

C064293

**CALIFORNIA COURT OF APPEAL
FOR THE THIRD APPELLATE DISTRICT**

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

QSA COORDINATED CIVIL CASES

Appeal From Judgment Entered February 11, 2010
Sacramento Superior Court Case No. JCCP 4353
Coordination Trial Judge The Honorable Roland L. Candee, Department 41

**IMPERIAL COUNTY AIR POLLUTION CONTROL DISTRICT'S
RESPONDENT'S AND CROSS-APPELLANT'S OPENING BRIEF**

COUNTY OF IMPERIAL, COUNTY COUNSEL
Michael L. Rood, County Counsel (SBN 96628)
Katherine Turner, Deputy County Counsel (SBN 251536)
940 Main Street, Suite 205, El Centro, California 92243
Telephone: (760) 482-4400; Facsimile: (760) 353-9347

JACKSON DeMARCO TIDUS PECKENPAUGH
Michael L. Tidus (SBN 126425)
Alene M. Taber (SBN 218554)
Kathryn M. Casey (SBN 227844)
2030 Main Street, Suite 1200 Irvine, California 92614
Telephone: (949) 752-8585; Facsimile: (949) 752-0597

Attorneys for Respondents and Cross-Appellants
IMPERIAL COUNTY AIR POLLUTION CONTROL DISTRICT

<p>COURT OF APPEAL, THIRD APPELLATE DISTRICT, DIVISION</p>	<p>Court of Appeal Case Number: C064293</p>
<p>ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Michael L. Tidus, Bar No. 126425 Alene M. Taber, Bar No. 218554 JACKSON DeMARCO TIDUS PECKENPAUGH 2030 Main Street, Suite 1200 Irvine, CA 92614 TELEPHONE NO.: 949-752-8585 FAX NO. (Optional): 949-752-0597 E-MAIL ADDRESS (Optional): ataber@jdtplaw.com ATTORNEY FOR (Name): Imperial County Air Pollution Control District</p>	<p>Superior Court Case Number: Sacramento JCCP No. 4353</p>
<p>APPELLANT/PETITIONER: IMPERIAL IRRIGATION DISTRICT; SAN DIEGO COUNTY WATER AUTHORITY, et al. RESPONDENT/REAL PARTY IN INTEREST: ALL OTHER PARTIES TO QSA COORDINATION PROCEEDING NO. 4353</p>	<p>FOR COURT USE ONLY</p>
<p>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE</p>	
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1. This form is being submitted on behalf of the following party (name): Imperial County Air Pollution Control District

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 23, 2010

Alene M. Taber
 (TYPE OR PRINT NAME)

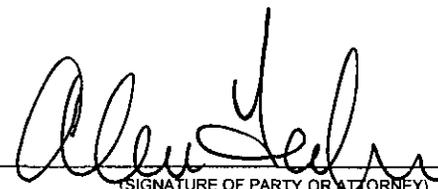
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GLOSSARY OF DEFINED TERMS

AB. Assembly Bill.

Air District. Imperial County Air Pollution Control District.

af. Acre-feet.

afy. Acre-feet per year.

APA. Federal Administrative Procedures Act.

APCT. Air Pollution Control Trading.

AR. Administrative Record.

ARB. Air Resources Board.

BO. FWS biological opinion.

BOR. United States Bureau of Reclamation.

Case 82. *County of Imperial v. State Water Resources Control Board*, Case No. 03CS00082.

Case 83. *South Coast Air Quality Management District et al. v. State Water Resources Control Board*, Case No. 03CS00083.

Case 1643. *Morgan et al. vs. Imperial Irrigation District et al.*, Case ECU01643

Case 1649. *Imperial Irrigation District v. All Persons*, Case No. 04CS00875/ECU01649.

Case 1653. *POWER v. Imperial Irrigation District et al.*, Case No. 04CS00877/ECU01653.

Case 1656. *County of Imperial v. Metropolitan Water District of Southern California et al.*, Case No. 04CS00878/ECU01656.

Case 1658. *Morgan, et al. v. Imperial Irrigation District, et al.*, Case No. 04CS00879/ECU01658

CAA. Federal Clean Air Act

CEQ. Council of Environmental Quality.

CEQA. California Environmental Quality Act.

County. County of Imperial.

County Agencies. Air District and County

County Board. County of Imperial Board of Supervisors

CVWD. Coachella Valley Water District.

CRWDA. Colorado River Water Delivery Agreement.

DFG. California Department of Fish and Game.

DOI. United States Department of Interior.

DWR. California Department of Water Resources.

ECSA. Environmental Cost Sharing, Funding, and Habitat Conservation Plan Development Agreement

EIR. Environmental Impact Report.

EIS. Environmental Impact Statement.

EMCs. Emission Reduction Credits.

EMRs. Environmental Mitigation Requirements.

EPA. Environmental Protection Agency.

GLOSSARY OF DEFINED TERMS

Escondido. City of Escondido.

Federal QSA. *See* CRWDA.

FONSI. Finding of No Significant Impact

FWS. United States Fish and Wildlife Service.

GBUAPCD. Great Basin Unified Air Pollution Control District.

HCP IT. Habitat Conservation Plan Implementation Team.

IID. Imperial Irrigation District.

IOP. Inadvertent Overrun and Payback Policy.

mg/L. milligrams per liter.

MMRP. Mitigation Monitoring and Reporting Program.

MSJ. Motion for summary judgment.

msl. mean sea level.

MWD. Metropolitan Water District of Southern California.

NAAQS. National Ambient Air Quality Standards.

NOP. Notice of Preparation.

PM10. PM10 refers to particles with a diameter of 10 micrometers or less.

ppt. parts per thousand.

