

In the Supreme Court of the State of California

ELK HILLS POWER, LLC,
Plaintiff and Appellant,

v.

**CALIFORNIA STATE BOARD OF
EQUALIZATION AND COUNTY OF
KERN,**

**Defendants and
Respondents.**

**SUPREME COURT
FILED**

Case No. S194121

JUN 26 2012

Frederick K. Ohlrich Clerk

Deputy

Fourth Appellate District, Division One, Case No. D056943
San Diego County Superior Court, Case No. 37-2008-00097074-CU-
MC-CTL; The Honorable Ronald L. Styn, Judge

**RESPONDENT'S OPPOSITION TO MOTIONS FOR JUDICIAL
NOTICE FILED BY CALIFORNIA TAXPAYER ASSOCIATION,
CALIFORNIA MANUFACTURERS & TECHNOLOGY
ASSOCIATION AND SILICON VALLEY LEADERSHIP GROUP;
AND BROADBAND TAX INSTITUTE**

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I. INTRODUCTION

Respondent California Board of Equalization ("the Board") respectfully submits the following objections to the Requests for Judicial Notice (RJN) filed by the following applicants: (1) California Taxpayer Association ("CalTax") and California Manufacturers & Technology Association and Silicon Valley Leadership Group (collectively, "CalTax, et al."), and (2) Broadband Tax Institute ("Broadband"). This Court should deny the request of CalTax, et al. in its entirety and portions of Broadband's request for lack of relevancy to the issues raised in this action, lack of foundation, and hearsay.

II. ARGUMENT

A. CalTax, et al.'s Request Should Be Denied for Lack of Relevance, Lack of Foundation, and Hearsay.

1. CalTax, et al.'s Proffered Materials Are Inadmissible.

CalTax, et al.'s request should be denied in its entirety for lack of relevance, lack of foundation, and hearsay. Further, the Board objects to the Court taking judicial notice of the following documents on the following grounds:

- a. **Items 1-6:** "Materials Considered by California Legislature in Enacting SB 657"

Objection: Irrelevant as to legislative intent as this lobbyist's advocacy material does not shed light on the collegial view of

the Legislature as a whole; lack of proper foundation as not certified or otherwise properly authenticated; hearsay.

- b. **Items 7-16:** "Legislative History of SB 657"

Objection: Lack of proper foundation as not certified or otherwise properly authenticated; hearsay; irrelevant.

- c. **Items 8 and 13:** Senator Maddy's letters to Senator Thompson and to Governor Wilson

Objection: Irrelevant as to legislative intent as only reflecting the views of one legislator and thus not probative as to the collegial view of the Legislature as a whole; lack of proper foundation as not certified or otherwise properly authenticated; hearsay.

- d. **Item 14:** Governor's Office of Planning and Research Enrolled Bill Report for SB 657

Objection: Lacks proper foundation as not certified or otherwise properly authenticated; hearsay.

- e. **Item 17:** "California Attorney General, Indexed Letter No. 10485 (February 4, 1936)"

Objection: This document, which antedates the relevant authorities upon which the parties rely in this appeal, is irrelevant as it merely indicates that intangible assets are not in and of themselves subject to property tax, a point that is not

in dispute despite appellant Elk Hills Power's (EHP) many factual mischaracterizations. The document also lacks proper foundation in that it is not certified or otherwise properly authenticated, and thus also is hearsay as submitted.

- f. **Entire Request:** In addition to the above objections, the Board objects to the entire Request for Judicial Notice under Evidence Code section 352 (any probative value in the proffered material is greatly outweighed by the undue consumption of time that will be entailed for the Court in having to address this newly submitted post-briefing material).¹

2. Even if the Materials Submitted by CalTax, et al. Were Relevant and Properly Authenticated, this Court Has the Discretion to Decline to Take Judicial Notice of Them.

Evidence Code section 459, subdivision (a) provides that a reviewing court “may” take judicial notice of any matter specified in section 452. For its part, section 452, subdivision (b) of the Evidence Code states that judicial notice “may” be taken of such matters as “official acts” of a legislative or executive department of a state.

