IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

WESTLANDS WATER DISTRICT, Petitioner, v. SUPERIOR COURT FOR THE COUNTY OF SHASTA, Respondent, PEOPLE OF THE STATE OF CALIFORNIA EX REL. ATTORNEY GENERAL XAVIER BECERRA, Real Party in Interest.	Court of Appeal Case No. (Shasta County Superior Court Case No. 192487) Honorable Tamara L. Wood; Honorable Dennis J. Buckley Department 8 Telephone: (530) 225-5116

STAY OF TRIAL COURT PROCEEDINGS REQUESTED

VERIFIED PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL Third **APPELLATE DISTRICT, DIVISION**	COURT OF APPEAL CASE NUMBER:
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APPELLANT/ PETITIONER: Westlands Water District RESPONDENT/ REAL PARTY IN INTEREST: People of the State of California Ex Rel. Attorney General Xavier Becerra	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Westlands Water District

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (*Explain):*
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: August 12, 2019

Daniel J. O'Hanlon
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF APPELLANT OR ATTORNEY)

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INTRODUCTION: WHY WRIT RELIEF SHOULD BE GRANTED

This petition challenges a preliminary injunction, which the respondent Shasta County Superior Court acknowledged is unprecedented, enjoining a public agency's *environmental review and decision-making process* and relates to important questions concerning public policy and underlying water management issues of statewide significance. The California Environmental Quality Act ("CEQA") is California's pre-eminent environmental law. Typically, it is an agency's decision made after completion of the CEQA process that is challenged based on an alleged inadequacy of that process. Here, the respondent Superior Court adopted the remarkable position that actions to comply with CEQA are themselves illegal, and ordered Petitioner Westlands Water District ("Westlands") to stop its preparation of an environmental impact report. There is no basis for this anti-CEQA injunction.

The Superior Court reached its extraordinary conclusion by misconstruing another environmental statute, Public Resources Code section 5093.542, meant to protect the McCloud River. A key component of Westlands' CEQA analysis was whether environmental conditions and potential impacts are such that the McCloud River statute would prohibit Westlands' ultimate participation in a potential project to raise Shasta Dam. Pursuant to the Superior Court's ruling, however, Westlands cannot engage in a public environmental review process under CEQA to gather and share information or solicit public comment in the evaluation required to make that determination.

Public Resources Code section 5093.542 does not prohibit raising Shasta Dam. Rather, section 5093.542(c) prohibits a state agency from "assist[ing] or cooperat[ing] 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." (Pub. Resources Code, § 5093.542(c) [emphasis added].)

The question presented by this petition is whether the CEQA process constitutes "planning" prohibited by Public Resources Code section 5093.542(c), such that an agency is foreclosed from utilizing the public environmental review process established by CEQA to evaluate the potential environmental impacts of a potential project, including whether the proposed project will have an adverse effect on the free-flowing condition of the McCloud River or its wild trout fishery. The Superior Court erred as matter of law in deciding that it is. Neither the language of Public Resources Code section 5093.542(c), CEQA, the CEQA Guidelines, nor relevant case law support an interpretation that prohibits environmental review under CEQA.

Absent writ relief, Westlands will be prohibited from engaging the public in CEQA's decision-making process, and Westlands' ability to prepare an adequate defense to this matter will be impaired. Westlands may also lose the opportunity to contribute funding to the United States Bureau of Reclamation's proposed project to raise Shasta Dam. Accordingly, the Court should grant this petition.

PETITION FOR WRIT OF MANDATE

Westlands Water District ("Westlands") petitions this Court for a writ of mandate and/or prohibition, or other appropriate relief, directing respondent Shasta County Superior Court to vacate its preliminary injunction enjoining Westlands from continuing its review under the California Environmental Quality Act ("CEQA") or engaging in any other "planning" related to a potential project to raise Shasta Dam.

Westlands alleges as follows:

Beneficial Interest of Petitioner; Capacities of Respondent and Real Party in Interest

1. Westlands is a California Water District. Its principal office is located in Fresno, California. Westlands' service area encompasses approximately 614,000 acres and includes some of the most highly productive agricultural lands in the world. Farmers in Westlands produce more than sixty high-quality food and fiber crops, including row crops, grapes, and nuts. Westlands provides water primarily for irrigation of farms, but also provides water for some municipal and industrial uses as well, including Naval Air Station Lemoore. The principal source of water delivered by Westlands to farmers in its boundaries is the federal Central Valley Project ("CVP"), which is owned by the United States. (Tab 13, SD00512-513.) Westlands has been enjoined from continuing with its environmental review under CEQA related to funding a potential project to raise Shasta Dam, pending trial. (Tab 22, SD00636-642.) It has been further enjoined from engaging in any other supposed "planning" of the potential project to raise Shasta Dam pending trial. (*Ibid.*)

2. Respondent is the Shasta County Superior Court, which issued the preliminary injunction against Westlands.

3. Real party in interest is the People of the State of California ex rel. Attorney General Xavier Becerra, which sought the preliminary injunction against Westlands.

Authenticity of Exhibits

4. The exhibits accompanying this petition are true and correct copies of original documents filed with the Superior Court. The exhibits are paginated consecutively from page SD00001 to page SD00642. Page references in this petition are to the consecutive pagination.

