PEOPLE VS. WESTLANDS WATER DISTRICT
Case Number: 192487

Tentative on Plaintiff's Motion for Preliminary Injunction: The Attorney General, representing the People of the State of California, moves here for a preliminary injunction enjoining defendant Westlands Water District from assisting or cooperating in any planning or construction of the Shasta Dam Raise Project, pending trial of this matter. The motion is made to halt a California Environmental Quality Act process initiated by Westlands Water District back in 2018, and to otherwise enjoin Westlands Water District from taking any action that would violate the California Wild and Scenic Rivers Act, Public Resources Code section 5093.542.

Preliminary Statement on Use of Evidence: Both parties have submitted requests for judicial notice of various federal and state documents in support of their respective positions. The Court takes judicial notice of these documents pursuant to Evidence Code section 1280. Evidence Code section 1280 permits the Court to admit official records or reports without necessarily requiring a witness to testify as to its identity and mode of preparation. See *Bhatt v. State Dept. of Health Services* (2005) 133 Cal.App.4th 923, 929. The Court in judicially noticing these documents recognizes that the contents of the documents remain inadmissible hearsay. See *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482; *Coyne v. City and County of San Francisco* (2017) 9 Cal.App.5th 1215, 1223. However, the official conclusions of certain state and federal agency documents, that the Shasta Dam Raise Project may cause adverse impacts to the free flow of the McCloud River and its wild trout fishery, are considered by the Court not for the truth of the matter asserted in the conclusions, but to establish that findings on the subject have been made by various state and federal agencies.

Factual Background: The Shasta Dam has been an iconic landmark of Shasta County dating back to its completion in the 1940s. The Shasta Dam provides several benefits to the region, as well as to broader Northern California, including flood control, water storage, recreation, and hydroelectric power. The reservoir formed by Shasta Dam is called Shasta Lake, which is the largest man-made lake in the State of California.

The McCloud River is a tributary of the Pit River, which in turn flows to the Shasta Dam. The McCloud River flows in Siskiyou County and Shasta County, draining a scenic portion of the Cascade Range, including part of Mount Shasta. Its drainage includes a series of picturesque waterfalls and vistas that flow through the surrounding forests. The McCloud River, Pit River, and Sacramento River all join in Shasta Lake.

In 1972, the California Legislature passed the California Wild and Scenic Rivers Act ("Act"). The Act is codified under Public Resources Code sections 5093.50 et seq. The Act states at section 5093.50:

> "It is the policy of the State of California that certain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. The Legislature declares that such use of these rivers is the highest and most beneficial use and is a reasonable and beneficial use of water within the meaning of Section 2 of Article X of the California Constitution. It is the purpose of this chapter to create a California Wild and Scenic Rivers System to be administered in accordance with the provisions of this chapter."

In 1989, the Legislature amended the Act to include special protections for the McCloud River. These protections are codified under Public Resources Code section 5093.542. Relevant portions of section 5093.542 state:

> "The Legislature finds and declares that the McCloud River possesses extraordinary resources in that it supports one of the finest wild trout fisheries in the state. Portions of the river have been appropriately designated by the Fish and Game Commission, pursuant to Chapter 7.2 (commencing with Section 1725) of Division 2 of the Fish and Game Code, as wild trout waters,

with restrictions on the taking, or method of taking, of fish. The Legislature has determined, based upon a review of comprehensive technical data evaluating resources and potential beneficial uses, that potential beneficial uses must be balanced, in order to achieve protection of the unique fishery resources of the McCloud River, as follows:

(a) The continued management of river resources in their existing natural condition represents the best way to protect the unique fishery of the McCloud River. The Legislature further finds and declares that maintaining the McCloud River in its free-flowing condition to protect its fishery is the highest and most beneficial use of the waters of the McCloud River within the segments designated in subdivision (b), and is a reasonable use of water within the meaning of Section 2 of Article X of the California Constitution.

