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

PLAINTIFFS' OPENING BRIEF ON THE MERITS

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ISSUES 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?

PRELIMINARY STATEMENT

The Oroville Dam is the largest earthen dam in the United States. First licensed in 1957, the dam and its associate Oroville Facilities are a central feature of California's State Water Project. Although subject to the Federal Energy Regulatory Commission's ("FERC") jurisdiction over electric generating facilities, the Oroville Facilities also provide statewide water delivery and storage, and are operated for other purposes, including flood control, recreation, and protection of fish and wildlife.

The Oroville Facilities initial 50-year FERC license expired in 2007. California's Department of Water Resources—the facilities' owner and operator—is charged with determining whether, and upon what terms, it will seek a new long-term license. In California, that determination requires DWR to assess the facilities' environmental impacts under the California

Environmental Quality Act, Public Resources Code section 21100 et seq. ("CEQA"). Because a new FERC license will allow operations for another fifty years, an accurate assessment of the environmental conditions under which the Oroville Facilities will operate—including increasingly frequent periods of extreme drought and flooding—is critical to understanding how relicensing will affect California's environment and water resources.

Until the Court of Appeal ruled, sua sponte, that the Federal Power Act preempted CEQA here, no party to this case ever questioned DWR's obligation to comply with CEQA, nor has FERC questioned that obligation. For good reason. Compliance with the CEQA is a core element of California's self-governance. Under this Court's decision in *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal. 5th 677, 705, courts must presume "that Congress would not alter the balance between state and federal powers without doing so in unmistakably clear language." No such clear statement exists in the Federal Power Act. Indeed, the Act specifically reserves the States' powers "relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses." (16 U.S.C. § 821.)

Nonetheless, relying on case law interpreting the preemptive reach of the Federal Power Act over the licensing of privately-operated dams, the Court of Appeal held that applying CEQA to DWR's project was a regulatory action that the Federal Power Act preempted. However, the

requirement that state agencies comply with CEQA when assessing environmental impacts of state projects is not regulatory action. It is an essential expression of California's sovereignty, protected under the U.S. Constitution's federalist system.

Notably DWR, opposes preemption and supports adjudicating the merits even though it prepared the Environmental Impact Report ("EIR") challenged here. "[B]ased on the reasoning" of *Friends of the Eel River*, DWR recognized that the Court of Appeal "has jurisdiction to reach the merits" and "the Federal Power Act should not be read to preempt the State from requiring one of its own agencies—here, DWR—to comply with CEQA in undertaking its own project." (DWR's Opening Supplemental Brief, filed May 23, 2019, at p. 8.) The State Water Resources Control Board ("State Board") likewise opposes preemption on these grounds.

Additionally, the Federal Power Act does not, and cannot, preempt state court challenges to an EIR prepared for federal water quality certification under section 401 of the federal Clean Water Act, 33 U.S.C. § 1341. Section 401 requires federal license applicants, such as DWR, to obtain state certification that a project complies with state water quality standards. Certification must include conditions meeting both Clean Water Act requirements and "any other appropriate requirements of state law." (33 U.S.C. § 1341(d).)

Congress reserved this authority solely to the States, and FERC does not have jurisdiction to reject the conditions of a state 401 certificate. (See, e.g., *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700, 712-22 ("*Jefferson County*").) Instead, state law challenges to a state's 401 certificate must be brought in state court. Accordingly, the Federal Power Act does not preempt challenges to an EIR prepared to comply with section 401 certification.

For over 11 years, Butte County, Plumas County, and Plumas County Flood Control and Water Conservation District ("the Counties") have pursued this action to ensure that DWR comply with CEQA, and ensure that the substantial environmental impacts of DWR's project are analyzed and mitigated. This Court should reverse the Court of Appeal's decision and remand this case with directions to rule on the merits of the Counties' CEQA claims.

STATUTORY BACKGROUND

I. The Federal Power Act

Congress enacted the Federal Power Act, 16 U.S.C. § 791 et seq., to create "a broad federal role in the licensing and development of hydroelectric power" throughout the country. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 957.) The Act authorizes FERC to act as the primary regulator of hydroelectric projects and issue licenses for project construction and operations. (16 U.S.C.

§ 797.) Congress's delegation of authority to FERC, however, does not determine the extent to which Congress intended the Federal Power Act to preempt state law. (*California v. FERC* (1990) 495 U.S. 490, 496-97.)

Although the U.S. Supreme Court has interpreted the Act to generally preempt state regulation of hydroelectric projects (*id.* at p. 502), FERC's jurisdiction over those projects is not plenary. The Federal Power Act "establishes a dual system of control," split between the FERC and the States. (*First Iowa Hydro-Electric Cooperative v. Federal Power Com.* (1946) 328 U.S. 152, 167.) The Act does not affect state powers in areas where Congress has not expressly regulated, or where the U.S. Constitution reserves authority exclusively for the States. (*Ibid.*) For instance, the Federal Power Act does not address, much less constrain, a State's internal decisions when seeking a new FERC license for a public hydroelectric project. The Act also expressly preserves state authority over "proprietary" water uses, including projects that serve municipal and irrigation purposes. (See *County of Amador*, *supra*, 76 Cal.App.4th at pp. 958-60 [discussing 16 U.S.C. § 821].)

II. The Clean Water Act

Section 401 of the federal Clean Water Act establishes a system of cooperative federalism for maintaining water quality when federal agencies license or permit projects. (33 U.S.C. § 1341.) Congress authorized state agencies to "certify" whether the proposed actions would comply with the

Clean Water Act and "any other appropriate requirement of State law." (*Id.* § 1341(d).)

The Federal Power Act does not preempt a State's requirements adopted for a water quality certification under section 401. The U.S. Supreme Court has broadly interpreted state authority under section 401(d) to ensure compliance with state water quality objectives. (*Jefferson County, supra*, 511 U.S. at pp. 713-14.) "Not a single sentence, phrase or word in the Clean Water Act purports to place any constraint on a State's powers to regulate the quality of its own waters more stringently than federal law may require." (*Id.* at p. 723 (J. Stevens, concurring).) Rather, "the Act recognizes States' ability to impose stricter standards." (*Ibid.*) The Clean Water Act therefore requires FERC to accept and incorporate into a license any water quality conditions that a State imposes on a hydroelectric project through section 401. (*American Rivers, Inc. v. FERC* (2d Cir. 1997) 129 F.3d 99, 107.)

