S271869

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHEVRON U.S.A., INC., et al.

Plaintiffs and Respondents,

v.

COUNTY OF MONTEREY, et al.

Defendants,

PROTECT MONTEREY COUNTY and DR. LAURA SOLORIO

Intervenors and Appellants.

After a Decision by the Court of Appeal,

Sixth Appellate District, Case No. H045791

Monterey County Superior Court Case No. 16-CV-3978

(and consolidated cases), The Hon. Thomas Wills

AERA ENERGY LLC'S OPPOSITION TO INTERVENORS' REQUEST FOR JUDICIAL NOTICE

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OPPOSITION TO MOTION FOR JUDICIAL NOTICE

Respondent Aera Energy LLC ("Aera") respectfully submits this opposition to Intervenors and Appellants Protect Monterey County and Dr. Laura Solorio's (collectively, "PMC") motion for judicial notice as to Exhibits D and E.

Aera does not oppose the request for judicial notice as to the cognizable components of Exhibits A–C, but objects to the extent that Exhibits A–C include non-cognizable legislative history. (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, (2005) 133 Cal.App.4th 26, 37–39.) The cognizable legislative history of Public Resources Code Section 3106[1] is relevant to understanding the dual purposes of the statute to increase the ultimate recovery of underground hydrocarbons, while balancing that purpose against preventing, as far as possible, damage to life, health, property, and natural resources. Though PMC ignores the oil production purpose throughout its opening brief, and its characterizations of the

[1] All subsequent statutory references unless otherwise noted are to the Public Resources Code.

legislative intent are flawed, Aera does not oppose the Court's consideration of the cognizable aspects of Exhibits A–C.

However, Aera opposes the request for judicial notice of Exhibits D and E, which are two executive orders issued in 2018 and 2020,[2] on two separate grounds: (1) PMC misleads by omitting that the orders were not available to the trial court when it adjudicated the claims; and (2) the orders are not relevant to any issues in this appeal because they reflect views of the executive branch—and not the legislative branch—and were issued decades after the relevant statutes were enacted. The orders are also not legally binding, and their content is unrelated to regulation of oil and gas production and do not even mention the specific statutory provision at issue in this appeal.

Accordingly, PMC's request should be denied as to Exhibits D and E.

[2] Exhibit D is referred to herein as "2018 order," Exhibit E is referred to "2020 order," and collectively they are referred to as the "orders."

LEGAL ARGUMENT

1. The Executive Orders Issued in 2018 and 2020 Did Not Exist at the Time the Trial Court Rendered Its Judgment, and Therefore Judicial Notice of Them Is Not Appropriate

The executive orders issued in 2018 and 2020 attached as Exhibit D and Exhibit E to PMC's motion did not exist at the time the trial court rendered its judgment, and therefore judicial notice of them is not appropriate. California Rules of Court ("CRC"), Rule 8.252(a)(2)(D) provides that a request for judicial notice "must state: … (D) [w]hether the matter to be noticed relates to proceedings occurring after *the order or judgment* that is the subject of the appeal." (CRC, Rule 8.252, subd. (a)(2)(D), italics added.) The rule applies to requests for judicial notice filed in this Court. (CRC, Rule 8.520, subd. (g) [directing parties to seek judicial notice under CRC, Rule 8.252, subd. (a)].)

A party is also required to state whether the matter to be judicially noticed was presented to the trial court, and if so, whether judicial notice was taken by the court. (CRC, Rule 8.252, subd. (b).) If the trial court did not take judicial notice, the request must explain why the subject matter is subject to judicial

notice under Evidence Code sections 451, 452, and 453. (CRC, Rule 8.252, subd. (c).) PMC failed to do so.

In a sleight of hand maneuver, PMC's request states that the "executive orders [i.e. Exhibits D–E] predate the issuance of the *appellate* opinion that is the subject of this appeal to the Supreme Court." (1-RJN-7, italics added.) Conveniently, the request fails to mention that the executive orders *do not* predate the *trial court's* order and judgment, the final statement of decision. (31-AR-7545–7591) The orders were issued in 2018 and 2020, but the bench trial below occurred in December 2017, and the trial court entered the statement of decision resolving the trial court proceedings on January 25, 2018. (31-AA–7591) Therefore, the trial court had neither of the executive orders before it when the trial court rendered its decision, and they are not relevant here for that reason alone.

CRC, Rule 8.252, subdivison (a)(2)(D), requires PMC to explain whether the materials it seeks judicial notice of relate to proceedings after the "order or judgment" that is the subject of the appeal. Here, the judgment was issued by the trial court, not the Court of Appeal. PMC's request did not comply with the rule.