…

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

…

(e) Nothing in this section shall prejudice, alter, affect in any way, or interfere with the construction, maintenance, repair, or operation by the Pacific Gas and Electric Company of the existing McCloud-Pit Development (FERC 2106) under its license, or prevent Pacific Gas and Electric from constructing a hydroelectric generating facility by retrofitting the existing McCloud Dam if the operation fo the facility does not alter the existing flow regime below the dam."

Defendant Westlands Water District ("Westlands") is a California water district with its main office in Fresno, California. It was created and is operating pursuant to the California Water Code, and serves as a "public agency of the State." See Wat. Code §§ 37822, 37823. Westlands is responsible for providing water to approximately 614,000 acres of land in western Fresno and Kings Counties. In addition to providing irrigation to farms, Westlands provides water for municipal and industrial uses, including Naval Air Station Lemoore. Westlands' irrigation water need varies, and historically is in the range of 1.4 million acre-feet per year.

Traditionally, Westlands contracts with the United States for delivery of water produced by the federal Central Valley Project ("CVP"). The CVP is overseen by the United States Bureau of Reclamation ("Bureau"), which is the largest wholesale water supplier in the United States. The Shasta Dam and Reservoir were constructed as integral elements of the CVP, with Shasta Reservoir representing about forty percent of the total reservoir storage capacity of the CVP, and about 55 percent of the total annual CVP supply. In recent decades, competing demands for CVP water has made it more difficult for the Bureau to satisfy the congressionally authorized and mandated purposes of the CVP.

In light of the increasing demand for CVP water, state and federal agencies in recent decades have explored the possibility of raising Shasta Dam and enlarging Shasta Reservoir. In the mid-1990s, a group of state and federal agencies created the CALFED program and considered various actions intended to solve problems of ecosystem quality, water supply, reliability, and water quality. Those agencies prepared programmatic EIS/EIRs, which included a proposal for enlargement of the Shasta Dam and Reservoir, but did not make a recommendation thereon. In 1999, the Bureau issued an Appraisal Assessment of the Potential for Enlarging Shasta Dam and

Reservoir, which evaluated various options for raising the dam, ranging from 6.5 feet at the low end to 202.5 feet at the high end. In more recent years, various federal and state agencies have been focused on a proposal to raise the dam by 18.5 feet.

On July 29, 2015, the Bureau issued its Final Environmental Impact Statement ("EIS"), which examined proposed alternatives for raising Shasta Dam. The Bureau also released a Final Feasibility Report assessing the feasibility of the proposed alternatives. Both the Final EIS and Final Feasibility Report state conclusions that an 18.5 foot dam raise would adversely affect the McCloud River's free-flowing condition and the wild trout fishery. The United States Fish and Wildlife Service and the California Department of Fish and Wildlife have issued similar conclusions.

In 2016, Congress enacted the Water Infrastructure Improvement for the Nation Act ("WIIN Act"). The WIIN Act authorizes the Bureau to participate in water storage projects at federally owned facilities like Shasta Dam, but limits the portion of the project the Bureau may finance to fifty percent of the total cost. The Bureau is required to finance the remaining fifty percent of the total cost through other agencies and sources.

Even prior to WIIN's passage, Westlands had been in discussions with the Bureau regarding financing of the raising of the Shasta Dam. This included two Agreements in Principle regarding the sharing of costs, the most recent of which expired in September 2017 and has not been renewed. On November 30, 2018, Westlands issued an Initial Study/Notice of Preparation (IS/NOP) to develop an environmental impact report (EIR) under CEQA for the Shasta Dam Raise project. The stated purpose of the EIR is to evaluate six action alternatives relating to the enlargement of Shasta Dam. Westlands submits that it is currently considering whether, along with other public water agencies, to assume the very limited role of contributing funding for the Bureau's potential project. To make this determination, Westlands hopes to use the CEQA process to (1) evaluate whether Public Resources Code section 5093.542 precludes Westlands from entering into a cost share agreement; and (2) comply with CEQA. The Bureau has issued an anticipated schedule for the Shasta Dam Raise Project under which it intends to identify cost share partners by August 2019. The Bureau hopes to move forward with construction by the end of this year.

