No. S258574

In the Supreme Court of California

COUNTY OF BUTTE, COUNTY OF PLUMAS, et al.
Plaintiffs and Appellants,
v.
DEPARTMENT OF WATER RESOURCES
Defendant and Respondent.

STATE WATER CONTRACTORS, INC., et al.
Real Parties in Interest and Respondents.

After a Decision by the Court of Appeal
Third Appellate District
Case No. C071785
Appeal from the Superior Court
Yolo County Case No. CVCV091258
The Honorable Daniel P. Maguire, Judge Presiding

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF CALIFORNIA WATER IMPACT NETWORK AND AQUALLIANCE IN SUPPORT OF PLAINTIFFS AND APPELLANTS

*Adam Keats (SBN 191157)
LAW OFFICE OF ADAM KEATS, PC
303 Sacramento St., 2nd Floor
San Francisco, CA 94111
Telephone: 415-826-2770
adam@keatslaw.org
Attorney for Amici Curiae
CALIFORNIA WATER IMPACT NETWORK and AQUALLIANCE

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Pursuant to Rule 8.520(f) of the California Rules of Court, California Water Impact Network and AquAlliance (Amici) hereby apply for leave to file the amicus curiae brief that follows this application.

In accordance with Rule 8.520(f)(4), Amici affirm that no party or counsel for a party in the pending case authored the proposed amicus brief in whole or in part, or made any monetary contribution intended to fund its preparation.

California Water Impact Network ("C-WIN") is a California non-profit public benefit organization with its principal place of business in Santa Barbara, California. C-WIN's organization purpose is the protection and restoration of fish and wildlife resources, scenery, water quality, recreational opportunities, agricultural uses, and other natural environmental resources and uses of the rivers and streams of California. In administrative proceedings, public reports, and litigation, C-WIN has expressed strong interests in ensuring public accountability and environmental

responsibility of California State Water Project (SWP) managed and operated by DWR under CEQA and other laws. The Oroville Facilities, the keystone of the SWP's water storage and delivery system, are "operated for power generation, water quality improvement in the Sacramento-San Joaquin Delta, recreation, fish and wildlife enhancement, and flood management." (*County of Butte v. Department of Water Resources*, Opinion on Transfer, September 5, 2019, p. 7.)

AquAlliance is a California public benefit corporation whose headquarters is in the city of Chico, Butte County, California, located in close proximity to the Oroville Facilities. Its mission is to defend northern California waters and the ecosystems these waters support and to challenge threats to the hydrologic health of the Sacramento River watershed. AquAlliance's members include farmers, scientists, businesses, educators, and residents all of whom have significant financial, recreational, scientific, aesthetic, educational, and conservation interests in the aquatic and

terrestrial environments that rely on waters of the Sacramento River Watershed and Bay-Delta estuary. Since February, 2017, AquAlliance has played a major role in exposing the existence of asbestos in the air and water that was blasted from underneath the collapsed spillway of the Oroville Facility, pursuing and litigating requests for public records under the federal Freedom of Information Act and the California Public Records Act. AquAlliance is interested in the full enforcement of CEQA and other environmental laws, and in ensuring that state decision-makers, when reviewing decisions involving the State Water Project, fully account for climate change when assessing the range of hydrologic conditions.

The current case is of concern to C-WIN and AquAlliance as its outcome will substantially impact future compliance and enforcement of CEQA as well as future agency decision-making regarding water quality issues. The current case is also of concern to Amici because of the significant potential environmental impacts of the project,

both to the immediate communities below the Oroville Dam and to everybody and everything downstream, especially in light of the 2017 spillway failure. Moreover, both C-WIN and AquAlliance have extensive experience with DWR's efforts to conceal information about its activities and projects from the public and have successfully challenged DWR in court many times. Immunizing any public agency from scrutiny by the public is bad public policy, but is especially problematic with this particular agency, given its poor record of protecting the environment, complying with California's environmental laws, and disclosing its actions to the public.

Amici's brief will assist the Court in deciding the matter by presenting different and/or expanded legal arguments in support of Plaintiffs and Appellants than briefed by the parties. Amici therefore respectfully request that the Court grant permission to file the accompanying proposed amici curiae brief.

