

C064293

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

**COORDINATED PROCEEDINGS SPECIAL TITLE
(RULE 3.550)**

QSA COORDINATED CIVIL CASES

Sacramento County
Judge: Roland L. Candee
Sacramento County No. JCCP4353

**RESPONDENTS MORGAN/HOLTZ PARTIES, RONALD
LEIMGRUBER AND LARRY PORTER'S BRIEF**

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, THIRD APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: <p align="center">C064293</p>
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APPELLANT/PETITIONER: Imperial Irrigation District, et al. RESPONDENT/REAL PARTY IN INTEREST: All Other Parties to QSA Cases	FOR COURT USE ONLY
<p align="center">CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</p> (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE	
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1. This form is being submitted on behalf of the following party (name): Respondent Ronald Leimgruber, et al., Pro Per

2. a. There are no interested entities or persons that must be listed in this certificate under rule 8.208.
 b. Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person

Nature of interest (Explain):

- (1)
- (2)
- (3)
- (4)
- (5)

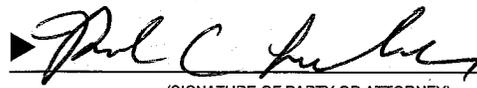
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The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: November 19, 2010

Ronald Leimgruber

 (TYPE OR PRINT NAME)



 (SIGNATURE OF PARTY OR ATTORNEY)

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APPELLANT/PETITIONER: Imperial Irrigation District, et al. RESPONDENT/REAL PARTY IN INTEREST: All Other Parties to QSA Cases	<i>FOR COURT USE ONLY</i>
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE	
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1. This form is being submitted on behalf of the following party (name): Respondent Larry Porter, Pro Per

2. a. There are no interested entities or persons that must be listed in this certificate under rule 8.208.
- b. Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
--	-------------------------------

- (1)
- (2)
- (3)
- (4)
- (5)

Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: November 19, 2010

Larry Porter
LARRY PORTER
(TYPE OR PRINT NAME)

▶ Larry Porter
(SIGNATURE OF PARTY OR ATTORNEY)

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested persons or entities to list in this Certificate of Interested Entities or Persons submitted in behalf of Respondents Michael W. Morgan, Walter Holtz, Toni Holtz, John J. Elmore, Richard Elmore, Gary Foster, and Rodney Foster.

Dated: March 30, 2010

LAW OFFICES OF
PATRICK J. MALONEY

By: 
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GLOSSARY OF TERMS

Category 1 Parties. Designation used by Superior Court for IID, SDCWA, CVWD, MWD, VID, Escondido and State.

Category 2 Parties. Designation used by Superior Court for Barioni Parties, County Parties, Cuatro, Morgan/Holtz Parties, POWER, Porter and Leimgruber.

CEQA. California Environmental Quality Act. (Pub. Resources Code, § 21000 et seq.)

County. County of Imperial.

CVWD. Coachella Valley Water District.

Dream Team. IID Key Negotiators and Representatives during the QSA negotiations, including David Osias, John Carter and Rodney Smith (term created by IID management during QSA negotiations).

DWR. California Department of Water Resources.

ECSA. Environmental Cost Sharing, Funding, and Habitat Conservation Plan Development Agreement between IID, CVWD, and SDCWA.

Escondido. City of Escondido.

Federal QSA. *See* Water Delivery Agreement.

IID. Imperial Irrigation District.

Indian Bands. La Jolla, Pala, Pauma, Rincon, and San Pasqual bands of Mission Indians.

Morgan/Holtz Parties. Numerous Imperial County landowners (Superior Court Defendants and Appellate Court Respondents), sometimes referred to as the Putative Class Representatives and the Imperial Group.

MWD. The Metropolitan Water District of Southern California.

Part 417. Bureau of Reclamation administrative process that analyzed IID's water use.

PEIR. Programmatic Environmental Impact Report.

QSA (or State QSA). Quantification Settlement Agreement by and among IID, MWD and CVWD.

QSA Agreements. The QSA and QSA-related agreements -- number at least 35.

QSA-JPA Agreement. Quantification Settlement Agreement Joint Powers Authority Creation and Funding Agreement among the State (through DFG), CVWD, IID, and SDCWA.

INTRODUCTION

The water transfer as presently structured by the Appellants lacks a valid foundation, and the superior court properly so found. The obviously missing element is a firm and enforceable resolution of the fate of the Salton Sea. The superior court referred to this keystone as a potential “environmental Chernobyl.” AA:47:292:12738. From this pronounced lacuna can the other procedural and substantive infirmities be viewed and their significance appreciated.

The superior court’s core finding was that no actual agreement had been reached on the fate of the Salton Sea, much less a constitutional one. The Appellants have, as shown below, assigned as error only a scant portion of the superior court’s many factual findings and legal conclusions, limiting their briefs to predominantly analyses of Article XVI of the California Constitution and have elected to leave untouched the superior court’s findings that the decision-makers (as opposed to the attorney-scriveners) were never given an opportunity to come to a unified agreement on all material terms.

The Morgan/Holtz Parties and Pro Per Respondents Larry Porter and Ronnie and Laura Leimgruber¹ (“these Respondents”) expect that sooner or later the Appellants will assert that the water transfer and its importance to the State, to the various western states, and perhaps even to the nation are reasons to justify over-looking minor inconsistencies or violations of rules or laws. Some have started on the “its too big to fail” path already.

To provide the background needed *for a full appreciation of the QSA’s importance to resolving intra-state, inter-state, and state-federal disputes*, a short summary of the law governing the allocation of the Colorado River and of the disputes resolved by the QSA follows.

State Opening Brief, p. 7, II, (emphasis supplied). These Respondents agree that the transfer is important to the Imperial Valley region, the people of the State, the western states, and beyond. Where the Respondents and Appellants part company are the public policies on which each side relies. Respondents believe that precisely because the transfer and its associated components are so “big” and may be seen as a model for the future, the details of the transaction and the behavior of those involved must be subjected to even more rigorous

¹ Ronald C. (“Ronnie”) and Laura L. Leimgruber are husband and wife. They filed their Answer and General Denial to Unverified First Amended Complaint for Validation on January 20, 2004. Supp.AA:16:141:3990. Ronnie Leimgruber acted on behalf of the marital unit at trial and continues to do so on appeal.

standards. Or at a minimum, the well-known policies of transparency, accountability, loyalty, honesty, and the like, apply as fully as if the transfer were one for “small” amounts of water. Using the analogy proposed by IID before trial, even “one gold bar²” worth of prohibited actions is more than the law – and this Court – can allow.

While this brief will not delve into a detailed justification of the superior court’s analysis of Article XVI sections 1 and 7, these Respondents support their kindred Respondents’ constitutional arguments and showings thereon, as they did at trial and before.

AA:47:292:12749, ¶3, Morgan/Holtz Issue V-2; AA:26:185:06799, Cuatro del Mar Issues 1 and 2. AA:34:203:09213, Morgan/Holtz Parties’ Phase 1A Responsive Brief (reiterating their joining in Cuatro’s briefs on constitutionality of the QSA-JPA Agreement).

These Respondents will also allow the County, ICAPCD, and others to speak for their concerns about compliance with the environmental standards to which the water transfer was supposed to

² IID asked that the superior court interpret the validation statutes to bar allegations of inappropriate behavior or conflict as a basis for invalidity, unless the initial pleading provided a detailed trial-level showing. The analogy IID offered was that if an IID director received 100 gold bars ten minutes before voting on a contract, then the public would be required to ferret out the details ahead of time and specifically plead the 100 gold bars and the ten minute timing within the limited initial filing or answer period. Supp.AA:155:1562:038622, lines 1-14, IID Motion to Preclude Certain Issues.

adhere. The Morgan/Holtz parties are no strangers to such arguments at trial. Supp.AA:207:1937:051610, Morgan Petitioners Opening Trial Brief Phase 1C.

The judgment of the superior court must be upheld for the various reasons contained in this and other Respondents' briefs. However, a just result requires far more. The Salton Sea must be addressed, not allowed to waste away while the Appellants use up time on the clock – something the true Public Agencies (the County of Imperial and its Air Pollution Control District) cover well in their briefs. And any opinion affirming the superior court must, as explained below, honor the scope of a judgment of *validity* by applying the same scope to a judgment of *invalidity*. Otherwise, the years of effort and expense come to naught.

STATEMENT OF THE CASE

A. Statement of Facts

The Appellants have to varying degrees provided background facts and allegations, which will not be repeated here. Instead, these Respondents will supply certain background elements missing from the Appellants' briefs.

First of all, the Respondents presently known as the Morgan/Holtz Parties did not enter this fray as spoilers or strangers. They and their colleagues at trial are long-term owners of land and farmers who thoughtfully considered the need for a water transfer and advocated for a rational approach well before the QSA was signed. Their relationship to IID is that of beneficiary to trustee, as is that of Ronnie Leimgruber, a third generation local farmer. RT:9:2446, line 24. They are entitled to water (whether one labels that entitlement a formal water right or a right to service is not critical to this appeal), which entitlement is appurtenant to the land.

It may be true, as the Court of Appeals said, that no individual farm in the District has a permanent right to any specific proportion of the water held in trust by the District. But there is no doubt that prior to 1929 the District, in exercising its rights as trustee, delivered water to individual farmer beneficiaries without regard to the amount of land under single ownership. It has been doing so ever since. There is no suggestion, by the Court of Appeals or otherwise, that as a matter of state law and absent the interposition of some federal duty, the District did not have the right and privilege to exercise and use its water right in this manner. Nor has it been suggested that the District, absent some duty or disability imposed by federal law, could have rightfully denied water to individual farmers owning more than 160 acres. Indeed, as a matter of state law, not only did the District's water right entitle it to deliver water to the farms in the District regardless of size, but also the right was equitably owned by the beneficiaries to whom the District was obligated to deliver water.

Bryant v. Yellen (1980) 447 US 352, 371 n 23. They believed that a well-developed transfer could benefit the entire region, and developed a list of strategic points (sometimes referred to as the Nine-Point Plan) to aid IID in its negotiations with others.

1. Imperial Irrigation District (IID) and the Landowners - Farmers will consent to the 3,100,000-acre feet annual cap and Department of Interior (DOI) will recognize this cap. IID will immediately make 300,000 acre-feet of this water available for transfer.

2. This water will only be available once Congress and the California Legislature or a Court of competent jurisdiction approves a settlement binding on all parties, including environmental interests. satisfactory to IID and the Landowners - Farmers:

A> Protection of IID, Landowners - Farmers, and the County of Imperial from any claims of liability for endangered species, condemnation or environmental claims including but not limited to claims based on impacts to the Salton Sea.

B> Protection of IID, Landowners - Farmers and the County of Imperial from claims or liability for unreasonable and non-beneficial use of water.

C> Water for transfer will no longer be available to MWD or SDCWA in the event any Administrative Action, Court decision or Legislative enactment reduces the above described protection. Either IID or the Landowners-Farmers representing 60% or more of acreage currently eligible, will determine this event. In such an event MWD and SDCWA will be obligated to

continue paying as though the water were being transferred.

3. All Landowners - Farmers in IID who are presently eligible to receive water will immediately make a charitable contribution of -----% to a community-based foundation similar to Great Valley Foundation of Modesto, California for the benefit of the residents of Imperial County.
4. All Governmental entities in Imperial County currently delivering IID water will receive ---- dollars per year. The allocation of this money shall be determined by LAFCO.
5. All Landowners - Farmers in IID eligible to receive water will immediately receive ----- dollars per acre per year.
6. No individual Landowner in the Imperial Valley can transfer water from Imperial County unless it has the consent of the Landowners representing 90% of the acreage eligible to receive water.
7. A Study Group will be established to analyze measurement issues on Farm Water Use and develop a recommendation, which will be accepted by IID.
8. IID will immediately develop a Water Clearing House similar to the Water Clearing House in the Westlands Water District. The purpose of the Water Clearing House will be to increase and facilitate the reasonable and beneficial use of water in the Imperial Valley.
9. A system will be developed by IID to guarantee Landowners - Farmers fair water rate protection. If IID fails to develop a system, the Landowners - Farmers representing 60 % of the acreage currently eligible to receive water availability charges can develop their own system and IID will adopt it

Supp.AA:41:491:010164-010165. When IID appeared adrift and unclear about its duties to the Imperial Valley, the Morgan/Holtz Parties tried to sever themselves and save IID from the imminent danger, i.e., an inappropriate water transfer agreement. AR 3/7/70722/70722-70626.

The Morgan/Holtz Parties did not cease their efforts to craft a rational and justifiable version of the water transfer just because IID had initiated litigation. They pursued attempts at settlement with the State, among others. Supp.AA:83:1000:020606-020609. The superior court went so far as to expressly invite the parties to a settlement conference, but all of the Appellants rejected the overture. Supp.AA:161:1651:040234.

Among these landowners and farmers were and are members of the Elmore family who had been instrumental over one generation ago in taking IID to task for wasting water. AR2/1/153/09298-09376, SWRCB June 1984 Decision 1600. That history is implicitly recognized by at least some of the Appellants. SDCWA, CVWD and MWD Opening Brief, at p. 11. These Respondents desired to see a transfer that was rational and for the best interest of the Imperial Valley, the State, the western states, and Mexico rather than to benefit

short-term special interests. In that vein, they attempted (it turns out, without success) to ensure that IID's key personnel were loyal. Supp.AA:98:24299:024305-307, Maloney March 24, 2003, letter to Carter regarding conflict of an IID attorney; Supp.AA:98:24299:024314-315, Carter March 27, 2003, letter (in which he stated, ". . . , it is my policy when retaining outside counsel that he or she cannot represent a person with an interest adverse to IID. . . .") By the end of the trial, it was clear that IID's key personnel had never been loyal, and IID had misled the public. *See* part I.B.

Larry Porter is an environmental activist residing in Newport Beach, California. Both Messrs. Leimgruber and Porter answered IID's complaint as is their right as persons "interested" in the subject matter per IID's published summons. They participated in the litigation, including at trial. RT:9:2440-46 and RT:11:3160-65, Larry Porter; RT:9:2446-49 and RT:11:3155-60, Ronnie Leimgruber.

The preexisting and continuing reality is that the water needs of the Morgan/Holtz Parties and their farming colleagues can vary tremendously from time to time, depending in part on market conditions. One year they may plant a crop that uses less water while at other times the market demands a "thirsty" crop. *See*

Supp.AA:121:1202:030209-230, IID Crop Acreage Report;
RT:11:3160, lines 7-13, Ronnie Leimgruber. The farming community
uses over 90% of the water in Imperial Valley. *See*
Supp.AA:121:1202:030177, IID Annual Report. So for them, a water
transfer is not a mere economic opportunity or risk, but a potential
threat or guarantee of their very livelihood and by extension, the well
being of the Imperial Valley region.

The Morgan/Holtz Parties participated in the federal lawsuit
brought by IID in 2003. AR3/30/110767, 110783, 110805 and
110808. They moved to intervene, which motion was denied without
prejudice as moot since the federal court ordered that the Bureau of
Reclamation had to conduct a new administrative process to analyze
IID's water use – the so-called Part 417 proceeding. SDCWA,
CVWD and MWD Opening Brief, at p. 23. The Morgan/Holtz Parties
were active participants in the Part 417 proceeding. That proceeding
found that the most critical area for improvement for IID was in its
inability to properly measure water – something that the
Morgan/Holtz Parties and their colleagues recognized based on their
own experiences.

Recommendation 1. Water Measurement. Reliable
water measurement records are essential to the decisions

that result in water conservation. Reclamation recommends that IID develop, maintain and use a district-wide network of water measurement devices for the consistent monitoring, recording and reporting of system and on-farm water use data. Measurements within the IID should include: 1) canal and lateral spills, 2) actual deliveries to farmers' head gates, 3) tailwater runoff, 4) drain flows, including discharges from drains, and 5) leach water and other components of water diverted from the Colorado River for use in IID.

IID may consider a carefully planned and executed measurement program approach to install continuous recorders at selected representative sites and conduct regular spot measurements at the remaining sites. This approach could be used at lateral and farm turnouts and well as drain ditches.

AR3/31/120019/120080-81, Part 417 Determinations and Recommendations.

These Respondents seek a just result. They recognized that their chances of prevailing at trial were small, given the “stacked deck” of a validation action that usually results in a government victory. They understood that they faced litigation liabilities, but believed that the importance of the transfer and its potential benefits or devastating effect on the Imperial Valley region – principally the fate of the Salton Sea – outweighed the risks. They understood their potential liability for fees as evidenced by the declarations they filed in 2005 in connection with their Motion to Certify Class.

I understand that the Court has the ability to award costs of suit to any party under the validation statutes, which means that the Court may determine that I must pay some portion of another party's costs of suit.

Supp.AA:78:950:019271, John Elmore; Supp.AA:78:955:019322, Michael Morgan; Supp.AA:78:959:019370-371, Rodney Foster; Supp.AA:78:961:019394-395, Walter Holtz.

One other fact missing from the Appellants' briefs is that the Appellants (all but VID and Escondido, apparently) had entered into many joint defense promises in the subject contracts.

AR3/1/10080/10089, AR3/10092/10109, AR3/1/10287/10311, AR3/1/10342/10364, AR3/1/10373/10401, AR3/1/10457/10475, AR3/1/10536/10544, AR311110579110647, AR3/1/11127/11201 (QSA Agreements containing joint defense clauses). Accordingly, these Respondents assert that to the extent that there is a seeming disagreement among the Appellants, it is a planned and jointly agreed but not genuine dispute for the purpose of furthering advocacy.

Finally, since some reference will be made to an entity known as "Western Farms" in this brief, a few words are necessary to explain its role. Briefly, Western Farms is an entity that purchased substantial agricultural land in the Imperial Valley at about the time talk of water transfers started. Their ownership was about 10% of such lands, in

excess of 40K acres. AR3/11/62254/62254-62259;

Supp.AA:120:1201:029703, press regarding Western Farms land. As was shown at trial and is repeated below, Western Farms was a client of at least IID's primary negotiator and advisor. *See* part I.B.2. *below*.

On the heels of the QSA and transfer, IID announced it had purchased the Western Farms land. The Morgan/Holtz Parties suspected that the purchase was not defensible and commenced two suits, which were consolidated with this action. Imperial County Case No. ECU01834 and Imperial County Case NO. ECU01886 (challenges to IID's acquisition of the Western Farms). Supp.AA:23:318:5728 and Supp.AA:25:350:6145. *See also*, SDCWA, CVWD and MWD Opening Brief, p. 33. The legality of the purchase, e.g., whether IID's decision had been improperly influenced by one or more IID advisors who had a relationship with Western Farms, was to be tried as Phase 2. AA:13:80:03143:03152, February 19, 2009 court order. It may still be tried after this appeal. AA:48:296:12818 (Cases 1834 and 1886 severed and remanded to Imperial County Superior Court). The core law at issue is Government Code section 1090.

B. Procedural History

Appellants neglected to mention that when the superior court denied granting injunctive relief about the water transfer in 2007 brought by the Morgan/Holtz Parties and others, it warned the Appellants that they proceeded at their own risk.