QSA. Quantification Settlement Agreement and related agreements (35 total agreements).

QSA-Contracts. QSA related agreements at issue in Case 1649 (13 total agreements).

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

ROD. Record of decision.

SCAQMD. South Coast Air Quality Management District.

SDCWA. San Diego County Water Authority.

Secretary. Secretary of DOI.

SIP. State Implementation Plan.

State-QSA. Quantification Settlement Agreement by and among IID, MWD, and CVWD.

SSHCS. Salton Sea Habitat Conservation Strategy.

SWRCB. State Water Resources Control Board.

t/y. tons a year.

µg/m³. micrograms per cubic meter.

Validation Action. *See* Case 1649.

VID. Vista Irrigation District.

Water Agencies. IID, SDCWA, MWD, and CVWD.

Water Order. Final SWRCB Order WRO 2002-0013, as modified by Order WRO 2002-0016.

I. INTRODUCTION.

1. CASE OVERVIEW AND AIR DISTRICT'S POSITION.

The Air District is a governmental agency statutorily responsible for protecting public health by adopting and implementing rules to reduce airborne contaminants so that Imperial County will achieve health-based federal and state ambient air quality standards. Attainment of these standards, public health, and viability of ecological systems are jeopardized by the current QSA¹ scheme that violates environmental protection laws.²

Worse yet, the State Attorney General's office admitted the State will not honor its promise and unconditionally agree to pay for mitigating impacts of the QSA when there "isn't any 'money' in the checkbook." This admission contradicts critical terms of the QSA-JPA and reveals that the State of California's agreement to unconditionally pay for mitigation is simply an *empty promise*. While this position may appear on the surface to be reasonable, it is not what the State promised or Water Agencies³ bargained for and relied upon in executing the QSA. Indeed, the State's unconditional commitment is the sole source of funding for CEQA mitigation when the costs exceed \$133 million (in 2003 dollars).

The State's failure to guarantee air quality mitigation as agreed would, and should, have been determined to violate CEQA, resulting in the voiding of the EIRs and approvals. Yet, despite seven years of litigation, the merits of this and other environmental claims remain un-adjudicated and the defective EIRs have been allowed to remain valid environmental documents.

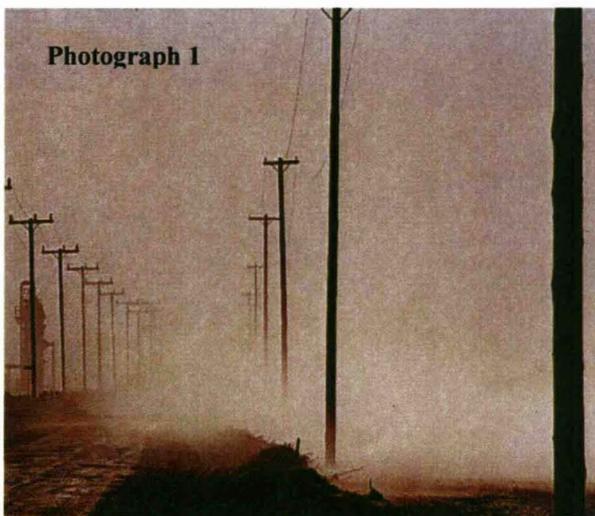
¹ "QSA" is all 35-contracts; "QSA-Contracts" are the 13-contracts sought to be validated. All abbreviated terms are defined in the glossary of terms.

² CEQA, NEPA, and the CAA.

³ Collectively, IID, SDCWA, CVWD, and MWD.

This outcome is unjust and contrary to CEQA mandates. Ordinarily, CEQA challenges take precedent in litigation, for good reason: How can a government agency make a sound decision if the facts it relies upon are wrong? CEQA documents are therefore generally ruled upon first, or tested during that litigation. Thus, the EIRs must be invalidated along with the QSA-Contracts, or alternatively, this Court should decide the merits. Why? Because if not, these defective EIRs will possibly be deemed certified and any statute to challenge them will have passed, thereby allowing the Water Agencies to use these deficient CEQA documents in the future.

A remand and continued procedural gridlock while the water transfers continue will turn an impending disaster at the Salton Sea to the



brink of a public health and ecological emergency of catastrophic proportions. This has occurred before, when Los Angeles depleted Owens Lake. Here, a depleted Salton Sea will expose significant playa and seabed sediment contaminated with toxic

compounds creating toxic-laden dust storms (as shown in Photograph 1) harming public health, agricultural crops, and ecological systems including fish, birds and natural habitat. (AA:40:242:10875.⁴)

⁴ Citations to the various appendices in this appeal are as follows:

- Appellants' Appendix: AA:vol.:tab:page(s).
- County Agencies' Respondents Appendix: RA:vol.:tab:page(s).
- Morgan/Holtz Respondent's Appendix :M/H.RA:vol.:tab:page(s).
- Appellants' Supplemental Appendix: Supp.AA:vol.:tab:page(s).
- County Agencies' concurrently filed Supplemental Respondents Appendix: Supp.RA:vol.:tab:page(s).

