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No ambiguity in statutory deadline for writ petition challenging decision of Occupational Safety and Health Appeals Board (Jenkins, J.)

Raam Construction, Inc. v. Occupational Safety and Health Appeals Board (Department of Industrial Relations, Division of Occupational Safety and Health)

C.A. 1st; September 28, 2018; A149734

The First Appellate District affirmed a judgment. The court held that the statutory deadline for filing a petition for writ of mandate challenging an order or decision of the Occupational Safety and Health Appeals Board is unambiguous.

The Division of Occupational Safety and Health (DOSH) cited Raam Construction, Inc. for a safety violation on a job site. Raam contested this citation before an administrative law judge of the OSH Appeals Board. The ALJ issued a decision upholding the citation. Raam petitioned the Appeals Board for reconsideration. On March 4, 2016, the Appeals Board denied the petition. It filed its decision and served a copy on Raam via first class mail the same day. On April 8, 35 days later, Raam filed a petition for writ of mandate challenging the Appeal Board’s decision.

The trial court dismissed the petition as untimely. The court of appeal affirmed, holding that Raam’s writ petition was properly dismissed as untimely. Under Labor Code §6627, a petition for writ of mandate challenging an order or decision of the Appeals Board “must be made within 30 days after a petition for reconsideration is denied, or, if a petition is granted or reconsideration is had on the appeals board’s own motion, within 30 days after the filing of the order or decision following reconsideration.” This language is unambiguous. That the triggering event for the 30-day deadline is, in one event, the date of denial of petitioner’s request for reconsideration and, in the other event, the date of filing of the order of decision does not render the statutory language ambiguous.

Criminal Law

Failure to instruct on specific intent with regard to attempted robbery charges constituted plain error (Friedland, J.)

United States v. Moreno Ornelas

9th Cir.; October 25, 2018; 15-10510

The court of appeals reversed in part a judgment of conviction. The court held that the district court committed plain error in failing to instruct the jury on specific intent as a required element of attempted robbery.

The Sixth Appellate District affirmed a judgment of sentence. In the published portion of its opinion, the court held that defendant failed to demonstrate that trial counsel was constitutionally ineffective for failing to object to sexual offender fines imposed by the trial court.

Following a bench trial, Ralph Acosta was found guilty of (1) committing a lewd or lascivious act on a child under the age of 14, in violation of Penal Code §288(a) and (2) contacting a minor with the intent to commit a sexual offense, in violation of §288.3(a). Acosta was sentenced to an eight-year prison term and ordered to pay $800 in sex offender fines under §290.3, as well as other fees, fines, and related penalty assessments. The court made no explicit findings about Acosta’s ability to pay the §290.3 fines. Acosta did not ask for a hearing on his ability to pay these fines and did not object to their imposition.

On appeal, Acosta argued that trial counsel was ineffective for failing to object to the sex offender fines.

The court of appeal affirmed, holding that Acosta failed to demonstrate ineffective assistance of counsel. Acosta’s convictions under §288(a) and §288.3 triggered the imposition of sex offender fines for both counts under §290.3: a $300 fine for the first count and a $500 fine for the second count. With the addition of penalty assessments and administrative fees, the total cost to Acosta was $3,440. Acosta argued that it was clearly evident to counsel that he did not have the means to pay that amount, and that it was thus equally evident that counsel was remiss in failing to object to the imposition of the §290.3 fines. The record failed to support Acosta’s contention. The probation report prepared for Acosta’s sentencing stated that it was “anticipated that defendant will have means to pay for any Court ordered fine or fee.” Counsel may have thus reasonably determined that he would not have the means to establish otherwise. Trial counsel may also have determined that Acosta would be able to work in the future or would have access to assets or income not mentioned in the probation report sufficient to pay the sex offender fines. Counsel was thus not demonstrably ineffective for failing to challenge the imposition of the fines and related fees and assessments.

Criminal Law

Counsel not demonstrably ineffective for failing to object to imposition of costly sex offender fines (Danner, J.)

People v. Acosta

C.A. 6th; October 25, 2018; H045175
U.S. Forest Service Officer Devin Linde received a report of two suspicious men walking along a road not far from the border, near an area of National Forest. Linde found the two men, offered them water, and asked them to put their hands on the hood of his truck. One of the men complied. The other, Jesus Moreno Ornelas, did not. A struggle ensued between Linde and Moreno. Linde drew his gun. Moreno grabbed it away from him and fired several shots into the air before tossing it aside. According to Moreno, he was trying to empty the gun so that Linde could not shoot him. Moreno then ran to Linde’s truck, thinking he could escape by driving to the border and then abandoning the truck there. He did not drive away, however, either because he changed his mind or because Linde stopped him. Moreno was arrested and charged with assault on a federal officer, attempted murder of a federal officer, use of a firearm during and in relation to a crime of violence, possession of a firearm by a convicted felon, possession of a firearm by an illegal alien, attempted robbery of Linde’s gun, attempted robbery of Linde’s truck, and illegal reentry.

The jury found Moreno guilty on all charges other than attempted murder.

The court of appeals reversed Moreno’s convictions for attempted robbery of Linde’s gun and vehicle, holding that the jury was erroneously instructed on those counts. The district court instructed that, for the jury to convict Moreno of attempted robbery, the government had to prove that he “did take or attempt to take from the person or presence of another any kind or description of personal property belonging to the United States,” and that he “did so by force and violence, or by intimidation.” The district court did not, however, instruct the jury that Moreno could be found guilty of attempted robbery only if he possessed the specific intent to steal. The omission of any instruction on specific intent was plain error. Further, based on Moreno’s testimony at trial, in which he denied any intent to permanently deprive Linde of either his weapon or the truck, there was a reasonable probability that failing to instruct the jury on specific intent affected the jury’s verdict. The instructional error thus affected Moreno’s substantial rights and seriously undermined the fairness and integrity of the proceedings. Chief Judge Thomas concurred in part and dissented in part, finding the instructional error, even if it could be deemed plain error, was harmless. Judge Zilly dissented, finding that the district court’s erroneous exclusion of a defense expert witness warranted reversal on all counts except his conviction for illegal reentry, which he declined to appeal.

Environmental Law

Determination of mine owners’ valid existing rights in operation of mine not major federal action under NEPA (Block, J.)

Havasupai Tribe v. Provencio

9th Cir.; October 25, 2018; 15-15754

The court of appeals affirmed in part and vacated in part a district court judgment and remanded. The court held that an agency finding that a mine owner had valid existing rights in a mining operation that was approved several decades prior did not constitute a major federal action for purposes of the National Environmental Policy Act of 1969 (NEPA).

In 2012, the Secretary of the Interior issued a decision to withdraw, for twenty years, more than one million acres of public lands around Grand Canyon National Park from new mining claims. That withdrawal did not extinguish “valid existing rights.” The U.S. Forest Service subsequently issued a “Mineral Report” in which it determined that Energy Fuels Resources (USA), Inc., and EFR Arizona Strip LLC (collectively, Energy Fuels) had a valid existing right to operate a uranium mine on land within the withdrawal area. The Havasupai Tribe, the Grand Canyon Trust, and others filed suit challenging that determination. The tribe sought, among other things, a declaration that the Forest Service was acting in violation of NEPA, the National Historic Preservation Act of 1966 (NHPA), and other laws. The tribe argued, among other things, that the Forest Service’s determination that Energy Fuels had valid existing rights to operate the mine was a “major federal action significantly affecting the environment,” for which NEPA required the preparation of an environmental impact statement (EIS).

The district court granted summary judgment in favor of the Forest Service.

The court of appeals affirmed in part, holding that no EIS was required. Where a proposed federal action does not change the status quo, an EIS is not necessary. Here, the Forest Service approved operation of the disputed mine in 1988. Because that decision constituted a major federal action, the Forest Service prepared an EIS during the approval process, as required under NEPA. The 2012 decision allowing Energy Fuels to resume operation of the mine did not require any further action. The tribe’s NHPA claim was similarly without merit. Further, the district court properly found that the Trust’s claim, under the General Mining Act of 1872, that the Forest Service erred in its “valid existing rights” (VER) determination fell outside the zone of interests to be protected or regulated under the Mining Act. However, the Trust also argued that the Forest Service’s VER determination violated the Federal Land Policy and Management Act of 1976 (FLPMA). The district court did not address the FLPMA’s zone of interests in its analysis of the Trust’s VER claim. Because a VER determination affects whether activities on federal land can be limited under the FLPMA, the Trust’s challenge to the Forest Service’s VER determination fell within the FLPMA’s zone of interests. The court accordingly vacated the district court judgment with respect to the Trust’s FLPMA claim and remanded for consideration of the claim on the merits.
Insurance Litigation

Commercial property owner’s loss of right to use property as intended constituted property damage (Ramirez, P.J.)

Thee Sombrero, Inc. v. Scottsdale Insurance Company

C.A. 4th; October 25, 2018; E067505

The Fourth Appellate District reversed a judgment. The court held that a commercial property owner’s loss of rights to use the property in the manner intended constituted property damage.

Thee Sombrero, Inc. owns a commercial property in Colton. Pursuant to a conditional use permit (CUP), Sombrero’s lessees operated a nightclub on the property. In 2007, there was a fatal shooting at the nightclub, and the CUP was revoked. A modified CUP was issued, allowing the property be used as a banquet hall only. Sobrero sued the company that had provided security guard services at the nightclub, Crime Enforcement Services (CES). Sombrero alleged that CES’ negligence caused the shooting, which in turn caused the revocation of the CUP, which in turn caused a diminution in value of the property. Sombrero won a default judgment against CES. Sombrero then filed suit against CES’ liability insurer, Scottsdale Insurance Company.

The trial court granted summary judgment in favor of Scottsdale, ruling that Sombrero’s claim against CES was for an economic loss, rather than for “property damage” as defined in and covered under Scottsdale’s policy.

The court of appeal reversed, holding that Sombrero’s loss of the ability to use the property as a nightclub constituted property damage, which was defined in the policy as including a loss of use of tangible property. The loss of the ability to use the property as a nightclub was, by definition, a “loss of use” of “tangible property.” It defied common sense to argue otherwise. Sombrero suffered a loss of use of tangible property. Moreover, the diminution in value of the property was a proper measure of the damages from that loss of use.
I. Linde was responsible for patrolling a vast swath of mountainous desert stretching across Arizona and New Mexico and running down to the Mexican border, which contained areas of National Forest. Apart from the Forest Service, the United States Border Patrol was the only law enforcement agency operating in that remote area. While carrying out his duties, Linde often encountered people who had crossed the border unlawfully, some of whom were smuggling drugs. Many of those people fell victim to the heat and harsh terrain. Stranded without food and water, they sometimes sought help from federal officers on patrol. Linde carried water and other supplies in his truck to prepare for such encounters.

A. One day during a patrol, Linde received a report of suspicious people walking along a road near an area of National Forest. Linde called Border Patrol and was asked to respond. As he had many times before, Linde agreed to assist and set out in his truck, which was clearly marked as a law enforcement vehicle. Before long, he encountered two men, one of whom had scrapes and scratches on his face. The other, who did not appear injured, was Moreno.

The two men walked up to the truck. Linde offered them water, but they declined. Linde then directed Moreno and his companion to come to the front of the truck and put their hands on the hood. The injured man complied, but Moreno did not. With verbal commands failing, Linde drew his gun. A struggle between Linde and Moreno began moments later, the details of which are in dispute.¹

¹ The injured man appears to have fled during the struggle.

Linde testified in Moreno’s subsequent jury trial that he ordered Moreno to turn away and put his hands on his head. This time, Moreno complied. Linde approached with his gun drawn. When he was a few feet away, Linde holstered his weapon and pulled out handcuffs. After cuffing Moreno’s right hand, Linde began to cuff Moreno’s left.

At trial, Linde admitted not remembering exactly what happened next, but he recalled being yanked forward, then going blank. The next thing he knew, he and Moreno were fighting. Moreno went for the gun. Linde threw his hands down to his holster, one covering the handle of the gun, the other fending off Moreno.

Moreno responded by throwing Linde to the ground. Entangled, the two men rolled towards an embankment on the side of the road. Moreno started pummeling Linde in the face. Linde blacked out briefly before feeling his gun being pulled out of its holster. Two shots rang out. Having lost control of his weapon, Linde flailed his arms, searching for the gun.

Linde testified that he located the weapon right before Moreno could take aim at his chest. Linde pushed Moreno’s hand away and then rolled onto his side, just as another shot...
discharged near his head. Linde grabbed Moreno’s wrist, trying to keep the gun pointed away. Moreno nearly broke free, but Linde grabbed him by the neck, wrapped his leg around Moreno’s throat, and squeezed. Moreno fired several shots skyward before dropping the gun.

Linde grabbed it. He aimed at Moreno and pulled the trigger. Nothing happened. Linde rolled away, backing up to put distance between them. Moreno—on his knees, hands in the air—cried “no, no, no, no.” Thinking the clip was empty, Linde reloaded. Moreno bolted for the truck.

As Moreno ran, Linde realized that the gun was jammed. Linde quickly cleared the jam but, knowing that his truck contained no weapons and that its security system would prevent Moreno from driving away, did not fire. Instead, as he told the jury, Linde went to the truck, aimed the gun at Moreno’s chest, and threatened to kill him if he moved. Linde then grabbed the radio and reported, “Shots fired.”

2.

Moreno gave law enforcement a very different account of the incident. In a post-arrest interview that was recorded and later played for the jury, Moreno admitted that he initially refused to comply with Linde’s commands but claimed that he sat down as the officer approached with handcuffs. By Moreno’s telling, Linde never holstered the gun but instead kept his finger on the trigger, with the barrel pointed at Moreno. Fearing for his life and wanting to return to Mexico rather than go to prison, Moreno tried to grab the gun. A shot went off. Moreno tackled Linde with all the force he could muster. Two more shots rang out as the two men struggled on the ground, each trying to wrest the gun from the other.

Moreno claimed that, by this point, he could have beaten Linde unconscious. Instead, Moreno slammed Linde’s hand onto the ground, forcing him to release the gun. Moreno seized it, fired the remaining rounds into the air, and tossed the gun aside. He ran for the truck, thinking he would drive to the border and leave it there.

Moreno recounted that, when he got behind the wheel, he suddenly realized that he had been acting stupidly and that he should not drive away. For that reason, Moreno explained, he got out of the truck and gave himself up voluntarily.

B.

Moreno was charged with assault on a federal officer, attempted murder of a federal officer, use of a firearm during and in relation to a crime of violence, possession of a firearm by a convicted felon, possession of a firearm by an illegal alien, attempted robbery of Linde’s gun, attempted robbery of Linde’s truck, and illegal reentry. At trial, the jury hung on the attempted murder charge but convicted on the others. The district court sentenced Moreno to just over 43 years in prison.

On appeal, Moreno challenges all of his convictions except the one for illegal re-entry. We reverse both of Moreno’s convictions for attempted robbery but affirm the rest.

A.

Moreno argues that the jury instructions given at trial did not accurately define the elements of attempted robbery under 18 U.S.C. § 2112. The district court instructed that, for the jury to convict Moreno of attempted robbery under that statute, the Government had to prove that he “did take or attempt to take from the person or presence of another any kind or description of personal property belonging to the United States,” and that he “did so by force and violence, or by intimidation.” Although Moreno requested an instruction requiring the Government to prove that he acted with the “intent to steal” and that his use of “force or intimidation” was “directly related” to the attempted taking, he acknowledges that he did not object when the district court instructed the jury differently at trial. We may therefore review only for plain error. See Jones v. United States, 527 U.S. 373, 388 (1999); see also Fed. R. Crim. P. 30(d).

