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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO

CENTRAL DELTA WATER AGENCY, et al. Case Number: 34-2010-80000561  
al.

Petitioners,

vs.

**FINAL STATEMENT OF DECISION RE  
TRIAL OF TIME-BAR AFFIRMATIVE  
DEFENSES TO SECOND AND THIRD  
CAUSES OF ACTION**

CALIFORNIA DEPARTMENT OF  
WATER RESOURCES, KERN COUNTY  
WATER AGENCY, et al.

Respondents,

Hon. Timothy M. Frawley

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ALAMEDA COUNTY FLOOD CONTROL  
& WATER CONSERVATION DISTRICT  
ZONE 7, et al.

Real Parties in Interest.

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This matter regularly came on November 2, 2012, at 9:00 a.m., in Department 29 of the above-entitled court, the Honorable Timothy M. Frawley, presiding, for a bench trial of the time-bar affirmative defenses to the Second (Reverse Validation) and Third (Mandate) Causes of Action of Plaintiffs' First Amended Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief (the "First Amended Petition").

Adam Keats and Adam Lazar of the Center for Biological Diversity appeared for plaintiffs Central Delta Water Agency, South Delta Water Agency, California Water Impact

1 Network, California Sportfishing Protection Alliance, Center for Biological Diversity,  
2 Carolee Krieger, and James Crenshaw ("Plaintiffs"). Supervising Deputy Attorney  
3 General Eric Katz and Deputy Attorney General Marilyn Levin appeared for respondent  
4 California Department of Water Resources ("DWR"). Clifford Schulz and Hanspeter  
5 Walter appeared for respondent Kern County Water Agency ("KCWA").  
6 Stephen Roberts, Robert Thornton, Ernest Conant, Steven Torigiani, and Steven Saxton,  
7 appeared for real parties in interest the Kern Water Bank Authority ("KWBA"), Roll  
8 International Corp., Paramount Farming Company LLC, Westside Mutual Water  
9 Company, Tejon Ranch Company, Semitropic Water Storage District, Wheeler Ridge-  
10 Maricopa Water Storage District, Tejon-Castac Water District, Dudley Ridge Water  
11 District, and Kern County Water Agency's Improvement District No. 4 (hereinafter referred  
12 to collectively as the "Kern Water Bank Parties"). (Ernest Conant and Steven Torigiani  
13 also appeared for real party in interest Oak Flat Water District.)

14 Adam Kear appeared for real party in interest Metropolitan Water District of  
15 Southern California ("Metropolitan Water"); Robert Sawyer appeared for real parties in  
16 interest Antelope Valley – East Kern Water Agency, Desert Water Agency, Crestline-Lake  
17 Arrowhead Water Agency, Ventura County Watershed Protection District, Castaic Lake  
18 Water Agency, and San Geronio Pass Water Agency; and Steven Abbott appeared for  
19 real party in interest Coachella Valley Water District (collectively, the "SWP Contractors").

20 David Aladjem appeared for real parties in interest San Bernardino Valley  
21 Municipal Water District and Alameda County Flood Control and Water Conservation  
22 District (Zone 7). Aaron Ferguson appeared for real party in interest City of Yuba City.  
23 Natalie Weber appeared for real party in interest Solano County Water Agency. Stephen  
24 Peck appeared for real party in interest Alameda County Water District. Ryan Drake  
25 appeared for real parties in interest Central Coast Water Authority and Santa Barbara  
26 County Flood Control and Water Conservation District. Christine Carson appeared for  
27 real parties in interest Littlerock Creek Irrigation District and San Gabriel Valley Municipal  
28 Water District.

1           Documentary evidence was introduced on behalf of the respective parties and the  
2 cause was argued and submitted for decision.

3           On December 19, 2012, the Court issued its Proposed Statement of Decision Re  
4 Trial of Time-Bar Affirmative Defenses to Second and Third Causes of Action in this  
5 matter, providing time for objections.

6           On January 15 and 18, 2013, Plaintiffs and the Kern Water Bank Parties filed  
7 separate objections to the Proposed Statement of Decision. Plaintiffs also filed a Motion  
8 to Reopen the Trial Record for Leave to Offer Two Additional Documents and a Request  
9 for Judicial Notice of the two additional documents. The two documents offered by  
10 Plaintiffs are (i) a Notice of Determination prepared by DWR, dated December 13, 1995,  
11 and (ii) Findings and Mitigation Measures prepared by DWR, dated December 13, 1995.

12           Thereafter, the Court issued a written ruling on the objections to the Proposed  
13 Statement of Decision, Motion to Reopen the Trial Record, and Request for Judicial  
14 Notice.

15           The Court, having considered the evidence and heard the arguments of counsel  
16 and being fully advised, and having received and ruled on the parties' timely objections to  
17 the Proposed Statement of Decision, the Court now issues this Final Statement of  
18 Decision.

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I.

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Introduction

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The issue tried was whether Plaintiffs' Second and Third Causes of Action, challenging the validity of the "Monterey Amendment" to the State Water Project contracts and the related "Agreement for the Exchange of the Kern Fan Element of the Kern Water Bank," are barred by the applicable statutes of limitations, by the defense of laches or mootness, and/or because the agreements previously were "validated" as part of a settlement of prior litigation in *Planning & Conservation League v. Department of Water Resources*. The Court shall conclude that Plaintiffs' claims are barred.

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II.

Background Facts and Procedure<sup>1</sup>

A. The State Water Project

The history of this case begins, as it must, with a description of California's State Water Project. The State Water Project is one of California's two great water projects -- the other being the Central Valley Project. Both water projects were designed to address California's "fundamental water problem," which has been described as a "maldistribution" of water resources in relation to human needs. (See *El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 945.)

The State Water Project is today one of the largest water, power, and conveyance systems in the world. It consists of a complex system of dams, reservoirs, storage tanks, power and pumping plants, aqueducts, pipelines, and canals designed to capture, store, and convey water throughout the state. In general, water is captured and stored in reservoirs in the northern part of the State, and then transported to the central and southern areas of the State. The Project includes 34 storage facilities, reservoirs and lakes; 20 pumping plants; 4 pumping-generating plants; 5 hydroelectric power plants; and about 701 miles of open canals and pipelines. It delivers water to about 25 million people and irrigates about 750,000 acres of farmland each year.

The Department of Water Resources (DWR) is the state agency charged with operating and managing the State Water Project. During the 1960's, as the State Water Project was being constructed, DWR entered into a series of long-term contracts with local and regional water agencies -- known as the State Water Project Contractors (the

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<sup>1</sup> The findings contained herein relate only to the trial of the statute of limitations and other time-bar affirmative defenses (laches and mootness) to Plaintiffs' second and third causes of action, and cannot and do not bind the Court in any way in regard to the trial of the first cause of action under CEQA. The Court retains the power to amend or change its findings before entry of judgment.

1 SWP Contractors).<sup>2</sup> These contracts set forth the parties' respective obligations.  
2 concerning the sale, delivery, and use of the water made available by the Project.

3 Under the contracts, the SWP Contractors received "entitlements" to an amount of  
4 water made available by the Project. Attached to each contract is a table -- "Table A" --  
5 setting forth the maximum amount of Project water that the State agreed to provide to  
6 each SWP Contractor from the available water supply during the year. The amount of  
7 water contracted to be delivered to each SWP Contractor originally was called an  
8 "entitlement," but is now referred to as a "Table A Amount."

9 In return for this entitlement, each SWP Contractor agreed to pay a proportional  
10 share of the costs of developing, operating, and maintaining the State Water Project. The  
11 SWP Contractors agreed to make these payments regardless of how much water was  
12 delivered to them each year.

13 The amount of water that the State Water Project can deliver to SWP Contractors  
14 each year depends on a number of factors, including the amount of rainfall, snowpack,  
15 runoff, reservoir capacity, pumping capacity, and regulatory and environmental  
16 constraints on Project operations. Thus, in negotiating the long-term water supply  
17 contracts, the parties anticipated there could be shortages that would cause requests for  
18 water to exceed the available water supply.

19 To address this contingency, the long-term water supply contracts contained  
20 provisions specifying what would happen in the event of a water supply shortage. Article  
21 18(a) provides that in the event of a temporary shortage in water supply, agricultural SWP  
22 Contractors would have their deliveries cut back first, before reducing any water  
23 deliveries to urban (i.e., municipal and industrial) SWP Contractors.<sup>3</sup> The contracts refer

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25 <sup>2</sup> There were originally 31 SWP Contractors, but in 1981 and 1992 two of the agencies transferred  
26 their water contracts to other SWP contractors. There are currently 29 SWP Contractors. Five  
27 Contractors use Project water primarily for agricultural purposes; the remaining twenty-four use  
28 Project water primarily for municipal purposes.

<sup>3</sup> Under Article 18(a), allocations to agricultural SWP Contractors would be reduced first in a  
shortage, but not to exceed 50% in any one year, and not to exceed an aggregate limit of 100%  
in any seven consecutive years. If additional reductions were necessary after all allowable  
agricultural reductions were applied, the reductions were to be allocated proportionately among  
all Contractors.

1 to this as the "agriculture first deficiency," but it has come to be known colloquially as the  
2 "urban preference," since it prefers urban water users over agricultural water users in  
3 times of drought.

4 In the event of a permanent shortage in water supply, Article 18(b) provided that,  
5 with certain exceptions, the entitlements of all SWP Contractors would be reduced  
6 proportionately so that the sum of entitlements would be equal to the State Water  
7 Project's reduced water supply (or "yield").

8 The parties also recognized that in some years there could be a temporary  
9 surplus in the available water supply, meaning the supply of water could exceed what  
10 was necessary to meet Contractors' annual demands and Project operational  
11 requirements (e.g., storage goals). Under Article 21 of the long-term water supply  
12 contracts, surplus water would be offered first to agricultural SWP Contractors, for  
13 agricultural use or groundwater replenishment, and its use for urban purposes was  
14 restricted.

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16 B. The Monterey Agreement

17 By the early 1990's, the interpretation and application of Articles 18 and 21 of the  
18 long-term water supply contracts had become a significant point of contention between  
19 agricultural SWP Contractors and their urban counterparts. The root of the problem was  
20 that the State Water Project was unable to deliver sufficient water to satisfy Contractor  
21 demands on a reliable basis. There were several reasons for this.

22 One reason was that many of the facilities originally contemplated for the State  
23 Water Project were not completed. The original long-term water supply contracts  
24 contemplated that additional State Water Project facilities would be constructed in the far  
25 north of the State on the Eel, Trinity, Mad, Van Duzen, and Klamath rivers. It was  
26 expected that at full build-out the State Water Project would deliver about 4.2 million acre-

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1 feet (maf) of water per year. Accordingly, the contract entitlements for water from the  
2 State Water project totaled about 4.2 maf annually.<sup>4</sup>

3 However, because the additional facilities were not constructed, the State Water  
4 Project generally cannot deliver all the water to which Contractors are entitled under the  
5 long-term water supply contracts. (See *Planning & Conservation League v. Department*  
6 *of Water Resources* (2000) 83 Cal.App.4th 892, 912-913; *Santa Clarita Organization for*  
7 *Planning the Environment v. County of Los Angeles, supra*, 106 Cal.App.4th at pp. 717-  
8 718.) DWR has estimated that actual, reliable water supply from the State Water Project  
9 is in the vicinity of 2 to 2.5 maf of water annually, which is only about one-half the 4.23  
10 maf contemplated by the contracts.<sup>5</sup> DWR has never reduced the original Table A  
11 Amounts to reflect the fact that the State Water Project was never fully built out. Thus, by  
12 the late 1980's, the State Water Project was having trouble delivering sufficient water to  
13 meet SWP Contractors' rising demands.

14 A drought in the early 1990's compounded the problem, resulting in even larger  
15 disparities between contractual "entitlements" and actual water deliveries. Not  
16 surprisingly, disputes arose among the agricultural and urban SWP Contractors about  
17 how the limited amount of water available should be allocated during shortages.

