act."). Subject to a selection of limited exceptions, the same "enabling legislation" precludes public entities like MID from extending areas of service beyond existing boundaries absent prior LAFCO approval--just as MID has attempted here. [18] See *Cal. Gov't Code § 56133*; see also Req. for Jud. Notice, Exh. 16 (discussing the Sacramento Municipal Utility District's application to move outside its establish boundaries); Stats. 1993, ch. 1307, *§ 2* (noting that *section 56133* "plugged [the] loophole" [**28] that allowed agencies to circumvent the LAFCO process). [19]

18 That MID recently received--via the largess of California's legislature--a specific, geographically-limited exemption to *section 56133* for its move into the Four Cities Area confirms as much. See *Cal. Gov't Code §§ 9610, 9611* (noting that the proscriptions of the section do "not apply to electric services provided by [MID] within the geographic areas described in subdivisions (a) and (b) of *section 9610*," that is, in the "Four Cities Area"). If *section 56133* did not apply to MID's move into the Four Cities Area, a legislative exemption would have been logically and legally unnecessary. Indeed, MID needed a legislative exemption to enter the Four Cities Area without LAFCO preapproval precisely *because* it could not lawfully do so otherwise. Unless it complies with *section 56133*--or secures another legislative exemption--MID *a fortiori* cannot enter Pittsburg (or any other area outside its sphere of influence) either.

19 In an attempt to prove *section 56133* inapplicable, MID argues that the relevant statutory "loophole" concerned activities among agencies already subject to particular LAFCO's purview. See Pl.'s Opp. at 8-10. This theory depends on the (erroneous) predicate assumption that MID had statewide jurisdiction *ex ante;* it misstates the purpose of *section 56133*; and it elides the effect of the statute overall. Nothing in the Act or its legislative history suggests that *section 56133* targeted a narrow or limited subset of "districts" (e.g., "park districts"), and MID cannot legitimately argue otherwise. See *Cal. Govt. Code § 56036(a)* ("'District' or 'special district' means an agency of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.").

[**29] The Act makes plain that where an irrigation district wishes to "extend[] [its] services by contract or agreement outside its jurisdictional boundaries" the district must "first request[] and receive[] written approval from the LAFCO in the affected county." Id. MID did the former (i.e., extend its services outside its jurisdictional boundaries), but it did not do the latter (i.e., receive written LAFCO pre-approval). [20] MID thus failed to comply with the terms of its "enabling legislation." It has, in short, failed to satisfy the requirements of *section 56133.*

20 The 1997 amendment to *section 56133* does not change the section's core statutory charge, nor

does it exempt otherwise covered districts altogether. The 1997 amendment merely offers a narrow exception to *section 56133*'s LAFCO preapproval requirement, namely where expansion of service would not "involve the acquisition, construction or installation of electric distribution facilities." See Req. for Jud. Notice, Exh. 10. MID's move into Pittsburg undeniably involved the acquisition of electric distribution facilities--and MID concedes as much--so the 1997 amendment does not apply here.

[**30] In a closely analogous context, a state trial court reached the same conclusion. [*1167] This court is always reluctant to second-guess California's courts on issues of California state law, and it is only more hesitant to do so where, as here, California's courts have reached a manifestly sound determination. Id. MID is not a pure "municipal corporation" under *Article XI, section 9(a)*, and *section 56133* applies to MID's provision of electric services. Thus, unless a specific *section 56133* exception applies, or *section 56133* is otherwise invalid, MID is required to seek LAFCO approval for new or extended services outside its jurisdictional boundaries--something it has not done here. [21]

21 It follows from this conclusion that MID's "jurisdictional boundaries" do not embrace the entire state of California. Like many other state statutory provisions, *section 56133* speaks of a district's "jurisdictional boundaries." See *Cal. Gov't Code § 56133*. These "jurisdictional boundaries" are identical to the political (rather than "land") boundaries of the district in which the irrigation agency sits, and they are, by extension, necessarily smaller than that agency's "sphere of influence." See id. (presupposing that "jurisdictional boundaries" are smaller than a district's "sphere of influence" by permitting expansion beyond the former but within the latter). Since MID's "sphere of influence" is not equivalent to the entire state of California, its "jurisdictional boundaries"--which are *de facto* less expansive than "spheres of influence"--cannot possibly include all of California. MID's claims to the contrary are simply dissimulative and facile.