The Court cautions the parties that IID and the other QSA parties are moving forward at their own risk . . . The Court's ruling in this contested matter does not alter that assumption of risk. The QSA and associated transfers are not beyond this Court's reach.

AA:7:46:01655, ¶2, court ruling on Motion for Preliminary

Injunction.

The request for injunctive relief sought protections for the Imperial Valley and the public in general, e.g., to prevent IID from interfering with improvements to IID's water management by outside experts, allowing a method to optimize water service, placing monies into an interest bearing account in the event of invalidation, and stopping transfers until the air quality issues of the exposed playa at the Salton Sea were addressed. Supp.AA:95:1053:023737-023739, Notice of Motion for Preliminary Injunction. The Appellants defeated the request for preliminary injunctive relief, but were warned that they proceeded entirely at their own risk.

The Appellants also omitted any discussion of Rulings 69 and 85. Ruling 69 found that IID's primary negotiator David Osias (and lead trial counsel for all Appellants) had improperly switched sides from one of the farmers (John Elmore) to IID on a host of matters in which their interests were actually or potentially in conflict. AA:7:45:01645-646, Substantial Relationship Summary, court ruling 69, January 10, 2007. (This conflict is separate from any Government Code section 1090 violations.) The ruling held, however, that notwithstanding the conflict, the motion for disqualification had been brought too late. Ruling 85 followed and found, in relevant part, that David Osias had misrepresented the facts about his ethical duties in his response in the Ruling 69 matter.

The Holtz Parties submitted a copy of a January 28, 2008 letter from IID to counsel for the Putative Class Representatives which letter discloses the existence of a December 1996 conflict waiver. . . . While the Court's general understanding was that the waivers primarily at issue during the disqualification motion were any between the moving parties in the disqualification motion and Osias/Osias firms, this waiver clearly bears upon the subject at issue in the motion and was not earlier disclosed. The IID letter explicitly acknowledges some of the attorney-client relationships at issue in the disqualification motion . . . , and acknowledges the potential for conflicts between Osias/Allen Matkins' landowner clients and IID.

The excerpt quoted in the IID letter confirms IID's and Osias' explicit awareness of the potential conflict and the concurrent representation. Indeed, IID consents to that representation in part. Consent is not required absent potential adversity and, hence, conflict. Notably, paragraph 8 of the December 6, 2007 declaration submitted by Mr. Osias in opposition to the disqualification motion states in part:

“I am knowledgeable of and sensitive to, the requirements of California Professional Rules of Conduct with respect to conflicts of interest. At no time from 1997 to the present did I believe the facts and circumstances of Allen Matkins' and my representation of IID required the informed written consent of the IID and the relevant Elmore entity or person.”

The Court's reading of this assertion is informed in light of the newly discovered (to the Court and parties) indication that Mr. Osias/Allen Matkins and IID had previously entered into the above referenced waiver. The Court in no way condones the conduct that apparently occurred. . . .

AA:9:67:02119. The superior court declined to take any action to prevent further misrepresentations, however.

Finally, MWD before and during trial made special efforts to suggest that the water use in the Imperial Valley was not reasonable and beneficial. AA:33:195:08952-956 (MWD Trial Brief), RT:10:2896-2902 (Linus Masouredis for MWD). The Morgan/Holtz Parties explained before trial why MWD was incorrect in its views. AA:36:213:09616-617, Morgan/Holtz Parties Trial Brief. Messrs.

Leimgruber and Porter also explained the fallacies of the MWD advocacy at trial. RT:11:3164-65, Porter re MWD reasonable and beneficial; RT:11:3159, Leimgruber.

I. APPELLANTS HAVE FAILED TO SHOW ANY PREJUDICE FROM CONSTITUTIONAL “ERROR” WHEN OTHER INDEPENDENT BASES FOR JUDGMENT EXIST

The post trial judgment can be readily upheld on a number of bases unrelated to any possible error in constitutional interpretation, as is common enough on appeal. *Ericson v. Federal Express* (2008) 162 Cal.App.4th 1291, 1306-1307.

However, " '[n]o rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' " (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19, 112 Cal.Rptr. 786, 520 P.2d 10, disapproved on other grounds in *Woodland Hills Residents Ass'n, Inc. v. City Council* (1979) 23 Cal.3d 917, 944, 154 Cal.Rptr. 503, 593 P.2d 2000.)

In a separate but related vein, the Appellants cannot complain of prejudice from the superior court's constitutional analysis because the superior court improperly held in their favor on several separate issues

that would have independently resulted in a judgment of invalidity.

CCP § 906.

A. Superior Court Found That There was No Meeting of Minds on Critical Terms of QSA Deal

No Appellant has devoted any argument in its opening brief on the superior court's Statement of Decision Issue Six, especially with respect to whether IID ever reached a meeting of the minds with the other Appellants on critical terms about the Sea. AA:47:292:12723-742. Phrased a little differently, did IID actually approve the QSA deal? Or, using the phrasing of the superior court, "whether there is substantial evidence in the record to show that the agency [IID] action was not arbitrary, capricious, or entirely lacking in evidentiary support"? AA:47:292:12723. The several opening briefs are remarkable in that even now – years after the facts – the Appellants cannot agree among themselves precisely what they agreed to in 2003, and instead offer a smorgasbord of things *possibly* agreed to by less than all contracting parties e.g., that the State would seek further appropriations, that the State had an existing fund so no new appropriations were needed, that the State would compel IID to change its operations so that the State would have no mitigation obligations, that the State would pay for all mitigation costs no matter

what, and that the non-State parties would voluntarily pay what the State had initially promised. The Constitutional arguments are fantastic for offering a range of possible agreements – and *never* firmly stating with unanimity the terms of the actual agreement.

1. Appellants Failed to Raise Claim of Error in Opening Brief as to Superior Court’s Findings of Lack of Actual Agreement on Material Terms

The Appellants recognized at the outset that the superior court decision found (“hinted” according to Appellants) that IID had not actually approved the QSA deal but assured this Court that they would address the sufficiency of the superior court decision in the appeal, i.e., in their opening briefs.

The Trial Court also hinted that perhaps IID’s Board had not approved the QSA-JPA Agreement, notwithstanding that the contract was signed by IID’s Board President (AR3/1/10457/10476), and for seven years IID had sought to have it validated. Any intimation that IID’s Board did not approve the QSA-JPA Agreement is incorrect. IID approved pre-agreement outlines (*see* AR3/2/20070/20072-20073, AR3/3/30101/30105 and AR3/3/30114/30117), and a draft³ which the General Manager⁴, President, and Chief Counsel determined were

³ This is the “draft” QSA-JPA Agreement that was not submitted to any court until the Appellants filed their Petition in February 2010 (attached to the Declaration of John Penn Carter in support of the Petition for Writ of Supersedeas) – two months after the conclusion of the Phase 1A trial.

⁴ Appellants have not provided any evidence that the General Manager ever determined that the final QSA-JPA Agreement was materially the same – only that IID’s Chief Legal Counsel claimed that to be the case after the fact.

not materially different from the executed agreement.
*See Declaration in Support of Petition for Writ of
Supersedeas.*

Petition by Public Agencies for Writ of Supersedeas, p. 14, footnote
18.

Issues about sufficiency of the Statement of Decision will
be raised *in the appeal*, not this Petition.

Petition by Public Agencies for Writ of Supersedeas, p. 13, footnote
17, (emphasis supplied). The Appellants (except the State, who later
joined) all proffered a declaration to introduce new evidence they had
known about well before trial but declined to offer at trial or in any
section 473 motion. CCP § 473.

Although the October 2, 2003 draft of the QSA-JPA
Agreement was inadvertently omitted from the AR, I can
personally confirm that copies were in my files and that
the copies were given to and reviewed by the IID Board
on October 2, 2003. When the QSA Coordinated Cases
suddenly focused on the QSA-JPA Agreement as trial

Approval of the final versions required the consent of the General Manager,
which the record lacks. “The Board hereby authorizes the President or Vice
President and the Secretary to sign the QSA and all related agreements, upon
determination by the *General Manager* and the Chief Counsel that said
agreements are substantially in the same form and substance as those identified on
Exhibit "D" and submitted to the Board for review prior to approval of this
Resolution.” AR3/3/30110/30112, IID Resolution No. 10-2003, section (5)
(emphasis supplied). Section 5 of IID Resolution No. 9-2003 used virtually
identical language regarding the requirement that both the General Manager and
Chief Counsel determine that the final documents were substantially the same in
form and substance. AR3/3/30107/30109.

approached⁵, IID counsel discovered the October 2, 2003 draft of the QSA-JPA Agreement was not in the AR, but this was long after the record augmentation deadline set by the Superior Court. If the case is remanded for retrial, it is expected that a motion to augment the AR will be made.

Carter Declaration in Support of Petition for Writ of Supersedeas,
Vol. 2, Tab 16, Bates 207-208, ¶5.

Although the Appellants acknowledged when seeking the stay that the superior court found that substantial evidence showed that the QSA deal had not been lawfully approved by IID, no mention of the draft QSA-JPA Agreement or of Mr. Carter's declaration can be found among the 400 or so pages of opening briefing. The Appellants have not, for example, devoted any of their tens of thousands of words in their briefs to illustrate that the draft QSA-JPA Agreement that Mr. Carter on behalf of Appellants asserts is "substantially similar" to the final document, and thus all of the lengthy and detailed Constitutional arguments apply with equal force to both QSA-JPA Agreement documents. *See below* at part II.A.3. The Appellants seemingly are content to leave intact that part of the superior court's decision that

⁵ In their June 11, 2009, Memorandum of Points and Authorities in Opposition to CVWD's and MWD's Motion for Summary Judgment in Case 1658, the Morgan/Holtz Parties noted that there was no draft QSA-JPA Agreement in the AR, almost *five* months prior to the Phase 1A trial. M/H.RA:3:9:00589-00592.

found IID never approved the QSA-JPA Agreement. The Appellants have waived any claim of error with respect to Issue Six, thus allowing this Court to fashion a truly brief opinion upholding the judgment on a basis apparent on the face of the judgment. *Alameida v. State Personnel Board* (2004) 120 Cal.App.4th 46, 55; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 (unfair to consider matters in reply brief “never even suggested” in opening brief); *but see* part IV *below*, as to scope of invalidation judgment.

2. Superior Court Finding of Lack of Meeting of the Minds Supported by Substantial Evidence

Even if the Appellants had not waived any claim of error, none can be found.⁶ The superior court in its Issue Six, starting at its heading “The IID Contract Approval Process,” makes a series of factual findings based on the evidence the Appellants offered and the evidence they refused to offer. Those factual findings are entitled to deference when challenged on appeal.

When findings of fact are challenged on appeal, we are bound by the familiar and highly deferential substantial evidence standard of review. This standard calls for review of the entire record to determine whether there is any substantial evidence, contradicted or not contradicted, to support the findings below. We view the

⁶ An alternate presentation reaching the same result is ably presented in the brief of the Barioni Respondents.

evidence in the light most favorable to the prevailing party, drawing all reasonable inferences and resolving all conflicts in its favor.

People ex rel Brown v. Tri-Union Seafoods, LLC (2009) 171

Cal.App.4th 1549, 1567. IID, for its part, contends that the appeal is based on *undisputed* facts, and it is surely in the best position to make such a concession. “The standard of review for an appeal presenting issues that are questions of law based on undisputed facts is *de novo*.” IID Opening Brief, p. 24, IV.A. ¶2.

The superior court was explicit that IID and its allies had not reached agreement when the IID decision makers were asked by the IID negotiators (i.e.; Messrs. Smith, Osias, and Carter) to cast their votes.

The wording of the QSA-JPA Agreement . . . was not settled on at the time of the IID Board’s formal approval on October 2, 2003. . . . [A]nd because of their interrelationship and the critical nature of the QSA-JPA Agreement, the entire QSA – still had substantive terms remaining to be negotiated as of October 6, 2003. The Court additionally finds that the lack of any draft QSA-JPA Agreement in the administrative record at the time of the IID Board meeting and the timing of the DFG Director Email (Exhibit 1) show that material portions of the QSA-JPA Agreement were still being negotiated days after the October 2, 2003 approval by the IID Board.

AA:47:292:12740-12741. The superior court found that “in the days between October 2, 2003, and before the October 12, 2003 deadline, .

. . the QSA-JPA language was successfully negotiated by the non-State parties to expressly provide that the” State obligation is an unconditional contractual obligation not condition upon any appropriation. AA:47:292:12741. The superior court did not find that IID then lawfully approved the new language in the QSA-JPA Agreement, and there exists no evidence that it could have lawfully done so, e.g., further drafts presented to the public, open voting about the changes, etc. The superior court also identified that the peculiar voting arrangement involving the State in the final QSA-JPA Agreement was a material term that was changed after IID Board approval.

This Court’s conclusion that the voting arrangement is not illusory does not preclude the Court from viewing, as the Court does, this contractual voting arrangement as an item of significant substantive legal effect *that did not exist when the IID Board formally voted to approve the contracts on October 2, 2003.*

AA:47:292:12744 (emphasis supplied).

The evidence amply supports all the above conclusions: The October 6, 2003 Hight email reflecting ongoing negotiations, the October 2, 2003 IID Resolutions approving all contracts that the Board had actually *seen*, and the Appellant’s refusal to produce any draft QSA-JPA Agreement at trial. AA:38:236:10359, Robert High

10/6/03 email (“reviewing JPA” – “two significant policy/legal issue which make it difficult for State to agree to agreement as drafted”); AR3/3/30107/30109, October 2, 2003 IID Resolution 9-2003; AR3/3/30110/30112 and 30113, October 2, 2003 IID Resolution 10-2003 and Exhibit D “List of QSA Agreements”; RT:8:2299, lines 21-26 (Mr. Osias at trial stated – “. . . JPA agreement at the time of approval was in outline form with material terms only, which is why there was a parenthetical that it needed to be consistent with the outlines”); and RT:12:3308, lines 3-4 (Mr. Osias at trial states the JPA “just an outline”).

IID itself implicitly acknowledges in its Opening Brief that no meeting of the minds was reached when it admits that the State had -- effective August 16, 2004 -- taken away the alleged funding source for the State’s “unconditional contractual obligation” IID alleges everyone understood was the source of payment. IID Opening Brief, p 23, fn 10. Whether the Constitution is offended when the State plays bait and switch with its funding is one thing – that the State behavior reflected no initial agreement is quite another.

The superior court recites the same facts in its Issue Four about the Brown Act, but declines to reach a conclusion. That discussion

concludes as follows: “There is no evidence in the record that either the IID Board or the public ever had any opportunity to see or comment on all of the substantive and material provisions of that [QSA-JPA] contract.” AA:47:292:12723. The superior court was, of course, correct that the Brown Act technical issues need not be reached, since there was no meeting of the minds in the first place. The Brown Act violations are a narrow technical subset of the underlying finding that the IID Board was the victim of a collective bait and switch by its (and others’) negotiators. There is ample evidence to support the factual findings of the superior court that the IID Board approved one thing but IID’s president was presented with something quite different to sign on October 10, 2003.

3. Appellants’ Attempt to Deflect Findings of a Lack of Meeting of Minds Proves There was No Meeting of the Minds

The Appellants have created a quagmire by proffering the declaration of John Carter and the allegedly missing draft QSA-JPA Agreement. First of all, the missing draft may not be genuine. The final pages purport to reflect edits that were made to reach the document proffered. Yet, it is impossible to reconcile all of the edits with the content, suggesting that the physical printout is not a

complete version of the actual draft. For example, the time was backdated from 4:29 PM to 4:21 PM. The redline notations throughout the document do not coordinate with the summary at end (showing edits by Allen Matkins and Daniel Hentschke to page 3 and 11 only). Entire paragraphs were deleted or rewritten without any reflection as to when or by whom; e.g., paragraph 15.13 Indemnification is not in the final document (pp 18-19). The last edit actually shown in the edit summary was made by Allen Matkins on 10/2/03 at 11:06 AM while the draft date and time is shown as 10/2/03, 4:21 PM. Had discovery been available one could have examined the electronic version and determined with reliability who made what change when. So these Respondents cannot concede that the draft QSA-JPA Agreement is genuine, but for purposes of argument will treat it as if it were.

What appears clear is that both SDCWA's general counsel Mr. Hentschke and IID and its primary negotiator Mr. Osias of the Allen Matkins firm played major roles in the creation of the document. *See Carter Declaration in Support of Petition for Writ of Supersedeas, Vol. 2, Tab 16, Bates 235-238* – Allen Matkins and Dan Hentschke are shown as the authors of various edits on pages 3 and 11 of draft QSA-

JPA Agreement. It is uncontroverted that at least Messrs. Osias, Hentschke, and Carter were aware that the trial was being conducted without the key piece of (alleged) evidence.

That the draft and final QSA-JPA Agreement are anything but substantially similar should go without saying – and since no Appellants has uttered a single word in any filing or brief on that topic since the Carter Declaration first appeared, maybe at least that much is conceded. The Morgan/Holtz Parties identified several times the import of the declaration and the suspect draft QSA-JPA Agreement, to a stunning silence by the Appellants. *See* part II.B. Out of an abundance of caution, below are some of the major differences that preclude any finding that (1) the present constitutional arguments – good, bad, or indifferent – can be applied seamlessly to both versions of the QSA-JPA Agreement and (2) the negotiation of the QSA-JPA Agreement away from the IID Board and public was harmless.

a. Definition of Restoration Changed Drastically

One major difference already identified is that the definition of restoration markedly changed. The draft QSA-JPA Agreement uses a broad and “lay” sort of definition while the final QSA-JPA Agreement ties it to specific statutory thresholds.

“Restore” and “restoration” shall mean any measure to restore, to improve the condition of, or to minimize or mitigate the projected decline of biological, recreational or environmental resources of the Salton Sea, its tributaries and associated areas.

Draft QSA-JPA Agreement, ¶ 1.1.c, Carter Declaration in Support of Petition for Writ of Supersedeas, Vol. 2, Tab 16, Bates 212. In the final QSA-JPA Agreement signed by the IID President on October 10, 2003, a new “Restore” and “Restoration” definition replaced the “draft” definition.

“Restore” and “Restoration” shall have the same meaning as such terms are used in the QSA Legislation.

AR3/1/10457/10459. The broad and “lay” definition seen by IID Board President Lloyd Allen on October 2, 2003 comports well with the letter IID Board President Lloyd Allen sent to all of IID’s Customers on October 29, 2003, he stated that:

As part of the QSA arrangement, the State has committed to “undertake the restoration of the Salton Sea.”

Except for a fixed amount dedicated by IID, San Diego and Coachella, recently enacted State legislation provides that any future State actions to restore the Salton Sea will be the “sole responsibility of the State of California.”

AA:38:236:10362. That the definitions are substantially different matters a great deal, since as the superior court recognized, there were pending disputes regarding restoration and mitigation.

The Court notes that “restoration” may differ from “mitigation”, and that there are pending disputes regarding the QSA and QSA transfer, and sufficiency of mitigation. The Court does not reach, nor make any finding, regarding these issues in this Statement of Decision.

AA:47:292:12739. Appellants understand and represent that the scope of restoration will define the limits of mitigation.

