STAY REQUESTED of Preliminary Injunction

S_____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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.

From an Order Summarily Denying a Writ Petition
Court of Appeal, Third Appellate District No. C090139

Petition From Order Granting Preliminary Injunction Against CEQA Review
County of Shasta, Case Number 192487, Hon. Tamara L. Wood;
Hon. Dennis J. Buckley

PETITION FOR REVIEW

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I. ISSUE PRESENTED

Public Resources Code section 5093.542(c) provides that no "state agency shall assist or cooperate with . . . the planning . . . 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 its wild trout fishery."

Is preparation of an environmental impact report under the California Environmental Quality Act ("CEQA"), which is intended to inform a public agency's decision whether it will, or can, in light of the prohibition in the Public Resources Code, contribute funding for a project prohibited "planning" of that project?

II. REVIEW SHOULD BE GRANTED

This petition concerns a preliminary injunction, which the Shasta County Superior Court acknowledged is unprecedented, enjoining a public agency's *environmental review and decision-making process*. It implicates important questions of a statewide significance concerning the public's ability to participate in public agency decision making, and underlying water management issues involving the federal Central Valley.

CEQA is California's pre-eminent environmental law. An agency's decision made after completion of the CEQA process may be 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 ("EIR"). There is no basis for this anti-CEQA injunction.

The Superior Court reached its extraordinary conclusion by misconstruing Public Resources Code section 5093.542, meant to protect the McCloud River, and misconstruing CEQA analysis as planning. A key component of Westlands' CEQA evaluation was whether environmental

conditions and potential impacts are such that the McCloud River statute would prohibit Westlands' ultimate participation in a potential project by the United States Bureau of Reclamation ("Reclamation") to raise Shasta Dam (the "Project"). Westlands' potential participation would be limited to funding; only Reclamation will decide whether, when and how to proceed with the Project. Pursuant to the Superior Court's ruling that environmental review under CEQA is itself planning, however, Westlands cannot engage in a public review process to gather and share information or solicit public comment in the evaluation required to make that funding decision.

Under the preliminary injunction, Westlands is foreclosed from utilizing CEQA's public environmental review process to evaluate the potential environmental impacts of a decision to contribute funding for a 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. 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 as "planning" of a project.

The Court of Appeal summarily denied Westlands' writ petition challenging the Superior Court's preliminary injunction. This Court should grant review because the Project, the potential raising of Shasta Dam by Reclamation to expand its storage capacity, has the potential to significantly increase water supplies for environmental, municipal and agricultural uses across a broad swath of California, and because the preliminary injunction is an unprecedented attack on the use of the CEQA process to inform public agency decision-making.

This Court should either grant review and decide the issue presented, or grant review and transfer the matter to the Court of Appeal with directions to consider Westlands' writ petition on the merits.

III. A STAY SHOULD BE GRANTED

In compliance with the preliminary injunction, Westlands has ceased all work on its environmental impact report. With a trial set for April 2020, it will be delayed until about May 2020 before it can restart its process. Westlands' ability to prepare an adequate defense to this matter will be impaired, because it will be denied the benefit of public comment under CEQA. Westlands may also lose the opportunity to contribute funding to Reclamation's proposed project to raise Shasta Dam and expand its storage capacity. 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. There is no harm to the California Attorney General ("AG") from allowing CEQA review to proceed.

IV. STATEMENT OF THE CASE

On May 13, 2019, the AG filed a 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 "[b]y taking steps to become a cost-sharing partner with the federal government to raise Shasta Dam and expand Shasta Reservoir." (Appendix of Supporting Documents for Petition for Writ of Mandate ["Appx."], 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. The specific issue of potential impacts on the free-flowing condition and the wild trout fishery were areas of evaluation in Westlands' CEQA review, which has now been enjoined. (Appx., Tab 13, SD00515.)

On 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." (Appx., 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.") (Appx., 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. (Appx., Tab 9, SD00362-364.)

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

On Monday, July 29, 2019, the Honorable Dennis Buckley, a visiting judge, presided over oral argument on the motion. (Appx., 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." (Appx., 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." (Appx., Tab 20, SD00578 at lns. 18-19.) Judge Buckley did engage with counsel for nearly an hour, asking many questions and expressing several thoughts that were not aligned with the conclusions expressed in the tentative ruling. (Compare Appx., Tab 19, SD00573 [finding that "several federal and state agencies have already concluded that raising the Shasta Dam will have some adverse impacts"] to Appx., 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." (Appx., 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. (Appx., 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. (Appx., 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. (Appx., 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*.)