The Attorney General, on behalf of the People of the State of California, has filed this action seeking declaratory and injunctive relief enjoining Westlands from assisting or cooperating in any planning or construction of the Shasta Dam Raise Project. The instant motion is made for a preliminary injunction to halt the CEQA process initiated by Westlands, and to otherwise enjoin Westlands from taking any action that would violate the California Wild and Scenic Rivers Act, Public Resources Code section 5093.542, pending trial in this action.

Preliminary Injunction Standard: A party requesting a preliminary injunction may give notice of the request to the opposing party either by serving a noticed motion under Code of Civil Procedure section 1005, or by obtaining and serving an Order to Show Cause. Cal. Rules of Ct. Rule 3.1150, subd. (a). Here, plaintiff has elected to proceed by way of noticed motion. Plaintiff has filed evidence in support of the motion in the form of documents of which the Court has taken judicial notice. See Code Civ. Proc. § 527, subd. (a). No objections have been raised to the procedural process.

The standard for a preliminary injunction is set forth in Code of Civil Procedure section 525 et seq. To obtain a preliminary injunction, the plaintiff must establish that the defendants should be restrained from the challenged activity pending trial. See Code Civ. Proc. § 526, subd. (a); see also *Trader Joe's Co. v. Progressive Campaigns* (1999) 73 Cal.App.4th 425, 429. In seeking a preliminary injunction, the burden is on the moving party to show all elements necessary to support issuance of the preliminary injunction. *O'Connell v. Superior Court (Valenzuela)* (2006) 131 Cal.App.4th 1452, 1481. The Court is to weigh two interrelated factors: (1) the likelihood that the moving party will prevail on the merits; and (2) the relative interim harm to the parties from the issuance or nonissuance of the injunction. See *Donahue Schriber Realty Group, Inc. v. Nu Creation Outreach*

(2014) 232 Cal.App.4th 1171, 1177; *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1449; *Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 624-625.

Probability of Success on the Merits: The Attorney General's entire case relates to Westlands' alleged ongoing violation of Public Resources Code section 5093.542, subdivision (c). Subdivision (c) states, in relevant part, "… no department or agency of the state shall assist or cooperate with, whether by loan, grant, license, or otherwise, any agency of the federal, state, or local government in the planning or construction of any dam, reservoir, diversion, or other water impoundment facility that could have an adverse effect on the free-flowing condition of the McCloud River, or on its wild trout fishery."

The plain language of the statute prohibits departments or agencies of the State from financing, facilitating, or even cooperating with any other government agencies in the planning or construction of any water impoundment facility that could have an adverse effect on the free-flowing condition of the McCloud River, or on its wild trout fishery. The prohibition must be read in the context of the entire statute, whose stated policy objectives are to preserve the extraordinary scenic, recreational, fishery, or wildlife values of protected rivers in their free-flowing state; and, with respect to the McCloud River, to protect its wild trout waters by managing the river resources in its existing natural condition. See Pub. Resources Code §§ 5093.50, 5093.542.

Here, Water Code section 37823 makes clear that Westlands is a public agency of the State. As such it is subject to the Public Resources Code section 5093.542 prohibition. The Attorney General is likely to succeed on the merits of his case, as Westlands has already previously entered into Agreements in Principle to help the Bureau in financing the Shasta Dam raise, and is otherwise currently in the process of determining whether it wants to move forward with financing the Shasta Dam raise.

Westlands in its opposition does not appear to refute that it must comply with section 5093.542, but rather contends that it has not yet violated section 5093.542, or that it will not be in violation of section 5093.542 after a CEQA process determines that the dam raise proposal presents no adverse impacts to the McCloud River. However, in making its arguments, Westlands twists the plain meaning of the statute towards interpretations that are untenable and otherwise out of tune with the stated policy purpose of the statute. This is seen in five (5) areas.