18 The views of agricultural SWP Contractors were shaped in large part by the  
19 "urban preference" contained in Article 18(a) of the water supply contracts. During the  
20 drought, DWR invoked Article 18(a)'s "urban preference" to significantly reduce water  
21 deliveries to agricultural SWP Contractors. However, under Article 22 of the long-term  
22 water supply contracts, the agricultural SWP Contractors were still required to pay their  
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24 <sup>4</sup> As of 2012, the maximum Table A delivery amount is 4.172 maf. Of the contracted water supply,  
25 70 percent goes to urban users and 30 percent goes to agricultural users. The largest SWP  
26 Contractor serving principally urban users is Metropolitan Water District of Southern California  
27 (Metropolitan), with a current Table A amount of 1.911 million acre feet. The largest SWP  
Contractor serving principally agricultural users is Kern County Water Agency (KCWA), with a  
current Table A amount of 982,730 acre feet.

28 <sup>5</sup> The average actual deliveries of water by the State Water Project from 1980 to 1993 were  
around 2.0 maf. In 2011, DWR estimated that, on average, the State Water Project is able to  
supply about 2.5 maf per year – or approximately 61% of the total contracted amounts. (Ex. 58,  
Table 6-3 [RV3160]; see also Ex. 51, at Table B-5B [RV2706].)

1 share of the costs of financing, operating, and maintaining the State Water Project. As a  
2 result, many agricultural SWP Contractors were experiencing severe financial hardships.

3 The agricultural SWP Contractors believed it was inequitable for DWR to reduce  
4 water deliveries to the agricultural SWP Contractors under Article 18(a) because the  
5 water shortages were "permanent" shortages, caused (at least in part) by DWR's failure  
6 to build the facilities necessary to meet the entitlements set forth in Table A. Because of  
7 the gap between the amount of water promised and the amount of water that DWR could  
8 actually deliver, the agricultural SWP Contractors believed that DWR should declare a  
9 permanent shortage and reduce all SWP Contractors' annual "entitlements" pursuant to  
10 Article 18(b).

11 The urban SWP Contractors naturally disagreed. They believed that DWR should  
12 not invoke Article 18(b), and should continue to allocate water under Article 18(a) based  
13 on the existing Table A entitlements.

14 In 1994, DWR and SWP Contractor representatives engaged in mediated  
15 negotiations in an attempt to settle allocation disputes arising under the long-term water  
16 supply contracts. Although the negotiations initially concerned only water allocation  
17 issues under Articles 18 and 21, the parties soon determined that the water allocation  
18 problem was too complex to be resolved as a single-issue problem, and the negotiations  
19 grew into an omnibus revision to the long-term water supply contracts. In December of  
20 1994, a comprehensive agreement was reached in Monterey, California. On December  
21 1, 1994, representatives of DWR and various SWP Contractors executed the "Monterey  
22 Agreement - Statement of Principles." (Ex. 46.) Because the agreement was negotiated  
23 in Monterey, it came to be known as the "Monterey Agreement."

24 The Monterey Agreement established a set of 14 principles designed to resolve  
25 disputes over water allocations and certain operational aspects of the State Water  
26 Project. These principles fell into three general categories that matched the following  
27 goals: to increase the reliability of existing water supplies; to provide stronger financial  
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1 management of the State Water Project; and to increase water management flexibility by  
2 providing more tools to local water agencies.

3 To implement the Monterey Agreement, the parties translated the Monterey  
4 Agreement principles into a standard amendment to the long-term water supply contracts.  
5 The standard amendment became known as the "Monterey Amendment," and the  
6 separate amendments to the long-term water supply contracts are sometimes referred to  
7 collectively as the "Monterey Amendments."

8 The Monterey Amendment required certain changes to the methodology of  
9 allocating water among contractors and in the operation and administration of State  
10 Water Project facilities, including changes to Articles 18 and 21, discussed above.<sup>6</sup>  
11 Among other things, the Monterey Amendment: (1) altered water allocation procedures in  
12 times of shortage by eliminating the "urban preference" and mandating that deliveries to  
13 both agricultural and urban Contractors would (with some exceptions) be reduced  
14 proportionately; (2) authorized permanent sales of water among contractors; and (3)  
15 implemented various other changes to the way the State Water Project is administered,  
16 including revisions in the provisions governing transfers, water storage and management  
17 practices, and project financing.

18 The Monterey Amendment also provided for the transfer of the Kern Fan Element  
19 of the Kern Water Bank from DWR to KCWA.

20 The Kern Fan Element is an approximately 20,000 acre property in southern Kern  
21 County that overlies a groundwater aquifer or basin. DWR purchased the Kern Fan  
22 Element in 1988 as part of a plan to develop a state-owned groundwater storage "bank"  
23 for the State Water Project, which DWR called the "Kern Water Bank." DWR purportedly  
24 determined it could not feasibly develop a state-owned water bank on the lands and, in  
25 1993, stopped work on the water bank project. As part of the Monterey Agreement, DWR  
26 agreed to sell or lease the Kern Fan Element and related assets to "designated Ag  
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28 <sup>6</sup> In total, the Monterey Amendment modified Articles 1, 4, 7, 12, 14, 16, 18, 21, 22, 24, 25, 50, 51,  
52, 53, 54, 55, 56, and the General Provisions of the long-term water supply contracts.

1 Contractors."<sup>7</sup> In exchange, agricultural Contractors purportedly agreed to retire 45,000  
2 acre-feet of water entitlements.<sup>8</sup>

3 To effectuate this aspect of the Monterey Agreement, the Monterey Amendment  
4 added Articles 52 and 53 to the long-term water supply contracts. Article 52 required the  
5 State to convey the Kern Fan Element property from DWR to KCWA in accordance with a  
6 separate agreement between DWR and KCWA entitled "Agreement for the Exchange of  
7 the Kern Fan Element of the Kern Water Bank" (hereinafter the "KFE Transfer  
8 Agreement"). Article 53 provided for the transfer and retirement of 45,000 acre-feet of  
9 water entitlements from KCWA (40,670 acre-feet) and Dudley Ridge Water District (4,330  
10 acre-feet). (See Ex. 10 [RV106-107].)

11 The Monterey Amendment to the SWP Contracts was expressly conditioned upon  
12 (1) the amendments to the KCWA and Metropolitan Water having been executed and no  
13 legal challenge having been filed (or, if filed, a final judgment having been entered  
14 sustaining or validating said amendments); and (2) the State having conveyed the Kern  
15 Fan Element to KCWA. (See Ex. 1 [RV61].)

16 The Monterey Amendment was executed by 27 of the 29 SWP Contractors. Only  
17 Empire West Side Irrigation District and Plumas County Flood Control and Water  
18 Conservation District did not execute the Amendment. Thirteen of the SWP Contractors  
19 executed the Monterey Amendment in December of 1995. (See Exs. 1-3, 7-10, 13-14,  
20 22-25.) Another eleven executed the Monterey Amendment in 1996. (See Exs. 4-6, 11-  
21 12, 15-17, 19-21.) Two Contractors executed the Amendment in 1997. (See Exs. 18 and  
22 27.) One Contractor executed the Amendment in 1999. (See Ex. 26.)

23 A programmatic environmental impact report (EIR) was prepared under CEQA for  
24 the proposal to implement the Monterey Agreement (the "Monterey Agreement EIR"). In  
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27 <sup>7</sup> The characterization of the sale of the Kern Fan Element and related assets remains a contested  
issue between the parties.

28 <sup>8</sup> In the Monterey Agreement, agricultural Contractors also committed to allow up to 130,000 acre-  
feet of entitlement to be sold to urban Contractors, but it is unclear whether this transfer was  
made in exchange for the Kern Fan Element. (See Ex. 28 [RV1283, RV1287]; Ex. 46.)

1 October of 1995, Central Coast Water Agency ("CCWA") completed and certified a final  
2 EIR for the "Monterey Agreement" project. DWR, as a responsible agency, approved the  
3 EIR two months later.

4 On December 13, 1995, DWR and KCWA executed the Monterey Amendment  
5 and the KFE Transfer Agreement. Pursuant to the KFE Transfer Agreement, DWR  
6 agreed to convey fee simple title to the Kern Fan Element to KCWA at the close of  
7 escrow. (Ex. 28 [RV1287].) As partial consideration for the transfer and the  
8 implementation of the Monterey Agreement, KCWA agreed to procure and deliver for  
9 retirement by DWR the 45,000 acre-feet of water entitlements. (*Ibid.*) The parties further  
10 agreed that KCWA may, immediately upon the close of escrow, transfer all or a portion of  
11 the Kern Fan Element, and assign its rights and obligations under the KFE Transfer  
12 Agreement, to a joint powers agency or other "transferee." (Ex. 28 [RV1288].)

13 KCWA's obligations under the KFE Transfer Agreement were conditioned upon its  
14 review and approval of all governmental licenses, permits, approvals, agreements, or  
15 memoranda of understanding relating to the construction, operation, use or occupancy of  
16 the Kern Fan Element, including environmental and endangered species laws. (Ex. 28  
17 [RV1289].) Further, both parties' obligations to close escrow were subject to a number of  
18 conditions, including (i) that CEQA review of the implementation of the Monterey  
19 Agreement shall have been completed and become final; and (ii) that the Monterey  
20 Amendments with KCWA and Metropolitan Water shall have been duly approved,  
21 executed, and validated. (Ex. 28 [RV1292].) Such conditions could be mutually waived  
22 by the parties in writing. (*Ibid.*)

23 The deed conveying title of the Kern Fan Element from DWR to KCWA (the  
24 "KCWA Deed") was executed the same day, December 13, 1995, but it was not recorded  
25 until after the close of escrow, on August 9, 1996. (Ex. 31.)

1           On December 14, 1995, KCWA executed a deed to transfer title of the Kern Fan  
2 Element from KCWA to KWBA (the "KWBA Deed").<sup>9</sup> KWBA is a "joint powers authority"  
3 agency formed in October 1995. (See Cal. Gov. Code § 6500.) Its members include  
4 several water and water storage districts (Dudley Ridge Water District, Semitropic Water  
5 Storage District, Tejon-Castac Water District, Wheeler Ridge-Maricopa Water Storage  
6 District), a water agency (Kern County Water Agency on behalf of its Improvement District  
7 4), and a mutual water company (Westside Mutual Water Company).<sup>10</sup> The Kern Fan  
8 Element property ultimately was developed into a functioning water bank (the "Kern  
9 Water Bank").

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11       C.     The PCL Litigation and Settlement

12           In December of 1995, a water agency (Plumas County Flood Control and Water  
13 Conservation District) and two citizen groups (the Planning and Conservation League and  
14 the Citizens Planning Association of Santa Barbara County) (collectively, the "PCL  
15 Plaintiffs") filed a lawsuit in California Superior Court challenging the sufficiency of the  
16 Monterey Agreement EIR (the "PCL Litigation"). (See *Planning & Conservation League*,  
17 *supra*, 83 Cal.App.4th at pp.898, 903.) The PCL Plaintiffs alleged that the EIR violated  
18 CEQA because CCWA, and not DWR, served as the lead agency for purposes of  
19 preparing the EIR.

20           In addition, the PCL Plaintiffs alleged the EIR was inadequate under CEQA  
21 because it failed to properly define the project, failed to assess the adverse impacts of the  
22 project, failed to identify and analyze feasible alternatives to the project, failed to identify

23 \_\_\_\_\_  
24 <sup>9</sup> Like the KCWA Deed, the KWBA Deed was not recorded until after the close of escrow, on  
25 August 9, 1996. (Ex. 3001.)

26 <sup>10</sup> Although KWBA purports to be a public agency, Plaintiffs allege that KWBA is controlled by  
27 private agri-business and real estate development interests. Specifically, Plaintiffs allege that  
28 Westside Mutual Water Company, which controls approximately 48% of KWBA, is a wholly  
owned subsidiary of Paramount Farming Company, LLC, which in turn is owned by Roll  
International Corporation. Plaintiffs further allege that Wheeler Ridge-Maricopa Water Storage  
District and Tejon-Castac Water District, which collectively control about 26% of KWBA, are  
controlled by Tejon Ranch Company. However, whether KWBA is actually controlled by private  
entities is not before the Court at this time.