On appeal, Moreno maintains that the district court plainly erred in two ways in instructing the jury on the elements of attempted robbery under § 2112: (i) by failing to instruct that Moreno must have possessed the specific intent to steal; and (ii) by failing to instruct that Moreno must have formed such intent by the time he used force, not just by the time he tried to take the property in question. We agree with the first contention but reject the second.

I.

We may reverse for plain error only if four conditions are met. “First, there must be an error that has not been intentionally relinquished or abandoned.” Molina-Martinez v. United States, 136 S. Ct. 1338, 1343 (2016). “Second, the error must be plain—that is to say, clear or obvious.” Id. “Third, the error must have affected the defendant’s substantial rights,” which in cases like this one means that there is “‘a reasonable probability that, but for the error,’ the outcome of the proceeding would have been different.” Id. (quoting United States v. Dominguez Benitez, 542 U.S. 74, 76 (2004)); see also, e.g., United States v. Conti, 804 F.3d 977, 981 (9th Cir. 2015). If those conditions are met, we will exercise our discretion to correct the forfeited error if the error ‘seriously affects the fairness, integrity or public reputation of judicial proceedings.’” Molina-Martinez, 136 S. Ct. at 1343 (quoting United States v. Olano, 507 U.S. 725, 736 (1993)).

2.

Although the district court was correct not to instruct the jury that Moreno must have formed the specific intent to steal by the time he used force, the court was wrong—and plainly so—to omit an instruction on specific intent altogether.
The statute under which Moreno was charged with attempted robbery of Linde’s gun and truck punishes “[w]hoever robs or attempts to rob another of any kind or description of personal property belonging to the United States.” 18 U.S.C. § 2112. Although the statute does not further define “robs or attempts to rob,” see id., those terms had “established meanings at common law,” Carter v. United States, 530 U.S. 255, 266 (2000). And when “Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice,” we presume that Congress “knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.” Id. at 264 (emphasis omitted) (quoting Morissette v. United States, 342 U.S. 246, 263 (1952)). Thus, when Congress has “simply punished” a common law crime, Congress has “thereby le[ft] the definition of [the offense] to the common law.” Id. at 267 n.5. In fact, the Supreme Court has pointed to this very robbery statute as an example of this legislative method. See id. (citing 18 U.S.C. § 2112). We accordingly “turn to the common law for guidance” in interpreting the statutory phrase “robs or attempts to rob.” Id. at 266.

At common law, robbery was “the felonious and forcible taking, from the person of another, of goods or money [of] any value by violence or putting him in fear.” 4 W. Blackstone, Commentaries on the Laws of England 241 (1769). In addition to requiring a defendant to assault another person and take his things, this definition required the defendant to take them with “felonious intent.” Id. And “felonious” is just “a common-law term of art signifying an intent to steal.” Carter, 530 U.S. at 278 (Ginsburg, J., dissenting); accord United States v. Lilly, 512 F.2d 1259, 1261 (9th Cir. 1975) (observing that “feloniously” was “recognized as signifying the element of specific intent to steal in robbery at common law”).

Common law robbery was therefore a specific intent crime. See, e.g., Lilly, 512 F.2d at 1261; United States v. Klare, 545 F.2d 93, 94 (9th Cir. 1976); 3 Wayne R. LaFave, Substantive Criminal Law § 20.3(b) (3d ed. 2017). That meant, for example, that a defendant accused of “snatching [a] pistol” was not guilty of robbery at common law if he had “not … intended at the time to steal it” and intended instead to “prevent its being used against [hi]m.” Jordan v. Commonwealth, 66 Va. (25 Gratt.) 943, 948 (1874). This principle held true even if a defendant later formed an intent to permanently deprive the owner of the property—thus, a defendant was not guilty of robbery even if after “[t]aking [a] gun by force … under the impression that it may be used against him,” he admitted “that he w[ould] sell the gun.” R v. Holloway (1833), 5 Car. & P. 524, 524–25. Common law robbery—and by extension common law attempted robbery—thus required the defendant to have formed the specific intent to steal by the time he took the property in question.4

But, at common law, the defendant need not have formed the specific intent to steal by the time he used or threatened to use force. To the contrary, it was enough for a defendant to “take[,] advantage of a situation which he created for some other purpose.” 3 LaFave § 20.3(e). As a result, a defendant “who str[uck] another, perhaps intentionally but with no intent to steal … and who then, seeing his adversary helpless, t[ook] the latter’s property” was guilty of robbery. Id. & n.98 (collecting cases); see also, e.g., R v. Hawkins (1828), 3 Car. & P. 393, 393 (observing that where “a gang of poachers attack[ed] a game-keeper, and le[ft] him senseless on the ground,” the “one of them [who] return[ed] and st[ole] his money” was guilty of robbery even if he and the others had attacked only to “resist the keeper[’]s” efforts at preventing poaching). The same was true of a defendant who threatened a woman with the intent to rape her, only to accept her offer of money instead. See R v. Blackham (1787), 2 East P.C. 711, 711.

It follows that a defendant would have committed attempted robbery at common law if he struck another without the specific intent to steal and then reached to take the helpless adversary’s property—only to be thwarted in carrying out his freshly formed specific intent to steal by the timely arrival of a constable. See 3 LaFave § 11.3(a) (describing the requisite mental state for attempt as “the intent to do certain proscribed acts or to bring about a certain proscribed result”); see also United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1193 (9th Cir. 2000) (en banc) (addressing common law attempt generally). Given our reversal here based on the omission from the jury instructions of the specific intent element, we need not also rule on Moreno’s new argument on appeal regarding the district court’s failure to instruct the jury on the substantial step element.

2. In Carter, the Supreme Court distinguished the statute at issue here (§ 2112 robbery of government property) from that at issue there (§ 2113 bank robbery). See 530 U.S. at 267 & n.5. Because § 2113, unlike § 2112, spells out elements of the offense and does not simply punish “robbery,” the Court declined to import elements of common law robbery not specifically enumerated in the text of § 2113. See id. at 264–67.

3. For completed robbery at common law, there must have been a taking involving some degree of “asportation.” Carter, 530 U.S. at 272, which meant “at least a slight movement” of the property, 3 Wayne R. LaFave, Substantive Criminal Law § 20.3(a)(2) (3d ed. 2017). But attempted robbery could not have required the same, because it would otherwise have collapsed into the completed offense. Cf. 4 Blackstone at 231 (observing that even the “bare removal from the place in which [the thief] found the goods, though the thief d[id] not quite make off with them, is a sufficient asportation, or carrying away” for completed larceny). Instead, attempted robbery “at common law require[d] proof that the defendant … took some overt act that was a substantial step toward committing” robbery with the requisite intent. United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1190 (9th Cir. 2000) (en banc) (addressing common law attempt generally). Given our reversal here based on the omission from the jury instructions of the specific intent element, we need not also rule on Moreno’s new argument on appeal regarding the district court’s failure to instruct the jury on the substantial step element.

4. For a defendant to possess the specific intent to steal, he need not intend “to convert the property to [his] own use; it is sufficient that there is an intention to permanently deprive the owner of the property.” 3 LaFave § 20.3(b); see also Carter, 530 U.S. at 268 (equating the “specific intent” to steal with the intent to “permanently … deprive” the victim of its property).

5. We recognize that this well-regarded treatise is not entirely consistent on this point. Another section of the treatise suggests that the specific intent to steal must coincide with the use or threatened use of force, but that section is unpersuasive because it relies only on a single modern case analyzing a state robbery statute. See 1 LaFave § 6.3(a) & n.11 (citing People v. Green, 609 P.2d 468, 498-500 (Cal. 1980)).
Cir. 2000) (en banc) (“The reason for requiring specific intent for attempt crimes is to resolve the uncertainty whether the defendant’s purpose was indeed to engage in criminal, rather than innocent, conduct.”).

Congress’s use of the common law terms “robbery” and “attempted robbery” in § 2112 imported the common law meanings of those terms. The district court therefore should have instructed the jury that, to convict Moreno of attempted robbery, it needed to conclude beyond a reasonable doubt that he had formed the specific intent to steal the gun and truck by the time he tried to take them, though not necessarily by the time he used force against Linde. And, given the well-settled elements of common law robbery as well as Carter’s clear indication that § 2112 incorporates the common law, failing to instruct the jury on specific intent was an obvious omission. 6

3.

That obvious instructional error affected Moreno’s substantial rights, and it seriously undermined the fairness and integrity of the proceedings. See Molina-Martinez, 136 S. Ct. at 1343. We therefore reverse both of Moreno’s convictions for attempted robbery.

To begin, there is a reasonable probability that failing to instruct the jury that Moreno must have had the specific intent to steal the gun—that is, the specific intent to permanently deprive Linde of the weapon—affected the jury’s verdict. Again, Moreno claimed that he grabbed the gun to avoid being shot. Even if the jury did not believe that Moreno reasonably feared for his life before the struggle, the jury might well have believed Moreno when he said that he “struggled with the officer for all the bullets to be fired” so that he “could go to Mexico,” and that he tossed the gun aside once he had emptied the clip. 7 On those facts, Moreno would have lacked the specific intent to steal. Accordingly, Moreno has shown that the evidence was not “overwhelming” as to the omitted element, and thus has convinced us that the plain instructional error affected his substantial rights. United States v. Nguyen, 565 F.3d 668, 677 (9th Cir. 2009); see also Conti, 804 F.3d at 981–82 (collecting plain error cases).

The same is true of the attempted robbery conviction related to the truck. Recall Linde’s testimony. He told the jury that, in the heat of the struggle, he tried to shoot Moreno but the gun did not fire. Linde then rolled away from Moreno, who was left kneeling on the ground, pleading for his life. Linde reloaded, and Moreno ran for the truck. On those facts, the jury could have found that Moreno intended to flee for fear of being shot, rather than with intent to steal the truck. And given how close to Mexico the struggle occurred, Moreno’s statement that he planned to abandon the truck at the port of entry left room to conclude that he expected all along that the truck would be recovered. Failing to instruct on specific intent thus affected Moreno’s substantial rights on this count too. 8

Finally, the error seriously affected the fairness and integrity of the proceedings. As in United States v. Paul, 37 F.3d 496 (9th Cir. 1994), the “instructions improperly deprived [the defendant] of his right to have a jury determine an essential element” of the offense: “mental state.” Id. at 501. Also as in Paul, the jury was presented with a version of the events under which the requisite mental state was lacking. See id. at 500. Thus, following Paul, we correct the instructional error in this case because “a miscarriage of justice would otherwise result.” Id.

B.

Moreno maintains that the jury instructions were flawed in two additional ways that warrant reversal of his other convictions. First, Moreno urges us to reverse all of his remaining convictions on the ground that the jury instructions given at trial failed to present resistance to excessive force as a defense, and that the instructions thus failed to cover his theory of the case. Second, Moreno challenges his convictions for assault on a federal officer under 18 U.S.C. § 111 and for use of a firearm during and in relation to a crime of violence (the assault) under 18 U.S.C. § 924(c), contending that the instructions improperly defined “official duties.” Neither argument is persuasive.

I.

Moreno’s theory of the case was that Linde, by pointing his gun directly at Moreno, used excessive force—and that Moreno thus acted in reasonable self-defense from the start. In line with that theory, Moreno requested an instruction observing that “[a] person has a right to resist an officer who is using excessive force” to supplement our court’s model instruction on general self-defense. 9 The district court de-

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6. Indeed, even as to robbery statutes that, unlike § 2112, require only general intent for the completed offense, we have required specific intent for an attempt. See, e.g., United States v. Goldtooth, 754 F.3d 763, 770 (9th Cir. 2014) (requiring specific intent for attempted robbery within the special maritime and territorial jurisdiction of the United States under 18 U.S.C. § 2111); United States v. Darby, 857 F.2d 623, 626 (9th Cir. 1988) (requiring specific intent for attempted bank robbery under 18 U.S.C. § 2113(a)).

7. Chief Judge Thomas’s dissent argues that Moreno’s admission that he intended to “throw [the gun] away in the desert,” shows he intended to permanently deprive Linde of the gun. But given that the struggle occurred in the desert, the jury could just as easily have concluded that Moreno intended to toss the gun out of reach but not in a way that would prevent Linde from later locating it.

8. All that said, construing the trial record in favor of the Government, we reject Moreno’s contention that no reasonable jury could find that he had the specific intent to steal as to either attempted robbery count. See United States v. Nevills, 598 F.3d 1158, 1169 (9th Cir. 2010) (en banc) (rejecting a sufficiency of the evidence challenge because the evidence at trial was not “so supportive of innocence that no rational trier of fact could find guilt beyond a reasonable doubt”). Accordingly, the Government is not prohibited from retrying Moreno on the attempted robbery counts. See, e.g., United States v. Shipsey, 190 F.3d 1081, 1088-89 (9th Cir. 1999).

9. We use the term “general” to differentiate this model instruction from the model instruction geared specifically to a charge under § 111 of assault against a federal officer, which will be discussed be-
as a constitutional right to have the jury instructed according to his theory of the case” so long as the instruction he requested was “supported by law and ha[d] some foundation in the evidence.” United States v. Marguet-Pillado, 648 F.3d 1001, 1006 (9th Cir. 2011) (first quoting United States v. Johnson, 459 F.3d 990, 993 (9th Cir. 2006), then quoting United States v. Bello-Bahena, 411 F.3d 1083, 1088–89 (9th Cir. 2005)). If the district court failed to give such an instruction, we would have to reverse unless “other instructions, in their entirety, adequately cover[ed]” Moreno’s theory of the case. Id. (quoting United States v. Thomas, 612 F.3d 1107, 1120 (9th Cir. 2010)). We assume without deciding that Moreno’s excessive force instruction was supported by law and had some foundation in the evidence, but we hold on de novo review that the general self-defense instruction given at trial adequately covered Moreno’s resistance-to-excessive-force theory. See Bello-Bahena, 411 F.3d at 1089.

Following our court’s model instruction on general self-defense, the district court instructed the jury that the “[u]se of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force,” and that “[t]he government must prove beyond a reasonable doubt that [Moreno] did not act in reasonable self-defense.” See Ninth Circuit Model Criminal Jury Instruction No. 6.8. That instruction left Moreno ample room to argue that Linde’s use of force was excessive and therefore “unlawful”—and that Linde’s use of (allegedly) excessive force justified Moreno’s attempt to grab the gun. Indeed, Moreno’s closing argument made those very points. Thus, even if express language on excessive force might have helped Moreno, and even if such language would have done no harm, its absence did not “impair [Moreno’s] right to have the jury decide whether the government ha[d] proven” that he had not acted in reasonable self-defense.90 Marguet-Pillado, 648 F.3d at 1009 (emphasis omitted). Contrary to Moreno’s contentions, United States v. Span, 970 F.2d 573 (9th Cir. 1992) (“Span I”), and United States v. Span, 75 F.3d 1383 (9th Cir. 1996) (“Span II”), do not require a different result. In those two cases we confronted—on direct appeal and collateral review, respectively—a different instruction on a different record. The problematic instruction in the Span cases was our court’s model instruction geared specifically towards the charge of assault on a federal officer. That instruction shielded from guilt only defendants who (1) “reasonably believed that use of force was necessary to defend [themselves] against an immediate use of unlawful force,” (2) “used no more force than appeared reasonably necessary in the circumstances,” and (3) “did not know that [the alleged victims] were federal officers.” Span I, 970 F.2d at 576; see also Span II, 75 F.3d at 1387–88. As we observed in Span I, that instruction “allow[ed] the government to defeat an excessive force theory of defense merely by proof beyond a reasonable doubt that the defendant knew that the person that [the defendant] allegedly assaulted was a federal law enforcement officer.” 970 F.2d at 577. The district court’s instruction in Span thus precluded an acquittal even if the jury “believed that the [officers’] exercise of force … was unlawful because it was excessive” and “found that the [defendants] reasonably defended themselves from that unlawful exercise of force.” Id.