Timeliness of the Petition

5. On July 29, 2019, the Superior Court (Honorable Dennis J. Buckley) issued an order granting the Attorney General's request for a preliminary injunction. (Tab 22, SD00636-642.) The Attorney General served notice of the ruling by overnight delivery on July 31, 2019. (*Ibid.*)

Summary of Relevant Facts

6. The United States, through the Bureau of Reclamation ("Reclamation"), owns and operates the CVP. Shasta Dam and Reservoir were constructed as integral elements of the CVP, with Shasta Reservoir representing about 40 percent of the total reservoir storage capacity of the CVP and about 55 percent of total annual CVP supply. (Tab 13, SD00514.) The Shasta Dam and Reservoir were completed and have been operational since the 1940s.

7. Federal and state agencies have been studying the potential of raising Shasta Dam, to increase its ability to store water in times of abundant precipitation so as to provide water for water supply, hydro-electric generation, and environmental uses in drier periods. In the mid-1990s a group of state and federal agencies created the CALFED Program and considered a suite of actions intended to solve problems of ecosystem quality, water supply reliability, and water quality. The state agencies that were part of

CALFED included the California Resources Agency (subsequently renamed the California Natural Resources Agency), the California Department of Water Resources, the California Department of Fish and Game (subsequently renamed the California Department of Fish and Wildlife), and the California State Water Resources Control Board. Those agencies, through the CALFED Program, prepared a programmatic environmental impact statement/environmental impact report, which included raising Shasta Dam. In 2000, the CALFED agencies released a Record of Decision that outlined a 30-year plan to improve the Delta's ecosystem, water supply reliability, water quality, and levee stability. (Tab 11, Ex 1.) Through that CEQA review, raising Shasta Dam was identified as one of three surface storage projects warranting additional study and potential adoption in the near term. (Tab 11, Ex 1, SD00410.)

8. Since 2000, Reclamation has continued investigation of raising Shasta Dam. Reclamation has identified a potential project to enlarge Shasta Dam and Reservoir that would increase the height of Shasta Dam by up to 18.5 feet and expand capacity of Shasta Reservoir by up to 634,000 acre-feet. (Tab 13, SD00514.) Hereinafter, Reclamation's proposal to raise Shasta Dam will be referred to as the "Project," which is distinct from the "project" Westlands was evaluating under CEQA, whether to contribute funding for the Project. In 2015, Reclamation released a Final Feasibility Report and Final Environmental Impact Statement ("EIS"). (*Ibid*.) The Final Feasibility Report, along with the Final EIS, provided the results of various studies, including planning, engineering, environmental, social, economic and financial, and included possible benefits and effects of alternative plans. However, Reclamation did not formally adopt the Final EIS through a record of decision and has not made a final decision whether to proceed with the Project. (Tab 13, SD00515.)

9. The Project is Reclamation's potential action—whether, when, and how the Project will go forward will be decided only by Reclamation.

10. One of the requirements of existing federal law applicable to the Project involves funding. Under section 4007 of the Water Infrastructure Improvements for the Nation ("WIIN") Act, Reclamation can contribute no more than 50 percent of the cost of the Project. (P.L. No. 114-322, § 4007(b)(2) (Dec. 16, 2016) 130 Stat. 1864.)

11. Westlands, along with other public agencies, is considering whether to provide funding for the Project as a non-federal cost share partner. Prior to making any decision whether to provide funding for the Project, Westlands must comply with CEQA. (Pub. Resources Code, § 21065(b) [CEQA's definition of "project" includes activity by another person that is supported by funding from a public agency].) Westlands has no authority or discretion to decide whether, when, or how the Project will go forward. Those decisions will be made only by Reclamation. Westlands' only discretionary decision is whether to provide funding. Westlands' CEQA review, which was enjoined by the Superior Court, was initiated for the purposes of informing that decision. (Tab 13, SD00515.)

12. Among other considerations relevant to any decision to contribute funding, Westlands must evaluate whether Public Resources Code section 5093.542 precludes Westlands from entering into a cost share agreement. (*Ibid*.) Public Resources Code section 5093.542(c) prohibits a state agency from "assist[ing] or cooperat[ing] 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." (Pub. Resources Code, § 5093.542(c) [emphasis added].)

13. Application of Public Resources Code section 5093.542(c) involves issues of fact and law. Until enjoined by the Superior Court, Westlands was using the CEQA process, as required by law, to develop the necessary factual information to evaluate consistency of the Project (because of its possible role to contribute funding) with section 5093.542. (Tab 13, SD00515.)

14. As part of its CEQA process, on November 30, 2018, Westlands issued a Notice of Preparation of an Environmental Impact Report ("EIR"). (*Ibid*.) Westlands provided a 30-day public comment period and received comments from various interested parties. In December 2018, Westlands conducted a public scoping meeting in Redding. (Tab 6, Ex. F, SD00153.) Until enjoined, Westlands was preparing a draft EIR. Westlands has not yet circulated a draft EIR for public comment. Westlands has not certified the EIR or executed a cost share agreement. Westlands has been targeting the end of 2019 as the date for completion of its CEQA review and a decision by the Westlands Board of Directors regarding whether it can and whether it would become a non-federal cost share partner in the Project. (*Ibid*.)

The Proceedings in the Superior Court

15. On May 13, 2019, the Attorney General filed a complaint for declaratory and injunctive relief and petition for writ of mandate in Shasta County Superior Court. (Tab 1, SD0007-15.) The complaint alleges that Westlands' activities to comply with CEQA are "planning" prohibited by Public Resources Code section 5093.542. (Tab 1, SD00013 at ¶ 27.)

