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10
 11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF SHASTA

13 **PEOPLE OF THE STATE OF**
 14 **CALIFORNIA EX REL. ATTORNEY**
 15 **GENERAL XAVIER BECERRA,**

16 Plaintiff and Petitioner,

17 v.

18 **WESTLANDS WATER DISTRICT AND**
 19 **DOES 1-20,**

20 Defendants and Respondents.

Case No. 192487

**PLAINTIFF'S MEMORANDUM IN
 SUPPORT OF MOTION FOR
 PRELIMINARY INJUNCTION**

Date: July 15, 2019
 Time: 8:30 a.m.
 Dept: 8
 Judge: Wood
 Trial Date: April 14, 2020
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1 and mandates protections for designated rivers. (Pub. Resources Code, 5093.50, et seq.) In 1989,
2 the Legislature amended the Act, adding a provision that mandated specific protections for the
3 McCloud River’s free-flowing condition and wild trout fishery. (Pub. Resources Code, §
4 5093.542.) Section 5093.542, subdivision (c) provides:

5 Except for participation by the Department of Water Resources in studies involving
6 the technical and economic feasibility of enlargement of Shasta Dam, *no department*
7 *or agency of the state shall assist or cooperate with, whether by loan, grant, license,*
8 *or otherwise, any agency of the federal, state, or local government in the planning*
9 *or construction of any dam, reservoir, diversion, or other water impoundment*
10 *facility that could have an adverse effect on the free-flowing condition of the*
11 *McCloud River, or on its wild trout fishery.*

12 (Pub. Resources Code, § 5093.542, subd (c).)

13 II. FEDERAL INVESTIGATIONS REGARDING RAISING SHASTA DAM

14 Since at least 1980, federal agencies have explored the possibility of raising Shasta Dam
15 and enlarging Shasta Reservoir. (Request for Judicial Notice [RJN], Exh. A, pp. 1-4, 1-5.) In
16 1999, the Bureau issued an Appraisal Assessment of the Potential for Enlarging Shasta Dam and
17 Reservoir, which evaluated various options for raising the dam, ranging from 6.5 feet at the low
18 end to 202.5 feet at the high end. (RJN Exh. B, pp 4-7.) The Bureau acknowledged all of the
19 dam raise options would affect the free-flowing stretches of the McCloud River, and noted that
20 Section 5093.542 prohibits any state agency from assisting with any project that could have an
21 adverse effect on the free-flowing condition of the McCloud or its wild trout fishery. (*Id.* at p.
22 47.)

23 On July 29, 2015, the Bureau issued a Final Environmental Impact Statement (EIS), which
24 examined proposed alternatives for raising Shasta Dam 6.5, 12.5, or 18.5 feet, with the preferred
25 alternative being an 18.5 foot raise. (RJN Exh. A, p. S-34.) Concurrently with the EIS, the
26 Bureau released a Final Feasibility Report assessing the feasibility of the preferred alternative.
27 (RJN Exh. C.) As discussed in detail in Argument § I.B.i, *infra*, the Bureau’s EIS and Final
28 Feasibility Report both concluded that an 18.5 foot dam raise would adversely affect the
29 McCloud River’s free-flowing condition and wild trout fishery. Due to various “outstanding
30 considerations,” including the Act’s prohibition on state agency participation in a project to

1 enlarge Shasta Dam, the Feasibility Report declined to recommend implementation of any project
2 alternative to raise Shasta Dam. (RJN Exh. C, pp. 9-1-9-2.)

3 **III. FEDERAL FUNDING REQUIREMENTS AND WESTLANDS' EFFORTS TO SHARE COSTS**

4 In 2016, Congress enacted the Water Infrastructure Improvements for the Nation Act
5 (WIIN Act) (PL 114-332, 2016, S. 612.) The WINN Act authorizes the Bureau to participate in
6 water storage projects at federally owned facilities like Shasta Dam, but limits the portion of the
7 project the Bureau may fund to fifty percent of the total cost. (WINN Act, §§ 4007(b)(2), (3)
8 [requiring an agreement providing upfront funding as is necessary to pay the non-Federal share of
9 the capital costs before construction can commence].)

10 For many years, Westlands has negotiated with the Bureau regarding sharing the costs of a
11 Shasta Dam Raise project. Westlands and the Bureau have entered into at least two “Agreements
12 in Principle” regarding the sharing of costs, one of which was renewed in March of 2014.¹ (RJN
13 Exs. D, E.)