Hence, the Salton Sea’s rate of decline and the feasibility of restoration were key unknowns at the time of contracting and would unquestionably impact the ultimate cost of mitigation.

SDCWA, CVWD, and MWD’s Opening Brief, p. 59, ¶1. IID is in accord. *See* IID Opening Brief, p. 6, ¶2 and p. 10, ¶2.

Thus, any argument predicated on cost estimates may be affected by the dueling definitions of “restoration” since that affects “mitigation.” That a specific definition of Sea “restoration” was accepted by the Board differing markedly from the final agreement also undermines the superior court’s rulings on whether the Morgan/Holtz Parties were entitled to summary judgment on the “final” version of the QSA-JPA Agreement. AA:25:179:06637-06639 (ruling 145).

The Court recognized that dealing with the Salton Sea appeared to “have been the single most significant environmental issue faced in

the QSA process.” AA:47:292:12738 ¶1. The Court further noted that:

The impacts of the water transfers are clearly a subject of the QSA The Court notes that “restoration” may differ from “mitigation”, and that there are pending disputes regarding the QSA and QSA transfer impacts, and sufficiency of mitigation. The Court does not reach, nor make any finding, regarding these issues in this Statement of Decision.

AA:47:292:12739 ¶2.

The record reflects that in September and October 2003 the Appellants told the public that the State was committed to and assumed the liability for the Salton Sea mitigation *and* restoration. AR4-07-517-30738, CVWD, September 24, 2003 press release; AR4-07-519-30813 and AR4-07-522-30836, SDCWA 9/24/03 Committee Report and 9/25/03 PowerPoint presentation; AA:38:236:10362, IID Lloyd Allen 10/29/03 letter to the “Concerned IID Customers”. These contemporaneous public pronouncements suggest that the “draft” QSA-JPA Agreement was approved by the Appellants’ boards in late September and early October 2003, assuring the Imperial Valley that the State was committed to and would assume the liability for Salton Sea mitigation *and* restoration.

No rational politician would have accepted a definition of “restoration” in the later QSA-JPA Agreement that all but ensured liability for his or her constituents and agency:

Emissions from the playa exposed by projects approved before the IID Water Conservation and Transfer Project, plus emissions from the playa that may be exposed due to projects approved after the QSA approval (above -235 feet msl and below -248 feet msl), are not included in the analysis of impacts of the No Action Alternative, nor would they be included in the QSA related air quality mitigation. These uncontrolled emissions would be the *responsibility of the landowners*, and may add to air quality issues in the Salton Sea Air Basin.

Supp.AA:91:1051:022736 (emphasis supplied). The restoration liability accepted by IID’s board – if any – was that of none at all, being consistent with the draft QSA-JPA Agreement. The differences in Sea “restoration” and the promises that derive from it are substantial between the QSA-JPA Agreement versions and preclude any finding that there was a meeting of the minds.

b. Third Party Rights Changed Drastically

Another radical difference is that one agreement provides third party rights whereas the other does not.

Missing Draft – Paragraph 15.11 *No Third Party Beneficiaries*

This Agreement is made solely for the benefit of the Parties hereto and their respective successors and assigns. No other person or entity may have or acquire

any right by virtue of this Agreement. Carter Declaration in Support of Petition for Writ of Supersedeas, Vol. 2, Tab 16, Bates 227 (emphasis supplied).

Final – Paragraph 15.11 Third Party Beneficiaries

This Agreement, *other than with respect to Section 9.2*, is made solely for the benefit of the Parties hereto and their respective successors and assigns. No other person or entity may have or acquire any right by virtue of this Agreement. AA:4:1(cont.):00837 (emphasis supplied).

The final QSA-JPA Agreement *added* third party beneficiary language, suggesting that the intent was that persons such as the Morgan/Holtz Parties could demand of the State that it pay its unconditional contractual obligation without the need for an appropriation.

The QSA-JPA Agreement proffered by John Carter has no such third party rights allowing Messrs. Morgan, Holtz, Porter, Leimgruber, or Barioni (various Respondents) to force the State to (1) exercise its JPA voting rights appropriately and (2) pay without appropriation its unconditional contractual obligation. Since a third party has rights only to section 9.2 of the QSA-JPA Agreement, the State cannot rely on the complicated and technical Article XVI exemptions Appellants claim derive from other language of the QSA-

JPA Agreement, since the third party is bound by none of that other language.

IID's claims that reference to "seeking an appropriation" was included in Section 14.2 of the QSA-JPA Agreement because the "DFG's contingent obligation was one which might ... require further or additional appropriations, or even replacement appropriations." IID Opening Brief, pp. 33-35. Assuming (but not conceding) that this was the parties' intention (even though the State has not thus far embraced the view), it still does not save section 9.2 when relied on by a third-party beneficiary who has no rights given, and hence cannot be affected, by section 14.2. To a third party beneficiary armed – by design of the Appellants -- with just the language of section 9.2, the Appellants' Constitutional arguments are meaningless and inapplicable.

These Respondents expect that some or all Appellants will argue that the fact that IID is pursuing validation is somehow evidence of a meeting of the minds in 2003 – or perhaps that the parties have come to an agreement at some point at or after trial. That argument ignores the ability of the third-party beneficiaries to test the contract to make sure it is lawful and valid, specifically that section

9.2 means what it says on its face, particularly when the State has admitted that 9.2 “cannot purport to state a legal commitment, as all parties who contract with the State are deemed to know.”

AA:23:129:06003:06004. If the third-party beneficiaries have an independent right to force the state to pay for all mitigation no matter its cost (into the billions if no restoration is pursued), they seek an explicit finding. If not, then as to the rights of the third-parties, there was no meeting of the minds.

So the change is critical and yet not a single Appellants has included any analysis of how the Constitutional nuances and exemptions addressed could ever apply to a third party beneficiary relying exclusively on her rights obtained by section 9.2.

c. Voting and State Obligation Language Drastically Different

The language in section 9.2, 14.1 and 14.2 changed as well. A few sentence were merely moved around, which need not be a substantial change. But the key language that the State was providing an “unconditional contractual obligation” not reliant on any appropriation is not in both QSA-JPA Agreement versions.

Missing Draft – Paragraph 9.2 State Contribution

The State is responsible for the cost of and liability for Remaining Environmental Mitigation Costs as set

forth in the ECSA. Such costs and liabilities shall be as determined by the Authority and shall be deposited or otherwise satisfied within thirty (30) days after written demand therefore from the Authority. Once the Parties' Funds have become contractually committed for expenditures in the full amount and only \$5,000,000 remains to be paid by the Authority, the State will seek necessary additional funds by appropriation from the California Legislature with the support of IID, CVWD and SDCWA, and if not promptly appropriated by the California Legislature, IID, CVWD, SDCWA and/or the Authority may pursue the enforcement of the State Contribution obligation. Carter Declaration in Support of Petition for Writ of Supersedeas, Vol. 2, Tab 16, p. 220

Final – Paragraph 9.2 State Obligation

The State is solely responsible for the payment of the costs of and liability for Environmental Mitigation Requirements in excess of the Environmental Mitigation Cost Limitation. The amount of such costs and liabilities shall be determined by the affirmative vote of three Commissioners, including the Commissioner representing the State, which determination shall be reasonably made. *The State obligation is an unconditional contractual obligation of the State of California, and such obligation is not conditioned upon an appropriation by the Legislature, nor shall the event of non-appropriation be a defense.* AA:4:1(cont.):00829 (emphasis supplied).

And it is that last iteration of the State's obligation that the State emphatically stated was "unconstitutional" and that "everyone knew it."

The second [sic, third] sentence of section 9.2, alleged by Cuatro to offend article XVI, section 7, in fact imposes no contractual obligation, but is merely a representation – *albeit an incorrect one.* It does not and cannot purport to

state a legal commitment, as all parties who contract with the State are deemed to know.

AA:23:129:06003:06004, Morgan/Holtz Parties' Notice of Water Parties Admissions, (emphasis supplied).

d. Conclusion – Appellants' Post Trial Tactics Prove No Meeting of the Minds

The Appellant-created error confirms the superior court's factual finding that the IID Board and the State did not have a meeting of the minds and that a violation of the Brown Act structurally precluded any lawful agreement. AA:47:292:12706:12740-12741 (bottom 12740, top 12741). The record (as it now exists thanks to the admitted Appellant error) makes that result evident on its face. As noted above, the JPA-QSA Agreement actually signed by the IID personnel differs materially from what the IID Board approved and no Brown Act process occurred to address the "bait and switch" of the most key promise – restoration. The Court further noted that, "material portions of the QSA-JPA Agreement were still being negotiated days after the October 2, 2003, approval by the IID Board." AA:47:292:12706:12741 ¶1.

Ultimately, whether one finds one or the other QSA-JPA Agreement "better" in some sense due to, for example, more or less

consistency with the Constitution or providing varying rights to different entities and interests, is not the critical point. The fact is that they are substantially different and reflect that as to many of the most material terms on which all of the QSA deal was premised – Sea mitigation and restoration, the fiscal responsibility for it, and the rights of IID’s beneficiaries – the collective minds of the decision makers never met. The IID decision makers never had a chance to reach a meeting of the minds with the other entities, since the final negotiations occurred separately and neither they nor the public were informed. That the new negotiations and terms were not disclosed to the public or to the IID Board may or may not be related to the conflicts under which the IID key negotiators labored, but the lack of disclosure occurred not just for a few days, but for over seven years, before several superior courts, and all the way past trial and the tentative decision, e.g., the draft QSA-JPA Agreement remained hidden from scrutiny until 2010. *See* part II.B.

B. Appellants Cannot Show Prejudice Where All Facts Reflect that All Agreements – Whether Constitutional or Not – Were Void Ab Initio as Violating Government Code Section 1090

The Appellants cannot show that they were prejudiced from any constitutional or remedies infirmity because the record reveals that the

contracts were all void ab initio due to the taint of the IID Negotiators' conflicts of interest. Government Code § 1090. A substantial portion of the Morgan/Holtz Parties trial brief and trial presentation addressed the issue. While the superior court summarized the trial proceedings on the negotiators' conflicts in three sentences, a significant portion of all trial briefing, time, and evidence was devoted to this additional basis for invalidity. AA:34:199:09039-98948, Morgan/Holtz Trial Brief; AA:38:236:10346-10351, 10353-10354, Morgan/Holtz Trial Presentation; 15 Administrative Record references; 11 extra-record exhibits; 4 declarations (Smith, Carter, Garber, Mendoza) – all evidence germane to showing some or all were public officials with adverse interests that participated in the making of the QSA contract(s).

Since the Appellants did not offer at trial facts in opposition to the facts proffered by the Morgan/Holtz Parties, this Court's review of the superior court's three-sentence analysis is functionally equivalent to determining a judgment on stipulated facts. As noted in section I.A.2. of this brief, IID specifically concedes the *de novo* standard is appropriate to a review of this judgment. "The standard of review for an appeal presenting issues that are questions of law based on

undisputed facts is *de novo*.” IID Opening Brief, p. 24, IV.A, ¶2. The facts are found in the administrative record and in the exhibits admitted at trial. This Court can review *de novo* the superior court’s conclusion about those facts. Specifically, the superior court’s legal analysis was as follows:

The record supports that John Carter was, as IID Chief Counsel, a public official within the meaning of Government Code section 1090. The Court has not seen any evidence that would lead the Court to conclude, however, that Mr. Carter had a “financial interest” in the QSA contracts as the required to establish a section 1090 violation. The Court has reviewed the citations provided by the Morgan/Holtz Parties to the administrative record and does not find any evidence that David Osias or Dr. Rodney Smith were public officials within the meaning of Government Code section 1090.

AA:47:292:12752. The law applicable is hardly contested, having been readily identified before and during trial. AA:38:236:10346-10355; AA:43:257:11589-11595. *California Housing Finance Authority vs. Hanover/California Management* (2007) 148 Cal.App.4th 682, 691-93 in Morgan/Holtz Trial Brief, p. 16 and Opening Slide 42; *People vs. Honig* (1996) 48 Cal.App.4th 289 in Morgan/Holtz Opening Trial Brief, p. 16 and in Opening Slide 42; *Thomson vs. Call* (1985) 38 Cal.3rd 633, 648 in Morgan/Holtz Opening Trial Brief, pp. 15, 16 & 25 and in Opening Slides 42, 57;

Carson Redevelopment Agency vs. Padilla (2006) 140 Cal.App.4th 1323, 1337 in Morgan/Holtz Opening Slide 57; *People v. Gnass* (2002) 101 Cal.App.4th 1271 in Morgan/Holtz Rebuttal Slide 9; *Klistoff v. Superior Court* (2007) 157 Cal.App.4th 469, 478 in Morgan/Holtz Rebuttal Slide 7 (IID cited); *D'Amato v. Superior Court* (2008) 167 Cal.App.4th 861 in Morgan/Holtz Rebuttal Slide 7 (IID cited); *Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533 in Morgan/Holtz Rebuttal Slide 11.

Appellants SDCWA, MWD and CVWD noted in their Opening Brief that all applicable laws became part of the contracts.

It is established law that all applicable laws in existence when the agreement is made become part of the contract as though fully incorporated by reference. Contractual language must be interpreted in light of existing law, regardless of whether the agreement refers to it. This principle applies to constitutional provisions . . . including provisions that affect the validity, construction, obligations and enforcement of the contract.

SDCWA, MWD and CVWD Opening Brief, p. 49. The “existing laws” at the time the QSA Agreement and Related Agreements were made included section 1090 of the Government Code.

1. All Evidence Reflected IID’s Negotiating Team Were Public Officials under Section 1090

Since the primary impediment identified by the superior court to finding a section 1090 violation was whether the individuals were “public officials,” this element will be addressed first. The standards for determining whether an individual is a “public official” are plain, as was explained during the Morgan/Holtz opening trial presentation (Slide 42):

Government Code § 1090
Just Facts:

1. Are they public officials; i.e., in a position to influence Agency action? California Housing Finance Authority vs. Hanover/California Management (2007) 148 Cal.App.4th 682, 691-93; see also People vs. Honig (1996) 48 Cal.App.4th 289.
2. Conflict, i.e., in role “fraught with temptation”? It’s not about intent, but to preclude serving two masters when one is public. Thomson vs. Call (1985) 38 Cal.3rd 633, 648.

(Supplements Trial Briefs, Issue VI-2)

AA:38:236:10346. The IID Negotiators were (and still are) public officials as that term is used in the section 1090 jurisprudence.

The evidence was overwhelming that Messrs. Carter, Osias, and Smith were in a position of influence on what became the QSA from at least 1999. The AR showed that Messrs. Osias, Smith, and Carter signed an agreement to influence (recommend) IID to proceed with

the water transfer in 1999. AR3/2/20611/20612, October 15, 1999 Key Terms (“The Negotiating Teams for IID and CVWD agree to *recommend* that their Boards ... authorize use of Key Terms ...”). The “Dream Team” of John Carter, David Osias, and Rodney Smith signed the Key Terms as part of the negotiating team for IID. Appellants SDCWA, CVWD and MWD candidly admit that IID’s negotiators (among others) “reached agreement” on the major parts of what we now call the QSA:

1999, negotiators for Imperial, Coachella, Metropolitan, and San Diego, and federal and State agencies reached agreement on several ‘Key Terms’ for settling the longstanding disputes overall allocation of California’s apportionment of Colorado River water. Those terms formed the basis for preparing final agreements and conducting environmental review of the proposed elements.

SDCWA, CVWD and MWD Opening Brief, pp. 15 and 16.

In his Declaration in Opposition of Motion to Disqualify, John Carter detailed his involvement in virtually all negotiation sessions from 1995 through 2003; identified David Osias as a key member of the IID negotiation team from the time he hired Mr. Osias and the Allen Matkins firm (in December 1996); noted that he and Mr. Osias had spent hundreds of hours in complex negotiations and that they were the key players for IID in negotiating and drafting the ultimate

terms of the agreements; and stated that Mr. Osias and his firm had been in the forefront of every major negotiation, settlement, litigation, and arbitration leading up to the QSA and Related Agreements and the subsequent implementation of the agreements. AA:34:199:09041. The control of the Dream Team extended, not surprisingly, to the environmental array of documents as well. County Agencies RJN 11(J) at 000223 (email reflecting in late 2000 attorneys allowed review of draft EIR/EIS but did not permit it or copies thereof to leave their hands).

None of this evidence was rebutted nor was any objection raised to relying on non-AR evidence in assessing section 1090, since section 1090 litigation requires full-scale trial tools. *See Thomson v. Call* (1983) 150 Cal.App.3d 320, 325, affirmed by *Thomson v. Call* (1985) 38 Cal.3d 633 (live testimony of witnesses).⁷ IID's representatives also filed declarations in the QSA proceedings noting that Messrs. Osias, Carter and Smith spent a substantial amount of

⁷ The superior court precluded discovery on the section 1090 issues. Final Ruling on Requests for Discovery, Contested Matter 85, AA:8:67:02115:02124. The Morgan/Holtz parties – among others – sought the use of subpoenas for trial, which was denied. RT:7:1930, lines 14-28 – 1931, lines 1-5, court ruling on motions to quash; Supp.AA:218:2034:054257, minute order. To the extent that this Court finds an insufficient amount of evidence supporting the 1090 violations, the Morgan/Holtz Parties assert that the denial of discovery was error that prejudiced their ability to obtain a favorable judgment on this issue. CCP § 906.

time during which they played a key role as the three IID negotiators. AA:39:236(cont.):10401-10439; AR3/2/20611/20612-20615, AR3/3/33606/33607. In other words, there was ample corroborating evidence of the Dream Team's roles in positions of influence on the QSA and its terms.

While providing IID with a variety of services from at least the late 1980s, Smith's role with regard to the water transfer was to advise IID on pricing issues. Simultaneously, between 2000-2002 Smith worked for SDCWA analyzing, among other things, MWD's water rate structure. AA:39:236(cont.):10432, SDCWA September 2000 engagement letter; AR3/6/61996/61997-98, press; AR3/6/61469/61469, press; AR3/11/110958/110960, Smith attending BOR meetings representing IID; Supp.AA:133:1320:033196, ¶4, Smith Declaration; AA:38:236:10348-10349, Morgan/Holtz Parties' Opening Presentation, Slides 45-48, extra record exhibits 10 & 11. *See also*, AA:34:199:09039-09049, Morgan/Holtz Parties' Trial Brief. Additional evidence regarding the key role of Messrs. Osias, Carter and Smith as public officials was set forth in the Morgan/Holtz Parties' rebuttal presentation at trial. AA:43:257:11592, Slides 3-7.

The law has been clarified further since the trial. *Hub City Solid Waste Services v. Compton* (2010) 186 Cal.App.4th 1114. That recent jurisprudence confirms that conducting negotiations and influencing an entity's decisions to enter into a transaction and its terms makes one a public official under the statutes. *Id.* at 1120, 1124-25. Stated plainly, “the negotiations, discussions, reasoning, planning and give and take leading to the execution of a contract are deemed to be a part of the making of an agreement under section 1090.” *Id.* at 1126 (internal quotes and references omitted). That attorneys acting as independent contractors (e.g., special counsel or the like) are public officials under that section is well established. *Id.* at 1125. As the unrefuted evidence reflects, these three – the so-called Dream Team – contracted to exercise their influence over IID to cajole it into a water transfer since 1999. AR3/2/20611/20612, Key Terms Agreement. As a matter of law all three are public officials.