First, Westlands argues that it is not assisting or cooperating in the planning of the Shasta Dam Raise Project, but merely gathering information while it decides whether or not to provide money for the project. However, Westlands' own opposition papers reveal cooperation with the Bureau in the planning of the Bureau's Shasta Dam Raise Project going back to 2012. Westlands has previously entered into Agreements in Principle with the Bureau. Moreover, Westlands submits that it owns a significant portion of the land adjoining portions of the McCloud River that are anticipated to be impacted by the dam increase. Purportedly, Westlands ownership of this land limits the impact on fishing in the area. Whether this ownership is in an effort to mitigate impacts on fishing to facilitate the dam raise, or whether the ownership is simply a matter of happenstance remains to be seen through further evidence at trial. Nevertheless, there appears to be a strong probability that the evidence in this case is going to show cooperation and facilitation by Westlands towards a raising of the Shasta Dam. While Westlands may currently be contemplating whether to put money forward on the project, financing alone is not the only way section 5093.542 might be violated, and Westlands' past actions will need to be considered at trial in this action.

Second, Westlands argues that it has not engaged in "planning," as no final project decision has been made. This argument fails for two reasons. First, CEQA's review process by definition is part of an agency's planning process. "A basic tenet of CEQA is that an environmental analysis 'should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment.'" *Laurel Heights Improvement Assn.*

v. Regents of the Univ. of California (1988) 47 Cal.3d 376, 395; quoting Cal. Code Regs., tit. 14, § 15004, subd. (b). Further, CEQA sets out a fundamental policy requiring local agencies to integrate CEQA requirements with planning and environmental review procedures otherwise required by law. *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 936. Clearly, CEQA is a part of agency planning. However, equally important is the fact that section 5093.542's focus is not on the agency's planning efforts, but on the agency's assistance or cooperation with another federal, state, or local entity in the planning or construction of water impoundment facilities. It is the nexus of activity between Westlands and the Bureau that is at issue here, and the extent to which common planning towards the raising of the dam has occurred. While no final decisions may have been made on the project, there is a strong probability that the evidence of this case at trial will reveal that planning has occurred by both Westlands and the Bureau, with the end objective being to raise Shasta Dam.

Third, Westlands argues that because other state agencies have previously participated in CEQA review in relation to a Shasta Dam raise, Westlands should also be permitted to engage in a CEQA review. However, this argument fails to grasp why the other CEQA reviews occurred. The CALFED project was a collaboration between state and federal agencies to explore ecological restoration and water management proposals in the Bay-Delta system. CALFED did not evaluate any specific project to raise the dam, and otherwise was not seeking to become involved in such a project. As for the PG&E hydroelectric project license renewal at the McCloud-Pit facility, Westlands' argument is similarly inapplicable. Subdivision (e) of section 5093.542 expressly provides an exception for the PG&E facility. No such exception applies in this case.

Fourth, Westlands contends that it is not in violation of the Act, as it has not yet made an independent determination that raising the Shasta Dam would adversely affect the McCloud River. The plain language of the statute does not require a public agency to make its own independent findings before the prohibition applies. Rather, section 5093.542's prohibition is absolute regardless of agency findings. It mandates that state departments and agencies not assist or cooperate with other agencies on a dam raise project that **could** adversely affect the free-flowing condition or wild trout fisheries of the McCloud River. In other words, the mere possibility of an adverse impact is enough to trigger the statute. This reading of the statute makes sense, as the language is to be read in the context of the statute's policy, which is to protect the McCloud River's wild trout waters by managing the river resources in its existing natural condition. See Pub. Resources Code § 5093.542.

Here, several federal and state agencies have already concluded that raising the Shasta Dam will have some adverse impacts on the free-flowing condition and wild trout fisheries of the McCloud River. The Court need not accept the conclusions in those reports as true to recognize that section 5093.542 applies. Rather, the conclusions establish that the possibility of adverse impacts exists. In other words, the dam raise project **could** adversely affect the free-flowing condition or wild trout fisheries of the McCloud River. No independent CEQA process by Westlands is needed to reach this conclusion.