14 **IV. WESTLANDS' CEQA PROCESS**

15 On November 30, 2018, Westlands issued an Initial Study/Notice of Preparation (IS/NOP)
16 to develop an environmental impact report (EIR) for the Shasta Dam Raise project. In the
17 “Project Description,” the IS/NOP states that the EIR will evaluate six action alternatives, each of
18 which “includes enlarging Shasta Dam.” (RJN Exh. F, p. 1-7.) Westlands’ IS/NOP states that the
19 EIR is anticipated to evaluate the same project alternatives analyzed in the Bureau’s EIS. (*Ibid.*)
20 Further, the IS/NOP states that its “preliminary impact determinations are based primarily on the
21 analysis in the 2014 SLWRI Final EIS [Bureau EIS].” (*Id.* at p. 2-2.) Indeed, Chapter 2 of
22 Westlands’ IS/NOP includes a checklist of the potential environmental effects, which purports to
23 summarize the “Impact Determinations” documented in the federal EIS. (*Id.* at Chapter 2.)

24 While purporting to base the forthcoming EIR on the analysis already available in the
25 Bureau’s EIS, Westlands’ IS/NOP specifically mischaracterizes the project’s impacts on the

26
27 ¹ By its terms, the March 2014 Agreement in Principle terminated on September 30,
28 2017, “unless otherwise amended or extended by written, mutual consent of the Parties.” (RJN
Exh. D.) It is unknown if Westlands and the Bureau have formally extended or renewed the
Agreement in Principle.

1 McCloud River identified in the federal EIS. The federal EIS identified significant, unavoidable
2 impacts to the McCloud River’s free-flowing condition and wild trout fishery. (See Argument §
3 I.B.i, *infra*.) However, Westlands’ IS/NOP fails to acknowledge the impacts identified in the
4 federal EIS, instead stating incorrectly that these impacts are “TBD.” (RJN Exh. F, p. 2-32.)

5 By mischaracterizing the project impacts to the McCloud River, Westlands appears to
6 implicitly acknowledge that the Act bars its participation in the Shasta Dam Raise project if the
7 project could adversely affect the free-flowing condition or wild trout fishery of the McCloud
8 River. But federal studies have already determined that the project *would* adversely affect these
9 resources. Westlands’ attempt to manufacture uncertainty regarding the application of the Act by
10 ignoring the documented impacts of raising Shasta Dam contravenes the Act’s specific
11 protections for the McCloud River. Westlands’ unlawful participation in the Shasta Dam Raise
12 project, including its CEQA process, must be preliminarily enjoined, as discussed further below.

13 LEGAL STANDARD

14 “In determining whether to issue a preliminary injunction, the trial court considers two
15 related factors: (1) the likelihood that the plaintiff will prevail on the merits of its case at trial; and
16 (2) the interim harm that the plaintiff is likely to sustain if the injunction is denied as compared to
17 the harm that the defendant is likely to suffer if the court grants a preliminary injunction.”
18 (*Donahue Schriber Realty Group, Inc. v. Nu Creation Outreach* (2014) 232 Cal.App.4th 1171,
19 1177, quoting *14859 Moorpark Homeowner’s Assn. v. VRT Corp.* (1998) 63 Cal.App.4th 1396,
20 1402; see also Code Civ. Proc., § 526, subd. (a).) “The trial court’s determination must be guided
21 by a ‘mix’ of the potential-merit and interim-harm factors; the greater the plaintiff’s showing on
22 one, the less must be shown on the other to support an injunction.” (*Butt v. State of California*
23 (1992) 4 Cal.4th 668, 678; see also *Right Site Coalition v. Los Angeles Unified School Dist.*
24 (2008) 160 Cal.App.4th 336, 338-339.)

25 ARGUMENT

26 I. THE PEOPLE ARE LIKELY TO PREVAIL ON THE MERITS

27 As an agency of the state, Westlands may not assist or cooperate with any project that could
28 adversely affect the McCloud River’s free-flowing condition or wild trout fishery. (Pub.

1 Resources Code § 5093.542, subd. (c).) Here, there is no question that the Shasta Dam Raise
2 project “could” have such adverse effects because federal and state agencies have already studied
3 the impacts and determined that raising Shasta Dam *would* adversely affect the free-flowing
4 condition of the McCloud River and its wild trout fishery. Westlands’ planning efforts in support
5 of raising Shasta Dam, including preparation of an EIS, violate the Act and the People are likely
6 to prevail on their claims for declaratory and injunctive relief.

