Case No. S258574

IN THE SUPREME COURT OF CALIFORNIA

COUNTY OF BUTTE, COUNTY OF PLUMAS et al.,
Plaintiffs and Appellants,

vs.

DEPARTMENT OF WATER RESOURCES et al.,
Defendants and Respondents.

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

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PLAINTIFFS AND RESPONDENTS COUNTY OF BUTTE, COUNTY OF PLUMAS et al.

Court of Appeal, Third Appellate District
Case No. C071785

Yolo County Superior Court
Case No. CVCV091258
The Honorable Daniel P. Maguire, Judge

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I. Motion for Leave to File Amicus Brief

The California State Association of Counties (CSAC) seeks leave to file the attached amicus brief.[1]

II. Interests of Amicus Curiae

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

This Court is addressing critical issues for local agencies, including CSAC's member counties: 1) To what extent does the Federal Power Act (FPA) preempt application of the California Environmental Quality Act (CEQA) 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 FPA preempt State court challenges to an environmental impact report prepared under CEQA in order to comply with the federal water quality certification under the federal Clean Water Act (CWA)?

These issues have broad implications for the over 120 hydroelectric facilities the Federal Energy Regulatory Commission (FERC) licenses in the State and the counties where these projects take place.

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[1] No party or counsel for a party authored the attached brief, in whole or in part. No one made a monetary contribution intended to fund the preparation or submission of this brief.

When making public decisions that impact the environment, local agencies are responsible for evaluating those impacts and considering mitigation measures. Federal hydroelectric licenses are granted in 30 to 50 year terms, making it especially crucial that CSAC's member counties have way to participate in the development of environmental review documents and, where needed, challenge the adequacy of the review.

III. Issues to be Briefed in the Proposed Amicus Curiae Brief

This Court has granted review to resolve whether CEQA is preempted by the FPA when the State is pursuing licensing and relicensing of hydroelectric dams. Removing CEQA review would subject communities to license terms that are not evaluated under State law. This would have acute, practical effects on the counties where these projects are located, and is not the intent of the CWA.

Counsel for amicus has reviewed the party briefing in this case and does not duplicate those arguments here. Rather, the proposed amicus brief provides this Court with practical examples of how finding that CEQA is preempted by the FPA in federal hydroelectric licensing will have a wider, disruptive impact. The brief also explains why preemption of CEQA is directly contrary to both the CWA and the case law that informs the statute.

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For the foregoing reasons, CSAC respectfully requests that this Court accept the accompanying amicus curiae brief.

Dated: August 28, 2020 Respectfully submitted,

By: 

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Attorney for Amicus Curiae
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I. ISSUES PRESENTED FOR REVIEW

1. To what extent does the Federal Power Act (FPA) preempt application of the California Environmental Quality Act (CEQA) 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 FPA preempt state court challenges to an environmental impact report prepared under the CEQA to comply with the federal water quality certification under section 401 of the federal Clean Water Act (CWA)?

II. INTRODUCTION

Section 401 of the CWA requires hydroelectric projects licensed and relicensed by the Federal Energy Regulatory Commission (FERC) to obtain a water quality certification from the State, providing that "any other appropriate requirement of State law set forth in such certification . . . shall become a condition on any Federal license or permit subject to the provisions of this section." (33 U.S.C. § 1341(d).) In California, the appropriate State law to protect water quality, and the overall environment, is the California Environmental Quality Act (CEQA). (Pub. Resources Code, § 21000 et seq.) Through CEQA, public agencies consider the immediate and long-term effects of a project on the environment, as well as feasible mitigation measures that help offset a project's impact. Counties rely on this State law level of protection to maintain a quality environment for their communities and preserve county resources.

Moreover, public agencies are required to comply with CEQA. The State, in an act of self-governance and not regulation, directs how agency decisions are to be made under State law when their projects impact the environment.

Because FERC's license terms are for 30 to 50 years, it is especially important that the counties that host these projects can meaningfully engage in the comprehensive environmental review process that California requires of its agencies. Eliminating CEQA review from the State's own decisionmaking process would have serious consequences. Counties rely on the water availability created by hydroelectric projects, and feel the impacts when these projects change water quality. Hydropower fluctuations due to climate variances can impact energy consumers Statewide. Add to this every county with a hydroelectric project faces the potential of multi-year construction projects to repair and maintain an aging infrastructure. These consequences highlight the substantial interest counties have in reviewing the environmental impacts of hydroelectric projects. Applying CEQA to this process protects county interests and promotes the development of environmental review documents and feasible mitigation measures.