[**31] II. The Meaning of *Section 22120* and *Section 56133*'s Related Provisions

Because the court finds that the Act's terms apply to MID, it must address two subsidiary questions: first, whether *section 56133* is irreconcilably inconsistent with other provisions of state law (specifically, *section 22120 of California's Water Act*); and, second, whether any of *section 56133*'s related language excuses MID's unapproved expansion into Pittsburg. The first question is easily resolved: *Section 56133* does not repeal--impliedly or otherwise--Water Code *section 22120*. See *Cal. Water Code § 22120*. In pertinent part, *section 22120* permits irrigation districts to "sell, dispose of, and distribute electric power for use outside of its boundaries." Id. The language of *section 22120* is permissive (i.e., "*may* sell ... "), stating only that districts *can* "sell, dispose of, and distribute," not that they have an uncompromised or unilateral rights to do so. Id.; see also *Cal. Water Code § 22115* (stating, likewise, that "any district heretofore or hereafter formed *may* purchase or lease electric power ... and *may* provide for [**32] the acquisition, operation, leasing, and control of plants for the generation, transmission, distribution, sale, and lease of electric power ...") (emphasis added). [22] Like other provisions of California's law, *section 56133* cabins districts' right to "sell, dispose of, and distribute" utility services, specifying *how* and *when* districts may do so but *not* eliminating those rights altogether. See *Cal. Gov't Code § 56133*. This sort of statutory qualification of preexisting statutory rights is not uncommon under California law, see, e.g., *Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 569, 71 Cal. Rptr. 2d 731, 950 P.2d 1086 (Cal. 1998)*; *People v. Atkinson, 115 Cal. App. 2d 425, 427, 252 P.2d 67 (Cal. App. 1953)* (discussing, in a distinct context, the "continuance of [an] old law" consistent with the "modification[s]" inserted by a new one), and nothing in California law [*1168] suggests that the imposition of such procedural limitations constitutes any sort of legislative repeal, implied or otherwise. See, e.g., *California State Employees Ass'n v. California Pub. Employees' Retirement Syst. Bd. of Admin., 113 Cal. App. 4th 137, 144, 5 Cal. Rptr. 3d 922 (Cal. App. 2003)* [**33] ("Repeals by implication are disfavored and are recognized only when potentially conflicting statutes *cannot be harmonized.*") (quoting *Nickelsberg v. Workers' Comp. Appeals Bd., 54 Cal. 3d 288, 298, 285 Cal. Rptr. 86, 814 P.2d 1328 (1991)*) (emphasis added). *Section 22120* and *section 56133* can--and do--coexist easily; the former does not permit MID to ignore the terms of the latter.

22 MID cites a number of other Water Code sections to suggest that it can provide electric services state-wide, but when scrutinized closely, MID's argument amounts to little more than historical misdirection. None of the statutes or cases cited suggest that MID is empowered to expand at its whim. They only suggest that MID *may* expand in certain contexts, like those elaborated in *section 56133*. See, e.g., *Yolo v. Modesto Irrigation Dist., 216 Cal. 274, 277, 13 P.2d 908 (Cal. 1932)*; *Cal. Water Code §§ 22116& 22117*.

Nor does anything else in *section 56133*--whether the limited authorizations [**34] discussed in subsec-

tions (b) and (c) or the exceptions of subsection (e)--excuse MID's unauthorized expansion into Pittsburg. Subsection (b) of *section 56133*, as noted, applies only where a district attempts to expand "*within* [that district's] sphere of influence in anticipation of a later change of organization"; in attempting to grow *outside* its existing "sphere of influence," MID lands outside subsection (b)'s protection. See *Cal. Gov't Code § 56133(b)* (emphasis added); see also *Cal. Gov't Code § 56076* (defining "spheres of influence" as plans "for the probable physical boundaries and service area of a local agency" or district). Subsection (c), in turn, applies only where a district expands in response to an "existing or impending threat to public health or safety," and even then only after proper "documentation" and notice are provided; none of these factors pertain here. Id. at *§ 56133(c)*.