1 adequate mitigation measures for the project, and failed to adequately respond to public  
2 comments about the EIR. The PCL Plaintiffs sought a writ of mandate compelling CCWA  
3 to set aside its certification of the EIR, and declaratory and injunctive relief with regard to  
4 the implementation of the Monterey Agreement.

5 In February of 1996, the PCL Plaintiffs filed an amended petition and complaint  
6 adding a reverse validation cause of action challenging the validity of the Monterey  
7 Amendments and the KFE Transfer Agreement.

8 On June 10, 1996, this court (Hon. C. Bond) entered an order granting  
9 defendants' motion for summary adjudication on the reverse validation cause of action,  
10 finding that plaintiffs had improperly failed to join KCWA as an indispensable party. The  
11 court dismissed the reverse validation action.

12 On or about August 9, 1996, notwithstanding that the trial court's ruling was not  
13 yet reduced to a judgment, the parties closed escrow on the Kern Fan Element transfer  
14 and recorded the deeds transferring title of the Kern Fan Element from DWR first to  
15 KCWA and then to KWBA. (Ex. 31; Ex. 3001.)

16 On August 15, 1996, Judge Bond entered a final judgment denying petitioners'  
17 application for a writ of mandate to set aside the 1995 EIR. Although Judge Bond  
18 concluded that CCWA was not the proper lead agency under CEQA, she nonetheless  
19 upheld the adequacy of the EIR.

20 In 2000, the Court of Appeal reversed the judgment. The Court of Appeal upheld  
21 the trial court's determination that DWR, not CCWA, was the proper lead agency, but  
22 rejected the trial court's finding that the EIR was sufficient despite its failure to discuss  
23 implementation of Article 18(b) of the SWP Contracts as a no-project alternative. The  
24 Court held that such errors mandated the preparation of a new EIR under the direction of  
25 DWR.

26 The Court of Appeal also held that the trial court erroneously dismissed the  
27 reverse validation challenge to the execution of the Monterey Amendments and KFE  
28 Transfer Agreement for failure to name and serve indispensable parties.

1           In its opinion, the Court of Appeal ordered the trial court to vacate its summary  
2 adjudication of the reverse validation action; to issue a writ of mandate vacating the  
3 certification of the Monterey Agreement EIR; and to consider such other orders as it  
4 deems appropriate under Public Resources Code § 21168.9(a) consistent with the views  
5 expressed in the Court's opinion. The Court further ordered the trial court to retain  
6 jurisdiction over the action until DWR, as lead agency, certifies an EIR meeting the  
7 substantive and procedural requirements of CEQA.

8           The PCL Plaintiffs asked the Court of Appeal to modify its opinion to enjoin the  
9 implementation of the Monterey Agreement project and to compel the defendants to  
10 vacate and set aside their approvals of the Monterey Amendment and KFE Transfer  
11 Agreement, in addition to setting aside certification of the EIR. (Ex. 33.) The PCL  
12 Plaintiffs argued that because the Court ordered the Monterey Agreement EIR  
13 certification to be set aside, under Public Resources Code section 21168.9, the contract  
14 approvals based on that EIR (including the Monterey Amendments and the KFE Transfer  
15 Agreement) also must be set aside. (*Ibid.* [citing § 21168.9 and *San Joaquin*  
16 *Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-  
17 722].) The Court of Appeal declined to so order, concluding that the trial court is the  
18 "more appropriate forum" to consider and rule upon such request.

19           On remand, the parties engaged in extensive mediation before the Honorable D.  
20 Weinstein (Ret.) and, on or about July 22, 2002, reached a settlement agreement (the  
21 "Settlement Agreement").

22           In Section III of the Settlement Agreement, the parties agreed that DWR would act  
23 as lead agency in preparing a new EIR. (Ex. 34 [RV1478].) The parties agreed that the  
24 proposed "project" to be analyzed would be specifically defined during the scoping  
25 process. However, the parties agreed that at a minimum the new EIR would evaluate, as  
26 components of the project, the Monterey Amendment (including the provisions relating to  
27 the transfer of the Kern Fan Element) plus certain additional amendments agreed to in  
28 the Settlement Agreement. This project came to be known as the "Monterey Plus" project

1 because it is comprised of the original Monterey Amendment *plus* the additional terms  
2 and conditions of the Settlement Agreement. The new EIR for this project shall be  
3 referred to as the "Monterey Plus EIR."

4 Among other things, the parties agreed that the Monterey Plus EIR would include:

5 (i) an analysis of the environmental effects of the pre-Monterey Amendment long-term  
6 water supply contracts as part of the CEQA-mandated "no project" alternative analysis;  
7 (ii) an analysis of the potential environmental impacts of changes in State Water Project  
8 operations and deliveries relating to the implementation of the Monterey Plus project; (iii)  
9 an analysis and determination regarding the impacts related to the transfer, development,  
10 and operation of the Kern Water Bank. (Ex. 34 [RV1479-1480, 1482].) Upon completion  
11 of the new EIR, DWR agreed to file a notice of determination for the new EIR, a return to  
12 writ of mandate, and a request for an order discharging the writ. (Ex. 34 [RV1499].)

13 The parties also agreed to a set of procedures for DWR's preparation of the new  
14 EIR, including the creation of an "EIR Committee" to provide advice and  
15 recommendations to DWR in connection with the preparation of the new EIR, and a  
16 mediation process to settle disputes regarding compliance of the new EIR with the  
17 requirements of CEQA and the terms and conditions of the Settlement Agreement. (Ex.  
18 34 [RV1475, 1479].)

19 Pending completion of the Monterey Plus EIR and an order discharging the writ of  
20 mandate in the underlying litigation, the parties agreed in Section II of the Settlement  
21 Agreement to jointly request that the trial court enter an order under Public Resources  
22 Code section 21168.9 "authorizing on an interim basis the administration and operation"  
23 of the State Water Project and Kern Water Bank in accordance with the terms of the  
24 Monterey Amendment, as supplemented by the Settlement Agreement. (Ex. 34  
25 [RV1478].)

26 In Section V of the Settlement Agreement, the parties agreed that KWBA "shall  
27 retain title" to the Kern Fan Element property and that KWBA may continue to operate  
28

1 and administer the Kern Water Bank, subject to certain restrictions on use set forth in the  
2 Settlement Agreement. (Ex. 34 [RV1490].)

3 In Section VI of the Settlement Agreement, the parties agreed that DWR shall pay  
4 the sum of \$5.5 million to the PCL Plaintiffs to implement the settlement.

5 Section VII of the Settlement Agreement contains terms and conditions governing  
6 the sequence and process for implementation of the Settlement Agreement. It provides  
7 that as soon as practical after execution of the Settlement Agreement, the parties shall  
8 jointly file a motion for (1) a court order approving the Settlement Agreement, and (2) a  
9 court order authorizing on an interim basis the administration and operation of the State  
10 Water Project and Kern Water Bank in accordance with the Monterey Amendment as  
11 supplemented by the Settlement Agreement (the "Interim Implementation Order"). (Ex.  
12 34 [RV1497].)

13 Upon court approval of the Settlement Agreement and issuance of the Interim  
14 Implementation Order, DWR agreed to execute amendments to the long-term water  
15 supply contracts attached to the Settlement Agreement (the "Attachment A  
16 Amendments"). The Attachment A Amendments made certain clarifications to Articles 1,  
17 6, and 16 of the long-term water supply contracts, and also added a new Article 58,  
18 addressing the determination of the dependable annual supply of available State Water  
19 Project water.<sup>11</sup> (Ex. 34 [RV1520].)

20 Upon execution of the Settlement Agreement and the Attachment A Amendments,  
21 and satisfaction of other conditions, the PCL Plaintiffs agreed to request dismissal without  
22 prejudice of their reverse validation cause of action seeking to invalidate the Monterey  
23 Amendment and the KFE Transfer Agreement. The PCL Plaintiffs further agreed that so  
24 long as such conditions are met, they would not re-file the cause of action or file any new

25 \_\_\_\_\_  
26 <sup>11</sup> In sum, the Attachment A Amendments replace use of the term "entitlement" with "Annual Table  
27 A Amount," and define the terms "Annual Table A Amounts," "Maximum Annual Table Amount,"  
28 and "Minimum SWP Yield." The Amendments also added Article 58 to the long-term water  
supply contracts, requiring DWR to make a biennial determination of the "dependable annual  
supply" of State Water Project water, which would then provide the basis for the determination of  
the State Water Project's "minimum project yield." (See Ex. 60, at p.4-10.)

1 cause of action challenging the validity of the Monterey Amendment or the Kern Fan  
2 Element transaction. (Ex. 34 [RV1498].) As between the PCL Plaintiffs, DWR, and the  
3 SWP Contractor who signed the Settlement Agreement, it was agreed that the statute of  
4 limitations relating to the validation cause of action would be tolled until forty-five days  
5 after the filing of a notice of determination on the new (Monterey Plus) EIR, but only as to  
6 the named PCL Plaintiffs. (Ex. 34 [RV1498-1499].)

7 The parties agreed that the Settlement Agreement is an integrated agreement  
8 setting forth the entire agreement among the parties concerning the subject matter  
9 thereof. (Ex. 34 [RV1505].)

10 In February of 2003, the parties to the Settlement Agreement issued a Joint  
11 Statement on the Monterey Amendments Litigation. (Ex. 48.) Among other things, the  
12 Joint Statement provides that "key components" of the Settlement Agreement include:

- 13
- 14 • "The Kern Water Bank will remain in local ownership and will operate as it  
15 has, but will be subject to additional restrictions on use."
- 16 • "The State Water Project will be operated pursuant to the Monterey  
17 Amendments and new amendments pending completion of the new EIR  
18 and termination of the litigation." (*Ibid.*)
- 19

20 In May of 2003, following execution of the Settlement Agreement, the parties  
21 submitted the Settlement Agreement for approval by the trial court. (Ex. 49, Ex. 2006.)  
22 The trial court (Hon. L. McMaster) approved the Settlement Agreement and issued the  
23 contemplated Interim Implementation Order. The Interim Implementation Order provides  
24 that "until DWR files its return in compliance with the Peremptory Writ of Mandate and this  
25 Court orders discharge of the Writ of Mandate, the administration and operation of the  
26 State Water Project and Kern Water Bank Lands shall be conducted pursuant to the  
27 Monterey Amendments to the State Water Contracts, as supplemented by the  
28

1 Attachment A Amendments . . . and the other terms and conditions of the Settlement  
2 Agreement." (Ex. 37.)

3 The trial court also issued a Peremptory Writ of Mandate compelling CCWA and  
4 DWR to set aside their certifications of the Monterey Agreement EIR, and compelling  
5 DWR as lead agency to prepare and certify a new EIR and, upon certification, make  
6 written findings and decisions and file a notice of determination in compliance with CEQA.  
7 (Ex. 35.)

8 Subsequently, the PCL Plaintiffs filed a request for dismissal without prejudice of  
9 their reverse validation cause of action. (Ex. 38.) On November 12, 2003, the trial court  
10 entered an order dismissing the validation cause of action without prejudice.

11 DWR and the affected SWP Contractors subsequently executed the Attachment A  
12 Amendments in accordance with the Settlement Agreement.

13  
14 D. The Monterey Plus Litigation

15 On February 1, 2010, DWR, as the lead agency, prepared and certified a final EIR  
16 for the Monterey Plus project. (See Exs. 39-40.) According to DWR, the proposed  
17 project and project objectives in the Monterey Plus EIR were substantially the same as  
18 the proposed project and objectives in the Monterey Agreement EIR with the exception of  
19 some changes brought about by the Settlement Agreement. (Ex. 40 [RV1668].)

20 However, because the State Water Project already was operating under the Monterey  
21 Amendment and Settlement Agreement at the time DWR issued its notice of preparation  
22 of the EIR, DWR identified the proposed project as the decision "to continue operation  
23 under the existing Monterey Amendment . . . and the existing Settlement Agreement."  
24 (See Ex. 40 [RV1666], Ex. 60.)

