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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF SHASTA**

16 PEOPLE OF THE STATE OF CALIFORNIA
EX REL. ATTORNEY GENERAL XAVIER
17 BECERRA,
18 Plaintiff and Petitioner,
19 v.
20 WESTLANDS WATER DISTRICT AND
DOES 1-20,
21 Defendants and Respondents.

Case No. 192487
**DEFENDANT AND RESPONDENT
WESTLANDS WATER DISTRICT'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
MOTION FOR PRELIMINARY
INJUNCTION**

BY FAX
Date: July 29, 2019
Time: 8:30 a.m.
Dept.: 8
Assigned for All Purposes to:
Hon. Tamara L. Wood
Action Filed: May 13, 2019
Trial Date: April 14, 2020

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1 **I. INTRODUCTION**

2 Westlands Water District (“Westlands”) is in the process of gathering and disseminating
3 information and analysis to inform its later decision on whether it will become a cost share partner
4 for a possible project the United States Bureau of Reclamation (“Reclamation”) is considering - an
5 18 ½ foot raise of the existing Shasta Dam. Westlands is gathering and disseminating the
6 information and analysis to ensure compliance with State law. The information will: (1) allow
7 Westlands to assess whether the prohibition in California Public Resources Code section 5093.542
8 precludes Westlands from becoming a cost share partner, and (2) inform the Westlands’ board and
9 the public of the environmental effects of a decision by Westlands to become cost share partner, if
10 one were made, as required by the California Environmental Quality Act (“CEQA”). The result of
11 the process is still unknown, and any vote as to Westlands’ provision of funding for Reclamation’s
12 project is uncertain. Even Reclamation has not made a determination as to whether it will implement
13 the project. In his motion for preliminary injunction, however, the Attorney General (“AG”)
14 curiously seeks to stop Westlands from gathering and disseminating information to support an
15 informed, and certainly not predetermined, decision.

16 The AG fails to meet his burden of demonstrating either a likelihood of success on the merits,
17 or that the balance of irreparable harm tips in his favor to justify such injunction. The AG wrongly
18 contends that Westlands is bound by prior factual findings and legal conclusions expressed in an
19 environmental impact statement prepared by a federal agency relating to application of state law,
20 and which consist entirely of inadmissible hearsay. Westlands has an obligation to conduct an
21 independent investigation. Moreover, the harm to the public interest caused by barring collection of
22 such information and preventing public input weighs against granting the injunction.

23 The Court should deny the AG’s Motion and maintain the status quo by permitting
24 Westlands to complete an environmental review under CEQA and develop the information and
25 analysis necessary to inform Westlands and the public of the potential impacts of enlarging Shasta
26 Dam and Reservoir. The concerns expressed by the AG in this action could be unrealized, depending
27 on the information and analysis developed by Westlands and/or if Westlands decides not to
28 contribute funding. Ultimately, if it decides to contribute funding, the AG may pursue his challenge

1 with the information and analysis developed through the process Westlands is following.

2 **II. WESTLANDS' MOTION TO CHANGE VENUE PRECLUDES CONSIDERATION**
3 **OF THE AG'S MOTION FOR PRELIMINARY INJUNCTION UNTIL THE**
4 **VENUE MOTION IS DECIDED**

5 On June 12, 2019, Westlands filed motions to transfer this matter, and a related matter, to
6 Fresno County Superior Court. The two motions to change venue are set to be heard on July 22,
7 2019. So long as the motion to change the venue for this action is pending, the AG's motion for
8 preliminary injunction should not proceed.

9 A motion to change venue stays proceedings and must be decided before a court can take
10 any other steps in the case. (See *Pickwick Stages System v. Superior Court of Los Angeles County*
11 (1934) 138 Cal.App.448, 449.) It is the long-established rule that the stay resulting from the pending
12 transfer motion suspends a trial court's jurisdiction to decide other motions. (*Brady v. Times-Mirror*
13 *Co.* (1895) 106 Cal. 56, 61-62.) Rulings issued while a motion to transfer is pending, including on
14 motions for preliminary injunctive relief, are void. (See *County of Riverside v. Superior Court of*
15 *San Diego County* (1968) 69 Cal.2d 828, 831 [temporary restraining order and order to show cause
16 set aside pending hearing of a motion to transfer].)

17 If Westlands' motion to change venue of this action is granted, then the AG's motion for a
18 preliminary injunction should be decided by the Fresno court following transfer. Only if, and after,
19 the motion to change venue is denied may this Court proceed with the AG's motion for preliminary
20 injunction.