III. The California Environmental Quality Act

CEQA prescribes a "meticulous process designed to ensure that the environment is protected." (*Planning and Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892, 911.) That process generally applies to any public agency discretionary determination regarding a "project." (Pub. Resources Code § 21080(a); Cal. Code Regs. tit. 14 ("CEQA Guidelines") § 15002(i).) A "project" is an activity undertaken,

supported, or approved by a public agency that may cause a physical change in the environment. (Pub. Resources Code § 21065; CEQA Guidelines § 15378.) Consequently, CEQA's procedures apply both when agencies regulate private projects and when agencies independently pursue public projects. (*Friends of the Eel River*, *supra*, 3 Cal.5th at pp. 711-12; see also *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112 [CEQA applies when an agency uses "its judgment in deciding whether and how to carry out the project"].)

If a project might have a significant effect on the environment, CEQA requires a lead agency to prepare an "EIR" to study the project's potential impacts. (Pub. Resources Code §§ 21100, 21151; CEQA Guidelines § 15063(a), (b).) An EIR, like the one DWR prepared here, also must identify project alternatives and mitigation measures that would reduce the severity of the project's significant environmental impacts. (CEQA Guidelines §§ 15126.4, 15126.6.) The EIR's discussion of project alternatives and mitigation is the "the core of the EIR." (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162.) If an agency approves a public project with significant environmental impacts, it must incorporate all feasible mitigation measures into the project. (Pub. Resources Code §§ 21002, 21081(a)(1), (b).)

Even if a project does not require mitigation, an EIR serves as a "document of accountability," which ultimately protects "informed self-government" in California. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512.) CEQA's "foremost principle" is that "the Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" (*Id.* at p. 511 (citation omitted).)

STATEMENT OF THE CASE

I. The Oroville Dam

DWR owns and operates the Oroville Facilities. Developed as part of the State Water Project, the facilities serve as a keystone of California's water storage and delivery system. (Administrative Record ("AR") C000033.) The Oroville Facilities are "operated for flood management, power generation, water quality improvement in the Sacramento-San Joaquin Delta, recreation, and fish and wildlife enhancement." (AR G000128.)

The central feature of the Oroville Facilities is the Oroville Dam, the largest earthen dam in the United States, which is located on the Feather River in Butte County. (AA 11:95:2369[1]; AR G002501-02.) The dam was first licensed in 1957 and constructed between 1961 and 1968. (AA

[1] Citations to the Appellants' Appendix ("AA") appear herein as "AA [volume]:[tab]:[page number]."

11:95:2369.) It "blocks access to 66.9 miles of high-quality habitat for anadromous fish," including salmon and steelhead. (AA 11:95:2369.) Its operation further impairs regional water quality (AR G002440), imposes ecological and economic costs on Butte County (AR G002538-2606), and creates risks for fisheries and other resources in Plumas County (AR H000363-70).

II. DWR's Relicensing Efforts

DWR is both the project proponent and CEQA lead agency for the Oroville Facilities relicensing project. (AR C001740; see also Pub. Resources Code § 21067 ["'Lead agency' [is] the public agency which has the principal responsibility for carrying out or approving a project."].) DWR's 50-year federal license to operate and maintain the Oroville Facilities (FERC Project No. 2100) expired on January 31, 2007. (AR C000033.) Since then, the Oroville Facilities have operated on temporary licenses, which renew annually by operation of law. (See 16 U.S.C. § 808(a)(1).) FERC has not issued a decision on DWR's pending license application.

In 2001, FERC granted DWR permission to use FERC's Alternative Licensing Process, 18 C.F.R., section 4.34(i), to pursue a new license. (AR B000617-18.) That process authorizes certain "alternative procedures for pre-filing consultation and the filing and processing of an application" for a new license. (18 C.F.R. § 4.34(i).)

Neither state nor federal agencies anticipated that the Alternative Licensing Process would supersede CEQA's application to DWR's relicensing decisions. Instead, DWR proceeded with the environmental review required by state law. In 2001, DWR issued a combined NEPA and CEQA scoping notice, which acknowledged that the Alternative Licensing Process would incorporate requirements of NEPA, CEQA, and comply with other "State and federal resources agencies [sic] approval and permitting processes." (AR C000027, C000033, C000216.)

In 2003, DWR issued an amended scoping notice recognizing that an EIR may be required, both for the State Board's decision-making "over Section 401 Water Quality Certification" *and* "to support decision-making by DWR." (AR C001739.) The notice recognized that "all the requirements of NEPA and CEQA must eventually be satisfied." (AR C001740.) DWR then undertook the role of "Lead Agency in preparing the EIR for the relicensing of the Oroville Facilities and for use by the SWRCB in issuing Section 401 Water Quality Certification." (*Ibid.*)

In January 2005, DWR submitted its initial application to FERC to renew the Oroville license for another 50 years. (AR B066039-50.) Butte County expressed concerns about the extensive environmental impacts that would occur if the Oroville Facilities continued operating for another half-century. (AR C001817-19.)

In March 2006, DWR filed a proposed Settlement Agreement with FERC (AR D000422), which replaced DWR's initial application and became the new proposed project for DWR's CEQA evaluation. The Settlement Agreement includes an Appendix A, which incorporates all of the protections, mitigations, and enhancement measures DWR believed to be necessary for the operation of the Oroville Facilities under a new FERC license. (AR D000835.) The Settlement Agreement also contains an Appendix B, which includes matters that are beyond FERC's jurisdiction, and therefore will not be part of a new license. (*Ibid.*) DWR's EIR analyzed the environmental impacts of matters contained in both Appendices A and B. (AR C001264.)

