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CERTIFIED FOR PARTIAL PUBLICATION[1]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

RECLAMATION DISTRICT NO. 684, Plaintiff and Appellant, v. STATE DEPARTMENT OF INDUSTRIAL RELATIONS et al., Defendants and Respondents; FOUNDATION FOR FAIR CONTRACTING, Real Party in Interest and Respondent.	C044814 (Super. Ct. No. CV019537)

APPEAL from a judgment of the Superior Court of San Joaquin County, Bob W. McNatt, Judge. Affirmed.

Nomellini, Grilli & McDaniel, Dante John Nomellini, Daniel A. McDaniel for Plaintiff and Appellant.

Gary J. O'Mara, Christopher Frick, Vanessa L. Holton, Sarah L. Cohen, for Defendants and Respondents.

Stanton, Kay & Watson, James P. Watson, for Real Party in Interest and Respondent.

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[1] Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II and III of the Discussion.

Reclamation District No. 684 (District) appeals from a judgment that denied its petition for a writ of mandamus. District seeks to vacate the determination of the Director (Director) of the Department of Industrial Relations (DIR) that the maintenance work done on a levee to protect an island in the Delta from flooding was a public works project subject to the prevailing wage laws. (Lab. Code, § 1720 et seq.)[2]

The Director is authorized to determine, pursuant to a request by an interested party, whether a "specific project or type of work to be performed" is covered under the prevailing wage laws as a public work. (Cal. Code Regs., tit. 8, §§ 16001-16002.5, hereafter Title 8.)

District contracted with a manufacturing firm to place fill on a levee in the Delta but did not require it to pay prevailing wages to its employees. The work has been performed. An interested party, the Foundation for Fair Contracting (FFC), obtained a coverage determination from the Director that the work was subject to the prevailing wage laws. District challenges the determination. It contends the maintenance work was not a "public work" because it is exempt as involving the "operation of [an] irrigation or drainage system of [a] reclamation district . . . ." (§ 1720, subd. (a)(2).) We disagree.

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[2] A reference to a section is to the Labor Code unless otherwise designated.

In the published portion of the opinion we conclude the maintenance work did not involve the operation of the District nor is there any showing the work had anything to with irrigation or drainage.

District also argues the doctrines of res judicata and collateral estoppel barred DIR from relitigating the issue whether the maintenance work was public work. It also argues that the Director's determination was void as a regulation adopted in violation of the Administrative Procedure Act (APA).

We shall affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

District is a political subdivision of the State of California that exists pursuant to the provisions of Water Code sections 50000, et seq. Its jurisdiction encompasses Lower Roberts Island, an island in the Delta in San Joaquin County. The Natali levee is a dry land levee on which Natali Road is located. Its purpose is to protect Lower Roberts Island from flooding.

On April 27, 2001, District contracted with Holt Repair and Manufacturing, Inc. (Holt) to perform maintenance work on the Natali levee. It consisted of placing 13,480 tons of earth fill and 400 tons of Class 2 aggregate base on the levee adjacent to the Natali Road. The purpose of the work was to maintain the levee in a condition to withstand flooding from Middle Roberts Island. The work was completed on or about June 8, 2001.

On October 9, 2001, the FFC sent a request to the DIR for a coverage determination to the Director, asking whether the work performed by Holt was a "public work" subject to the prevailing wage laws. (§ 1720; Title 8, §§ 16000 ff.) On July 1, 2002, the Director issued a determination pursuant to Title 8, section 16001, subdivision (a) that the Natali Levee work was a public work subject to the payment of prevailing wages under sections 1720 and 1771.

District appealed the Director's determination of coverage pursuant to Title 8, section 16002.5. It argued that under principles of res judicata and collateral estoppel, a prior superior court decision involving a different project (*Dutra Construction Co. v. DIR, et.al.* (Super. Ct. San Joaquin Co., 1990, No. 187912) prevented the Director from determining the Natali Levee project was a public work. District also argued that the Director's determination was a regulation adopted without compliance with the Administrative Procedure Act (APA).

The Director denied the appeal. District filed a petition for writ of mandate in the superior court. The trial court denied the petition. This appeal followed.