Diagram 1

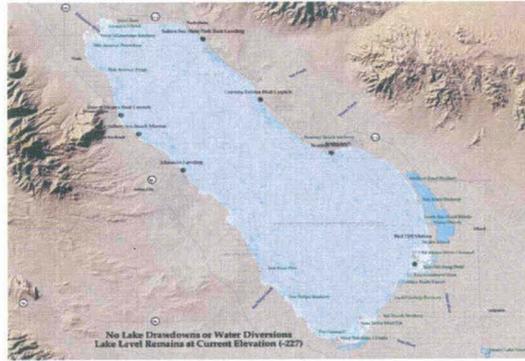


Diagram 2



Diagram 3

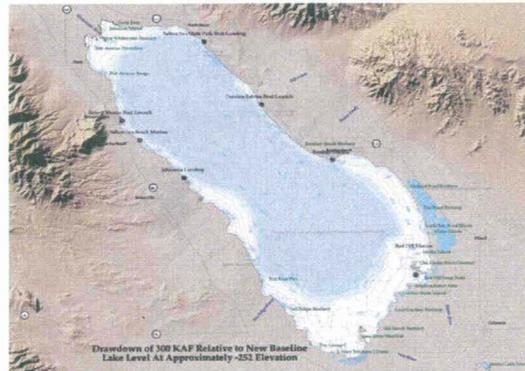
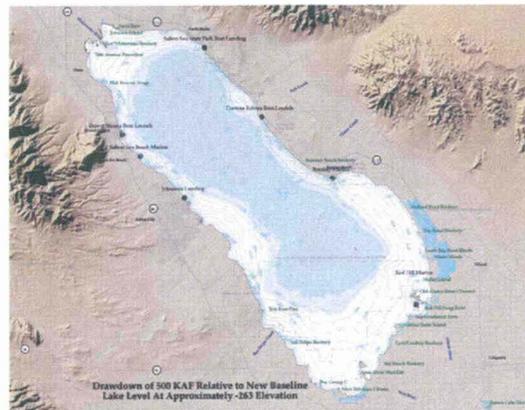


Diagram 4



As Diagrams 1-4 above show, the QSA will reduce California's largest lake to dust. Diagram 1 (Vol-4:Tab-68:AR2:CD6:29090⁵) shows the Salton Sea elevation at the time the QSA was executed. Diagram 2 (Vol-4:Tab-68:AR2:CD6:29091) shows the assumed elevation using the hypothetical baseline. Diagram 3 (Vol-4:Tab-68:AR2:CD6:29106) shows the effect of transferring 300,000 afy of water. Diagram 4 (AR2:CD6:29107) shows the effect of transferring 500,000 afy of water. No one should suffer by the acts of another. (Cal. Civ. Code, § 3520.) These issues are of great public importance and cannot be left unaddressed by the courts or time alone will write history instead of justice.

2. COUNTY AGENCIES' CROSS-APPEAL.

A. Statement of the Cross-Appeal.

The trial court entered judgment in the QSA Coordinated Proceeding on February 11, 2010. The judgment includes four of the QSA coordinated cases: (1) the Validation Action, Case 1649: (*IID v. All Persons*, 04CS00875/ECU01649; (2) Case 1653 (*POWER v. IID et al.*, 04CS00877/ECU01653; (3) Case 1646 (*County of Imperial v. MWD et al.*, 04CS00878/ECU01656); and, (4) Case 1658 (*Morgan, et al. v. IID, et al.*, 04CS00879/ECU01658). The Air District is a defendant in Case 1649. The trial court denied the Air District's motions to intervene in Cases 1653 and 1656.

In Case 1649, the trial court properly voided and invalidated 12 of the 13 QSA-Contracts at issue because it found the State's commitment in the QSA-JPA to assume multiple-year open-ended liability for Salton Sea protection without Legislative appropriation unconstitutional. The trial court incorrectly dismissed the CEQA cases, Cases 1653, 1656, and 1658, and the environmental affirmative defenses in Case 1649 as moot, leaving the CEQA documents intact.

⁵ Citations to the ARs are: Vol-No.:Tab-No.:AR#:CD[file]:Page(s). The Vol. and Tab numbers refer to the County Agencies' excerpts of ARs.

IID, SDCWA, CVWD, MWD, Escondido, and VID appealed the final judgment on February 19, 2010. The State of California, by and through the DWR and DFG, appealed the judgment on February 23, 2010.

POWER filed a cross-appeal of the trial court's dismissal of Case 1653. The County Agencies also timely filed a cross-appeal on March 9, 2010, because the judgment provides incomplete relief. The trial court erred in failing to void the QSA-Contracts' underlying environmental documentation and approvals. Unless the defective CEQA documents and approvals are also voided, an unjust and prejudicial circumstance will be created by the courts because the Water Agencies may rely on these defective documents in the future even though they were timely challenged in this proceeding.

B. Appealability of the Trial Court's Judgment.

An appeal may be taken of a validation judgment within 30-days after notice of entry of judgment. (Code Civ. Proc., § 870(b); *Planning and Conservation League v. Dept. of Water Resources (PCL)* (1998) 17 Cal.4th 264, 267.) A cross-appeal may be filed within 20-days after notice of the first appeal. (Cal. Rule Court, Rule 8.108, subd. (f)(1).) Judgment was entered on February 11, 2010 (AA:48:312:13071-13077), and was first appealed on February 19, 2010 (AA:48:313:13078-13092). The County Agencies' March 9, 2010, cross-appeal was timely.

C. Questions Presented in the Cross-Appeal.

The County Agencies' cross-appeal raises the following questions:

- (1) Did the trial court err in not deciding CEQA Cases 1653 and 1656?
- (2) Did the trial court err in denying the Air District's motions to intervene in Cases 1653 and 1656?
- (3) Did the trial court err in not issuing writs on the merits in CEQA Cases 1653 and 1656?
- (4) Did the trial court err in dismissing Cases 1653 and 1656 as moot?

- (5) Did the trial court err in denying relief under Water Code section 1810 et seq. as expressed in the County's first cause of action in Cases 1656, and in the County Agencies' defenses in Case 1649?
- (6) Did the trial court err in not reaching the merits of CEQA, NEPA,⁶ and the CAA claims and defenses in Case 1649?
- (7) Did the trial court err in its statement of decision, if it is so interpreted, that one or more of the QSA-related contracts not before the trial court are validated-by-operation-of-law?