21 **III. FACTUAL BACKGROUND**

22 A. Westlands Water District

23 Westlands is a California water district with its main office in Fresno, California.
24 (Declaration of Jose Gutierrez ["Gutierrez Dec."], ¶ 2.) It was created and is operating pursuant to
25 the California Water Code. (Wat. Code §§ 37800 et seq.; Gutierrez Dec. at ¶ 2.) Westlands is
26 responsible for providing water to approximately 614,000 acres of land in western Fresno and Kings
27 counties. (Gutierrez Dec. at ¶ 2.) Growers in Westlands produce more than sixty high-quality food
28 and fiber crops on some of the most highly productive farmlands in the world. (*Ibid.*) In addition to
providing irrigation for farms, Westlands provides water for municipal and industrial uses, including

1 Naval Air Station Lemoore. (*Ibid.*) Westlands' irrigation water need varies, and historically was in
2 the range of 1.4 million acre-feet per year. (*Id.* at ¶ 3.)

3 Westlands has a contract with the United States for delivery of water produced by the federal
4 Central Valley Project ("CVP"). (*Ibid.*) CVP water is the principal source of water Westlands
5 supplies to its farmers. (*Ibid.*) Shasta Dam and Reservoir were constructed as integral elements of
6 the CVP, with Shasta Reservoir representing about forty percent of the total reservoir storage
7 capacity of the CVP and about 55 percent of the total annual CVP supply. (*Id.* at ¶ 9.) Reclamation
8 operates Shasta Dam and Reservoir, in conjunction with other facilities, to provide flood protection,
9 irrigation and municipal and industrial water supply, maintain navigation flows, protect fish in the
10 Sacramento River and the Sacramento-San Joaquin Delta, and generate hydropower. (*Id.* at ¶¶ 3, 9.)

11 In recent decades, competing demands for CVP water has frustrated the ability of
12 Reclamation to operate CVP facilities, including Shasta Dam and Reservoir, to meet
13 Congressionally authorized and mandated purposes of the CVP. (*Id.* at ¶ 4.) Significant conflict has
14 arisen between operation of Shasta Dam and Reservoir to provide cold water immediately below
15 the Dam for salmon and flow further downstream for other species, particularly the Delta smelt.
16 (*Ibid.*) And, during this period Westlands, like many other CVP contractors, has suffered from
17 declining reliability and quantity of CVP water supplies. (*Id.* at ¶ 5.) In only four years since 1989
18 has Westlands received a 100 percent allocation of its contractual entitlement to CVP water. (*Ibid.*)
19 Indeed in half the years since Westlands received fifty percent or less of its full contractual
20 entitlement to CVP water. (*Ibid.*) In water years 2014 and 2015, during the drought, Westlands
21 received a zero percent allocation under its CVP contracts. (*Ibid.*) Westlands thus has a strong
22 interest in exploring, and potentially financially supporting, projects that will help restore the ability
23 of Reclamation to operate the CVP to meet its purposes, which include providing water that can be
24 beneficially used by farmers within Westlands. (*Id.* at ¶ 7.)

25 Those supplies must be cost-effective, however. If the cost of additional supplies is too great
26 for farmers to bear, then Westlands will decline to participate in a project. (*Id.* at ¶¶ 16-17.) For
27 example, after much consideration, in September 2017 the Westlands Board of Directors decided
28 not to participate in the Delta tunnels project known as California WaterFix, based on concerns that

1 the costs to Westlands were not justified by the quantity of additional water supply that project might
2 have made available to Westlands. (*Id.* at ¶ 18.)

3 B. Reclamation Is Considering Raising Shasta Dam

4 The declining ability of Reclamation to operate the CVP for the Congressionally authorized
5 and mandated purposes has led to various studies and proposals and studies relating to CVP facilities
6 and operations. In the mid-1990s, a group of state and federal agencies created the CALFED
7 Program and considered a suite of actions intended to solve problems of ecosystem quality, water
8 supply reliability, and water quality. (*Id.* at ¶ 10.) The state agencies that were part of CALFED
9 included the California Resources Agency, the California Department of Water Resources, the
10 California Department of Fish and Game, and the California State Water Resources Control Board
11 (“State Water Board”). (*Ibid.*) Those agencies, through the CALFED Program, prepared a
12 programmatic environmental impact statement/environmental impact report, which includes
13 enlargement of Shasta Dam and Reservoir. In 2000, CALFED released a Record of Decision that
14 outlined a 30-year plan to improve the Delta’s ecosystem, water supply reliability, water quality and
15 levee stability. (*Ibid.*) The CALFED agencies identified enlargement of Lake Shasta as among the
16 actions to be further studied and pursued. (*Ibid.*)