Moreover, in a fit of near irony, IID Negotiator John Penn Carter submitted a declaration in support of the stay in this appeal that provides confirming evidence that he and cohorts David Osias and Rodney Smith qualify as public officials subject to the section 1090 prohibitions. Mr. Carter states that these three of the proverbial IID

Dream Team “reviewed the attached draft with the IID Board prior to the Board’s action approving all of the QSA-related agreements.” Carter Declaration in Support of Petition for Writ of Supersedeas, Vol. 2, Tab 16, Bates 207, ¶ 4. Mr. Carter confirms that the Dream Team was in a position at a time and place to exercise the most influence of any three human beings over the IID Board on the QSA. And that remains the same whether the Dream Team’s influence was exercised in public or in executive session (which is hinted at by Mr. Carter and would even more strongly confirm the Dream Team’s preeminent roles).

Given the superior court’s third sentence on section 1090, a finding as a matter of law on the corroborated and unrefuted evidence that Messrs. Osias and Smith were and are public officials for purposes of section 1090 analysis leads to a finding as a matter of law that section 1090 was violated, since the superior court carefully refrained from any finding that Messrs. Osias and Smith lacked financial conflicts, while finding that Mr. Carter did not have a suspect financial interest. To the extent that is not an obvious conclusion, all of the evidence (again, unrefuted) shows that the

Messrs. Osias and Smith had adverse financial interests as a matter of law.

2. Evidence Showed that IID Negotiators Were Tempted by Adverse Financial Interests

The adverse financial interests is most blatant as to Mr. Osias, since he confirmed in writing that he would not be loyal to his public client IID in the 1996 written “waiver” document. He had professional, i.e., fiscal, relationships with others interested in the water transfer matters.

IID is aware of Allen Matkins’ historic client relationships The representation includes matters unrelated to water as well as matters involving water issues in the Imperial Valley. Allen Matkins also represents Western Farms, Citrus Heights Ranches and Kent Seafarms in matters involving water issues in the Imperial and Coachella Valleys. Allen, Matkins intends to continue its representation of these clients. IID agrees that we may do so and will not seek to disqualify Allen, Matkins from these representations now or in the future. . . . Allen, Matkins also has existing relationships with numerous clients who are located within the Metropolitan Water District service area, San Diego County, Imperial and Coachella Valleys in matters unrelated to water. We intend to continue such client relationships and you acknowledge that no conflict is created nor will one be asserted now or in the future because of any indirect impact on these clients arising from the nature of our representation of the IID.

AA:39:236(cont):10469-10470. In other words, Mr. Osias put in writing that he would be protecting Western Farms and unknown

“others” as his paying clients who had direct or indirect interests in Imperial Valley water issues. The Court noted in Ruling 85 that, “Consent is not required absent potential adversity and, hence conflict.” AA9:67:02115:02119. Shortly after the water transfer was executed, IID purchased Western Farm’s 40K+ acres of land for fallowing in order to meet the water transfer requirements. Supp.AA:27:366:006642, Resolution 2-2004. One of the advisors to IID in that purchase was Rodney Smith, who also worked for Western Farms according to the evidence at trial. AR3/6/61996-61998, IV Press article, p.3 (“In my business clients never go away . . .”); AR3/6/61692/61693-61694, IV Press article (Smith is Western Farms consultant in 1995); AA:43:257:11594, Morgan/Holtz Rebuttal Slide 12. Since there was no discovery available, these Respondents rely on the Appellants’ decision not to offer exonerating evidence. Evidence Code § 412.

A financial interest need not be direct to be prohibited. A temptation suffices as a prohibited financial interest under section 1090. AA:43:257:11592-11594, Morgan/Holtz Rebuttal presentation, Slides 8-13. *Thomson v. Call*, 38 Cal.3d at 648; *People v. Gnass*, (2002) 101 Cal.App.4th 1271, 1301. The law remains protective of the

public weal. *Hub City Solid Waste Services*, 186 Cal. App.4th at 1125 (“Section 1090 is a prophylactic against personal gain at public expense.”). According to Mr. Osias’ own written words, he structured his dealings with IID so that he was able to continue his representation of certain identified and an unknown amount of unspecified entities that have direct or indirect interests in “water matters” involving IID. This representation extended to IID’s environmental review, lending additional importance to the County’s and ICAPCD’s identification of the flaws therein since such flaws tend to harm the region but may benefit out-of-area interests. County Agencies RJN 11(J) at 000223 (showing IID lawyer control of the EIR/EIS process).

Whether or not Mr. Osias and his firm actually profited at IID’s expense and by what amount (or perhaps helped IID to profit) is wholly irrelevant –temptation is the evil section 1090 prohibits. *Thomson v Call*, 38 Cal.3d at 649 (merit of deal or lack of intent not a defense). (The parameters of attorney loyalty in a private context are presently on review in the California Supreme Court, *Oasis West Realty v. Goldman* (2010) 182 Cal.App.4th 688, review granted June 9, 2010).

Since Mr. Osias was a public official who was disloyal, placing himself in a position of temptation of putting IID into a secondary position, the transaction is void ab initio and IID is entitled to recoup all it has spent or transferred as a matter of strong public policy, including presumably all payments to the conflicted officials.

Thomson v. Call (1985) 38 Cal.3rd 633, 647. AA:34:203:09214, lines 13-22. Such recoupment could include physical water inappropriately transferred without the need to return payments, as at least CVWD implicitly recognizes. Supp.AA:107:26542, CVWD's Opposition to Motion for Preliminary Injunction, p. 38, lines 25-28. *See also* AA:38:236:10354, Morgan/Holtz trial presentation (Slide 57).

As for Mr. Smith, a similar written document reveals that Mr. Smith chose to work for a party directly adverse to IID during negotiations – SDCWA, the party with whom IID was negotiating – noting that the “Authority would expressly consent” to his “continuing role in negotiations”. AA:39:236(cont.):10407. The budget for the scope of services provided by Mr. Smith to SDCWA was not to exceed \$125,000.00 – while the QSA was in the negotiation stages. AA:39:236(cont.):10432.

No section 1090 jurisprudence allows the tempted public officials to avoid the prohibition by simply changing “hats” between public agencies on a given day or given project. The record clearly shows that IID relied on its “experts,” Messrs. Osias, Carter and Smith, that there was substantial participation by these experts (who received commendation for the substantial effort), that price was an important concern and in the province of its economist, Smith, and that they were working for IID. AA:38:236:10348, Morgan/Holtz trial presentation, Slide 45. There is ample unrefuted evidence to hold as a matter of law that Mr. Smith – a primary negotiator and Dream Team member -- had a financial interest adverse to IID from IID’s counterpart in negotiations, SDCWA. The evidence of impermissible conflict of both Messrs. Smith and Osias is amply supported by the record, whereas there is *no* evidence in the record to reflect otherwise, much less substantial evidence.

3. Public Policy Requires Invalidity Given Conflicts of Messrs. Osias and Smith

There is no authority that holds that the strong public policy of section 1090 can be waived – whether by action or self-serving written disclosures. Bluntly stated, there are no exceptions to section 1090 for “special” advisors such as economists or attorneys.

Messrs. Osias and Smith were at all times independent contractors in the role of public officials with financial interest adverse to IID. The superior court's finding that Mr. Carter was a public official applies with equal force to Mr. Osias on this record, since there is no evidence *with respect to the QSA* that Messrs. Carter and Osias performed substantially different tasks, had different responsibilities, had different access to the decision-making body (e.g., executive sessions), or exercised varied magnitudes of influence on IID. The only identifiable difference *relevant to the QSA* between Messrs. Carter and Osias was their titles: chief v. special counsel. As a matter of law, all parts of the QSA transaction – this includes the environmental documentation to be tried in Phase 1B and 1C as well as all federal contracts to which IID is a party also approved by the IID Board on the fateful day under the influence of the Dream Team – are void ab initio.

C. State's Opening Brief Reveals that Superior Court Erred in Finding Key QSA-JPA Agreement Language Was Not Illusory

There appears yet another independent basis to uphold the superior court's judgment, given the implicit admission by the State in its opening brief. The State appears not entirely clear on the superior

court's rulings that protect the landowners or beneficiaries' right to continue farming and using water, inasmuch as the State appears to contend that it has unfettered discretion to dictate to IID its management of the Salton Sea. In defense of the contingent nature of the State's obligation, it explains:

The third contingency is that the other mechanisms provided in the QSA-JPA Agreement and ECSA to manage mitigation costs may be effective, again resulting in no need to seek an appropriation, and therefore no need to draw money from the Treasury. For example, by agreement of the parties, the State has the right under section 4.2(2) of the ECSA to reduce the environmental mitigation costs *by compelling modifications to IID's operations*. (ECSA, § 4.2(2), AR 311110457110498.).

State Opening Brief, p. 24 (emphasis supplied). The fly in the ointment is that mitigation of the Sea requires water and in this zero sum game, the State is not free to direct by fiat whether the Sea is entitled to more money (from the State) for mitigation, more water (and a commensurate reduction in farming ability), or some combination.

The superior court gave the State a substantial benefit of the doubt in its Trial Issue Eight when it held that the State was required to and would act in good faith in making decisions under its authority to "veto" any IID decisions about Sea mitigation.

Under the facts present in this case, the express requirement for the determination to be reasonably made and the implied covenant of good faith and fair dealing which exists in all contract situations prevents this Court from calling the State's obligation in regard to excess mitigation requirement expenditures illusory and invalidating the contracts on t his claimed ground.

AA:47:292:12744. The State appears to consider its right to veto mitigation expenses absolute. "If the State's representative does not agree to mitigation expenses over the limit, then the State's obligation will not be triggered." State Opening Brief, p. 23. One of the purpose of the QSA-JPA Agreement is to effect the QSA deal, which itself includes as the superior court pointed out a system that will assure enough water for all farming in the future. AA:47:292:12732, Statement of Decision (water available for farming not reduced by transfer). If the State's power under the QSA-JPA Agreement is unfettered by the implied covenant of good faith as its opening brief implies, perhaps the QSA-JPA Agreement is invalid for the additional reason that the language detailed in Trial Issue Eight is illusory. In its reply, the State can *unequivocally assure* this Court that in exercising any authority under the QSA-JPA Agreement it contends is lawful the State will never seek to reduce the amount of water available for farming, even if it means the States' fiscal burden (up to billions)

increases as a result. Without such an unequivocal confirmation, the QSA-JPA Agreement is unlawful as the State “veto” language is illusory.

D. Actions of Appellants After Judgment Have Rendered the Appeal – Not the Judgment – Moot

The John Penn Carter declaration illustrates that this entire appeal is moot and it should be dismissed forthwith. The Morgan/Holtz Parties so suggested at the outset. Morgan/Holtz Parties’ Preliminary Response and Opposition to Petition for Stay, page 3. No Appellants has devoted even a single syllable in the 400 pages of the opening briefs to explain why this appeal remains “live” now that all parties – and this Court – knows that the Appellants withheld from the superior court the critical draft QSA-JPA Agreement. The appeal – not the cause or controversy– is moot because the parties that proffered the record in this record case now have shown that the trial decision and many that preceded trial were obtained by reliance on a materially misleading record. *See e.g.*, the superior court’s analysis of a promise of “restoration” of the Sea (Ruling 145) without benefit of the QSA-JPA Agreement allegedly voted on by the IID Board. AA:25:179:06638-06639. If the appeal resulted in an opinion – of whatever nature – it would be based on

proceedings that no party claims were conducted fairly. What is the point of an appeal at all? To provide clarity about an analysis concededly based on an incomplete record?

While the procedural posture of this particular form of mootness is odd, it is only so because the Appellants (or to be precise, the lawyers for the parties who did not wish to subject themselves to the mandatory fiscal liability section 473 requires) failed to move the superior court to vacate its decision and issue a new one after considering the “inadvertently” missing QSA-JPA Agreement draft. CCP § 473(b). These Respondents suggest that in addition to the fiscal concerns of the professionals in applying section 473, the Appellants wished to prevent the superior court from analyzing the missing draft QSA-JPA Agreement out of fear it would allow an even stronger adverse decision on the merits. Perhaps the Appellants chose to “forget” that they all possessed this draft because had it been part of the record, the judgment of invalidity would have come far sooner and the motion for a preliminary injunction in 2007 may have been successful. Evidence Code §§ 412, 413. No other Appellant counsel submitted a declaration that confirms or refutes that the draft attached to Mr. Carter’s declaration is the same one s/he saw on or about

October 2, 2003 or October 6, 2003, much less any explanation why no other counsel was capable of introducing into evidence the “missing” draft. That the draft was a key piece of evidence was long apparent. *See e.g.*, M/H.RA:3:9:00591 (the June 2009 Morgan/Holtz opposition brief identifying draft agreements not found in the AR). Such an absence of testimony suggests that all of the Appellants knew the trial was being conducted on an incomplete set of evidence.

E. Appellants’ Conduct Precludes a Just Result at Trial, Necessitating Judgment for Respondents

Before trial, the superior court ordered that it would not allow the Morgan/Holtz Parties to pursue a theory that the QSA transactions were a product of bad conduct before and especially during litigation. AA:34:202:09185. During and after trial more events have occurred that reveal that such theory was and now is even more strikingly an independent basis on which to uphold the judgment. CCP § 906. These Respondents do not make this showing lightly or out of personal animosity, but to obtain a just result.

As the superior court decision identified, the key document analyzed was one of the few that was missing a lineage – there was no draft. AA:47:292:12722 ¶3. The Appellants knew this at least five months before trial. M/R.RA:3:9:00591. The draft of the QSA-JPA

Agreement, however, was alive and well, in at least one filing cabinet. Carter Declaration in Support of Petition for Writ of Supersedeas, Vol. 2, Tab 16, Bates 207-209, ¶¶ 4 & 5. It must have been similarly available to all other counsel since it had been emailed to or from them. AA:37:236:000141, Robert Hight October 6, 2003 email. Yet, the Appellants proclaimed that among the dozen or so formal trial counsel and perhaps thousands of lawyers collectively in the prestigious private firms, not a single one could discern how to admit the missing draft before, during, or after trial. Carter Declaration in Support of Petition for Writ of Supersedeas, Vol. 2, Tab 16, Bates 208-209, ¶5. None of the legion of lawyers was able to file a section 473 motion, apparently, either. Morgan/Holtz Parties' Preliminary Response and Opposition to Petition for Writ of Stay, p. 3, ¶1. David Osias in his closing argument for all Appellants stated he had a list that showed where every draft agreement was in the record, "other than the J.P.A., which is just an outline." RT:12:3308, lines 1-4. He never provided the list to the court.

The Appellants expressly prepared the various AR's and signed declarations attesting to their completeness. AA:7:44:01572; AA:7:50:01683; AA:7:51:01695; AA:8:59:01952; AA:10:72:02253.

On the first day of trial (November 9, 2009), the superior court asked the parties whether there were “any objections” to marking AR1 through 6 as the administrative record. No objections were made by the IID or its allies. The superior court then marked and admitted all six, AR1 through AR6. RT:7:1943, lines 6-28 – RT:7:1944, lines 1-12. We now know that the declarations about the completeness of the records and moving them into evidence was not done in good faith given the Appellants knew that the key document was in the parties’ (lawyers’) possession, but not in any AR. Carter Declaration in Support of Petition for Writ of Supersedeas, Vol. 2, Tab 16, Bates 207-209, ¶¶ 4 & 5 (brief offering declaration signed by all Appellants except State).

The Appellants have had no less than four occasions to offer facts or argument justifying this appeal after conceding a flawed trial, but have never offered a single word of explanation. Morgan/Holtz Parties’ Preliminary Opposition to Petition for Stay filed March 9, 2010; Opposition to Petition for Stay filed April 1, 2010; Opposition to State Petition for Stay filed April 15, 2010; and Opposition to Motion to Correct filed August 25, 2020. Their decisions to repeatedly ignore important adverse facts allows this Court to

conclude the Appellants have no opposition. A party's failure to deny statement of fact in an adversary's brief may result in a court's acceptance of that fact as true if the record does not prove otherwise. *H.M. Moffatt v. Rosasco* (1953) 119 Cal.App.2d 432. Statements in briefs are within the same ambit as express facts. "While briefs and argument are outside the record, they are reliable indications of a party's position on facts as well as the law, and a reviewing court may make use of statements therein as admissions against a party." *Franklin v. Appeal* (1992) 8 Cal.App.4th 875, 893 n.11. On four opportunities to respond, the Appellants' briefs and arguments offered no response, explanation, or denial that they all encouraged the trial (not to mention years of litigation previously) to proceed with a record that *the Appellants* claim lacked the single most important document that they all possessed or at least had possessed.

And even now, the Appellants refuse to acknowledge that the trial was, to be blunt, a sham, perhaps unfairly hoping to offer an explanation on rebuttal so that there is no opportunity for a reply to correct any further false assertions or interpretations. The Appellants' four-time silence amounts to a concession that there is no evidence or argument available to refute Mr. Carter's admissions that the superior

court was correct that IID did not show at trial that it had approved what is purported to be the QSA-JPA Agreement, and since the most material term (the future and responsibility for the Salton Sea) never reached a meeting of the minds, all of the deal fails. *See* part I.A.3.

The decision by all Appellants to pursue pretrial and trial rulings on the flawed record renders many pre-trial decisions unreliable, an obvious example being Ruling 145 in which the superior court denied summary judgment on the “restoration” aspects of the (allegedly final) QSA-JPA Agreement without benefit of the key document on that precise point – the “missing” QSA-JPA Agreement draft that carries a definition of restoration far broader than what the Appellants misled the superior court into analyzing. AA:25:171:06468. Notably, even while denying the motion, the superior court recognized that there was more to the picture than what it had before it: “The Court does not reach the question whether there is any basis not raised in this motion that would create such an obligation [for the State to restore the Sea].” AA:25:171:06468 (footnote 1). After trial, the superior court reiterated that it did not feel it had the full picture in hand: “The Court does not reach, nor make any finding, regarding these issues [that “restoration” may differ

from “mitigation”] in this Statement of Decision.” AA:47:292:12739

¶2. Had the draft QSA-JPA Agreement been a part of the record, a wholly different motion about Salton Sea restoration could have been made and trial avoided.

At this point the landscape is littered with so many outright lies, half-truths, lies by omission, and other irreconcilable statements that no one – party nor court – should be forced to make sense of it all. Such problems started at the very beginning, when IID “somewhat mislead” the Imperial County courts about its validation action and selected conflicted counsel to prosecute this action against one or more former clients.

It appears that IID represented a limited if not somewhat misleading scope of the direct validations action to the Imperial Court. IID stated in its opposition to the Case 1643 plaintiffs’ ex parte application for permission to publish summons in their reverse validation action that it had “already brought a validation action . . . pertaining to the same subject matter.”