DATED: August 28, 2020

Respectfully submitted,

By 

Adam Keats
Attorney for Amici Curiae
California Water Impact
Network and AquAlliance

AMICUS CURIAE BRIEF OF CALIFORNIA WATER IMPACT NETWORK AND AQUALLIANCE IN SUPPORT OF PLAINTIFFS AND APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

I. INTRODUCTION

The appellate court's determination that federal preemption prevents state court review of the Environmental Impact Report (EIR) prepared by Appellee Department of Water Resources (DWR) for its relicensing of the Oroville Dam, if upheld, would prevent any judicial scrutiny of the only environmental review of this massive and consequential public infrastructure project. As detailed in Appellants' briefs, the appellate court incorrectly applied the preemption doctrine and failed to properly follow existing precedent, including this Court's specific instructions in *Friends of Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677.

The following issues are presented for review: (1) To what extent does the Federal Power Act preempt application of the California Environmental Quality Act when the state is acting on its own behalf, and exercising its discretion, in deciding to pursue licensing for a hydroelectric dam project? (2) Does the Federal Power Act preempt state court

challenges to an environmental impact report prepared under the California Environmental Quality Act to comply with the federal water quality certification under section 401 of the federal Clean Water Act?

C-WIN and AquAlliance submit this amicus curiae brief in support of Plaintiffs-Appellants, agreeing that, as to both of the issues presented, preemption is not appropriate. Amici also seek to emphasize the significant consequences of the Court of Appeal's decision, if upheld, and the importance of and need for robust judicial enforcement of state agency compliance with the California Environmental Quality Act (CEQA).

If affirmed here, the Court of Appeal's misguided approach to preemption would nullify an eleven-year effort by communities directly affected by the Oroville Dam to ensure that the Oroville Facilities EIR (the sole environmental review of a state-sponsored relicensing project meant to last for the next half-century) complies with

CEQA. But such court review of the EIR is an exercise of state sovereign authority that cannot be preempted.

DWR, the lead agency who prepared the EIR, agrees with Plaintiffs-Appellants that it was required to comply with CEQA and that state courts can and must adjudicate the merits of the CEQA action filed by Plaintiffs-Appellants. See DWR Answer Brief, pp. 13-14, 39-54, 68. In its Answer Brief, DWR also confirms that the State Water Resources Control Board, the CEQA responsible agency that relied on DWR's EIR for its water quality certification under section 401 of the Clean Water Act, opposes preemption on the same grounds. *Id*. at p. 15, fn. 1. The only outlier opposing preemption is the State Water Contractors and several of its members, interested parties that rely on water exports from the State Water Project and have no CEQA responsibilities or decision-making authority in this matter.

II. ARGUMENT

The Court of Appeal failed to properly apply the controlling authority of this Court in *Friends of Eel River*, *supra,* 3 Cal.5th 677, despite this Court's explicit instruction to do so. The Court of Appeal found that judicial review of the EIR prepared by DWR is preempted by the Federal Power Act, 16 U.S.C. Sec. 791, *et seq*. (FPA), citing two United States Supreme Court decisions from 1946 and 1990 regarding states' efforts to regulate private hydroelectric facilities. (Decision at pp. 25-27; *First Iowa Hydro-Elec. Co-op. v. Federal Power Commission* (1946) 328 U.S. 152; *California v. Federal Energy Regulatory Commission* (1990) 495 U.S. 490.)

But DWR's proposed relicensing of its Oroville facilities is a discretionary decision by a state agency regarding a *public* facility—one that must serve multiple water uses subject to state law. CEQA, at its core, proscribes how public agencies should make decisions or take actions that may have significant effects on the environment. (*Friends of*

Eel River, 3 Cal.5th at p. 712 ["CEQA is a legislatively imposed directive governing how state and local agencies will go about exercising the governmental discretion that is vested in them over land use decisions"].) Just because the FPA provides for federal regulation of the licensing and operation of hydroelectric facilities does not mean that it preempts a state's sovereign decision to build, operate, or pursue relicensing of a state-owned hydroelectric facility. Under *Friends of Eel River,* California's requirement that its agencies comply with CEQA before decisions on their own projects is an exercise of state sovereignty, not a regulatory act. CEQA "operates as a form of self-government when the state itself is the owner of...property." (*Friends of Eel River*, 3 Cal.5th at p. 723.) No preemption can occur unless Congress has required that in "unmistakably clear" language. (*Id*. at p. 726.) The FPA has no "unmistakably clear" language, or any language, preempting CEQA.