17 Reclamation has continued investigation of raising Shasta Dam. Reclamation released a
18 Final Feasibility Report and Final EIS in July 2015, for what is called the Shasta Dam Raise Project.
19 (*Id.* at ¶ 11.) Reclamation’s Final Feasibility Report, along with a Final EIS, provide the results of
20 various studies, including planning, engineering, environmental, social, economic and financial, and
21 included possible benefits and effects of alternative plans. (*Ibid.*)

22 In March 2018, Congress appropriated \$20 million for expenditure under the Water
23 Infrastructure Improvements for the Nation (“WIIN”) Act (P.L. No. 114-322 (Dec. 16, 2016) 130
24 Stat. 1627) for further design and pre-construction activities. However, Reclamation has not made
25 a final decision whether to construct the project. (Gutierrez Dec. at ¶ 11.) One of the considerations
26 relevant to Reclamation’s decision is whether local agencies are willing to contribute to the costs of
27 raising Shasta Dam. Under section 4007 of the WIIN Act, Reclamation can contribute no more than
28 fifty percent of the cost of the Shasta Dam Raise Project. (P.L. No. 114-322, § 4007(b)(2) (Dec. 16,

1 2016) 130 Stat. 1864.)

2 C. Westlands Is Considering Whether To Contribute Funding For Reclamation's
3 Project

4 Westlands is considering whether, along with other public water agencies, it will assume the
5 very limited role of contributing funding for Reclamation's potential project. (Gutierrez Dec. at ¶
6 12.) To make that determination, among numerous other considerations, Westlands must: (1)
7 evaluate whether Public Resources Code section 5093.542 precludes Westlands from entering into
8 a cost share agreement, and (2) comply with CEQA. (*Ibid.*)

9 Westlands' review process is not complete. So far, Westlands has released a Notice of
10 Preparation and an Initial Study. (*Id.* at ¶ 13.) Westlands has not yet released a draft EIR for public
11 comment. (*Id.* at ¶ 14.) Westlands has not certified an environmental document or approved a cost
12 share agreement. (*Ibid.*) Westlands is targeting the end of 2019 as the date for completion of its
13 CEQA review and a decision by the Westlands Board of Directors regarding whether it can and
14 whether it should contribute funding. (*Ibid.*)

15 Reclamation has issued an anticipated schedule for the Shasta Dam Raise Project under
16 which it would identify cost share partners by August 2019. (AG's Request for Judicial Notice in
17 support of Motion for Preliminary Injunction ["AG RJN"], Ex. Q.) If this preliminary injunction
18 were granted and completion of the CEQA review process were delayed into 2020, it is unknown
19 whether the opportunity for Westlands to be a cost share partner would still be available. (*Id.* at ¶
20 14.) Injunction delay could effectively prevent Westlands from becoming a cost share partner, and
21 perhaps jeopardize the entire project, even if Westlands ultimately prevails on the merits after trial.

22 **IV. STANDARD FOR PRELIMINARY INJUNCTION**

23 To obtain a preliminary injunction, the AG must demonstrate: (1) a likelihood of success on
24 the merits; and (2) a significant threat of irreparable harm. (See *Common Cause of Cal. v. Bd. of*
25 *Supervisors* (1989) 49 Cal.3d 432, 441-442.) Both of these factors must be proved, as the lack of
26 one of them justifies denying the injunction. (See *Jessen v. Keystone Sav. & Loan Ass'n* (1983) 142
27 Cal.App.3d 454, 459; *S.F. Newspaper Printing Co. v. Superior Court* (1985) 170 Cal.App.3d 438,
28 442 (a preliminary injunction must not issue unless it is "reasonably probable that the moving party

1 will prevail on the merits”).) Thus, while the Court’s determination is “guided by a ‘mix’ of the
2 potential-merit and interim-harm factors . . . [the] court may not grant a preliminary injunction,
3 regardless of the balance of interim harm, unless there is some possibility that the plaintiff would
4 ultimately prevail on the merits of the claim.” (*Butt v. State of California* (1992) 4 Cal.4th 668, 678.)
5 The burden of proof is on the AG to demonstrate all of the necessary elements to support the issuance
6 of a preliminary injunction. (See, e.g., *Casmalia Res., Ltd. v. Cty. of Santa Barbara* (1987) 195
7 Cal.App.3d 827, 838.) In carrying his burden, the AG “must present sufficient evidentiary facts to
8 establish a likelihood that [he] will prevail.” (*Tahoe Keys Property Owners’ Ass’n v. State Water*
9 *Res. Control Bd.* (1994) 23 Cal.App.4th 1459, 1478.)