DISCUSSION

I
Labor Code Section 1720

District argues the Director and the trial court improperly interpreted section 1720 as applied to the specific project at issue. It claims the project was exempted from the definition

of public work by the exclusion from the definition of an "operation of [an] irrigation or drainage system . . . ." (§ 1720, subd. (a)(2).) We disagree.

a. Standard of Review

The Director's determination arises under Title 8, sections 16001 and 16002.5. Section 16001 authorizes the Director to resolve a "request [of an interested party][3] to determine coverage under the prevailing wage laws regarding either a specific project or type of work to be performed . . . ." In this case the determination involves a specific project which has been completed and therefore is not to be performed.[4] Title 8, section 16002.5 authorizes an appeal of the Director's determination. Both avenues of relief were pursued.

The Director's authority under Title 8, section 16002.5 is deemed to be quasi-legislative and subject to judicial review under Code of Civil Procedure section 1085. (*Id.* at subd. (c).) The judicial review of the quasi-legislative act of an administrative agency is generally limited to the question

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[3] "When used with reference to a particular prevailing wage determination made by the Director" the term "interested party" includes "[a]ny contractor . . . or any organization, . . . or other representative of any contractor or subcontractor likely to bid on or to perform a contract for public work which is subject to the particular prevailing wage determinations . . . ." (Tit. 8, § 16000, subd. (b)(7)(1).)

[4] The parties have not suggested the phase "to be performed" modifies the term "specific project" nor does it appear to us that it does. Accordingly, we conclude that the coverage of a specific project may be determined regardless whether work on the project has been completed.

whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11.) However, when "a regulation is challenged as inconsistent with the terms or intent of the authorizing statute, the standard of review is different, because the courts are the ultimate arbiters of the construction of a statute." (*Ibid;* see also *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1584.) The interpretation of a statute is a matter of law over which we exercise our independent judgment.

b. Labor Code and Rules

Two statutes are pertinent. Section 1771 sets forth the basic rule regarding the payment of prevailing wages on public works. It states, with exceptions not pertinent here, that "not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works." It expressly provides that "[t]his section is applicable to contracts let for maintenance work."[5]

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[5] The meaning of "maintenance" is amplified by the California Code of Regulations. (Tit. 8, § 16000.) It includes: "Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes

Section 1720 generally defines "public works" as "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds . . . ." (§ 1720, subd. (a)(1).)[6] It includes work done for reclamation districts, but does not include "the operation of the irrigation or drainage system of any irrigation or reclamation district . . . ." (§ 1720, subd. (a)(2).)

c. The Contract

The content of the contract in issue is not in dispute. It called for Holt to furnish and place approximately 13,480 tons of fill earth and 400 tons of aggregate base along the side of the Natali Levee for the price of $61,402.[7] The purpose was to protect the Lower Roberts Island from flooding. There is no showing in the record that the levee had anything to do with irrigation or drainage. It has been a component of District's reclamation works for more than 75 years. At the time the work

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in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired." (*Ibid.*)

[6] Prior to 1974 section 1771 provided that prevailing wages "shall be paid to all workmen employed on public works *exclusive of maintenance work.*" (Stats. 1953, ch. 1706, § 3, p. 3455, italics added.) The italicized words were deleted in 1974 and the present language of inclusion was added. (Stats. 1974, ch. 1202, § 1, p. 2593.) Accordingly, maintenance work is within the general definition of public works. For this reason *Franklin v. City of Riverside* (1962) 58 Cal.2d 114, cited by District, is inapposite. It relied on the pre-1974 law. (*Id.* at p. 116.)

[7] However, the invoices from Holt indicate it charged District $82,661.59.

was performed the levee was completely functional and had not failed or been breached. The work was done to strengthen the levee so that it would withstand flooding from Middle Roberts Island. The title of the contract documents given to bidders was "2001-2002 Levee Maintenance Project Natali Levee Rehabilitation Lower Roberts Island."

d. Analysis

District apparently concedes the work in question was maintenance work, but argues that it is exempted from the definition of public work as the operational work of a reclamation district. There is no support for this contention.

There is no ambiguity in the statutory scheme. The general rule is that any work done for a reclamation district is "public work" and that maintenance work is included. The exception is the operation of an irrigation or drainage system. The "operation" of a system connotes the day-to-day business of running the system. This is frequently done by employees of the district.[8] The day-to-day running of an irrigation or drainage system involves such things as the turning of valves that permit an irrigation or drainage system to function. The record indicates the levee in this case operates to prevent flooding.