The application of CEQA in this context protects county interests and is clearly provided for in the law. The history of the CWA shows it was the intent of lawmakers to preserve the role of State law to set conditions on federal licensed and permits. Courts have consistently upheld this role for the State any time there is a water discharge point that requires a federal license or permit. However, there have been federal preemption challenges to CEQA's applicability in other fields, including rail and railroad transportation, habitat protection, and mining, which are likely to recur without clear resolution from this court.

The California State Association of Counties agrees with Plaintiffs as to both issues presented that CEQA is not preempted by the Federal Power Act. (16 U.S.C. § 791 et seq.) Therefore, CSAC urges this Court to reverse the Third District's ruling and find that CEQA review of the State's decision to pursue relicensing of a State-owned hydroelectric project is not preempted by the FPA, nor does the Act preempt State court challenges to as environmental impact report prepared pursuant to section 401 of the CWA.

III. ARGUMENT

A. Removing CEQA review from relicensing processes in California would have significant practical consequences and undermine counties' efforts to engage in meaningful environmental analysis.

1. Hydroelectric projects have a considerable impact on the environment in ways that call for full environmental review.

There are 124[2] active FERC hydropower licenses in California. The communities in which these projects are placed, including CSAC's member counties, are directly impacted by such licenses in a variety of ways, including water availability and quality and construction impacts. These drastic changes to the environment necessitate full review. Counties therefore have a significant interest in understanding the environmental review process used in renewing such licenses.

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[2] *Complete List of Active Licenses* (July 6, 2020) FERC <https://www.ferc.gov/sites/default/files/2020-07/ActiveLicense_07.06.2020.xlsx> (as of Aug. 3, 2020).

CEQA ensures that counties have the ability to participate in the development of environmental review documents and mitigation measures, and, if needed, to challenge the sufficiency of such documents and mitigation in State court under the CEQA statutes. The DWR, the party that prepared the EIR challenged in this action, agrees that CEQA is not preempted, and that it affords them the framework to have a discussion with the Counties and others on the merits of the Department of Water Resources' (DWR) environmental review for its Oroville relicensing project. Preempting CEQA from the State's decision-making process removes an essential layer of environmental protection needed where, as here, the project uniquely affects the environment and is itself affected by climate change.

a) Hydroelectric projects shape water quality and availability.

Hydroelectric projects transform entire regions, and their effect on water availability and quality demands comprehensive review in a context that does not exclude local and State concerns. At a minimum, hydroelectric projects divert and store large quantities of water, creating water availability for recreational, residential, and agricultural uses, and providing flood control. The operation of these projects can "alter stream flows, water temperature, turbidity (amount of sediment in the water), and oxygen content[3]." For example, hydroelectric dams hold large reservoirs of water but are susceptible to environmental processes that pose serious threats to water quality and availability.

[3] *Hydroelectric Power* (2020) Water Education Foundation <https://www.watereducation.org/aquapedia/hydroelectric-power> (as of Aug. 5).

Sediment from upstream water that slows as it enters the reservoir can accumulate, causing the larger particles to settle to the bottom.[4] The deposited sediments can trap chemicals from agricultural run-off, in addition to metals, which are eventually discharged downstream.[5] Deeper reservoirs, like the one at Oroville, can develop thermal stratification, a process in which warm and cold water separate to create two distinct layers. Releasing water from either layer can result in downstream water temperature changes in excess of 20 degrees Fahrenheit.[6] Sedimentation and thermal stratification create dissolved oxygen levels too low to support aquatic life. "[R]epeated or prolonged exposure to such low levels has detrimental effects on [aquatic life] activity, feeding, growth rates, and other normal biological functions," even if oxygen levels are adequate at other times.[7]

In addition to the environmental processes that are endemic to reservoirs, hydropower is distinctively vulnerable to the effects of climate change. The State has increased its reliance on hydropower since 2001, and it now accounts for 15% of California's energy consumption.[8] Droughts can have devastating practical consequences.

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[4] Enion, *Rethinking National Wildlife Federation v. Gorsuch: The Case for NPDES Regulation of Dam Discharge* (2011) 38 Ecology L.Q. 797, 805.

[5] *Ibid.*

[6] *Id.* at p. 810.

[7] Bevelhimer & Coutant, *Assessment of Dissolved Oxygen Mitigation at Hydropower Dams Using an Integrated Hydrodynamic/Water Quality/Fish Growth Model* (March 2006) Oak Ridge National Laboratory <https://info.ornl.gov/sites/publications/files/Pub3612.pdf> (as of Aug. 21, 2020).

