August 17, 2020

The Honorable Tani G. Cantil-Sakauye, Chief Justice
The Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Stanford Vina Ranch Irrigation Co. v. State of California*
Third Appellate District, Case No. C085762
California Supreme Court Case No. S263378
Association of California Water Agencies, *et al.* Request for Depublication

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Association of California Water Agencies, Northern California Water Association, Sacramento River Settlement Contractors, San Joaquin River Exchange Contractors Water Authority, San Luis & Delta-Mendota Water Authority, State Water Contractors, Tehama Colusa

Canal Authority, Byron Bethany Irrigation District, Central California Irrigation District, City of Ukiah, Contra Costa Water District, East Bay Municipal Utility District, El Dorado Irrigation District, Metropolitan Water District of Southern California, Placer County Water Agency, and Westlands Water District (collectively, "Amici") have filed an amicus curiae letter in support of Petitioner Stanford Vina Ranch Irrigation Company's ("Stanford Vina") petition for review of the Court of Appeal's opinion in *Stanford Vina Ranch Irrigation Co. v. State of California, et al.* (2020) 50 Cal.App.5th 976 (the "Opinion"). Stanford Vina's petition for review of the opinion in the above captioned case was filed on July 21, 2020 and remains pending before this court.

Pursuant to Rule 8.1125(a) of the California Rules of Court, Amici respectfully request that the Opinion be depublished if this Court declines to grant Stanford Vina's petition for review. The Opinion arose from exigent circumstances in a unique factual setting and should not serve as citable precedent to justify upending the due process rights of property owners statewide. The Opinion also fails to meaningfully analyze several legal issues such as the distinction between quasi-legislative and quasi-adjudicatory actions and longstanding rules regarding the State Water Resources Control Board's ("State Board") administration of California's water rights system.

Amici are concerned that the State Board will cite the Opinion to eliminate or substantially curtail procedural due process protections, outside of the circumstances presented by this case. Accordingly, if the Court declines to grant review, it should limit the effect of the Opinion to its unique set of underlying facts by depublishing it.

I. Statement of Interest

Amici are a diverse coalition of water associations and public water agencies engaged in municipal, agricultural, and wildlife refuge water supply service throughout California. Collectively, Amici and their association members are responsible for more than 90% of the water delivered to cities, farms and businesses in California. In addition, these agencies include wildlife refuges that provide water for fish and wildlife uses across the state. Amici depend upon the consistent application of longstanding water rights principles, and on the procedural protections that have historically been applied in adjudicatory proceedings before the State Board and the courts, to ensure that the vast majority of Californians and California businesses have the water they need to survive and thrive.

As explained more fully below, the Appellate Court's Opinion fails to properly analyze the scope of the State Board's quasi-legislative authority and contravenes long-settled legal rules regarding the protections accorded water right holders and administration of water rights. In doing so, the Opinion creates instability and uncertainty for Amici, their rights, and the rights exercised to benefit them and those they serve.

II. This Case Arises in a Unique Factual Setting in a Small Stream System in Northern California Amidst a Statewide Drought.

California's most recent drought, which started in 2012 and continued through 2015, impacted every corner of the state, from the forests of the Sierra Nevada to river flows in the Sacramento

Valley and home landscapes in every county. To address this statewide problem, the Legislature amended Water Code section 1058.5 to permit the State Board to adopt emergency regulations to prevent the unreasonable use of water. Pursuant to this amendment, the State Board, the state agency charged with protection of the public interest in the development of the State's water, twice adopted "emergency" regulations establishing minimum instream flows on Deer Creek, a small stream in rural northern California that ultimately flows to the Sacramento River, through the San Joaquin-Sacramento River Delta, and into the San Francisco Bay before draining to the ocean. The regulations provided that diversions from Deer Creek "that would cause or threaten to cause flows" to fall beneath minimum flow levels established by the State Board constituted a waste and unreasonable use of water under Article X, Section 2 of the California Constitution. (Cal. Code Regs., tit. 23, former § 877.) The stated purpose of the emergency regulations was not to address the impacts and causes of the drought statewide, but rather to protect endangered salmon that sometimes inhabit Deer Creek. (*See* Cal. Code Regs., tit. 23, former § 877(a); Op. at 13 [observing that one curtailment order was suspended "due to the absence of [species of concern] in Deer Creek."].)

During the administrative process, the State Board acknowledged that it would be preferable to undertake "adjudicative water right proceedings" to assign responsibility for minimum instream flows (AR008442, ¶ 18). Nonetheless, the State Board styled its emergency regulations and related enforcement actions as quasi-legislative in nature to avoid compliance with what it characterized as "cumbersome" constitutional due process requirements. (AR008253 p. 27:11-28:6; 008255 p. 33:10-14; 008265 p. 74:11-14; 007815; 008249 p. 11:25-12:3.) The State Board subsequently issued four separate curtailment orders pursuant to the emergency regulations, directing all water right holders on Deer Creek to cease diverting water in 2014 and 2015. (Op. at pp. 10-13.)