The general self-defense instruction given at Moreno’s trial, by contrast, did not hinge on whether Moreno knew that Linde was a federal officer. That being so, the jury in Moreno’s case was not led to believe that, “regardless of the amount of force used by” Linde, Moreno “had no legal right to do anything except [to] submit.” Span II, 75 F.3d at 1390. Rather, to reiterate, the jury was instructed that the “[u]se of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force.”

To be sure, we observed in Span I that “the general self-defense instruction offered by the [defendants] d[id] not amount to a proposed instruction on the right to offer reasonable resistance to repel any excessive force used by federal law enforcement officers.” 970 F.2d at 578. But we did so while emphasizing that the defendants had neither presented at trial an excessive force theory of self-defense nor preserved for direct appeal a challenge to the district court’s use of a self-defense instruction foreclosing that otherwise very promising theory. See id. And it is true that, in Span II, we faulted trial counsel for “failing to request an instruction that … self-defense in the face of an excessive use of force … is an affirmative defense.” 75 F.3d at 1389. But we did so while holding that trial counsel was constitutionally ineffective for failing to present an excessive force theory or to preserve a challenge to the self-defense instruction given at trial. See id. at 1389–90. We did not consider in Span I or Span II whether that order suggested that the self-defense instruction applied beyond just the assault and attempted murder charges.


10. For three reasons, it also does not matter that the district court declined to instruct the jury on a justification defense specific to the two counts of unlawful possession of a firearm. First, the general self-defense instruction allowed Moreno to argue not only that he was justified in wresting the gun away from Linde, but also that (by extension) he was justified in possessing the gun despite his prior felony conviction and immigration status—which is precisely what Moreno’s closing argument contended. Second, Moreno was in some ways better off without the proposed justification instruction. For example, the self-defense instruction given at trial put the burden on the Government to prove a lack of self-defense beyond a reasonable doubt, but Moreno’s proposed justification instruction would have put the burden on Moreno to prove justification by a preponderance of the evidence. Third, although the general self-defense instruction referenced the “[u]se of force” without expressly mentioning possession of a firearm, the district court gave that instruction after instructing the jury on the elements of every charge at issue in the trial. Giving the instructions in Span I and Span II whether
Linde was performing his official duties. For example, Linde testified that he is acting within the scope of what he is employed to do, as officer is engaged in an official duty under § 111 as "whether the officer is performing a function covered by his job description." That instruction was appropriate. See United States v. Hoy, 137 F.3d 726, 729 (9th Cir. 1998).

C.

Moreno’s final argument on appeal is that the district court abused its discretion by excluding expert testimony he belatedly sought to introduce at trial. We disagree.

I.

On February 3, 2015—five months after trial counsel was appointed to represent Moreno—the district court granted Moreno’s third request for a continuance and pushed the trial date from February 18 to April 7. In the same order, the district court set a clear deadline for the parties to request disclosures mandated by Federal Rule of Criminal Procedure 16—

11. The statute further punishes those who assault federal officers “on account of” their official duties, 18 U.S.C. § 111(a)(1), but the Government has not relied on that clause here.

12. There was sufficient evidence at trial to support a finding that Linde was performing his official duties. For example, Linde testified that he was routinely tasked with assisting Border Patrol, and that he was doing just that when he encountered Moreno.

requiring that such requests be made within two weeks and that the parties respond within seven days of receiving one. As relevant here, Rule 16 requires a defendant to reciprocate government disclosure of expert witnesses by disclosing, “at the government’s request … a written summary” of any expert “testimony that the defendant intends to use” at trial. Fed. R. Crim. P. 16(b)(1)(C)(i). Rule 16 further instructs that “if a party fails to comply with this rule,” the district court may “prohibit that party from introducing the undisclosed evidence.” Fed. R. Crim. P. 16(d)(2)(C).

On February 13, the Government represented that it had complied with a request from Moreno for disclosure of the Government’s expert witnesses. It then requested reciprocal disclosure, which under Rule 16 had to include the defense expert “witness’s opinions, the bases and reasons for those opinions, and the witness’s qualifications.” Fed. R. Crim. P. 16(b)(1)(C). Seven days came and went. Then two more months went by, until on April 16—two weeks after the trial date was pushed from April 7 to June 23—Moreno informed the Government at a status conference that an expert named Weaver Barkman “would be potentially assisting the defense.” Moreno provided no further information.

On June 1—six weeks after the status conference and three weeks before trial—Moreno filed a formal notice that he intended to call Barkman as an expert witness. Moreno’s filing listed Barkman’s qualifications and stated that Barkman would likely “provide more information regarding the Glock pistol fired in this case.” The filing represented that trial counsel could not yet provide a summary of Barkman’s proposed testimony because Barkman had “not yet finished viewing the evidence in the case.” A week later, Moreno filed his sixth request for a continuance, in part to allow Barkman time to finish his report. The district court denied the request the next day.

On June 18—four months after Moreno’s expert disclosures were due and a mere five days before trial—the Government finally received Barkman’s expert report. The report indicated that Barkman would testify that the available physical evidence suggested that Linde never holstered his gun, the gun could have slipped out of the holster accidentally, several shots were accidentally fired, and no shot was fired near Linde’s head.

The Government moved to exclude Barkman’s testimony. It argued that Moreno’s disclosure was “incredibly untimely” and, in the alternative, that Barkman’s testimony would be inadmissible for evidentiary reasons. The district court granted the Government’s motion “based on [a] lack of timeliness and failure to follow the Court’s orders,” explaining that the “whole idea” of setting a deadline was for the parties to “disclose expert opinions early enough … so the other side [could] have an opportunity to evaluate those opinions and hire his or her own expert prior to trial to meet those opinions.”

13. Having excluded the expert testimony on timeliness grounds, the district court did not rule on the Government’s evidentiary objec-
2.

Relying on his constitutional right to present witnesses in his own defense, Moreno argues that the district court abused its discretion in imposing the “sanction” of excluding Barkman’s expert testimony. Such a sanction, he maintains, is inappropriate for a discovery violation unless the violation was found to be willful and blatant, and the district court made no such findings here.

Like the government in United States v. W.R. Grace, 526 F.3d 499 (9th Cir. 2008) (en banc), Moreno “mischaracterizes the enforcement order[ ] as an exclusionary ‘sanction.’” Id. at 514. The exclusion here, as in W.R. Grace, was no sanction. It “simply enforce[d] the [district court’s] earlier pretrial order” setting disclosure deadlines. Id. And so far as we can tell from the record, as well as from Moreno’s own representations on appeal, Moreno “did not object to the disclosure deadline[ ] set by the [district court’s pretrial order].” Id. The exclusion thus “could hardly have been a surprise.” Id. Moreover, in view of Moreno’s “acquiescence” to the disclosure deadline when it was set, along with the several months of trial preparation that had already occurred by that point, we see nothing unreasonable about the deadline. See id.

Moreno is correct that we distinguished between the government and criminal defendants in W.R. Grace. But we did so with respect to the appropriate standard for excluding a witness as a “sanction”—an issue we discussed while affirming the district court’s exclusion order on the alternative ground that the exclusion was appropriate even if viewed as a sanction. See id. at 514–15. We did not similarly cabin our earlier, independent holding that simply enforcing reasonable deadlines established in a pretrial order is not a sanction in the first place. The cases cited by Judge Zilly in dissent do not hold otherwise. W.R. Grace therefore controls.

Moreno counters that the district court’s order required him to disclose only expert testimony that he “intend[ed]” to use at trial, and that he had not yet intended to call Barkman when the disclosure deadline came and went. This argument is meritless, for it would render deadlines meaningless. By requiring the parties to disclose by a certain date expert witnesses whom they intended to call at trial, the district court required the parties to figure out before that date whom they wanted to call.

United States v. Schwartz, 857 F.2d 655 (9th Cir. 1988), is not to the contrary. In Schwartz, a fellow defendant flipped at the eleventh hour, and the government sought to call him as a cooperating witness at trial. Id. at 656. Although the newly minted cooperator had not been disclosed as a witness on time, we held that he could still testify. Id. at 659–60. We did reason that “the government could not then have intended to call” the cooperator when the district court’s disclosure deadline came and went. Id. at 659. But that was because the cooperator “had an absolute privilege not to testify,” leaving the government powerless to disclose him as a witness it intended to call at trial. Id. (citing U.S. Const. amend. V). Expert witnesses, in contrast, have no such privilege and, relatedly, are not normally being prosecuted in the very criminal case for which they would be called to testify. Moreno thus had full control over his intent to call an expert witness. Because he did not come close to meeting the district court’s reasonable disclosure deadline, Moreno was properly left to proceed without his desired expert testimony.

III.

For the foregoing reasons, we reverse Moreno’s convictions for attempted robbery and remand for a new trial on those charges. We affirm Moreno’s remaining convictions.

AFFIRMED in part, REVERSED in part, and REMANDED.

THOMAS, Chief Judge, concurring in Parts I, II(A)(1) and (2), and II(B) and (C); and dissenting from Part II(A)(3).

because no willful and blatant discovery violations had occurred was a response to the government’s alternative argument that, even if the defendant’s attorney did not commit a clear-cut violation of any discovery rule, the witness was properly excluded because defense counsel deliberately failed to divulge the existence of the expert witness to get an advantage at trial. Peters, 937 F.2d at 1426. And, in United States v. Finley, 301 F.3d 1000 (9th Cir. 2002), the issue was not timely disclosure but rather an alleged divergence between the disclosure that had been timely made and what the expert actually testified to at trial. Id. at 1018. Moreover, in Finley, the expert witness presented the only evidence of Finley’s diagnosed mental disorder, and the district court’s exclusion of the entirety of the expert testimony—not just the arguably undisclosed part—left Finley unable to present his main defense. Id. Even assuming the expert testimony excluded in this case was relevant to and supportive of Moreno’s self-defense theory, it was not essential to that theory to anywhere near the extent the expert testimony in Finley was.
When the defendant requests a specific jury instruction, but fails to object when the district court instructs the jury differently, we may only review for plain error. *Jones v. United States*, 527 U.S. 373, 388 (1999). Although Moreno initially requested that the district court instruct the jury that, with respect to the two attempted robbery charges under 18 U.S.C. § 2112, the Government must prove he acted with the specific “intent to steal,” Moreno failed to object to the instructions he now challenges in the district court. As such, our review is a limited review for plain error. *Id.; see also* Fed. R. Crim. P. 52(b).

Under this difficult standard, Moreno fails to demonstrate that any instructional error was not harmless in light of his post-arrest admissions. Accordingly, I respectfully dissent from the majority’s reversal of Moreno’s two attempted robbery convictions. The failure to preserve a claim ordinarily prevents a party from raising it on appeal, but Rule 52(b) “recognizes a limited exception to that preclusion” for plain errors. *Puckett v. United States*, 556 U.S. 129, 135 (2009). “[T]he authority created by Rule 52(b) is circumscribed.” *United States v. Olano*, 507 U.S. 725, 732 (1993). Plain error review under Rule 52(b) involves a four-pronged process, and “[m]eeting all four prongs is difficult.” *Puckett*, 556 U.S. at 135. First, “there must be an error or defect … that has not been intentionally relinquished or abandoned.” *Id.* “Second, the legal error must be clear or obvious.” *Id.* “Third, the error must have affected the appellant’s substantial rights.” *Id.* To affect the appellant’s substantial rights, the appellant must demonstrate the error “affected the outcome of the district court proceedings.” *Id.* (quoting *Olano*, 507 U.S. at 734). And finally, even if the appellant establishes the first three prongs, our discretion to remedy the error “ought to be exercised only if the error ‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *Id.* (quoting *Olano*, 507 U.S. at 736). As such, Rule 52(b) “leaves the decision to correct the forfeited error within the sound discretion” of this Court, *Olano*, 507 U.S. at 732–34, and the discretion conferred on us by Rule 52(b) should be exercised only where a “‘miscarriage of justice would otherwise result,’” *United States v. Young*, 470 U.S. 1, 15 (1985) (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)).

Even if there were plain instructional error as to the robbery counts, I respectfully disagree that it affected Moreno’s substantial rights and seriously undermined the fairness and integrity of the proceedings. Any instructional error was harmless in light of the record evidence. The evidence introduced at trial, in conjunction with Moreno’s post-arrest statements, demonstrates that he possessed the specific intent to permanently deprive the officer of both the gun and the vehicle, and the failure to instruct the jury regarding that intent did not affect the outcome of the district court proceedings. With respect to the officer’s gun, Moreno admitted that at the time he attempted to disarm the officer, he intended to gain possession of the gun and take the gun so that the officer could not use it against him. Although Moreno claimed that he went after the gun to avoid being shot, Moreno further admitted that he intended to take the gun from the officer, and throw it out somewhere in the desert so that the officer could not use the gun against him, effectively depriving the officer of the gun. Specifically, Moreno admitted that in going after the officer’s gun, he “wanted to take the gun from [the officer],” and once he gained possession of the gun, he intended to “throw it out into the desert” so that he would not be shot by the officer. The logical implication of Moreno’s admission is that in order to avoid being shot, Moreno intended to permanently deprive the officer, and the government, of the gun by taking it and throwing it out in the desert in such a way that the officer would not able to recover it. Moreno’s admissions evidence more than an intent to momentarily take the gun from the officer. In fact, Moreno’s claimed motive to avoid being shot, when viewed in conjunction with his admitted intent to take the gun and throw it in the desert, establish that he possessed the requisite intent to permanently deprive the officer, and the government, of the gun. The failure to instruct the jury on that element therefore did not have an impact on the ultimate conviction because Moreno freely admitted that he possessed the requisite intent. As such, Moreno failed to establish plain error.

With respect to the officer’s vehicle, Moreno’s admissions, when coupled with his actions, once again establish the requisite intent to sustain the attempted robbery conviction. In the post-arrest interview, Moreno admitted that his overall intent in getting in the officer’s vehicle was to use the vehicle in his escape. Specifically, at the time he got inside the officer’s vehicle, and just before he put the vehicle in gear, Moreno admitted he intended to “take[e] off” in the vehicle in order to “get to the border.” Further, following the sheriff’s paraphrase of his statement, Moreno agreed that when he initially got in the vehicle, “his original intentions” were to “take off” and “just keep going.” Moreno clarified, he “was going to go all the way to the border,” and that he “was going to take the car and go in it all the way to the border.” Although ultimately, once he arrived at the border, Moreno intended to “jump and flee to [Mexico]” and necessarily “leave the truck at the port of entry,” Moreno’s admissions establish that at the time he attempted to drive off in the officer’s vehicle, he had formed the requisite intent to permanently deprive the officer, and the government, of it.