7 **A. Westlands Is an Agency of the State**

8 By statute, Westlands is a “public agency of the state.” (Wat. Code, §§ 37822 [“The name
9 of the surviving district is Westlands Water District”], 37823 [“The surviving district is a public
10 agency of the state”].) Westlands is also a “special district,” which is “an agency of the state,
11 formed pursuant to general law or special act, for the local performance of governmental or
12 proprietary functions[.]” (Gov. Code, § 56036, subd. (a); see also Gov. Code, § 16271, subd.
13 (d).) Westlands is therefore bound by Public Resources Code section 5093.542, subdivision (c).

14 **B. The Shasta Dam Raise Project Could Adversely Affect the McCloud
15 River’s Free-Flowing Condition and Wild Trout Fishery**

16 Section 5093.542, subdivision (c), of the Public Resources Code restricts state agencies’
17 participation in planning or construction of any dam project that “could” adversely affect the free-
18 flowing condition or wild trout fishery of the McCloud River. (Pub. Resources Code § 5093.542,
19 subd. (c).) Thus, participation is barred if there is any possibility that the project may cause the
20 proscribed effects on the McCloud River. Here, state and federal agencies have already
21 determined that the proposed project to raise Shasta Dam 18.5 feet *will* adversely affect the
22 McCloud’s free-flowing condition and wild trout fishery.

23 **1. The Bureau’s EIS and Feasibility Report documented adverse effects
24 on the McCloud’s free-flowing condition and wild trout fishery**

25 The Bureau’s EIS concluded that an 18.5 foot dam raise would cause the following impacts
26 to the McCloud River:

- 27 • Raising Shasta Dam 18.5 feet would increase the portion of the McCloud river that is
28 periodically inundated by Shasta Lake, known as the “transition reach,” (RJN Exh. A, pp.

1 25-3, 25-4) by approximately 3,550 feet, about two-thirds of a mile. (*Id.* at 25-37.) This
2 would be a 39 percent increase in the length of the transition reach. (*Id.* at p. 25-37.)

- 3 • The dam raise would inundate an additional 27 acres of the McCloud River, and increase
4 the maximum width of the river channel by 140 feet. (RJN Exh. A, p. 25-37.)
- 5 • Raising the dam would adversely affect the free-flowing condition of the McCloud River
6 within the extended transition reach.² (RJN Exh. A, pp. 25-38, 25-40.) The extended
7 transition reach would have “slower moving waters and a wider river channel,” a
8 modification which would not meet the definition of a free-flowing river. (*Id.* at p. 25-
9 38.)
- 10 • Extension of the transition reach and associated inundation would make approximately
11 3,550 feet of the lower McCloud River ineligible for listing as wild and scenic under
12 federal law. No mitigation is available, and this impact is significant and unavoidable.
13 (RJN Exh. A p. 25-39.)
- 14 • Expanding the transition reach would convert aquatic habitat and adversely affect the free-
15 flowing conditions of the McCloud within the extended transition reach, in violation of
16 the California Wild and Scenic Rivers Act. (RJN Exh. A, p. 25-40.) This impact would
17 be significant and unavoidable, even with mitigation. (*Ibid.*)
- 18 • Expanding the transition reach would affect the McCloud River’s wild trout fishery by
19 converting aquatic habitat and causing water levels to fluctuate within the expanded
20 transition reach, an impact that is potentially significant. (RJN Exh. A, p. 25-40.)

21 Concurrently with the EIS, the Bureau released its Feasibility Report regarding the dam
22 raise alternatives evaluated in the EIS. The Feasibility Report also determined that raising Shasta
23 Dam would cause numerous impacts on the McCloud River:

- 24 • “Raising Shasta Dam would inundate portions of the lower McCloud River.” (RJN Exh.
25 C, p. 2-35.) “Raising Shasta Dam 18.5 feet would result in inundating an additional 3,550
26 lineal feet (about 27 acres), of the lower McCloud River.” (*Id.* at p. 4-44.)
- 27 • “Long-term adverse effects in wet years are unavoidable for up to .67 miles of the
28 McCloud River.” (RJN Exh. C p. 5-16.)

² “The free-free flowing conditions of the river would not be adversely affected *beyond the upstream extension of the transition reach.*” (EIS, p. 25-40.)