16. On June 12, 2019, the Attorney General filed a motion for preliminary injunction. (Tabs 4-9, SD00025-364.) The motion sought to enjoin Westlands' CEQA process, any assistance or cooperation in the planning or construction of the Project, and any action that would violate Public Resources Code section 5093.542. (Tab 5, SD00033.)

17. Westlands filed an opposition. (Tabs 10-15, SD00365-537.) The Attorney General filed a reply. (Tabs 16-18, SD00538-562.)

18. The Superior Court issued a tentative ruling on the motion on Sunday, July 28, 2019. (Tab 19, SD00563-576.) The tentative ruling was to grant the motion. (*Ibid*.) The motion was heard on Monday, July 29, 2019 by a visiting judge, the Honorable Dennis Buckley. (Tab 20, SD00578.) It was apparent from argument that Judge Buckley had not written the tentative ruling and had reservations about the requested injunction. (See e.g. Tab 20, SD00580-581.)

19. Ultimately, however, the Superior Court granted the motion for preliminary injunction. (Tab 22, SD00636-642.) The Superior Court modified the proposed form of order submitted by the Attorney General. Under the order, as entered on July 29, 2019, "Westlands is enjoined from taking any action that constitutes planning for or the construction of the Shasta Dam Raise project, pending trial of this matter," and "[t]he CEQA process initiated by Westlands' issuance of an Initial Study/Notice of Preparation in November 2018 is enjoined, pending trial of this matter." (*Ibid*.) The Superior Court did not expressly adopt the reasoning of the tentative ruling, or otherwise elaborate on the basis for the ruling or the intended effect and limits of the preliminary injunction.

Basis for Relief

20. Issuance of the preliminary injunction was an abuse of discretion, because Westlands' activities to comply with CEQA are not "planning" within the meaning of Public Resources Code section 5093.542(c). Westlands has not made any decision on funding and cannot make a decision until it completes CEQA review, including potential effects on the free flowing condition of the McCloud River and its wild trout fishery. The preliminary injunction is thus an attack on Westlands' decision-making process. It is unprecedented for a court to order an agency to stop a CEQA

review, before an agency has even been able to complete that review and make its decision. The issuance of the preliminary injunction is also an abuse of discretion because the injunction is impermissibly vague. The injunction broadly enjoins actions that are "planning" for the Project without providing any definition of what constitutes "planning." In its opposition to the motion for preliminary injunction, Westlands objected to the use of the term "planning" in the Attorney General's proposed order as impermissibly vague. (Tab 10, SD00383-384.)

21. It is in the public interest for Westlands to complete its CEQA review, including an analysis of the application of Public Resources Code section 5093.542, in an open and transparent manner. CEQA is intended, *inter alia*, to inform agencies and *the public* about the environmental effects of a proposed, discretionary project and to enhance public participation in the environmental review process through public notice, scoping meetings, and public review and comment. Allowing Westlands to complete the CEQA review will improve the information available to Westlands, other agencies, and members of the public who are interested in Westlands decision of whether to contribute funding for Reclamation's proposed Project. Allowing Westlands to complete the CEQA review will also enable Westlands' to reach an informed decision in a manner consistent with the requirements and purposes of CEQA.

Absence of Adequate Legal Remedies

22. Westlands has no adequate legal remedy to challenge the preliminary injunction other than writ relief. While an order granting injunctive relief is appealable, (Code Civ. Proc., § 904.1(a)(6)), an appeal likely would not be decided before trial, which is set for April 14, 2020. Further, pending trial, Westlands would be prohibited from engaging the public through a CEQA process regarding the application of Public Resources Code section 5093.542. This impairs Westlands' ability to prepare

its defense. Further, if the injunction remains in place, Westlands' CEQA review will be delayed and any decision by its Board of Directors on whether to contribute funding will be delayed well into 2020. If this were to occur, it is uncertain whether Westlands will still have an opportunity to help fund the Project. (Tab 13, SD00515.) In appropriate circumstances, including those presented here, a writ may issue to prohibit the trial court from enforcing its preliminary injunction. (*Evans v. Superior Court* (1939) 14 Cal.2d 563, 581.)

Grounds for an Immediate Stay

23. Until enjoined, Westlands was progressing with its CEQA review, with a goal of completing CEQA review by the end of 2019. (Tab 13, SD00515.) A stay would restore the status quo and allow Westlands to continue that process without further delay. If Westlands is allowed to complete its CEQA review and subsequently makes a decision not to contribute funding, the trial set for April 2020 will be unnecessary as moot. If Westlands completes its CEQA review and subsequently decides to contribute funding, the trial in April 2020 can go forward with the benefit of a record created through the public process mandated by CEQA and an explanation of Westlands' decision.

PRAYER

Petitioner Westlands prays that this Court

1. Issue an immediate temporary stay of the Superior Court's preliminary injunction pending resolution of this writ petition; and

2. Issue a peremptory writ of mandate and/or prohibition in the first instance, (Code Civ. Proc., §§1087–88, 1104–05; see *Palma v. U.S. Indus. Fasteners, Inc.* (1984) 36 Cal.3d 171, 178), directing the Superior Court to vacate its July 29, 2019 order granting the Attorney General's motion for preliminary injunction: or

3. Should it deem such action necessary and appropriate, issue an alternative writ directing respondent court either to grant the relief specified in paragraph 2 of this prayer or to show cause why it should not be ordered to do so, and upon the return of the alternative writ, issue a peremptory writ as set forth in paragraph 2 of this prayer; and

4. Award Westlands its costs; and

5. Grant such other relief as may be just and proper.

DATED: August 12, 2019

KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Professional Corporation

By: */s/ Daniel J. O'Hanlon*
Daniel O'Hanlon
Attorneys for Westlands Water District

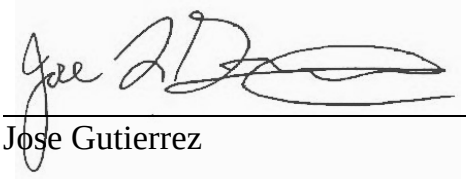
VERIFICATION

I have read the foregoing Verified Petition for Writ of Mandate and know its contents.