Amici also agree with Plaintiffs-Appellants that the FPA cannot preempt a CEQA challenge to an EIR that was prepared to comply with water quality certification under section 401 of the Clean Water Act, a point also supported by DWR. (See DWR Answer Brief at p. 63.) Even the State Water Contractors concede this point but then erroneously assume, contrary to well-established CEQA law and practice, that to challenge the EIR's water quality analysis Plaintiffs would have had to separately challenge the State Board's certificate on the identical EIR grounds two years later. (SWC Answer Brief at pp. 55-58.) That assumption conflates the roles of CEQA lead and responsible agencies, and if followed, would needlessly confuse and complicate CEQA cases inactions where more than one agency has decision-making responsibilities. (See Plaintiffs-Appellants' Opening Brief, pp. 39-47; Plaintiffs-Appellants' Reply Brief, pp. 32-38.)

If the Court of Appeal's decision is upheld, the 2008 Oroville Facilities EIR—the only environmental review

conducted for state agency decision-making on this massive state public infrastructure project—will escape any judicial review. Two discretionary decisions of major importance, (1) DWR's decision as the state lead agency to pursue the fifty-year relicensing of its own Oroville Facilities, and (2) the State Water Resources Control Board's decision as a responsible agency to issue the water quality certificate required under state law and section 401 of the federal Clean Water Act, would be effectively immune from legal challenge. This is directly contrary to CEQA, which is predicated on the ability of members of the public (in this case two counties directly impacted by the Oroville Dam) to ensure public agencies' compliance with CEQA through judicial review.

CEQA "is an integral part of any public agency's decision making process." (Pub. Resources Code § 21006.) "The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the

reasonable scope of the statutory language." (*Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.) "CEQA establishes a duty for public agencies to avoid or minimize environmental damage wherever feasible." (CEQA Guidelines, 14 Cal. Code of Regulations § 15021, subd. (a).) It is fundamental, black-letter law that environmental review pursuant to CEQA must take place before an agency makes its final decision or takes an action that may have significant effects on the environment. "[A]n EIR must be performed before a project is approved, for '[i]f postapproval environmental review were allowed, EIR's would likely become nothing more than post hoc rationalizations to support action already taken'." (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 130 [quoting *Laurel Heights Improvement Assn v. Regents of University of California* (1988) 47 Cal.3d 376, 394].) ""[U]nless a public agency can shape the project in a way that would respond to concerns raised in an EIR, or its functional equivalent, environmental review would be a

meaningless exercise." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 117.)

CEQA ensures that public agencies follow these principles by providing for judicial enforcement through actions brought by members of the public. (See Pub. Resources Code § 21167.) Such actions are given preference over all other civil actions, and larger counties with populations over 200,000 must designate judges with particular CEQA expertise to hear challenges under the law. (Pub. Resources Code § 21167.1.) In short, CEQA, especially its procedures for judicial review, hard-bakes into every decision by a public agency the need to consider a project's impact on the environment. The Court of Appeal's decision, if upheld, would subvert this longstanding public policy and establish a very dangerous precedent.

If upheld, the Decision would be hugely consequential to the communities near the Oroville Dam (including Appellants), as well as to communities throughout California that rely on the Sacramento River watershed for their water

supply and/or are affected by the numerous infrastructure projects that are managed by DWR. These communities and affected members of the public would lose their only means of challenging what they allege to be clear violations of the law by DWR.

SWC seeks to minimize the environmental importance of the underlying CEQA action. (See SWC Answer Brief at p. 22.) Although both of the issues now before the Court involve preemption, and the merits remain to be adjudicated, SWC is wrong about the importance to the environment, and to the future of communities near Oroville, of the CEQA merits in this action. (See Plaintiffs' Reply Brief at pp. 22-23.) A significant deficiency in the EIR is its failure to account for the full range of anticipated drought, flood and precipitation conditions due to climate change, an issue of even greater importance after the recent failure of the Dam's spillway. (See, e.g., I. James, Oroville Dam Unprepared for Climate Change, critics warned years before crisis, The Desert Sun, February 20,2017;

http://www.desertsun.com/story/news/environment/2017/02/14/dangerously-falseoroville-dam-isnt-prepared-global-warming-2008-lawsuit-says/97903842/; J. Little, "California Dam Crisis Could Have Been Averted," Scientific American, February 20, 2017; https://www.scientificamerican.com/article/california-dam-crisis-could-havebeen-averted/.) Among other issues, Butte County criticized DWR's EIR for failing to assess how the project would perform in more extreme climate conditions, and understating the risk of "catastrophic flooding in and downstream of Oroville." (Plaintiffs'-Appellants' Reply at p. 15 (citing Administrative Record H000235).)

Beyond this one project, the core enforcement mechanism of CEQA would be effectively nullified by a judicial doctrine that has never been applied in this manner or to this statute in this way. The Court of Appeal's decision, if upheld, would establish a dangerous precedent regarding the role and (lack of) importance of judicial review in the

CEQA process. Such a ruling would thus have state-wide importance beyond this specific project.