Further, the fact that the overall incident took place near the border does not negate Moreno’s admitted intent to deprive the officer and the government of the vehicle. Moreno stated that when he got into the driver’s seat of the officer’s vehicle, he intended to flee, and that he was “just [going to] keep going.” Although Moreno stated that if he had been able to drive off in the vehicle, he would have left the vehicle at the port of entry, that does not negate his original admitted intent to take off in the vehicle, to just “keep going,” and to deprive the officer of the use of the vehicle in such a way that the officer would not be able to recover the vehicle or use it to apprehend Moreno. Even though the overall incident took place near the border, the record does not indicate that
Moreno intended to relinquish the vehicle at the border, or that he intended for the government to regain possession of the vehicle. Aside from the proximity to the border, there is no indication that Moreno intended for his taking of the vehicle to be only temporary, or for the government to regain possession of the vehicle.

Because the evidence was sufficient to establish the requisite intent, any instructional error was harmless, and certainly did not constitute plain error as to the robbery counts. I join the majority in all other respects.

For these reasons, I respectfully dissent, in part.

ZILLY, District Judge, dissenting from Part II(C):

In the criminal context, courts have upheld the “drastic remedy” of excluding a witness only in cases involving “willful and blatant” discovery violations. Taylor v. Illinois, 484 U.S. 400, 416 (1988); United States v. Peters, 937 F.2d 1422, 1426 (9th Cir. 1991). In this case, the district court made no finding that Moreno engaged in willful and blatant conduct. Rather, in the district court’s own words, Moreno’s expert witness was excluded “based on lack of timeliness and failure to follow the Court’s order.” The district court’s exclusion of Moreno’s expert witness (Weaver Barkman), without any finding of willful or blatant conduct, violated Moreno’s fundamental right to due process. This exclusion of the expert witness requires reversal and a new trial on all appealed counts. United States v. Finley, 301 F.3d 1000, 1018 (9th Cir. 2002).

The Supreme Court has recognized that the right to present evidence in one’s own defense is a fundamental constitutional right. Rock v. Arkansas, 483 U.S. 44, 52 (1987). The Supreme Court considered the intersection of this right and discovery sanctions in Taylor, and held that “few rights are more fundamental than that of an accused to present witnesses in his own defense.” Taylor, 484 U.S. at 408. Taylor holds that exclusion is possible only if the violation was “willful and blatant.” Id. at 416–17.

The majority wrongfully attempts to avoid this well-established law by reasoning that Barkman’s exclusion “was no sanction,” but rather simply enforcement of an earlier pretrial order. The district court, however, imposed a “sanction,” plain and simple. A discovery sanction is defined as: “[a] penalty levied by a court against a party or attorney who ... inexcusably fails to comply with ... the court’s discovery orders.” Black’s Law Dictionary 1542 (10th ed. 2014). Numerous Ninth Circuit opinions have characterized the exclusion of a witness for violating a discovery or scheduling order as a “sanction.” See United States v. Verduzco, 373 F.3d 1022, 1033–35 (9th Cir. 2004) (observing that, if the discovery violation at issue had been the sole ground for excluding the defense expert, a Ph.D. sociologist, the district court would have abused its discretion in imposing such sanction, but affirming on the basis of the district court’s additional Rule 403 analysis); United States v. Peters, 937 F.2d 1422, 1426 (9th Cir. 1991) (holding that, with respect to a forensic pathologist proffered as an expert by the defendant in an allegedly untimely manner, “no willful and blatant discovery violations occurred” and “application of the exclusionary sanction is impermissible”; see also Finley, 301 F.3d at 1016–18 (9th Cir. 2002) (reversing the exclusion of the defendant’s expert witness, a licensed clinical psychologist, reasoning that, even if a discovery violation occurred, the “severe sanction of total exclusion of the testimony was disproportionate to the alleged harm suffered by the government.”).16

The majority nevertheless asserts that Moreno “miscalculates the enforcement order as an exclusionary ‘sanction’” relying on United States v. W.R. Grace, 526 F.3d 499 (9th Cir. 2008) (en banc). W.R. Grace, however, does not support the majority, but rather Moreno’s right to a new trial. In W.R. Grace, the district court had excluded undisclosed witnesses from the government’s case-in-chief.17 Ironically, in W.R. Grace, the government, rather than the defendant, argued that the exclusion of witnesses can be imposed as a sanction only when the district court finds that the violation was “willful and motivated by a desire to obtain a tactical advantage.” Id. at 514–15 (quoting Finley, 301 F.3d at 1018). Because the district court in W.R. Grace made no such finding, the government contended the exclusion order could not stand. W.R. Grace rejected the government’s argument, which relied on Finley, observing that “Finley, ... like Taylor, involved a defendant’s right to present evidence, not the government’s, and has no bearing here.” Id. at 515 (emphasis added). W.R. Grace explicitly recognized that the government and a criminal defendant are subject to different standards,18 and its ruling, which was unfavorable to the government, had no effect on the doctrines applicable to the exclusion of criminal defense witnesses.

The majority’s conclusion that Moreno was “properly left to proceed without his desired expert testimony” completely ignores Supreme Court jurisprudence. Even if Moreno violated the applicable scheduling order, the district court improperly precluded the defense expert without making the requisite finding of willful or blatant conduct. As a result, the district court never reached the merits of the government’s evidentiary objections or conducted a Daubert hearing. Any skepticism about the proffered evidence that stems from an

16. The majority’s attempt to distinguish these cases is unconvincing. Each decision stands for the proposition that the exclusion of a witness on the basis of a discovery or scheduling order violation constitutes a sanction. The majority does not suggest otherwise.

17. In W.R. Grace, the district court did not exclude any witnesses, but rather precluded the government from identifying additional witnesses after the deadline. Thus, W.R. Grace involved only the enforcement of a scheduling order, as opposed to sanctions for a discovery violation.

18. The majority’s suggestion that Verduzco, Peters, and Finley do not contradict W.R. Grace is analytically flawed because (i) all three cases predate W.R. Grace, and (ii) all three cases involve a criminal defendant’s right to call witnesses, which was not even at issue in W.R. Grace.
undeveloped record is not within the province of an appellate court to consider.

I would reverse Moreno’s convictions on all counts, except for the unappealed illegal re-entry count, because his defense expert was excluded in violation of his constitutional rights, and I therefore respectfully dissent. I concur, however, in the result reached in Part II(A) of the majority opinion, reversing Moreno’s convictions for attempted robbery of the gun and the truck based on instructional error.

Cite as 18 C.D.O.S. 10367

HAVASUPAI TRIBE, Plaintiff-Appellant,
and
GRAND CANYON TRUST; CENTER FOR BIOLOGICAL DIVERSITY; SIERRA CLUB, Plaintiffs,
v.
HEATHER PROVENCIO, Forest Supervisor, Kaibab National Forest; UNITED STATES FOREST SERVICE, an agency in the U.S. Department of Agriculture, Defendants-Appellees,
ENERGY FUELS RESOURCES (USA), INC.; EFR ARIZONA STRIP LLC, Intervenor-Defendants-Appellees.

No. 15-15754
United States Court of Appeals for the Ninth Circuit
D.C. No. 3:13-cv-08045-DGC

GRAND CANYON TRUST; CENTER FOR BIOLOGICAL DIVERSITY; SIERRA CLUB, Plaintiffs-Appellants,
and
HAVASUPAI TRIBE, Plaintiff,
v.
HEATHER PROVENCIO, Forest Supervisor, Kaibab National Forest; UNITED STATES FOREST SERVICE, an agency in the U.S. Department of Agriculture, Defendants-Appellees,
ENERGY FUELS RESOURCES (USA), INC.; EFR ARIZONA STRIP LLC, Intervenor-Defendants-Appellees.

No. 15-15857
United States Court of Appeals for the Ninth Circuit
D.C. No. 3:13-cv-08045-DGC

Appeal from the United States District Court for the District of Arizona
David G. Campbell, District Judge, Presiding
Argued and Submitted December 15, 2016
San Francisco, California
Filed October 25, 2018
Before: Marsha S. Berzon and Mary H. Murguia, Circuit Judges, and Frederic Block, District Judge.*
Order;
Opinion by Judge Block

*The Honorable Frederic Block, United States District Judge for the Eastern District of New York, sitting by designation.

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ORDER

Judges Berzon and Murguia have voted to deny the petitions for rehearing en banc, and Judge Block so recommends. The full court has been advised of the petitions and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Accordingly, the petitions for rehearing en banc are DENIED.

The Opinion filed December 12, 2017, appearing at 876 F.3d 845 (9th Cir. 2017), is withdrawn. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit. A new opinion is being filed concurrently with this order. Further petitions for rehearing or rehearing en banc may be filed.

OPINION

BLOCK, District Judge:

In National Mining Association v. Zinke, 877 F.3d 845 (9th Cir. 2017), we upheld the decision of the Secretary of the Interior to withdraw, for twenty years, more than one million acres of public lands around Grand Canyon National Park from new mining claims. That withdrawal did not extinguish “valid existing rights.” In these consolidated appeals, we consider challenges by the Havasupai Tribe (“the Tribe”) and three environmental groups—Grand Canyon Trust, Center for Biological Diversity and Sierra Club (collectively, “the Trust”—to the determination of the United States Forest Service (the “Forest Service”) that Energy Fuels Resources (USA), Inc., and EFR Arizona Strip LLC (collectively, “Energy Fuels”) had a valid existing right to operate a uranium mine on land within the withdrawal area. As elaborated below, we affirm, with one exception, the district court’s order rejecting those challenges.

Much of what we said in National Mining Association concerning the history of uranium mining in the area and the Secretary’s withdrawal decision is also relevant here. To that we add some additional background regarding the particular mine at issue in this case.

Grand Canyon National Park is bordered to the north and south by the Kaibab National Forest. The southern portion of the forest—which is included in the withdrawal area—contains Red Butte, a site of religious and cultural significance to the Tribe.

In 1988, the Forest Service approved a plan to build and operate what became known as Canyon Mine, a 17.4-acre uranium mine in the area around Red Butte. During the approval process, the Forest Service prepared an Environmental Impact Statement (“EIS”) pursuant to the National Environmental Policy Act of 1969 (“NEPA”). NEPA requires an EIS for any “major Federal action[] significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

At that time, the Forest Service also addressed the mine’s impact under the National Historic Preservation Act of 1966 (“NHPA”). Section 106 of the NHPA requires federal agencies, prior to issuing a license for any “undertaking,” to “take into account the effect of the undertaking on any [historic property].” Pub. L. No. 89-665, § 106 (codified, as amended, at 54 U.S.C. § 306108). Historic property is defined as “any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register.” 54 U.S.C. § 300038. Based on its review, the Forest Service required mitigation measures to minimize the impact on possible relics buried on the site of the mine. The review did not include nearby Red Butte because that site was not eligible for inclusion on the National Register until 1992. See National Historical Preservation Act Amendments of 1992, Pub. L. No. 102-575, tit. XL, § 4006 (making “[p]roperties of traditional religious and cultural importance to an Indian tribe” eligible for inclusion on the National Register).
The EIS, however, did not address the tribal religious significance of Red Butte.

The Tribe sought judicial review, but both the district court and this Court rejected the challenge. See Havasupai Tribe v. United States, 752 F. Supp. 1471 (D. Ariz. 1990), aff’d sub nom. Havasupai Tribe v. Robertson, 943 F.2d 32 (9th Cir. 1991), cert. denied, 503 U.S. 959 (1992). The mine operator built surface facilities and sank the first fifty feet of a 1,400-foot shaft, but placed the mine on “standby” status in 1992 due to the unfavorable conditions in the uranium market that we described in National Mining Association.

As noted, the Secretary’s withdrawal decision was “subject to valid existing rights.” 77 Fed. Reg. 2563 (Jan. 18, 2012). A few months before the decision became final, Energy Fuels—which had become Canyon Mine’s owner— notified the Forest Service that it intended to return the mine to active operations. At the Service’s request, Energy Fuels agreed not to resume sinking the mineshaft pending review of its claim of existing rights.

On April 18, 2012, the Forest Service issued a “Mineral Report.” It found that Energy Fuels’ predecessors-in-interest had “located” mining claims at the site in 1978 and “discovered” uranium ore there between 1978 and 1982. It further found that there were 84,207 tons of uranium ore on the site, and that “under present economic conditions, the uranium deposit on the claims could be mined, removed, transported, milled and marketed at a profit.” Based on those findings, the Forest Service concluded that Energy Fuel had “valid existing rights that were established prior to the mineral withdrawal.”

The Forest Service also reviewed its 1988 decision, including its EIS and the mine’s approved plan of operations (“PoO”), “for any changes in laws, policies or regulations that might require additional federal actions to be taken before operations resume.” In a “Mine Review” dated June 25, 2012, it concluded that the existing PoO was “still in effect and no amendment or modification to the PoO is required before Canyon Mine resumes operations under the approved PoO.” It further concluded that “[n]o new federal action subject to further NEPA analysis is required for resumption of operations of the Canyon Mine.”

With respect to historic preservation, the Mine Review concluded that “there will be no new federal undertakings subject to NHPA Section 106 compliance.” It noted, however, that Red Butte had become eligible for inclusion on the National Register, and opined that the site “could be considered a newly ‘discovered’ historic property.” Applying the regulation applicable to such discoveries, 36 C.F.R. § 800.13(b)(3), the Forest Service immediately contacted the Tribe to “enter into government-to-government consultation” to “develop ‘actions’ to resolve or minimize the adverse effects” on Red Butte. In response, the Tribe insisted on a revised PoO, a supplemental EIS and a full consultation under section 106 of the NHPA. The Forest Service and the Tribe continued to correspond, but never settled on a specific plan of action.

The Mine Review alludes to the likely reason: “Tribes have commented that most anticipated impacts, including the most serious impacts, cannot be mitigated if uranium mining is conducted at the Canyon Mine site.”

Consultation with the Tribe ended in March 2013, when the Tribe and the Trust jointly filed suit against the Forest Service in the district court. Energy Fuels intervened as a defendant.

As amended, the complaint asserted four claims under the Administrative Procedure Act (“APA”):

1. the Forest Service’s determination that Energy Fuels had valid existing rights to operate the Canyon Mine notwithstanding the January 2012 withdrawal was a “major federal action significantly affecting the environment,” and, therefore, the service violated the NEPA by not preparing an EIS in connection with its determination;

2. the Forest Service’s determination was an “undertaking,” and, therefore, the service violated the NHPA by not conducting a full consultation under section 106 in connection with its determination;

3. alternatively, the Forest Service violated the NHPA by not properly updating its original section 106 analysis to account for the impact on Red Butte; and

4. the Forest Service violated several federal laws by failing to take various costs into account in its determination that Canyon Mine could be operated at a profit.

As relief, the plaintiffs sought a declaration that the Forest Service was acting in violation of the NEPA, the NHPA and other laws; an order setting aside any “approvals or authorizations” for operations at Canyon Mine; and an injunction prohibiting “any further uranium exploration or mining-related activities at the Canyon Mine unless and until the Forest Service fully complies with all applicable laws.”