I am Chief Operating Officer for Petitioner Westlands Water District, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am familiar with Westlands' CEQA process related to its decision whether to be a local cost share partner in the United States Bureau of Reclamation's potential project to enlarge Shasta Dam and Reservoir. I have read the foregoing document, and know its contents. The facts alleged in the petition are true.

Executed at Fresno, California, on August 12, 2019.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.



Jose Gutierrez

MEMORANDUM

I. SUMMARY OF ARGUMENT

The California Environmental Quality Act ("CEQA") is California's preeminent environmental law, a primary purpose of which is to apprise both the agency and the public of the environmental impacts of a proposed project. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391; Pub. Resources Code, § 21061.) Petitioner Westlands Water District ("Westlands") petitions this Court for review of an unprecedented order granting a preliminary injunction to enjoin Westlands from completing an environmental impact report ("EIR").

The United States Bureau of Reclamation ("Reclamation") is evaluating a potential project to enlarge Shasta Dam and Reservoir ("Project"). This is not a project, however, which Westlands can plan, approve, or construct. (Tab 13, SD00515 at ¶¶ 12-14.) Rather, prior to the issuance of the preliminary injunction, Westlands was engaged in an environmental review process pursuant to CEQA to inform its decision whether to help fund the Project. Westlands had not yet made any final decision, or even issued a draft EIR, when Real Party in Interest California Attorney General Xavier Becerra ("AG") filed a lawsuit and sought to enjoin Westlands' CEQA process. (Tab 13, SD00515 at ¶ 14.) The AG argued, and the respondent Shasta County Superior Court apparently agreed, that Westlands' activities to comply with CEQA constitute "planning" prohibited by Public Resources Code section 5093.542(c), a statute meant to protect the McCloud River and its wild trout fishery. (Tab 5, SD00033 at lns. 16-22.) The Superior Court abused its discretion in issuing the injunction because it misread Public Resources Code section 5093.542.

The preliminary injunction impairs Westlands' ability to engage the public in its environmental review process, including on issues related to potential impacts on the McCloud River and its wild trout fishery. The

injunction prohibits "planning," which the AG contends includes disseminating information to the public and receiving the public's comments on the same. This is not an injunction to enjoin a project or to require an agency to correct deficient environmental review. Instead, this injunction halts the CEQA process before it can be completed. The injunction imposes on Westlands what is effectively a gag order. This is an injunction without precedent. It undermines the purposes for which CEQA was enacted, *inter alia*, to inform agencies and *the public* about the significant environmental effects of a proposed discretionary project and to enhance public participation in the environmental review process through scoping meetings, public notice, and public review and comment. A writ should issue to the Superior Court directing it to dissolve the preliminary injunction.

II. STANDARD OF REVIEW

An order granting a preliminary injunction is reviewed for abuse of discretion. (*Butt v. State of California* (1992) 4 Cal.4th 668, 678 ["Appellate review is limited to whether the trial court's decision was an abuse of discretion," however, "[a] trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim."].) Here, the Superior Court abused its discretion by misinterpreting the Public Resources Code and improperly determining that section 5093.542(c) prohibits an agency from performing CEQA review.

The appellate court "review[s] the trial court's application of law independently." (*McCrary Construction Co. v. Metal Deck Specialists, Inc*. (2005) 133 Cal.App.4th 1528, 1535; see also *Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513.) The issue raised by this petition, whether an agency's activities to comply with CEQA are prohibited by Public Resources Code section 5093.542(c), is purely one of law, and thus should be reviewed without deference to the Superior Court.

III. BACKGROUND

On or about May 13, 2019, the AG filed his Complaint for Declaratory Relief and Injunctive Relief and Petition for Writ of Mandate against Westlands, alleging that Westlands was violating Public Resources Code section 5093.542[1] "[b]y taking steps to become a cost-sharing partner with the federal government to raise Shasta Dam and expand Shasta Reservoir." (Tab 1, SD00013 at ¶ 27.)

Adopted in 1989, section 5093.542 does not prohibit the enlargement of Shasta Dam. Rather, subdivision (c) of the statute prohibits a state agency from "assist[ing] or cooperat[ing] 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." (Emphasis added.) There is no case law interpreting or otherwise applying this statute. On its face, the statute is meant to limit state agencies' participation in projects that could adversely impact the free-flowing conditions and wild trout fisheries of the McCloud River. The specific issue of potential impacts on these resources was one of the areas of evaluation in Westlands' CEQA review, which has now been enjoined. (Tab 13, SD00515.)[2]

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[1] Section 5093.542 is a provision of the Wild and Scenic Rivers Act; however, the McCloud River is not a component of the California Wild and Scenic Rivers System. The rivers included in the system are listed in Public Resources Code section 5093.54, and the McCloud River is not among the rivers listed.