[8] Gleick, *Impacts of California's Five-Year (2012-2016) Drought on Hydroelectric Generation* (April 2017) Pacific Institute <https://www.courthousenews.com/wp-content/uploads/2017/04/Calif-Hydroelectric-Drought-Study.pdf> (as of Aug. 5, 2020).

During the most recent drought, which brought some of the driest conditions ever recorded in the State, hydropower was reduced by as much as 41% between 2012 and 2016, representing an estimated market value of $2.45 billion.[9] This number signifies both the cost of hydropower that was lost as well as the cost of more expensive, non-renewable sources of energy to meet the shortfall, a cost borne by energy consumers State wide.

The impacts of hydroelectric projects on water quality and water availability highlight the importance of a multi-level approach. CEQA review- required both to guide State agency decisionmaking for a public project and to inform the State's 401 certification process- ensures the meaningful participation of those counties most impacted by these projects. And when needed, impacted counties must have recourse in State court under State law to protect resources and compel consideration of State environmental quality objectives.

b) Counties face increasingly disruptive construction impacts as aging hydroelectric facilities require extensive repairs and maintenance.

The construction and operation of hydroelectric facilities leaves a lasting impression on the environment, both for the immediate surrounding area and for the environments downstream of the facilities. Maintenance and repair of hydroelectric projects can extend these impacts well past the original construction, an increasingly common scenario as dams and reservoirs across the State are aging and more FERC licenses expire.

[9] *Ibid.*

CEQA Guidelines call for State decisionmakers to consider construction impacts on the environment, a necessary evaluation in the planning of multi-year projects that will require construction down the road to remain operational. (Cal. Code Regs., tit. 14, § 15604, subd. (b).) Dam and reservoir hydroelectric facilities provide a good example of the kind of involved and high-priced repairs projects may require as they grow older. The typical lifespan of a dam is 50 years, but the average age of California's dams is 70.[10] In 2019, the State's dams received a "C-" grade from the American Society of Civil Engineers (ASCE), indicating these facilities "show[] general signs of deterioration and require[] attention. Some elements exhibit significant deficiencies in conditions and functionality, with increasing vulnerability to risk."[11]

That vulnerability to risk materialized in 2017 when the emergency spillway at the Oroville Dam suffered structural damage that necessitated the evacuation of residents from Butte, Yuba, and Sutter counties.[12] The subsequent repairs took two years to complete and had detrimental effects on county resources. In 2019, the DWR and Butte County reached a $12 million settlement to restore County maintained roads damaged by the heavy truck traffic during construction.[13]

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[10] *Report Card for California's Infrastructure* (May 2019) ASCE (hereafter *Report Card*) p. 26.

[11] *Id.* at p. 6.

[12] *Lake Oroville Timeline: $100 Million in Damage, Evacuees Returning But More Rain On The Way*, L.A. Times (Feb. 14, 2017) p. 1.

[13] *Butte County and DWR Reach Settlement on Road Repairs Following Oroville Spillways Incident* (Oct. 15, 2019) CDWR <https://water.ca.gov/News/News-Releases/2019/October-19/Butte-County-and-DWR-Reach-Settlement-on-Road-Repairs-Following-Oroville-Spillways-Incident> (as of Aug. 21, 2020).

However, the Oroville Dam is still classified by ASCE as high-hazard, due to the potential for widespread damage if it were to fail.[14] The dam will need maintenance construction in the future to stay functional. If the $1.1 billion price of the spillway repair is any indication, the price of future maintenance is sure to rise steeply as the dam ages.[15]

With maintenance repairs certain in the future, licenses of hydroelectric projects commit the resources of their host counties and the State. During the response to the 2017 spillway incident at Oroville, the California Governor's Office of Emergency Services activated the State Operations Center in Sacramento and Governor Brown issued a State of emergency declaration to help mobilize disaster response resources and support the local evacuations.[16] It simply does not follow to exclude county enforcement of State law from the State's decisionmaking process regarding whether and how to pursue relicensing. CEQA review of these projects is essential to counties as they work to protect their resources and communities.

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[14] Casey, Lieb, & Minkoff *California Has Six of the Nation's 1,680 High-Hazard Dams Deemed in Risky Condition*, L.A. Times (Nov. 12, 2019) p. 1, *Report, supra,* at p. 27.

[15] Vartabedian, *Oroville Dam Repair Costs Soar Past $1 Billion*, L.A. Times (Set. 5, 2018) p. 1 (as of Aug. 21, 2020).

[16] *Oroville Spillway Incident Resource Page*, Cal OES <https://www.caloes.ca.gov/ICESite/Pages/Oroville-Spillway-Incident.aspx> (as of Aug. 21, 2020).