The Settlement Agreement also stated an intent to resolve among the parties "all issues . . . including 401 Certification, NEPA and CEQA" requirements that might arise during DWR's efforts to obtain permits and other approvals associated with the new project license, while also recognizing that "several regulatory and statutory processes are not yet completed." (AR D000432.)[2] The Settlement Agreement acknowledges that before FERC issues a new project license, "each Public Agency shall participate in the relicensing proceeding, including environmental review

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[2] Butte and Plumas Counties were unable resolve their concerns with DWR, and were excluded from final discussions culminating in the Settlement Agreement. (AR F002488-96, H001095.)

and consideration of public comments, as required by applicable law." (AR D000434.) Additionally, most of the contractual obligations under the Settlement Agreement would not become fully effective until after DWR's "affirmative acceptance of a Final New Project License" issued by FERC. (AR D000429.)

In May 2007, DWR circulated its Oroville Facilities Project Draft EIR. (AR G000004.) The project includes DWR's proposed terms and conditions for relicensing the Oroville Facilities. (AR A000015; G000130.) Beyond generating hydroelectric power, DWR's project objectives also required DWR to meet other commitments and requirements analyzed in the EIR, including decisions affecting water supply, flood control, and protection of Delta water quality and fisheries. (AR G000128, G000190-91.) To meet the project's objectives, DWR needed to show it could continue generating electric power while complying with multiple "statutory, contractual water supply, flood management, and environmental commitments," as well as fishery, water quality, and other obligations. (AR A000013; see also AR G000128, G000158, G000160-63 [describing project objectives].)

DWR planned to "use the [Final EIR] and any supplemental CEQA documents to make all necessary decisions for acceptance and implementation of the new FERC Project License" and implementation of the Settlement Agreement. (AR G000110, G000134.) DWR's EIR also

confirmed that it was the only environmental review document informing the State Board's section 401 water quality certification for the Oroville Facilities, as well as other discretionary decisions by responsible and trustee agencies. (AR G000110, G000134.)

The Counties submitted detailed EIR comments, identifying significant unaddressed environmental impacts and a deficient assessment of alternatives and mitigation. (AR G002406-813, G002817-91.) The Counties' comments criticized DWR's decision to test project performance under only a portion of the past century's range of hydrologic conditions, noting that leading scientists, including DWR's own, had discredited this assumption due to the wider range of flood and drought conditions expected in the new century. (AR H000216-33, H000367-68, H000491-92, H000385-94, L001040-44.) Butte County's EIR comments also criticized DWR for understating the risk of "catastrophic flooding in and downstream of Oroville" from a "failure or uncontrolled spill" at Oroville Dam. (AR H000235.) Other commenters likewise identified significant unaddressed risks in DWR's EIR during both flood and drought conditions. (H000385-94, H000415-81, H000489-95.)

In July 2008, DWR certified the Final EIR and issued its Decision Document approving the Oroville Facilities project. (AR A000003-102.) The Final EIR refused further study, and perpetuated many of the errors identified by EIR comments. For instance, the Final EIR did not study a

broader range of hydrologic conditions or analyze a climate-resilient project alternative, but instead assumed a selective range of last century's hydrologic conditions were "expected to continue for the foreseeable future." (AR H000133.)

DWR's Decision Document, however, confirmed DWR's obligation to comply with CEQA as lead agency for the Oroville Facilities project. (AR A000033, A000059.) After considering the EIR and other pertinent information, "the Director will determine whether to approve the Proposed Project." (AR A000007.) The Decision Document also clarified that DWR's discretion over the project would not usurp FERC's still-unmade decision over the proposed license. Although approval "will not lead to immediate implementation" of the Settlement Agreement, if FERC issues a new license, "DWR will have 30 days to decide whether to accept the license and license conditions." (AR A000008.) If FERC's license is for the proposed project or for the FERC staff alternative analyzed in the EIR, "no additional analysis under CEQA is required and the DWR Director may accept the license." (*Ibid.*)

III. After a Trial on the Merits, the Court of Appeal Rules, Sua Sponte, that the Federal Power Act Preempts this Case.

In 2008, the Counties filed CEQA petitions in Butte County Superior Court, which were consolidated and transferred to Yolo County Superior Court. (AA 1:1:1-28 (Butte County petition), 1:3:30-43 (Plumas

County petition).) The trial court adjudicated the merits of DWR's CEQA compliance in June 2012 and ruled in DWR's favor. (AA 14:124:3046-63.)

Throughout the merits briefing in the trial court and on appeal, DWR and Real Parties in Interest State Water Contractors, et al. ("SWC") defended the necessity and adequacy of the EIR without questioning state court jurisdiction over this action. (See, e.g., AA 1:22:0176-0221, 1:23:0195-0221, 11:94:2304-65, 1:98:2444-506; SWC Respondents' Brief, filed May 31, 2013, at pp. 10-13, 89; DWR Respondents' Brief, filed June 24, 2013, at pp. 3, 8-15, 22, 120.)

However, the Third District Court of Appeal issued an order sua sponte directing the parties to brief whether the proscription on state "veto power" over hydroelectric projects subject to the Federal Power Act, and DWR's Settlement Agreement under FERC's Alternative Licensing Process, preempted the Counties' CEQA challenge. (April 11, 2016 Order at pp. 2-3.) The Third District then held that Federal Power Act preemption barred the Counties from challenging the Oroville Facilities EIR.

The Counties petitioned for review. This Court granted the Counties' petition and transferred the matter back to the Third District with instructions to "reconsider the case in light of *Friends of the Eel River*." (*County of Butte v. Dept. of Water Resources* (2019) 245 Cal.Rptr.3d 411, 411.)

IV. Following Transfer, DWR Rejects Preemption, but the Court of Appeal Again Rules that this Case Is Preempted.

After transfer, the Counties and DWR agreed that *Friends of the Eel River* removed this case from the Federal Power Act's preemptive sphere, and that state courts have jurisdiction to adjudicate the Counties' CEQA action. (See DWR Supplemental Opening Brief, filed May 23, 2019, at p. 8.) Accordingly, DWR asked the Court to "address[] the merits" of the Counties' CEQA claims. (*Id.* at p. 19.)