AA:47:292:12712 ¶2, Statement of Decision. Ruling 69 reflects that IID’s attorneys violated the rules of ethics and statutes against attorney conflict. AA:7:46:01634-01639. IID notably failed to minimize or eliminate the conflict, despite having ample time in which to do so. Instead, IID admitted that it was aware of the (at least

potential) conflict since 1996 and nevertheless hired and continued to employ for its own interest such conflicted counsel.

AA:39:236(cont.):10467-471; AA:9:67:02119, Ruling 85. As noted in this ruling, in his 12/6/07 declaration in opposition to the disqualification motion, Mr. Osias misrepresented to the court when he stated:

“I am knowledgeable of, and sensitive to, the requirements of the California Professional Rules of Conduct with respect to conflicts of interest. At no time from 1997 to the present did I believe the facts and circumstances of Allen Matkins’ and my representation of IID required the informed written consent of the IID and the relevant Elmore entity or person.”

AA:9:171:02119 ¶5. IID knowingly used conflicted counsel for the past thirteen years.

IID’s Special Counsel, Mr. Osias, also misled the court at trial. Mr. Osias spent a good portion of his presentation going through the minutia of his red lined versions of drafts found in the AR yet he failed to tell the court that, for all intents and purposes, IID had the “draft” of the QSA-JPA Agreement in its back pocket.

MATERIAL MISREPRESENTATIONS

11/12/09	There are only five agreements where this argument is raised and one of them is clearly true that they’re different, that is <i>the J.P.A. agreement at the time of approval was in the outline form with the material</i>	Osias
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	<p><i>terms only</i>, which is why there was a parenthetical that it needed to be consistent with the outlines. RT:8:2299, lines 21-26 (emphasis supplied).</p>	
12/02/09	<p>I have a list, Your Honor, sorry I ran out of time, that shows you where every draft agreement is in the record <i>other than the J.P.A., which is just the outline</i>. Every other one had a draft. And there is one other exception, the groundwater storage agreement, not very controversial, haven't heard anything about it, which is an exhibit to the Acquisition Agreement. Didn't have a draft until it was approved. Every other one has a draft in the record. Some as far back as December 2002. RT:12:3308, lines 1-4 (emphasis supplied).</p>	Osias
02/22/10	<p>The superior court's statement that no draft of the QSA-JPA Agreement is in the AR is correct, but <i>only because it was inadvertently omitted</i> from the AR. A draft of the QSA-JPA Agreement laws given to the IID Board on October 2, 2003, at the open session before it voted in open session to approve the QSA agreements, including the draft QSA-JPA Agreement. <i>Attached hereto as Exhibit "A" is a true and accurate copy of the October 2, 2003 draft of the QSA-JPA Agreement which I provided to the Board. Special Counsel David Osias, Consultant Dr. Rodney Smith, and I reviewed this draft with the IID Board prior to the Board's action approving all the QSA-related agreements.</i> The October 2, 2003 draft of the QSA-JPA Agreement was not the final version executed on October 10, 2003 (<i>see AR 3/1/10457</i>). Subsequent to the October 2, 2003 Board meeting, and as the drafts were all finalized the IID Board held closed session Board meetings in which all the QSA-related agreements were discussed . . . Carter Declaration in Support of Petition for Writ of Supersedeas, Vol. 2, Tab 16, Bates 207, ¶ 4 (emphasis supplied).</p>	Carter

Either Mr. Osias at trial deliberately withheld from the court the existence of the “draft” QSA-JPA Agreement or Mr. Carter lied in his declaration in support of the IID’s Petition for a Stay. *See also* Declaration in Support of Barioni/Krutzsch Parties’ Opposition to petition for writ of supersedeas (attaching the March 21, 2010 Declaration of Rodolfo J. Maldonado) and Declaration of Michael B. Jackson in Support of All Oppositions to petition for writ of supersedeas (attaching March 25, 2010 Declaration of Bruce Kuhn) (both declarations, by former IID directors who voted on October 2, 2003, disputed the accuracy of IID’s counsel’s representation to the court). Mr. Carter recites in his declaration that he cannot disclose what the IID Board actually did in the later closed sessions due to an “attorney client” privilege, leaving in this record only evidence of *no* meeting of the minds since the closed sessions produced no public report or new agreements. IID bore the burden of establishing a prima facie case, but now coyly refuses (if Mr. Carter is truthful) to meet it by competent evidence. No matter which version of the story one believes, IID and its allies (who also must have had the draft QSA-JPA Agreement since they helped draft and/or approved it earlier)

participated in presenting something substantially less than the truth in their quest to obtain an unjust result at trial, and now on appeal.

It is impossible to determine when this “draft” QSA-JPA Agreement was before the Board. According to Mr. Carter, it was given to the Board “*at the open session before it voted in open session to approve the QSA agreements, including the draft QSA-JPA Agreement.*” Carter Declaration in Support of Petition for Writ of Supersedeas, Vol. 2, Tab 16, Bates 207, ¶4. The October 2, 2003 approved Board minutes reflect that the Open session started at 1:00 PM and the Public Hearing at 5:30 PM. The “draft” QSA-JPA Agreement attached to Mr. Carter’s declaration was first time stamped 4:29 PM and then changed to *the earlier time* of 4:21 PM. The minutes reflect that Director Horne was concerned that some of the documents were “still marked draft and some of them were just received this afternoon.” Director Mendoza wanted to “Delay decision on this issue until next Tuesday to allow more time for review of the documents.” AR3/3/30101/30103, October 2, 2003 IID Board minutes.

Was a different “draft” given to the Board at the 1:00 PM Open Session? Was this one of the draft documents about which Directors

Horne and Mendoza were noting they had not had time to review the documents? Nowhere in the AR can one find a comprehensive packet of QSA documents that Attorney David Osias reviewed with the Board during the Open Session. Mr. Osias told the superior court that there was no draft of the QSA-JPA Agreement – *just an outline of the material terms*. AA:38:230:10273, lines 21-26 and 46:265:12319, lines 1-4.

Moreover, the Appellants cannot claim that they were somehow caught unawares about the missing QSA-JPA Agreement draft. In June 2009, the Morgan/Holtz Parties filed their opposition to the MWD/CVWD motion for summary judgment in the 1658 case noting the lack of draft agreements in the AR and in particular that the draft QSA-JPA Agreement was missing. The opposition included a chart specifically showing which drafts could not be found in the record. M/H.RA:3:9:00589-00592. The Appellants chose to remain silent and did not proffer the missing documents. The court noted in its Ruling 146 that:

The Court is troubled by the lack of evidence of when the 2003 Transfer Addendum first became available to the public. The moving parties, aligned in this case with IID, are in a much better position than the Morgan Petitioners to have produced such evidence, but did not. Finally,

whether the Addendum (and related documents) were ever provided to the public for review is a disputed fact.

AA:25:180:06649 ¶1.

Until trial, IID referenced the QSA documents in general without specifically stating whether or not there was a draft QSA-JPA Agreement in the AR. During the trial on two separate occasions the Appellants listened approvingly to Mr. Osias tell the Court that there was no draft QSA-JPA Agreement – just an outline.

AA:38:230:10273, lines 21-26; AA:46:265:12319, lines 1-4.

The summary of some (importantly, not all) of the revisions attached to the back of the draft QSA-JPA Agreement reveal that SDCWA's attorney, Mr. Hentschke, was making edits to the draft. SDCWA knew there was a draft QSA-JPA Agreement but never made any effort to tell the truth to the superior court on 11/12/09 or 12/2/09 when Mr. Osias stated something other than the truth. Carter Declaration in Support of Petition for Writ of Supersedeas, Vol. 2, Tab 16, Bates 236-237. By remaining silent the Appellants allowed the summary judgment motions, the pre-trial briefing, and trial to be conducted without a key piece of evidence – the draft QSA-JPA Agreement seen by and approved by their respective Boards. Their continued silence further reflects that they supported the tactical

decision of IID's attorneys to advance by any means their collective unjust goals.

While VID and Escondido may have had some ability and possibly unique facts on which to distance themselves from their allies previously, they waived that opportunity several fold. They (1) offered no evidence that they either were not or could not have been aware that their allies were misleading the superior court, (2) their counsel absented themselves from trial and in effect foreclosed any opportunity they may have had to protect their clients, and (3) signed the petition for a stay proffering the Carter declaration that admitted the trial had been conducted without the key piece of evidence. That VID retained Mr. Carter also forecloses any possibility that VID was unaware. RT:7:1933, lines 27-28, – RT:7:1934, lines 1-10; March 1, 2010 Petition by Public Agencies for Writ of Supersedeas; April 1, 2010 Morgan/Holtz Declaration in Support of Response and Opposition to Petition for Writ of Supersedeas, Exhibit H.⁸

MWD fares no better. The Hight October 6, 2003 email clearly reflects that the draft QSA-JPA Agreement was received from “SDCWA late Friday, October 3.” AA:37:236:000141, Robert Hight

⁸ Appellants VID and Escondido relied on declarations in their opening brief at pages 9, 13, and 19.

October 6, 2003 email. The email to Messrs. Carter, Kightlinger, Robbins, and Slater and Ms. Stapleton (i.e., from the State to IID, MWD, CVWD, and SDCWA) advised that there remained “*significant policy/legal issues which make it difficult for the State to agree to the agreement as drafted by SDCWA, CVWD and IID.*” AA:38:236:10359. Recipient Mr. Kightlinger was, at the time of the Hight email, MWD’s general counsel, and during trial was and still remains its General Manager. Thus MWD knew the truth about the draft QSA-JPA Agreement well before trial via both its (1) legal department (whom are counsel of record) and (2) upper management. *See e.g.*, AA:4:1(cont.):00949 (Kightlinger signs as General Counsel). Much like VID and Escondido above, MWD is also unable to claim innocence or surprise that a draft QSA-JPA Agreement had been the focus of the pre-October 6, 2003 approvals by the rest of the Appellants but was changed by October 10, 2003.

The law provides a drastic yet unfortunately appropriate remedy for such behavior – a decision on all of the merits against the offending array of parties. *Slesinger v. Walt Disney Co.* (2007) 155 Cal.App.4th 746, 761 (“The recognition that California courts have inherent power to terminate litigation for deliberate and egregious

misconduct when no other remedy can restore fairness is consistent with the overwhelming weight of authority from federal courts and courts of other states.”). Or, in a slightly more elegant fashion: “Courts cannot lack the power to defend their integrity against unscrupulous marauders; if that were so, it would place at risk the very fundament of the judicial system.” *Id.* (internal quotes and citation omitted). The power to dismiss against the offending party is a rare, but at times, necessary option.

Finally, contrary to SSI’s contention, a court’s exercise of inherent power to dismiss for misconduct need not be preceded by violation of a court order. The essential requirement is to calibrate the sanction to the wrong. Whether the misconduct violates a court order is relevant to the exercise of inherent power, but it does not define the boundary of the power. (See, e.g., *Cummings, supra*, 533 N.W.2d at p. 14 [witness tampering]; *Aoude, supra*, 892 F.2d at pp. 1118-1119 [fabrication of evidence and other acts constituting a “fraud on the court”].) The decision whether to exercise the inherent power to dismiss requires consideration of all relevant circumstances, including the nature of the misconduct (which must be deliberate and egregious, but may or may not violate a prior court order), the strong preference for adjudicating claims on the merits, the integrity of the court as an institution of justice, the effect of the misconduct on a fair resolution of the case, and the availability of other sanctions to cure the harm. (See, e.g., *Aoude, supra*, 892 F.2d 1115; *Anheuser-Busch, supra*, 69 F.3d at pp. 348-349.) We do not attempt to catalogue all the factors that must be considered in any particular case, except to emphasize that dismissal is *always* a drastic remedy to be employed *only* in the rarest

of circumstances. We also do not attempt to catalogue the types of misconduct necessary to justify an exercise of the inherent power to dismiss, because “corrupt intent knows no stylistic boundaries.” (*Aoude, supra*, 892 F.2d at p. 1118.) Rather, we hold only that when the plaintiff has engaged in misconduct during the course of the litigation that is deliberate, that is egregious, and that renders any remedy short of dismissal inadequate to preserve the fairness of the trial, the trial court has the inherent power to dismiss the action. Such an exercise of inherent authority is essential for every California court to remain “ ‘a place where justice is judicially administered.’ ” (*Von Schmidt v. Widber* (1893) 99 Cal. 511, 512, 34 P. 109, quoting 3 Blackstone Commentaries 23.)

Id. at 763-765 (footnotes omitted). No remedy is possible short of dismissal of the appeal and a comprehensive judgment for the Respondents in the face of the Appellants’ refusal to break ranks to offer the courts a just option to “purge” the proceedings of the array of offending actions and actors. That the Appellants have retained the same lawyers all through trial – most of whom were also the negotiators and either actual or partners of percipient witnesses with knowledge of what QSA-JPA Agreement(s) existed or were approved or rejected – strongly suggests that dismissal of the appeal and a comprehensive judgment for Respondents is the appropriate harsh remedy. Nor has the IID Board obtained untainted counsel to sift through the morass and offer just options to the courts. *Slesinger v.*

Disney, 155 Cal.App.4th at 756-757 and n. 15 (even where offending party changed lawyers and volunteered to use separate law firm to review taint was insufficient to prevent future strategy from being influenced by the inappropriate conduct).

In addition, the key document reflecting the section 1090 violation of Mr. Osias was hidden before trial.

AA:39:236(cont.):10467-472. The waiver was not found in the AR. It was submitted at trial without objection after being obtained, despite no formal discovery in this litigation.

Nor did the AR contain the waiver Rodney Smith obtained from Messrs. Carter and Hentschke (IID and SDCWA) allowing Smith to work for both. That the waivers cannot be found in the AR is further proof that IID intended to obtain a judgment in its favor by any means, be those methods crafty, clever, unethical, or outright dishonest.

The public asked IID to assure it that its negotiators were not conflicted far ahead of the final QSA. IID's attorney responded on 3/27/03 that,

It is my policy when retaining outside counsel to represent IID to confirm with counsel that he or she cannot represent a person with an interest adverse to IID. It is also my policy that after initial retention of outside

counsel, to reconfirm, from time-to-time, that no conflict exists

AA:39:236(cont.):10485. One can infer that the reason for not being truthful and forthright was to protect not the IID, but some or all of the “other” interests recited in the 1996 waiver document. Hence, the bad conduct was to prevent the disclosure of facts that would constitute a violation of section 1090.

The attempts to obtain unjust results occurred outside of the courtroom as well. The Morgan/Holtz parties and their colleagues availed themselves of Water Code sections 5100 et seq – filing statements of water diversion with the SWRCB during the stay in this matter. Water Code §§ 5100 et seq. As explained in the opening pages, these Respondents’ primary concern was long-term protection for the region, and thus took actions to protect the integrity of their water use apart from any litigation. IID, through its primary negotiator, trial advocate, and advisor David Osias insisted to the SWRCB that the statements of water diversion be rejected and that those filing them be penalized. *See* Supp.AA:86:1032:021279-021283 (Elmore Statement of Water Diversion); Supp.AA:104:1125:025919-025931, March 8, 2006, Maloney letter to Victoria Whitney with Statements of Water Diversion;

Supp.AA:86:1032:021268-021277, Osias May 12, 2006 letter to Victoria Whitney of SWRCB; Supp.AA.104:1125:025932-026000 – 105:1126:026001-026143, Maloney May 16, 2006 letter to Victoria Whitney, (includes Statements of Water Diversion which evidence was withdrawn as trial exhibits when superior court declined to try the bad conduct issues). That IID – at least someone *claiming* to act for IID – tried to thwart even out of court attempts to protect the long-term interest for the region may also be tied into the interests of one or more of the listed or unknown “others” to whom IID’s advisors were beholden, since IID’s genuine interests are in no way harmed by its beneficiaries’ reliance on the Water Code.

At this juncture, the truth is impossible to determine. One thing that is simple to determine is that if the missing draft QSA-JPA Agreement was truly an “inadvertence,” Mr. Osias’ serial misrepresentations were simply incompetent advocacy, or the other Appellant(s) counsel were victims instead of willing participants in the duplicity, instead of this appeal the Appellants would be asserting the merits of a motion under section 473. CCP § 473. Morgan/Holtz Preliminary Response and Opposition to Petition for Writ of Supersedeas, page 3. But none have moved for relief under section

473 so at least one explanation – sudden contemporaneous incompetence by all trial counsel for the Appellants – is no longer viable. The facts presented about the draft QSA-JPA Agreement or lack of one are simply irreconcilable, at least without full-scale discovery on all germane actors’ businesses and personal computers, notes, and telephones in order to track down the truth along the lines of a civil RICO case. IID negotiator, lawyer, and percipient witness David Osias claims that there was no draft QSA-JPA Agreement presented to the IID Board. The other IID negotiator, lawyer, and percipient witness Mr. Carter swears that a draft QSA-JPA Agreement was submitted and explained by Mr. Osias to the Board. The only consistency to the two statements is that both confirm that at least one IID lawyer is materially misleading a (trial, appellate, or both) court. Under the rationale of the *Slesinger* case, this Court is compelled to dismiss the appeal and enter a comprehensive judgment in favor of the all Respondents since the pervasive falsity cannot be purged (and no Appellant has even suggested a way to do so).

The potential remedies are harsh, but there is no choice left. When those paid well to act as public officials chose to sell their loyalty to other bidders and no one “in the know” objects but actually

supports the conflict as favorable to their ultimate goals, no remedy other than invalidity suffices. When the counsel involved for years in the litigation sit silently as a colleague misleads the other side and the Court on the record, the documents, and what occurred on the fateful alleged day of decision (October 2, 2003), no remedy other than invalidity suffices. When the keystone of the entire deal – the fate of the Salton Sea – is purposely bargained away out of the public and the actual elected officials’ sight between October 2 and October 10, 2003, no remedy other than invalidity suffices. While these Respondents and their many friends, neighbors, colleagues, and other residents of the Imperial Valley hoped and worked mightily for a rational, appropriate and just way to transfer water *and* take care of the Salton Sea, unless and until all of the other parties divorce themselves of their conflicts and come together in good faith, the only option is to start from scratch.

II. APPELLANTS CAN SHOW NO PREJUDICE FROM CONSTITUTIONAL ERRORS BECAUSE ANY ERRORS WERE A RESULT OF APPELLANTS CONDUCT AND TRIAL TACTICS

The invited error doctrine is to prevent a party (or here, many parties working together) from misleading the superior court and then profiting from that bad conduct on appeal. The invited error doctrine

is not to be confused with simply “endeavoring to make the best of a bad situation of which they were not responsible,” which is almost by definition the typical struggle at trial for at least one side. *Nogart v. Upjohn* (1999) 21 Cal.4th 383, 403.

A. State’s Backtracking From Explicit Admission That Agreement Was Unconstitutional and Appellants’ Acquiescence Injected Further Error Into Trial

Invited error occurred when the State – in an apparent anomaly of candor – proclaimed that the QSA-JPA Agreement language was unconstitutional and everyone knew so. In its memorandum in opposition to Cuatro del Mar’s motion on the constitutionality of the QSA-JPA Agreement, the State at page 19 admitted that,

The second [sic, third] sentence of section 9.2, alleged by Cuatro to offend article XVI, section 7, in fact imposes no contractual obligation, but is merely a representation – *albeit an incorrect one*. It does not and cannot purport to state a legal commitment, as all parties who contract with the State are deemed to know.