2. Counties have a substantial interest in understanding and engaging with CEQA review of State agency decisionmaking as to relicensing projects.

Courts have long recognized that "the conservation of waters of [California] is of transcendent importance. Its waters are the very life blood of its existence." (*Gin S. Chow v. Santa Barbara* (1933) 217 Cal. 673, 702.) Counties have a substantial interest in understanding and engaging with the licensing and relicensing process as a means to proactively protect this "life blood" as well as their communities. Because hydroelectric projects have real, physical effects on the environment, the counties that house these projects rely on CEQA to ensure that State agencies consider environmental standards in their decisionmaking process. Applying CEQA review in this context makes certain that counties can analyze and mitigate the environmental effects that directly impact their communities.

a) CEQA's mitigation measure requirements guarantee agencies will consider environmental impacts.

CEQA's "substantive mandate" requires public agencies to refrain from approving projects if there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects. (*Mountain Lion Foundation v. Fish and Game Com.* (1997) 16 Cal.4th 105, 134; see also Pub. Resources Code, § 21002.)

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The mitigation measures must be "enforceable through project permit conditions, agreements or other measures [in order] to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded." (*Federation of Hillside and Canyon Assns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1260-1261, see also Pub. Resources Code, § 21002.1, subd. (b); CEQA Guidelines, § 15126.4, subd. (a)(1)-(2).) Contrast this with the FPA, which requires "[FERC] to give equal consideration to energy conservation, protection, mitigation and enhancement of fish and wildlife, protection of recreational opportunities, and the preservation of other aspects of environmental quality." (*State ex rel. State Water Resources Control Bd. v. FERC* (1992) 966 F.2d 1541, 1559.) This is far from a substantive mandate, and the limited scope of the FPA cannot be a substitute for the DWR's distinct responsibility as the CEQA lead agency tasked with identifying and considering mitigation measures of its own project.

As the lead agency under CEQA, the DWR "plays a pivotal role in defining the scope of environmental review, lending its expertise in areas within its particular domain, and in ultimately recommending the most environmentally sound alternative." (*Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 904.) The State, in an act of self-governance, requires public agencies like the State-owned DWR to comply with CEQA. When, as here, the lead agency relies on incomplete information that does not contemplate future environmental changes, CEQA provides counties the avenue for challenging the sufficiency of the lead agency's impact assessment and proposed mitigation measures.

Removing CEQA review from the State's decision-making process would deprive the communities that are home to these hydroelectric projects the benefit of a vigorous environmental review that includes taking into account feasible mitigation measures.

B. Finding CEQA is not preempted by the FPA is consistent with the legislative history of the CWA and with the case law.

Courts have consistently interpreted the CWA and CEQA to allow for coordinated certification requirements that contemplate State law in conjunction with federal licensing. Without this coordination, key safeguards are lost, principally the State and local perspectives that are vital to informing robust environmental review. The loss of these perspectives could have implications that extend beyond the hydroelectric licensing and relicensing sphere.

CEQA preemption by a federal statutory scheme has also been raised in railroad and rail transportation, habitat conservation, and mining, to name a few, and is likely to come before the courts again. CSAC urges this Court to find the FPA does not preempt CEQA for the purposes of relicensing a hydroelectric project, consistent with the intent behind and interpretation of the law.

1. The CWA authorizes the application of State laws to federal licensing and permitting procedures to protect water quality.

The State water quality certification requirement found in section 401 of the CWA has been read by many courts to include State review of the environmental impacts of the licensing and relicensing of hydroelectric projects on water quality and beyond.

"[Section 401's] terms have a broad reach, requiring State approval any time a federally licensed activity 'may' result in a discharge . . . and its object comprehends maintaining State water quality standards." (*S. D. Warren Co. v. Med. Bd. of Envtl. Prot.* (2006) 547 U.S. 370, 380.) (hereafter *S.D. Warren Co.*) The legislative intent to protect this power of the States predates the CWA itself. "Section 401 recast pre-existing law and was meant to 'continu[e] the authority of the State . . . to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.'" (*S.D. Warren Co., supra,* 547 U.S. at p. 380.)

Section 401 is "most reasonably read as authorizing additional [State] conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." (*Pud No. 1 v. Wash. Dep't of Ecology* (1994) 511 U.S. 700, 712 (hereafter *Pud. No. 1*).) In affirming this statutory authority, the Supreme Court has held "[s]ection 401[] thus allows the State to impose 'other limitations' on the project in general to assure compliance with various provisions of the Clean Water Act and with 'any other appropriate requirement of State law.'" (*Pud No. 1, supra,* at p. 711.) Congress was clear in its intent that section 401 brings State law into the domain of federal licensing and permitting. "The purpose of the certification mechanism provided in [the CWA] is to assure that Federal licensing or permitting agencies cannot override State water quality requirements." (Sen. Rep. No. 92-414, 2d Sess. (1972), reprinted in 1972 U.S. Code Cong. & Admin. News p. 3735.)