25 Thus, the Monterey Plus EIR included a range of "no project" alternatives. Three  
26 of the "no project" alternatives considered what the impacts of the State Water Project  
27 would be if it were operated in accordance with the long-term water supply contracts in  
28 place before the Monterey Amendment (i.e., as if the Monterey Amendment had not been

1 implemented). A fourth "no project" alternative analyzed the impacts assuming the  
2 Monterey Amendment took place, but that none of the additional terms and conditions  
3 agreed to as part of the Settlement Agreement were included. (Ex. 40 [RV1670].)

4 On May 5, 2010, DWR recorded a "Notice of Determination" regarding its decision  
5 to carry out the project. (Ex. 41.)

6 On June 3, 2010, the DWR filed a Return to Peremptory Writ of Mandate  
7 requesting the trial court to discharge the Writ. The following day, June 4, the PCL  
8 Plaintiffs filed a Consent to Entry of Order Discharging Writ. The Consent to Discharge  
9 indicates that while the PCL Plaintiffs believe DWR's new EIR does not fully comply with  
10 CEQA, they believe they are constrained by the terms of the Settlement Agreement from  
11 bringing a challenge to it.

12 On August 27, 2010, this court (Hon. L. Connelly) entered an order discharging  
13 the 2003 writ of mandate. (Ex. 44.)

14 On June 3, 2010, the same day DWR filed its Return, the Plaintiffs in this action  
15 filed their petition for writ of mandate and complaint for declaratory and injunctive relief.  
16 The following day, June 4, Plaintiffs filed their First Amended Petition.

17 Plaintiffs' First Cause of Action challenges the sufficiency under CEQA of DWR's  
18 new Monterey Plus EIR. Plaintiffs allege the new EIR fails to provide an adequate  
19 description of the project and its impacts, fails to adequately analyze alternatives and  
20 mitigation measures, contains inadequate responses to public comments, and was not  
21 properly circulated. Plaintiffs also allege that DWR's CEQA findings are not supported by  
22 substantial evidence and that DWR failed to provide proper notice of its CEQA Notice of  
23 Determination.

24 Plaintiffs' Second and Third Causes of Action seek to challenge the validity of  
25 what Plaintiffs refer to as the "Monterey Plus Amendments." In using the term "Monterey  
26 Plus Amendments," Plaintiffs appear to refer to all of the various underlying agreements  
27 as though they are a single "contract amendment," presumably because they are part of  
28 the same CEQA "project." However, this approach risks confusing the EIR project with

1 the underlying agreements. Thus, to avoid confusion, this court will refer to the  
2 agreements separately, as the "Monterey Amendment," the "KFE Transfer Agreement,"  
3 and the "Attachment A Amendments." The court will refer to the proposed CEQA project  
4 as the "Monterey Plus" project, and will not use the term "Monterey Plus Amendments."

5 The specific contract provisions that Plaintiffs allege are not valid are the "material  
6 changes" to the long-term water supply contracts relating to the transfer of the Kern  
7 Water Bank and the re-structuring of the repayment obligations of the SWP Contractors.  
8 (See Ex. 59; First Amended Petition, at pp.56-65.) The First Amended Petition expressly  
9 refers to Articles 18, 22, 51, 52, 53, 54, and 55 of the long-term water supply contracts  
10 and the KFE Transfer Agreement as the "key amendments" to the contracts. (First  
11 Amended Petition, at pp.24-35.) The First Amended Petition does not specifically  
12 challenge the validity of the Attachment A Amendments, such as the addition of Article 58  
13 or the revisions to Articles 1, 6, and 16. Accordingly, the court has assumed, for  
14 purposes of this trial, that in challenging the "Monterey Plus Amendments," Plaintiffs seek  
15 to challenge only the validity of the Monterey Amendment and the KFE Transfer  
16 Agreement, and not the additional amendments achieved by the Attachment A  
17 Amendments. For simplicity, the court sometimes will refer to these agreements -- the  
18 standardized Monterey Amendment, the subsequent Monterey Amendments, and the  
19 KFE Transfer Agreement -- collectively as the "Subject Contracts."

20 Plaintiffs' Second Cause of Action is a "reverse validation" action against DWR  
21 brought under Civil Procedure Code § 860 and Government Code §§ 53510, 53511, and  
22 17700. In the reverse validation action, Plaintiffs challenge the validity of the agreement  
23 to transfer the Kern Fan Element property from DWR to KCWA and the consideration  
24 made in exchange for such transfer, including the re-structured repayment obligations of  
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1 the SWP Contractors, as reflected in the Monterey Amendment and KFE Transfer  
2 Agreement.<sup>12</sup> Plaintiffs seek a judgment invalidating the agreements.

3 Plaintiffs' Third Cause of Action is a "mandamus" cause of action. It was pled as  
4 an alternative to the reverse validation action and contains the same essential claims.  
5 (See Plaintiffs' Trial Brief, p.30, line 4.) While Plaintiffs contend the challenged  
6 agreements are subject to challenge under the validation statute, if the court were to  
7 conclude otherwise, Plaintiffs contend the agreements are subject to challenge under the  
8 mandamus statute.

9 On April 25, 2012, the Court granted DWR's motion to set a special trial on the  
10 statute of limitations and other time-bar affirmative defenses (laches and mootness) to  
11 Plaintiffs' second and third causes of action. The parties then negotiated a joint  
12 stipulation governing trial procedures and exhibits, which was entered as a court order on  
13 August 20, 2012. (Ex. 59.) In the Joint Stipulation, the parties set forth their respective  
14 contentions as they relate to the statute of limitations affirmative defense. The parties  
15 further stipulated that the trial on the time-bar defenses will be conducted without live  
16 witnesses or a jury and that the trial court will sit as the trier of fact.

17 The parties stipulated that the documents identified as Exhibits 1 through 44 are  
18 deemed authenticated. DWR also has lodged Exhibits 45 through 60, which it contends  
19 are authenticated by the declarations of Eric Katz and Nancy Quan. The SWP  
20 Contractors have lodged Exhibits 2001 through 2008, which are purportedly  
21 authenticated by the declaration of Hanspeter Walter. The Kern Water Bank Parties have  
22 filed a Request for Judicial Notice of Exhibits 3029 through 3038.

23 Respondents DWR and KCWA, the SWP Contractors,<sup>13</sup> and the Kern Water Bank  
24 Parties each have filed a brief urging the Court to find that Plaintiffs' Second and Third

25 \_\_\_\_\_  
26 <sup>12</sup> In a related lawsuit filed on July 2, 2010, entitled *Central Delta Water Agency, et al. v. California*  
27 *Department of Water Resources* ("Central Delta II"), Superior Court Case No. 34-2010-  
28 80000719, Plaintiffs challenge the transfer of the Kern Water Bank lands from KCWA to KWBA.

<sup>13</sup> Real Parties in Interest Tulare Lake Basin Water Storage District, Empire Westside Irrigation  
District, Mojave Water Agency, Palmdale Water District, Oak Flat Water District, County of  
Kings, Central Coast Water Authority, Solano County Water Agency, City of Yuba City, Alameda

1 Causes of Action are barred by the affirmative defenses of the statute of limitations,  
2 laches, and/or mootness.

3 Plaintiffs have filed two separate trial briefs: one addressing the allegations of  
4 DWR and the SWP Contractors, and the other addressing the allegations of the Kern  
5 Water Bank Parties.

6  
7 III.

8 Arguments of the Parties

9 DWR, the SWP Contractors, and the Kern Water Bank Parties allege that  
10 Plaintiffs' claims are barred for two reasons: first, because Plaintiffs failed to file their  
11 claims within the applicable statute of limitations period; and second, because the Subject  
12 Contracts already were "validated" as part of the settlement of the PCL Litigation. The  
13 Kern Water Bank Parties further assert that Plaintiffs' claims are barred by the doctrine of  
14 laches and/or mootness.

15 Plaintiffs dispute that the Subject Contracts were validated as part of the PCL  
16 Litigation. While conceding that the Subject Contracts may have been previously  
17 approved as part of the Monterey Amendment project, Plaintiffs argue that any such  
18 approval necessarily was vacated as part of the Settlement Agreement and its associated  
19 documents (namely, the Interim Implementation Order and the PCL Writ of Mandate).  
20 Plaintiffs contend that the Subject Contracts were not *finally* "authorized" until DWR  
21 certified its Final EIR and issued its Notice of Determination for the project on May 5,  
22 2010. Thus, Plaintiffs contend their complaint was timely filed under both the validation  
23 and mandamus statutes

24  
25  
26 County Water District, Santa Clara Valley Water District, Napa County Flood Control and Water  
27 Conservation District, San Gabriel Valley Municipal Water District, Littlerock Creek Irrigation  
28 District, San Bernardino Valley Municipal Water District, Santa Barbara County Flood Control  
and Water Conservation District, and Alameda County Flood Control and Water Conservation  
District (Zone 7) have joined with the SWP Contractors described above. For simplicity, the  
court uses the term "SWP Contractors" to refer to the SWP Contractors collectively.

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IV.

Standard of Review

The defendants/respondents/real parties, as the parties asserting the affirmative defenses, have the burden of proving entitlement to the defense by a preponderance of the evidence. (*Kaiser Foundation Hospitals v. Workers' Comp. Appeals* (1985) 39 Cal.3d 57, 67 n.8; *Ladd v. Warner Bros. Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1309.)

Once a prima facie case of an applicable affirmative defense is established, the burden shifts to the plaintiffs to show that some exception applies. (*California Highway Patrol v. Industrial Accident Commission* (1961) 195 Cal.App.2d 765, 768-769.)

V.

Evidentiary Objections

Plaintiffs objected to the admission of the following exhibits offered by DWR and the SWP Contractors: Nos. 48, 49, 50, 2006, 2007. The Court provisionally received Exhibit Nos. 48, 49, 2006 [which also is included in Ex. 49], and 2007, for the purpose of determining whether the Settlement Agreement, Interim Implementation Order, and PCL Writ are reasonably susceptible to the interpretation urged by the parties offering the evidence. (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1350.) The Court did not provisionally receive Ex. 50, finding it irrelevant.

After considering the proffered evidence, the Court concludes that the language of the documents is reasonably susceptible to different interpretations. Accordingly, the Court admits the extrinsic evidence to aid in its interpretation of the contract.

Plaintiffs also objected to all of the exhibits and declarations offered by Kern Water Bank Parties. The Court overrules Plaintiffs' objections and admits the evidence.

With the exception of Exhibit 50, each of Exhibits 1-60, 2001-2008, and 3029-3038, is admitted into evidence.

Plaintiffs proffered two exhibits at trial, which have been labeled as Exhibits "1001" and "1002." The exhibits consist of a 2005 Writ of Mandate issued in *County*

1 Sanitation District #2 of Los Angeles v. County of Kern, and a 2009 Judgment issued in  
2 Preserve Wild Santee v. City of Santee. These two exhibits were not admitted into  
3 evidence.

4  
5 VI.

6 Discussion

7  
8 A. The Reverse Validation Cause of Action

9 Where the Validation Statute applies, it imposes a short 60-day limitation period  
10 on anyone who would seek to challenge the validity of the public agency's action. (Civ.  
11 Proc. Code §§ 860, 863, 869.) As an initial matter, therefore, the Court must determine  
12 whether the Validation Statute applies. If so, this case is governed by the 60-day statute  
13 of limitations applicable to validation proceedings.

14 The Validation Statute does not specify the matters to which it applies. Rather, it  
15 applies to "any matter which under any other law is authorized to be determined pursuant  
16 to this chapter." (Civ. Proc. Code § 860.) Therefore, the Court must look to other  
17 statutes to determine the scope of public agency actions that are subject to validation  
18 under the Validation Statute. (*California Commerce Casino, Inc. v. Schwarzenegger*  
19 (2007) 146 Cal.App.4th 1406, 1423.)