- 1 • The plan to raise Shasta Dam 18.5 feet “would have some effect on the free-flowing
2 condition of the McCloud River and the wild trout fishery within the part of the lower
3 McCloud protected by Section 5093.542 of the PRC.” (RJN Exh. C, p. 6-39.)

4 **2. The U.S. Fish and Wildlife Service identified adverse effects on the**
5 **McCloud’s free-flowing condition and wild trout fishery**

6 In 2014, the U.S. Fish and Wildlife Service (Service) issued Report assessing effects of the
7 proposed Shasta Dam Raise on fish and wildlife resources. The Service concluded that “the
8 project would result in the conversion of riverine habitat to lacustrine habitat within the lower
9 reaches of the hundreds of tributaries that enter Shasta Lake,” including the McCloud River.
10 (RJN Exh. G, p. 90.) Further, “[t]he inundation of the lower McCloud River may affect its status
11 as a river with State Wild and Scenic River Act protection.” (*Id.* at p. 91.) The Service also
12 determined that fluctuations in reservoir levels could disturb fish spawning in riverine areas like
13 the lower McCloud. (*Id.* at p. 91.) Inundation of the lower reaches of tributaries, such as the
14 McCloud River, “would also affect the fluvial and biological characteristics of the stream
15 channels,” which could cause “potential changes in channel location, channel geometry, slope,
16 form, turbidity, sedimentation, nutrients, erosion, mass wasting, channel aggradation or
17 degradation, incision, cutbanks, loss of SRA [shaded riverine aquatic] cover, and increase in
18 warm-water predatory fish habitat and access by eliminating existing barriers.” (*Ibid.*) The
19 Service noted that if Shasta Dam were raised 18.5 feet, “[a]bout 30.14 acres of the McCloud
20 River riverine habitat and 8.67 acres of wetland habitat would be inundated and converted to
21 lacustrine habitat.” (*Ibid.*)

22 **3. The California Department of Fish and Wildlife commented**
23 **regarding the adverse effects of raising Shasta Dam on the McCloud**
24 **River**

25 In letters to both the Bureau and Westlands, the California Department of Fish and Wildlife
26 (DFW) identified impacts to the McCloud’s free-flowing condition and wild trout fishery. In a
27 September 13, 2013, letter to the Bureau, DFW stated, “Raising the water level behind Shasta
28 Dam will convert part of the McCloud River into reservoir habitat, changing the free-flowing
 condition of the McCloud River.” (RJN Exh. H, p. 7.) In its January 14, 2019, comment letter in

1 response to Westlands' Initial Study/Notice of Preparation, DFW reiterated that raising Shasta
2 Dam would convert portions of the McCloud River into reservoir, changing the McCloud's free-
3 flowing condition. (RJN Exh. I, p. 7.) DFW also noted:

4 Inundation of the McCloud River would result in a significant loss of this river
5 ecosystem to a reservoir ecosystem, **resulting in direct and indirect adverse impacts**
6 **to the current trout fishery in conflict with State law and policy.** Likely changes to
the trout fishery would include a shift from riverine trout habitat to habitat that
supports non-native lake dwelling fish species.

7 (*Id.* at p. 8.)

8 **C. Westlands' Cooperation and Assistance in the Shasta Dam Raise Project Is**
9 **an Ongoing Violation of the California Wild and Scenic Rivers Act**

10 In light of the established adverse effects of raising Shasta Dam on the McCloud River's
11 free-flowing condition and wild trout fishery, Westlands may not participate in planning or
12 construction of the dam raise project. Nevertheless, since at least 2012, Westlands has assisted
13 and cooperated in the federal project, in violation of the Act. Westlands has entered into at least
14 two "Agreements in Principle" with the Bureau of Reclamation regarding sharing the costs of a
15 project to raise Shasta Dam. (RJN Exs. D, E.) In March of 2014, Westlands and the Bureau
16 executed a renewal of their previous "Agreement in Principle for Potential Sharing of Costs of
17 Enlarging Shasta Dam and Reservoir Between The Bureau of Reclamation and The Westlands
18 Water District." (*Ibid.*)

19 At its September 18, 2018, Board of Directors meeting, Westlands discussed retaining
20 consultants to prepare an EIR for the Shasta Dam Raise project. (RJN Exh. J.) The agenda item
21 (Item 15) included a draft task order to retain Stantec Consulting Services, Inc. to perform
22 "professional *planning* and environmental documentation services...for the Shasta Dam Raise
23 CEQA Compliance Project," including preparation of Draft and Final EIRs. (*Ibid.*, italics added.)
24 In October of 2018, Westlands approved a budget transfer in the amount of \$1,020,000 for
25 "Consulting Services related to Shasta Dam." (RJN Exh. K, p. 11.)