10 **V. ARGUMENT**

11 A. Injunctive Relief Should Be Denied Because The AG Is Unlikely To Prevail On
12 The Merits

13 1. Westlands’ Study Of Potential Environmental Impacts Under CEQA Is Not
14 “Planning” Prohibited By Public Resources Code Section 5093.542

15 Subdivision (c) of Public Resources Code section 5093.542 prohibits a state agency from
16 “assist[ing] or cooperat[ing] with, whether by loan, grant, license, or otherwise, any agency of the
17 federal, state, or local government in the planning or construction of any dam, reservoir, diversion,
18 or other water impoundment facility that could have an adverse effect on the free-flowing condition
19 of the McCloud River, or on its wild trout fishery.” Westlands’ activities do not violate this statute.

20 Contrary to the AG’s argument, Westlands is not assisting or cooperating in the “planning”
21 of the Shasta Dam Raise Project.¹ Westlands is only considering whether, along with other public
22 water agencies, it can/will contribute funds for Reclamation’s project. (Gutierrez Dec. at ¶ 12.) To
23 date, Westlands has not made a decision whether to contribute funding.² Under any reasonable

24 ¹ The AG does not contend that Westlands is participating in “construction” of the Shasta Dam Raise
25 Project.

26 ² The AG cites an expired March 2014 Agreement in Principle between Westlands and Reclamation
27 (Motion, 8 at fn.1, and p. 13; AG RJN Ex. D) as supposed planning, but that agreement is only for
28 “potential” cost sharing between Westlands and Reclamation, and provides that each party “may”
be willing to enter formal negotiations, subject to a number of contingencies that have not occurred.
That agreement expired by its terms on September 30, 2017 and has not been renewed. (Gutierrez

1 construction of subdivision 5093.542(c), Westlands' efforts to gather information to inform its own
2 decision is not a violation of the statute.

3 The AG contends that Westlands' efforts to comply with CEQA before making a decision
4 regarding funding is "planning" prohibited by section 5093.542. (Motion, 13-14.) For this assertion,
5 it relies on CEQA Guideline 15004(b). (Motion, 14:6-9 [also citing *Laurel Heights Improvement*
6 *Assn. v. Regents of University of California* (1988) 47 Cal.3d 376].) But Guideline 15004(b) simply
7 says that CEQA documents should be prepared "as early as feasible in the planning process," not
8 that CEQA review is itself a planning process. And in any event, Westlands' CEQA review is to
9 inform Westlands' decision whether to contribute funding. Westlands is not planning the Shasta
10 Dam Raise Project. Whether and how Shasta Dam will be enlarged is something only Reclamation
11 will decide.

12 The AG's position in this case that performing CEQA review related to enlargement of
13 Shasta Dam violates section 5093.542 is contradicted by activities of other state agencies in the
14 CALFED Program, described above. State agencies including the California Resources Agency
15 (now the California Natural Resources Agency), the California Department of Water Resources, the
16 California Department of Fish and Game (now the California Department of Fish and Wildlife), and
17 the State Water Board participated in preparation of an EIR that identified enlargement of Shasta
18 Dam as a project warranting further study and consideration as a means to achieve program's goals.
19 (Request for Judicial Notice ["RJN"], Ex. 1.)

20 More recently, some of these state agencies have also provided comments on an
21 Environmental Impact Study issued by the Federal Energy Regulatory Commission ("FERC") for
22 relicensing of PG&E's McCloud-Pit Hydroelectric Project. (RJN, Ex. 2, at pp. A2-A3.) And, the
23 State Water Board recently issued its own draft initial study and negative declaration pursuant to
24 CEQA for the PG&E project on the McCloud River, and it received numerous comment letters
25 arguing that the project will have adverse impacts on the McCloud River. (RJN, Exs. 3, 4, 5.) The
26 position advocated by the AG in this case is inconsistent with those agencies commenting on
27 FERC's EIS regarding relicensing, and the State Water Board's preparation of a CEQA document
28 for its certification related to relicensing.