And the series of exceptions listed in subsection (e) is inapplicable as well--as MID conceded during oral argument. In pertinent part, subsection (e) reads:

> This section does not apply to contracts or agreements [**35] solely involving two or more public agencies where the public service to be provided is an alternative to, or substitute for, public services already being provided by an existing public service provider and where the level of service to be provided is consistent with the level of service contemplated by the existing service provider .... This section does not apply to an extended service that a city or district was providing on or before January 1, 2001. This section *does not apply to a local publicly owned* electric utility, as defined by *Section 9604* of the Public Utilities Code, providing electric services that do not involve the acquisition, construction, or installation of electric distribution facilities by the local publicly owned electric utility, outside of the utility's jurisdictional boundaries. [23]

See *Cal. Gov't Code § 56133(e)*. [24] Of the three relevant "does not apply" clauses, the first (viz., the clause discussing contracts) might seem to present the most difficult question, but it does not apply here. As a part of its expansion plan, MID entered a series of contracts with a variety of entities, including a permission agreement [**36] with the City of Pittsburg. The permission agreement purported to [*1169] allow MID to offer electric services in the Pittsburg area, seemingly confirming Pittsburg's approval of--or acquiescence in--MID's expansion. But Pittsburg's approval of MID's move can only go so far. It cannot itself permit MID to expand absent LAFCO preapproval, and it cannot function as a surrogate for the type of agreement envisioned by subsection(e). Under subsection (e), a district need not comply with *section 56133* where there exist "contracts or agreements solely involving two or more public agencies where the public service to be provided is an alternative to, or substitute for, public services already being provided by an existing public service provider and where the level of service to be provided is consistent with the level of service contemplated by the existing service provider." Id. Were Pittsburg granting MID the right to compete with (or to replace) the City of Pittsburg *itself* as supplier of utilities and services, and were MID promising to offer services on a par with those already offered to Pittsburg's residents by PG&E, the relevant portion of subsection (e) might apply. But the MID-Pittsburg [**37] agreement does neither. It simply condones--and attempts to effectuate--MID's attempt to select a group of particularly profitable customers (notably, Praxair) while usurping PG&E's status as Pittsburg's state-licensed electricity provider. No guarantees are made regarding the level and extent of service MID plans to offer, and no legitimate pro-competitive benefit accrues to anyone, least of all Pittsburg's residents. Subsection (e) does not sanction the kind of end-run bargain MID and the City of Pittsburg have crafted, and the first "does not apply" clause of subsection (e) cannot excuse MID's unauthorized expansion into Pittsburg. Id. [25]

23 In its opposition brief, MID offers a curious discussion of the coverage of the 1997 amendment, referencing portions of the amendment's legislative history (viz., those discussing the Sacramento Municipal Utility District) and Water Code sections discussing sales of "surplus" power. See Pl.'s Opp. at 11. The argument is neither directly germane nor particularly instructive, nor is it correct. See Req. For Jud. Notice, Exh. 17 (Legislative History) (discussing expressly the application of the amendment to "more than" the Sacramento Municipal Utility District).

[**38]

24 California's courts have yet to discuss subsection (e) in any detail, but the language of the statute conduces to straightforward explication.

25 The City of Pittsburg is not a utility provider, so its agreement with MID does not directly concern the provision of alternative or substitute electric services. And to say that Pittsburg could enter a contract with MID to permit MID to offer services would strip the PUC and CPUC processes of meaning and effect.

The same is true of the remaining two "does not apply" clauses. For one, MID never actually provided electric service to Pittsburg, delaying its project after PUC intervened at FERC on PG&E's behalf, so it was not pro-

viding an extended service "on or before January 1, 2001." Id. For another, MID's expansion into Pittsburg required the acquisition of electric distribution facilities (viz., one of Praxair's substations), so the final clause does not protect MID's expansion, either. Id. Indeed, nothing in subsections (b), (c), or (e) permit the kind of unauthorized expansion MID has attempted. The LAFCO pre-approval provisions [**39] of *section 56133* thus apply to MID's move into Pittsburg; as MID readily concedes, it has failed to abide these terms.