26 On November 30, 2018, Westlands issued an IS/NOP to develop an EIR under CEQA for
27 the Shasta Dam Raise project. The IS/NOP states that Westlands, "as Lead Agency under
28 [CEQA], will prepare an environmental impact report (EIR) for the Shasta Dam Raise Project."

1 (RJN Exh. F, Cover summary page.) In the “Project Description,” the IS/NOP states that
2 Westlands’ EIR will evaluate six action alternatives, each of which “includes enlarging Shasta
3 Dam.” (*Id.* at p. 1-7.) To date, Westlands has not yet issued any draft EIR.

4 Westlands’ preparation of an EIR constitutes “planning” of the Shasta Dam Raise project.
5 The CEQA Guidelines characterize the preparation of an EIR as a part of the lead agency’s
6 planning process. (Cal. Code Regs., tit. 14, § 15004, subd. (b) [EIR should be prepared “as early
7 as feasible in the planning process”]; see also *Laurel Heights Improvement Assn. v. Regents of*
8 *University of California* (1988) 47 Cal.3d 376, 395.) Further, the purpose of the EIR is to aid the
9 lead agency in its project planning: “An [EIR] is the public document used by the governmental
10 agency to analyze the significant environmental effects of a proposed project, to identify
11 alternatives, and to disclose possible ways to reduce or avoid the possible environmental
12 damage.” (Cal. Code Regs., tit. 14, § 15002, subd. (f).)³ Westlands’ preparation of the EIR is
13 therefore prohibited by the California Wild and Scenic Rivers Act, and should be enjoined.

14 **II. THE BALANCE OF HARMS WEIGHS IN FAVOR OF INJUNCTIVE RELIEF**

15 Based on the foregoing evidence and judicially noticeable facts, the People are likely to
16 prevail on their claims, satisfying the first factor in the preliminary injunction analysis. Under the
17 second factor, the balance of harms favors the People, as discussed further below.

18 A preliminary injunction’s general purpose is preservation of the status quo pending a
19 determination on the merits. (*Jamison v. Dept. of Transportation* (2016) 4 Cal.App.5th 356, 361,
20 quoting *SB Liberty, LLC v. Isla Verde Assn., Inc.* (2013) 217 Cal.App.4th 272, 280.) Here,
21 preservation of the status quo is vitally important. Enjoining Westlands’ participation in the
22 project while this case is pending would impose a minimal burden on Westlands; if Westlands
23 prevails in the action, it may simply resume its activities after a temporary delay. By contrast,
24 allowing Westlands to continue its efforts in support of raising Shasta Dam until the conclusion of

25 ³ Westlands has asserted that it “has not yet made any determination regarding the Shasta
26 Dam Raise Project” and is instead “merely conducting environmental review to adequately
27 evaluate, in part, whether Public Resources Code section 5093.543 [sic] precludes the District
28 from becoming a local cost share partner.” (RJN Exh. R.) However, this is inconsistent with the
CEQA process. An EIR is not prepared to evaluate whether to propose a project in the first
instance: “A governmental agency is required to comply with CEQA procedures *when the agency*
proposes to carry out or approve the activity.” (Cal. Code Regs., tit. 14, § 15002, subd. (e).)

1 this case would (1) permit an ongoing violation of state law, (2) force state and local public
2 agencies into a Hobson's choice of fulfilling their obligations under CEQA and complying with
3 the California Wild and Scenic Rivers Act, (3) cause irreparable harm to the Shasta Lake
4 environment if construction begins according to the Bureau's and Westlands' stated timetable.
5 Accordingly, the preliminary injunction should issue to maintain the status quo and halt
6 Westlands' continuing violation of the Act.