This is not merely a technical defect—PMC's request is deliberately misleading. Even if the Court of Appeal's decision is said to be the order leading to this Court's grant of the petition for review, the Court of Appeal's review was in turn limited to the record at the trial court where neither of the two executive orders had been issued.[3] Thus, whether the trial court's statement of decision or the Court of Appeal's decision is considered the order leading to this Court's review, the fact remains the executive orders did not exist during the trial court proceedings, rendering them irrelevant. (Cf. *Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 924 fn. 13 [declining to take judicial notice of legislative history of statute that became effective after underlying events leading to the claim].)

PMC's request also states "[t]he parties did not request that the trial court grant judicial notice of these records." (1-RJN-7) Of course the parties did not make such a request because the materials *did not exist* until more than a year after

[3] PMC's Opening Brief also argues at length for why field preemption does not invalidate Measure Z, an issue considered *only* by the trial court and not the Court of Appeal. (*Chevron U.S.A., Inc. v. County of Monterey* (2021) 70 Cal.App.5th 153, fn. 14.)

(or three years after in the case of Exhibit E) the trial court issued its statement of decision. For this reason alone, Exhibits D and E are not relevant and the request should be denied. (*Diego*, *supra,* 231 Cal.App.4th at p. 924 fn. 13.)

Accordingly, the Court should deny the request and decline to grant judicial notice of Exhibits D and E. And, critically, as explained next, the recent executive orders are irrelevant to the statutory issues in this dispute.

2. The 2018 and 2020 Executive Orders Are Not Relevant Because They Do Not Show Any Legislative Intent for Section 3106, and Are Not Helpful to Resolving Any Issues

A general precondition to taking judicial notice is that the matter proffered is relevant to a material issue presented in the appeal. (Evid. Code, § 350 [only relevant evidence is admissible]; *Ste. Marie v. Riverside County Regional Park & Open-Space Dist.* (2009) 46 Cal.4th 282, 293, fn. 7; see *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422–423, fn. 2 [matter to be judicially noticed must be relevant to material issue]; *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063–1064 ["[J]udicial notice, since it is a substitute for proof [citation], is always confined to those matters which are

relevant to the issue at hand."], overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257.)

Evidence proffered in a request for judicial notice must relate to some matter properly at issue in the case, and it must have probative worth (i.e., some logical tendency to prove the matter at issue). (Evid. Code, § 210; *Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1029; *Ruiz v. Minnesota Mining & Mfg. Co.* (1971) 15 Cal.App.3d 462, 468, fn. 3 [relevance test is that the evidence must have a logical tendency to prove the disputed matter—i.e., to create a reasonable inference as to the existence or nonexistence of the fact at issue].) This is true even where the material is of the type that is generally subject to judicial notice. (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 747 fn. 6 [denying judicial notice of official acts where not necessary, helpful, or relevant].)

Here, the executive orders are not relevant to resolving this appeal for several reasons. First, the orders were issued by the State's executive branch, not the Legislature, so the orders do not reflect any legislative intent of Section 3106. (See *Professional Engineers in California Government v. Schwarzenegger* (2010) 50

Cal.4th 989, 1015–1016 [observing that the authority to enact or amend statutes resides solely in "the Legislature," not the executive branch, and that "the ultimate authority to establish or revise" legislative enactments does not belong to the Governor].) Thus, the recent executive orders cannot be entitled to any weight whatsoever as to interpretation of section 3106, subdivisions (a), (b) an (d), which have been in their current form since 1972, long before the orders issued.

Nonetheless, PMC contends the orders "reflect the state's goals and priorities over time." (1-RJN-6) Regardless of whether PMC's contention is true or not, it bears no relevance here where resolving the implied preemption issues involves an analysis of what the *Legislature* intended for the implementation of Section 3106. Resolving that issue requires an inquiry into Section 3106's language, purpose, and the *legislative* intent, not any non-binding *executive* orders that did not attempt a legislative intent analysis.

Second, beyond the separation of powers problem, the executive orders logically cannot show any relevant legislative intent because they were issued *decades* after the germane amendments to Section 3106. PMC and Aera both acknowledge

that the relevant statutory provisions are: (1) the 1961 amendment (subdivision (b)); (2) the 1970 amendment (now located in subdivision (a)); and (3) the 1972 amendment (subdivision (d).) (See Intervenors' Opening Brief. at pp. 13–17; see also Aera's Answering Brief at pp. 13–16.) Though PMC argues the environmental protection purpose "overrides" the statutory purpose of oil and gas production—which is not true because the statute does not make preference as to which purpose is paramount—it still remains that the relevant statutory provisions were passed *50-60 years* before the issuance of the executive orders PMC now seeks to have admitted, and the Legislature has not amended them since the issuance of the executive orders.