The parties cross-moved for summary judgment. In an order dated April 7, 2015, the district court held (1) that the plaintiffs had Article III standing, (2) that the plaintiffs lacked prudential standing with respect to their fourth claim, and (3) that the Mineral Report—which the district court referred to as the “VER [Valid Existing Rights] Determination”—was a final agency action subject to review under the APA. See Grand Canyon Tr. v. Williams, 98 F. Supp. 3d 1044, 1055–61 (D. Ariz. 2015). Turning to the merits, the district court held (1) that the Mineral Report was not a “major federal action” requiring an EIS under the NEPA; (2) that the report was not an “undertaking” requiring a full section 106 consultation under the NHPA; (3) that the Forest Service’s decision to consider the effect on Red Butte under 36 C.F.R. § 800.13(b)
(3) was reasonable; and (4) that the Forest Service had complied with that regulation. See id. at 1062–73.1

Both the Tribe and the Trust timely appealed.

II

The Forest Service argues that we lack jurisdiction because its determination that Energy Fuels has valid existing rights was not a final agency action. See Ukidah Valley Med. Cir. v. FTC, 911 F.2d 261, 266 (9th Cir. 1990) ("[F]inal agency action’ is a jurisdictional requirement imposed by [5 U.S.C. § 704].").2 We review this threshold issue de novo. See Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236, 247 (3d Cir. 2011).3

"[A]gency action’ includes the whole or a part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or failure to act[,]” 5 U.S.C. § 551(13). "[R]elief," in turn, includes the “recognition of a claim, right, immunity, privilege, exemption, or exception.” Id. § 551(11) (B).

The Forest Service claims that it has no authority to recognize mining rights, and that the Mineral Report represents only the agency’s “opinion” as to their validity. But whether or not the Mineral Report was legally required, it was prepared. Its conclusion that Energy Fuels had valid existing rights at the time of the withdrawal falls within the plain meaning of “recognition of a claim.”

We further conclude that the Mineral Report was final. “As a general matter, two conditions must be satisfied for agency action to be ‘final[,]’” Bennett v. Spear, 520 U.S. 154, 177 (1997). “First, the action must mark the consummation of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature.” Id. at 177–78 (citation and internal quotation marks omitted). It is true that the final decision to contest a claim of existing rights rests with the Department of the Interior’s Bureau of Land Management (“BLM”). See Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963). If, however, the Forest Service finds a claim is valid, nothing else happens. The district court sensibly described that outcome as “the Forest Service’s ‘last word’ on the validity of the Canyon Mine mineral rights.” Grand Canyon Tr. v. Williams, 38 F. Supp. 3d 1073, 1078 (D. Ariz. 2014), and we agree with that description.

In addition, to be final, “the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” Bennett, 520 U.S. at 178 (internal quotation marks omitted). Rights to a mineral deposit on public land are not conferred by agency action; they are acquired by the miner’s own actions of location and discovery. See American Law of Mining § 4.11 (2d ed. 1997) (“[The prospector] may seek ‘valuable minerals’ and, if he finds them, may initiate a vested right without the approval of anyone else, including representatives of the government that owns the land.”). Nevertheless, the Mineral Report determined that such rights existed with respect to Canyon Mine, and that is all Bennett requires.

We have observed that “courts consider whether the practical effects of an agency’s decision make it a final agency action, regardless of how it is labeled.” Columbia Riverkeeper v. U.S. Coast Guard, 761 F.3d 1084, 1094–95 (9th Cir. 2014). We therefore focus on both the “practical and legal effects of the agency action,” and define the finality requirement “in a pragmatic and flexible manner.” Or. Nat. Desert Ass’n v. U.S. Forest Serv., 465 F.3d 977, 982 (9th Cir. 2006) (citations omitted). We agree with the district court’s assessment that the Mineral Report was a practical requirement to the continued operation of Canyon Mine because “the Forest Service, Energy Fuels, and interested tribes all understood that mine operations would not resume until the VER Determination was completed.” Grand Canyon Tr., 38 F. Supp. 3d at 1079.

III

The challenges to the merits of the district court’s judgment raise three issues: (A) Was the Mineral Report a “major federal action” under the NEPA? (B) Did the Mineral Report approve an “undertaking” under the NHPA? (C) Did the Trust fall within the zone of interests of either the Federal Land Policy and Management Act of 1976 (“FLPMA”) or the General Mining Act of 1872 (“Mining Act”)? Our review of each question is de novo. See N. Cheyenne Tribe v. Norton, 503 F.3d 836, 845 (9th Cir. 2007) (compliance with NEPA and NHPA on summary judgment); Mills v. United States, 742 F.3d 400, 406 (9th Cir. 2014) (zone of interests).

A. NEPA

We have held that “where a proposed federal action would not change the status quo, an EIS is not necessary.” Upper Snake River Chapter of Trout Unlimited v. Hodel, 921 F.2d 232, 235 (9th Cir. 1990). Nor is an EIS necessary to “discuss

1. The district court also rejected the defendants’ argument that two of the plaintiffs’ claims were barred by collateral estoppel. See Grand Canyon Tr., 98 F. Supp. 3d at 1061–62. That ruling has not been challenged on appeal.


3. In the district court, the Forest Service further argued that the plaintiffs lacked Article III standing. It has not pursued that argument on appeal, but we are satisfied that the plaintiffs have suffered injuries in fact that are fairly traceable to the Service’s actions and that could be redressed by a favorable judicial determination. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992). Continued uranium mining at Canyon Mine causes concrete injury to the Tribe’s religious and cultural interests and the Trust’s aesthetic and recreational interests. While the parties dispute whether continued mining required the Forest Service’s approval, we must assume that it did in assessing standing. See Equity Lifestyle Props., Inc. v. Cty. of San Luis Obispo, 548 F.3d 1184, 1189 n.10 (9th Cir. 2008) (“The jurisdictional question of standing precedes, and does not require, analysis of the merits.”). If the Tribe and Trust are correct that continued mining required approval, then their injuries are fairly traceable to that approval and could be redressed by setting it aside.
the environmental effects of mere continued operation of a facility.” Burbank Anti-Noise Grp. v. Goldschmidt, 623 F.2d 115, 116 (9th Cir. 1980). We applied those general principles in Center for Biological Diversity v. Salazar, 706 F.3d 1085 (9th Cir. 2013) (“CBD”).

At issue in CBD was the resumption of mining at a uranium mine, “after a seventeen-year hiatus, under a plan of operations that BLM approved in 1988.” 706 F. 3d at 1088. We held that “no regulation requires approval of a new plan of operations before regular mining activities may recommence following a temporary closure.” Id. at 1093. We further held that the original approval of the plan was a major federal action, but that “that action [wa]s completed when the plan [wa]s approved.” Id. at 1095 (quoting, with alterations, Norton v. S. Utah Wilderness All., 542 U.S. 55, 73 (2004)). By contrast, in Pit River Tribe v. United States Forest Service, 469 F.3d 768 (9th Cir. 2006), we held that a lease extension was a major federal action that altered the status quo because without it, the lessee would not have been able to continue operating a power plant on the leased property. See id. at 784.

The district court correctly held that CBD, not Pit River, governs this case. As in CBD, the original approval of the plan of operations was a major federal action. And as in CBD, that action was complete when the plan was approved. Unlike Pit River, resumed operation of Canyon Mine did not require any additional government action. Therefore, the EIS prepared in 1988 satisfied the NEPA.

B. NHPA

As we explained, the NHPA requires consultation pursuant to section 106 prior to any “undertaking.” 54 U.S.C. § 306108. As pertinent here, “undertaking” means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those requiring a Federal permit, license, or approval[].” Id. § 300320(3). Here, too, we agree with the district court that the Mineral Report did not “permit, license, or approv[e]” resumed operations at Canyon Mine; it simply acknowledged the continued vitality of the original approval of the PoO. Just as that approval was the only “major federal action” requiring an EIS under the NEPA, it was the only “undertaking” requiring consultation under the NHPA.

The Tribe concedes that the approval process in 1986 included the necessary consultation, and that the cultural and religious impacts on Red Butte were not included because they were not required to be at that time. It argues, however, that the NHPA imposes a continuing obligation on federal agencies to address the impact on historic property at any stage of an undertaking.

The statutory definition of “undertaking” dates from 1992. Prior to that, it was defined by the Advisory Council on Historic Preservation (“ACHP”), the agency charged with implementing the NHPA, to include “continuing projects, activities, or programs and any of their elements not previously considered under section 106.” 36 C.F.R. § 800.2(a) (1991). But that definition was superseded by 54 U.S.C. § 300320(3), which omits the reference to continuing projects. The regulatory definition now conforms to the statutory definition. See 36 C.F.R. § 800.16(y). We therefore disagree with the Tribe that the current definition of “undertaking” encompasses a continuing obligation to evaluate previously approved projects.

Although continuing obligations have been removed from the definition of “undertaking,” they remain in 36 C.F.R. § 800.13(b):

If historic properties are discovered or unanticipated effects on historic properties found after the agency official has completed the section 106 process . . . , the agency official shall make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties and:

(1) If the agency official has not approved the undertaking or if construction on an approved undertaking has not commenced, consult to resolve adverse effects pursuant to § 800.6; or . . .

(3) If the agency official has approved the undertaking and construction has commenced, determine actions that the agency official can take to resolve adverse effects, and notify the [state or tribal historical office], any Indian tribe . . . that might attach religious and cultural significance to the affected property, and the [Advisory Council on Historic Preservation] within 48 hours of the discovery. The notification shall describe the agency official’s assessment of National Register eligibility of the property and proposed actions to resolve the adverse effects. The . . . Indian tribe . . . and the Council shall respond within 48 hours of the notification. The agency official shall take into account their recommendations regarding National Register eligibility and proposed actions, and then carry out appropriate actions. The agency official shall provide the . . . Indian tribe . . . and the Council a report of the actions when they are completed.

As noted, the Forest Service concluded that this regulation applied to Canyon Mine. It further concluded that subsection (3) applied because construction had begun in the early 1990s, although it acknowledged that the 20-year hiatus presented a “somewhat unusual situation.”

The Tribe objects that Red Butte was not a newly discovered historic property—and that the effect of operating a uranium mine near it was not unanticipated—because it had informed the Forest Service of the religious and cultural significance of this site decades earlier. While that is true, the Tribe does not dispute that Red Butte was not a “historic property” eligible for inclusion on the National Register until 2010. As a result, the NHPA did not obligate the For-
est Service to take the site into account when it conducted a full section 106 consultation in 1986. And while we agree that eligibility for inclusion on the National Register is not exactly a “discovery,” there is no other regulation requiring an agency to consider the impact on newly eligible sites after an undertaking is approved. In other words, by invoking § 800.13(b), the Forest Service may have given the Tribe more than it was entitled to demand.

The Tribe further argues that if § 800.13(b) applies, the Forest Service should have proceeded under § 800.13(b)(1), instead of § 800.13(b)(3). In sum, the agency must engage in a full section 106 consultation if it “has not [yet] approved the undertaking or if construction on an approved undertaking has not [yet] commenced.” 36 C.F.R. § 800.13(b)(1).

If, however, the agency “has approved the undertaking and construction has commenced,” it can engage in a simplified process to “determine actions that the agency official can take to resolve adverse effects.” Id. § 800.13(b)(3).

Canyon Mine fits squarely within the scope of subsection (3). The mine was approved in 1988, and construction of the surface facilities began shortly thereafter. The Tribe argues that subsection (3) was intended to address emergency situations, but there is no express limitation to such situations.4

Finally, the Tribe briefly argues that the Forest Service did not comply with § 800.13(b)(3). Having reviewed the record, we conclude that the Forest Service made a good-faith effort to ascertain steps it could take to resolve the possible adverse effects of mining on Red Butte. If that effort was not successful, it is because the Tribe insisted on a full consultation under section 106, which was not legally required, and a complete ban on mining around Red Butte, which the Forest Service lacks the authority to impose.

C. FLPMA and Mining Act

The plaintiffs’ fourth claim, advanced by the Trust, challenged the merits of the Forest Service’s conclusion that Energy Fuels had valid existing rights predating the withdrawal because its predecessors-in-interest had discovered a deposit of uranium ore that could be “mined, removed, transported, milled and marketed at a profit.” The district court did not address this claim, instead holding that the Trust lacked prudential standing to make it. See Grand Canyon Tr., 98 F. Supp. 3d at 1058–60.

“[A] person suing under the APA must satisfy not only Article III’s standing requirements, but an additional test: The interest he asserts must be arguably within the zone of interests to be protected or regulated by the statute that he says was violated.” Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 224 (2012) (internal quotation marks omitted).5 We agree with the district court that the Trust’s fourth claim falls outside the Mining Act’s zone of interests. See Grand Canyon Tr., 98 F. Supp. 3d at 1059 (explaining that the Mining Act’s obvious intent was “to reward and encourage the discovery of minerals that are valuable in an economic sense,” and that the Trust’s interests are environmental and historical, but not economic).

However, the Trust also argued that the Forest Service’s VER determination violated the FLPMA. The district court did not address the FLPMA’s zone of interests in its analysis, concluding that “the sections of the [FLPMA] to which Plaintiffs cite do not relate to validity determinations or mineral examinations … . and do not provide the Court with any relevant law to apply in deciding claim four.” Id. at 1059 n.8. It is true, of course, that the plaintiff must fall within the zone of interests of the “statutory provision whose violation forms the legal basis of his complaint.” Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 883 (1990). However, we conclude that the FLPMA, and not the Mining Act, forms the legal basis of the Trust’s fourth claim.

We described the FLPMA at length in National Mining Association. See 877 F.3d at 845. Relevant here, the FLPMA confers on the Secretary authority to withdraw federal lands for specified purposes, 43 U.S.C. § 1701(a)(4), but makes that authority “subject to valid existing rights.” Pub. L. 94-579, § 701(h), 90 Stat. 2743, 2786 (1976). Thus, the VER determination that the Trust challenges in this case was made to decide whether Canyon Mine would be subject to a withdrawal made pursuant to the FLPMA.

Here, the Forest Service looked to the Mining Act to make its VER determination. However, that does not conclusively establish that the Mining Act, and not the FLPMA, forms the “legal basis” of the Trust’s fourth claim. Had Energy Fuels claimed rights of a different nature, the Forest Service would have consulted a different statutory scheme, but it still would have made a VER determination. Regardless of the statute

4. In a letter to the Forest Service, the ACHP opined that subsection (3) applies “where construction activities have begun and would be ongoing, and thus, the agency had limited time and opportunity for consultation.” Normally, an agency’s interpretation of its own ambiguous regulation is “controlling unless plainly erroneous or inconsistent with the regulation.” Auer v. Robbins, 519 U.S. 452, 461 (1997) (internal quotation marks omitted). Subsection (3) is not ambiguous. Moreover, the letter was motivated by a concern that proceeding under subsection (3) “would continue the unproductive conflict between the Forest Service and the Indian tribes that consider Red Butte a sacred place.” We agree with the district court that the letter “appears to be more tactical advice than an interpretation of the regulation.” Grand Canyon Tr., 98 F. Supp. 3d at 1070.