[2] Westlands is unaware of any study performed by a state agency that evaluates the impacts of a 18.5 feet raise of Shasta Dam (Reclamation's current proposal) on the free-flowing condition of the McCloud River or its wild trout fishery, and in support of its motion for a preliminary injunction the AG did not submit any evidence of such a study. To the contrary, in 2000,

On or about June 12, 2019, the AG filed a motion for preliminary injunction seeking to enjoin "Westlands' assistance or cooperation in the planning or construction of the Shasta Dam Raise project, including any CEQA process." (Tab 5, SD00047 at lns. 23-25.) In support of his motion, the AG alleged that Westlands violated Public Resources Code section 5093.542 by "enter[ing] into at least two 'Agreements in Principle' regarding the share of costs," and "issu[ing] an Initial Study/Notice of Preparation (IS/NOP) to develop an environmental impact report (EIR for the Shasta Dam Raise project." (Tab 5, SD00035-36.) The hearing, originally set to occur prior to the hearing on Westlands' then-pending motion to transfer venue, was re-noticed for July 29, 2019. (Tab 9, SD00362-364.)

The Superior Court posted the tentative ruling on its website the Sunday afternoon before the Monday morning hearing. (Tab 19, SD00563-576.) The tentative ruling was to grant the motion for preliminary injunction. (Tab 19, SD00574.)

On Monday, July 29, 2019, the Honorable Dennis Buckley, a visiting judge, presided over oral argument on the motion. (Tab 20, SD00578.) At the outset of the hearing, Judge Buckley expressed an impression that Public Resources Code section 5093.542 was "so vague [he was] inclined to say it's unconstitutional." (Tab 20, SD00581 at lns. 12-25.) Judge Buckley acknowledged the significance of the issues raised by the motion, noting he "could check with [the attorneys] for half a day about this, but decided not to." (Tab 20, SD00578 at lns. 18-19.) Judge Buckley did engage with counsel

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CALFED agencies, including agencies of the State, released a programmatic environmental impact report prepared pursuant to CEQA and Record of Decision that included enlargement of Shasta Dam as a potential means of improving the Delta ecosystem, water supply reliability, and water quality, but noted effects on McCloud River resources would require additional analysis. (Tab 11, Ex 1.).

for nearly an hour, asking many questions and expressing several thoughts that were not aligned with the conclusions expressed in the tentative ruling. (Compare Tab 19, SD00573 [finding that "several federal and state agencies have already concluded that raising the Shasta Dam will have some adverse impacts"] to Tab 20, SD00616-617 [questioning whether inundation was conclusively adverse].) At the conclusion of the hearing, Judge Buckley took the matter under submission and remarked that the parties would "receive a copy of the order, one worthy of the assistance from research counsel." (Tab 20, SD00620 at lns. 8-9.)

On August 1, 2019, Westlands received the notice from the AG of entry of an order granting a preliminary injunction. (Tab 22, SD00639-642.) The order signed by Judge Buckley modified the proposed form of order submitted by the AG, with hand edits to paragraph 1 of the order and to strike paragraph 3. (Tab 22, SD00640.) The order did not expressly adopt the reasoning provided in the tentative ruling, or set forth any alternative rationale for the ruling. (Tab 22, SD00639-642.) In paragraph 1, the order enjoins Westlands from "taking any action that constitutes planning for the" Project, but does not explain what is "planning." (*Ibid*.) It further enjoins Westlands' CEQA process related to the Project. (*Ibid*.)

IV. ARGUMENT

A. The Preliminary Injunction is an Abuse of Discretion Because it is Based on Misinterpretation of Public Resources Code Section 5093.542

The uncontradicted evidence before the Superior Court showed the proposal to raise Shasta Dam is Reclamation's Project. (Tab 13, SD00514-515.) Westlands has no discretion to design or approve the Project. Westlands' CEQA review was undertaken to inform Westlands' decision whether or not it can/will contribute funding. (Tab 13, SD00515 at ¶ 12.) Westlands was not planning, and cannot plan, any project to raise Shasta

Dam. Whether and how Shasta Dam will be raised is something only Reclamation will decide. (Tab 13, SD00514 at ¶ 11.) Notably, Reclamation has *not* issued a record of decision approving the project or adopting the Final Environmental Impact Statement released in 2015. (Tab 13, SD00514 at ¶ 11.) Query, then, how can anything Westlands is doing be deemed "planning" of the Project?

The AG argued, and the Superior Court apparently accepted, that Westlands' activities to comply with CEQA to inform a decision whether or not it can/will help fund the Project constitutes "planning" prohibited by Public Resources Code section 5093.542(c). The Superior Court misconstrued CEQA and the Public Resources Code section 5093.542(c), and hence abused its discretion in granting a preliminary injunction. The preliminary injunction must be vacated.

1. The CEQA Process is Not "Planning" for Purposes of Public Resources Code Section 5093.542(c)

Subdivision (c) of Public Resources Code section 5093.542 prohibits a state agency from "assist[ing] or cooperat[ing] 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." Westlands' CEQA review process is not planning in violation of this statute.[3]

"Planning" is not defined in the Wild and Scenic Rivers Act. (See Pub. Resources Code, § 5093.52 [definitions applicable to Chapter 1.4, Division 5, of Pub. Resources Code]), and section 5093.542(c) has not been construed

[3] There has been no allegation by the AG that Westlands is assisting or cooperating in "construction" of the Project, which indeed Reclamation has not even decided whether to pursue.

by any court. Nor has any court construed Public Resources Code section 5093.56, which imposes a prohibition against "planning" of water impoundment facilities that could adversely affect rivers that are designated as part of the California Wild and Scenic Rivers System.[4] The dictionary definition of "planning" is "the act or process of making or carrying out plans." (Webster's 9th New Collegiate Dict. (1991) p. 899.) Westlands is not making or carrying out a plan for the Project, such as how much to raise the dam, what to do with affected infrastructure, or how to physically raise the height of the dam. Under the commonly understood meaning of planning, Westlands is not planning, or assisting or cooperating with others in planning, the Project.