The Court of Appeal declined and once again concluded that the Federal Power Act preempts this case. Its new opinion attempts to distinguish *Friends of the Eel River* by contrasting the deregulatory purpose of the Interstate Commerce Commission Termination Act ("ICCTA") with FERC's regulatory authority over environmental protection. (Opinion on Transfer, filed Sept. 5, 2019, at pp. 25-26 ("Opinion").) The Opinion states that the "unmistakably clear" statement requirement applied in *Friends of the Eel River* does not extend to the Federal Power Act (*id.* at pp. 26-27), and concludes that even when applied to public projects like DWR's, "CEQA laws . . . are regulatory acts pure and simple" (*id.* at p. 29).

The Opinion also applies preemption to the EIR's role informing the State Board's water quality certification. The Opinion states that any "environmental predicate" to certification is subject to FERC review (*id.* at

p. 5), and that CEQA review for water quality compliance can await a later "implementation" stage (*id.* at p. 19).

The Counties filed their second Petition for Review on October 15, 2019.[3] The Court granted review on December 11, 2019.

STANDARD OF REVIEW

Federal preemption of state law presents a question of statutory interpretation that this Court reviews de novo. (*In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10.)

ARGUMENT

I. The Federal Power Act Lacks an Unmistakably Clear Congressional Statement of Intent to Preempt State Self-Governance.

Under the U.S. Constitution's federalist system, the States "retained 'a residuary and inviolable sovereignty,'" through which they "remain independent and autonomous within their proper sphere of authority." (*Printz v. United States* (1997) 521 U.S. 898, 919, 928.)

Fundamental to this sovereignty is the States' authority to constitute and govern their political subdivisions. "Through the structure of its government . . . a State defines itself as a sovereign." (See *Gregory v. Ashcroft* (1991) 501 U.S. 452, 460.) Consequently, "[t]he number, nature

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[3] Amicus letters supporting the petition were filed by the California Association of Counties; Friends of the River, California Sportfishing Protection Alliance, Friends of the Eel River, and the Sierra Club; and the California Water Impact Network and AquAlliance.

and duration of the powers conferred upon [subdivisions] . . . rests in the absolute discretion of the State." (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 254-55 [quoting *Hunter v. Pittsburgh* (1907) 207 U.S. 161, 178-79].)

Courts are highly reluctant to interfere with this essential sovereignty by reading congressional enactments to "interpos[e] federal authority between a State and its . . . subdivisions." (*Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, 140-41; see also *Parker v. Brown* (1943) 317 U.S. 341, 351 ["an unexpressed purpose to nullify a State's control over its officers and agents is not lightly to be attributed to Congress"].) If Congress intends to alter the usual balance of powers between the States and Federal Government, "it must make its intention to do so *unmistakably clear in the language of the statute*." (*Gregory, supra*, 501 U.S. at p. 460 (quoting *Atascadero State Hospital v. Scanlon* (1985) 473 U.S. 234, 242; emphasis added); *City of Los Angeles v. County of Kern* (2014) 59 Cal.4th 618, 631, abrogated on other grounds.) This heightened clear statement rule operates with greater force than other clear statement requirements (*John v. United States* (9th Cir. 2001) 247 F.3d 1032, 1042-43 (Tallman, J., concurring)) and avoids potential constitutional infirmities that could arise from reading "federal legislation . . . to trench on the States' arrangements for conducting their own governments" (*Nixon, supra*, 541 U.S. at p. 140).

For these reasons, in *Friends of the Eel River*, this Court unequivocally held that federal law does not preempt CEQA's application to California agency decisions about whether and how to pursue publicly owned and operated projects. Such decisions "constitute[] self-governance on the part of a sovereign state and at the same time on the part of an owner." (*Friends of the Eel River*, *supra*, 3 Cal.5th at p. 723; see also *City of Columbus v. Ours Garage and Wrecker Service, Inc.* (2002) 536 U.S. 424, 437 ["Whether and how" a State exercises its discretion in allocating responsibilities to its subdivisions "is a question central to state self-government."].) "CEQA prescribes how governmental decisions will be made when public entities . . . are charged with approving, funding—*or themselves undertaking*—a project with significant effects on the environment." (*Friends of the Eel River*, *supra*, 3 Cal.5th at p. 712 [citing Pub. Resources Code § 21065].) Thus, the Legislature's determination to require CEQA compliance for DWR's public projects reflects California's sovereign control over its subdivisions.

DWR's actions here are prototypical exercises of discretion over a public project with significant effects on the environment. The relicensing of the dam is not mandatory. (See 16 U.S.C. § 808 [discussing possible relicensing scenarios, including the Federal government taking over the dam or issuing a new license to a different licensee].) DWR *chose* which project to pursue, and its EIR was necessary to inform the agency's

ultimate decision to approve that project. (See AR A000007 ["After the [DWR] Director's review and consideration of the [EIR], the Director will determine whether to approve the Proposed Project"]; AR G000129 [describing discretionary choice among the "no project" alternative and two project alternatives]; see also AR G000134 [confirming DWR's future exercise of discretion].)

DWR's obligation to comply with CEQA when pursuing its relicensing project is precisely the type of state requirement that "is highly unlikely that Congress intended" to preempt. (*Nixon*, *supra*, 541 U.S. at p. 126.) CEQA must be preserved absent an unmistakably clear statement from Congress to the contrary.

The Federal Power Act's text and legislative history do not exhibit any congressional intent to interfere with state self-governance. Instead, they reflect Congress's "determination to avoid [an] unconstitutional invasion of the jurisdiction of the states." (*First Iowa*, *supra*, 328 U.S. at p. 171.)