20 Relevant here, Government Code sections 53511 and 17700 authorize validation  
21 proceedings to test the validity of state or local "bonds, warrants, contracts, obligations, or  
22 evidences of indebtedness." (Gov. Code §§ 53511, 17700.) In this case, all parties  
23 agree that the Subject Contracts are subject to validation under these statutes. The  
24 Court of Appeal apparently reached the same conclusion in the PCL Litigation.<sup>14</sup> (See  
25 *Planning and Conservation League, supra*, 83 Cal.App.4th at pp.921-926.)

26  
27 <sup>14</sup> The Court of Appeal reversed the judgment granting the summary adjudication of the validation  
28 cause of action and remanded the cause to the trial court. Such action would have constituted  
an idle act if the contracts were not subject to validation. Thus, one can reasonably conclude the  
Court of Appeal viewed the contracts as matters subject to validation.

1           After *Planning and Conservation League*, some courts have construed the word  
2 "contracts" in Government Code sections 53511 and 17700 to have a "restricted  
3 meaning," limited to those contracts that are in the nature of, or that directly relate to, a  
4 public agency's bonds, warrants, or other evidences of indebtedness. (See *California*  
5 *Commerce Casino v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1424-1430; *Kaatz*  
6 *v. City of Seaside* (2006) 143 Cal.App.4th 13, 42; see also *Quantification Settlement*  
7 *Agreement Cases* (2011) 201 Cal.App.4th 758, 826 [discussing *Ontario v. Superior Court*  
8 *of San Bernardino County* (1970) 2 Cal.3d 335].)

9           One might question whether the Subject Contracts "directly" relate to public  
10 agency "evidences of indebtedness." However, given that all the parties in this  
11 proceeding agree the Subject Contracts are subject to validation; that the Court of Appeal  
12 implicitly endorsed this view by remanding the validation cause of action in the PCL  
13 Litigation; and the fact that approximately \$27.5 million in bonds and other debt was  
14 issued in reliance on the Kern Water Bank transfer, this Court shall conclude that the  
15 Subject Contracts are subject to validation. (See *Empire West Side Irrigation Dist. v.*  
16 *Lovelace* (1970) 5 Cal.App.3d 911, 913 [validation action to determine the validity of  
17 contract affecting water rights of two districts].)

18           Under Civil Procedure Code § 860 et seq., an action to challenge the validity of a  
19 "contract" must be commenced within 60 days after the contract comes into "existence."  
20 (Civ. Proc. Code § 860.) Thus, to determine whether Plaintiffs' validation cause of action  
21 is timely, it is necessary to determine when the Subject Contracts came into "existence."

22           In general, the following elements are essential to the existence of a valid  
23 contract: (1) parties that are capable of contracting; (2) their mutual consent; (3) a lawful  
24 object; and (4) sufficient cause or consideration. (See Civ. Code § 1550.)

25           However, under the Validation Statute, the "validity" of the contract is the precise  
26 question to be answered in the validation proceeding. (See *Smith v. Mt. Diablo Unified*  
27 *School Dist.* (1976) 56 Cal.App.3d 412, 416.) Thus, for purposes of the Validation  
28 Statute, the validity or enforceability of the contract has no bearing on the question of its

1 "existence." Cognizance under the Validation Statute is based on *when* the contract was  
2 formed or came into existence, not why or how it came into existence. (*Ibid.*)

3 Code of Civil Procedure section 864 attempts to shed additional light on when a  
4 contract comes into "existence" for purposes of the Validation Statute. It states: "For  
5 purposes of this chapter, bonds, warrants, contracts, obligations, and evidences of  
6 indebtedness shall be deemed to be in existence upon their authorization." (Civ. Proc.  
7 Code § 864.) Under section 864, "contracts shall be deemed authorized as of the date of  
8 adoption by the governing body of the public agency of a resolution or ordinance  
9 approving the contract and authorizing its execution." (*Ibid.*)

10 Under section 864, courts look to the date the agency approved the contract and  
11 authorized its execution, rather than the date it was executed. It is not necessary for the  
12 agency to sign a formal written contract for the contract to come into "existence." (*Smith,*  
13 *supra*, 56 Cal.App.3d at pp.416-417.) Likewise, signing a formal written contract does not  
14 necessarily cause a contract to come into existence, if execution of the contract has not  
15 been approved and authorized. (*California Commerce Casino, Inc., supra*, 146  
16 Cal.App.4th at p.1433 n.17.)

17 Even when section 864 applies, there must be a "contract," not merely a proposal  
18 or offer. A contract cannot come into "existence" without both a proposal or offer by one  
19 party and an acceptance by the other. If a public agency's acceptance of a contract is  
20 conditional, then it follows that the condition must be satisfied for the approval to become  
21 "effective" and the contract to be subject to validation. (*Ibid.*)

22 When the Validation Statute applies, any matters which could be adjudicated in  
23 the validation action, including constitutional challenges, must have been raised within the  
24 60-day statutory limitations period or they are waived. (*Friedland v. City of Long Beach*  
25 (1998) 62 Cal.App.4th 835, 846-847.)

26 In this case, the Subject Contracts are "contracts" that were "authorized" by DWR  
27 in 1995 with its approval of the Monterey Agreement, the Monterey Amendment, and the  
28 KFE Transfer Agreement. In 1996, the PCL Plaintiffs filed a reverse validation lawsuit

1 challenging the validity of those contracts. The Court of Appeal reversed the trial court's  
2 dismissal of the validation cause of action and remanded the matter to the trial court. The  
3 reverse validation cause of action subsequently was voluntarily dismissed by the PCL  
4 Plaintiffs pursuant to the Settlement Agreement. Thus, there can be no dispute that the  
5 Monterey Agreement, the Monterey Amendment, and the KFE Transfer Agreement were  
6 deemed to be in "existence," both by the parties to the PCL Litigation and the Court of  
7 Appeal, as early as 1996.

8 In addition, all of the Subject Contracts, including all 27 of the Monterey  
9 Amendments, were fully executed between 1995 and 1999. This further supports the  
10 conclusion that the contracts were in "existence" many years before the Plaintiffs filed this  
11 action.

12 Nevertheless, Plaintiffs contend that their complaint was timely filed under the  
13 Validation Statute. While conceding that the Subject Contracts were "authorized" and  
14 hence came into "existence" in 1996, Plaintiffs dispute the Subject Contracts were  
15 validated as part of the PCL Litigation. Plaintiffs contend DWR's approval of the Subject  
16 Contracts was set aside as part of the Settlement Agreement and its associated  
17 documents and, therefore the Subject Contracts "ceased to exist" upon the filing of the  
18 Interim Implementation Order. From 2003 until 2010, Plaintiffs contend the Subject  
19 Contracts were "in effect" only on a temporary, interim basis, pursuant to the Court's  
20 Interim Implementation Order. Plaintiffs contend the Subject Contracts were not  
21 authorized on a final basis until DWR certified the Monterey Plus EIR and issued its  
22 Notice of Determination for the Project on May 5, 2010.

23 The Court rejects Plaintiffs' arguments. As described above, the evidence before  
24 the Court shows that the Monterey Amendment and the KFE Transfer Agreement were  
25 authorized and came into "existence" in 1995. As a result, the Contracts properly were  
26 subject to validation at that time.

27 That the Contracts were subject to validation is supported by the fact they were  
28 the subject of a validation action. Although the trial court dismissed the validation cause

1 of action, it did not do so because the validation action was improper or premature; it did  
2 so because it concluded that the PCL Plaintiffs had failed to name certain indispensable  
3 parties.

4 Similarly, the Court of Appeal implicitly endorsed the view that the Contracts were  
5 subject to validation by reversing the trial court's summary judgment of the validation  
6 cause of action and remanding the matter to the trial court. If the Subject Contracts were  
7 not subject to validation, the trial court's "error" in dismissing the validation action would  
8 have been harmless and there would have been no purpose in remanding the matter to  
9 the trial court. Thus, the Court of Appeal must have concluded that the Subject Contracts  
10 were subject to validation under the Validation Statute.

11 Plaintiffs concede that the Monterey Amendment and the KFE Transfer  
12 Agreement came into "existence" and were subject to validation in 1995. But Plaintiffs  
13 claim that the Subject Contracts thereafter were taken out of "existence" in 2003 as part  
14 of the Settlement Agreement and its associated documents. Plaintiffs claim that, as part  
15 of the Settlement Agreement, the trial court "necessarily" voided the 1995 approvals of  
16 the Monterey Amendment project -- including DWR's authorization of the Subject  
17 Contracts -- and required a "new decision" on a "new project" based on a "new EIR."  
18 Consequently, Plaintiffs claim, the Subject Contracts were not finally approved and  
19 authorized until DWR issued its new Notice of Determination on May 4, 2010.

20 There are two fundamental problems with Plaintiffs' argument. The first is that  
21 Plaintiffs conflate the CEQA "project" with the "matters" subject to validation under the  
22 Validation Statute (i.e., the Subject Contracts). This is perhaps understandable since the  
23 CEQA projects at issue here involved implementation of the Contracts subject to  
24 validation. However, it is important to remember that a CEQA project is not a "matter"  
25 subject to validation, and that the existence of a CEQA project does not inevitably mean  
26 that a matter subject to validation has come into "existence" for purposes of the Validation  
27 Statute.

28

1 Second, Plaintiffs' argument rests on the unfounded assumption that the 1995  
2 contract approvals must have been set aside because DWR's certification of the  
3 Monterey Amendment EIR was set aside. Contrary to what Plaintiffs argue, Public  
4 Resources Code section 21168.9 does not *require* that all project approvals be voided if  
5 any portion of an EIR is found to be inadequate.

6 Rather, Public Resources Code section 21168.9 vests extensive equitable  
7 discretion in the superior courts to determine the appropriate remedy for a CEQA  
8 violation. Section 21168.9 states:

9 (a) If a court finds, as a result of a trial, hearing, or remand from an  
10 appellate court, that any determination, finding, or decision of a public  
11 agency has been made without compliance with this division, the court  
12 shall enter an order that includes one or more of the following:

13 (1) A mandate that the determination, finding, or decision be voided  
14 by the public agency, in whole or in part.

15 (2) If the court finds that a specific project activity or activities will  
16 prejudice the consideration or implementation of particular  
17 mitigation measures or alternatives to the project, a mandate that  
18 the public agency and any real parties in interest suspend any or all  
19 specific project activity or activities, pursuant to the determination,  
20 finding, or decision, that could result in an adverse change or  
21 alteration to the physical environment, until the public agency has  
22 taken any actions that may be necessary to bring the  
23 determination, finding, or decision into compliance with this  
24 division.

25 (3) A mandate that the public agency take specific action as may  
26 be necessary to bring the determination, finding, or decision into  
27 compliance with this division. (Pub. Res. Code § 21168.9.)  
28

1 In sum, section 21168.9(a) states that after a CEQA violation is found, the court  
2 shall enter an order that includes "one or more" of the three options: void the finding or  
3 decision, in whole or in part, under subdivision (a)(1); suspend any or all project activity  
4 under subdivision (a)(2); and/or mandate that the agency take specific action to bring the  
5 finding or determination into compliance with CEQA under subdivision (a)(3).

6 Under section 21168.9, the court need not order all three forms of relief. Section  
7 21168.9 was enacted in 1984 to give courts flexibility in tailoring a remedy to fit a specific  
8 CEQA violation, and the Legislature amended section 21168.9 in 1993 to expand the  
9 court's authority, expressly authorizing courts to fashion a remedy that permits some part  
10 of the project to go forward while the agency seeks to remedy its CEQA violations.

11 (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 288; see also Pub.  
12 Res. Code § 21168.9(b).) In deciding which mandates to include in its order, a trial court  
13 relies on equitable principles. (*Preserve Wild Santee, supra*, 210 Cal.App.4th at p.287.)

14 In *Preserve Wild Santee*, the plaintiffs argued that whenever a trial court finds an  
15 EIR inadequate, CEQA demands the trial decertify the EIR and vacate all related project  
16 approvals. The Fourth Appellate District Court of Appeal flatly rejected this argument:

17 "In our view, a reasonable, commonsense reading of section 21168.9  
18 plainly forecloses plaintiffs' assertion that a trial court must mandate that a  
19 public agency decertify the EIR and void all related project approvals in  
20 every instance where the court finds an EIR violates CEQA." (*Id.* at  
21 p.288.)