1 In a footnote, the AG argues that Westlands’ preparation of an EIR pursuant to CEQA
2 indicates it has already made a decision to contribute funding to the Shasta Dam Raise Project.
3 (Motion, 14 fn. 3.) For this assertion, it relies on CEQA Guideline 15002(e), which says an agency
4 is required to comply with CEQA when it “proposes to approve or carry out the activity.” (Cal. Code
5 Regs., tit. 14, § 15002, subd.(e).) The AG’s position that Westlands’ preparation of an EIR means
6 it has already made a decision is a remarkable distortion of CEQA. As *Laurel Heights* explains
7 “[t]he EIR is . . . ‘the heart of CEQA.’” (*Laurel Heights*, 47 Cal.3d at p. 392.) “An EIR is an
8 environmental alarm bell whose purpose is to alert the public and its responsible officials to
9 environmental changes before they have reached the ecological points of no return. . . . If CEQA is
10 scrupulously followed, the public will know the basis on which its responsible officials either
11 approve *or reject* environmentally significant action, and the public, being duly informed, can
12 respond accordingly to action with which it disagrees.” (*Id.* at p. 392 [citations omitted; emphasis
13 added].) Under CEQA, preparation of an EIR necessarily precedes any project determination, and
14 that determination may be a rejection of a project. Under the AG’s position Westlands cannot
15 prepare an EIR unless it has already made a decision. But Westlands cannot comply with CEQA if
16 it makes a decision without first preparing an EIR. The AG is wrong on CEQA.

17 The AG’s complaint and motion seem to suggest Westlands must accept as definitive the
18 conclusory statements the AG cites from Reclamation’s EIS and Feasibility Study, and from the
19 comment letters by other agencies. CEQA, however, requires that a “final EIR reflect[] the lead
20 agency’s *independent* judgment and analysis.” (Cal. Code Regs., tit. 14, § 15090, subd.(a)(3)
21 [emphasis added].) Westlands is fulfilling its duty by studying the potential impacts of
22 Reclamation’s project, and by independently determining *whether* it may be a cost share partner in
23 that project. Those impacts are not predetermined and definite, no matter how many times the AG
24 repeats the conclusory, hearsay statements on which his motion relies. The AG concedes that CEQA
25 responsible agencies have a duty to make independent findings regarding any potential impacts of
26 a project. (Motion, 16: 20 [referencing Cal. Code Regs., tit. 14, § 15096, subd.(h)].) That is no less
27 true for Westlands as a CEQA lead agency.

28 In sum, Westlands’ ongoing CEQA review is not “planning” prohibited by section 5093.542.

1 Under CEQA, preparation of an EIR is instead a necessary predicate for a decision by Westlands
2 whether to contribute funding for the Shasta Dam Raise Project. The AG therefore is not likely to
3 prevail on his claims that Westlands is violating section 5093.542.

4 2. The AG Has Failed To Carry His Burden Of Proving That Raising Shasta
5 Dam Could Adversely Affect The Free-Flowing Condition Of The
6 McCloud River Or Its Wild Trout Fishery

6 The AG has failed to show a likelihood of success on the merits for another reason. The AG
7 has failed to prove that the Shasta Dam Raise Project could adversely affect the “free-flowing
8 condition” of the McCloud River, or its “wild trout fishery,” within the meaning of Public Resources
9 Code section 5093.542(c).

10 The only evidence offered by the AG in support of his motion is a collection of documents
11 for which he requests judicial notice as official acts of either federal or state agencies, or by
12 Westlands, pursuant to Evidence Code section 452, subdivision (c). (See AG RJN.) But judicial
13 notice of an official act or record, where proper, extends only to existence of the act or record and
14 not to truth of any statement therein. (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.
15 App. 4th 471, 482 [“While we may take judicial notice of court records and official acts of state
16 agencies (Evid. Code, § 452, subds. (c), (d)), the truth of matters asserted in such documents is not
17 subject to judicial notice”].)

18 At pages 10 through 13 of its memorandum, the AG offers various statements in some of the
19 documents for the truth of the matters asserted, as supposed proof that raising Shasta Dam would
20 adversely affect the “free-flowing condition” of the McCloud River, or its “wild trout fishery.” The
21 AG cites to statements in portions of Reclamation’s Final EIS (AG RJN, Ex. A), Reclamation’s
22 Final Feasibility Report (AG RJN, Ex. C), a report by the US Fish & Wildlife Service (AG RJN,
23 Ex. G), and two comment letters by the California Department of Fish and Wildlife (AG RJN, Exs.
24 H and I). These statements are inadmissible hearsay. (Evid. Code, § 1200.) Therefore, these
25 statements cannot be relied upon by this Court as evidence that the Shasta Dam Raise Project could
26 adversely affect the free-flowing conditions of the McCloud River or its wild trout fishery. The AG
27 has failed to prove a likelihood of success on the merits with evidence that would be admissible in
28 court, and hence his motion must be denied, on this ground as well.

1 3. The Application Of Section 5093.542 Here Is Much More Involved Than
2 The AG's Motion Presumes

3 Westlands has not yet determined whether the Shasta Dam Raise Project would adversely
4 affect the free-flowing condition of the McCloud River, or its wild trout fishery. Westlands will not
5 make that determination until it completes the ongoing environmental review. The AG's motion
6 presumes it is foregone conclusion that raising Shasta Dam would adversely affect the "free-flowing
7 condition" of the McCloud River, and its "wild trout fishery," but in reality that determination is not
8 so simple, both as a matter of law and fact. Here, we identify only a few of the issues involved.