The answer to all of these questions is "yes." Therefore, the judgment as to these issues should be reversed, and this Court should issue a writ invalidating the CEQA documents and approvals. (See AA:48:303:12878-12880.) The Air District addresses the second, fourth, sixth, and seventh questions. The Air District joins the County's brief that also addresses these questions. (Cal. Rule Court, Rule 8.2000(a)(5).)

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY OF QSA COORDINATED PROCEEDING.

1. ADMINISTRATIVE REVIEW PROCESS AND APPROVALS.⁷

A. IID and SDCWA Joint Petition to SWRCB.

Prior SWRCB decisions (1984 Decision, D-1600; Order 84-12; and, Order 88-20) directed IID to conserve water and to avoid flooding property around the Salton Sea. (Vol-1:Tab-3:AR3:CD15:501403-501430; Vol-1:Tab-19:AR3:CD15:500028-500031.) In response, IID agreed in December 1988 to conserve and transfer 100,000 afy to MWD, and in April 1998, IID and SDCWA entered into an agreement for IID to conserve and

⁶ The Air District disagrees with Appellants' position that the trial court lacks jurisdiction to adjudicate NEPA defenses in validation. Because it believes the CEQA claims/defenses are determinative of the inadequacy of the EIR/EIS it is not necessary for the Court to adjudicate NEPA merits.

⁷ A timeline is attached for the Court's reference.

transfer up to 300,000 afy of Colorado River water to SDCWA. (Vol-1:Tab-14:AR3:CD1:11151-11152, 11183; Vol-1:Tab-4:AR3:CD1:11433; Vol-1:Tab-5:AR2:CD1:00501.) Following of farmland for the transfer was prohibited under the IID-SDCWA agreement. (Vol-1:Tab-14:AR3:CD1:11195.)

In July 1998, IID and SDCWA submitted a joint petition to SWRCB requesting approval of the IID-SDCWA agreement.⁸ (Vol-1:Tab-19:AR3:CD15:500001.) CVWD and MWD protested, arguing that under the federal Law of the River and priority system Colorado River water should flow to them as junior appropriators and not to SDCWA, and that the CEQA analysis was deficient. (Vol-2:Tab-31:AR3:CD18:52166-52167; Vol-2:Tab-29:AR3:CD15:500902, 500907; Vol-2:Tab-32:AR3:CD5:52128-52149, 52152-52153; 52171-52176; Vol-1:Tab-13:AR3:CD10:101325-101329; Vol-2:Tab-30:AR3:CD15:500909.)

To settle the disputes with CVWD and MWD, IID and SDCWA entered into a Protest Dismissal Agreement and reduced the transfer to SDCWA to 200,000 afy, and re-directed 100,000 afy to CVWD and/or MWD. (Vol-2:Tab-50:AR3:CD15:504508-504515.) In order to obtain federal approval of the transfer, the Colorado River water allocations had to be quantified. (Vol-1:Tab-24:AR2:CD3:07338.) Thus, IID, SDCWA, MWD, and CVWD formulated a “QSA package” consisting of agreements with 11 other parties to quantify allocations and resolve outstanding issues about the delivery of Colorado River water to southern California. (Vol-2:Tab-45:AR4-03-247-15479/15481; Vol-2:Tab-33:AR2:CD5:20611.)

⁸ The joint petition was amended on October 8, 1998 (Vol-1:Tab-20:AR3:CD15:500890-500893), and on December 10, 2001. (Vol-2:Tab-49:AR3:CD15:500895-500899.) *See also County of Imperial v. Superior Court* (2007) 152 Cal.App.4th 13.

B. Environmental Review Process.

Three environmental documents were prepared for the transfer project and QSA. In January 2002, co-lead agencies IID and BOR released a draft EIR/EIS for the transfer project that CVWD denounced as having “major inadequacies.” (Vol-3:Tab-51:AR3:CD10:101804_0003, 101804_0005; RJN:11(C):199-202.)⁹ SWRCB was a responsible agency under CEQA and relied on this EIR/EIS in approving the IID-SDCWA petition. (Vol-6:Tab-113:AR3: CD18:526977.)

SWRCB conducted hearings between April 22 and July 16, 2002, including testimony about the insufficiency of the EIR/EIS (Vol-5:Tab-88:AR3:CD18:523809-523986; Vol-4:Tab-70:AR3:CD18:522493-522495) and the destruction the transfers would cause to the Salton Sea. (Vol-5:Tab-76:AR2:CD3:08721-08723; Vol-5:Tab-81:AR3:CD11:200098-200101; Vol-5:Tab-82:AR3:CD11:200088-90; Vol-5:Tab-77:AR2:CD6:27944.) IID published the final EIR/EIS on June 20, 2002. (Vol-4:Tab-73:AR3: CD12:204885, 204900.)

On January 30, 2002, MWD, IID, CVWD, and SDCWA, as “co-lead agencies” under CEQA, jointly published a draft PEIR for the QSA that was intended to analyze the QSA’s aggregate impacts. (Vol-3:Tab-52:AR4:CD4:4-04-334-20047/20048, 20149/20153.) The final PEIR was published on June 13, 2002. (Vol-5:Tab-74:AR4-06-435-27215/27217; Vol-8:Tab-160:AR3:CD14:400129.)