¹ As acknowledged by CalTax, et al., its Request for Judicial Notice here is substantially the same as the one it submitted to the Court of Appeal, but which was rejected by that court. (See CalTax, et al. RJN, p. 5, fn. 1.)

In deciding issues raised in an appeal, a reviewing court will ordinarily look only to the record made in the trial court. (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325.) While the reviewing court may take judicial notice of matters not before the trial court, it need not do so. (*Ibid.*) An appellate court may properly decline to take judicial notice under Evidence Code sections 452 and 459, of a matter that should have been presented to the trial court for its consideration in the first instance. (*Id.* at pp. 325-326.) Therefore, this Court has the discretion to decline to take judicial notice of the materials submitted by CalTax, et al.

3. Letters to Subsets of the Legislature and to the Governor (Items 1 through 4) Are Not Properly Considered in Determining Legislative Intent.

Statements from interested parties must at a minimum be shown to have been communicated to the Legislature as a whole and not just to individual members, subsets of the Legislature, or the Governor. (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062, fn. 5; *Collins v. Department of Transportation* (2003) 114 Cal.App.4th 859, 870, fn. 11.)

Items 1 through 4 of CalTax, et al.'s request consist of letters or memoranda written by CalTax, a special-interest lobbying organization to members of specified legislative committees (Items 1 and 2), to members of one legislative house but not the other (Item 3), and to the Governor (Item 4). As such, these items run afoul of the requirement of relevance.

4. CalTax's Memoranda and Newsletters (Items 1 through 6) Are Not Reliable Legislative History Materials Due to CalTax's Role as a Lobbyist.

In addition to the lack of a showing that the submitted documents were addressed to the entire Legislature, let alone considered by it, the newsletters from CalTax are particularly objectionable as they constitute an attempt to substitute an interest group's subjective viewpoint in place of appropriate, objective indicia of legislative intent.

The California Supreme Court has summed up the fundamental problem with requests such as that of CalTax here as follows: “[J]udicial reliance on legislative materials like committee reports . . . may give unrepresentative committee members – *or, worse yet, unelected staffers and lobbyists* – both the power and the incentive to *attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.*” [Citation.]” (*Martinez v. Regents of University of Calif.* (2010) 50 Cal.4th 1277, 1293, italics added.)

CalTax's website makes it clear that CalTax is a special-interest lobbyist. The website states:

The most experienced tax policy and *tax-lobbying* staff in Sacramento resides with CalTax. *When working on tax policy problems before the Legislature, tax agencies, local governments, in court, or on statewide ballots, the CalTax advocacy team is an effective business partner with member companies.*

(<http://www.caltax.org/about/about.html> (last visit June 6, 2012), italics added.)

Furthermore, although CalTax sponsored SB 657, the enacted legislation contained provisions substantially different than those originally proposed by CalTax due to concerns relating to potential unconstitutionality, as discussed in the Board's Respondent's Brief. (See also Defendant's Request for Judicial Notice, II CT 387-473 (SB 657 legislation).) Thus, CalTax's viewpoints on SB 657 have little or no probative value as to legislative intent on the language ultimately adopted.

Specifically, Items 1-4 are copies of materials CalTax submitted during the legislative process of SB 657. These items constitute non-objective and unreliable legislative history materials because CalTax is a lobbyist and sponsor of certain proposed provisions of the bill, some of which were not enacted as proposed. The notion that Items 5 and 6, CalTax newsletters, could be considered part of "legislative history" represents a novel attempt to insinuate professional lobbyists into the legislative process. There is absolutely no authority for a special interest group to use its own newsletters as evidence of legislative intent, and the proffering of this material illustrates how far CalTax believes it must reach to create a case.