Rather, Westlands was seeking to comply with CEQA to inform the future, limited decision whether it can or will help fund Reclamation's Project. (Tab 13, SD00515 at ¶ 12.) As mandated by CEQA, Westlands is evaluating the potential environmental impacts of the Project, including impacts on McCloud River resources. To date, Westlands has not made a decision whether to contribute funding. (Tab 13, SD00515 at ¶ 12.) Under any reasonable construction of subdivision 5093.542(c), Westlands' efforts to gather information to inform its own decision on whether it will or will not provide funding is not a violation of the statute.

CEQA is a *process* by which a public agency develops an "informational document," which "is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." (*Laurel Heights*, *supra*, 47 Cal.3d at p. 391

[4] As noted above, the McCloud River is not a component of the California Wild and Scenic Rivers System. (See Pub. Resources Code, § 5093.54.)

[citing Pub. Resources Code, § 21061 and Cal. Code Regs., tit. 14, § 15003(b)-(e)].) "'Project' means, among other things, '[a]ctivities directly undertaken by any public agency.'" (*Ibid*.) Here, Westlands set out to prepare an EIR for its "project," which is a determination of whether it can or will help fund Reclamation's potential project to enlarge Shasta Dam and Reservoir. The Superior Court enjoined Westlands' activities to comply with CEQA before Westlands could complete the process required by law.

The order issuing the preliminary injunction does not set forth the Superior Court's reasoning, or expressly adopt the reasoning of the tentative ruling. The tentative ruling, however, adopted the arguments of the AG, which misconstrued the CEQA Guidelines and case law to argue that compliance with CEQA is "planning," and thus the CEQA process is prohibited by section 5093.542(c). CEQA Guideline section 15004, cited in the tentative ruling and by the AG, provides:

> "The environmental document preparation and review should be coordinated in a timely fashion with the existing planning, review, and project approval processes being used by each public agency. These procedures, to the maximum extent feasible, are to run *concurrently, not consecutively*."

(Cal. Code Regs., tit. 14, § 15004(c) [emphasis added].) Implicit in this language is that the environmental review process under CEQA is separate and distinct from project planning. Were they not distinct processes, the Guidelines would not need to mandate that they run concurrently.

The Guidelines and case law state that CEQA documents should be prepared "as early as feasible in the planning process;" however, this does not mean, as misrepresented by the AG, that activities undertaken by an agency to comply with CEQA are "planning," as that term is used in section 5093.542(c). (See Cal. Code Regs., tit. 14, § 15004; see also *Laurel Heights*, *supra*, 47 Cal.3d at p. 395]; see also *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 936 [noting only that city was

obligated "to integrate CEQA review with the requirements of the Coastal Act," and not stating that CEQA is, by definition, planning]; compare SD00573.) Again, directing that these processes be integrated acknowledges that they are, in fact, separate. These are provisions about timing of CEQA review, and do not evince that CEQA review is planning.

Directing that CEQA review run concurrently with project planning, and as early in project planning as is feasible, is rational given that a primary purpose of CEQA is "to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment." (*Banning Ranch Conservancy*, *supra*, 2 Cal. 5th at p. 937.) "If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve *or reject* environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees." (*Laurel Heights*, *supra*, 47 Cal.3d at p. 392 [citations omitted; emphasis added].) Under CEQA, preparation of an EIR necessarily precedes any project determination, and that determination may be a rejection of a project. Accordingly, while CEQA review may *inform* project planning, it is *not* itself project planning.

The preliminary injunction is premised on an error of law, and therefore the issuance of the injunction was an abuse of discretion.

2. The Injunction Is Against the Public Interest

The AG's position, that CEQA review should be enjoined as planning in violation of Public Resources Code section 5093.542(c), is terrible public policy. As provided above, "[i]f CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve *or reject* environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees." (*Laurel Heights*,

supra, 47 Cal.3d at p. 392 [citations omitted; emphasis added].) Enjoining Westlands' CEQA process deprives the public of the benefit of that process.

The AG does not assert that Westlands' analysis of potential impacts of Reclamation's Project on the free flowing condition of the McCloud River or its wild trout fishery is a violation of Public Resources Code section 5093.542(c). Rather, the AG objects to the participation by other agencies and the public provided for by CEQA, and it is that which the AG sought to enjoin.

In his reply brief, the AG advocated that Westlands could first "study the issue in the abstract." (Tab 16, SD00543 at fn.2; see also Tab 20, SD00587.) This is a remarkable position. The only difference between the CEQA process and the AG's suggested "abstract study" is participation and comment by other agencies and the public mandated as part of the CEQA process. The AG made clear his position at the hearing, stating:

> And we say in a footnote we don't have a problem with them studying, we have a problem with them *studying in a public process* that is going to cost a lot of money for all the state and local agencies and the public at large that would have to participate.

(Tab 20, SD00597 [emphasis added].)