Finally, Westlands argues that the dam raise cannot impact the "free-flowing" nature of the McCloud River or its wild trout fisheries, as the upstream PG&E hydroelectric plant determines the free-flowing state of the McCloud River, and Westlands' ownership in the area precludes recreational fishing. This is a clear misapplication of the statute. Public Resources Code section 5093.52 defines "free-flowing" as "existing or flowing without artificial impoundment, diversion, or other modification of the river. The presence of low dams, diversion works, and other minor structures does not automatically bar a river's inclusion within the system…" Here, while the PG&E hydroelectric plant indeed impacts the upstream free-flowing state of the McCloud River, the entire system must be taken into consideration in determining that system's free-flowing state. The Shasta Dam by its very nature can limit the McCloud River's free-flowing state by converting free-flowing waters into reservoir waters. Even the language of the statute confirms this point, as section 5093.542, subdivision (c) begins, "Except for participation by the Department of Water Resources in studies involving the technical and economic feasibility of enlargement of Shasta Dam…" If the State Legislature did not believe that the Shasta Dam could have an impact on the McCloud River's free-flowing state, then it would not have

felt the need to carve out an exception for studies performed by the Department of Water Resources involving enlargement of the Shasta Dam.

As for Westlands' claim that wild trout fisheries will not be impacted, the term "fisheries" in this context is not referring to people who are fishing, but to the population of wild trout that makes up the fishery of the river. The Court's reading of the term is in harmony with both the United States Code and the California Code. For example, both Fish & Game Code section 7650 and section 1802(13) of Title 16 of the United States Code define "fishery" to mean "one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics." Here, when the statute is referring to wild trout fisheries, its concern is with the potential for adverse impacts on the actual stock of fish. This reading is once again in accordance with the language of the entire statute, which was enacted to protect the McCloud River, which possesses extraordinary resources in that it supports one of the finest wild trout fisheries in the State. Pub. Resources Code § 5093.542.

The Attorney General has met his burden in showing a probability of success on the merits.

Relative Interim Harm of the Parties: The second factor on a motion for preliminary injunction requires the Court to weigh the relative interim harm to the parties from the issuance or nonissuance of the injunction. *Donahue Schriber Realty Group, Inc.*, *supra*, 232 Cal.App.4th at 1177. In balancing these competing interests, the Court is guided by a purpose to preserve the status quo pending a determination on the merits. *Jamison v. Dept. of Transportation* (2016) 4 Cal.App.5th 356, 361.

Here, the granting of a preliminary injunction will assist the Attorney General in remedying alleged violations of Public Resources Code section 5093.542, while also ensuring that Westlands does not move forward with cooperation or funding of the Shasta Dam raise during the pendency of this case. However, Westlands notes that the Bureau has issued an anticipated schedule for the Shasta Dam Raise Project under which it intends to identify cost share partners by August 2019, and that the Bureau intends to move forward with construction by the end of this year. Westlands fears that a preliminary injunction during the pendency of this case could preclude its consideration by the Bureau as a cost share partner.

In weighing these competing interests, the Court notes that equity favors the Attorney General's position. The granting of a preliminary injunction will maintain the status quo during the pendency of this litigation, while ensuring that Westlands does not move forward with a CEQA process or funding position that may be in violation of Public Resources Code section 5093.542. While the Court recognizes Westlands' fear of being left behind as a cost sharing partner, Westlands has not presented any evidence establishing that the Bureau would stop considering Westlands as a potential cost sharing partner solely because of the issuance of a preliminary injunction, nor has Westlands addressed the myriad of other contingencies that could preclude Westlands' consideration as a cost sharing partner regardless of the presence of a preliminary injunction (contingencies such as an ongoing CEQA review, the potential for CEQA challenges by third parties, findings by Westlands that section 5093.542 applies, the realization that the financing exceeds Westlands' capabilities, or the Bureau's decision to move forward with a different plan or to not move forward on the dam raise at all).