On June 28, 2002, IID certified the PEIR and EIR/EIS, *without* approving the QSA or transfer project. (Vol-5:Tab-86:AR3:CD3:32097-32098; Vol-5:Tab-87:AR3:CD3:32099-32100.) The PEIR was certified by SDCWA on June 27, 2002 (Vol-5:Tab-83:AR4-05-381-25304/25305) and CVWD on June 25, 2002 (Vol-5:Tab-80:AR4-05-380-25302/25303), and

⁹ Citations to the County Agencies’ motion requesting judicial notice are: RJN:Exh.:page(s).

considered by MWD on June 24, 2002 (Vol-5:Tab-79:AR4-05-379-25300/25301).¹⁰ The PEIR and EIR/EIS did not include CEQA Findings, Statements of Overriding Considerations, or MMRPs. Because the EIR/EIS did not conform with NEPA CEQ regulations, IID and BOR prepared a new and expanded EIR/EIS that was issued three months later in October 2002. (Vol-5:Tab-92:AR3:CD13:301181-301183; AR3:CD11:200190-200194; RJN:11(A):188; RJN:11(F):211; RJN:11(M):228-230.)

In October 2002, BOR approved a final EIS for the IA,¹¹ IOP and related Federal Actions. (Vol-9:Tab-178:AR3:CD1:10042-10043.) The IA EIS was intended to describe the environmental effects of the Secretary's decision to make Colorado River water deliveries in accordance with the State-QSA. (Vol-5:Tab-75:AR3:CD11:203057.)

C. Impacts to the Salton Sea.

Addressing Salton Sea impacts was a key issue. (AA:47:292:12738; Vol-5:Tab-90:AR2:CD3:08899-08911.) Options for mitigating these impacts were not discussed in earnest until *after* the EIR/EIS and PEIR were certified in June 2002. (Vol-5:Tab-90:AR2:CD3:08899-08911.) Because the water transfers and QSA would "take" fully protected species in violation of State law, in September 2002, the State Legislature passed SB 482, adding Fish and Game Code section 2081.7 authorizing the take of fully protected species if the QSA was executed by December 31, 2002. (Vol-5:Tab-91:AR3:CD13:300007-300016; Vol-6:Tab-113:AR3:CD18:526941-526942; Vol-7:Tab-126:AR3:CD5:50518-50519.) SB 482 did not address air quality impacts. (Vol-7:Tab-126:AR3:CD5:50519.)

The legislation was followed by two months of negotiations between state and federal officials and the Water Agencies led by former Assembly

¹⁰ The June-2002 documents were the only publicly-reviewed versions.

¹¹ The IA later became the CRWDA, or federal-QSA. (Vol-9:Tab-178:AR3:CD:1:10045.)

Speaker Robert Hertzberg. In October 2002, the parties announced they reached a new QSA that allowed fallowing to create conserved water for the transfer, and for mitigation water be sent to the Salton Sea. (Vol-7:Tab-123:AR3:CD4:40313.) IID and SDCWA also capped the amount of money for environmental mitigation. (Vol-7:Tab-123:AR3:CD4:40314.) The changes from the Hertzberg negotiations required preparation of the first addenda in December 2002.¹² (Vol-6:Tab-107:AR2:CD3:09024.)

D. SWRCB Water Order.

After the announcement that a new QSA had been reached, on October 28, 2002, SWRCB issued Order-WRO-2002-0013, conditionally approving the IID-SDCWA petition. (Vol-6:Tab-95:AR3:CD18:526401.) The SWRCB was the first agency to approve the transfer project relying on the outdated June 2002 EIR/EIS (the transfer project and QSA were not yet approved), and not the October-2002 EIR/EIS. (RJN:11(F):212.)

Order-WRO-2002-0013 allowed IID to transfer up to 200,000 afy of Colorado River water to SDCWA and up to 100,000 afy to CVWD and/or MWD, provided the QSA was executed and IID approved the transfer. (Vol-6:Tab-95:AR3:CD18:526401, 526487.) The term of the transfer was 45-years with an optional 30-year renewal period, for a total of 75-years. (*Id.*) The County Agencies filed petitions for reconsideration of WRO-2002-0013 because mitigation in the EIR/EIS was insufficient. (Vol-6:Tab-97:AR3:CD18:526539-526543; Vol-6:Tab-96:AR3:CD18:526590-526916; Vol-6:Tab-98:AR3:CD18:526801-526817.)

On December 9, 2002, before SWRCB considered the petitions, IID *rejected* the transfer project, QSA, PEIR, and EIR/EIS. (Vol-6:Tab-101:AR3:CD3:31314-31315; Vol-6:Tab-102:AR3:CD3:31290-31292.) Parties to the SWRCB proceeding, including the County, requested the

¹² The Addenda of Hertzberg-negotiated changes were never submitted to SWRCB.

proceedings be suspended until IID approved a project. (Vol-6:Tab-109:AR2:CD3:09026; Vol-6:Tab-108:AR2:CD3:09027-09032; Vol-6:Tab-105:AR2:CD3:09009-09011; Vol-6:Tab-106:AR2:CD3:09022-09023.) Instead, on December 20, 2002, SWRCB issued Order-WRO-2002-0016, denying the requests for reconsideration and suspension of the proceedings, and issued Final Order-WRO-2002-0013, relying upon IID's rejected EIR/EIS. (Vol-6:Tab-112:AR3:CD18:526912; Vol-6:Tab-113:AR3:CD18:526917, 526922, 527005-527006.)

E. CEQA Addenda and Project Consideration.

On December 10, 2002, *one day after IID rejected the PEIR*, MWD considered, and CVWD certified, the first addendum to the PEIR and approved the Hertzberg-negotiated version of the QSA. (Vol-6:Tab-103:AR4-06-441-29042/29044; Vol-6:Tab-104:AR4-06-440-28976/29041.) On December 19, 2002, SDCWA also certified the first addendum to the PEIR and approved the QSA, however, it had issues with MWD over wheeling water through the Colorado River Aqueduct. (Vol-6:Tab-111:AR4-06-452-29436/29438; Vol-7:Tab-126:AR3:CD5:50518.)