Shutting out other agencies and the public from the process will not only be harmful to all interested parties, but it will also deprive Westlands of the benefits of engagement by other agencies and the public. The AG's position is contrary to the basic purposes of CEQA to "duly inform" and engage the public. That the AG wants to enjoin the sharing of information with and seeking comment from other agencies and the public is astounding and bewildering. The AG's argument that Westlands could conduct an "abstract study," for the explicit purpose of excluding the public from the environmental review process, demonstrates the absurdity of the AG's argument and the vacuous character of the injunction. The AG's

interpretation of section 5093.542(c) should be rejected as inimical to the purposes of CEQA.

B. The Superior Court's Unprecedented Anti-CEQA Injunction Warrants Writ Review

Westlands is unaware of any precedent for an injunction halting an agency's CEQA review process. The AG identified no such precedent, offering only that the situation is "unique." (Tab 20, SD00616 at lns. 2-9.)

CEQA review is needed. As far as Westlands is aware, no state agency has completed an analysis of whether Reclamation's Project (an up to 18.5 feet raise of Shasta Dam) would adversely affect the free-flowing condition of the McCloud River or its or wild trout fishery as those terms are used in Public Resources Code section 5093.542(c). That study should be performed, and the study should be performed in the well-established, public and transparent way provided by CEQA.

In retort to this argument, the AG asserts Westlands' actions to comply with CEQA are foreclosed by the not yet final conclusions stated by a federal agency, Reclamation, in its Final Environmental Impact Statement ("EIS") prepared under the National Environmental Policy Act ("NEPA"). In response to the Superior Court's comment that "it appears the State is trying to stop [Westlands] from doing their homework" (Tab 20, SD00601), the AG responded:

> If they can do a study on their own that says here's why the Federal Government was wrong, and here is how this can be done without any impacts to the McCloud River, and then they can put that out as their initial study and start their CEQA process based on that, then there – then they have a valid going forward CEQA process.

(Tab 20, SD00602-603.)

In response to the Superior Court's questions about the potential for the "adverse effects" prohibited by section 5093.542, the AG responded simply:

"Well, the Federal Government already says it changes" –

(Tab 20, SD00617.) Thus, the AG advocates enjoining Westlands' independent review under CEQA based on statements in a NEPA-environmental document the Final EIS, prepared for a federal agency but which not been adopted by that federal agency through preparation and release of a record of decision.[5]

Because the statements expressed in the Final EIS are to the AG's liking, he is willing to ignore that state law requires California public agencies to exercise their independent judgment.[6] CEQA requires that a "final EIR reflect[] the lead agency's independent judgment and analysis." (Cal. Code Regs., tit. 14, § 15090(a)(3) [emphasis added].) Westlands was fulfilling its duty under CEQA by evaluating the potential impacts of the Project, and by independently determining whether it may contribute funding given the requirements of section 5093.542(c). The statements in the Final EIS are not binding on Westlands and are not dispositive of any issues

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[5] Under NEPA, a record of decision formally concludes the environmental process for an environmental impacts statement. It indicates a Federal agency has complied with NEPA and taken potential impacts into consideration when identifying a preferred alternative and its decision was not arbitrary and capricious. (See 40 C.F.R. §§ 1505.2, 1506.1) A record of decision under NEPA is equivalent to a notice of determination certifying an environmental impact report under CEQA. (See Pub. Resources Code, § 21108.)

[6] The AG's argument begs the question, what if the shoe were on the opposite foot? As noted, Reclamation has not adopted the Final EIS and could conceivably release a supplemental environmental impact statement that concludes raising Shasta Dam 18.5 feet will not adversely affect the free-flowing condition of the McCloud River or its wild trout fishery. If that happens, would the AG still maintain that Westlands is bound by the finding made by a federal agency under NEPA?

concerning the application of section 5093.542(c). The AG is misguided in claiming otherwise.

The "harm" the AG claimed would occur absent an injunction is yet another assault on CEQA. The supposed harm was participation in Westlands' CEQA process:

> THE COURT: Why -- why do you -- why do have care about it? I mean, the CEQA is not going to hurt anybody.
>
> MR. HILDRETH: It is an insanely expensive, time-consuming process.
>
> THE COURT: It's their money.
>
> MR. HILDRETH: No, every state agency that has an interest, every local public agency that has an interest, and the public are all going to have to participate in what we see is an illegal process. And no one should be forced to become a party to an illegal process.

(Tab 20, SD00588, lns 15-24.)

The AG's complaint that public agencies participating in review of environmental documents prepared pursuant to CEQA is "insanely expensive," and "time-consuming" is better directed to the legislature. So long as CEQA remains the law, the expense and time required to further its purposes cannot suffice as irreparable harm justifying a preliminary injunction.

The AG has obtained an unprecedented, anti-CEQA injunction. Writ review is needed to undo this harmful error.

C. An Appeal Will Not Provide Adequate and Timely Relief and Westlands Will Be Irreparably Harmed if the Preliminary Injunction Remains in Place

"The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." (Code Civ. Proc., § 1086.) California Code of Civil Procedure section 904.1(a)(6) does provide

for appeal of orders granting injunctions, however, an appeal is unlikely to provide Westlands a timely, and thus adequate, remedy. The matter is currently scheduled for trial to commence April 14, 2020. (Tab 3, SD00022.) Any appeal from the preliminary injunction would not be decided by then, likely mooting the appeal.