Petitioner Stanford Vina filed the underlying civil action in October 2014. The operative complaint alleged that the State Board's adoption of the emergency regulations and issuance of the curtailment orders violated Stanford Vina's constitutional rights to due process and constituted a taking of private property triggering the constitutional requirement of just compensation. This amicus letter focuses on Stanford Vina's due process claims. With respect to those claims, Stanford Vina asserted that the State Board was required under state and federal law to hold an evidentiary hearing before it could adopt and enforce the emergency regulations.

In the trial court, the State Board argued that Stanford Vina was not deprived of due process because the emergency regulations themselves determined that Stanford Vina lacked a constitutionally protected interest in diverting water from Deer Creek. The trial court was understandably troubled by the circularity of this argument: "There is a 'chicken and egg' problem because it is the Water Board's actions, challenged in this case, which ostensibly established Stanford Vina's use was unreasonable and contrary to the public trust." (AR 1758.) Despite its stated reservations, the trial court determined that Stanford Vina was not entitled to the level of due process of law that is required in a quasi-adjudicatory proceeding and that should be accorded to a water right holder because the State Board's adoption of the emergency regulations was "quasi-legislative" in nature. The Court of Appeal upheld this determination. (Op. at 15, 20.) Stanford Vina's Petition for Review was filed on July 21, 2020, and is now pending before this Court.

III. If the Court Declines to Grant Stanford Vina's Petition for Review, It Should Order the Opinion to Be Depublished.

The Court of Appeal's decision in this case is incorrect, overbroad, and should be reversed. But if this Court declines to review the decision below, the Opinion should nevertheless be depublished for the three reasons provided below.

First, one of the threshold questions in this case is whether the State Board's enactment of emergency regulations governing Deer Creek in 2014 and 2015 was quasi-judicial or quasi-legislative. Quasi-judicial actions are subject to the due process clauses of the California and U.S. Constitutions, while the adoption of quasi-legislative actions generally are not. (*See e.g., Bi-Metallic Inv. Co. v. State Bd. of Equalization* (1915) 239 U.S. 441, 445 ["General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."].) An agency acts in a legislative capacity when it formulates a rule to be applied in future cases and in an adjudicative capacity when it applies such a rule to a specific set of facts. (*Patterson v. Central Coast Regional. Com.* (1976) 58 Cal.App.3d 833, 840.) Because the line between judicial and legislative decision-making is not always clear, California courts apply a comprehensive functional analysis in determining whether an action is judicial or legislative in nature, considering a variety of factors in their analysis. (*Wilson v. Hidden Val. Mun. Water Dist.* (1967) 256 Cal.App.2d 271, 280; *California School Boards Assn. v. State Bd. Of Education* (2015) 240 Cal.App.45h 838, 847.)

Here, the State Board admittedly styled its emergency regulations and related enforcement actions as quasi-legislative to avoid compliance with "cumbersome" constitutional due process requirements (AR008253 p. 27:11-28:6; 008255 p. 33:10-14; 008265 p. 74:11-14; 007815; 008249 p. 11:25-12:3). But the State Board's decision to style its actions as quasi-legislative is not outcome-determinative. For many years, California courts have traditionally applied a comprehensive functional analysis to determine whether an action is quasi-judicial or quasi-legislative in nature. (*E.g., Wilson v. Hidden Val. Mun. Water Dist.* (1967) 256 Cal.App.2d 271, 280.) In doing so, courts consider a variety of factors, such as whether the agency is determining the scope of a property right, whether the agency's action is resolving fundamentally political questions, and whether the agency's determination is informed by how it will affect a large community. (*See id.*; *California School Boards Assn. v. State Bd. of Education* (2015) 240 Cal. App. 4th 838, 847.)

The Court of Appeal never undertook a comprehensive functional analysis of whether the State Board's actions in this case were quasi-legislative or quasi-judicial. Instead, it merely stated, in conclusory fashion, that it had "no difficulty concluding the regulations formulated a rule to be applied to future cases, and were therefore legislative in nature." (Opinion at 20.)

The refusal to engage in a comprehensive functional analysis of whether the State Board's actions were quasi-judicial or quasi-legislative constitutes clear error. Indeed, if the Court of Appeal had

engaged in such an analysis, it would have been forced to grapple with this Court's repeated pronouncements that the determination of what constitutes an unreasonable use of water is a factual determination that must account for competing uses and assess alternatives on a case-by-case basis in the context of Article X, section 2's mandate that water "be put to beneficial use to the fullest extent" possible. (*See, e.g., Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal. 2d 132, 139.) And it likely would have reversed the trial court's denial of Stanford Vina's claims under the due process clauses of the California and U.S. constitutions.

