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## **California AG Decides Appointees To A JPA May Discuss A Matter Pending Before That JPA During Separate Open Meetings With Their Own Member Agencies.**

The Indian Wells Valley Groundwater Sustainability Agency (IWVGSA) is a joint powers authority (JPA) that manages local groundwater pursuant to the Sustainable Groundwater Management Act. The IWVGSA is responsible for implementing a Groundwater Sustainability Plan, and for providing technical and financial assistance to local groundwater agencies. The IWVGSA can also impose penalties for groundwater extraction that violates the Plan.

Five local agencies created the IWVGSA and comprise its voting members. Each member agency appointed a representative to serve on the IWVGSA's board of directors. In advance of IWVGSA board meetings, two member agencies hold their own meetings and take public comment on matters pending before the JPA. They then advise or direct their respective JPA appointees on those pending matters.

The California Attorney General (AG) considered two questions as to the IWVGSA's procedures: (1) whether the Brown Act prohibits IWVGSA board members from discussing matters that are pending before the JPA when they attend open public meetings of the member agency; and (2) whether procedural due process allows a member agency of a JPA to discuss with its JPA appointee, at the member agency's open meeting, how to decide an adjudicative matter pending before the JPA.

First, the AG concluded that discussions, between member agencies and the IWVGSA board members they appoint, about pending JPA matters would not violate the Brown Act. This is because these discussions would occur at open public meetings and there would be no collective deliberation by a majority of the members of any legislative body outside of an open meeting. The AG noted that the Brown Act does not regulate the individual conduct of individual members of any legislative body. Rather, the Act is concerned with collective deliberation among a majority of the members of a legislative body. Because only one IWVGSA board

member – the JPA appointee – would be attending the member agency’s open meeting, the IWVGSA members would not be deliberating with each other in violation of the Brown Act.

Second, the AG found that depending on the particular circumstances, discussing how to decide an adjudicative matter pending before the JPA could violate procedural due process by infringing on a party’s right to a neutral, impartial decision-maker. When an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal. This requires, among other things, an impartial adjudicator who is “free of bias for or against a party.” The AG concluded that a member agency’s discussion of the pending matter could compromise the appointee’s neutrality in at least two ways: (1) the appointee could be relying on evidence that is outside the record before the IWVGSA, or prejudge the matter prior to the adjudicatory proceeding; or (2) the discussion, coupled with the agency’s position of influence over the appointee, could create independent due process concerns. However, the AG noted this inquiry would require “careful inquiry into the circumstances in the particular case.”

Opinion of Rob Bonta, Attorney General, No. 18-201 (September 17, 2021).

**NOTE:**

*Although the AG’s opinions are not binding law, they are often persuasive to courts. This opinion illustrates the complexities to consider when evaluating the conduct of appointees to a JPA.*

This article was written by, Associate [Kaylee Feick](#) from the Los Angeles office of Liebert Cassidy Whitmore. Kaylee is a member of the firm’s Business and Facilities practice group, which assists public agency clients in matters including construction, contracts, purchase agreements and real property. Kaylee can be reached at (310) 981-2735 or at [kfeick@lcwlegal.com](mailto:kfeick@lcwlegal.com). For more information regarding the update above or about our firm please visit our website at <http://www.lcwlegal.com>, or contact one of our offices below.

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6033 W. Century Blvd.  
5<sup>th</sup> Floor  
Los Angeles, CA 90045  
(310) 981-2000

135 Main Street  
7<sup>th</sup> Floor  
San Francisco, CA 94105  
(415) 512-3000

5250 North Palm Ave.  
Suite 310  
Fresno, CA 93704  
(559) 256-7800

401 West “A” Street,  
Suite 1675  
San Diego, CA 92101  
(619) 481-5900

400 Capitol Mall  
Suite 1260  
Sacramento, CA 95814  
(916) 584-7000