NO. C078249

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

CENTRAL DELTA WATER AGENCY, et al.,
Petitioners and Appellants,

v.

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

On Appeal from the Superior Court of Sacramento
The Hon. Timothy M. Frawley, Presiding (Case No. 34-2010-80000561)

APPELLANTS' RESPONSE TO AMICUS CURIAE BRIEF OF PLANNING AND CONSERVATION LEAGUE

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I. Introduction

Appellants Central Delta Water Agency, et al. ("CDWA") submit this Response to the amicus curiae brief filed by the Planning and Conservation League ("PCL"). PCL's brief strongly contradicts repeated, unsupported assertions by Respondents and Real Parties made throughout this litigation. In doing so, the brief provides valuable context and support for CDWA's arguments, particularly regarding the fundamental role CEQA—the *process* of CEQA—plays in agency decision-making, and by extension, in the honest functioning of our representative democracy.

The importance and significance of PCL's amicus curiae brief cannot be overstated. That PCL sought to participate in this Appeal in any capacity is extremely significant, since under the terms of the Settlement Agreement the final payment to PCL and the other plaintiffs could be terminated if any litigation results in a final judgment invalidating any of the Monterey Amendments. (AR 25:12440.) PCL's willingness to file its amicus brief, and thus contribute, however tangentially, to the possible future invalidation of any of the Monterey Amendments, demonstrates the importance to PCL of the issues and arguments contained in its amicus brief. (See

PCL Application at p. 7 [“PCL does not take lightly its decision to participate as an *amicus* here...”].) The potential loss of this final payment is apparently worth taking because of the existential threat Respondents’ actions pose to “CEQA’s most important purpose[:] fully informing decision-makers and the public of ‘the choices before them.’” (PCL Amicus at p. 13, quoting *Planning and Conservation League v. Department of Water Resources*, 83 Cal.App.4th 892, 920 (2000).)

As PCL accurately recognizes, under no circumstances can an agency’s environmental review under CEQA ever be a *fait accompli*. (PCL Amicus at pp. 16-18.) DWR’s “decision” on the Monterey Plus project was not merely a cut corner or two; it was an assault on one of the most important laws in California and on the honest operation of government in general. If DWR’s actions stand, they affect not just the State Water Project, the Kern Water Bank, or the Sacramento-San Joaquin Delta, they affect the role that CEQA will play in all government actions in the future. PCL’s amicus curiae brief, by making clear that in no way did PCL ever condone DWR’s cynical interpretation of the law, is a testament to the importance of these values.

II. The Amicus Curiae Brief Corrects Repeated Misrepresentations by DWR and Real Parties Regarding the *PCL v. DWR* Settlement Agreement

The amicus curiae brief demonstrates that DWR and the real parties repeatedly misrepresented PCL's intentions in signing the Settlement Agreement. (See Defendant and Respondent's Brief at pp. 49-51 [section titled "The Settlement Agreement parties did not agree to take the Contracts out of existence"]; see KWBA Combined Respondents' Brief at pp. 62-69.) CDWA consistently challenged these misrepresentations by citing the plain language of the Settlement Agreement and all of the relevant introduced extrinsic evidence, including the language contained in the one-sided mediation documents inserted in the record by DWR. (Appellants' Opening Brief at pp. 46-51; Appellants' Combined Reply at pp. 24-32.) These documents do not demonstrate any intent by the *PCL* parties to authorize an improper retrospective environmental review process.

Despite the strength of these arguments, there remained a gorilla in the room: the absence of the *PCL v. DWR* plaintiffs from this litigation. While DWR and the real parties were able to essentially "testify" as to their intentions in signing the Settlement Agreement just by filing their briefs in opposition in this litigation, CDWA's

arguments as to the plaintiffs' intentions were restricted to the plain language of the Settlement Agreement and a few self-serving documents authored by the real parties in the course of a confidential mediation process. (See AR 101143-49 [2002 Memorandum]; AR 01137-40 [2007 Memorandum].)

This is no longer the case. PCL's amicus curiae brief disproves all of DWR's and the real parties' arguments concerning the PCL's intentions in crafting and signing the Settlement Agreement. First, PCL places the Settlement Agreement and related extrinsic evidence (the 2003 Joint Motion and the Joint Statement) in context, demonstrating how these documents fail to support DWR's interpretation of the mutual intent of the parties. (PCL Amicus at pp. 12-15.) Second, PCL discusses several documents contained in the administrative record that were not previously discussed in this litigation: the communications between PCL and DWR regarding the draft EIR, particularly two letters by PCL attorney Antonio Rossmann to DWR Director Lester Snow. (PCL Amicus at pp. 16-18.) Here, the consistency of PCL's message is made clear: from the beginning, PCL argued that DWR could not escape its obligations under the law to make a new approval of the project after completing environmental

review, and that any effort to evade this proper decision represented a "breach of trust" by DWR. (AR 180:90710.)