In reaching a contrary conclusion, the Court of Appeal discussed three sections of the Federal Power Act, none of which contain unmistakably clear language divesting California of its control over DWR's decision-making. The Opinion primarily discusses Federal Power Act section 27 (16 U.S.C. § 821), which does not even mention preemption of a

State's control of its subdivisions. (See Opinion at pp. 13-14.) Rather, section 27 expresses Congress's desire to *preserve* state authority:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

(16 U.S.C. § 821.) Although courts have read a broad negative pregnant into this savings clause to preempt certain state regulation of private hydroelectric facilities (see *Sayles Hydro Associates v. Maughan* (9th Cir. 1993) 985 F.2d 451, 454), this judicial interpretation does not equate to an unmistakably clear *congressional* statement to preempt DWR's CEQA obligations here. (See *City of Abilene v. FCC* (D.C. Cir. 1999) 164 F.3d 49, 53 [a statute must "indicate whether *Congress* focused on the effect on state sovereignty"].)

Sections 4(e) and 10(a) of the Federal Power Act also fall short of the heightened clear statement requirement. (*See* Opinion at pp. 4, 25 [citing 16 U.S.C. §§ 797(e), 803(a)(1)].) These sections require FERC to consider energy conservation, and recreational and environmental protection when deciding whether to issue a license, and authorize FERC to modify a project as needed to achieve these policy objectives. (16 U.S.C. §§ 797(e), 803(a)(1).) They do not mention, much less strip away, state control over subdivisions operating hydroelectric facilities.

Because the Federal Power Act lacks any clear intention to preempt a State's directions to its subdivisions to consider environmental factors when deciding whether and how to pursue a new license for a hydroelectric project, the Act does not preempt DWR's obligation to comply with CEQA here.

II. *Friends of the Eel River*'s Heightened Clear Statement Rule Applies to this Case.

The Court of Appeal incorrectly dismissed *Friends of the Eel River*'s applicability, ruling that the unmistakably clear statement requirement that this Court articulated did not apply under the Federal Power Act. (Opinion at pp. 22-27.)

The Court of Appeal first erred by asserting that the U.S. Supreme Court had "rejected" application of the heightened clear statement requirement to the Federal Power Act. (Opinion at pp. 22, 26-27 [discussing *First Iowa*, *supra*, 328 U.S. 152 and *California v. FERC*, *supra*, 495 U.S. 490].) Neither *First Iowa* nor *California v. FERC* applied, much less "rejected," the clear-statement rule that was central to *Friends of the Eel River*, *Nixon*, and predecessor cases. (See *Gregory*, *supra*, 501 U.S. 452.) The Court of Appeal was the first court to conclude that this heightened clear statement rule does not apply to Federal Power Act preemption.

Nor does the Federal Power Act's regulatory purpose distinguish it from *Friends of the Eel River* or other cases applying the heightened clear statement rule to separate federal statutes. (*See* Opinion at p. 22-25.) Whether a federal statute has regulatory or deregulatory components (or both, like the ICCTA; see *Friends of the Eel River*, *supra*, 3 Cal.5th at pp. 706-08) is irrelevant to determining whether the statute's preemptive scope stretches beyond state regulation to invade state self-governance. Critically, although both the ICCTA and Federal Power Act preempt certain *regulation* of private actors (*id.* at pp. 714–15; *County of Amador*, *supra*, 76 Cal.App.4th at p. 959), neither statute contains unmistakably clear language that preempts state *self-governance*.

Moreover, the Opinion's search for a significant distinction between the ICCTA and the Federal Power Act overlooks other similarities between these statutes. The Ninth Circuit has observed that the ICCTA and Federal Power Act have a "similarly broad preemptive scope." (*City of Auburn v. United States* (9th Cir. 1998) 154 F.3d 1025, 1031 [citing *California v. FERC*, *supra*, 495 U.S. at pp. 506-07 and *Sayles Hydro*, *supra*, 985 F.2d at p. 456].) In enacting the ICCTA, Congress "intended to occupy completely the field of state economic regulation of railroads" (*Cedarapids, Inc. v. Chicago, Central & Pacific Railroad Co.* (N.D. Iowa 2003) 265 F.Supp.2d 1005, 1013), which courts have construed as precluding state environmental regulation of private activity (*City of Auburn*, *supra*, 154

F.3d at p. 1030; see also *Friends of the Eel River*, *supra*, 3 Cal.5th at pp. 714-15 [the ICCTA prevents the States from "invad[ing] the regulatory field" of the Surface Transportation Board]).

The similarities between the regulatory authority crafted by the ICCTA and the Federal Power Act further confirm that there is no meaningful basis for distinguishing between these acts here. The ICCTA assigns wide (and exclusive) regulatory powers to the Federal Surface Transportation Board, which mirror FERC's authority over hydroelectric facilities. (See *Friends of the Eel River*, *supra*, 3 Cal.5th at p. 707 ["A number of [rail] transactions require approval from the [Surface Transportation Board]," including "licensing of railroad construction and operations" and "authorization to abandon a rail line or discontinue service."], 731, fn. 7 [acknowledging Surface Transportation Board authority to "implement[] NEPA" for a "railroad owned by the state"].)

Even with robust federal regulation, the ICCTA allows public and private rail operators to exercise discretions over the projects they own. Although not necessary for *Friends of the Eel River*'s outcome, this "zone of freedom" confirmed this Court's separate conclusion under the heightened clear statement doctrine that CEQA review for State-sponsored projects was not preempted. (See *Friends of the Eel River*, *supra*, 3 Cal.5th at p. 740.) Similarly here, and as discussed further below, nothing in the

Federal Power Act preempts or removes a prospective licensee's freedom to exercise its discretion in seeking a new license from FERC.

III. The Federal Power Act Does Not Eliminate a Licensee's Discretion When It Pursues a New License.

Even if preemption here did not threaten to trench on California's core sovereign functions, the Federal Power Act would not preempt the State's requirement that DWR, as owner and operator of the Oroville Facilities, conduct CEQA review to guide its project decisions.

"[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 [quotation omitted].) Courts start with the presumption that Congress did not intend to displace state law absent a "clear and manifest purpose" to do so. (*Ibid.*) This presumption against preemption applies to both the existence and scope of preemption. (*In re Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at p. 1088.)