The sole authority relied on by CalTax, *Martin v. Szeto* (2004) 32 Cal.4th 445, does not stand for the proposition that where there is a conflict

in statutory interpretation, the views of a lobbyist on one side may be judicially noticed as “legislative history.” In *Martin*, this Court did not adopt the views of one side to determine legislative intent. Rather, the Court pointed out that, on the issue of interpretation in question, all sides in the legislative debate were in agreement as to the intent of the provision in question. (See *id.* at pp. 450-451 [statements about pending legislation are entitled to consideration to the extent they constitute "a reiteration of legislative discussion and events leading to adoption of proposed amendments rather than merely an expression of personal opinion"].) Such is not the case here. Rather, CalTax, et al.'s memoranda and newsletters merely reflect its own interpretation and understanding of the bill.

Doubtless other entities and interest groups were involved in various stages of the legislation in question. This Court should not allow itself to become entangled in competing claims of authorship from various non-elected entities, none of whom were members of the Legislature. Rather, the Court should adhere to the rule that, if there is doubt at all about legislative intent, courts should look to those materials adopted by the Legislature. (See *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 590-591.)

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5. The Individual Senator's Letters Submitted by CalTax, et al. (Items 8 and 13) Should Be Rejected Because the Views of an Individual Legislator Do Not Shed Light on the Collegial View of the Legislature as a Whole.

The California Supreme Court has held that, as a general rule, in order to be admissible, legislative history must shed light on the collegial view of the Legislature as a whole. (*Calif. Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 701; see also *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 30.) The Supreme Court has frequently stated that "the statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation. [Citations.]" (*Quintano v. Mercury Casualty Co., supra*, 11 Cal.4th 1049, 1062.)

The views of individual legislators carry little weight in interpreting the intent of the legislative body as a whole. (See *People v. Johnson* (2002) 28 Cal.4th 240, 247.) The Supreme Court explained in response to a similar argument regarding a different statute: "Floor statements from two Senators cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory context." (*Martinez v. Regents*

of University of Calif., supra, 50 Cal.4th 1277, 1293, quoting *Barnhart v. Sigmon Coal Co.* (2002) 534 U.S. 438, 457.)

Items 8 and 13, the purported legislative history materials submitted by CalTax, et al., only reflect the individual views of a single state senator rather than the legislative body as a whole. Therefore, these requests should be denied. (See *People v. Garcia* (2002) 28 Cal.4th 1166, 1176, fn. 5; see also *People v. Patterson* (1999) 72 Cal.App.4th 438, 443.)

6. The Materials that CalTax, et al., Submitted for Judicial Notice Should Be Rejected in Their Entirety on the Ground of Lack of Foundation.

The foundation requirement for writings is that a copy of a document must be authenticated before it is received into evidence or before secondary evidence of its contents may be received. (Evid. Code, §§ 1401, 1531.) The materials submitted are not certified under Evidence Code section 1530, subdivision (a)(2) – as the copies are not “attested or certified as a correct copy of the writing or entry by a public employee, or a deputy of a public employee, having the legal custody of the writing” – or otherwise properly authenticated; and thus, are subject to objection for lack of proper authentication.

The Board also brings to the Court’s attention the fact that, due to the volume of these submissions to the Court and the Board, the Board has had insufficient time to examine the entire submission and determine whether or not the copied materials are accurate or complete.

A more thorough investigation may reveal further authentication issues. However, it should not be the burden of the Board or of the Court to authenticate documents proffered by an amicus applicant. (See Evid. Code, § 403, subd. (a)(3) [the party offering the writing has the burden of offering sufficient evidence of its authenticity to sustain a finding of fact to that effect].) The time required for the authentication of the unauthenticated documents and the prejudice resulting to the Board therefrom is not justified by the, at most, *de minimus* probative value of these materials.

**7. The Materials that CalTax, et al. Submitted for
Judicial Notice Should Be Rejected in Their
Entirety on the Ground of Hearsay.**

Evidence is hearsay if it is a statement made out-of-court offered to prove the truth of the matter asserted. (Evid. Code, §§ 135, 1200, subd. (a).) The materials submitted are subject to hearsay (and multiple hearsay) rules, as the requirements of Evidence Code section 1280 (Record by Public Employee exception) were not met. Thus, the contents of the documents submitted by CalTax, et al., may not be used to attempt to prove the “truth of the matter stated.”