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[8] Thus, subdivision (a)(2) of section 1720 is generally applicable only when an irrigation or reclamation district contracts out all or portions of the operation of its irrigation or drainage system in lieu of using its own employees to operate it.

It says nothing about irrigating or draining the land which the levee protects.

District failed to meet its burden of showing the work fell within the exception. (*Citizens for Improved Sorrento Access, Inc. v. City of San Diego* (2004) 118 Cal.App.4th 808, 814.)

II

Res Judicata and Collateral Estoppel

With regard to district's claim of res judicata and collateral estoppel, the trial court found, "there is no 'common nucleus of operative facts.' These matters involved two different projects, at two different locations, involving two different contractors." We agree.

District argues, under the doctrines of res judicata and collateral estoppel, a prior San Joaquin County Superior Court decision involving a different reclamation district and a different project is binding in this matter. The argument is incorrect for two reasons.

Res judicata is not available "to foreclose the relitigation of an issue of law covering a public agency's ongoing obligation to administer a statute enacted for the public benefit and affecting members of the public not before the court." (*California Optometric Assn. v. Lackner* (1976) 60 Cal.App.3d 500, 505.) The prevailing wage law was enacted to protect and benefit employees on public works projects. (*Department of Industrial Relations v. Seaboard Surety Co.* (1996) 50 Cal.App.4th 1501, 1507.) DIR has the obligation to

administer the statutes on their behalf. Were we to find the prerequisites to an application of res judicata present, it would nevertheless be inappropriate to apply the doctrine in this case.

Neither the claim preclusion nor the issue preclusion aspects of res judicata are available to District under the circumstances here. "The doctrine of res judicata is composed of two parts: claim preclusion and issue preclusion. Claim preclusion prohibits a party from relitigating a previously adjudicated cause of action; thus, a new lawsuit on the same cause of action is entirely barred. [Citation.] Issue preclusion, or collateral estoppel, applies to a subsequent suit between the parties on a different cause of action. Collateral estoppel prevents the parties from relitigating any *issue* which was actually litigated and finally decided in the earlier action. [Citation.] The issue decided in the earlier proceeding must be identical to the one presented in the subsequent action." (*Flynn v. Gorton* (1989) 207 Cal.App.3d 1550, 1554.)

District was not a party to the prior litigation. It was initiated by Dutra Construction Company, which sought the return of fees seized by DIR for the violation of sections 1720, et seq. in relation to a project performed for Reclamation District No. 2023. District cannot assert the claim preclusion aspect of res judicata, seeking to use the former judgment as a bar, because the cause of action is not the same. (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 408, p. 983.)

A stranger to a former judgment may invoke the doctrine of collateral estoppel against one who was a party to the former judgment only if the issue previously decided is identical to the one sought to be relitigated. (*Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 852.) "'[I]f the very same facts and no others are involved in the second case, . . . the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change. But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus, the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue. It may then reach a different result or, if consistency in decision is considered just and desirable, reliance may be placed upon the ordinary rule of stare decisis. Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment.' [Citations.]" (*Ibid.*, quoting *Commissioner v. Sunnen* (1948) 333 U.S. 591, 601-602 [92 L.Ed. 898, 908].)

The former decision involved a different levee, a different contract, a different contractor, and a different reclamation

district. In such a situation, the doctrine of collateral estoppel is unavailable.[9]

III
The APA

With regard to District's claim the Director violated the APA, the trial court found the Director was empowered by statute and regulation to determine whether a particular work is covered by the prevailing wage laws, and the trial court's task was simply to determine whether the Director abused his discretion. The trial court found no abuse of discretion.

District argues the Director's coverage determination was void as an underground regulation that did not comply with the rule making provisions of the APA. It claims the determination was a regulation because it is deemed a quasi-legislative act and because DIR admits the decision was precedental. (Tit. 8, § 16002.5, subd. (c).)