Undertaking: Neither party addressed the issue of an undertaking in this matter. The Court notes that no undertaking is necessary where the party in interest is the State of California or the people of the state, a state agency, department, division, commission, board, or other entity of the state. See Code Civ. Proc. §§ 529, 995.220, subd. (a).

Conclusion: The Attorney General's motion for a preliminary injunction is GRANTED. As he is representing the People of the State, no undertaking is required. A proposed order has been submitted and will be executed by the Court. The proposed order is not vague as to be unenforceable, as the language simply seeks a halt to the

present CEQA review and compliance with Public Resources Code section 5093.542 during the pendency of this action.

WESTERN SURETY CO. VS. WHITNEY-STONE, INC.,
Case Number: 186382

Tentative Ruling on Order to Show Cause Re Monetary Sanctions: An Order to Show Cause Re: Sanctions originally issued on April 19, 2019 to Plaintiff and Counsel for failure to appear at the Resolution Review hearing on April 15, 2019 and failure to timely proceed with default. Counsel has submitted a response to the Order to Show Cause. A request for dismissal as to defendants Sean Whitney and Zuheit Whitney was filed on May 30, 2019 but was rejected by the Clerk's Office. A default judgment packet has also been submitted, seeking default judgment against defendants Whitney Stone, Inc.; Robert Stone; and Meagan Hawley-Stone. However, the procedural posture of the case makes it unclear what plaintiff is trying to accomplish.

This breach of contract action was filed on December 12, 2016. Defendants Whitney Stone, Inc.; Robert Stone; Meagan Hawley-Stone; Sean Whitney; and Zuhelt Whitney all had their defaults taken on August 16, 2018. However, Sean Whitney and Zuhelt Whitney's defaults were subsequently set aside when it later became clear that the parties had indeed filed an answer. A Notice of Conditional Settlement of the entire action was filed on August 17, 2018, indicating that a Request for Dismissal would be filed no later than November 15, 2021.

On or about February 15, 2019, the Court received a proposed default judgment from plaintiff's counsel requesting judgment against defendants in excess of $700,000. The Court rejected the submission as there had never been a default prove-up hearing in the case, and no evidence had been submitted in support of the judgment. The matter proceeded to an April 15, 2019 resolution review hearing to ascertain the settlement's status, at which time the Court's tentative noted that it did not have the resources to continually monitor the settlement until 2021, and recommended the parties come to a final resolution of the matter. No parties appeared at the resolution review. On April 19, 2019, the Court issued this Order to Show Cause Re: Sanctions to plaintiff and counsel for failure to appear at the Resolution Review hearing on April 15, 2019 and failure to timely proceed with default.

Plaintiff's counsel's filings in response to the Order to Show Cause appear to show an effort to obtain a default judgment against the remaining defaulted defendants, and to otherwise dismiss the action against Sean Whitney and Zuhelt Whitney while having the Court retain jurisdiction over the parties pursuant to Code of Civil Procedure section 664.6. However, counsel has provided no explanation as to why default judgment is now being pursued against the defaulted parties after a Notice of Settlement of the Entire Action has been filed with the Court. Moreover, counsel has not provided a signed copy of the purported settlement between the parties together with a stipulation requesting the Court to retain jurisdiction pursuant to Code of Civil Procedure section 664.6. With no information on the purported settlement, the Court cannot ascertain plaintiff's course of action.

This matter is continued to **Monday, August 26, 2019 at 8:30 a.m. in Department 8**. Plaintiff's counsel is directed to submit any supplemental filings addressing today's ruling no later than five (5) court days prior to the continued hearing date. Today's Resolution Review hearing scheduled for 9:00 a.m. in continued to **Monday, August 26, 2019 at 9:00 a.m. in Department 8**. **No appearance is necessary on the 8:30 a.m. or 9:00 a.m. calendars.**