5. As the district court’s language reflects, the additional test was, until recently, described as a matter of “prudential standing.” See Match-E-Be-Nash-She-Wish, 567 U.S. at 224–28. But in Lexmark International, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014), the Supreme Court called that description “misleading,” id. at 125, and “in some tension with … the principle that a federal court’s obligation to hear and decide cases within its jurisdiction is virtually unflagging.” Id. at 126 (internal quotation marks and citations omitted). It held that the zone-of-interests inquiry instead asks “whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim,” id. at 127, or, in the APA context, whether a plaintiff’s interests “are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue,” id. at 130 (internal quotation marks and citations omitted).
consulted, a VER determination affects whether activities on federal land can be limited under the FLPMA. See 43 U.S.C. § 1703(j) (stating that the purpose of a withdrawal is to “limit[] activities … in order to maintain other public values”). That question implicates the Trust’s asserted environmental concerns.

In sum, the Forest Service applied the relevant standards from the Mining Act to make its VER determination, but the Trust’s claim that Canyon Mine should not be exempt from the withdrawal because the VER determination was in error remains a claim under the FLPMA. And since the Trust’s claim seeks to vindicate some of the same concerns that underlie the Secretary’s withdrawal authority, it falls within the statute’s zone of interests. See W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 485–86 (9th Cir. 2011) (plaintiffs’ environmental interests fell within the NEPA and the FLPMA’s zone of interests); Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1179 (9th Cir. 2000) (plaintiffs’ aesthetic and recreational interests fell within the FLPMA’s zone of interests).

IV

With respect to the claims under the NEPA and NHPA, the judgment of the district court is AFFIRMED. With respect to the claim under the FLPMA, the judgment is VACATED and the case is REMANDED for consideration of the claim on the merits.
California Courts of Appeal

Cite as 18 C.D.O.S. 10374

RAAM CONSTRUCTION, INC., Plaintiff and Appellant,

v.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD, Defendant and Respondent;
DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH, Real Party in Interest.

No. A149734
In The Court of Appeal of the State of California
First Appellate District
Division Three
(Alameda County Super. Ct. No. RG16810863)
Filed September 28, 2018
Certified for Publication October 25, 2018

COUNSEL

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J. Jeffrey Mojcher, Aaron R. Jackson, and Autumn R. Gonzales for Respondent.
Nathan D. Schmidt and Deborah A. Bialosky for Real Party in Interest.

ORDER CERTIFYING OPINION FOR PUBLICATION;
NO CHANGE IN JUDGMENT

THE COURT:

The opinion in the above-entitled matter filed on September 28, 2018, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports, and it is so ordered.

POLLAK, J., Acting P.J.

OPINION

This is an appeal from judgment after the trial court sustained the demurrer filed by real party in interest Division of Occupational Safety and Health (DOSH) and granted the motion to dismiss filed by defendant Occupational Safety and Health Appeals Board (Appeals Board), without leave to amend, on untimeliness grounds. Plaintiff Raam Construc-
limit specified in this section, apply to the superior court of the county in which he resides, for a writ of mandate, for the purpose of inquiring into and determining the lawfulness of the original order or decision or of the order or decision following reconsideration. *The application for writ of mandate must be made within 30 days after a petition for reconsideration is denied, or, if a petition is granted or reconsideration is had on the appeals board’s own motion, within 30 days after the filing of the order or decision following reconsideration.* (Italics added.)

According to Raam, this statute’s 30-day limitations period is ambiguous, in part because it “establishes two different deadlines depending upon whether [the Appeals Board] grants or denies the petition for reconsideration.” Raam argues that, if such a petition is granted, the writ petition must be filed in superior court “within 30 days of the ‘filing’ of [the Appeals Board’s] order . . . .” If, on the other hand, the Appeals Board denies the petitioner’s petition for reconsideration—which occurred here on March 4, 2016—“then the date for filing in court is 30 days ‘after a petition for reconsideration is denied [quoting § 6627].’ ” According to Raam, “the dichotomy established by the Legislature in Labor Code § 6627 between the filing date of a decision and the date when a denial of reconsideration becomes effective should be read to mean ‘denial’ is effective when the parties are deemed to know of its existence.” (Citing Cal. Code Regs., tit. 8, §§ 390.3, subd. (a), 390, subd. (a).) And here, Raam’s petition for writ of mandate was filed within 30 days after the company learned of the Appeals Board’s denial of its petition for reconsideration.

We reject Raam’s arguments, finding no ambiguity in the statutory language. Quite simply, section 6627 by its own terms mandates that an “application for writ of mandate must be made within 30 days after a petition for reconsideration is denied, or, if a petition is granted or reconsideration is had on the appeals board’s own motion, within 30 days after the filing of the order or decision following reconsideration.” We decline Raam’s request to read anything more, or different, into this straightforward provision. (Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735 [“If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature”].) Moreover, as DOSH and the Appeals Board note, the California Supreme Court has interpreted another Labor Code provision that is in all significant respects identical to section 6627 and, based on the clear language of the statute, our Supreme Court interpreted the statute in the manner we do here. In *Camper v. Workers’ Comp. Appeals Bd.* (1992) 3 Cal.4th 679 (Camper), the high court was asked to interpret section 5950, the statute governing the time limits for an aggrieved party to file a petition for review of a Workers’ Compensation Appeals Board decision before the Supreme Court or an appellate court. Aside from the different judicial forums (Supreme Court or Court of Appeal versus superior court) and prescribed time limits (45 versus 30 days), the language of section 5950 mirrors that of section 6627. Moreover, there, as here, the petitioner sought to read into the statute a triggering event for the running of the limitations period that was not found in the statutory language itself. Specifically, the petitioner argued section 5950 should be interpreted to mean the prescribed time limit is triggered not by the filing of the Appeals Board’s order following reconsideration, but by the service of said order, citing Code of Civil Procedure section 1013. (*Camper, supra*, 3 Cal.4th at pp. 683–684; see Code Civ. Proc., § 1013, subd. (a) [extending prescribed time limits under certain circumstances by five calendar days “upon service by mail, if the place of address and the place of mailing is within the State of California”].) The California Supreme Court disagreed, concluding section 5950 is clear on its face that the filing of the Appeals Board’s decision is what triggers the running of the limitations period: “The 45-day time period specified in section 5950 runs from the time ‘a petition for review is denied’ or from the ‘filing of [a]n order, decision, or award following reconsideration.’” (Lab. Code, § 5950, italics added.) There is no reference in this statute to service. The operative trigger of the time period set forth in section 5950 is the filing of the order. “[T]he cases have consistently held that where a prescribed time period is commenced by some circumstance, act or occurrence other than service then [Code of Civil Procedure] section 1013 will not apply. [Citations.][1] On the other hand, where a prescribed time period is triggered by the term “service” of a notice, document or request then section 1013 will extend the period. [Citations.]” (*Camper, supra*, 3 Cal.4th at pp. 684–685, fn. omitted.) *Camper* adds further support for our decision to interpret section 6627 according to the ordinary meaning of its terms. Like section 5950, section 6627 is clear on its face with respect to what triggers the running of the limitations period: The 30-day time period specified in section 6627 runs from the time “a petition for reconsideration is denied” or from “the filing of the order or decision following reconsideration.” (§ 6627, italics added.) Further, as the *Camper* court observed in regards to section 5950, the applicable statute in our case, section 6627, does not suggest, much less state, that a decision to deny a petition for reconsideration triggers

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2. As the Appeals Board notes, the regulations Raam relies upon in making this argument govern challenges to an ALJ ruling that are brought before the Appeals Board rather than, as here, brought in the superior court. (See Cal. Code Regs., tit. 8, §§ 390.3, subd. (a), 390, subd. (a).) 3. Section 5950 states: “Any person affected by an order, decision, or award of the appeals board may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which he resides, for a writ of review, for the purpose of inquiring into and determining the lawfulness of the original order, decision, or award or of the order, decision, or award following reconsideration. The application for writ of review must be made within 45 days after a petition for reconsideration is denied, or, if a petition is granted or reconsideration is had on the appeal board’s own motion, within 45 days after the filing of the order, decision, or award following reconsideration.”
the limitations period five days after its filing date (see Code Civ. Proc., § 1013) or, as Raam insists, after the petitioner “knew [the Appeals Board] had denied [its] petition[.]” (See Camper, supra, 3 Cal.4th at pp. 684–685.) Rather, a straightforward reading of the statute prescribes that the operative trigger of the limitations period applicable in this case is the date “[Raam’s] petition for reconsideration [was] denied”—to wit, March 4, 2016, the date the Appeals Board’s denial order was issued, filed and served on Raam via first class mail. No further statutory analysis is thus warranted; Raam’s writ petition was correctly found untimely. (See People v. Manzo (2012) 53 Cal.4th 880, 885 [“When the language of a statute is clear, we need go no further’’]; Voices of the Wetlands v. State Water Resources Control Bd. (2011) 52 Cal.4th 499, 519 [“When interpreting statutes, we begin with the plain, commonsense meaning of the language used by the Legislature. [Citation.] If the language is unambiguous, the plain meaning controls’’]; see also Camper, supra, 3 Cal.4th at p. 686 [the time limits specified in section 5950 for seeking judicial review of decisions by the Appeals Board are jurisdictional].)

And lastly, we quickly dispose of Raam’s remaining argument that the trial court’s order and judgment must be deemed void because no stipulation to have a commissioner decide the matter appears in the record. The law, which Raam does not mention, much less challenge, is clear. While generally speaking a commissioner is not qualified to act absent a stipulation (People v. Tijerina (1969) 1 Cal.3d 41, 49), the “tantamount stipulation” doctrine holds that “an implied stipulation arises from the parties’ common intent that the subordinate officer hearing their case do things which, in fact, can only be done by a judge.’ [Citation.]” (In re Horton (1991) 54 Cal.3d 82, 98.) That is exactly what occurred here—Raam appeared represented by counsel at a contested hearing on the petition, and at no time objected to or otherwise challenged the commissioner’s authority to decide the matter. Accordingly, we reject his belated attempt to do so here. (Ibid. [where “it is uncontroverted that counsel participated fully and vigorously

4. “Since 1862, our Constitution has contemplated the use of court commissioners to perform ‘chamber business’ (see Cal. Const. of 1849, art. VI, § 11, as amended Sept. 3, 1862; Cal. Const., former art. VI, § 14), now referred to as ‘subordinate judicial duties.’ (Cal. Const., art. VI, § 22; [citation].) In addition, since 1879, our Constitution has permitted a cause to be tried in the superior court by a temporary judge. (Cal. Const. of 1879, former art. VI, § 8; see also Cal. Const., former art. VI, § 5, as amended in 1928.) The original provision was that such a judge must be ‘a member of the bar, agreed upon in writing by the parties litigant or their attorneys of record, approved by the Court, and sworn to try the cause.’ [Citation.] This provision was repealed in 1926, but was reinstated in article VI, section 5 in 1928 to provide for trial by a temporary judge ‘[u]pon stipulation of the parties litigant or their attorneys of record. . .’ (Cal. Const., former art. VI, § 5, as amended in 1928.) The current version of this language, as revised in 1966, provides: ‘On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause.’ (Cal. Const., art. VI, § 21.)’ (In re Horton (1991) 54 Cal.3d 82, 90.)
I

FACTUAL BACKGROUND

The following facts are taken from the evidence admitted in support of and in opposition to the motion for summary judgment, and also from those allegations of the complaint that Scottsdale did not controvert.

Sombrero owned a piece of commercial property in Colton. A conditional use permit (CUP) had been issued authorizing the use of the property as a nightclub. One of the conditions of the CUP was that the city had to approve the floor plan for the property, and thereafter, the floor plan could not be modified without city approval.

In 2007, Sombrero leased the property to new tenants who operated it as a nightclub called El Sombrero. In connection with the new tenancy, the city inspected the property; it approved a floor plan, and it found that the property was in compliance with the floor plan. As part of the floor plan, the club had a single entrance door, equipped with a metal detector.

CES provided security guard services at El Sombrero. It had a corporate general liability policy issued by Scottsdale. The policy covered CES’s liability for “property damage” caused by an “occurrence.” “Property damage” was defined as either (a) “[p]hysical injury to tangible property, including all resulting loss of use of that property,” or (b) “[l]oss of use of tangible property that is not physically injured.” “Occurrence,” for present purposes, was defined as “an accident.”

On June 4, 2007, one patron of El Sombrero shot and killed another. After the shooting, Sombrero learned that CES had converted a storage area into a “VIP entrance” to the club. The VIP entrance had no metal detector. The owner of CES admitted that the gun used in the shooting got into the club through the VIP entrance.

As a result of the shooting, Colton revoked the CUP. Sombrero then filed this direct action (Ins. Code, § 11580, subd. (b)(2)) against Scottsdale Insurance Company (Scottsdale), CES’s liability insurer. The trial court granted summary judgment in favor of Scottsdale, ruling that Sombrero’s claim against CES was for an economic loss, rather than for “property damage” as defined in and covered under the policy.

We will hold that Sombrero’s loss of the ability to use the property as a nightclub constituted property damage, which was defined in the policy as including a loss of use of tangible property.

“The property went from being valued at $2,769,231 . . . with its large occupancy and nightclub entitlement, to being valued at $1,846,153 after the modified conditional use permit allowing for private banquet use . . . .”
“The difference in value is $923,078.”

“[Sombrero] is seeking negligence damages against [CES] . . . in the amount of $923,078, which represents the loss in value due to the modification of the conditional use permit.”

II

PROCEDURAL BACKGROUND

On February 20, 2015, Sombrero filed this action against Scottsdale,1 alleging one cause of action for breach of the insurance policy.

On May 10, 2016, Scottsdale filed a motion for summary judgment. It argued that the loss of the CUP was not a loss of use of tangible property but merely the loss of an intangible right to use property in a certain way. It also argued that property damage does not include economic loss.

In its opposition, Sombrero argued, among other things, that it lost the use of tangible property due to the revocation of the CUP. It also argued that, when an economic loss results from the loss of use of tangible property, it is covered as property damage.

On October 11, 2016, after hearing argument, the trial court granted the motion. It explained: “The underlying judgment against [CES] was set in the amount of $923,078 based on lost value after the permit was revoked. [Citation.] This amount is what Sombrero is seeking to recover from Scottsdale in this case [citation] and is described by Sombrero as economic loss [citation]. Lost value is economic loss, but economic loss is not lost use of tangible property [citation]. Accordingly, the coverage in Scottsdale’s policy for property damage does not extend to Sombrero’s economic losses caused by Scottsdale’s insureds.” (Capitalization altered, punctuation added.)

On November 7, 2016, the trial court entered judgment accordingly.

III

THE LOSS OF THE ABILITY TO USE THE PROPERTY AS A NIGHTCLUB CONSTITUTED COVERED PROPERTY DAMAGE

Sombrero contends that “[t]he loss of use of the [p]roperty by the revocation of the CUP[] constitutes . . . ‘loss of use of tangible property that is not physically injured.’”

A “[d]efendant[] [i]s entitled to summary judgment only if ‘all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” [Citation.] To determine whether triable issues of fact do exist, we independently review the record that was before the trial court when it ruled on defendant’s motion. [Citations.] In so doing, we view the evidence in the light most favorable to plaintiff[ ] as the losing party, resolving evidentiary doubts and ambiguities in [its] favor. [Citation.]” (Martinez v. Combs (2010) 49 Cal.4th 35, 68.)