The U.S. Supreme Court has conclusively determined that Federal Power Act preemption only displaces conflicting state *regulation* of hydroelectric projects. (*First Iowa*, *supra*, 328 U.S. at p. 181.) It does not reach beyond that subject matter to preempt other state powers that might relate to hydroelectric projects but do not interfere with FERC's regulatory authority. (*See id.* at pp. 166-67; see also *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.* (2d Cir. 2012) 673 F.3d 84, 99

[the Federal Power Act "leaves intact countless state powers, not just the hydropower-related ones specifically 'saved' by section 27"].)[4]

Moreover, the Federal Power Act and FERC's licensing process leave applicants such as DWR discretion to decide whether and how to pursue a new license. Applicants exercise their discretion when they decide whether to pursue a new license from FERC in the first instance. Applicants must also determine the details of a project, including its location and engineering details, and prepare studies assessing the project for use by FERC and other agencies. (18 C.F.R. § 4.38(b)(2).) And nothing in the Federal Power Act nor FERC's regulations prohibit an applicant from pursuing additional project improvements or accepting legal obligations beyond FERC's jurisdiction, as DWR did here. (See AR C000055; G000112 [DWR's project includes activities that fall "outside of FERC's jurisdiction"].)

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[4] The First District Court of Appeal separately held that section 27 defines the universe of California's regulatory power related to hydroelectric facilities. (See *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region* (2010) 183 Cal.App.4th 330, 356-58.) That holding is inconsistent with *First Iowa*'s recognition that state regulation in this field may persist beyond the boundaries of section 27. (See *First Iowa, supra*, 328 U.S. at p. 178; see also *N. Hartland, LLC* (2002) 101 FERC ¶ 61157, 61644, fn. 12 [citing same].) This Court need not resolve that inconsistency, however, because unlike *Karuk Tribe*, this case implicates California's sovereign self-governance, not the scope of the State's regulatory authority over private parties.

Even after filing a license application, an applicant may materially amend the application (18 C.F.R. § 4.35(b)) or pursue a different licensing procedure (18 C.F.R. § 4.34(i)(7)). If an applicant disagrees with the terms of a final license, it may contest them or reject the license. (16 U.S.C. § 825l; 18 C.F.R. § 385.713.) Licensees may also abandon or transfer a license that FERC has issued. (16 U.S.C. § 799; 18 C.F.R. §§ 6.1-6.4.)

Here, DWR's final Decision Document confirmed DWR's continuing discretion over the project when it certified the EIR. DWR explained that "after certification of the EIR, the DWR Director *may* approve the Proposed Project." (AR A000008 [emphasis added].) That discretionary decision, however, would not usurp FERC's still-unmade decision on DWR's proposed license. And if FERC issues a new license, DWR will maintain discretion over the project: "DWR will have 30 days to decide whether to accept the license and license conditions." (*Ibid.*)

For these reasons, requiring CEQA compliance here does not grant California "veto power" over FERC's license determination. Rather, CEQA guides *DWR*'s independent decisions about whether and how to proceed with the project, and through that process promotes mitigation and avoidance of potential environmental harms. (*In re Bay-Delta, supra*, 43 Cal.4th at p. 1162.) In fashioning these guideposts for agency decision making, CEQA does not cement an agency's path toward a decision, or

decide where that path ends. (See *County of Amador*, *supra*, 76 Cal.App.4th at p. 961 [CEQA does not "mandate how a project should be run"].)

Nor does CEQA impose additional requirements on *FERC*'s relicensing process or otherwise intrude on that process in a manner that would effectively veto FERC's regulatory authority.[5] Significantly, throughout the lengthy administrative proceedings culminating in DWR's project approval, FERC never objected to DWR's application of CEQA to its project. Rather, FERC and DWR coordinated their respective federal and state environmental processes from the outset. (See, e.g., AR C000027, C001740 [joint CEQA/NEPA scoping document].) FERC's actions during that process align with FERC's prior recognition that a State subdivision's authorization to seek a hydropower license from FERC is a matter of state law. (*Allegheny Elec. Cooperative, et al.* (1990) 51 FERC ¶ 61268, 61854-55; *Appomattox River Water Authority* (1989) 49 FERC ¶ 61313, 62174-75.)

In sum, the Federal Power Act does not displace applicants' discretion in seeking a new license from FERC, and it does not reach rules

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[5] The Counties acknowledge that their petitions encompass the full suite of remedies typically available in CEQA actions, including injunctive relief against DWR pending CEQA compliance. (See AA 1:1:24, 1:3:41.) However, the Counties do not seek an injunction in the FERC proceedings, nor will they request the Superior Court to enjoin those proceedings.

like CEQA that govern California's discretionary decisions about the State's hydroelectric projects.

IV. The Federal Power Act Preserves State Requirements for Projects, Like DWR's, that Serve Proprietary Uses.

Even if DWR were acting as a regulator here, which it is not, it is well settled that the Federal Power Act *does not* preempt state regulation of projects like the Oroville Facilities that implicate proprietary water uses. (*California v. FERC*, *supra*, 495 U.S. at p. 498.) Section 27 of the Act expressly preserves such state requirements. (*Ibid.*) Consequently, CEQA obligations are also preserved when California agencies consider projects that serve both proprietary and non-proprietary uses. (*County of Amador*, *supra*, 76 Cal.App.4th at pp. 958-60.)

County of Amador is instructive. There, petitioners filed a CEQA action challenging a State agency's decision to acquire a hydroelectric dam. (*Id.* at p. 940.) The Court of Appeal held that the Federal Power Act did not preempt this state court challenge because the dam was not "devoted solely to power generation," and would provide water for consumption. (*Id.* at p. 961.) The agencies' acquisition fell within the Federal Power Act's savings clause, which preserved California's requirement that the agencies comply with CEQA. (*Ibid.*)

Likewise here, DWR's Oroville Facilities project is not limited to generating hydroelectric power. Rather, the project will serve multiple non-

hydroelectric functions, including providing crucial water supply for California. (AR G000128, G000190-91; see also AR G000158 ["the objective of the Proposed Project is to continue generating electric power while continuing to meet existing commitments . . . pertaining to water supply, flood management, the environment, and recreational opportunities"]; G000160-63 [describing DWR's water supply objectives and commitments].) Likewise, according to FERC, DWR's Settlement Agreement is intended to "protect and enhance existing water use" in addition to serving other uses. (AR E000054.) That water use includes operating the Oroville Facilities to provide water to local water agencies along the Feather River and to distribute water downstream for consumption. (AR E000127-28.)