9 First, Public Resources Code section 5093.52, subdivision (d) defines "free-flowing" for
10 purposes of the Wild and Scenic Rivers Act as "existing or flowing without artificial impoundment,
11 diversion, or other modification of the river . . ." The portion of the McCloud River that would be
12 newly inundated if Shasta Reservoir reached a higher elevation does not meet this definition. Flows
13 in the twenty-three miles of the McCloud River immediately upstream of Shasta Reservoir are the
14 product of how much water is released by the McCloud Dam, part of Pacific Gas & Electric's
15 McCloud-Pit Hydroelectric Project. (Declaration of Mary Paasch ["Paasch Dec."], ¶¶ 5-9.) PG&E
16 uses McCloud Dam to divert a majority of the flow of the McCloud River at McCloud Dam through
17 a tunnel to the Pit River, to generate hydropower. (Paasch Dec. at ¶ 7.) A project cannot have an
18 adverse effect on the "free-flowing condition" of the McCloud River in a reach of the River that is
19 not "free-flowing" as that term is defined by the Act.

20 Second, section 5093.542(c) does not prohibit all effects; it applies only to an "adverse
21 effect." What type or level of effect qualifies as adverse is not defined by the statute. The periodic,
22 temporary inundation of a relatively small additional portion of the lower McCloud River, up to
23 about 3,550 feet of the McCloud River above the existing Shasta Lake full pool below McCloud
24 Dam, for a few months in some years may not rise to the level of an "adverse" effect on free-flowing
25 condition.

26 Third, the AG makes no showing that newly inundating a relatively small portion of the
27 lower McCloud River for a few months in some years will have an adverse effect on the "wild trout
28 fishery." A "fishery" connotes catching fish, and generally a particular location for doing so.

1 (Webster’s 3d New Internat. Dict. (2002) p. 858; *see also* Fish & G. Code § 7650(c); 16 U.S.C. §
2 1802(13).) There is no public access for fishing along the banks of the portion of the lower McCloud
3 River that would be newly inundated. Westlands owns that property. (Gutierrez Dec. at ¶ 18) Fishing
4 along the first seven miles of river above Shasta Reservoir is limited, with a maximum of twenty
5 guests and sixteen rods at a time. (*Id.* at ¶ 19.) In those limited months of certain years when an
6 additional 3,550 feet of the McCloud River are newly inundated, people fishing on Westlands’
7 property would still have at least 31,680 feet of the McCloud River to fish.³ (*Id.* at ¶ 20.)

8 In sum, the AG is not likely to prevail on the merits. Westlands’ CEQA review is not
9 “planning” prohibited by Public Resources Code section 5093.542(c). And, the AG has failed to
10 prove that raising Shasta Dam could adversely affect the “free-flowing condition” of the McCloud
11 River, or adversely affect its “wild trout fishery,” within the meaning of Public Resources Code
12 section 5093.542(c). Preliminary injunctive relief must therefore be denied.

13 B. Injunctive Relief Should Be Denied Because The AG Has Failed To Show
14 Injunctive Relief Is Needed To Avoid Irreparable Harm

15 The AG makes three claims of irreparable harm if the Court denies his request for a
16 preliminary injunction: (1) Westlands’ supposed violation of Public Resources Code section
17 5093.542(c) will continue; (2) public agencies will have conflicting duties under CEQA and Public
18 Resources Code section 5093.542(c); and (3) once construction begins the environment will suffer
19 harm. (Motion at pp. 15-19.) None of these arguments suffice to show threatened irreparable harm.

20 1. The Claimed Violation Of Section 5093.542 Is Not Irreparable Harm

21 The AG argues that irreparable harm will occur by Westlands’ supposed continued violation
22 of Public Resources Code section 5093.542(c). That argument fails. Westlands is not violating
23 Public Resources Code section 5093.542(c), as explained above. Further, an alleged, ongoing
24 _____

25 ³ The AG also makes no showing that newly inundating a relatively small portion of the McCloud
26 River in a few months of some years will have any adverse effect on the population of wild trout
27 that supports the “wild trout fishery.” The current population of wild trout in the McCloud River
28 has thrived under existing conditions, which include fluctuating levels of Lake Shasta that inundate
a portion of the lower McCloud River. There is no obvious reason why the occasional inundation of
slightly more of the McCloud River would have any perceptible adverse effect on that wild trout
population.