Thus, PMC's case citation for the proposition that the executive branch's view may be relevant to a statutory interpretation is disingenuous here. (See 1-RJN-7, citing *Robinson v. Fair Employment & Housing Commission* (1992) 2 Cal.4th 226, 234–238.) In *Robinson*, this Court considered a challenge brought under California's Fair Employment and Housing Act ("FEHA") and conducted a statutory construction analysis to review the lower court's resolution of the legal

challenge. (*Id.* at p. 234.) In doing so, this Court explained it would look to "the legislative history of the [FEHA] … and to administrative construction *reasonably contemporaneous* with the law's adoption in order to ascertain the Legislature's intent." (*Ibid.*, italics added.) The Court did not (and likely would not ever) look to executive or administrative views that are not contemporaneous to glean a legislative intent, much less to executive orders having nothing to do with the specific statutory provisions in question, as PMC is asking the Court to do here.[4]

Third, setting aside whether an executive branch's views could be relevant more than 50 years after a statute's enactment, the content of the orders has no relevance to the issues in this appeal because the orders relate to energy independence and consumption, not production. The orders outline policies for the State to achieve carbon neutrality by a specific year in the future, and are largely not directed at oil and gas *production*, but instead

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[4] Ironically, PMC's position throughout the litigation has largely ignored the 1976 Attorney General's opinion on preemption of local laws by Section 3106, which is much more contemporaneous view of the executive branch on the legislative intent, and thus more relevant. Moreover, an Attorney General's opinion is an attempt to glean the legislative intent of a statute, distinguishing it from executive orders which do not mention the applicable statutes at all.

focus on implementing policies for lowering gas *consumption* and the creation of alternative sources of energy. (See 7-RJN-478 [2018 order discussing carbon sequestration targets], 481 [2020 order discussing goal for the State to have zero-emission trucks], 482 [2020 order directing state agencies to enact policies to accelerate deployment of affordable fueling and charging centers for zero-emissions vehicles].) And though it is true the 2020 order does have some direction regarding oil extraction, it merely states that DOGGR shall implement regulations to ensure responsible practices are used to protect the public. (7-RJN-483) That statement simply reiterates the statutory dual purposes of Section 3106, which are to promote the increased production of oil and gas, balanced with protecting public health and the environment. (See Aera's Answering Brief at pp. 22–25.)

Fourth, even if it could be said that the Executive Branch can alter a legislative enactment decades later by issuing a policy statement, the executive orders on their face specify that they are not legally binding, and thus they cannot resolve the issue of whether Measure Z is preempted by Section 3106. (7-RJN-478 [2018 order "is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in

equity, against the State of California, its agencies, departments, entities, officers, employees, or any other person."], 484 [same disclaimer in 2020 order].) Accordingly, the orders are not helpful, necessary or relevant to this appeal, and they are unfit for judicial notice.

Ultimately, PMC's introduction of these the executive orders is a not-so-subtle attempt to imply that the State is putting its thumb on the scales in favor of prohibiting oil production, and thus, should be seen as support for the kind of ban Measure Z enacted. PMC argues that the orders are "important context" for showing how the State directs DOGGR to "implement its statutory obligations in light of the urgent and growing need to address climate change." (1-RJN-7) Not so. Nothing in the orders affect the mandate DOGGR has to regulate and authorize methods of oil and gas production to achieve Section 3106's dual purpose of increasing energy resource production balanced with protecting the environment. The request is an attempt to improperly influence the Court on a policy matter, and should be denied.

CONCLUSION

Aera respectfully requests that the Court deny the request for judicial notice as to Exhibits D and E and not consider them or any of their contents in resolving this appeal.

DATED: June 27, 2022

Respectfully submitted,
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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.504(d)(1), undersigned counsel certifies that this Aera Energy LLC's Opposition to Intervenors' Request for Judicial Notice consists of 2,400 words, including footnotes but excluding the cover, tables, signature block, and this certificate, according to the word count generated by the program used to prepare this request.

DATED: June 27, 2022

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PROOF OF SERVICE

Chevron U.S.A., Inc., et al. v. County of Monterey, et al.
Case No. S271869

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 Contra Costa, State of California. My business address is 1676 N. California Blvd., Suite 620, Walnut Creek, CA 94596.

On June 27, 2022, I served true copies of the following document(s) described as:

AERA ENERGY LLC'S OPPOSITION TO INTERVENORS' REQUEST FOR JUDICIAL NOTICE

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I served the document(s) on the person(s) listed in the Service List by submitting an electronic version of the document(s) to the Court's Electronic Filing System (EFS) operated by ImageSoft True Filing (True Filing) as indicated on the attached service list.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 27, 2022, at Concord, California.

/s/ Elaine T. Maestro
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