After IID rejected the EIRs and QSA, IID made changes to the QSA regarding mitigation costs and economic impacts of fallowing that were unacceptable to the other QSA parties, DOI, and BOR. (Vol-7:Tab-120:AR3:CD3:30877; Vol-7:Tab-126:AR3:CD5:50518; Vol-7:Tab-115:AR3:CD7:70846; Vol-7:Tab-123:AR3:CD4:40314-40316; Vol-7:Tab-124:AR3:CD4:40296-40301, 40304-40306; Vol-6:Tab-100:AR3:CD7:70926-70927.) On December 27, 2002, DOI threatened to reduce IID's water if it did not sign an acceptable QSA. (Vol-7:Tab-114:AR3:CD31:123915-123922.)

Nevertheless, on December 31, 2002, only eleven days *after* SWRCB relied on the June-2002 EIR/EIS in approving the Water Order, IID approved the "unacceptable" version of the QSA, certified addenda to the EIR/EIS and PEIR, and for the first time adopted CEQA Findings and

Statements of Overriding Considerations, and MMRPs. (Vol-7:Tab-118:AR3:CD13:300415-300417; Vol-7:Tab-119:AR3:CD3:32108-32110.) Neither the EIR/EIS nor PEIR addenda were circulated for public review or made available before IID's Board voted. (*Id.*; Vol-7:Tab-117:AR3:CD7:70841-70843; Vol-7:Tab-116:AR2:CD7:30875-30876.) SWRCB never considered or adopted the addenda when it approved the Water Order. (Vol-6:Tab-113:AR3:CD18:526977.)

With the Water Agencies approving different versions of the QSA, SB 482's December 31, 2002, deadline to execute the QSA passed without any agreement. (Vol-7:Tab-126:AR3:CD5:50518.) DOI then reduced IID's 2003 water under 43 C.F.R. Part 417. (Vol-7:Tab-114:AR3:CD31:123915-123922; Vol-7:Tab-121:AR3:CD30:114240; Vol-7:Tab-126:AR3:CD5:50521.) IID sued. (Vol-7:Tab-126:AR3:CD30:114226; Vol-7:Tab-122:AR3:CD3:30795-30797.) The federal court enjoined DOI and BOR from reducing IID's water. (Vol-7:Tab-127:AR3:CD30:110727.) The federal government responded in April 2003 by instead reducing MWD's and CVWD's water allocation. (Vol-7:Tab-130:AR3:CD7:70555-70558.)

F. **Approval of Transfer Project, Certification of the Second Addenda and Execution of QSA.**

After SB 482's December 31, 2002, deadline passed without a signed QSA, Richard Katz, Senior Advisor to the Governor and SWRCB member, and Senator Machado, led new negotiations to create a modified QSA to address Salton Sea impacts. (Vol-7:Tab-132:AR4-08-1000-34903/34904; Vol-7:Tab-126:AR3:CD5:50518.) A solution was needed to address the fact that environmental mitigation costs exceeded the amount the Water Agencies were willing to pay. (Vol-7:Tab-126:AR3:CD5:50519.) The County Agencies were excluded from the negotiations at the request of

some of the Water Agencies. (Vol-8:Tab-150:AR3:CD7:70101; RT-1/28/05:2:410,¹³ 442; RT-2/5/08:3:802.)

Finally, in September 2003, a new QSA deal was struck, allowing MWD to purchase Salton Sea mitigation water from DWR; MWD would not assume any responsibility for mitigation of the water transfer, and the State agreed to pay for environmental mitigation costs. (Vol-9:Tab-176:AR3:CD1:10080-10091; Vol-8:Tab-172:AR3:CD1:10467; Vol-7:Tab-138:AR3:CD7:70164-70165.) Within one week, SB 277 – Ducheny, SB 317 – Keuhl, and SB 654 – Machado, were amended to facilitate the QSA, provided it was executed by October 12, 2003. (Vol-8:Tab-152:AR3:CD2:20220-20224; Vol-8:Tab-153:AR3:CD2:20209-20218; Vol-8:Tab-154:AR3:CD2:20226-20234.) Again, *the changes to the QSA were never presented to SWRCB.*

Also in September 2003, IID prepared second Addenda for the EIR/EIS and PEIR, replacing the 2002 Addenda. (Vol-7:Tab-136:AR3:CD14:400126-400128; Vol-7:Tab-137:AR3:CD14:400129-400131.) The Addenda included CEQA Findings and MMRPs, replacing those approved in December 2002. (*Id.*) The County and public requested the opportunity to review the new agreements and CEQA documents, but they were not provided. (Vol-8:Tab-150:AR3:CD7:70101-70102; Vol-8:Tab-151:AR3:CD7:70067-70069; Vol-8:Tab-157:AR3:CD7:70073-70075; Vol-7:Tab-141:AR3:CD14:400258-400267.)

On October 2, 2003, IID approved the QSA, water transfers, and re-approved and re-certified the EIR/EIS and PEIR, as modified and supplemented by the second addenda. (Vol-8:Tab-159:AR3:CD14:400127-400128, 400128_06/_07, 400128_11, 400128_99, 400128_102; Vol-8:Tab-160:AR3:CD14:400129-400130.) Some of the final QSA agreements were

¹³ Citations to the reporter's transcript are: RT-date:volume:page(s).

only in outline or draft form, including the QSA-JPA and the ECSA. (Tab-8:Tab-163:AR4-08-1055-35347/35350; Vol-8:Tab-162:AR3:CD2:20042.) In fact, terms of the QSA-JPA were still being negotiated *after* IID approved it, including the State's unconditional agreement to pay for mitigation funding shortfalls exceeding \$133 million. (AA:38:236:10359; AA:47:292:12744; Vol-8:Tab-172:AR3:CD1:10467.) The second PEIR addendum was also certified by CVWD on September 24, 2003 (Vol-8:Tab-146:AR4-07-515-30541/30444, 4-07-516-30614/30619); SDCWA on September 25, 2003 (Vol-8:Tab-148:AR4-07-523-30850/30852); and, considered by MWD on September 23, 2003¹⁴ (Vol-7:Tab-143:AR4-07-513-30473/30475).