AA:23:129:06003:06004, Morgan/Holtz Parties’ Notice of Water Parties Admissions (emphasis supplied).

As the attorney for the County pointed out at trial, the State’s admission was not that of a lone Deputy Attorney General but rather was “the authoritative vote, voice, if you will, of the State.”

RT:11:3171, lines 2-3. The Appellants all continued lockstep with the

State and tried to explain away the State's admissions at later stages instead of, for example, seeking leave to strike the State's admission or otherwise acting to prevent the superior court's reliance on the admission. The Appellants, being joined at the hip by their joint defense agreements, chose to maintain a united front, as is their prerogative. AR3/1/10080/10089, AR3/10092/10109, AR3/1/10287/10311, AR3/1/10342/10364, AR3/1/10373/10401, AR3/1/10457/10475, AR3/1/10536/10544, AR311110579110647, AR3/1/11127/11201 (QSA Agreements containing joint defense clauses). They cannot now assert that the State's admission should be ignored when analyzing (one version of) the QSA-JPA Agreement language. The Appellants either made a tactical decision or, if they contend the superior court erred in its crediting of their ally's admission, they let the error be created. (The facts also suggest a waiver, of course). The Appellants can hardly claim that the superior court was wrong to listen to the State's admission that they all knew they had negotiated an unconstitutional series of agreements since the Appellants contributed to (or remained silent per their joint defense arrangements about) the "error" that the State proclaimed part of the truth and the superior court relied on such truth.

Moreover, the “error” was compounded when IID acknowledged at trial that the Court and State were correct about the facial unconstitutionality of the critical language. “(I)f Your Honor says, okay, I have read this and the only way to make the third sentence make sense is because of the time pressure they wrote something that can be only be interpreted as an express contractual waiver of Section 7, which we know you can’t do, then you’ve got a constitutional infirmity, okay.” RT:12:3298, lines 14-20 (David Osias).

Mr. Osias was the principal spokesperson for all Appellants during trial so the acknowledgement of unconstitutionality affects all Appellants, even apart from the existence of the joint defense agreements. “Mr. Osias has been the principal spokesperson for the Category 1 [Appellants] parties and we support his arguments that he has made very effectively.” RT:10:2889, lines 15-17 (Linus Masouredis for MWD).

Having made the tactical decision to proceed in lockstep at trial, various Appellants now try to distance themselves from their own tactical choices by implicitly shifting blame to the State and IID.

The constitutionality of the contract is determined by its language. Neither what “everyone” knew or *mere*

representations of [Appellants'] counsel at trial regarding the intent of the parties at the time of contracting nor counsel's proffering interpretations of the agreement are proper considerations in the construction of the agreement.

SDCWA, CVWD, and MWD's Opening Brief, page 40, ¶2 (emphasis supplied). Of course, the Appellants' arguments prove too much, for if they are correct then their own briefs should likewise be ignored as "mere representations of counsel" and the Court need focus only on the language of all parts of all contracts the Appellants jointly created. *See* parts II.A.3. (as to QSA-JPA Agreement) and III.C. (as to State QSA).

B. Appellants Withheld Evidence Most Critical to Proper Constitutional Analysis

Appellants' primary claim of error is that the superior court misapplied the Constitution to the language in the QSA-JPA Agreement. To the extent that the superior court's analysis and holding is less than 100% justifiable (not conceded), the Appellants have only themselves to blame because they collectively prevented the superior court from conducting a better analysis by withholding a key piece of evidence, the draft QSA-JPA Agreement. The Morgan/Holtz Parties incorporate herein the discussion about the "missing" evidence, above at part I.E. above. No Appellant has even

attempted to explain how this allegedly “substantially similar” QSA-JPA Agreement can be reconciled with their Constitutional arguments.

III. THE SUPERIOR COURT PROPERLY CONCLUDED THAT ANY INVALIDITY OF THE QSA-JPA NECESSARILY RESULTED IN THE INVALIDITY OF THE BALANCE OF THE AGREEMENTS

The Appellants have in varying measures asserted that because IID chose to offer something less than *all* of the various contracts that make up the entire set of QSA-related contracts, those “other” twenty-two contracts not listed in IID’s complaint somehow affect the validity of the thirteen IID specifically identified. At times, the argument takes the form of a blatant claim that because some of the QSA contracts are “valid” none of the rest could ever be invalid.

IID’s validation lawsuit filed shortly after the QSA and Related Agreements were executed. However, as noted earlier, the lawsuit was limited to the primary contracts to which IID was a party. The 22 QSA contracts not part of the validation lawsuit were never challenged. *Thus, these other 22 contracts became valid by operation of law.* Once that occurred, contracts in IID’s case could no longer be invalidated, if to do so would have the effect of invalidating QSA contracts already validated by law.

IID Opening Brief, ¶ IV. C, p.51 (emphasis in original). Sometimes the form of the assertion is couched in federal language. As to the three agreements to which the U.S. was signatory (Federal

Agreements), Appellants noted that the superior court “invalidated them because it found they were inextricably intertwined with the QSA-JPA Agreement.” SDCWA, CVWD and MWD Joint Opening Brief, VIII, A, p. 88. Other times the claim is couched in contract law.

Instead of examining the language of each agreement, the trial court adopted a ‘domino theory’ and found that the remaining agreements were ‘interdependent’ on the QSA-JPA Agreement

SDCWA, CVWD and MWD Joint Opening Brief, VII, A, p. 68-69.

Sometimes the argument is seemingly that a particular contract should never have been subject to IID’s validation complaint in the first place. VID-Escondido Opening Brief (passim).

The common denominator is the cry that the superior court erred in *agreeing* with IID (*see* paragraph 23 of its complaint) that the contracts were, in fact, interrelated and interdependent and thus when one fell they all did. In its final decision, the superior court ruled that:

With the QSA-JPA Agreement being the principal mitigation funding mechanism for the QSA, and with IID expressly stating that the other contractual QSA commitments would not have been made but for the commitments of the State in the QSA-JPA Agreement, the Court finds the remaining 11 contracts to be interdependent with the QSA-JPA Agreement. The

Court's finding here is consistent with IID's pleading in the Second Amended Validation Complaint, paragraph 23, that all of the contracts in question are "interrelated and interdependent".

AA:47:292:12750. IID's Second Amended Validation Complaint, paragraph 23, advised the court and the public that:

The QSA and related agreements described in this Complaint consist of a number of contracts signed at the same time (October 10, 2003) which provide a very detailed and critical roadmap for IID water use for decades to come. IID by this lawsuit seeks to validate certain contracts to which it is a party. The contracts described herein (the "Contracts") are interrelated and interdependent. They are all part of the overall quantification, settlement and transfers agreed to by the many parties to the QSA and related agreements.

Supp.AA:6:47:001423.

A. Superior Court Properly Considered Relationship of the Agreements

The superior court's decision takes a practical and realistic approach – if IID and its allies asserted that the contracts were capable of being validated by the court that also means they were capable of being invalidated by the same court. Anything less would be a judicial "rubber stamp" devoid of any fairness or Due Process.

AA:47:292:12749, ¶1. The superior court examined the universe of contracts not specifically identified by IID, i.e., not just the thirteen, and plainly noted that while those other contracts were "valid"

inasmuch as none had been explicitly invalidated so far, those other contracts recognized that their terms could end, change, or become unenforceable as a result of the contracts IID pleaded. The superior court gave an example of the IID-DWR contract that had not been included in the thirteen. The court noted:

The IID-DWR Agreement supports this Court's conclusion that the Court isn't precluded from invalidating the QSA-JPA Agreement. Article 3.6 of the IID-DWR Agreement provides that "This Agreement shall remain in effect only so long as the Department's agreement with Metropolitan, referred to in Recital 7, and the QSA referred to in Recital 1, remain in effect." Thus the IID-DWR Agreement expressly provides that if the contracts relied upon cease to remain in effect, then it too will cease to remain in effect. This provision was validated by operation of law. This provision explicitly contemplates invalidation (or other termination) of the QSA.

AA:47:292:12749, ¶2. The superior court did not go through each of the other 22, but the record reveals other examples that support the superior court's conclusion that those other contracts are no impediment to invalidity of the thirteen. Examples of some of the twenty-two contracts not included in the validation lawsuit but containing language linking the agreements as follows:

Agreement between IID and DWR for the Transfer of Colorado River Water, Article 3.5 – "The parties' rights and obligations under this Agreement are conditional upon Imperial's obligation under the QSA-JPA referred

to in Recital 5 remaining capped as set forth therein and upon the State's obligations therein being supported by sufficient appropriated funds or otherwise made binding in a manner satisfactory to Imperial." Article 3.6 – "This Agreement shall remain in effect only so long as the Department's agreement with Metropolitan, referred to in Recital 7, and the QSA, referred to in Recital 1, remain in effect." AR 3/1/10893/10869.

Agreement between MWD and DWR for Transfer of Colorado River Water, Recital 7 – "The Department and Imperial are contemporaneously with this Agreement entering into an agreement for the transfer by Imperial" Article 3.5 – "This agreement shall remain in effect only so long as the Department's agreement with Imperial, referred to in Recital 7, and the QSA, referred to in Recital 1, remain in effect." AR 3/1/10080/10081-10082.

Agreement for Acquisition of Water between CVWD and the MWD, Article 7, 7.1 – CVWD's rights and MWD's obligations "are all subject to the Execution of the QSA and Related Agreements"; Article 11, ¶11.3, Effect of Termination – "The provisions of Section 3.4 of the QSA are incorporated herein by reference." AR3/1/10092/10102 and 10104

Delivery and Exchange Agreement between MWD and CVWD for 35,000 Acre-Feet, Article 3, ¶ 3.1 -- Contract "shall end on the earlier of the termination of the Quantification Settlement Agreement, or expiration of Metropolitan's State Water Project Contract." AR3/1/10133/10144

Amendment to the Agreement to Supplemental Approval Agreement between the MWD and CVWD, ¶ 4 -- Agreement "will terminate and be of no force or effect upon termination of the Quantification Settlement Agreement." AR3/1/10935/10936

IID and CVWD October 10, 2003, letter to Ron Gastelum, Chief Executive Officer of MWD, consenting to the MWD proposed transfer of water from PVID to MWD, ¶1 --
“This consent is provided pursuant to Section 4.3 of the Quantification Settlement Agreement.”
AR3/1/10937/10937

Those twenty-two contracts may have simply become moot, unenforceable, ineffective, or otherwise modified by the invalidity of the thirteen. The best example is the agreement dear to VID and Escondido, the Allocation Agreement among the US, MWD, CVWD, IID, SDCWA, Indian Bands, Escondido and VID. AR3/1/101976. The VID and Escondido contract remains on its face unchallenged except that it has never been lawfully approved by IID for one or more reasons explained in this and other Respondents’ briefs. This Court need not offer any unsolicited opinion on what rights or claims VID and Escondido have remaining against any other party to the contract or their agent, only that with respect to IID, they are not entitled to any of the promises to be performed by IID. CCP § 870.

IID is unable to deny that the superior court was correct in finding the contracts were interrelated.

A number of the QSA-related contracts *not* in IID’s Validation Case, and thus validated long before Judgment, *are dependent for their efficacy on the QSA contracts in the Validation Case.*

IID Opening Brief, p. 52, ¶ C(1) (emphasis supplied). *See also*, pp. 55 ¶ C(2). While Appellants SDCWA, CVWD and the MWD dispute invalidation of the contracts, they do not dispute that at least some of the contracts are interrelated and interconnected. Appellants' SDCWA, CVWD and MWD Joint Opening Brief, pp. 71-72.

B. IID's "Approval" Was not Seriatim and Cannot be Severed

In addition to the explicit findings and analysis by the superior court, the record shows that there is no impediment to invalidating all thirteen via another route. The AR reflects that the IID Board was presented with a unified and polar decision – approve all or none of the QSA contracts. AR3/3/30107 (IID Resolution 9-2003); AR3/3/30110 (IID Resolution 10-2003). The Morgan/Holtz parties made this plain during trial. AA:38:236:10327-10331 (Morgan/Holtz Phase 1A Trial Presentation, Slides 4-11). The Resolutions have no “severability” provision to allow the approval or rejection of something less than all contracts.

(4) The Board hereby approves the QSA, on the terms and conditions set forth in the agreements and documents set forth on Exhibit “D” attached hereto (“QSA Agreements”).

AR3/3/30110/30112.

(4) The Board hereby approves the revised IID Water Conservation and Transfer Project, on the terms and conditions set forth in the Fourth Amendment to Agreement Between IID and SDCWA for Transfer of Conserved Water, attached hereto as Exhibit “D” (“Revised Fourth Amendment”).

AR3/3/30107/30109 and 30113 (the list of agreements being approved). That the Resolutions are so unified may be due to the non-unified approach IID took in late 2002 when the Board exercised its prerogative to actually counter-offer on select terms – a possibility those in charge of the negotiations seemingly successfully precluded in 2003. In 2002 the IID Board approved the environmental documents but as to the rest, the Board voted to make a nine-point counteroffer. AR3/3/31311/31314-31317.

Second, the superior court decision recognized that no meeting of the minds occurred and that such lack of agreement precluded the acceptance of any part of the interrelated QSA “deal.”

The Court’s conclusion that the voting arrangement is not illusory does not preclude the Court from viewing, as the Court does, this contractual voting arrangement as an item of significant substantive legal effect that did not exist when the IID Board formally voted to approve the contracts on October 2, 2003.

AA:47:292:12744. The Appellants attempted to confuse at trial the clear language of the IID Resolutions approving all contracts at once

by citing to the minutes, agenda, and anything other than the *actual Resolutions* enacted. AA:38:236:10328-10344 (slides 5-17). RT:8:2295 (lines 1-28), 2296 (lines 1-28), 2297 (lines 1-26) (IID references to agenda, minutes, four draft agreements and an outline of QSA-JPA Agreement). No Appellant at trial or now in their briefs has explained how the IID Resolutions allow a “severance” of one of many contracts approved as one package.

The authority on which IID and others rely does not assist them. In *Hollywood Park Land Co. v. Golden State Transp. Financing Co.* (2009) 178 Cal.App.4th 924, 937, the Third District Court of Appeals dismissed an appeal challenging bonds issued under the authority of Indian Gaming compacts which had never been properly challenged. Its rationale was that allowing such a challenge of the later in time and subsidiary bonds “would impermissibly allow seriatim challenges to a unified method of financing, which would defeat the validating procedure’s purpose of promptly settling all questions about the validity of a public entity’s action.” That same rationale to avoid seriatim challenges applies here, only that the specific facts here are that there were no seriatim approvals or actions. There was one approval of all agreements and one approval of the

supporting environmental documentation by the IID Board on October 2, 2003. AR3/3/30107 (IID Resolution No. 9-2003); AR3/3/30110 (IID Resolution No. 10-2003). Trying to segregate the agreements apart from the unified IID approval is a form of “seriatim challenge” that the Appellants’ authority advises must be avoided.

Ignoring the facts and law not in their favor did not assist the Appellants at trial and will not assist them now. Even if the superior court erred in some fashion in its explanation why one flawed agreement precludes validity of the rest, there are ample independent bases for the superior court’s conclusion on a record and factual findings to which no Appellant has claimed error.

C. Agreements Themselves Preclude Partial or Less Than Polar Finding of Invalidity

Even if the superior court’s decision is flawed with respect to the interrelated nature of the various contracts, and IID did not make an “all or nothing” approval of all of the contracts, the Appellants explicitly drafted terms that lead to the same conclusion reached by the superior court. Specifically, the “State QSA” Agreement itself expressly incorporates all of the other contracts and agreements, as discussed below. AA:3:00671 (State QSA Agreement). Thus, when IID included the State QSA Agreement for validity, it asked that the

superior court expressly review not just the thirteen, but *all contracts*.

If there is cause for a remand for another trial, it will be for the superior court to determine validity of *all* of the contracts at once rather than let any slip between the cracks unanalyzed.

The Appellants drafted¹⁰ their own trap – whether out of collective error or because the unjust goals of the unknown other interests required it. *See* part I.B.2. The State QSA Agreement contains recitals about the intent and nature of the various agreements, as does the QSA-JPA Agreement, among other contracts.

Recital H. On or about October 10, 2003, CVWD, IID, and The Metropolitan Water District of Southern California executed that certain Quantification Settlement Agreement (“QSA”) which settles a variety of long-standing Colorado River disputes regarding the priority, use and transfer of Colorado River water, establishes the terms for the further distribution of Colorado River water among those entities for a period of time based upon the water budgets set forth therein and includes as a necessary component thereof the implementation of the 1998 IID/SDCWA Transfer Agreement and the IID/CVWD Acquisition Agreement. These conserved water transfers and the QSA are critical components of the State’s efforts to comply with the California Limitation Act of 1929, Section 4 of the Boulder Canyon Project Act of 1928 and to implement the California

¹⁰ The contracts expressly recite that the Appellants were all to be considered “drafters.” “Each Party and its counsel have participated fully in the drafting, review and revision of this Agreement. A rule of construction to the effect that ambiguities are to be resolved against the drafting Party will not apply in interpreting this Agreement, including any amendments or modifications.” AR3/1/10287/10316, State QSA Agreement, ¶11.6.

Constitutional mandate of Article X, Section 2. Neither the QSA or these conserved water transfers could be implemented without compliance with extensive state and federal environmental laws, and this Agreement including, the State Obligation is the principal mechanism for ensuring that required mitigation under those laws for these transfers will be fully paid for.

Recital I. The terms of the 1998 IID/SDCWA Transfer Agreement and the IID/CVWD Acquisition Agreement are subject to the implementation of a mechanism to resolve and allocate environmental mitigation responsibility between those Parties on the terms and conditions set forth in that certain Environmental Cost Sharing, Funding and Habitat Conservation Plan Development Agreement among CVWD, IID, and SDCWA (“ECSA”). A copy of the ECSA is attached to this Agreement as Exhibit B.

Recital J. This Agreement is necessary to (1) allocate among the State, the CVWD, the IID and the SDCWA Environmental Mitigation Costs; (2) make certain and limit the financial liability of the CVWD, the IID and the SDCWA for Environmental Mitigation Costs; (3) make certain and limit the financial liability of the CVWD, the IID and the SDCWA for the Salton Sea restoration costs; and (4) allocate the remaining financial and other risks associated with the Environmental Mitigation Requirements and Salton Sea restoration costs to the State.

Recital K. CVWD, IID and SDCWA have agreed to substantial commitments of water, money, and other valuable resources to implement the 1998 IID/SDCWA Transfer Agreement and the IID/CVWD Acquisition Agreement, among which are commitments to funds to mitigate environmental impacts of those agreements and to promote restoration of the Salton Sea. These commitments would not have been made without the promises of the State as documented in this Agreement.

AR3/1/10457/10458 (QSA-JPA Agreement).