Finally, as explained in more detail in the briefs of Plaintiffs-Appellants, the FPA does not, and cannot, preempt a CEQA challenge to an EIR that, like DWR's Oroville Facilities EIR here, was prepared to inform water quality certification under section 401 of the Clean Water Act. By interfering with CEQA enforcement and the role of state law as it relates to water quality, the decision is in conflict with existing law. CEQA compliance is an "appropriate requirement of state law" needed to ensure compliance with section 401 of the Clean Water Act, 33 U.S.C. § 1313(d), which cannot be preempted under the seminal United States Supreme Court decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700, 710-722.

III. CONCLUSION

The Court of Appeal incorrectly applied the preemption doctrine to Appellants' challenge to DWR's EIR, a decision

that should be overturned. CEQA review of this Project is important to the local communities directly affected by the Project as well as to communities throughout the state with an interest in the Sacramento River watershed and DWR's operation of the State Water Project. Appellants must get their day in court to challenge DWR's compliance with CEQA, and CEQA's essential mechanism of judicial review of agency decision-making must be upheld. Amici thus respectfully request that this Court overturn the decision by the Court of Appeal.

DATED: August 28, 2020

Respectfully submitted,

By 

Adam Keats
Attorney for Amici Curiae
California Water Impact
Network and AquAlliance

CERTIFICATE OF COMPLIANCE

Pursuant to the California Rules of Court, Rule 8.204(c)(l), I certify that the attached Application for Leave to File Amicus Curiae Brief and Brief of California Water Impact Network and AquAlliance in Support of Plaintiffs and Appellants is proportionately spaced and has a typeface of 13 points or more. Excluding the caption page, tables of contents and authorities, signature blocks, and this certificate, it contains 2609 words.

DATED: August 28, 2020

Respectfully submitted,

By 

Adam Keats
Attorney for Amici Curiae
California Water Impact
Network and AquAlliance

PROOF OF SERVICE

I, Adam Keats, declare:

I am over the age of 18 years and not a party to this action. My business address is 303 Sacramento St., 2nd Floor, San Francisco, California, in the County of San Francisco.

On August 28, 2020 I served a copy of the following document:

Application for Leave to File Amicus Curiae Brief and Brief of California Water Impact Network and AquAlliance in Support of Plaintiffs and Appellants

through the user interface at www.truefiling.com to the registered users indicated in TrueFiling for this matter, detailed in the service list attached below. I also served a copy via first-class mail by enclosing it in an envelope and depositing the sealed envelope with the United States Postal Service with the postage fully prepaid, addressed to the recipient listed attached below.

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

Dated: August 28, 2020

Adam Keats

Service List

VIA TRUEFILING
Bruce Alpert
County of Butte, County Counsel
25 County Center Drive
Oroville, CA 95965
balpert@buttecounty.net
Attorney for Plaintiff and Appellant
County of Butte

VIA TRUEFILING
Ellison Folk
Edward Terry Schexnayder
Shute Mihaly and Weinberger LLP
396 Hayes Street
San Francisco, CA 94102
Folk@smwlaw.com
Schexnayder@smwlaw.com
Attorneys for Plaintiff and Appellant
County of Butte

VIA TRUEFILING
Joshua Patashnik
Aimee Feinberg
Deputy Solicitors General
Linda L. Gandara
Deputy Attorneys General
455 Golden Gate Ave. Suite 11000
San Francisco, CA 94102-7004
Josh.Patashnik@doj.ca.gov
Attorneys for Defendant and
Respondent Department of Water
Resources

VIA TRUEFILING
R. Craig Settlemire
County of Plumas, County Counsel
520 Main Street, Room 302
Quincy, CA 95971
CSettlemire@countyofplumas.com
Attorneys for Plaintiffs and
Appellants County of Plumas; and
Plumas County Flood Control and
Water Conservation District

VIA TRUEFILING
Roger B. Moore
Law Office of Roger B. Moore
337 17th Street, Suite 211
Oakland, CA 94612
rbm@landwater.com
Attorneys for Plaintiffs and
Appellants County of Butte; County
of Plumas; and, Plumas County
Flood Control and Water
Conservation District

VIA TRUEFILING
David R. E. Aladjem
Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
daladjem@downeybrand.com
Attorneys for Real Parties in Interest
and Respondents San Bernardino
Valley Municipal Water District; and
Alameda County Flood Control &
Water Conservation District, Zone 7

