

# The Arnold Law Practice

## News from the Practice

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### POKER PLAYERS LOSE A BET ON ESTOPPEL OF THE GOVERNMENT



*Photo courtesy of The Carmel Pine Cone*

Two champion poker players learned a hard lesson from the California Court of Appeals recently. They had bought a \$13 million beach front house on 17 Mile Drive in Pebble Beach because it had a private 3 hole golf course. But, the seller neglected to tell them that permission for the house was conditioned on maintaining the natural dune area where the seller had installed the golf course. And, the title company missed the restriction in the title report. The poker players won in the Monterey Superior Court – after all the Coastal Commission had not “seen” the golf course for 18 years. But the Court of Appeals reversed, ruling that the County that issued the building permit did not bind the Coastal Commission, and that the injustice to the homeowners did not outweigh vital public policy supporting protection and preservation of coast as reflected in Commission’s restrictions on property. *Feduniak v. Calif. Coastal Comm’n*, No. H028931.

### WHY WE CAN'T PREDICT THE OUTCOME OF YOUR CASE

For one of our offices we recently acquired over 400 volumes of reports of decisions of the California Supreme Court and the Court of Appeal. In each of the thousands of decisions, one of the parties thought they could not lose. This simple fact is why attorneys cannot advertise that they can predict the outcome of a case. And, while we will give you probabilities based on our experience, our knowledge of the facts, and our legal research, we never predict the outcome of a case.

### FARM AND FACTORY PONDS ARE NOT PROTECTED WETLANDS—SAYS THE NINTH CIRCUIT

A year ago, the Supreme Court in *Rapanos v US* ruled that the Corps of Engineers in regulating wetlands must establish a significant nexus on a case-by-case basis based on the “adjacency” of the wetlands to non-navigable tributaries to waters of the U.S. But, the Supreme Court did not issue a majority opinion that at least 5 of the Justices signed. So, there will be continuing lawsuits and uncertainty as to the extent of regulatory authority the Corps of Engineers has under the Clean Water Act.

The Ninth Circuit in March 2007 ruled that a runoff pond adjacent to waters of the U.S. is not protected by the Clean Water Act because there was no proof of (a) a hydrogeological connection, and (b) wetlands characteristics of the pond. *San Francisco Baykeeper v. Cargill Salt Division, et al.*, No. 04-17554.

*The moral of the story for owners of stormwater detention basins, and the like? Don't let your storm control basins turn into swamps.*

## PRETEXTING CAN LEAD TO PERSONAL LIABILITY

When a journalist, reporter, or investigator interviews you they may lie to you about who they are. You will more readily cooperate with questions from a person who you believe to be honest. The California Supreme Court has now ruled that such lies can make the liar personally liable to the victim because the victim's privacy was invaded. *Taus v. Loftus*, No. S133805.

This case fits with the caution that every attorney gives to a client that is an organization. When a serious problem occurs for which the organization may be liable, do not discuss it with investigators or even among employees until and unless legal counsel has been retained and is part of the investigation into what went wrong. In some states, there is a "medical peer review privilege," but for other organizations there is no such protection.

## APPEALS COURT CALLS MTBE THREAT TO HUMAN HEALTH

The U.S. Court of Appeals in New York rejected claims by oil companies that the U.S. Clean Air Act forced them to add MTBE to gasoline. The appellate court opinion called MTBE "a highly dangerous compound that, like tar and nicotine, poses a threat to human health if ingested." The court also found that "the district judge and the defendants acknowledged that the EPA identified six other additives, besides MTBE, that could be blended into reformulated gasoline to meet the requirements imposed by the CAA and the regulations..." That it may have been more convenient or less expensive for the defendants to use MTBE does not mean it would have been impossible for them to use other, less polluting additives..." *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 04-5974 (2d Cir. May 24, 2007)

## THE INDIAN RELIGIOUS FREEDOM ACT PREVAILS OVER GREEN SKI RESORT

A ski resort in "Arid-zona" thought it had come up with a nifty idea to make snow. It would use treated sewage effluent. The only problem was that the ski resort operated by permit on federal land, and 15 Native American tribes considered the area to be sacred. So, the tribes sued the Forest Service and the ski resort. The Ninth Circuit in March ruled that the final environmental impact statement (EIS) did not adequately discuss the risks of eating artificial snow made from treated sewage effluent. And, the EIS did not explain why such a discussion was not needed. *Navajo Nation v. U.S. Forest Service*, No. 0615371.

*Moral of the story. Run ideas like this one past the average high school civics class before spending a lot of money on it. You will then understand the "yuck" factor about eating "yellow snow."*

### The Arnold Law Practice Three Decades of Environmental Law

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**The Arnold Law Practice** represents business owners in multi-defendant litigation with claims of groundwater pollution by dry cleaning practices, USTs, waste disposal practices, OSHA penalty issues, claims against environmental consultants as to site audits, Fish & Game civil penalty proceedings, condemnation of portions of business for road expansion, failure of seller to disclose buried contamination, compliance with air pollution control laws, civil penalties from air quality management districts, spill response claims, toxics reporting and disclosure requirements, UST closure laws.

**The Arnold Law Practice** represents individuals in state and federal courts in a variety of lawsuits, including complaints for specific performance of real estate contracts, quiet title, defending permits issued by the National Marine Fisheries Service, defending and prosecuting construction claims, breach of contract, negligence, fraud, property trespass and damages, and related matters.

**The Arnold Law Practice** associates with specialized counsel in complex real estate closings, estate and trust planning, partition actions involving contamination, and transfers of real estate with indemnities and cleanup rights under the California UST Fund.

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