Indeed, the Oroville Facilities are a central feature of California's State Water Project. (AR C000033; *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 693.) It is well understood the State Water Project is subject to numerous requirements of state law, including laws that protect water quality and water rights. (*See generally State Water Resources Control Board Cases*, 136 Cal.App.4th 674; State Board Request for Depublication, filed November 4, 2019, at p.5 ("State Board Depublication Letter").)

As in *County of Amador*, because DWR's project serves proprietary uses, section 27 of the Federal Power Act expressly preserves DWR's

obligation to comply with CEQA in seeking a new license for the Oroville Facilities.

V. The Federal Power Act Does Not Insulate from Judicial Review an Environmental Impact Report Prepared to Support a Water Quality Certification.

In addition to *Friends of the Eel River*'s holding and the Federal Power Act's savings clause, the Clean Water Act fortifies the conclusion that federal law does not preempt a challenge to DWR's CEQA review here. Under Clean Water Act section 401, the States retain authority to review and impose conditions upon a FERC license to protect water quality. The Court of Appeal recognized this exception to Federal Power Act preemption (Opinion at p. 15), but its ruling is inconsistent with long-standing federal law recognizing the States' broad authority under section 401. As the State Board has explained, an EIR informing state certification is not subject to FERC review and approval, contrary to the Court of Appeal's decision. (State Board Depublication Letter at pp. 2-3.) Rather, as detailed below, FERC has no authority to second guess a State's 401 certification. State law challenges to a 401 certification—including the adequacy of the environmental review for a certificate—must also occur in state court. Accordingly, the Federal Power Act does not preempt this challenge to the environmental document DWR prepared for the State Board's 401 certification.

A. The Clean Water Act Promotes State Authority to Require Hydroelectric Facilities to Comply with State Water Quality Standards.

Section 401 of the Clean Water Act requires federal license applicants to obtain certification from a State that a project will comply with the State's water quality standards. (33 U.S.C. § 1341.) The State's certification must include conditions "necessary to assure" compliance with specific provisions of the Clean Water Act and "any other appropriate requirement of State law." (*Id.* § 1341(d).)

The U.S Supreme Court has recognized that "[s]tate certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution." (*S.D. Warren v. Maine Bd. of Environmental Protection* (2006) 547 U.S. 370, 386.) Congress adopted this policy to "protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." (33 U.S.C. § 1251(b).)

Under Clean Water Act section 401, States retain the right "to deny a permit and thereby prevent a Federal license or permit from issuing." (Sen. Rep. No. 92-414, 2nd Sess., p. 3735 (1971).) If the State issues a denial, "no license or permit could be issued by" Federal agencies, including the "Federal Power Commission, . . . unless the State action was overturned in the appropriate courts of jurisdiction." (*Ibid.*)

Consequently, the Federal Power Act does not preempt California law supporting a water quality certification. (*Jefferson County*, *supra*, 511 U.S. at pp. 713-14.) Rather, in *Jefferson County*, the U.S. Supreme Court broadly interpreted States' authority under section 401(d) to include requiring compliance with state water quality objectives and "any other appropriate requirement of State law set forth in such certification." (*Id.* at 714.)[6]

Jefferson County upheld a Washington Supreme Court decision holding that section 401(d) empowers States to "consider all state action related to water quality in imposing conditions on section 401 certificates." (511 U.S. at 710 [quoting *Department of Ecology v. PUD No. 1* (1992) 121 Wash.2d 179, 182].) The Washington Supreme Court upheld a two-year environmental study addressing numerous environmental matters, including water quality, hydrology, instream flows, and protection of fisheries habitat. (*Department of Ecology*, *supra*, 121 Wash.2d at pp. 184, 194.)

Additionally, FERC cannot reject conditions that a State imposes through a water quality certification even if FERC believes the conditions exceed the State's power or are unrelated to water quality issues. (*American*

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[6] *Jefferson County* also found preemption inappropriate because there, as here, FERC had "not yet acted" on the license application. (511 U.S. at p. 722.) The Counties' action, brought solely against DWR under CEQA, does not challenge any enacted federal license provision.

Rivers, *supra*, 129 F.3d at p. 107 [FERC's attempts to deem a State certification procedure ultra vires was contrary to the "unequivocal" language and broad State authority under section 401(d)].) State conditions imposed through a water quality certification must be included in the Federal permit or license. (33 U.S.C. § 1341(d).) "FERC may not alter or reject [such] conditions." (*United States Dept. of the Interior v. FERC* (D.C. Cir. 1992) 952 F.2d 538, 548; see also *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians* (1984) 466 U.S. 765, 779 [FERC lacks authority to reject conditions that the Secretary of Interior certifies as necessary to protect Indian reservation].)

B. State Certifications Under Section 401 Are Subject to State Court Review.

In California, the State Board is the "certifying agency" for section 401 water quality certifications. (Wat. Code § 13160; see generally Cal. Code Regs., tit. 23, § 3855, et seq.) The Board conducts CEQA review before issuing a certification (*Id.* §§ 3856(f), 3837(b)(2)), including for decisions supporting a FERC license (*Id.* § 3855(b)(1)(B)(2)).

The State Board's requirement for CEQA review is not disputed here. Because relicensing of the Oroville Dam required a 401 certification, which required CEQA review before the State Board would issue a certificate, "[a]ll parties to the proceedings, and the Court of Appeal, recognized . . . that the Water Board's decision to issue the 401 Certificate

for the relicensing required compliance with CEQA." (SWC Answer to Petition for Review, filed November 4, 2019, at p. 32.)