1 violation of section 5093.542(c) is not sufficient to support preliminary injunctive relief. The AG
2 must demonstrate *both* irreparable harm and a likelihood of success on the merits. (*Jessen, supra*,
3 142 Cal.App.3d at p. 459.) The AG cannot collapse these two factors and avoid a separate showing
4 of harm by arguing that the alleged violation of a statute is itself irreparable harm supporting
5 injunctive relief. (*Cohen v. Bd. of Supervisors* (1986) 178 Cal.App.3d 447, 453-454 [“bare showing
6 that public funds are about to be expended in an unconstitutional or otherwise illegal manner” does
7 not trigger a presumption of irreparable injury; such presumption would improperly negate
8 balancing of harms by equating the showing of illegality with harm].)

9 The AG’s reliance on a rebuttable presumption of “public harm” from the violation of a
10 statute is misplaced. A rebuttable presumption of harm to the public interest arises only where a
11 statute “specifically provide[s] injunctive relief for a violation of [that] statute or ordinance,” and
12 the government demonstrates it is likely to prevail on the merits. (*IT Corp. v. County of Imperial*
13 (1983) 35 Cal.3d 63, 71.) In contrast to the zoning ordinance at issue in *IT Corp.*, nothing in section
14 5093.542, nor any provision of the Wild and Scenic Rivers Act, section 5093.50 et seq., specifically
15 provides for injunctive relief. (Compare *IT Corp., supra*, 35 Cal.3d. at p. 70; compare also *People*
16 *ex rel. Feuer v. FXS Management, Inc.*, (2016) 2 Cal.App.5th 1154, 1157 [ordinance at issue
17 specifically provided for injunctive relief to restrain illegal marijuana businesses].) Accordingly, the
18 AG’s citations to *IT Corp.* and *FXS Management* are unavailing; those cases do not support a
19 rebuttable presumption of public harm to support injunctive relief here.

20 2. Public Agencies Have No Conflicting Duties Under CEQA And Section
21 5093.542

22 Next, the AG claims irreparable harm because public agencies are supposedly forced to
23 choose between violating section 5093.542 or failing their duties under CEQA. The simple answer
24 is that the AG is misreading section 5093.542. As is explained above, section 5093.542 does not
25 make CEQA compliance illegal. To the extent that responsible agencies will be required by CEQA
26 to make findings and trustee agencies will offer comments in response to Westlands’ EIR, doing so
27 is just fulfilling their obligations under CEQA, not irreparable harm warranting injunctive relief.

1 3. Impacts From Construction Of The Shasta Dam Raise Project Are Too
2 Remote To Support An Injunction

3 Finally, the AG argues that construction of the Shasta Dam Raise Project will cause
4 irreparable environmental impacts. The potential effects of construction are too remote to support a
5 preliminary injunction. Westlands has not yet made a decision to provide funding for the potential
6 Shasta Dam Raise Project. Indeed, Reclamation has not yet decided whether it will pursue the
7 project, and hence may not proceed even if Westlands or others decide to contribute to the costs.
8 The AG concedes that the “project remains in the planning stages; indeed, federal agencies have
9 studied and considered the project for nearly forty years . . . , [and further that] Westlands has not yet
10 committed funding for the project” (Motion, 19:24-26.) These admissions make clear that the
11 potential construction of the Shasta Dam Raise project and its related impacts are far too speculative
12 and attenuated to support enjoining Westlands’ CEQA review process. When and if Westlands
13 decides to contribute funding, and Reclamation decides to proceed, the AG will have ample notice
14 of those decision and an opportunity to seek injunctive relief before construction impacts occur.

15 The AG’s citation to *Costa Mesa City Employees Assn. v. City of Costa Mesa* is unavailing.
16 (Motion, 19:5-7 [citing *Costa Mesa* (2012) 209 Cal.App.4th 298.]) In *Costa Mesa*, the plaintiff-
17 employee union sued to enjoin the defendant-city’s implementation of an outsourcing plan, and
18 associated layoffs of city employees. (*Id.* at p. 301.) The city had already voted to approve the
19 outsourcing plan, had issued layoff notices, and prepared bids and requests for proposals for various
20 vendors. (*Id.* at pp. 302-303.) These facts, most specifically the issuance of layoff notices, were
21 sufficient to demonstrate the irreparable harm necessary for issuance of an injunction. (*Id.* at p. 305.)
22 In this case, Westlands has not made a final determination as to whether it will be a cost share partner
23 for the project, much less taken any steps to effect that determination. *Costa Mesa* only demonstrates
24 how premature the AG’s request for injunction and underlying complaint are because Westlands
25 has not made any final determination that is subject to judicial review.