Aside from directly disproving DWR's and Real Parties' arguments as to the mutual intent of the settling parties, PCL's amicus brief provides an important counter to any assumptive weight DWR's and the real parties' briefs previously may have carried. The only assumption concerning PCL's intent that is valid now is the one that PCL demonstrates in its amicus curiae brief: nothing in PCL's 50-year history, including its work in drafting and obtaining passage of CEQA, comports with the notion that PCL would willingly and intentionally sign an agreement that would fail to maintain its fidelity to the core purpose and function of CEQA.

III. The Contested Evidence Demonstrates the Absence of Mutual Intent by the Settling Parties

PCL objects to the use of certain contested evidence on the basis that it was improperly included in the administrative record. (PCL Amicus at pp. 19-20.) Appellants take no position as to whether an amicus brief is the proper means to contest the admissibility of this evidence. The documents were provided by DWR in response to document requests by CDWA and were thus included in the administrative record prepared by CDWA. CDWA did object to the

use of the evidence before the Trial Court, but did not appeal the Trial Court's overruling of this objection. CDWA then cited to and relied on this evidence in support of its briefs on appeal before this Court. (Appellants' Opening Brief at pp. 48-50; Appellants' Combined Reply at pp. 28-29.)

The documents are clearly hearsay and should not be considered as evidence for use in ascertaining the intentions of the *PCL* parties in signing the Settlement Agreement. However, to the extent they are admitted and considered by this Court, far from proving PCL's intent to condone an improper retrospective environmental review, they demonstrate the clear lack of mutual agreement between the settling parties as to the effect of the Settlement Agreement.

As the plain language of the Settlement Agreement is ambiguous, and the parties' intentions in conflict with each other, this Court should interpret the Settlement Agreement in a way that comports with the law. (*In re Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 797-798, quoting *Davidson v. Kessler* (1935) 10 Cal.App.2d 89, 91 ["The Court may not assume, in

the absence of evidence, that the parties intended to make an unlawful contract."].)

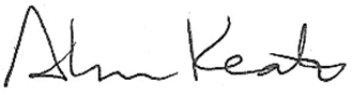
IV. The Amicus Curiae Brief Does Not Disturb CDWA's Argument that It Is the Judge's Intent, Not the Settling Parties', that Governs the Interpretation of the Writ and Order

PCL's amicus curiae brief provides compelling support for CDWA's arguments and should aid this Court in ascertaining the intent of the settling parties in drafting and signing the Settlement Agreement. As CDWA previously discussed, however, the intent of the settling parties is not relevant in interpreting the *PCL v. DWR* trial court's writ and order; it is the judge's intent that matters for those documents. (See Appellants' Opening Brief at p. 47.) Importantly, the rules of interpretation of judicial orders require that any ambiguities in the writ and/or order be interpreted in a way that renders the document lawful and valid. (*Id.* at pp. 28-29, citing *Graham v. Graham* (1959) 174 Cal.App.2d 678, 686.) If anything, PCL's amicus curiae brief supports the conclusion that the writ and order are ambiguous, and therefore this essential interpretative rule governs.

V. Conclusion

DWR and KWBA have repeatedly misrepresented PCL's intent in signing the Settlement Agreement, suggesting that PCL's absence from this litigation demonstrates that all of the parties to the Settlement Agreement held a mutual intent to ignore and avoid one of CEQA's most fundamental and important purposes: to require public agencies to look before they jump. PCL's amicus brief corrects those misrepresentations. Although this Appeal can and should be decided based on this Court's de novo review of the *PCL v. DWR* trial court's writ and order, to the extent the Settlement Agreement is considered, the amicus brief provides significant support for CDWA's position.

Respectfully Submitted,

DATED: July 20, 2016 BY: 

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PROOF OF SERIVCE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I, Effie Shum, declare: I am and was at the times of service hereunder mentioned, over eighteen (18) years of age, and not a party to this action. My business address is 303 Sacramento Street, 2nd Floor, San Francisco, CA 94111.

On July 20, 2016, I submitted the below listed document(s) entitled:

APPELLANTS' RESPONSE TO AMICUS CURIAE BRIEF OF PLANNING AND CONSERVATION LEAGUE

through the TrueFiling system pursuant to the Court's Local Rule 5, which electronically served all counsel registered with TrueFiling.

Further, I served a courtesy copy of the above-listed document(s) on counsel of interested parties via electronic mail, addressed as follows:

SEE ATTACHED ELECTRONIC SERVICE LIST

Executed on July 20, 2016, in San Francisco, California.

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

Effie Shum

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