Significantly, the Federal Power Act does not preempt a state court challenge to the adequacy of environmental review for a 401 certification. *American Rivers* specifically addressed the process for challenging a 401 certification. There, Vermont challenged FERC's rejection of the State's 401 certification, which attached conditions to the relicensing of several dams. Although FERC argued that the Federal Power Act empowered it to determine whether the conditions were within Vermont's authority, the Second Circuit disagreed. (*American Rivers*, *supra*, 129 F.3d at pp. 101-02.) The court held that FERC's authority over a 401 certification is highly circumscribed:

> While [FERC] may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period, [FERC] does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401.

(*Id.* at pp. 110-11.) If FERC objects to a 401 certification, its only remedy is to deny a license for the project. (*Ibid.*; see also *Escondido*, *supra*, 466 U.S. at p. 778, fn. 20 [FERC "is not authorized to seek review of its own decisions"].)

American Rivers and *Escondido* thus demonstrate that the Federal Power Act does not preempt challenges to a State's action under section

401. To the contrary, state court is the proper forum for such challenges "because the breadth of State authority under Section 401 results in most challenges to a certification decision implicating only questions of State law." (*Alcoa Power Generating, Inc. v. FERC* (D.C. Cir. 2011) 643 F.3d 963, 971; see also *Roosevelt Campobello Internat. Park Com. v. EPA* (1st Cir. 1982) 684 F.2d 1041, 1056 (challenges to a 401 certification must be brought through a state's "applicable procedures"); but see *Exelon Generation Co. v. Grumble* (2019) 380 F.Supp.3d 1, 10-11 [Federal constitutional challenges to 401 certification may be brought in federal court].)

The limit on FERC's authority to reject a State's 401 certification and the requirement that most challenges be brought in state court show that the Federal Power Act does not preempt litigation against an environmental impact report prepared for a 401 certification. This result accords with the central role that section 401 of the Clean Water Act grants States in the FERC relicensing process. (*S.D. Warren, supra*, 547 U.S. at p. 386.)

Preserving the right to challenge CEQA compliance for the State's 401 certification also aligns with this Court's holding that CEQA compliance is a fundamental attribute of state self-governance: "[i]t seems evident that the state's interest in self-governance extends to designing a system of enforcement. It is not unusual for the state to authorize citizen

enforcement of state-adopted rules governing how the state and its subdivisions will conduct the public's business." (*Friends of the Eel River*, *supra*, 3 Cal.5th at pp. 731-32.)

The Court of Appeal nonetheless held that such a state court challenge can be brought only upon project implementation. (Opinion at pp. 20, 30, fn. 22.) That conclusion is inconsistent with CEQA's requirement that challenges be brought following project *approval*. (Pub. Resources Code §§ 21108, 21167(b); see also *Friends of the Eel River*, *supra*, 3 Cal.5th at p. 713 (CEQA informs decision-makers of the "environmental consequences of their decision" before they are made [internal quotation omitted].) Moreover, as a practical matter, litigants cannot wait to challenge a project's ultimate implementation because the approval date (not implementation) triggers a very short, often 30-day, limitations period for challenging an EIR or a certification condition. (See Pub. Resources Code § 21167; Wat. Code § 13330(b).)

Here, the Clean Water Act preserves California's right to set the terms on which it will approve a project that affects state water quality, including compliance with and enforcement of CEQA's mandates.

C. The Counties Followed Established Procedure in Their Challenge to the State's Approval of the Oroville Dam.

As the agency carrying out the Oroville relicensing project, DWR is the lead agency tasked with preparing an EIR before committing to that

project. (See CEQA Guidelines § 15051(a).) As DWR recognized, this EIR serves not only to inform DWR's decision, but also discretionary actions by responsible agencies like the State Board, who must also issue approvals for the Oroville Facilities. (AR C001739.)

The Counties filed their challenge to the Oroville Facilities EIR within the time limits established by California law. (Pub. Resources Code § 21167.) The Counties' decisions to challenge the EIR once, rather than by filing multiple challenges against the same document, is consistent with the Legislature's intention to "expedite CEQA review" through a single action against the lead agency's CEQA documentation, instead of multiple suits against each responsible agency. (*City of Redding v. Shasta County Local Agency Formation Com.* (1989) 209 Cal.App.3d 1169, 1181 [interpreting Pub. Resources Code § 21167.3].) Thus, CEQA requires a responsible agency like the State Board to "assume that" DWR's challenged EIR is valid, but any "permission to proceed with the project" conferred by the responsible agency would remain "at the applicant's risk"—here, at DWR's risk—"pending final determination" of the proceeding against the EIR. (Pub. Resources Code § 21167.3(b).)

The Opinion asserts, however, that DWR's EIR is reviewable following action by the State Board, a responsible agency. (See Opinion at p. 12, fn. 14.) Nothing in CEQA supports this conclusion. Duplicative proceedings against both lead and responsible agencies conflicts with well-

established law, and undermines the Legislature's intent that CEQA challenges contest the lead agency's initial environmental determination.

The Counties' action is the proper vehicle through which to challenge the adequacy of the EIR used for the Oroville Facilities' water quality certification. The Federal Power Act does not preempt this state court action.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the Court of Appeal's decision and remand this case with directions to rule on the merits of Plaintiffs' CEQA claims.

DATED: February 10, 2020 LAW OFFICE OF ROGER B. MOORE

By: _____
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DATED: February 10, 2020 SHUTE, MIHALY & WEINBERGER LLP

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CERTIFICATE OF WORD COUNT

In accordance with California Rules of Court Rule 8.504(d)(1), I certify that, exclusive of this certification and the other exclusions referenced in Rule of Court 8.204(c)(3), this **PLAINTIFFS' OPENING BRIEF ON THE MERITS** contains 8,434 words, including footnotes, as determined by the word count of the computer used to prepare this brief.

DATED: February 10, 2020 SHUTE, MIHALY & WEINBERGER LLP

By: _____
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PROOF OF SERVICE

County of Butte et al. v. Department of Water Resources et al.
Supreme Court of the State of California
Case No. S258574

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 San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

On February 10, 2020, I served true copies of the following document(s) described as:

PLAINTIFFS' OPENING BRIEF ON THE MERITS

on the parties in this action as follows:

SEE 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. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the 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 February 10, 2020, at San Francisco, California.

Patricia Larkin

Patricia Larkin

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