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As such, CEQA is the most appropriate path for counties seeking to ensure hydroelectric projects meet the State's environmental objectives. "The foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 390, citing *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal.3d 247, 259.) This broad objective "compel[s] government at all levels to make decisions with environmental consequences in mind." (*Id*. at p. 393.) CEQA guarantees that the long-term protection of the environment be the guiding criterion in public decisions, a necessary framework for analyzing the environmental impacts of FERC's 30 to 50 year licenses. (Pub. Resources Code, § 21001, subd. (d).)

2. CSAC urges this Court to find that CEQA is not preempted by the FPA, a holding consistent with the Court's opinion in *Friends of Eel River* and others.

It is important for this Court to recognize that the questions raised in this case broadly touch on issues outside of the context of renewing a license for a hydroelectric facility. Most recently, in *Friends of Eel River*, this Court denied federal preemption of State law in the field of railroads and rail transportation, recognizing that "we must consider a presumption that, in the absence of unmistakably clear language, Congress does not intend to deprive the state of sovereignty over its own subdivisions to the point of upsetting the usual constitutional balance of state and federal powers." (*Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, 690.)

The distinction made by the Third District of the Court of Appeal of the deregulatory effect of the Interstate Commerce Commission Termination Act at issue in *Friends of Eel River* and the regulatory effect of the Federal Power Act relevant here does not consider the common thread. They are both statutes which operate to preempt their respective areas, with clear exceptions for specified State action. *Friends of Eel River* clearly governs a case like this one, in which the State has required CEQA compliance for a State agency's decisions on a State-owned project.

Federal preemption of CEQA was also at issue in *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306. In that case, Appellant, a tax-exempt nonprofit land trust created by an environmental advocacy group to receive land from the City set aside as a mitigation measure, argued that sections of the Internal Tax Code relating to private foundations preempted the City's requirements under CEQA. In denying this argument, the Fourth District of the Court of Appeal correctly found that there could be no way "that by enacting legislation designed to obtain revenue for the federal government Congress intended to completely and exclusively define what entities a local agency should be required to approve as owners and/or managers of mitigation land under a California statute, CEQA." (*Id*. at p. 1327.)

The trial court in *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252 held CEQA was preempted by the National Environmental Policy Act of 1969 (NEPA) and the County was therefore not required to conduct CEQA review of a surface mining operation situated on federal land under the control of the Bureau of Land Management. In denying this argument, the Fifth District of the Court of Appeal held "CEQA expressly recognizes there will be projects in which both CEQA and NEPA apply. In such cases, CEQA provides means of cooperation to avoid unnecessary duplication.

However, the State or local *lead* agency must still ensure that CEQA is fully complied with[.]" (*Id*. at p. 280.)

Even considering just the field of hydropower in isolation, some 500 hydroelectric projects licensed by FERC will require relicensing in the next decade, indicating future potential challenges to State law.[17] Taking into account the larger picture, the case law illustrates multiple attempts across various fields to limit or eliminate CEQA compliance from projects in the State through federal preemption. Whether it be due to the lead agency acting as a marketplace participant, or because the purportedly preemptive statute lacks unmistakably clear language to that effect, the courts in these cases found no preemption of CEQA. With so many FERC licenses expiring, counties will benefit from a holding by this Court that CEQA is not preempted by the FPA for the purposes of public agency decisionmaking on a hydroelectric project.

IV. CONCLUSION

For the foregoing reasons, CSAC respectfully requests that this Court reverse the Court of Appeal's decision that CEQA is preempted by the FPA in public agency decisionmaking as to the relicensing of hydroelectric projects.

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[17] Hearing on Discussion Drafts Addressing Hydropower Regulatory Modernization and FERC Process Coordination under the Natural Gas Act, Hearing before House Subcom. On Energy and Power, 114th Cong., 1st Sess., p. 8 (May 13, 2015), testimony of Ann F. Miles.

WORD COUNT CERTIFICATION

I certify that this brief and accompanying application contain a total of 4,874 words as indicated by the word count feature of the Microsoft Word computer program used to prepare them.

Dated: August 28, 2020

Respectfully submitted,

By: 

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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**

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8/28/2020

Date

/s/Laura Hirahara

Signature

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