7 **A. The People Will Suffer Irreparable Harm in the Absence of Preliminary**
8 **Injunctive Relief**

9 **1. Westlands' Continuing Violation of the California Wild and Scenic**
10 **Rivers Act Harms the Public Interest**

11 The People initiated this action to enforce the Act's prohibition against participation by
12 agencies of the state in planning for a project that could adversely affect the free-flowing
13 condition or wild trout fishery of the McCloud River. (Pub. Resources Code § 5093.542, subd.
14 (c).) As discussed above, the People have demonstrated that Westlands' conduct in support of the
15 Shasta Dam Raise project violates the Act. "Where a legislative body has enacted a statutory
16 provision proscribing a certain activity, it has already determined that such activity is contrary to
17 the public interest." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 70.) Further, where, as
18 here, the People have met their burden to establish an ongoing statutory violation, the Court may
19 "presume the existence of public harm." (*People ex rel Feuer v. FXS Management, Inc.* (2016) 2
20 Cal.App.5th 1154, 1162.) Each day that Westlands is allowed to continue its unlawful
21 participation in the Shasta Dam Raise project constitutes a continuing statutory violation that
22 harms the public interest. (*Ibid.*) The public should not be forced into participating in an illegal
23 CEQA process. The public interest in enforcement of and compliance with state laws outweighs
24 any harm Westlands might incur as a result of being enjoined from violating such laws.

25 **2. If Not Enjoined, Westlands' Illegal CEQA Process Will Impose**
26 **Conflicting Statutory Obligations Upon Public Agencies**

27 By initiating preparation of an EIR under CEQA, Westlands has invoked an expensive,
28 resource-intensive process that involves participation by tribal, federal, state, and local
governments, as well as private citizens, and non-governmental organizations. CEQA requires

1 public agencies to devote substantial staff time and resources to reviewing and commenting on a
2 draft EIR, particularly for a project as significant as the proposed Shasta Dam raise. However,
3 because the project that is the subject of Westlands' CEQA process would adversely affect the
4 free-flowing condition and wild trout fishery of the McCloud River, other public agencies will
5 face uncertainty in how to lawfully fulfill all of their responsibilities under CEQA to the extent
6 doing so would constitute assistance or cooperation in the "planning or construction" of the
7 Shasta Dam Raise project. (Pub. Resources Code § 5093.542, subd (c).)

8 Under CEQA, once the lead agency determines an EIR is required for a project, the lead
9 agency must notify the Office of Planning and Research, each responsible agency (those agencies
10 with authority to issue separate approvals required for the project), and those public agencies
11 having jurisdiction over natural resources affected by the project that are held in trust for the
12 people of California (trustee agencies). (Pub. Resources Code § 21080.4, subd. (a).) Indeed,
13 following Westlands' issuance of the IS/NOP in November of 2018, fifteen state agencies were
14 designated as "Reviewing Agencies" for the Initial Study/Notice of Preparation. (See RJN Exh.
15 L.) For the Shasta Dam Raise project, responsible agencies include the State Water Resources
16 Control Board and Department of Transportation (Caltrans), and the trustee agencies include
17 DFW and the State Lands Commission. (RJN Exhs. I, M, N, O.)

18 The California Wild and Scenic Rivers Act constrains public agencies in fulfilling their
19 CEQA consultation and commenting obligations for the Shasta Dam Raise project. For example,
20 under CEQA, a responsible agency must make independent findings regarding the significant
21 effects of the project. (Cal. Code Regs., tit. 14, § 15096, subd. (h).) These findings include
22 whether mitigation measures have been incorporated into the project to reduce its significant
23 effects. (Cal. Code Regs., tit. 14, § 15091, subd (a).) For the Shasta Dam Raise project, a
24 responsible agency would be limited in its ability to make substantive findings regarding the
25 project's significant effects, including regarding any project alternatives or mitigation measures,
26 because such developing such findings could be construed as prohibited "assist[ance] and
27 cooperat[ion]" in "planning" in support of the Shasta Dam Raise project.

1 Similarly, a trustee agency commenting on a draft EIR may propose mitigation measures or
2 project revisions. (Cal. Code Regs., tit. 14, § 15097, subd (f).) If a trustee agency does so, it
3 must “prepare and submit to the lead or responsible agency a draft monitoring or reporting
4 program for those measure or revisions.” (*Ibid.*) Here, a trustee agency would likely be unable to
5 propose mitigation measures or project revisions, or submit the associated draft monitoring or
6 reporting program, without violating the prohibition on “planning” for a project that could
7 adversely affect the McCloud River. (Pub. Resources Code § 5093.542, subd (a).)