22 Other courts also have allowed project activities to proceed even though the  
23 agency did not fully comply with CEQA when approving the project. (See *Schenck v.*  
24 *County of Sonoma* (2011) 198 Cal.App.4th 949, 960-961 [court not required to set aside  
25 project approval for failure to provide notice to responsible agency]; *County Sanitation*  
26 *Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1604-1605 [court not required  
27 to set aside heightened treatment standards pending preparation and certification of EIR];  
28 *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1455 [County

1 allowed to continue existing use of temporary detention facility pending certification of  
2 proper EIR]; *Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal.* (1988) 47  
3 Cal.3d 376, 423-424 [court allowed existing operations at new laboratory site to continue  
4 while proper EIR was prepared]; but see *LandValue 77, LLC v. Bd. of Trustees* (2011)  
5 193 Cal.App.4th 675, 681-682 [where a court finds that an EIR is legally inadequate, the  
6 writ should require the agency to set aside its certification of the EIR and all project  
7 approvals]; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124  
8 Cal.App.4th 1184, 1220-1221 [same.]

9 Plaintiffs are correct that in most cases, when a court finds that an EIR is legally  
10 inadequate, the court issues a writ of mandate requiring the agency to set aside its CEQA  
11 determination *and* related project approvals. It is also true that where courts have  
12 allowed project activities to proceed despite deficiencies in an EIR, the courts have done  
13 so because the activities are severable and the courts have found that the severable  
14 activities will not cause environmental harm or prejudice the agency's environmental  
15 review of the non-complying portions of the project. (See *Anderson First Coalition v. City*  
16 *of Anderson* (2005) 130 Cal.App.4th 1173, 1180-1182; see also Pub. Res. Code  
17 § 21168.9(b).) Courts generally will not allow activity on a project to continue pending  
18 CEQA compliance if the project activities could result in an adverse change in the  
19 environment or the activities will prejudice the consideration or implementation of  
20 particular mitigation measures or alternatives to the project. (*Ibid.*)

21 The reason for this is that the purpose of an EIR is to serve as an "informational  
22 document," which provides the public and responsible officials with detailed information  
23 about the effects a project is likely to have on the environment, and to list ways in which  
24 adverse effects might be minimized or avoided, before the changes have reached the  
25 point of no return. (Pub. Res. Code § 21061; see also *Santiago County Water Dist. v.*  
26 *County of Orange* (1981) 118 Cal.App.3d 818, 822; *Save Tara v. City of West Hollywood*  
27 (2008) 45 Cal.4th 116, 129-130.) Accordingly, CEQA requires the lead agency to certify  
28 a legally adequate EIR prior to deciding whether to approve the project. (*Bakersfield*

1     *Citizens for Local Control, supra*, 124 Cal.App.4th at p.1221.) If a project were to be  
2 approved prior to certification of the EIR, the EIR's purpose in serving as an  
3 environmental "alarm bell" would be frustrated. (*Id.* at p.1220.)

4             Defects in an EIR usually will taint the analysis of the entire project. Thus, when a  
5 court finds that an EIR is inadequate in some material respect, the court generally will  
6 require the agency to set aside the related project approvals or suspend project activities  
7 pending certification of a legally adequate EIR.

8             However, this result is not inevitable. As described above, a court has discretion  
9 to allow a project to proceed despite deficiencies in the EIR. *The critical question to be*  
10 *answered is whether the trial court did so here.*

11             Based on the evidence presented, this Court concludes that the Subject Contracts  
12 were not taken out of "existence" as part of the PCL Litigation, the Settlement Agreement  
13 or its associated documents, or the certification of the new Monterey Plus EIR.

14             First, notwithstanding the PCL Plaintiffs' request that the Court of Appeal modify  
15 its opinion to set aside the approvals of the contracts, the Court of Appeal refused to  
16 include this language in its order, concluding that the trial court is the "more appropriate  
17 forum" to consider and rule upon such request. It follows that the appellate decision in  
18 the PCL Litigation did not invalidate the contract approvals or cause the contracts to go  
19 out of "existence." If, as Plaintiffs contend, the 1995 contract approvals were required to  
20 be set aside because the EIR certification was set aside, why did the Court of Appeal  
21 refuse to modify its opinion in the manner requested by the PCL Plaintiffs? The Court of  
22 Appeal plainly did not agree that the contract approvals were legally required to be set  
23 aside.

24             Second, the parties did not agree in the Settlement Agreement to invalidate the  
25 Subject Contracts or DWR's approval of them. The parties agreed that DWR would  
26 prepare and certify a new EIR evaluating the components of the Monterey Plus project,  
27 and make a new determination based upon the EIR. But nowhere in the Settlement  
28 Agreement did the parties agree to invalidate the Subject Contracts.

1 To the contrary, the parties to the Settlement Agreement expressly agreed that  
2 KWBA "shall retain title to the [Kern Fan Element]," and that the State Water Project and  
3 the Kern Water Bank shall continue to be administered and operated in accordance with  
4 the Monterey Amendment and KFE Transfer Agreement. (Ex. 34 [RV1478, 1490].) Such  
5 an agreement would make little sense if the parties were simultaneously agreeing to set  
6 aside or invalidate those agreements.

7 Further, upon execution of the Settlement Agreement and satisfaction of certain  
8 conditions, the PCL Plaintiffs agreed in the Settlement Agreement to request dismissal of  
9 their reverse validation cause of action challenging the validity of the Subject Contracts.  
10 This is clear evidence that the parties intended to "validate" those Contracts as part of the  
11 Settlement Agreement.

12 Plaintiffs note that the parties only agreed to an order authorizing the  
13 administration and operation of the State Water Project on an "interim basis," pending  
14 completion of the new EIR. According to Plaintiffs, such "interim" authorization would  
15 have been unnecessary if the parties had agreed to fully "validate" the contracts. Thus,  
16 Plaintiffs contend, use of the term "interim" shows the parties intended to set aside the  
17 original approvals of the contracts and require DWR to make a new determination.

18 However, Plaintiffs are confusing the CEQA project with the underlying  
19 agreements. (See Ex. 34 [RV1493] [distinguishing proceedings relating to EIR from  
20 litigation seeking to invalidate the Monterey Amendment].)

21 Plaintiffs may argue that where a project is the implementation of a contract, the  
22 project is the contract and the contract is the project. But even if Plaintiffs are correct, this  
23 does not make the agency's approval of the project a "matter" subject to validation.

24 Moreover, considering the Settlement Agreement as a whole, the more  
25 reasonable interpretation of the term "interim" is that the parties needed to account for the  
26 fact that, under the Settlement Agreement, the PCL Plaintiffs retained a conditional right  
27 to re-file their challenge to the validity of the Subject Contracts. The PCL Plaintiffs agreed  
28 to dismiss their validation cause of action "without prejudice," and agreed not to re-file

1 only so long as certain conditions were met. (Ex. 34 [RV1498].) The parties explicitly  
2 agreed to toll the statute of limitations relating to the validation cause of action *for the*  
3 *PCL Plaintiffs* until forty-five days after the filing of the Notice of Determination on the new  
4 EIR. (Ex. 34 [RV1499]; see also Ex. 34 [RV1493, 1501].)

5 In addition, all parties understood that DWR, as part of the new Monterey Plus  
6 EIR, would study and consider the impacts of changes in State Water Project operations  
7 resulting from implementation of the Monterey Amendment and KFE Transfer Agreement.  
8 The parties understood that DWR, based on its analysis, might proceed in a number of  
9 different ways including, potentially, seeking further amendments to the long-term water  
10 supply contracts.

11 Thus, to remove any uncertainty that might be created by the Settlement  
12 Agreement, the parties clarified and affirmed that the State Water Project and Kern Water  
13 Bank would be administered and operated under the Monterey Amendment during the  
14 "interim" period between execution of the Settlement Agreement and completion of the  
15 new EIR. Such "interim" authorization may – or may not – have been necessary, but use  
16 of the term "interim" does not prove the parties implicitly agreed to set aside the approval  
17 of the Monterey Amendment and KFE Transfer Agreement.

18 The inclusion of the tolling agreement supports the Court's interpretation since it  
19 shows the parties intended the contracts to be "validated," subject only to the possibility  
20 that the PCL Plaintiffs might re-file their validation action if certain agreed-upon conditions  
21 were not met.

22 Further, if the parties intended to set aside approval of the Monterey Amendment,  
23 one would expect the parties to have stated this explicitly. They did not.

24 Pursuant to the Settlement Agreement, the trial court issued the Interim  
25 Implementation Order and PCL writ. The Interim Implementation Order approved the  
26 Settlement Agreement and directed issuance of the PCL writ. Consistent with the  
27 Settlement Agreement, the Interim Implementation Order authorized the administration  
28 and operation of the State Water Project under the Monterey Amendments, as

1 supplemented by the Settlement Agreement, pending DWR's return and discharge of the  
2 writ. Nothing in the Interim Implementation Order required DWR to set aside its approval  
3 of the Monterey Amendment or KFE Transfer Agreement.

4 Similarly, the PCL writ required DWR to set aside its certification of the Monterey  
5 Amendment EIR and prepare and certify a new EIR and file a new Notice of  
6 Determination, but nothing in the PCL writ required DWR to vacate or set aside its  
7 approval of the Monterey Amendment, the KFE Transfer Agreement, or any other  
8 contract.

9 In the absence of any language in the Settlement Agreement, Interim  
10 Implementation Order, or the PCL writ requiring DWR to set aside its approval of the  
11 Subject Contracts, it simply cannot be inferred that the parties or the trial court intended  
12 this result.

13 For the same reasons, DWR's completion of the new EIR and issuance of the new  
14 Notice of Determination did not cause the Subject Contracts to go out of "existence" and  
15 create a new "contract" subject to validation.

16 Plaintiffs may argue that the trial court *should* have invalidated the Monterey  
17 Amendment approvals, and that the trial court's failure to do so undermines CEQA by  
18 transforming the EIR into a "post hoc rationalization" to support action already taken. The  
19 problem with this argument is that even if the Court agrees that the trial court erred, the  
20 court's judgment is final and conclusive. The time to object to the Interim Implementation  
21 Order and PCL writ was when they were issued, and certainly no later than the discharge  
22 of the writ. Neither Plaintiffs, nor the PCL Plaintiffs, nor any other person raised any  
23 objections and, therefore, the PCL writ was issued and subsequently discharged.

24 Thus, the Court concludes that the Contract approvals were not invalidated. The  
25 extrinsic evidence before the Court further supports this interpretation.

26 In February of 2003, the parties to the Settlement Agreement issued a Joint  
27 Statement listing the "key components" of the agreement. If invalidation of the Monterey  
28 Amendment had been agreed to, one would reasonably expect it to be included as a "key

1 component" of the agreement. It was not. In contrast, the Joint Statement explicitly  
2 stated that the Kern Water Bank would "remain in local ownership" and continue to be  
3 operated "as it has," subject to additional restrictions on use. (Ex. 48.)

4 The Court also finds support in the November 4, 2002, memorandum to Judge  
5 Weinstein addressing a dispute over the language of the PCL writ. (Ex. 2007  
6 [DWR231341/AR101143].) While admittedly one-sided, the memorandum establishes  
7 that a dispute arose over whether the PCL writ should include language requiring DWR to  
8 set aside the "project approvals." In the memorandum, the PCL defendants argued that  
9 the PCL Plaintiffs' position was contrary to the Settlement Agreement and that defendants  
10 never agreed and never would have agreed to invalidate the Monterey Amendment.  
11 According to defendants, the Court of Appeal's opinion only required decertification of the  
12 EIR and preparation of a new EIR by DWR as the lead agency, and that is all that  
13 defendants agreed to.

14 Ultimately, as discussed above, the PCL writ did exactly as the PCL defendants  
15 described: it required decertification of the prior EIR and preparation of a new EIR by  
16 DWR as the lead agency.<sup>15</sup> If the writ were intended to vacate all project approvals, the  
17 PCL Plaintiffs and the trial court certainly knew how to include such language in the writ.  
18 Because they did not, the Court is bound to conclude that there was no intent to vacate  
19 the project approvals.