Leaving the preliminary injunction in place will impair Westlands' ability to prepare its defense. As explained, the CEQA process affords Westlands the ability to involve the public in its environmental review process, receive and respond to public feedback, and render an informed, public determination. Requiring Westlands to conduct its environmental study in the "abstract" deprives it of this valuable input. It is further unclear how a court will weigh the evidence developed by Westlands through such private study, especially as against evidence that may have been developed through a public process.

Finally, if the injunction stays in place, and hence any decision by its Board of Directors on whether to help fund Reclamation's Project is delayed well into 2020, it is uncertain whether Westlands will still have an opportunity to help fund the Project. (Tab 13, SD00515.) Westlands' CEQA process was already behind the schedule stated by Reclamation and further delay amplifies the uncertainty.

D. The Preliminary Injunction is Impermissibly Vague

The Superior Court's injunction includes two numbered paragraphs. (Tab 22, SD00640.) The first numbered paragraph provides: "Westlands is enjoined from taking any action that constitutes planning for or the construction of the Shasta Dam Raise project, pending trial of this matter."[7] (*Ibid*.) The order does not define or elaborate on what is meant by "planning." In its opposition brief, Westlands objected to the ambiguity of the proposed

[7] The second paragraph enjoins Westlands' CEQA process.

injunction, contending that "what constitutes prohibited planning should be specifically defined in the order." (Tab 10, SD00384.) The Court should direct the Superior Court to set aside its injunction against "planning for" the Project on the grounds it is impermissibly vague.

"An injunction must be definite enough to provide a standard of conduct for those whose activities are proscribed, as well as a standard for the ascertainment of violations of the injunctive order by the courts called upon to apply it. An injunction which forbids an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application exceeds the power of the court." (*Pitchess v. Super. Ct. of Los Angeles County* (1969) 2 Cal.App.3d 644, 651.) An injunction against "planning," without elaboration, fails for vagueness under this standard.

The Superior Court recognized the vagueness of the term. In the hearing, it engaged in the following dialogue with the AG, which ultimately did not illuminate what is "planning" prohibited by the statute:

> MR HILDRETH: Well, the statute says planning is illegal. Planning. I mean its actually – you know, the Court has said you think it's an unconstitutionally vague statute.
>
> THE COURT: Uh-huh.
>
> MR. HILDRETH: I don't agree. That's not the issue today. But I would say this is about it, it is a very broad statute. And clearly when the legislature adopted it 30 years ago, 1989, the intent was to protect the McCloud River. And the statute says, you know, not only can you not fund construction, you can cannot fund planning. And CEQA is clearly a planning process.
>
> THE COURT: What do you think their reasoning was as to the planning? I'm planning to go to the Pebble Beach next month --
>
> MR. HILDRETH: I -- I don't know.

> THE COURT: -- and to that extent I'm setting a little bit of money on the side. When does the planning kick in?
>
> MR. HILDRETH: Maybe their thinking was CEQA. CEQA is a planning process. And --

(Tab 20, SD00614, lns 4-24.) Despite recognizing the ambiguity in what actions might be deemed "planning," the Superior Court ultimately adopted that portion of the AG's proposed order without defining planning or providing any further elaboration.

Aside from his mistaken argument that CEQA review is planning, the AG did not explain what constitutes prohibited "planning." In his dialogue with the Superior Court above, the AG contended that vagueness in the statute was "not the issue today," which was plainly wrong given the AG was asking for an injunction tracking the terms of the statute. Although the AG did not define "planning," in his view it includes at least anything that involves a "studying in a public process" that invites public comment. (Tab 20, SD00597.) Thus, in the AG's view, the injunction against planning prohibits Westlands from engaging the public.

Westlands is therefore left to guess about whether a particular action will be deemed planning for the Project. For example, Westlands' preparation of its defense in this proceeding will require it to investigate and develop information about the potential effects of the Project on the McCloud River and its wild trout fishery. Is developing such information "planning" prohibited by the terms of the injunction? Westlands should not be put to guessing, and second-guessing by the AG or the Superior Court, about what actions will render it in contempt.

A writ should issue to the Superior Court directing it to vacate its injunction against planning as impermissibly vague.

E. The Preliminary Injunction Must Be Dissolved Entirely

The AG identified only two actions by Westlands it alleged were in violation of section 5093.542. The first is Westlands' initiation of CEQA review. As demonstrated above, the CEQA process is not "planning" prohibited by the statute and thus, not a basis for an injunction.

The second action the AG cited, and which the tentative ruling referenced, is an expired March 2014 Agreement in Principle between Westlands and Reclamation. (Tab 5, SD00035, SD00040; Tab 19, SD00572.) Contrary to the AG's representations, and as the agreement shows on its face, it provided only that each party "may" be willing to enter formal negotiations, subject to a number of contingencies that have not occurred. (Tab 6, Ex D, SD00144-147.) That agreement expired by its terms on September 30, 2017 and has not been renewed. (Tab 13, SD00515-516.) Accordingly, that agreement is not evidence that Westlands was, or is currently, violating the statute.

The AG submitted no evidence of any activity by Westlands that violates Public Resources Code section 5093.542, under the proper interpretation of that statute. The preliminary injunction must be dissolved in its entirety, including both the prohibition on "planning" for the Project and the prohibition on CEQA review.

V. CONCLUSION

Based on the foregoing, Westlands respectfully requests the Court exercise its discretion to grant writ review, and issue the writ as prayed for in Westlands' petition.

DATED: August 12, 2019

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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.204(c)(1)

Pursuant to California Rules of Court Rule 8.204(c)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 8,991 words.

DATED: August 12, 2019

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