On August 12, 2019, Westlands timely filed its Petition for Writ of Mandate with the Third District Court of Appeal. The AG filed his Preliminary Opposition to Petition for Writ of Mandate and Opposition to Request for Stay of Trial Court Proceedings ("Opp.") on August 21, 2019. On August 29, 2019, before the period in which Westlands could file a reply brief had run, the Court of Appeal issued a summary denial of the petition. (See Exhibit A to this Petition.)

V. LEGAL DISCUSSION

CEQA is California's pre-eminent 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.) Westlands petitions this Court for review of an unprecedented order granting a preliminary injunction to enjoin Westlands from completing an EIR.

The Project involves a decision by Reclamation whether to enlarge Shasta Dam and Reservoir. The Project is not something which Westlands can plan, approve, or construct. (Appx., 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 provide funds for Reclamation's Project. Westlands had not yet made any final decision, or even issued a draft EIR, when the AG filed a lawsuit and sought to enjoin Westlands' CEQA process. (Appx., 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. (Appx., 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.

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. (Appx., 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. (Appx., 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. (Appx., 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. (Appx., 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.[1]

"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 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.[2] 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.

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[1] 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.

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

Rather, Westlands was seeking to comply with CEQA to inform the future, limited decision whether it can or will help fund Reclamation's Project. (Appx., Tab 13, SD00515 at ¶ 12.) As mandated by CEQA, Westlands was evaluating the potential environmental impacts of Reclamation's Project, including impacts on McCloud River resources. To date, Westlands has not made a decision whether to contribute funding. (Appx., 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 [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 Guidelines 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 Appx., Tab 15, 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 Extreme Reading of Section 5093.542(c) Proposed By the AG Is Unsupported By Its Text and Is Contradicted By the Actions of State Agencies

To justify the Superior Court's unprecedented injunction against Westlands' CEQA review, the AG advanced an extreme reading of section 5093.542(c). He argued it bars CEQA review related to raising Shasta Dam "if there is any possibility that the project may cause the proscribed effects on the McCloud River." (Opp. at p.15.) In the Superior Court, he argued that section 5093.542(c) prohibits state agencies from even commenting on such a project as part of a CEQA review. (Appx., Tab 5, SD00043-44.)

The AG's argument that "any possibility . . . [of] the proscribed effects" violates the statute is unsupported by the language of section 5093.542. (Opp. at p. 15.) In practical terms, the AG's reading of subdivision (c) would mean causing any change at all in the McCloud River is prohibited, since one can always speculate about the possible effect of a change. Subdivision (c) however, proscribes only "adverse" effects, indicating the legislature intended to allow new facilities despite *some* effect on the McCloud River, so long as that effect was not adverse. Subdivision (c) can be usefully contrasted with subdivision (b). Subdivision (b) explicitly prohibits any new facilities in specific, designated portions of the McCloud

River, without qualification based on effect. Subdivision (c) does not impose a similar, unqualified ban. Further, the legislature was aware of the potential for raising Shasta Dam when it adopted section 5093.542, as indicated by its reference to "enlargement of Shasta Dam" in subdivision (c). But the legislature did not prohibit raising Shasta Dam, unlike the ban it imposed on new facilities in the portions of the McCloud River imposed in subdivision (b). Unlike the AG, the legislature was apparently open to the prospect that some, perhaps modest, enlargement of Shasta Dam would not have an "adverse" effect on the McCloud River and could therefore proceed with state agency involvement.

The AG's extreme reading is further contradicted by the conduct of state agencies after adoption of section 5093.542 in 1989. Since 1989, state agencies have participated in CEQA review related to raising Shasta Dam. Specifically, state agencies involved in the CALFED Program, a group of state and federal agencies, convened in the mid-1990's to consider a suite of actions intended to solve problems of ecosystem quality, water supply reliability, and water quality. (Appx., Tab 13, SD00514.) The California Resources Agency (now the California Natural Resources Agency), the California Department of Water Resources, the California Department of Fish and Game (now the California Department of Fish and Wildlife), and the State Water Board all participated in preparation of a programmatic environmental impact report that identified enlargement of Shasta Dam as a project warranting further study and consideration as a means to achieve CALFED Program's goals. (Appx., Tab 11, SD00395-411.)