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8. The Materials that CalTax, et al., Submitted Should Be Rejected in Their Entirety Because They Lack Sufficient Probative Value in this Case When Weighed against the Consumption of Time and Resources Necessarily Entailed and the Resulting Prejudice to the Board.

As to the Request for Judicial Notice taken as a whole, the Board also respectfully objects under Evidence Code section 352. The voluminous new material, submitted after briefing by the parties was completed, is prejudicial as substantial time and resources would need to be committed to addressing this lengthy new material, which has little or no probative value to any issue before the Court.

B. Portions of Broadband's Request for Judicial Notice Should Be Denied for Incompleteness and Lack of Foundation.

We object to the admission of the following items proposed by Broadband:

- a. **Item 3:** *The Appraisal of Real Estate* (13th ed. 2008), at pp. 7, 385-88, 561

Objection: Broadband proposes to educate the Court about proper appraisal theory and valuation methods, and in support it submits carefully selected partial pages from *The Appraisal of Real Estate* (13th ed. 2008), which is incomplete, has not been authenticated, and should not be admitted into the Record. (Evid. Code, § 1401.) While this Court may

certainly consider legal treatises for whatever value the Court finds them to have, portions excerpted for advocacy should not be admitted as “evidence”.²

- b. **Items 5 and 6:** Documents of the California Energy Commission (Item 5) and California Environmental Protection Agency Air Resources Board (CARB) (Item 6).

Objection: These items, identified as being from the California Energy Commission and CARB, are both incomplete and not properly authenticated. (Evid. Code, §§ 1401, 1530, 1531.) We note that item 6 from CARB purports to be the same as item 3 contained in the Motion for Judicial Notice of amicus South Coast Air Quality Management District (SCAQMD), yet it appears to contain fewer pages. While we have not been able to determine the reason for the discrepancy as of this writing, the discrepancy illustrates the need for authentication and the rationale for rejecting the proffered (and duplicative) material in the absence of authentication. To the extent the Court wishes to consider this material, it can do so either through the SCAQMD

² Please note that although select pages of the Board’s Assessors’ Handbooks were also submitted in this Request for Judicial Notice, the complete handbooks are accessible at the Board’s website at <http://www.boe.ca.gov/proptaxes/ahcont.htm>.

request or by reference to the material without admitting the
Broadband document as evidence.

III. CONCLUSION

For the above reasons, the Board objects to the Request for Judicial
Notice of CalTax, et al. and portions of Broadband's Requests for Judicial
Notice, and respectfully asks that these requests be denied.

Dated: June 22, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S OPPOSITION TO MOTIONS FOR JUDICIAL NOTICE FILED BY CALIFORNIA TAXPAYER ASSOCIATION, CALIFORNIA MANUFACTURERS & TECHNOLOGY ASSOCIATION AND SILICON VALLEY LEADERSHIP GROUP; AND BROADBAND TAX INSTITUTE** uses a 13 point Times New Roman font and contains 2,836 words.

Dated: June 22, 2012

KAMALA D. HARRIS
Attorney General of California

A handwritten signature in black ink, appearing to read "Tim Nader", written in a cursive style.

TIM NADER
Deputy Attorney General
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Elk Hills Power v. CA State Board of Equalization, et al.**
No.: **S194121**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 25, 2012, I served the attached:

**RESPONDENT'S OPPOSITION TO MOTIONS FOR JUDICIAL NOTICE FILED BY
CALIFORNIA TAXPAYER ASSOCIATION, CALIFORNIA MANUFACTURERS &
TECHNOLOGY ASSOCIATION AND SILICON VALLEY LEADERSHIP GROUP;
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by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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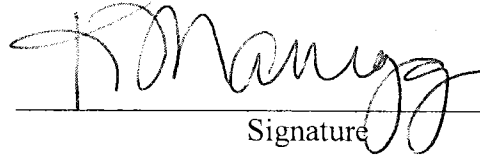
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Elk Hills Power v. CA State Board of Equalization, et al.**
No.: **S194121**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 25, 2012, at San Diego, California.

K. Marugg
Declarant



Signature