“Liability insurance obligates the insurer to indemnify the insured against third party claims covered by the policy by settling the claim or paying any judgment against the insured. [Citation.] Where judgment is obtained against an insured in an action based on bodily injury, death, or property damage, the plaintiff (now a judgment creditor) may bring an action against the insurer on the policy, subject to the policy’s terms and limitations, to recover on the judgment. [Citation.] In short, the ‘“judgment creditor may proceed directly against any liability insurance covering the defendant, and obtain satisfaction of the judgment up to the amount of the policy limits.”’ [Citation.] Among the elements that must be proven is that ‘“the policy covers the relief awarded in the judgment. . . .”’ [Citation.]” (Howard v. American Nat. Fire Ins. Co. (2010) 187 Cal.App.4th 498, 512–513.)

“An insurer’s duty of indemnification requires a determination of actual coverage under the policy. [Citation.] . . . [¶] In contrast, ‘“[a] liability insurer owes a duty to defend its insured when the claim creates any potential for indemnity. [Citation.] . . .[¶] ‘[T]he insurer must defend in some lawsuits even though there is no actual insurance policy coverage. However, as it acknowledges (albeit in throwaway fashion), this standard applies to the duty to defend, not the duty to indemnify. ‘[‘W]hile an insurer has a duty to defend suits which potentially seek covered damages, it has a duty to indemnify only where a judgment has been entered on a theory which is actually (not potentially) covered by the policy.’” [Citation.]” (Advanced Network, Inc. v. Peerless Ins. Co. (2010) 190 Cal. App.4th 1054, 1060–1061.)

Sombrero persistently argues that Scottsdale had to show that there was no potential for coverage. However, as it acknowledges (albeit in throwaway fashion), this standard applies to the duty to defend, not the duty to indemnify. “[‘W]hile an insurer has a duty to defend suits which potentially seek covered damages, it has a duty to indemnify only where a judgment has been entered on a theory which is actually (not potentially) covered by the policy.” [Palm er v. Truck Ins. Exchange (1999) 21 Cal.4th 1109, 1120.]

Thus, Scottsdale only had to show that there was no actual coverage.

This does not mean that cases dealing with a duty to defend are irrelevant. If a case holds that there is no duty to defend on facts similar to those here, it necessarily follows that there is also no duty to indemnify. Contrariwise, if a case holds that there is a duty to defend, because there is a potential that the facts might turn out to be similar to the facts here, it follows that there is a duty to indemnify on these facts.

“In general, interpretation of an insurance policy is a question of law and is reviewed de novo under settled rules of contract interpretation. [Citations.]” (Ameron Intern. Corp. v. Insurance Co. of State of Pennsylvania (2010) 50 Cal.4th 1370, 1377–1378.) “Our goal in construing insurance con-

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1. Henry Aguila was also named as a plaintiff, but the trial court sustained a demurrer with respect to him, then entered judgment against him.

James Murphy was also named as a defendant but was dismissed without prejudice.
tracts, as with contracts generally, is to give effect to the parties’ mutual intentions. [Citations.] “If contractual language is clear and explicit, it governs.” [Citations.] If the terms are ambiguous [i.e., susceptible of more than one reasonable interpretation], we interpret them to protect “the objectively reasonable expectations of the insured.” [Citation.] Only if these rules do not resolve a claimed ambiguity do we resort to the rule that ambiguities are to be resolved against the insurer. [Citation.]” (Minkler v. Safeco Ins. Co. of America (2010) 49 Cal.4th 315, 321.)

According to the allegations of Sombrero’s complaint against CES, CES’s negligence caused the revocation of the CUP, which caused Sombrero to lose the ability to use the property as a nightclub. The loss of the ability to use the property as a nightclub is, by definition, a “loss of use” of “tangible property.” It defies common sense to argue otherwise.

Nevertheless, there is some contrary authority. Scottsdale relies on a case with strikingly similar facts, Scottsdale Ins. Co. v. International Protective Agency, Inc. (2001) 105 Wash. App. 244 [19 P.3d 1058] (IPA). There, IPA insured a security services company, IPA. One of IPA’s clients was a restaurant owned by Northwest Visions. (Id. at p. 246.) Northwest Visions sued IPA, alleging, among other things, that IPA negligently allowed a minor to enter the restaurant and, as a result, Northwest Visions lost its liquor license. (Id. at p. 247.) Scottsdale refused to defend, on the ground that Northwest Visions was not claiming property damage. Northwest Visions obtained a default judgment against IPA. (Id. at p. 247 and fn. 2.) Scottsdale then filed an action for a declaratory judgment regarding its duty to defend. The trial court denied Scottsdale’s motion for summary judgment. (Id. at p. 247.)

The appellate court reversed. It held that Northwest Visions’ “complaint does not allege loss of use of tangible property. . . . A liquor license is merely representative of a privilege granted by the state and, as such, is intangible property. [Citation.] . . . The complaint alleges that Northwest Visions lost its liquor license thereby destroying its business. There is no allegation or evidence in the record that Northwest Visions lost its use of or right to occupy the premises. Even if it had, a right to occupy premises is not a tangible property interest. [Citation.] . . . [¶] . . . Scottsdale correctly argues that there was no property damage within the meaning of the policy because the complaint does not allege that Northwest Visions . . . lost the use of the premises or building for ‘any purpose, as owner or lessee, other than one that involves the sale of liquor.’ [Citation.]” (Scottsdale Ins. Co. v. International Protective Agency, Inc., supra, 105 Wash.App. at pp. 249–250 [19 P.3d at pp. 1061–1062].)

IPA is helpful, because it outlines the arguments that can be made against the common-sense position, but it is ultimately unpersuasive, for three reasons.

First, the appropriate focus is not on the loss of the entitlement, but rather on the loss of use of tangible property that results from the loss of the entitlement. We agree that in IPA, the liquor license was not tangible property. Nevertheless, the loss of the liquor license meant that Northwest Visions could no longer use its premises for the remunerative purpose of selling diners alcohol along with their food. Here, identically, the revocation of the CUP meant that Sombrero could no longer use the property as a nightclub.

Second, the reasonable expectations of the insured would be that “loss of use” means the loss of any significant use of the premises, not the total loss of all uses. (Liberty Mut. Ins. Co. v. Wheelwright Trucking Co., Inc. (Ala. 2002) 851 So.2d 466, 494–495 [“The failure . . . to specify the extent of the loss of use, whether complete uselessness or diminishment in value for a particular purpose, means that, at a minimum, the provision is ambiguous and therefore due to be construed against [the insurer].”]; Hartzell Industries, Inc. v. Federal Ins. Co. (S.D. Ohio 2001) 168 F.Supp.2d 789, 795 [“The policy does not specify that the loss of use must be total as opposed to partial.”]; see also Modern Equipment Co. v. Continental Western Ins. Co., Inc. (8th Cir. 2004) 355 F.3d 1125, 1127, 1129 [“diminished use” of warehouse due to collapse of several sections of storage racks constituted property damage]; contra, Nova Cas. Co. v. Able Const., Inc. (Utah 1999) 983 P.2d 575, 580-581.)

California law is in accord. In Hendrickson v. Zurich American Ins. Co. of Illinois (1999) 72 Cal.App.4th 1084 (Hendrickson), a group of growers sued Crown Nursery, alleging that it sold them strawberry plants that had been damaged by an herbicide. (Id. at pp. 1086–1087.) Zurich insured Crown Nursery, but Zurich refused to defend (id. at p. 1087), arguing that the growers had not alleged any property damage. (Id. at p. 1089.) The appellate court disagreed: “Here, the growers’ complaint may reasonably be construed as alleging that as a result of [Crown Nursery]’s negligent delivery of defective plants, the growers suffered a loss of strawberry production, and thereby a loss of the use of their land. The policies in this case expressly state that ‘[l]oss of use of tangible property that is not physically injured’ constitutes ‘property damage.’ Thus, we conclude that the growers’ action presents a potential for coverage which requires a defense.” (Id. at p. 1091.) Hendrickson therefore supports our view that a loss of a particular use of tangible property can be property damage.

Scottsdale argues that Hendrickson involved a physical injury rather than a loss of use; it asserts, “[T]he court found the insured’s contaminated strawberries could have potentially ruined tangible property, namely, the claimants’ strawberry crop.” Not so. As quoted above, the court specifically concluded that “the growers suffered . . . a loss of the use of their land.” (Hendrickson v. Zurich American Ins. Co. of Illinois, supra, 72 Cal.App.4th at p. 1091, italics added.)

Third, we question IPA’s statement that “a right to occupy premises is not a tangible property interest.” (Scottsdale Ins. Co. v. International Protective Agency, Inc., supra, 105 Wash. App. at p. 250 [19 P.3d at p. 1061].) At least under California law, “[a] lease is . . . a conveyance of an estate in real property
. . . . [Citation.]” (Avalon Pacific-Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC (2011) 192 Cal.App.4th 1183, 1190.) A building is tangible. Dirt is tangible. Hence, a lessee in possession has a tangible property interest in the leased premises. (Compare Cunningham v. Universal Underwriters (2002) 98 Cal.App.4th 1141, 1155–1156 [before tenant takes possession, tenant’s right to possess premises is not tangible property; it “is a contractual right that does not mature into a property right until possession actually occurs.”] with Riverbank Holding Co., LLC v. N.H. Ins. Co. (E.D. Cal. 2012) 2012 U.S. Dist. LEXIS 78781, at *22 [distinguishing Cunningham; tenant has tangible property interest in leased premises after tenant “actually took possession of the property.”])

In any event, the issue is not whether, as a technical legal matter, a leasehold is tangible property. Rather, it is whether an insured, reading his or her policy, would understand “tangible property” to include real property that he or she leases. If your leased apartment was rendered uninhabitable by some noxious stench, you would conclude that you had lost the use of tangible property; and if a lawyer said no, actually you had merely lost the use of your intangible lease, you would goggle in disbelief.

Most important, though, our view on this point is dictum, because our case is distinguishable. Here, Sombrero is the owner of the property, not a lessee. As such, it plainly has an interest in tangible property.

The trial court did not actually rely on Scottsdale’s argument (based on IPA) that Sombrero lost only an intangible right to use property in a certain way. Instead, it ruled that Sombrero suffered an economic loss, and that this is not property damage. Scottsdale therefore argues that a “mere economic loss” is not a loss of use of tangible property.

“[S]trictly economic losses like lost profits, loss of goodwill, loss of the anticipated benefit of a bargain, and loss of an investment, do not constitute damage or injury to tangible property covered by a comprehensive general liability policy [citations].” (Giddings v. Industrial Indemnity Co. (1980) 112 Cal.App.3d 213, 219.) However, as Giddings added, “A complaint seeking to recover damages of this nature from an insured [does] fall[] within the scope of the insurance coverage . . . . where these intangible economic losses provide ‘a measure of damages to physical property which is within the policy’s coverage.’ [Citations.]” (Ibid.) “In the liability policy context, diminution in market value is accepted as a proper method of measurement of any property damages which may have been sustained. [Citations.]” (Pruyn v. Agricultural Ins. Co. (1995) 36 Cal.App.4th 500, 510, fn. 6, italics added; accord, Mid-Continent Cas. Co. v. Circle S Feed Store, LLC (10th Cir. 2014) 754 F.3d 1175, 1184; Lucker Mfg. v. Home Ins. Co. (3d Cir. 1994) 23 F.3d 808, 818, fn. 12.)

In Hendrickson, the insurer argued that the growers’ claims for lost strawberry production “do not allege a loss of use of property, but claim only economic losses associated with the property, which does not constitute property damage.” (Hendrickson v. Zurich American Ins. Co. of Illinois, supra, 72 Cal.App.4th at p. 1090.) The appellate court disagreed: “[T]he alleged loss of profits or diminution in property value are not solely economic losses, but damages because of property damage, and therefore constituted alternative measures of any property damage allegedly sustained. [Citation.]” (Id. at pp. 1091–1092.)

The correct principle, then, is not that economic losses, by definition, do not constitute property damage. Like the court in Auto-Owners Insurance Company v. Southeastern Car Wash Systems (E.D. Tenn. 2016) 184 F.Supp.3d 625, we “find[] it difficult to conceive of loss-of-use damages as anything other than economic losses. [Citation.]” (Id. at p. 630.) Rather, the correct principle is that losses that are exclusively economic, without any accompanying physical damage or loss of use of tangible property, do not constitute property damage.

Here, for the reasons already stated, Sombrero did suffer a loss of use of tangible property. Moreover, the diminution in value of the property was a proper measure of the damages from that loss of use. Thus, the mere fact that Sombrero was seeking to recover damages calculated on the basis of diminution in value falls short of showing that it was not seeking to hold CES liable for a loss of use of tangible property.

At oral argument, Scottsdale asserted for the first time that Kazi v. State Farm Fire & Cas. Co. (2001) 24 Cal.4th 871 is on point.2 There, the Tollaksons sued the Kazis, claiming that they had an implied easement over the Kazis’ land and that the Kazis had interfered with their easement. Moreover, they claimed that, absent the easement, their own land “was not buildable.” (Id. at p. 876.) They alleged that the interference with the easement had diminished the value of their own land by $400,000. (Ibid.)

The Kazis had three separate insurance policies that covered liability for property damage. One defined property damage as “physical injury to or destruction of tangible property, including loss of its use.” (Kazi v. State Farm Fire and Cas. Co., supra, 24 Cal.4th at p. 876.) Another defined it as “. . . damage to or loss of use of tangible property.” (Id. at p. 877.) The third defined it as “physical damage to or destruction of tangible property, including loss of use of this property.” (Ibid.) The insurers failed to defend. (Id. at pp. 876-877.)

The Supreme Court held that there was no potential coverage, and hence no duty to defend, for two reasons. First, an easement is not tangible property. (Kazi v. State Farm Fire and Cas. Co., supra, 24 Cal.4th at pp. 880-885.) Second, the Tollaksons had not claimed that there was any physical damage to their own land. (Id. at pp. 885-887.)

Kazi is not controlling here because there is a crucial difference between the policy language in Kazi and the policy language in this case. Kazi relied extensively (see Kazi v. State Farm Fire and Cas. Co., supra, 24 Cal.4th at pp. 874-876) on the reasoning in Giddings, supra, 112 Cal.App.3d 213, 219, which is based on the Illinois decision that Scottsdale had cited in its brief, but only as authority for the definition of “tangible property.”

2. Scottsdale had cited Kazi in its brief, but only as authority for the definition of “tangible property.”
875, 878-884, 887) on the earlier case of Gunderson v. Fire Ins. Exchange (1995) 37 Cal.App.4th 1106. Gunderson had held, among other things, that when a policy defines property damage as “physical injury to or destruction of tangible property, including loss of its use,” it does not cover the loss of use of property that has not been physically damaged. (Id. at pp. 1117-1119.) Thus, in Kazi, the Supreme Court rejected any coverage for loss of use of the Tollakson’s own land on the sole ground that it had not been physically injured.3

Here, however, the policy expressly defined property damage as including “[l]oss of use of tangible property that is not physically injured.” (Section I, ante, italics added.) Thus, unlike in Kazi, the mere fact that Sombrero’s property was not physically damaged is not dispositive of the question of whether there was coverage for loss of use of that property.

Finally, Scottsdale relies on Golden Eagle Ins. Corp. v. Cen-Fed, Ltd. (2007) 148 Cal.App.4th 976. There, a bank (WMB) sued its landlord (Cen-Fed), alleging that Cen-Fed had failed to maintain and repair the air conditioning, elevator service, basement restrooms, landscaping, common areas, interior walls, and paint and had failed to provide contractually required parking. It further alleged that the failure to maintain and repair had forced WMB to move its safe deposit boxes from the basement to the first floor, thus preventing WMB from making any other use of the first floor and decreasing the number of safe deposit boxes that WMB was able to rent out. (Id. at p. 981.)