8 Westlands’ unlawful CEQA process harms reviewing public agencies by imposing upon
9 them an unworkable legal dilemma. On the one hand, a reviewing agency could choose to carry
10 out its CEQA obligations in full, including submitting substantive comments and, if necessary,
11 making findings, regarding the project’s impacts and mitigation for those impacts, but in doing so
12 would risk violation of the California Wild and Scenic Rivers Act by participating in “planning”
13 for the project. On the other hand, citing the Act, the agency could elect to refrain from
14 substantive participation in the CEQA process, but that choice would effectively abdicate the
15 agency’s obligations to protect the resources and interests within its jurisdiction by providing
16 thorough and substantive comments and/or findings on the proposed project.

17 Westland’s illegal conduct has created an untenable Catch-22 for reviewing public
18 agencies, the burden of which these agencies should not have to bear. A preliminary injunction
19 can and should issue to prevent public agencies from facing conflicting statutory obligations and
20 committing limited public resources to an illegal process.

21 **3. A Preliminary Injunction Will Prevent Irreparable Harm to the**
22 **Shasta Lake Environment**

23 Westlands’ current CEQA process is an intermediate phase in the overall scheme to enlarge
24 Shasta Dam. Westlands and the Bureau have announced a project schedule that contemplates
25 finalizing a cost share agreement in August of 2019, and awarding the construction contract
26 before the end of 2019. (RJV Exhs. P, p. 19/21; Q.) If Westlands’ unlawful participation in the
27
28

1 project is not enjoined now, construction of the dam raise may begin within months, causing
2 irreparable physical and environmental harm before a resolution of the merits of this action.⁴

3 In December of 2018, Westlands presented information about the Shasta Dam Raise project
4 at a public Scoping Meeting. (RJN Exh. P, p. 19/21.) Westlands indicated that “implementation
5 schedule milestones” for the project included executing “Cost Share Agreement(s)” in Summer
6 2019. (*Ibid.*) The timeline also included “Dam Raise Construction Contract Award and NTP
7 [Notice to Proceed]” in December of 2019. (*Ibid.*) In April of 2019, the Bureau issued a fact
8 sheet that confirmed the project timeline Westlands outlined a few months earlier. (RJN Exh. Q.)
9 The Bureau indicated August 2019 as the date for securing a 50% cost-share partner, and
10 December 2019 as the date for awarding the construction contract. (*Ibid.*)

11 If Westlands’ unlawful participation in the Shasta Dam Raise project is not enjoined at this
12 stage, Westlands’ and the Bureau’s plans call for construction to be authorized within six months.
13 As discussed above, raising Shasta Dam 18.5 feet will cause numerous adverse impacts to the
14 McCloud River’s free-flowing condition and wild trout fishery. But the impacts of the dam raise
15 are not limited to the McCloud River. For example, the Bureau’s EIS notes that raising Shasta
16 Dam to any of the evaluated heights would require: (i) Clearing vegetation from portions of the
17 inundated reservoir area; (ii) Constructing the dam, appurtenant structures, reservoir area dikes,
18 and railroad embankments; and (iii) Relocating roadways, bridges, recreation facilities, utilities,
19 and miscellaneous minor infrastructure. (RJN Exh. A, p. S-25.) While not an exhaustive list of
20 the project’s impacts, all of these activities would involve large-scale construction and cause
21 severe physical and environmental impacts. Once project construction begins, remediation of the
22 physical and environmental harm of the dam raise is likely impossible:

23 “Environmental injury, by its nature, can seldom be adequately remedied by money
24 damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such
25 injury is sufficiently likely, therefore, the balance of harms will usually favor the
26 issuance of an injunction to protect the environment.”

27
28 ⁴ Trial in this action has been set for April 14, 2020, after a construction contract and
Notice to Proceed are slated to be issued under Westlands’ and the Bureau’s project timeline.

1 (*Amoco Production Co. v. Village of Gambel, AK* (1987) 480 U.S. 531, 545, *abrogated in part on*
2 *other grounds by Winter v. Natural Res. Def. Council, Inc* (2008) 555 U.S. 7.) Here, the project
3 proponents' own timeline for the dam raise indicates that, in the absence of an injunction, these
4 impacts are likely to occur while this action is pending. The People are "not required to wait"
5 until physical environmental harm occurs before applying for an injunction. (*Costa Mesa City*
6 *Employees' Assn. v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 305, quoting *Maria P. v.*
7 *Riles* (1987) 43 Cal.3d 1281, 1292.) A preliminary injunction barring Westlands' participation in
8 the Shasta Dam Raise project will guard against these serious physical and environmental impacts
9 until the Court determines the merits of the action.