20 The other extrinsic evidence relied upon by the parties was given little weight by  
21 the Court, including the February 7, 2007, memorandum, and the June 4, 2010, Consent  
22 to Entry of Order Discharging Writ. The Consent, in particular, was issued several years  
23  
24

25 \_\_\_\_\_  
26  
27 <sup>15</sup> It is fair to say that the parties never agreed on the effect, if any, that preparing a new EIR for a  
28 new project would have on the "validity" of the Monterey Amendment and KFE Transfer  
Agreement. To the extent Plaintiffs contend that merely by preparing a new EIR and issuing a  
new Notice of Determination, DWR "re-authorized" the Monterey Amendment and brought it into  
"existence" for purposes of the Validation Statute, the Court does not agree, for the reasons  
described herein.

1 after the Settlement Agreement was executed, and *one day after* Plaintiffs filed this  
2 action.<sup>16</sup>

3 The Court would reach the same conclusion in the absence of the extrinsic  
4 evidence, but the extrinsic evidence supports the Court's interpretation.

5 In sum, the Monterey Amendment and KFE Transfer Agreement came into  
6 "existence" in the 1990's, never were invalidated or set aside, and remain in existence  
7 today. Thus, the time for challenging the contracts has long since passed.

8 Further, a timely reverse validation action challenging the contracts was brought  
9 and dismissed as part of the PCL Litigation. Thus, the Subject Contracts were "validated"  
10 and are now immune from challenge.

11  
12 B. The Mandate Cause of Action

13 Plaintiffs' Third Cause of Action seeks the same relief as the Second Cause of  
14 Action, except by mandamus rather than validation. Plaintiffs' mandamus cause of action  
15 cannot proceed if the Subject Contracts are subject to validation because, if a matter is  
16 subject to validation, it cannot be challenged through mandamus. (See *Water Users*  
17 *Assn. of El Camino Irr. Dist. v. Bd. of Directors of El Camino Irr. Dist.* (1973) 34  
18 Cal.App.3d 131, 135; *Hills for Everyone v. Local Agency Formation Comm'n of Orange*  
19 *County* (1980) 105 Cal.App.3d 461, 468; *Cal. Commerce Casino, supra*, 146 Cal.App.4th  
20 at pp.1430-1433; see also Civ. Proc. Code § 869.) Having concluded that the Subject  
21 Contracts are subject to validation, the Court concludes that Plaintiffs' mandamus cause  
22 of action is either not available or is similarly time-barred.

23 Moreover, even if the Subject Contracts are not subject to validation, Plaintiffs'  
24 mandamus cause of action still would be time-barred under any other applicable

25 \_\_\_\_\_  
26  
27 <sup>16</sup> The Court notes that the individual who verified Plaintiffs' complaint in this action also signed a  
28 letter commenting on the prior EIR on behalf of an organization which became one of the  
plaintiffs in the PCL Litigation. There appears, therefore, to be at least some connection or  
communication between the Plaintiffs in this action (or their members) and the PCL Plaintiffs (or  
their members). This, of course, is perfectly acceptable, but it further reduces the "weight" of the  
statements made in the Consent.

1 limitations period because it was filed more than fifteen years after the Subject Contracts  
2 were authorized and more than eleven years after the various Monterey Amendments  
3 were executed. This is well outside any of the applicable statutes of limitation – the  
4 longest of which is five years. (See Civ. Proc. Code §§ 318, 319, 337, 338, 340, 343.)  
5

6 C. The Validating Acts

7 In addition to the statute of limitations under the Validation Statute, the Kern Water  
8 Bank Parties also claim that Plaintiffs' validation and mandamus claims are barred by the  
9 statute of limitations under the annual validating acts, and, in particular the "Final  
10 Validating Act of 2003" (the "Annual Validating Act"). The Court agrees, in part.

11 To the extent it applies, the Annual Validating Act validates all "acts and  
12 proceedings" taken by or on behalf of any public body "for, or in connection with, the  
13 authorization, issuance, sale, execution, delivery, or exchange of bonds of any public  
14 body for any public purpose . . . ." (See Ex. 3029 [Sec.6].) The Annual Validating Act  
15 has a six month statute of limitations so, to the extent it applies to Plaintiffs' claims, those  
16 claims are time-barred.

17 In November of 2003, the KWBA, a joint powers authority agency, issued bonds to  
18 finance and re-finance the past and future development of Kern Water Bank facilities.  
19 The November 1, 2003, Deed of Trust and the related Reimbursement Agreement  
20 described in such Deed are an integral part of these bonds and their repayment scheme  
21 and, therefore fall within the scope of the Annual Validating Act. (See *Aughenbaugh v.*  
22 *Bd. of Supervisors of Tuolumne County* (1983) 139 Cal.App.3d 83 [validating act cured  
23 legal deficiencies of water charge that provided repayment source for bonds]; *Fairfield v.*  
24 *Hutcheon* (1949) 33 Cal.2d 475, 477 [validating issuance of bonds approved for a  
25 purpose that was previously unauthorized].)

26 Repayment of the bonds was secured by the land transferred as part of the KFE  
27 Transfer Agreement. Thus, the Court concludes, the Annual Validating Act also validated  
28 any alleged defects or illegalities in the transfer of title to KWBA (through KCWA).

1           The Court rejects the suggestion by Plaintiffs that the Annual Validating Act is  
2 limited to validating minor typographical errors or procedural irregularities. Validating acts  
3 are not limited to correcting procedural irregularities unless expressly so limited. (See  
4 *Hewitt v. Rincon del Diablo Municipal Water Dist.* (1980) 107 Cal.App.3d 78, 91.)

5           However, the Court is not persuaded that the Annual Validating Act goes so far as  
6 to validate the whole of the Monterey Amendment.

7           Moreover, it is undisputed that the Annual Validating Act cannot cure jurisdictional  
8 defects or constitutional infirmities. (*Fleming v. Kent* (1982) 129 Cal.App.3d 887, 892.)  
9 Thus, even if Plaintiffs' statutory challenges to the KFE Transfer Agreement are time-  
10 barred under the Annual Validating Act, Plaintiffs' constitutional challenges are not.

11  
12           D.    Laches and Mootness

13           The Kern Water Bank Parties also contend that Plaintiffs' claims are barred by the  
14 defenses of laches and mootness.

15           The Court agrees with the Kern Water Bank Parties that Plaintiffs' claims are  
16 barred by the defense of laches. The defense of laches requires unreasonable delay plus  
17 either acquiescence in the act about which plaintiff complains or prejudice to the  
18 defendant resulting from the delay. (*Schellinger Brothers v. City of Sebastopol* (2009)  
19 179 Cal.App.4th 1245, 1267-1268.) For the reasons described above, the Court finds  
20 that Plaintiffs unreasonably delayed filing their challenge to the validity of the Monterey  
21 Amendment and KFE Transfer Agreement, and that the real parties in interest were  
22 prejudiced by the delay in that they have entered into agreements and transactions and  
23 made significant investments and expenditures – all of which would be extremely difficult  
24 to unwind – in reliance on the validity of the agreements.

25           In contrast, the Court is not persuaded that the difficulty that would be  
26 encountered in trying to unravel the challenged transactions is sufficient to render  
27 Plaintiffs' claims moot. The case is moot only in the sense that the Court cannot award  
28 the relief sought because the claims are time-barred.

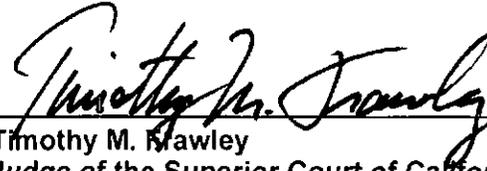
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VII.

Disposition

The Court finds and concludes that Plaintiffs' Second and Third Causes of Action are barred by the affirmative defenses of statute of limitations and laches. Upon resolution of this action, judgment shall be entered dismissing Plaintiffs' Second and Third Causes of Action.

Date: Jan. 31, 2013

  
Timothy M. Fawley  
Judge of the Superior Court of California  
County of Sacramento



**CERTIFICATE OF SERVICE BY ELECTRONIC MAIL**

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did send by electronic mail a copy of the foregoing Proposed Statement of Decision to each of the parties or their counsel of record as stated below.

**Plaintiffs / Petitioners:**

<p>Adam Keats John Buse Adam Lazar Center for Biological Diversity 351 California St., Suite 600 San Francisco, California 94104 Phone: 415-436-9682 Fax: 415-436-9683 <a href="mailto:akeats@biologicaldiversity.org">akeats@biologicaldiversity.org</a> <a href="mailto:jbuse@biologicaldiversity.org">jbuse@biologicaldiversity.org</a> <a href="mailto:alazar@biologicaldiversity.org">alazar@biologicaldiversity.org</a> <i>Attorneys for Plaintiffs/Petitioners</i></p>	<p>Dante John Nomellini Dante John Nomellini, Jr. Nomellini Grilli &amp; McDaniel, PLC 235 East Weber Ave Stockton, CA 95202 Phone: 209-465-5883 Fax: 209-465-3956 <a href="mailto:ngmplcs@pacbell.net">ngmplcs@pacbell.net</a> <i>Attorneys for South Delta Water Agency and Central Delta Water Agency</i></p>
<p>Donald B. Mooney Marsha A. Burch Law Office of Donald B. Mooney 129 C St., Suite 2 Davis, CA 95606 Phone: 530-758-2377 <a href="mailto:dbmooney@dcn.org">dbmooney@dcn.org</a> <a href="mailto:mburchlaw@gmail.com">mburchlaw@gmail.com</a> <i>Attorneys for CWIN, CSPA, CBD, Carolee Krieger and James Crenshaw</i></p>	<p>John Herrick Law Office of John Herrick 4255 Pacific Ave Stockton, CA 95207 Phone: 209-956-0150 Fax: 209-956-0154 <a href="mailto:jherrlaw@aol.com">jherrlaw@aol.com</a> <i>Attorney for South Delta Water Agency and Central Delta Water Agency</i></p>
<p>Michael R. Lozeau Lozeau Drury LLP 410 12th Street, Suite 250 Oakland, California 94607 Phone: 510-836-4200 Fax: 510-749-9103 <a href="mailto:michael@lozeaudrury.com">michael@lozeaudrury.com</a> <i>Attorney for CWIN, CSPA, CBD, Carolee Krieger and James Crenshaw</i></p>	<p>S. Dean Ruiz Harris, Perisho, &amp; Ruiz Brookside Corporate Center 3439 Brookside Rd., Suite 210 Stockton, CA 95219 Phone: 209-957-4245 Fax: 209-957-5338 <a href="mailto:dean@hpllp.com">dean@hpllp.com</a> <i>Attorney for South Delta Water Agency and Central Delta Water Agency</i></p>

**Defendants / Respondents Department of Water Resources:**

Daniel M. Fuchs Office of the Attorney General 1300 I Street Sacramento, CA 95814 Phone: 916-323-3549 Fax: 916-327-2319 <a href="mailto:Daniel.Fuchs@doj.ca.gov">Daniel.Fuchs@doj.ca.gov</a>	Eric M. Katz Marilyn H. Levin Office of the Attorney General 300 South Spring Street, Suite 1702 Los Angeles, CA 90013 Phone: 213-897-2612 Fax: 213-897-2802 <a href="mailto:Marilyn.Levin@doj.ca.gov">Marilyn.Levin@doj.ca.gov</a> <a href="mailto:Eric.Katz@doj.ca.gov">Eric.Katz@doj.ca.gov</a>
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**Respondent Kern County Water Agency:**

Clifford Schulz Hanspeter Walter Kronick Moskovitz Tidemann & Girard 400 Capitol Mall, 27 <sup>th</sup> Floor Sacramento, CA 95814 Phone: 916-321-4500 Fax: 916-321-4555 <a href="mailto:cschulz@kmtg.com">cschulz@kmtg.com</a> <a href="mailto:hwalter@kmtg.com">hwalter@kmtg.com</a> <i>Attorney for Kern County Water Agency</i>	Amelia Minaberrigarai Kern County Water Agency P.O. Box 58 Bakersfield, CA 93302 <a href="mailto:ameliam@kcwa.com">ameliam@kcwa.com</a>
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**Real Parties in Interest:**