On October 10, 2003, IID, MWD, and CVWD executed the State-QSA with new terms (Vol-8:Tab-168:AR3:CD1:10287-10326); BOR, IID, CVWD, MWD, and SDCWA executed the CRWDA (Vol-8:Tab-164:AR3:CD1:10273-10286); and, the Secretary approved the ROD. (Vol-9:Tab-178:AR3:CD1:10042.)

2. QSA COORDINATED PROCEEDING.

A. Air District's Case 83 Against SWRCB.

On January 21, 2003, the Air District and SCAQMD filed a writ petition challenging SWRCB's approval of the Water Order in Case 83. (Supp.RA:1:1:1-7.) SWRCB was the first agency to use the EIR/EIS for project approval. Also on January 21, 2003, the County filed a companion CEQA petition against SWRCB in Case 82. (Supp.AA:1:2:2-7.)

Cases 82 and 83 were stayed in February 2003 because execution of the QSA (a pre-condition to the Water Order becoming effective) had not occurred. (Supp.AA:1:4:9-17; Supp.RA:1:2:8-15.) Almost a year later, in

¹⁴ IID's representative observed that "there are a number of [MWD] Board members that don't have a clue, but they are inconsequential and they voted for it [the QSA] anyway." (Vol-8:Tab-145:AR3:CD7:70111.)

December 2003 after the QSA was executed, IID filed a notice of withdrawal from the stay of Cases 82 and 83. (Supp.AA:8:83:1952-1956; Supp.RA:1:3:16-20.) In March 2004, Cases 82 and 83 were again stayed, pending the trial court's ruling on IID's coordination petition. (Supp.AA:24:328:5852-5861.)

B. Coordination of the QSA Cases.

Eleven cases related to the QSA were filed. (Supp.AA:1:2:2-7; Supp.RA:1:1:1-7; Supp.AA:1:8:30-35; Supp.AA:1/4:10:38-930; Supp.AA:4:11:931-936; Supp.AA:4:13:938-944; Supp.AA:4:18:952-958; Supp.AA:4:24:977-998; Supp.AA:67:744:16669-16679; Supp.AA:23:318:5728-5733; Supp.AA:25:350:6145-6170.) On December 17, 2003, SDCWA and CVWD filed motions to transfer the QSA cases to Sacramento so that the QSA cases filed in Imperial County would be heard with CEQA Cases 82 and 83.¹⁵ (Supp.AA:7:71:1583-1593; Supp.AA:15:109:3511-3515.)

Then, on December 19, 2003, IID filed petitions to stay and coordinate the QSA cases, and designate a CEQA judge, claiming its "validation action substantively subsumes or overlaps with all the challenges to the [QSA]-Contracts on any basis (including CEQA or lack of compliance with any other law)." (Supp.AA:10:88:2350-2358; Supp.AA:10:89:2359-2386, 2366-2367.)¹⁶ The State and Water Agencies supported IID's petition, acknowledging that CEQA compliance was "unmistakably" a common and predominate question of law. (Supp.AA:18:192:4380; Supp.AA:17:174:4172-4173; Supp.AA:19/20:239:475.)

On May 13, 2004, the court granted IID's requests. (AA:5:9:1145-1149.) Judge Roland L. Candee was assigned coordination trial judge on

¹⁵ MWD and the County joined SDCWA's motion; IID filed non-oppositions. (Supp.AA:14:99:3435-3441; Supp.AA:16:144:3762-3767; Supp.AA:15:139:3739-3743.)

¹⁶ The State and SDCWA joined IID's petition. (Supp.AA:17:174:4171-4178; Supp.AA:19/20:239:4753.)

June 15, 2004. (AA:5:11:155-1158.) On August 9, 2004, the trial court vacated the stay, except for CEQA statutory deadlines. (AA:5:14:1177.)

C. IID's Operative Validation Complaint.

IID's complaint in Case 1649 sought to "validate" the QSA-Contracts as complying with all contractual pre-requisites and applicable laws. (AA:1:1:1-1079.) The County and SCAQMD demurred to the first amended complaint claiming it was ambiguous as to CEQA and NEPA compliance. (RA:1:5:41-73; Supp.AA:19:237:4725-4730.) IID argued that additional allegations beyond "a request for validity for all purposes" were not required to put CEQA and NEPA at issue. (RT-11/5/04:2:295.) The trial court overruled the demurrers based on IID's representation that its complaint did not assert a CEQA cause of action, but sustained the demurrers as to NEPA allegations. (AA:5:17:1191-1192.)

IID responded by amending its complaint to include CEQA and NEPA.¹⁷ (AA:6:38:1484-1485; Supp.AA:67:739:16522.) IID sought a judgment that "bar[red] any and all challenges to the 13 contracts validated under any legal or factual theory whatsoever, including CEQA, NEPA, or any other basis." (Supp.AA:67:739:16522.) The Air District answered the complaint, denied the QSA-Contracts' validity, and raised lack of compliance with CEQA, NEPA, and the CAA in its general denials and as affirmative defenses. (AA:7:40:1535-1536, 1541-1543, 1545.) Thus, compliance with state and federal laws was at issue in Case 1649.