10 **B. Westlands Will Suffer Minimal Harm, If Any, Should the Injunction Issue**

11 In contrast to the numerous, serious harms to the People if the preliminary injunction does
12 not issue, Westlands will incur minimal harm, and in fact stands to benefit if its participation in
13 the dam raise project is temporarily enjoined.

14 **1. The Preliminary Injunction Will Cause Only Temporary Delay to**
15 **Westlands' Participation in the Dam Raise Project**

16 If the Court enjoins Westlands from assisting or cooperating in the Shasta Dam Raise
17 project, including halting its CEQA process, the only harm to Westlands would stem from the
18 delay in its ability to participate in the illegal project until the conclusion of this case. Any harm
19 because of this delay, if it occurred, would be temporary. Where a plaintiff seeking injunctive
20 relief faces permanent harm and the opposing party faces only temporary delay if the injunction
21 issues, "the balance of equities tips toward the...plaintiffs." (*League of Wilderness Defs/Blue*
22 *Mountains Biodiversity Project v. Connaughton* (9th Cir. 2014) 752 F.3d 755, 765.)

23 Here, a delay in Westlands' participation in the Shasta Dam Raise project pending a
24 determination on the merits imposes no discernable harm on Westlands. The project remains in
25 the planning stages; indeed, federal agencies have studied and considered the project for nearly
26 forty years. Westlands has not yet committed funding for the project as a cost-sharing partner
27 with the Bureau, and, thus, is not at risk of losing such funds. Further, trial in the instant action is
28 set for April 14, 2020, less than ten months from now. Although unlikely, in the event Westlands

1 ultimately prevails in the action, it would have been restrained from participating in the project
2 for only “a short period of time,” at which point it could simply resume its efforts with no ill
3 effects. (*Volpicelli v. Jared Sydney Torrance Mem’l Hosp.* (1980) 109 Cal.App.3d 242, 251-
4 252.) A preliminary injunction against Westlands’ planning for the Shasta Dam Raise project is
5 appropriate here, as it will preserve the status quo without impairing Westlands’ ultimate interests
6 in the Shasta Dam Raise project.

7 **2. The Preliminary Injunction Will Benefit Westlands by Preventing**
8 **Further Unnecessary Costs of CEQA Review and Analysis**

9 At its September 18, 2018, Board of Directors Meeting, Westlands considered retaining
10 consultants to perform planning and prepare environmental documentation in support of the
11 Shasta Dam Raise project. (RJN Exh. J.) In October of 2018, Westlands approved a budget
12 transfer in the amount of \$1,020,000 for “Consulting Services related to Shasta Dam.” (RJN Exh.
13 K.)

14 This evidence indicates that Westlands has already incurred costs in furtherance of its
15 unlawful CEQA process, and that in the absence of a preliminary injunction, Westlands will
16 expend even more funds and resources toward this improper purpose. A preliminary injunction
17 against Westlands’ participation in the Shasta Dam Raise project, including the CEQA process,
18 will therefore benefit Westlands and its members. By preventing Westlands from incurring any
19 more costs in support of the Shasta Dam Raise project until a determination on the merits, a
20 preliminary injunction will preserve Westlands’ resources in the likely event that the People
21 prevail in the action.

22 **CONCLUSION**

23 For the foregoing reasons, the People respectfully request that the Court grant the instant
24 motion for a preliminary injunction against Westlands’ assistance or cooperation in the planning
25 or construction of the Shasta Dam Raise project, including any CEQA process.

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Dated:

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: *People ex rel Attorney General Xavier Becerra v. Westlands Water District, et al.*

Case No.: **Shasta County Superior Court no. 192487**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

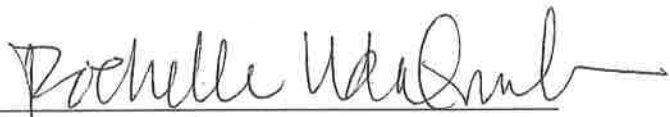
On June 12, 2019, I served the attached **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** by placing a true copy thereof enclosed in a sealed envelope with **GOLDENSTATE OVERNIGHT**, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 12, 2019, at Sacramento, California.

Rochelle Uda-Quillen
Declarant


Signature