VIA TRUEFILING
Carolyn Nelson Rowan
Office of the Attorney General
1300 I Street, Suite 125
Sacramento, California 95874
carolyn.rowan@doj.ca.gov
Attorneys for Defendant and Respondent Department of Water Resources

VIA TRUEFILING
Thomas M. Berliner
Jolie-Anne Shappell Ansley
Paul J. Killion
Duane Morris LLP
One Market, Suite 2200
San Francisco, CA 94105-1127
tmberliner@duanemorris.com
jsaAnsley@duanemorris.com
pjkillion@duanemorris.com
Attorneys for Real Parties in Interest and Respondents State Water Contractors Inc.; Alameda County Flood Control & Water Conservation District, Zone 7; Kern County Water Agency; San Bernardino Valley Municipal Water District; Santa Clara Valley Water District; and, Metropolitan Water District of Southern California

VIA TRUEFILING
Court of Appeal of the State of California
Third Appellate District
914 Capitol Mall, Fourth Floor
Sacramento, California 95814
Case No. C071785

VIA U.S. MAIL
Honorable Daniel P. Maguire Yolo County Superior Court
1000 Main Street
Woodland, California 95695
Case No. CV20091258

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BUTTE, COUNTY OF v. DEPARTMENT OF WATER RESOURCES (STATE WATER CONTRACTORS)**
Case Number: **S258574**
Lower Court Case Number: **C071785**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **adam@keatslaw.org**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	2020-08-28 - CWIN-AquAlliance Amicus Brief

Service Recipients:

Person Served	Email Address	Type	Date / Time
Jennifer Henning California State Association of Counties 193915	jhenning@counties.org	e-Serve	8/28/2020 2:01:12 PM
E. Wright Friends of the River 51861	bwright@friendsoftheriver.org	e-Serve	8/28/2020 2:01:12 PM
David Aladjem Downey Brand LLP 152203	daladjem@downeybrand.com	e-Serve	8/28/2020 2:01:12 PM
Roger Moore Law Office of Roger B. Moore 159992	rbm@landwater.com	e-Serve	8/28/2020 2:01:12 PM
Thomas Berliner Duane Morris LLP 83256	tmberliner@duanemorris.com	e-Serve	8/28/2020 2:01:12 PM
Edward Schexnayder Shute Mihaly & Weinberger LLP 284494	schexnayder@smwlaw.com	e-Serve	8/28/2020 2:01:12 PM
Bruce Alpert Office of County Counsel 075684	balpert@buttecounty.net	e-Serve	8/28/2020 2:01:12 PM
Joshua Patashnik Office of the Attorney General 295120	josh.patashnik@doj.ca.gov	e-Serve	8/28/2020 2:01:12 PM
Russell Hildreth Office of the Attorney General 166167	russell.hildreth@doj.ca.gov	e-Serve	8/28/2020 2:01:12 PM

Matthew Goldman California Dept of Justice, Office of the Attorney General 113330	Matthew.Goldman@doj.ca.gov	e-Serve	8/28/2020 2:01:12 PM
Carolyn Rowan Office of the Attorney General 238526	Carolyn.Rowan@doj.ca.gov	e-Serve	8/28/2020 2:01:12 PM
Jolie-Anne Ansley Duane Morris LLP 221526	JSAnsley@duanemorris.com	e-Serve	8/28/2020 2:01:12 PM
Aimee Feinberg California Dept of Justice, Office of the Attorney General 223309	Aimee.Feinberg@doj.ca.gov	e-Serve	8/28/2020 2:01:12 PM
Ellison Folk Shute, Mihaly & Weinberger 149232	folk@smwlaw.com	e-Serve	8/28/2020 2:01:12 PM
Victoria Domantay Duane Morris	VCDomantay@duanemorris.com	e-Serve	8/28/2020 2:01:12 PM
Paul Killion Duane Morris LLP 124550	PJKillion@duanemorris.com	e-Serve	8/28/2020 2:01:12 PM
Adam Keats Law Office of Adam Keats, PC 191157	adam@keatslaw.org	e-Serve	8/28/2020 2:01:12 PM
Courtney Covington Office of the State Attorney General 259723	courtney.covington@doj.ca.gov	e-Serve	8/28/2020 2:01:12 PM
R. Settlemire Office of the County Counsel 96173	csettlemire@countyofplumas.com	e-Serve	8/28/2020 2:01:12 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

8/28/2020

Date

/s/Adam Keats

Signature

Keats, Adam (191157)

Last Name, First Name (PNum)

Law Office of Adam Keats, PC

Law Firm