Thus, the Court of Appeal's refusal to engage in a comprehensive functional analysis of the State Board's actions constitutes clear error. If this Court declines to review that error, however, it should order the Opinion depublished to ensure that the State Board does not rely on the Opinion to avoid conducting such a comprehensive analysis of this critical and threshold issue.

Second, and similarly, both the State Board and the Court of Appeal below failed to sufficiently analyze whether the curtailment orders at issue could have been more narrowly crafted by considering the relative priority of water rights that may be subject to curtailment. California's rule of priority in water rights administration generally requires the State Board to "recognize and protect the interests of those who have prior and paramount rights to use the waters of [a] stream" by curtailing junior water rights before senior more water rights. (*Meridian, Ltd. v. San Francisco* (1939) 13 Cal.2d 423, 450; *see generally El Dorado Irr. Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937.) As this Court has stated, "water right priority has long been the central principle in California water law." (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1243.) Thus, both the State Board and the Court of Appeal should have considered whether curtailment of more junior rights could have allowed Stanford Vina to exercise its asserted senior rights to divert and beneficially use water from Deer Creek while still obtaining minimum flow objectives.

Here, however, the Opinion's only gesture to this central principle of California water law was to simply state that the State Board did not violate the rule of priority because it did not impose "a condition on a senior appropriator that it did not also impose on more junior appropriators" and implemented its unreasonableness determination by "curtailing all diversions that threatened to violate" the emergency regulations' minimum flow requirements. This level of analysis is insufficient, and directly conflicts with the Legislature's intent in delegating authority to the State Board to adopt emergency regulations in the midst of the statewide drought. (*See* 2013 California Senate Bill No. 104, California 2013-2014 Regular Session, California Committee Report (Feb. 27, 2014) [stating that curtailment regulations would "follow established California water right laws concerning priority."].) The Opinion should be depublished to ensure that the State Board and future courts do not simply disregard the rule of priority and the legislature's intent that it be strictly followed when analyzing future cases involving the State Board's administration of water rights.

Third, and finally, the Opinion should be depublished if this Court declines to grant review to ensure that its flawed analysis is strictly limited to its unique set of facts. Deer Creek is a small stream in a rural and remote area of northern California. It is a small tributary to the Sacramento River on which there are relatively few water diversions. It is far from the major stream systems

and the major infrastructure that form the backbone of California's water supply system. The Opinion recognized these unique circumstances when it referenced "…the Board's determination that, as the trial court put it, 'allowing diversions to reduce flows below the minimum, 'belly-scraping' amounts necessary for fish migrations and survivability would be 'unreasonable,''…" (Op. at 30.) It is certainly not representative of the statewide drought conditions that motivated the Legislature to amend Water Code section 1058.5. (*See* Sen. Bill No. 104 (2013-2014 Reg. Sess.) § 1 ["The Legislature finds and declares that California is experiencing an unprecedented dry period and shortage of water . . . ."].)

Amici are concerned that, if the Opinion remains citable precedent, the State Board will use it to justify further uses of emergency authority to eliminate or curtail procedural due process protections necessary to ensure that the State Board acts with due consideration for opposing viewpoints and inconvenient truths in administering a system that is critically important to California water users and the customers they represent. Indeed, taken to its logical extreme, the Opinion could be used to justify the State's restriction of all water rights, at any point and for any length of time, while refusing to hear the evidence and arguments presented by the persons and agencies most affected by such decisions.

III. Conclusion

For the reasons stated above, if not reviewed and overturned, the Opinion should be depublished.

Respectfully Submitted,

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PROOF OF SERVICE

Stanford Vina Ranch Irrigation Company v. State of California, et al.
California Supreme Court Case No. S263378

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

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 Sacramento, State of California. My business address is 621 Capitol Mall, 18th Floor, Sacramento, CA 95814.

On August 17, 2020, I served true copies of the following document(s) described as **ASSOCIATION OF CALIFORNIA WATER AGENCIES, *ET AL.* REQUEST FOR DEPUBLICATION** on the interested parties in this action as follows:

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 the practice of Downey Brand LLP for collecting and processing correspondence for mailing. 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 am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Sacramento, California.

The Honorable Timothy M. Frawley (Ret.),
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BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered users will be served by the TrueFiling system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

To Each on the Attached Service List
COURT OF APPEAL OF CALIFORNIA,
Third Appellate District, per Rule 8.500(g)(1)
SUPREME COURT OF CALIFORNIA, per
Rule 8.500(g)(1)

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

Executed on August 17, 2020, at Sacramento, California.

Nicole A. Bigley