The Appellants argue that under conventional contract law, these recitals differ from explicit promises or the terms of the contract. Appellants SDCWA, CVWD and MWD's Opening Brief, p. 69. The law relied upon need not be rebutted, however, because the Appellants have explicitly agreed to ignore such law. "The Recitals to this Agreement are a part of this Agreement *to the same extent as the Articles.*" AR3/1/10287/10298, ¶1.2(1) (emphasis supplied).

Moreover, the Appellants agreed that the "Exhibits and Attachments attached to this Agreement are incorporated by reference and are to be considered part of the terms of this Agreement." AR3/1/10287/10298, ¶1.2(2). What are the "Exhibits and Attachments" to the State QSA Agreement? *Every* other QSA related contract. *See* AR3/1/10287/10318-10321 (Exhibits A and B to State QSA Agreement). Thus, every QSA related agreement, along with its recitals, is a material term of all others.

In other words, the superior court had the ability to weigh in on the validity of each and every agreement under the plain drafting of the QSA, even though Appellants misled the superior court otherwise. By asking that the State QSA itself be subject to validity, IID asked

that all contracts related to the State QSA be subject to analysis since they are all “part of the terms” of the State QSA agreement.

AR3/1/10287/10298 and 10318-19 (Exhibit A—listing twenty-two QSA-Related Agreements to Quantification Settlement Agreement between IID, MWD and CVWD). And, since all other contracts are part of the State QSA agreements and subject to its language, all of the recitals are likewise part of the “terms” of the agreement.

When the superior court relied on Recital K of the QSA-JPA Agreement, it relied on express contractual term, not extra or aspirational verbiage.

These commitments would not have been made without the promises of the State as documented in this Agreement. In addition, IID, CVWD and SDCWA are relying upon this Agreement in entering into other agreements with third parties, including without limitation, contracts with landowners and farmers in Imperial Valley who are to produce conserved water.

AR3/1/1045/10458, K.

The Court noted that:

With the QSA-JPA Agreement being the principal mitigation funding mechanism for the QSA, and with IID expressly stating that the other contractual QSA commitments would not have been made but for the commitments of the State in the QSA-JPA Agreement ...

AA:47:292:12750. The superior court was required to “unravel” at least the twelve contracts before it when one failed. The language Appellants drafted allowed it no other option.

The Appellants have chosen to ignore their collective drafting. Instead, they engage in the “fantasy” that the contracts are so “inextricably intertwined” that none can be invalidated but not “inextricable intertwined” when invalidity of one would cause them all to be invalidated. In *California Commerce Casino v. Schwarzenegger* (2007) 146 Cal.App.4th 1406 the appellate court held that waiting more than 60 days to challenge certain compacts with Indian tribes precluded validation relief. The plaintiffs tried to avoid that result by showing that their challenges were not to the compact themselves, but other parts of the assembly bill that had approved the compacts. Here IID was kind enough to commence a validation proceeding well before the 60-day period, seeking validation of a specific array of agreements and IID’s approval(s) including the overall State QSA agreement that incorporated every other agreement. Unlike the *Commerce Casino* case, there is no separate or precursor “agreement” or “res” in the role of legislation that must have been challenged within 60 days. Had the Morgan/Holtz Parties tried to

implicitly challenge SB 654 – one of the QSA-supportive laws passed in 2003 about certain State plans to study the Salton Sea -- instead of the agreements, then perhaps *Commerce Casino* would apply. The superior court noted that, “The Court is not called upon nor does it address whether the QSA legislation is unconstitutional.”

AA:47:292:12748. All of the agreements are implicated when the State QSA is challenged, obviating the need to consider whether the *Commerce Casino* case applies. Appellants’ own drafting reveals that the superior court took the path they created – and the superior court could have proceeded even further.

D. Appellants Flip-Flopped on Interrelated Nature of All Agreements When It No longer Served Their Purpose, i.e., Incited Error and/or Waiver

Appellants themselves recognized the interrelated and interdependent nature of all of the agreements, at least until it no longer served their purpose. Over the past seven years, the Appellants advised various courts and the public that the State QSA and related agreements were interrelated and interdependent. For example, in February 2003 MWD sought to intervene in the federal lawsuit, *IID v. Norton*, 03 CV 0069 W (SD. Cal. 2003). In the Declaration of Dennis B. Underwood in Support of Ex Parte Application of the MWD’s

motion to intervene, Mr. Underwood stated in ¶12 that “*The QSA consists of a number of proposed interrelated agreements* that were designed to provide a framework for water conservation and water transfers among the participating agencies for up to 75 years” AR113270:113278-79 (emphasis supplied). In paragraph 23 of its complaint, IID said they contracts were *interrelated and interdependent*. Supp.AA:6:59:001423 (emphasis supplied). SDCWA agreed with IID in its answer to IID’s second amended complaint. AA:6:24:01351. In the Demurrers to the Imperial County’s Second Amended Petition for Writ of Mandate, MWD, CVWD and SDCWA advised the court that while all of the QSA agreements were not finalized until October 2003, there was “no difference in the dates that the agreements were finalized and signed (*which should not be surprising given the interrelated nature of the agreements*).” Supp.AA:74:882:018307 (emphasis supplied).

Once they perceived that the trial would be more than the “rubber stamp” they planned, the Appellants started to change their tune. But the language they all drafted together reflects in multiple ways that the agreements are all interrelated and interdependent, on which basis the superior court relied in finding that one fatal flaw kills

all related contracts, especially when a material terms expressly says so – QSA-JPA Agreement Recital K. If there is a flaw with the superior court conclusion that one flaw reaches the other twelve contracts, it is that the superior court did not go far enough and analyze which of the other twenty-two also became invalidated as part and parcel of the QSA contracts expressly within its jurisdiction.

E. If “Other” Contracts Preclude Finding of Invalidity, Appellants Have Conducted all Proceedings in Derogation of Due Process

If the Appellants nevertheless contend that the twenty-two contracts not recited by IID in its complaint have any affect on the validity, enforceability, or remedies for the thirteen contracts specifically identified, the Appellants are essentially conceding that the entire validation action was initiated and prosecuted in violation of fundamental Due Process. Because the Appellants have many joint defense agreements, one must conclude that all accepted any such strategy in order to obtain their collective unjust result.

AR3/1/10457/10475, ¶15.14; AR3/1/10287/10316, ¶11.10;

AR3/1/342/10364, ¶20.11; AR3/1/10373/10401, ¶19.11

The superior court decision said – with the benefit of hindsight and review of the AR -- that IID had misled the Imperial County superior court about the scope of its validation action in 2003.

It appears that IID represented a limited if not somewhat *misleading scope* of the direct validations action to the Imperial County Court. IID stated in its opposition to the Case 1643 plaintiffs’ ex parte application for permission to publish summons in their reverse validation action that it had “already brought a validation action ... *pertaining to the same subject matter.*” (emphasis supplied)

AA:47:292:12712, ¶2. IID, for its part, claims the real flaw was that its opponents were not sufficiently prescient to protect the public from IID’s ruse.

When Plaintiffs attempted to publish their summons, IID objected to the extent the reverse validation action overlapped with contracts being addressed in the Validation Case. For contracts not in the Validation Case, IID warned that Plaintiffs needed to comply with validation procedures and bring their case in the counties where those other agencies were located. (Supp.AA:5:28:001009-001012.) The case was then dismissed, and no appeal was filed. (Supp.AA:6:65:001464-001465 ; *see also* Supp.AA:24:331 :005909.)

Appellant Imperial Irrigation District’s Opening Brief; p. 21. The controversy need not be resolved, since the Due Process focus is not on who misled whom before the several trial courts involved, but whether the public was fully informed.

1. The Initial Statutory Service Was Insufficient to Meet Due Process For Failure to Advise Any Interested Party That Validity Would be Decided by Events Separate from IID's Lawsuit

The beginning of the analysis is IID's complaint, as IID is the master of its own pleadings. Specifically, its paragraph 23 recites that while there were many contracts approved, IID is only alleging and seeking relief on a certain subset for which it used the capitalized term "Contracts." Its paragraph 24 provides an alleged summary of the effect of the various "Contracts." Its summons added nothing new, listing merely the thirteen Contracts by name. AA:1:1:00018-00019.

In order to comply with the validation statutes, IID was obligated to provide notice to the public that complied not only with the specifics of the Code of Civil Procedure, but also with Due Process. Appellants SDCWA, MWD and CVWD agree. "Such notice may satisfy certain Due Process requirements." SDCWA, MWD and CVWD Opening Brief, p. 99, ¶2. The superior courts recognized that Due Process was involved, not mere statutory compliance.

Finally, the plaintiffs *due process* and notice concerns or [sic] mitigated by the fact that statutory and *constitutional* notice will be given by the IID as the validation action.

RT:1:3, lines 8-11 (emphasis supplied).

As evidenced at the December 8, 2003 hearing, the Morgan/Holtz Parties were concerned about the scope of the proceedings inasmuch as their reverse validation lawsuit (No. ECU01643) encompassed all of the QSA Related Agreements – not just the ones IID sought to validate in its validation complaint (No. ECU01649).

MR. VIRSIK: The Holtz, Morgan, non-IID persons here, position that the matter IID is seeking to have a validation in action 49; that 49 [ECU01649] is limited by the face of the complaint to twelve contracts, they're listed in the complaint. It also – the complaint also states that these are only a portion of all the contracts. And the record will not be too clear, but from my perspective, it's half an inch of matter that the IID is asking the Court to look at versus approximately two feet of matter that the landowners is asking the Court to look at. RT:1:6, lines 15-20, 27-28 – RT:1:7, lines 1-3.

MR. SMERDON: In IID case, they're seeking to validate twelve contracts which are not each and every contract that IID is a party, but they're the ones that we feel we can move forward on. Many of the other contracts legislation that comprises water transfer are contracts or legislations that IID is not a party to and can't be brought to this County. RT:1:12, lines 11-17.

MR. VIRSIK: ... [T]here are contracts that we know of between IID and a cross defendant that are not part of those twelve. So again, our point about the narrow versus wide scope of inquiry, for example, the Department of Water Resources [agreement with IID] that comes to mind. RT:1:13, lines 6-11.

So there's the twelve contracts, but it's also a thirteen, fourteen, et cetera, et cetera. And our concern is that those are not precluded for inquiry just because IID has chosen [sic] first to the courthouse and says these twelve and not the other ten or forty. *Our concern is that leaves the public without any ability to have relief as to the rest,* if there is a holding, if that's the direction we're supposed to go in. RT:1:13, lines 12-19, (emphasis supplied).

The Imperial County trial court's view was that validation required "one single action in which all interested parties in the world are brought to either invalidate or validate in [sic] public agencies action" and for that reason dismissed the action (No. ECU01643) brought by the Morgan/Holtz Parties in light of IID's (No. ECU01649) action. RT:1:4 (lines 10-12).

The first superior court involved concluded that the Due Process concerns expressed by the Morgan/Holtz Parties were legitimate and worthy of protection, and selected a practical approach consistent with that court's view that an affirmative and a reverse validation action could not exist at once. The superior court, however, specifically protected the public and the Morgan/Holtz Parties by holding that their Due Process concerns were to be satisfied by IID's notice in its own validation action (No. ECU01649). SUPP.AA:6:65:001464-001465 (December 17, 2003, Ex Parte Application Order). As to the

twenty-two contracts, however, IID never tried to satisfy Due Process by publication or otherwise in its validation action.

Before trial, the Morgan/Holtz Parties brought a motion for summary judgment on the impropriety of service based on the facts then known, which motion failed. *See* Memorandum of Points and Authorities in Support of Morgan/Holtz Parties' Motion for Summary Adjudication of "Issue" re: Service, filed April 2, 2009 M/H.Supp.AA:5:23-25:00786-00834; AA:23:134:06054. Supp.AA:188:1851, Ruling 139. The superior court did not find any Due Process violation before trial. Now, however, the Appellants implicitly contend that the Constitution allows them to prosecute a validation lawsuit strictly as a "diversionary action" while validity is established elsewhere.

If Appellants are correct that the other twenty-two contracts have some validation effect on the present thirteen, then the Appellant's complaint and summons lulled the public into the incorrect belief that the thirteen contracts would be tried in this action only, rather than becoming valid through passage of time or otherwise. There was not, for example, a warning in the Summons that said "If you do not contest these Contracts *and* any Related

Contracts within x days, a Court may find . . .” The Summons only listed the thirteen. If the belated Appellant theory that the twenty-two contracts preclude the invalidity of the thirteen is to be credited, then IID did not file or prosecute the “uniformed [sic – uniform] simple clear and binding” action the first superior court involved herein was (mis)led to believe.

Again, I think it’s a balancing between the public’s right to challenge a public agency action and a public agency’s right to validate it in a uniformed [sic] simple and *binding* way.

RT:1:13, lines 26-28, RT1:14, lines 1-2, (emphasis supplied).

Perhaps the Appellants will claim that they have a right to use clever lawyers who are able to trick the public (and at least three superior court judges in two counties) into a massive waste of time and effort. Perhaps a “treasure hunt” is an appropriate model for contract drafting and public notice. RT:10:2441, line 21 (Porter). The Appellants may be proud to have discovered a path to validity by piecemealing a transaction into many separate yet interrelated components, bringing a subset of them to a court for validation (the ones with the least or no flaws, one would expect), and thereby cause all of them to become valid by the expiration of a shortened statute as to at least one interrelated contract kept out of court. And they will

likely claim that the Legislature encouraged them to perform such a sleight of hand in the first place. Water Code § 22762.

The fly in the ointment is Due Process. Sneaky tricks by the government (even local government) to get its way are not rewarded, but prohibited. The fundamental concern is that persons who are affected by a proposed government action are provided with appropriate notice. The seminal cases are *Jones v. Flowers* (2006) 547 US 220, *Tulsa Professional Collection Services v. Pope* (1999) 485 US 478, and *Mullane v. Central Hanover Bank & Trust Co.*, (1950) 339 U.S. 306. There are few bright lines or specifics, but instead an examination whether the governmental entity provided notice that was appropriate under all of the circumstances, given what the government knew or should have known. For example, when the government has actual knowledge of a person's identity or whereabouts, notice must reflect that. It is not enough to simply "try" to give notice if more can be done based on what the government knows or should know.

As for *Mullane*, it directs that "when notice is a person's due ... [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." [] Mindful of the dissent's concerns, we conclude, at the end of the day, that someone who actually wanted to alert Jones that he

was in danger of losing his house would do more when the attempted notice letter was returned unclaimed, and there was more that reasonably could be done.

Jones v. Flowers, 547 US at 221.

Did IID and its allies choose means that could “actually inform” the public of the true scope of IID’s validation action? The superior court answered “no” in finding in 20/20 hindsight that IID misled the Imperial County superior court about the scope of its validation action.

It appears that IID represented a limited *if not somewhat misleading scope* of the direct validations action to the Imperial County Court. IID stated in its opposition to the Case 1643 plaintiffs’ ex parte application for permission to publish summons in their reverse validation action that it had “already brought a validation action ... pertaining to the same subject matter.” (emphasis supplied)

AA47:292:12712. Since the superior court itself concluded IID had misinformed the judiciary (despite the unsuccessful efforts of the Morgan/Holtz parties to divine IID’s strategy), IID cannot claim that the public was fully informed. IID cannot claim as a matter of Due Process that the public should have known from what IID told it that the twenty-two contracts *not* mentioned in IID’s validation lawsuit or summons – v. the subset of thirteen Contracts (small v. capital letters) – actually controlled the validity of the thirteen Contracts. While a

government is not required to ensure proper notice is actually made, it is required to try to effect appropriate notice, even if that takes some effort. *City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 927-928 (record shows government made numerous attempts to provide adequate notice in receivership case). No facts exist here that IID took any effort whatsoever in informing the public that the trial of the thirteen Contracts would not determine their validity. Since the Legislature gave IID and the rest of the Appellants the privilege to use the validation statutes, they were and are obligated to use those statutes consistent with Due Process and fully inform the public, rather than treat the public as an adversary to be tricked and manipulated. If, on the other hand, these Respondents are naïve beyond belief and government lawyers and the courts are encouraged by the validation statutes to treat a validation action as a rubber stamp or a game of hide and seek, this Court has the ideal facts on which to so proclaim. *But see, Community Youth Athletic Center v. City of National City* (2009) 170 Cal. App. 4th 416 (trial court erred in not finding good cause to deviate from letter of validation statute).

2. Appellants' Theory of Invalidity Through "Other" Agreements Waived as Not Timely Raised or Prosecuted

If the Appellants are correct that the validation by passage of time of some other subset of the QSA related agreements precludes the invalidity of the thirteen herein at issue, then such legal effect was reached by early 2004 (i.e., 60 or so days after October 10, 2003, give or take a few). Yet, no Appellant filed any motion, demurrer, or took any action consistent with any such theory. The Appellants' answers never raised the "affirmative defense" about the other twenty-two contracts, even though when the answers were filed late December 2003 and January 2004 more than 60 days had elapsed since the contracts were approved, executed, and formally signed.

Supp.AA:7:70:1571, SDCWA Answer filed December 17, 2003;
Supp.AA:11:91:2698, Proof of Publication – response due by January 20, 2004.

On July 29, 2008, the superior court concluded that while the twenty-two contracts not at issue may have been validated by the passage of time, nothing precluded its trial of the thirteen.

To the extent that the matters before the Court – i.e., the scope of these validation actions – are limited, so will be the Court's determinations of validity. The two must be consonant. The Court, however, is not going to look to some other contract, not one of the contracts for which

validation is being sought, which may have been validated by operation of law as necessarily determinative of the validity of terms of the contracts for which validation is being sought. To that extent, each matter (contract) can be viewed as a separate contest (a race). The fact that some party won a previous contest (race) by inaction (no one showed up for the race and the law worked to declare a legal winner of that race) is hardly good precedent in a separate contest (race) for someone (even the legal winner in the previously mentioned race) having properly entered, qualified, and run the contest now under consideration.

AA:9:66:02107, Court Scoping Order. Yet, the Appellants did not bring a motion for summary judgment or other pre-trial request for judgment. The superior court noted that, “According to IID, the prior validation by operation of law of the IID-DWR Agreement precludes invalidation of the QSA-JPA Agreement upon which the IID-DWR Agreement is dependent.” AA:47:292:12748. Appellants appear to have embraced the theory only after they sensed that all was not well with their expectation of a judicial “rubber stamp.” Noting IID’s argument, the superior court observed:

If, as IID now argues, the Court is *required* to validate the agreement, all that is requested is a rubber stamp. The Court finds that this argument is not credible.

AA47:292:12749, (emphasis in original). Even if their theory had any legs at all (despite Due Process) Appellants waived any such theory by failing to act on it for over six years and nearly 150 superior court

rulings. If the superior court was wrong to conclude the Appellants' theory was "not credible" it is because the Appellants themselves treated it as nonexistent in their answers, pleadings, and pre-trial skirmishes. The Court need not consider the Appellant's tardy theory of error when they themselves failed to prosecute it.