26 In sum, the AG has failed to show a significant threat of irreparable harm absent injunctive
27 relief, and for this reason too his motion should be denied.

28 ///

1 C. The Balance Of Hardships Weighs Against Injunctive Relief

2 The proposed injunction would significantly harm Westlands and the public. A preliminary
3 injunction would harm Westlands by enjoining its right to gather and disseminate information and
4 engage the public; the public would be harmed by being denied such information and engagement.
5 Challenges to a CEQA processes are generally grounded in the assertion that the process is
6 incomplete or otherwise deficient. The AG’s contention that the entire process here is “illegal” and
7 must be enjoined is confounding, especially when contrasted with its acknowledgement of public
8 agencies’ duty to conduct their own independent review. (Motion, 16:18-21.) One may only surmise
9 that the AG does not want Westlands to discover facts and evidence that may support an outcome
10 with which he disagrees. But even if that does occur, the appropriate action would not be to prevent
11 the CEQA review, but to challenge the ultimate determination now duly informed by the completed
12 CEQA process. (*Laurel Heights, supra*, 47 Cal.3d at p. 392.)

13 Halting CEQA review pending a trial in April 2020 would also impose significant additional
14 costs for CEQA consultants. (Paasch Dec. at ¶ 14.) If Westlands’ consultant Stantec is forced to stop
15 working on the EIR in late July and allowed to resume in April 2020, Westlands’ costs are likely to
16 increase. (*Ibid.*) Such disruption is likely to result in staff turnover, duplication, and other
17 inefficiencies. (*Ibid.*)

18 Finally, one possible result of Westlands’ CEQA review is that it determines it will not to
19 contribute funding to Reclamation’s project. If and when Westlands’ finally determines to become
20 a cost share partner in a potential Shasta Dam Raise Project the AG may then, “being duly informed.
21 . . . respond accordingly to action with which [he] disagrees.” (*Laurel Heights, supra*, 47 Cal.3d at p.
22 392.) A suit challenging that determination, and seeking a preliminary injunction then if appropriate,
23 provides the AG with a more than adequate potential remedy.

24 D. The Form Of Order Proposed By The AG Is Too Indefinite For An Injunction

25 The Court should deny the AG’s motion, for the reasons explained above. If the Court
26 decides to grant preliminary injunctive relief, it should not adopt the form of order submitted by the
27 AG. “An injunction must be definite enough to provide a standard of conduct for those whose
28 activities are proscribed, as well as a standard for the ascertainment of violations of the injunctive

1 order by the courts called upon to apply it. An injunction which forbids an act in terms so vague that
2 men of common intelligence must necessarily guess at its meaning and differ as to its application
3 exceeds the power of the court.” (*Pitchess v. Super. Ct. of Los Angeles County* (1969) 2 Cal.App.3d
4 644, 651.) Numbered paragraphs 1 and 3 of the form submitted by the AG do not meet these
5 requirements, and Westlands objects to the proposed order on those grounds.

6 The first numbered paragraph in the proposed order provides: “Westlands is enjoined from
7 assisting or cooperating in any planning for or the construction of the Shasta Dam Raise project,
8 pending trial of this matter.” As discussed above, Westlands does not believe that it has engaged in
9 any “planning” of the Project to date. The AG disagrees, and apparently has a far more expansive
10 interpretation of “planning.” If the Court issues an injunction, what constitutes prohibited planning
11 should be specifically defined in the order.

12 The third numbered paragraph in the proposed order provides: “Westlands is enjoined from
13 taking any action that would violate the California Wild and Scenic Rivers Act, Public Resources
14 Code section 5093.542, pending trial of this matter.” Westlands has discussed its understanding of
15 section 5093.542 above, and explained that application of the statute is not so simple as the AG’s
16 motion presumes. If the Court nonetheless issues an injunction, that injunction should specifically
17 identify what actions Westlands cannot take.

18 **VI. CONCLUSION**

19 Based on the foregoing, Westlands respectfully requests the Court deny the AG’s motion
20 for preliminary injunction.

21 DATED: July 16, 2019

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation

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23
24 By: 

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26 Attorneys for Defendant and Respondent
WESTLANDS WATER DISTRICT

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PROOF OF SERVICE

**People, et al. v. Westlands Water District, et al.
Shasta County Superior Court Case No. 192487**

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 July 16, 2019, I served true copies of the following document(s) described as **DEFENDANT AND RESPONDENT WESTLANDS WATER DISTRICT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

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

Executed on July 16, 2019, at Sacramento, California.



Selena Paradee

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SERVICE LIST
People, et al. v. Westlands Water District, et al.
Shasta County Superior Court Case No. 192487

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