<b>Alameda County Flood Control and Water Conservation District, Zone 7</b> David R.E. Aladjem Downey Brand LLP 621 Capitol Mall, 18th Floor Sacramento, CA 95814 Phone: 916-444-1000 Fax: 916-444-2100 <a href="mailto:daladjem@downeybrand.com">daladjem@downeybrand.com</a> <i>Attorneys for Alameda County Flood Control and Water Conservation District, Zone 7</i>	<b>Alameda County Water District:</b> Stephen B. Peck Hanson Bridgett LLP 425 Market St., 26 <sup>th</sup> Floor San Francisco, CA 94105 Phone: 415-995-5022 Fax: 415-995-3425 <a href="mailto:speck@hansonbridgett.com">speck@hansonbridgett.com</a> <i>Attorneys for Alameda County Water Dist.</i>
<b>Antelope Valley - East Kern Water Agency</b> Michael T. Riddell Robert M. Sawyer Russell G. Behrens Best, Best & Krieger LLP 500 Capitol Mall, Ste. 1700 Sacramento, CA 95814	<b>County of Butte:</b> Bruce Alpert County Counsel 25 County Center Drive, Suite 210 Oroville, CA 95965-3380 Phone: 530-538-7621 Fax: 530-538-6891 <a href="mailto:balpert@buttecounty.net">balpert@buttecounty.net</a>

<p>Phone : 916-325-4000  <u>Michael.Riddell@bbklaw.com</u>  <u>Robert.Sawyer@bbklaw.com</u>  <u>Russell.Behrens@bbklaw.com</u>  <i>Attorneys for Antelope Valley – East Kern Water Agency, Crestline – Lake Arrowhead Water Agency, Ventura County Watershed Protection District, Castaic Lake Water Agency; and San Geronio Pass Water Agency</i></p>	<p>Roger K. Masuda  David L. Hobbs  Griffith &amp; Masuda  517 E. Olive Ave.  P.O. Box 510  Turlock, CA 95381  Phone: 209-667-5501  Fax: 209-667-8176  <u>rmasuda@calwaterlaw.com</u>  <u>dhobbs@calwaterlaw.com</u>  <i>Attorneys for County of Butte</i></p>
<p><b>Central Coast Water Authority</b>  Lisabeth D. Rothman  Tim Irons  Brownstein Hyatt Farber Schreck, LLP  P.O. Box 720  Santa Barbara, CA 93102  Phone: 310-500-4616  Fax: 310-500-4602  310-500-4633 Melanie Duncan  (Assistant)  <u>lrothman@bhfs.com</u>  <u>tirons@bhfs.com</u>  <i>Attorneys for Central Coast Water Auth.</i></p>	<p><b>Coachella Valley Water District</b>  Steven B. Abbott  Julia K. Strong  Redwine and Sherrill  1950 Market Street  Riverside, CA 92501  Phone: 951-684-2520  Fax: 951-684-9583  <u>sabbott@redwineandsherrill.com</u>  <u>jstrong@redwineandsherrill.com</u>  <i>Attorneys for Coachella Valley Water Dist.</i></p>
<p><b>Dudley Ridge Water District</b>  Steven M. Torigiani  Ernest Conant  Law Offices of Young Wooldridge, LLP  1800 30th Street, 4<sup>th</sup> Floor  Bakersfield, CA 93301  Phone: 661-327-9661  Fax: 661-327-0720  <u>storigiani@youngwooldridge.com</u>  <u>econant@youngwooldridge.com</u>  <i>Attorneys for Dudley Ridge Water District, Kern Water Bank Authority, Oak Flast Water District, Semitropic Water Storage District, Tejon-Castac Water District, and Wheeler Ridge-Maricopa Water Storage District</i></p>	<p><b>Empire – Westside Water District</b>  Michael S. Nordstrom  Law Offices of Michael S. Nordstrom  222 W. Lacey  Hanford, CA 93230  559-584-3131  <u>nordlaw@nordstrom5.com</u>  <i>Attorney for Empire Westside Irrigation District, Tulare Lake Basin Water Storage District,</i></p>
<p><b>County of Kings</b>  Colleen Carlson, County Counsel  1400 West Lacey Boulevard.  Hanford, CA 93230</p>	<p><b>Kern Water Bank Authority</b>  Kevin M. O'Brien  Steven Saxton  Downey Brand, LLP</p>

<p>Phone: 559-582-3211  <a href="mailto:colleen.carlson@co.kings.ca.us">colleen.carlson@co.kings.ca.us</a>  <a href="mailto:Bernadette.fontes@co.kings.ca.us">Bernadette.fontes@co.kings.ca.us</a>  <i>Attorneys for County of Kings</i></p>	<p>621 Capitol Mall, 18<sup>th</sup> Floor  Sacramento, CA 95814  Phone: 916-444-1000  <a href="mailto:ssaxton@downeybrand.com">ssaxton@downeybrand.com</a>  <a href="mailto:kobrien@downeybrand.com">kobrien@downeybrand.com</a>  <i>Attorneys for Kern Water Bank Authority</i></p>
<p><b>Littlerock Creek Irrigation District and San Gabriel Valley Municipal Water District:</b>  Scott Nave  Christine M. Carson  Lemieux &amp; O'Neill  4165 E. Thousand Oaks Blvd. Suite 350  Westlake Village, CA 91361  Phone: 805-495-4770  Fax: 805-495-2787  <a href="mailto:scott@lemieux-oneill.com">scott@lemieux-oneill.com</a>  <a href="mailto:christine@lemieux-oneill.com">christine@lemieux-oneill.com</a>  <a href="mailto:kathi@lemieux-oneill.com">kathi@lemieux-oneill.com</a>  <i>Attorneys for Littlerock Creek Irrigation District and San Gabriel Valley Municipal Water District</i></p>	<p><b>Metropolitan Water District of Southern California</b>  Adam Kear  700 N Alameda Street  Los Angeles, CA 90012  Mail: P.O. Box 54153  Los Angeles, CA 90054-0153  Phone: 213-217-6057  Fax: 213-217-6890  <a href="mailto:akear@mwdh2o.com">akear@mwdh2o.com</a>  <a href="mailto:tkirkland@mwdh2o.com">tkirkland@mwdh2o.com</a>  <i>Attorneys for Metropolitan Water District of Southern California</i></p>
<p><b>Mojave Water Agency</b>  William J. Brunick  Leland McElhaney  Brunick, McElhaney &amp; Kennedy  1839 Commerce Center West  San Bernardino, CA 92408  Mail to:  P.O.Box 13130  San Bernardino, CA 92423  Tel. 909-889-8301  <a href="mailto:bbrunick@bmblawoffice.com">bbrunick@bmblawoffice.com</a>  <a href="mailto:lmcelhaney@bmblawoffice.com">lmcelhaney@bmblawoffice.com</a>  <i>Attorney for Mojave Water Agency</i></p>	<p><b>Napa County Flood Control and Water Conservation District</b>  Robert C. Martin  County of Napa  1195 Third Street, Room 301  Napa, CA 94559  Tel. 707-259-8443  <a href="mailto:Rob.martin@countyofnapa.org">Rob.martin@countyofnapa.org</a>  <i>Attorney for Napa County Flood Control and Water Conservation District</i></p>
<p><b>Palmdale Water District:</b>  Timothy J. Gosney  Jim Ciampa  Lagerlof, Senecal, Gosney &amp; Kruse  301 North Lake Avenue, 10<sup>th</sup> Floor  Pasadena, CA 91101  Phone: 626-793-9400  Fax: 626-793-5900</p>	<p><b>Paramount Farming Company LLC and Roll International Corporation</b>  Sophie N. Froelich  Roll Law Group P.C.  11444 West Olympic Blvd., 10th Fl.  Los Angeles, CA 90064  Phone: 310-966-8400  <a href="mailto:sfroelich@roll.com">sfroelich@roll.com</a></p>

<p><a href="mailto:tgosney@lagerlof.com">tgosney@lagerlof.com</a>  <a href="mailto:JCiampa@lagerlof.com">JCiampa@lagerlof.com</a>  <i>Attorneys for Palmdale Water District</i></p>	<p><i>Attorney for Roll International Corporation an, Paramount Farming Company LLC</i></p>
<p><b>Plumas County Flood Control and Water Conservation District:</b>  R. Craig Settlemire  County Counsel, County of Plumas  520 Main Street, Room 301  Quincy, CA 95971  530-283-6243  <a href="mailto:liz@countyofplumas.com">liz@countyofplumas.com</a></p>	<p><b>San Luis Obispo County Flood Control and Water Conservation District</b>  Timothy McNulty  Chief Deputy County Counsel  County of San Luis Obispo  1055 Monterey Street, Ste. D320  San Luis Obispo CA 93408  805-781-5400  <a href="mailto:tmcnulty@co.slo.ca.us">tmcnulty@co.slo.ca.us</a>  <i>Attorney for San Luis Obispo County Flood Control and Water Conservation District</i></p>
<p><b>Santa Barbara County Flood Control and Water Conservation District</b>  Jordan Sheinbaum  105 East Anapamu Street, 2nd Floor  Santa Barbara, CA 93101  Phone: 805- 568-2950  Fax. 805-568-2982  <a href="mailto:jsheinbaum@santa-barbara.ca.us">jsheinbaum@santa-barbara.ca.us</a>  <i>Attorney for Santa Barbara County Flood Control and Water Conservation District</i></p>	<p><b>Santa Clara Valley Water District</b>  Anthony Fulcher  Stanly T. Yamamoto  Office of District Counsel  5750 Almaden Expressway  San Jose, CA 95118-3686  Tel. 408-265-2600  <a href="mailto:afulcher@valleywater.org">afulcher@valleywater.org</a>  <a href="mailto:syamamoto@valleywater.org">syamamoto@valleywater.org</a>  <i>Attorneys for Santa Clara Valley Water District</i></p>
<p><b>Solano County Water Agency</b>  Jeanne M. Zolezzi  Herum Crabtree  5757 Pacific Ave., Ste. 222  Stockton, CA 95207  Tel. 209-472-7700  <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a>  <i>Attorneys for Solano County Water Agency</i></p>	<p><b>City of Yuba City:</b>  Andrew Hitchings  Aaron Ferguson  Somach Simmons &amp; Dunn  500 Capitol Mall, Suite 1000  Sacramento, CA 95814  Tel. 916-446-7979  Fax 916-446-8199  <a href="mailto:ahitchings@somachlaw.com">ahitchings@somachlaw.com</a>  <a href="mailto:aferguson@somachlaw.com">aferguson@somachlaw.com</a>  <i>Attorneys for City of Yuba City</i></p>

**Roll International Corporation;  
Paramount Farming Company LLC;  
Westside Mutual  
Water Company; and Tejon Ranch  
Company**

Stephen N. Roberts  
Nossaman LLP  
50 California Street, 34<sup>th</sup> Floor  
San Francisco, CA 94111  
Tel. 415-438-7213  
Fax 415-398-2438  
[sroberts@nossaman.com](mailto:sroberts@nossaman.com)

**Roll International Corporation;  
Paramount Farming Company LLC;  
Westside Mutual  
Water Company; and Tejon Ranch  
Company**

Robert Thornton  
John Flynn  
Nossaman LLP  
18101 Von Karman Avenue, Suite  
1800  
Irvine, CA 92612  
Tel. 949.833.7800  
Fax 949.833.7878  
[rthornton@nossaman.com](mailto:rthornton@nossaman.com)  
[jflynn@nossaman.com](mailto:jflynn@nossaman.com)

I, the undersigned Deputy Clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: February 6, 2013

By: Frank Temmerman, Deputy Clerk  
Dept.29, Hon. Timothy M. Frawley  
Superior Court of California  
County of Sacramento