The AG's position here also contradicts the involvement of state agencies in another project involving the McCloud River, Pacific Gas & Electric's McCloud-Pit Hydroelectric Project. For that project state agencies have provided comments on an Environmental Impact Study issued by the Federal Energy Regulatory Commission ("FERC") for a new permit to allow

continued operation of PG&E's project. (Appx., Tab 11, SD00454-456.) And, the State Water Board recently issued its own draft initial study and negative declaration pursuant to CEQA for PG&E's project, on which it received numerous comment letters arguing that PG&E's project will have adverse impacts on aquatic resources. (Appx., Tab 11, SD00457-501.) If the AG's position in this case were correct, that CEQA review would be prohibited by section 5093.542(c). The AG's argument that subdivision (e) excuses state agency CEQA review for PG&E's project is unavailing; by its terms subdivision (e) applies only to the activities of PG&E, it makes no mention of the activities of state agencies.

What the conduct of state agencies and the text of section 5093.542 itself show is that the AG has posited an extreme, unreasonable reading of the statute. The legislature could not have intended section 5093.542(c) to bar state agencies from using CEQA's process for public participation to do the analysis and study necessary to make a determination whether their actions will comply with section 5093.542(c).

B. 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 the Superior Court, the AG advocated that Westlands could first "study the issue in the abstract." (Appx., 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.

(Appx., 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.

C. 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." (Appx., 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 asserted 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"). When the Superior Court commented that "it appears the State is trying to stop [Westlands] from doing their homework" (Appx., 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.

(Appx., 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 –"

(Appx., Tab 20, SD00617.) Thus, the AG advocates enjoining Westlands' independent review under CEQA based on statements in a NEPA-environmental document, the Final EIS, which was prepared for a federal

agency but which has not been adopted by that federal agency through preparation and release of a record of decision.[3]

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.[4] 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 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.

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[3] 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.)

[4] 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?

> 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.

(Appx., 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.

D. 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. (Appx., 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. (Appx., Tab 13, SD00515.) Westlands' CEQA process was already behind the schedule stated by Reclamation and further delay amplifies the uncertainty.

E. The Preliminary Injunction Is Impermissibly Vague

The Superior Court's injunction includes two numbered paragraphs. (Appx., 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."[5] (*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 injunction, contending that "what constitutes prohibited planning should be specifically defined in the order." (Appx., 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

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

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 --

(Appx., 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. (Appx., 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.

VI. CONCLUSION

This Court should grant review and decide the issue presented, or alternatively grant review and transfer the matter to the Court of Appeal with

directions to consider Westlands' writ petition on the merits.

DATED: September 6, 2019

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD

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

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.504(d)(1)

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 6,047 words.

DATED: September 6, 2019

KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Professional Corporation

By: */s/ Daniel J. O'Hanlon*
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PROOF OF SERVICE

People, et al. v. Westlands Water District
Shasta County Superior Court Case No. 192487
Third District Court of Appeal Case No. C090139

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814.

On September 6, 2019, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

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BY TRUEFILING NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case will be served by the court's electronic filing system, TrueFiling.

Honorable Tamara L. Wood
Honorable Dennis Buckley
Shasta County Superior Court, Dept. 8
1500 Court Street
Redding, CA 96001

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Kronick, Moskovitz, Tiedemann & Girard for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Sacramento, California.

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

Executed on September 6, 2019, at Sacramento, California.

/s/ Sherry Ramirez
Sherry Ramirez

EXHIBIT A

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

WESTLANDS WATER DISTRICT,
Petitioner,
v.
THE SUPERIOR COURT OF
SHASTA COUNTY,
Respondent;
THE PEOPLE ex rel. XAVIER BECERRA, as
Attorney General, etc.,
Real Party in Interest.

C090139
Shasta County
No. 192487

BY THE COURT:

The petition for writ of mandate with request for stay is denied.

BLEASE, Acting P.J.

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cc: See Mailing List

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: Westlands Water District v. The Superior Court of Shasta County
C090139
Shasta County Super. Ct. No. 192487

Copies of this document have been sent by mail to the parties checked below unless they were noticed electronically. If a party does not appear on the TrueFiling Servicing Notification and is not checked below, service was not required.

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