The appellate court held that Golden Eagle had no duty to defend because WMB was not making a claim for loss of use of tangible property:

“A review of the allegations in WMB’s complaint shows that there was no claim for any physical injury to tangible property or for any loss of use of tangible property that was not physically injured. Rather, WMB’s claim rested entirely on Cen–Fed’s alleged breach of the lease and the resulting economic damage, including the need to replace its safe deposit boxes to the first floor leased premises, which resulted in fewer boxes being rented and the consequent denial of the use that first floor space for other purposes (that is, a loss of rental income and loss of use of leased space). The jury determined Cen–Fed’s breaches of the lease constituted a diminution in the value of the lease, that is, the difference between the fair market value of WMB’s leasehold interest if the leased premises were in the promised condition and the fair market value of those premises in their actual condition. WMB’s leasehold interests were not tangible property; and WMB’s claim against Cen–Fed did not seek to recover for damage to or the loss of use of tangible property.

Thus, WMB’s complaint and theory of recovery against Cen–Fed did not constitute claims for ‘physical injury to tangible property’ and therefore they did not constitute claims for ‘property damage.’ Rather, they amounted to claims for economic harm suffered by WMB due to Cen–Fed’s failure to perform its contractual obligations. . . . ‘The property loss section of the standard policy provides coverage for “physical injury or destruction of tangible property which occurs during the policy term.” The focus of coverage for property damage is therefore the property itself, and does not include intangible economic losses, violation of antitrust laws or nonperformance of contractual obligations. [Citations.] . . . “[S]trictly economic losses like lost profits, loss of goodwill, loss of the anticipated benefit of a bargain, and loss of an investment, do not constitute damage or injury to tangible property covered by a comprehensive general liability policy . . . .’ [Citations.]”

“Conceptually, Cen–Fed’s claim that the failure to maintain its building in the condition in which it contracted to maintain it is no more a ‘property damage’ claim than the claim of any property buyer who fails to obtain tangible property in the condition promised or warranted. Such claims are for economic loss, not ‘property damage.’” (Golden Eagle Ins. Corp. v. Cen-Fed, Ltd., supra, 148 Cal.App.4th at pp. 986–987.)

The lynchpin of this reasoning is that “WMB’s leasehold interests were not tangible property . . . .” (Golden Eagle Ins. Corp. v. Cen-Fed, Ltd., supra, 148 Cal.App.4th at p. 987.) Golden Eagle did not cite any authority for this proposition, and we have found none. As discussed above, in connection with IPA, we question whether the proposition is valid; however, anything we have to say on the point is dictum, because here Sombrero owned the property. Hence, we may accept, for purposes of argument, that in Golden Eagle, WMB’s claim for the diminution in value of its leasehold interest was a claim for economic loss, untethered to an interest in tangible property. Even if so, here, Sombrero’s claim for the diminution in value of its ownership interest, even though it was a claim for economic loss, was a claim for loss of use of tangible property.

Having so held, we need not discuss Sombrero’s alternative arguments that (1) the loss of the CUP itself was a loss of use of tangible property and (2) the construction of the new VIP entrance constituted physical damage to tangible property.4

3. The court even noted that its grant of review, with respect to any coverage for loss of use of the Tollakson’s own land, had been “specifically limited” to whether that portion of the underlying action “involve[d] physical property damage.” (Kazi v. State Farm Fire and Cas. Co., supra, 24 Cal.4th at p. 879, fn. 1.) Thus, there was no issue before the court regarding coverage for tangible property that is not physically injured.

4. Scottsdale argues that, even assuming the construction of the new VIP entrance constituted physical damage to tangible property, that construction was not an “occurrence” within the meaning of the policy. However, because we do not base our opinion on the construction of the VIP entrance, we need not address this argument. Scottsdale does not argue that the shooting was not an “occurrence.”
IV
DISPOSITION
The judgment is reversed. Sombrero is awarded costs on appeal against Scottsdale.
CERTIFIED FOR PUBLICATION
RAMIREZ P. J.
We concur: McKINSTER J., MILLER J.

THE PEOPLE, Plaintiff and Respondent,
v.
RALPH ACOSTA, JR., Defendant and Appellant.

No. H045175
In The Court of Appeal of the State of California
Sixth Appellate District
(Monterey County Super. Ct. No. SS162018)
APPEAL from the Superior Court of San Bernardino County.
Janet M. Frangie, Judge. Reversed.
Filed October 25, 2018

CERTIFIED FOR PARTIAL PUBLICATION*
* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.A and II.C.

COUNSEL
Attorney for Defendant and Appellant Ralph Acosta, Jr.: Lori A. Quick, under appointment by the Court of Appeal for Appellant
Attorneys for Plaintiff and Respondent The People: Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Senior Assistant Attorney General, Catherine A. Rivlin, Supervising Deputy Attorney General, Bruce M. Slavin, Deputy Attorney General

OPINION
Ralph Acosta, Jr., appeals aspects of his sentence for his convictions for committing a lewd or lascivious act on a child under the age of 14 and for contacting a minor with the intent to commit a sexual offense. He contends that: (1) the sentence imposed for contacting a minor with the intent to commit a sexual offense should have been stayed pursuant to Penal Code section 654 because he harbored the same intent and objective for both crimes of conviction; (2) his trial counsel was constitutionally ineffective for failing to object to the sexual offender fines imposed by the trial court; and (3) the trial court lacked authority to issue a protective order forbidding him from contacting the sister of the named victim of his crimes.

In the unpublished portion of our decision, we conclude that the trial court correctly imposed sentences for each count of conviction without staying the punishment for either crime.

1. All further statutory references are to the Penal Code unless otherwise specified.
and had authority to issue a protective order barring Acosta from having contact with Jane Doe’s sister, Jane Doe 2, under section 136.2, subdivision (i)(1).

In the published portion of our decision, we determine that Acosta has not demonstrated that his trial counsel was constitutionally ineffective for failing to request a hearing on Acosta’s ability to pay the sexual offender fines. Nevertheless, we encourage trial courts to inquire into a defendant’s financial circumstances when imposing a sexual offender fine, even in the absence of a request by the defendant.

I. FACTS AND PROCEDURAL BACKGROUND

Eight-year-old Jane Doe was a student at the elementary school where her mother, M.S. 2 worked as a teacher. Jane Doe and her five-year-old sister were playing outside after school while M.S. worked in her classroom. The girls got tired and went back inside the school.

Jane Doe first saw Acosta, whom she did not know, standing outside the school office. Acosta told Jane Doe to “[c]ome here,” and she followed him into a small room near the school office. Acosta and Jane Doe then exited the room together, and Jane Doe followed Acosta down several hallways.

Acosta sat down on a bench and again told Jane Doe to “[c]ome here.” Acosta picked Jane Doe up by her torso, put her on his lap, and touched her vagina.2 After Acosta touched Jane Doe’s vagina, she stood up and got off his lap.

Acosta went to a door leading outside to the school playground and gestured to Jane Doe to follow him. Jane Doe followed Acosta to the door but then ran to her mother’s classroom. Jane Doe next saw Acosta outside of her mother’s classroom. Acosta again gestured to Jane Doe with his hand to go to him. Jane Doe refused by shaking her finger back and forth. Jane Doe’s sister was present during all of Jane Doe’s interactions with Acosta. Jane Doe’s sister discussed details of the incident with her mother the following day. Acosta did not touch Jane Doe’s sister.

An information charged Acosta with committing a lewd or lascivious act on a child under the age of 14 (§ 288, subd. (a) (count 1)) and contacting a minor with the intent to commit a sexual offense (§ 288.3, subd. (a) (count 2)). The information alleged in count 2 that Acosta contacted Jane Doe with the intent “to commit an offense specified in Penal Code Section 273a and/or 288.” The information listed Jane Doe4 as the sole victim and made no reference to her sister.

Acosta waived his right to a jury trial. Following a bench trial, the trial court found him guilty of both crimes. With respect to the offense of contacting a minor with the intent to commit a sexual offense, the court found “the People have proven their case beyond a reasonable doubt as to Count 2, Penal Code [section] 288.3[, subdivision] (a), under the theory that the defendant intended to commit Penal Code [section] 288.” The court stated that it did “not find sufficient evidence as to the alternate theory that [Acosta] intended to commit [a violation of section] 273a.”

The trial court sentenced Acosta to eight years on count 1 for the violation of section 288, subdivision (a). The trial court imposed a concurrent sentence of four years on count 2 for the violation of section 288.3. The court stated, “I do believe that under [the] circumstances the 288.3 was really almost something that necessarily has to happen to commit the 288, [subdivision] (a). So that’s a concurrent term.” The prosecutor and defense counsel agreed that a concurrent term was appropriate for the section 288.3 conviction. Neither the court, the prosecutor, defense counsel, nor the probation officer raised section 654’s prohibition against double punishment regarding Acosta’s crimes.

Among other fees and fines assessed during Acosta’s sentencing, the trial court imposed two fines pursuant to section 290.3, the first for $300 and the second for $500, as well as related penalty assessments and administrative fees. The court made no explicit findings about Acosta’s ability to pay the section 290.3 fines. Acosta did not ask for a hearing on his ability to pay these fines and did not object to their imposition.

At the sentencing hearing, the prosecutor read a letter written by M.S. M.S. referenced the nightmares and fears that both her daughters continued to experience as a consequence of Acosta’s actions. The prosecutor argued that “there really were two victims here . . . he did this in front of two girls.” The trial court asked the prosecutor whether he had listed both Jane Doe and her sister, whom the court referred to as Jane Doe 2, on the criminal protective order “given your argument at sentencing.” The prosecutor responded that he had, and the court issued a 10-year criminal protective order listing “Jane Doe 1 & 2” as the protected persons. Acosta did not object to the inclusion of Jane Doe 2 in the protective order.

II. DISCUSSION

Acosta challenges three aspects of his sentence. He argues that section 654 precluded the imposition of an unstayed sentence on count 2 in light of his sentence on count 1. He contends that his trial counsel was ineffective for failing to object to the sexual offender fines imposed pursuant to section 290.3. Finally, he states that the trial court lacked authority to issue a criminal protective order for Jane Doe’s sister. We discuss each claim in turn.

[ PART II.A, See FOOTNOTE*, Ante ]
B. Imposition of the Section 290.3 Sex Offender Fines

Acosta’s convictions of section 288, subdivision (a) and section 288.3 triggered the imposition of sex offender fines for each count pursuant to section 290.3. That section requires that a defendant convicted of those and other similar offenses “be punished by a fine of three hundred dollars ($300) upon the first conviction or a fine of five hundred dollars ($500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine.” (§ 290.3, subd. (a).)

Pursuant to this provision, the trial court ordered fines of $300 and $500, plus penalty assessments and administrative fees, totaling $3,440. Acosta did not object at sentencing to the imposition of these fines; nor did he assert that he did not have the ability to pay them. As Acosta concedes, by failing to object to these fines at sentencing, he has waived any claim on appeal that the trial court improperly imposed them. (People v. Walz (2008) 160 Cal.App.4th 1364, 1369.) However, Acosta maintains that we should remand his case to the trial court for a hearing on his ability to pay because his trial counsel was constitutionally ineffective for failing to object to the fines.

The test for ineffective assistance of counsel is a demanding one. It requires that a criminal defendant establish both that his counsel’s performance was deficient and that he suffered prejudice. (Strickland v. Washington (1984) 466 U.S. 668, 687.) Acosta bears the burden of demonstrating by a preponderance of the evidence that his counsel’s performance fell below an objective standard of reasonableness. (In re Thomas (2006) 37 Cal.4th 1249, 1257.) Ineffective assistance of counsel is particularly difficult to demonstrate on direct appeal, where we are limited to the record from the trial court. “The appellate record . . . rarely shows that the failure to object was the result of counsel’s incompetence; generally, such claims are more appropriately litigated on habeas corpus, which allows for an evidentiary hearing where the reasons for defense counsel’s actions or omissions can be explored.” (People v. Lopez (2008) 42 Cal.4th 960, 966.) “Unless a defendant establishes to the contrary, we shall presume that “counsel’s” performance fell within the wide range of professional competence.” (Ibid.) “If the record “sheds no light on why counsel acted or failed to act in the manner challenged,” an appellate claim of ineffective assistance of counsel must be rejected . . . “unless there simply could be no satisfactory explanation.” (Ibid.)

Acosta contends that “it is clearly evident” that he could not pay the fines and penalty assessments imposed under section 290.3, subdivision (a), and “[i]t cannot be said that counsel might have had some tactical reason to refrain from objecting.” Moreover, Acosta argues that he suffered prejudice from his counsel’s failure to object because there is a “reasonable probability” that the trial court would not have imposed the fines had counsel objected.

We reject both contentions. We cannot say that, on the record before us, there is no satisfactory explanation for defense counsel’s failure to object to the sexual offender fines. The probation report prepared for Acosta’s sentencing stated that “[t]he defendant will have means to pay any Court ordered fine or fee.” Defense counsel may have determined that he would be unable to establish otherwise.

5. The trial court correctly imposed a section 290.3 fine for each count of conviction. (People v. O’Neal (2004) 122 Cal.App.4th 817, 822.)
note that the amount of the section 290.3 fine has increased threefold since the issuance of the McMahan decision. (Id. at p. 749.) With the addition of penalty assessments and administrative fees, the section 290.3 assessment alone can amount to thousands of dollars, and there are other mandatory fines and fees levied in a typical felony sentencing. (See, e.g., §§ 1202.4, subd. (b); 1465.8.) Moreover, we are confident that trial courts can inquire expeditiously into a defendant’s financial circumstances such that the hearing need not be “significantly time-consuming.” (Cf. McMahan, supra, at p. 749.) Nonetheless, Acosta has not demonstrated that his trial counsel was constitutionally deficient by failing to object to the trial court’s imposition of sex offender fines. We reject his appeal on this ground.

[ PART II.A, See FOOTNOTE*, Ante ]

DISPOSITION

The judgment is affirmed.

DANNER, J.

WE CONCUR: GREENWOOD, p.J., GROVER, J.

Cite as 18 C.D.O.S. 10385

UBER TECHNOLOGIES, INC., Plaintiff and Respondent,

v.

GOOGLE LLC., Defendant and Appellant.

No. A153653
In The Court of Appeal of the State of California
First Appellate District
Division Three
(City & County of San Francisco Super. Ct. No. CPF-17-515960)
Filed October 25, 2018

ORDER MODIFYING OPINION; NO CHANGE IN JUDGMENT

BY THE COURT:

It is ordered that the opinion filed herein on September 28, 2018, be modified as follows:

On page 15, in the paragraph commencing with the words “Next, Uber claims,” the three consecutive sentences beginning with “The record shows” and ending with “scope of the indemnified claims” are deleted. The following sentence is inserted in its place: “The record shows Diligenced Employees were required to cooperate and make their devices available to Stroz as a precondition to the execution of the Put Call Agreement and as a means to determine the scope of the indemnified claims.”

The petition for rehearing filed October 15, 2018, is denied. There is no change in the judgment.

SIGGINS, P.J. P.J.