The APA establishes a procedure that state agencies must follow in adopting a regulation. The statues provide for public notice, comment, hearing, filing, review, and approval. (Gov. Code, §§ 11346.2, 11346.4, 11346.5, 11346.8, 11346.9, 11347.3, 11349.1, 11349.3; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568 (*Tidewater*); *Kings Rehabilitation Center, Inc. v. Premo* (1999) 69 Cal.App.4th 215, 217.) Failure

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[9] Collateral estoppel is also unavailable because the judgment in the prior case was that the levee work was a reconstruction of the levee and not within the exception for operation of the drainage system. Any statements the court made about when such work would fall within the operations exception is mere dicta.

to comply with the APA in adopting a regulation voids the regulation. (Gov. Code, § 11340.5; *Tidewater, supra*, 14 Cal.4th at p. 570; *Kings Rehabilitation, supra*, 69 Cal.App.4th at p. 217.) The APA applies "to the exercise of any quasi-legislative power conferred by any statute" as well as to administrative rules which interpret a statute. (Gov. Code, § 11346; *Tidewater, supra*, at pp. 571-572.)

A regulation is defined as "every rule, regulation, order, or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Gov. Code, § 11342.600.) However, the procedures for adopting a regulation are not applicable to a "regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state." (Gov. Code, § 11340.9, subd. (i).)

In *Tidewater, supra*, the Supreme Court, citing to Government Code section 11343, subdivision (a)(3), the predecessor of Government Code section 11340.9, subdivision (i), acknowledged that agencies may provide private parties with advice letters, and that such letters are not subject to the rulemaking provisions of the APA. (14 Cal.4th at p. 571.)

Tidewater cited as an example the determination by the Division of Labor Standards Enforcement that an employer must pay employees who are required to be on the premises and on call, although permitted to sleep, was not a regulation because it was no more than an interpretation and application of a

regulation to a specific situation. (*Tidewater, supra,* 14 Cal.4th at p. 572, citing *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 24-28.) Likewise, resolutions of the California Toll Bridge Authority adopted authorizing the issuance of revenue bonds were not regulations because they were not of general application but were adopted for particular application to the subject project. (*Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324.) These examples indicate there is no regulation where an agency merely interprets a statute or regulation and applies it to the specific facts of the case before it.

The determination at issue was not a policy or procedure adopted by the DIR to be applied generally. Rather, it interpreted the relevant statutes as they applied to a specific set of facts. It was an advice letter. The determination specifically references the Natali Levee project. It restates the specific facts of the project that are pertinent to the application of the Labor Code. It states the number of tons of fill and rock to be furnished, the nature of the work to be done, the contract price, and the purpose of the work. The conclusion of the determination letter is "the work performed by Holt Repair and Manufacturing, Inc. . . . on the Natali Levee Rehabilitation Project . . . under contract with San Joaquin County Reclamation District No. 684 . . . is a public work subject to the payment of prevailing wages." The language of the determination indicates it was directed to a specifically named group of persons and to a specific set of facts. It was

intended to apply only to the Natali Levee project and was not a general statement of policy intended to apply statewide. As such, it was not a regulation subject to the procedures of the APA.[10]

Lastly, the fact that the coverage determination may be precedental is not determinative. "[I]nterpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases. [Citations.]" (*Tidewater*, *supra*, 14 Cal.4th at p. 571.)

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[10] DIR asserts the determination was also exempt from the APA's rulemaking requirements pursuant to Government Code section 11340.9, subdivision (g), which exempts "[a] regulation that establishes or fixes rates, prices, or tariffs." DIR cites to *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, which stated that coverage determinations are an integral part of the establishment of wage rates, and as such are also exempt from the APA.

In *Winzler & Kelly*, the issue was whether surveyor classifications were covered under the prevailing wage laws. The court held the determination that surveyors were covered was exempt from the procedural requirements for adoption of regulations under Government Code section 11380, subdivision (a)(3) (see now § 11340.9, subd. (g)) exempting regulations that establish or fix "rates, prices, or tariffs . . . ." (121 Cal.App.3d at p. 126.) The court reasoned that in fixing the rate for each type of work the Director must necessarily determine whether the type of work is covered under the prevailing wage law, thus the coverage question is exempted as an integral part of fixing the rate for each type of work. (*Id.* at p. 128.)

We have no occasion to determine whether a coverage question which is not decided in the context of setting a prevailing wage is covered by *Winzler & Kelly*.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

MORRISON, J.

ROBIE, J.