III. Antitrust Injury [26]

26 According to MID's papers, this issue is both improperly before the court and already resolved by the Ninth Circuit. See Pl.'s Opp. at 22-23; *Modesto Irrigation Dist. v. PG&E, 54 Fed. Appx. at 883*. But MID's argument is incorrect in both parts, and MID conceded as much during oral argument. The court is mindful that the Ninth Circuit held that MID can *allege* antitrust injury in this case. Id. Even if MID can *allege* antitrust injury, however, it cannot necessarily *prove* it; indeed, the fact that MID violated *section 56133* confirms that it cannot. It follows that MID's antitrust action against PG&E cannot survive. This court will not force PG&E to engage in the unnecessary exercise of filing a separate motion asking the court explain the significance and unavoidable consequence of this conclusion. During oral argument, even MID agreed that such extra steps are unnecessary.

[**40] Courts have long recognized that "an action under the antitrust laws will not lie where the business conducted by the [*1170] plaintiff, and alleged to have been restrained by the defendant, was itself unlawful." *Jenkins v. Greyhound Lines, Inc., 1971 U.S. Dist. LEXIS 13448, 1971 WL 529, *1 (N.D. Cal. 1971)*(Schacke, J.)(citing, e.g., *Okefenokee Rural Mem. Corp. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954)*); *Cottonwood Mall Shopping Ctr. v. Utah Power & Light Co., 440 F.2d 36, 38-40 (10th Cir. 1971)*. This is so, courts have reasoned, because a party cannot prove a cognizable antitrust injury when it itself engaged in unlawful conduct *ex ante*. See, e.g., *Snake River Valley Electric Ass'n v. Pacificorp, 357 F.3d 1042, 2004 U.S. App. LEXIS 1966, 2004 WL 231235, *6 n.8 (9th Cir. 2004)* ("Even if PacifiCorp acted anti-competitively by refusing to wheel [power to the association], there is no injury to [the association] because it could not have taken any of PacifiCorp's customers *absent affirmative action by the PUC* ....") (emphasis added); see also *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)* [**41] (noting that, to succeed on an antitrust claim, a plaintiff must "*prove* the existence of *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent") (citation and internal quotation marks omitted; first emphasis added); *Vinci v. Waste Mgmt., Inc., 80 F.3d 1372, 1376 (9th Cir. 1996)* (holding that a plaintiff who is neither a proper competitor nor a legitimate consumer in the relevant market cannot claim to have suffered cognizable antitrust injury); *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co., 113 F.3d 405, 415 (3d Cir. 1997)*.

Adhering to this well-founded principle, the court finds that MID cannot prove--as opposed to allege--that it suffered antitrust injury in this instance. MID possessed neither the legal right nor the necessary LAFCO permission to expand its services into Pittburg. *Id.* Instead, MID attempted to enter Pittsburg unilaterally, thereby contravening controlling state law and attempting to derive income without attendant "legal right." See *National Ass'n of Pharmaceutical Mfrs. v. Ayerst Labs., 850 F.2d 904, 913 (2d Cir. 1988)* (citations omitted). [**42] Because MID's conduct was unlawful by its own terms, PG&E's response--however anti-competitive or seemingly monopolistic--could not inflict an cognizable antitrust injury; i.e., MID cannot *prove* it sustained cognizable antitrust injury here. *Id.*; see also *Snake River Valley Electric Ass'n, F.3d , 357 F.3d 1042, 2004 U.S. App. LEXIS 1966, 2004 WL 231235, at *6 n.8*. Absent the ability to prove such an injury, MID's antitrust claims are untenable at their core. See *Atlantic Richfield Co., 495 U.S. at 334*. [27]

27 The elimination of MID's antitrust claims disposes of all claims in this action. MID's second amended complaint does refer to "related state law claims," but *all* of the claims actually articulated in the complaint are antitrust claims. Neither party disputes this conclusion.

CONCLUSION

Defendant's motion for summary judgment is GRANTED.

IT IS SO ORDERED.

Date: March 18, 2004

/s/

MARILYN HALL PATEL

Chief Judge, United States District Court

Northern [**43] District of California

PROOF OF SERVICE

I, undersigned declare under penalty of perjury that I am over the age of 18 and not a party to the within action; my business address is: 520 South Grand Avenue, Suite 300, Los Angeles, California, 90071-2610; telephone (213) 892-1592.

On October 26, 2010, I served on interested parties in said action the following document(s): **APPELLANT'S OPENING BRIEF**

The document(s) referenced herein was served to the parties on the attached Service List by the following means:

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I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction the service was made and that the foregoing is true and correct.

Executed on October 26, 2010, at Los Angeles, California.

Socorro Romero

(Signature)

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