3. If Initial Notice Violated Due Process then a New Notice Period Is Required and a New Opportunity to Divest Litigation of Tainted Persons

If notice does not comply with the statutory or other standards, courts have the ability to require a new period of notice. *Community Youth Athletic Center v. City of National City* (2009) 170 Cal. App. 4th 416 (good cause to start publication again). If the Appellants continue to advocate that the twenty-two contracts play any role in the validity, effect, or remedy of the thirteen, then the obvious solution is to remand the matter to commence a brand new period of notice that encompasses all of the contracts, using a class action procedure if warranted. AA:8:62:01968:01972 (superior court did not believe a class action offered benefits over a validation action). While such a suggestion may sound counter-productive at this stage, it need not be. A new notice period will allow the clock to start again on removing actors who are conflicted (be it professionally, ethically, or otherwise)

with a renewed possibility that the true issues could be addressed or litigated without any hint of taint. *See* superior court Rulings 69 and 85 at AA:7:45:01633-01646 and AA:9:67:02155-02129 and part II.B. The QSA “baby” does not necessarily need to be thrown out with the tainted “bathwater.”

IV. RESPONDENTS ARE ENTITLED TO BROAD INVALIDATION RELIEF

As the Morgan/Holtz Parties have insisted from the start of the litigation morass, their goals are in resolving the serious problems rather than “winning” litigation for the sake of a Pyrrhic victory. *See* Imperial Group’s [Morgan/Holtz Parties] July 20, 2004, Statement and Proposed Agenda, Supp.AA:39:482:009556-009558. They continually advocated finding solutions, not winning battles, a view of the world apparently not shared by any Appellant.

THE COURT hereby notifies the parties that it will set a mandatory settlement conference in a given case at the parties’ request if such a settlement conference is requested by at least two parties to the case, including one part on each side of that case. The Morgan/Holtz Parties are Category 2 parties, and parties to Cases 1649, 1658, 1834 and 1886, and have filed such a request. In the absence of the filing of a request for such a settlement conference by a Category 1 party which is a party to one or more Cases) 1649, 1658, 1834 and 1886, by April 6, 2009, (1) the Court shall deny the Morgan/Holtz Parties’ request for mandatory settlement conference. ... March 30, 2009.

AA:13:83:03166. Not a single Appellant took up the superior court on its generous offer.

The Morgan/Holtz Parties' efforts to resolve the serious political, legal, social, and economic controversies were not confined to the courtroom, and they never saw litigation as an end in itself.

See M/H.AA:3:12:00618-00658, Declaration of Patrick J. Maloney in Support of Motion for an Award Attorneys Fees and Costs.

A. Relief Must Recognize Local Water Entitlements

As the superior court recognized, the QSA transaction did not reduce the farmers' and landowners' ability to continue with farming as they have historically done.

The diagrams on the following two pages, Plates 3 and 4, from the administrative record (AR3/132/204885205141 and 205143) regard how crop evapotranspiration (water used by crops) *is not reduced* by transferring conserved water.

AA:47:292:12732 (emphasis supplied), Statement of Decision¹¹.

After all, if the beneficiaries for whom IID delivers water were to lose part or all of their ability to use water without their consent, the courts

¹¹ These Respondents do not concede that the factual information and calculations underpinning IID's trial evidence and hence the superior court's references to it are accurate. Respondents were denied discovery and so could not demonstrate the fallacy of the some of the water transfer projections about water and money. Should a retrial be ordered (not suggested) these Respondents would renew their quest to verify or refute the underlying assumptions.

would be available to protect them. IID, in fact, relied on the federal court and offered evidence that a diminution of water quantity or reliability would harm its beneficiaries. AR3/30/113644/113647-49, Gilbert declaration offered by IID in support of its Motion for Preliminary Injunction. The California Supreme Court held: “Thus, although it is clear that a superior court may impose a physical solution to achieve a practical allocation of water to competing interest, the solution’s general purpose cannot simply ignore the priority rights of the parties asserting them.” *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1251. Here, the IID beneficiaries are protected by long-standing law that prevents a diminution in their ability to use water once such water use has been perfected to their lands.

Whenever any corporation, organized under the laws of this state, furnishes water to irrigate lands that the corporation has sold, the right to the flow and use of that water is and shall remain a perpetual easement to the land so sold, at any rates and terms that may be established by the corporation in pursuance of law. Whenever any person who is cultivating land on the line and within the flow of any ditch owned by the corporation, has been furnished water by it with which to irrigate his or her land, that person shall be entitled to the continued use of that water, upon the same terms as those who have purchased their land from the corporation.

(Corp. Code § 14452, formerly Civ. Code § 552) *See* AA:43:11601, Slide 25 -- Morgan/Holtz Phase 1A Rebuttal Presentation. Notably, all that the Appellants could offer in rebuttal to the law’s guarantee of the IID beneficiaries’ strong legal position was that it arose from “ancient” law.

You have been told the ancient water rights are the equivalent of an easement.

RT:11:3306, lines 9-12. That “ancient” law, of course, pre-dates IID’s existence and to which IID’s rights, assets, and powers have always been subject.

[F]or the right of plaintiff to water service is a property right appurtenant to his land, although subject to regulation, or, in other words, upon the utility corporation was impressed a public trust, to wit, the duty of furnishing water to plaintiff and others in like situation to whom a water right has been dedicated.

Henderson v. Oroville-Wyandotte ID (1929) 207 Cal 215, 220

(relying on *Price v. Riverside L & I Co* (1880) 56 Cal. 431, 440 *et seq.*

interpreting former Civil Code section 552). No Appellant has claimed as error the Court’s decision that the QSA is structured to enable farming to continue unaffected consistent with “ancient” or law that simply pre-dates October 2, 2003. IID’s opening brief concedes that the superior court’s decision was “relatively accurate”

in describing the water transfer details. Appellant IID Opening Brief, page 5, ¶1. The other Appellants concede that the water transfer could not have disturbed rights under preexisting laws.

It is established law that all applicable laws in existence when the agreement is made become part of the contract as though fully incorporated by reference. Contractual language must be interpreted in light of existing law, regardless of whether the agreement refers to it. ... including provisions that affect the validity, construction, obligations and enforcement of the contract.

SDCWA, MWD and CVWD Opening Brief, p. 49.

Nor can IID do indirectly what it is prohibited from doing directly – reducing the ability of the farmers whose water entitlements are appurtenant to their lands. Another form of protection, as one pre-trial decision (to which no claim of error has been asserted) explained, is that the QSA deal did not provide to IID carte blanc to ignore important structural restrictions on and duties to the IID’s beneficiaries, the landowners who developed the right to use water before IID was created.

The Morgan/Holtz Parties and Barioni Parties express concern that in implementing the thirteen contracts which IID seeks to validate in Case 1649, IID will incur costs that it may seek to impose on its landowners by way of future taxes, assessments, fees and charges.

It would be improper for this Court to speculate as to whether IID will or will not comply with Articles XIIC

and XIID, if applicable, in connection with taxes, assessments, fees or charges that it may impose at some point in the future.

Supp.AA:202:1908:050401-050402. That the landowners developed water prior to IID is uncontroverted. *Arizona v. California* (2008) 547 US 150, 175 (annual use of 2.6 million acre-feet water by Imperial Valley landowners was perfected in 1901). IID was formed on paper in 1911. AR2/1/050525_0817/105/02821. The farmers/landowners/beneficiaries therefore in the abstract had little to fear from the QSA and the water transfer, so long as the deal was in compliance with the law, commercially reasonable, and premised on an understandable and enforceable array of assurance for the Salton Sea by one or more solvent parties. Its present iteration lacks all of that in spades, and is invalid in various ways as a result.

B. Relief Must Include Environmental Assurances

The Morgan/Holtz Parties are strongly supportive of the Public Agencies' (the County and Air Pollution Control District) sensitivity to the Salton Sea and the notion that the true beneficiaries of the transfer must pay for its detrimental effects in the Imperial Valley. Among the Morgan/Holtz Parties are members of families that have been keenly aware of and involved in Salton Sea issues for several

generations. AR/4/01A/024/04205, SWRCB Decision 1600. *See also* AA:7:45:01635-01637 and 01640-01641, Court Ruling 69. The Morgan/Holtz Parties have spent substantial effort trying to find solutions within and outside of litigation. *See* Maloney Declaration, Morgan/Holtz AA:3:12:00618-00658. Mr. Leimgruber is no less a stranger to the issues confronting the Imperial Valley. RT:11:3159, lines 2-9 (Leimgruber).

Well before trial, the Morgan/Holtz Parties asserted that the Salton Sea was entitled to certain flows of water based on its history, i.e., Public Trust flows. The superior court avoided making a calculation of the amount required to flow to the Salton Sea when such was raised by the Morgan/Holtz Parties' Cross-Complaint. In its Ruling 81, the Court found that:

It is apparent from the pleading that the public trust issue arises in connection with the Salton Sea.

Even if the Court were willing to infer that the conduct complained of arises in connection with the QSA changes to water allocation and the impacts thereof on the Salton Sea, the Court considers at least some if not all of the missing parties (e.g., IID, MWD, et. al.) indispensable to the resolution of the inferred public trust doctrine violation.

AA:7:53:01739. It is time to make the Public Trust calculation and these Respondents ask that the Court's opinion not foreclose that

option so that once flows are established, a rational and enforceable plan for the Sea can be selected and accomplished. In a similar vein, the superior court did not – and perhaps was not required to – reach any findings about the reasonable and beneficial use of water by IID, the farmers, or the Coastal water entities such as MWD. Nor did the superior court try the question whether MWD and others historically encouraged IID water practices in order to build up an inflated California right to water from the Colorado River that they could then fall back on, but avoid the liability for the effect of the behavior they first supported and then attacked – the Salton Sea. MWD, after all, has multiple straws in the Salton Sea, which evidence suggests it desires the Sea to “die” so that it can obtain more water free or at a reduced rate. Supp.AA:122:1203: 010359-030303, MWD 1997 petition to appropriate “surplus” water from Alamo River that flows through IID service area and into Sea, revised after the QSA, i.e., 2004. Should retrial be warranted (not suggested) these issues may need to be resolved.

C. Scope of Invalidation Relief Must be Commensurate with Scope of Validation Relief

These Respondents ask that the court affirm the judgment. But the judgment – while justified on multiple grounds as identified in this

and other Respondents' briefs – is only part of the relief to which Respondents are entitled. The relief sought by the Appellants in their validation action was not limited to a narrow finding that a small array of contracts were facially valid. An equivalent to such a “judgment” can be obtained by the lapse of time if no one acts. *City of Ontario v. Superior Court* (1970) 2 Cal.3d 335, 341-342.

IID and its allies did not wait for time to lapse. IID affirmatively filed a validation action, forcing those who suspected something was amiss to immediately take action and commit themselves to a long, expensive, and lopsided process. Had these Respondents and others not committed their resources and accepted the risks of trial, IID and the other Appellants would have been able to obtain a judgment that would have been binding “as to all matters adjudicated or which at that time *could have been adjudicated.*” CCP § 870 (emphasis supplied). The Appellants could have, for example, adjudicated how much or little water the Sea was to receive in order to effect the transfer, that the Sea was beyond any hopes of restoration, that those who developed the water rights would lose their ability to use water without their procedural or substantive consent, that the water use by the farmers in the Imperial Valley was reasonable or not,

that IID's management of the water was reasonable or not¹², the manner in which IID can approve documents which its decision-makers were denied the opportunity to consider, that the environmental review conducted was appropriate, and that public agencies can engage in water transfers using public officials tempted by adverse interests, among other possible scenarios.

A judgment of validation would have been a bar against challenging not only a series of contracts, but any claims about how the contracts came to be, what they meant, their ramifications, any claim they harmed IID's beneficiaries or the public, and any offense on their face or in their making to public policy, laws, and the Constitution. That same breadth is appropriate now. The breadth of a successful validation judgment militates in favor of findings of invalidity of comparable breadth, preventing the Appellants from crafting a new QSA that changes only one narrow issue (e.g., the one sentence in section 9.2 of the JPA) and claims all other issues have not been barred. This Court has the duty to determine all of the reasons that the deal is invalid and by implication, the minimum requirements

¹² Landowners and other water users have a right to challenge their irrigation district's management of water on a reasonable and beneficial basis. *See Elmore v. IID* (1984) 159 Cal.App.3d 185; AR2/1/153/09298-09376, SWRCB June 1984 Decision 1600.

of a water transfer like the one Appellants insisted the superior court take jurisdiction. Nothing suggests that a finding of invalidity must or can be narrow, given a judgment of validity is purposely broad. CCP § 870.

That same breadth must be applied to the invalidity of all issues here adjudicated or that “could have been adjudicated” as defined by the pleadings, defenses, and denials. *See* ICAPCD Respondent/Opening Brief at II.2.G. The Appellants have not raised as error the superior court’s treatment of the scope of validation, nor the breadth of its final ruling. Accordingly, to meet a judgment of all that was and *could have been* adjudicated pursuant to section 870, this Court is obligated to render determinations on the following defenses and denials raised through trial:

- A firm, identifiable, and enforceable decision on the fate of the Salton Sea – mitigation and restoration -- by one or more solvent parties;
- That only persons who are 100% loyal to their respective employing public agency and have no other public or private interest with any stake in the subject matter can

participate in the “making” of any contract regarding any transfer;

- A thorough CEQA and other environmental review of the actual transfer and enforceable Sea promises, the details of which can be found in the briefs of the County, ICAPCD, and others;
- A reliable system of water measurement in the Imperial Valley so all transfers are real and not based on “paper” water;
- Protection of the water users by a guarantee that they will have sufficient water for crops whose needs vary from time to time, meaning that any shortfalls will be visited on a transferee rather than a beneficiary;
- If a transfer is impossible with a guarantee that shortfalls will fall on the transferee, then the participation of such transferring interests, aka, the landowners and their farmers entitled to water service, in the design and approval of the transfer; and

- A role consistent with the law and social policy for the true public agencies charged with protecting the common weal, the County and ICAPCD.

A valid transfer would require the participation of two types interests that were shut out of the process – the true public agencies and the water users. The County and ICAPCD have, in their respective briefs, well addressed the error of the Appellants’ refusal to honor their roles.

The Morgan/Holtz Parties as water users¹³ have suggested terms – whether as a rational settlement or otherwise – that are premised on a thorough understanding of the real (as opposed to paper) water needs, deliveries, and uses. M/H.RA:3:12:00618-00658 (Maloney Declaration-Attorneys Fees); Supp.AA:41:491:010164-010165 (Nine-Point Plan); Supp.AA:83:1000:020606-020609 (settlement proposal); M/H.RA:4:22:00781-00782; Supp.AA:83:1000:020606-020609. And that will require the involvement of those who use nearly all of the water and have the knowledge. As Mr. Leimgruber said at trial, RT:9:2448, lines 12-17 (Leimgruber).

¹³ There are other water user Respondents, such as the Barioni parties, represented by other counsel.

To the extent that an Appellant claims that true involvement of the landowners and farmers is unworkable, these Respondents simply offer the well-known and well-rehearsed procedures by which public agencies routinely engage in new projects with the substantial support of those impacted by them – Articles XVIII C and D of the California Constitution (aka Proposition 218). *Silicon Valley Taxpayers' Assoc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431 (ratepayers entitled to exercise franchise on levy for proposal to obtain open space). If the Appellants are truly desirous of a voluntary transfer, the means to effect one have existed for well over a decade.

A valid transaction is within the realm of the possible, albeit its likely terms will necessitate that the recipients of water will be required to pay much closer to true market rates for the water, instead of the substantial discount in both dollars changing hands and avoidance of liability for the Sea and transfer effects. MWD, at least, has no objection to payment for the *true cost* of water transfers.

In any event, the parties in the Q.S.A. I think were all operating under the notion that the beneficiary pays.

TR:10:2909, line 8-10, (Masouredis for MWD).

An invalidation judgment of the breadth contemplated by section 870 will serve as the model for future transfers of water from

the Imperial Valley. If anything can be salvaged from the seven years of effort and untold expense and effort by the courts and those resisting the unjust result sought by the Appellants, it will be a road map of how a valid, legal, voluntary, and *just* water transfer can be accomplished. All interested parties – Appellants, Respondents, the region, the people of the State –deserve nothing less.

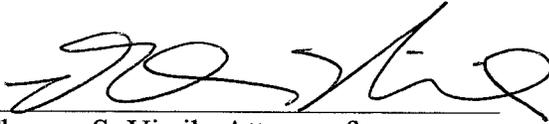
The Morgan/Holtz Parties additionally ask the Court to allow an award of attorneys' fees to Respondents pursuant to section 1021.5 of the Code of Civil Procedure, in an amount to be determined by the superior court.

Respectfully submitted,

LAW OFFICES OF PATRICK J. MALONEY

November 19, 2010

BY:



Thomas S. Virsik, Attorney for
Respondents Morgan/Holtz Parties
Jointly with Pro Per Respondents
Larry Porter and Ronald Leimgruber
Pursuant to October 8, 2010 Order

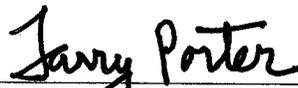
November 19, 2010

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Leimgruber Pursuant to October 8, 2010
Order

Respectfully submitted,

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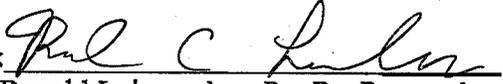
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November 19, 2010

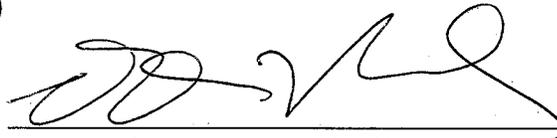
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Order

BRIEF FORMAT CERTIFICATE

Pursuant to Rule 81204(c) of the California Rules of Court, the text of the Respondents Morgan/Holtz Parties, Ronald Leimgruber and Larry Porter's Brief, excluding Tables of Content, Table of Authorities, Glossary of Terms and Citation Format and Certificates of Interested Parties, contains 27,497 words, including footnotes as counted by the Microsoft Word Program.

Dated: November 19, 2010

A handwritten signature in black ink, appearing to read 'T. Virsik', written over a horizontal line.

Thomas S. Virsik

PROOF OF SERVICE

I am employed in the County of Alameda, State of California. I am over the age of 18 and not a party to the within action. My business address is 2425 Webb Avenue, Suite 100, Alameda, California 94501.

On November 22, 2010, I served on interested parties in said action the following document:

RESPONDENTS MORGAN/HOLTZ PARTIES, RONALD LEIMGRUBER AND LARRY PORTER'S BRIEF

CD CONTAINING A COPY OF RESPONDENTS MORGAN/HOLTZ PARTIES' SUPPLEMENTAL APPENDIX

by placing a true copy thereof, enclosed in a sealed envelope, addressed as reflected on the attached Service List, by first class mail (United States Postal Service) with postage thereon fully prepaid.

I am readily familiar with the business practice of this office for collection and processing of correspondence with the United States Postal Service and such correspondence is deposited in the mail or an approved collection facility that same day in the ordinary course of business and by transmission of the above document via electronic mail (e-mail) to all QSA parties whose email address is known as a matter of courtesy.

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

Executed November 22, 2010, at Alameda, CA.

Mary Hernandez

Mary Hernandez

**IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT**

MAILING LIST

Re: QSA Coordinated Civil Cases
C064293
Sacramento County No. JCCP4353

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submitted electronically on this date
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