D. Trial Court's Dismissal of County's Case 82.

IID, joined by other Water Agencies, demurred to the County's writ petition in Case 82 on indispensable party grounds. (RT-1/28/05:2:403-455; Supp.AA:49:614; Supp.AA:47:583:11663-11676; Supp.AA:47:586:11694-11721.) The trial court granted the demurrer without leave to amend on

¹⁷ The second amended complaint was filed after the September 14, 2007, status conference. (AA:6:37:1471.)

January 28, 2005, and dismissed Case 82. (AA:6:29:1427.) On February 14, 2005, the County petitioned this Court for a writ of mandate reversing the dismissal of Case 82.¹⁸ (*County of Imperial*, 152 Cal.App.4th 13.) This Court denied the petition, but relied upon the trial court's finding that the County could assert its CEQA claims in Cases 83 and 1649. (*Id.* at 39-40; AA:6:29:1422.)

E. Trial Court's Dismissal of Air District's Case 83.

After the September 14, 2007, status conference, SWRCB and SDCWA filed demurrers (belatedly joined by IID) challenging the Air District's Case 83 petition, also on indispensable party grounds. (Supp.RA:1:6:147-159; Supp.RA:1:7:160-172; Supp.RA:1:8:173-180.) The trial court sustained the demurrers without leave to amend, but stated the Air District could present its CEQA claims in Case 1649 and Cases 1653, 1656, and 1658. (AA:7:47:1671-1676; RT-2/5/08:3:767-826.) Judgment was entered on April 7, 2008 (Supp.RA:2:15:274-282); the Air District appealed. (Supp.RA:2:16:283-299.) That appeal, in related Case C059264, was briefed as of June 17, 2009, and is pending before this Court.

F. Trial Court's Denial of Air District's Motions to Intervene in CEQA Cases 1653 and 1656.

After dismissing Case 83, the trial court lifted its hold on filing intervention motions. (AA:7:49:1681.) On April 3, 2008, the Air District filed motions to intervene in Cases 1653 and 1656, two of the cases the trial court identified in its Case 83 ruling would be available forums for the Air District to adjudicate its CEQA claims. (Supp.AA:126:1281:31428-31452; Supp.AA:126:1283:31469-31493.) The Water Agencies opposed the Air District's motions. (Supp.AA:131:1300:32548-32572; Supp.AA:131:1301:

¹⁸ The proceeding was stayed in the trial court from February 2005 to September 2007 while this Court considered the County's writ petition in Case 82. (AA:6:36:1464.)

32573-32596; Supp.AA:131:1302:32597-32616; Supp.AA:131:130432633-32652; Supp.AA:131:1306:32660-32677; Supp.AA:131:1307:32678-32689; Supp.AA:131/132:1312:32735-32757; Supp.AA: 132:1313:32758.)

The trial court's order on May 8, 2008, denied both of the Air District's motions. (AA:7:53:1740-1747, 1751-1752; RT-5/1/08:4:898-964.) The trial court found the intervention motions were timely filed; that the Air District has a direct interest in CEQA compliance; but, that the Air District failed to exhaust its administrative remedies. (*Id.*) The Air District cross-appealed the trial court's ruling.

G. Trial Court's Ruling on Validation Scope.

On June 3, 2008, the trial court requested briefing on the scope of validation. (AA:8:58:1944-1946.) The County Agencies argued their claims were defined by the complaint and general denials and affirmative defenses, and that the actions of all public entities that approved the QSA-Contracts were at issue. (RA:1:15:261-275; RT-7/24/08:5:1327-1338.) The State and Water Agencies argued a narrower scope of validation. (*See* RA:2:16:289-333; RA:2:17:334-348; RA:2:18:349-371; RA:2:19:372-388; RT-7/24/08:5: 1295-1325, 1344-1350.)

The trial court issued a Guidance Ruling on July 29, 2008. (AA:9:66:2098-02114; RT-7/24/08:5:1295-1356.) The trial court determined that validation was not limited to IID's actions; the court had the authority to review the entire QSA process; and, validation included issues properly raised in answers as affirmative defenses and denials. (AA:9:66:2099-2102, 2105, 2107.)

H. Statements of Issues and Motions to Preclude Issues.

The trial court's August 19, 2008, orders required parties to submit statements of issues they intended to pursue at trial. (AA:9:71:2245-2246.) The County Agencies submitted a statement on October 6, 2008, and identified CEQA, NEPA and CAA non-compliance as issues for trial.

(RA:2:27:521-531.) The County Agencies also requested on October 23, 2008, that the trial court set a hearing and briefing schedule under CEQA. (Supp.AA:153:1519:38121-38130; RT-10/30/08:5:1473-1474, 1505-1506.)

After the October 30, 2008, status conference, the trial court ordered a “do over” of the issue statements. (AA:13:75:3072-3074; RT-10/30/08:5:1467-1472.) The trial court declined to set a CEQA hearing and briefing schedule. The County Agencies filed a revised statement of issues. (RA:3:30:558-612.) The orders also allowed validation proponents to challenge opponents’ issues already addressed by prior rulings. (AA:13:75:3074-3075.) IID and SDCWA filed motions challenging the County Agencies’ issues. (RA:3:32:617-643; RA:3:34:646-697.)

The trial court issued final rulings on SDCWA’s and IID’s motions on January 26, 2009. (AA:13:77:3083-3102; AA:13:78:3103-3129; RT-1/22/09:6:1539-1551, 1564-1569.) The trial court denied SDCWA’s motion to prevent the Air District from raising CEQA issues as a party in validation (AA:13:77:3088-3099), and granted IID’s motion, in part, eliminating some of the County Agencies’ issues for trial. (AA:13:78:3118-3119). The trial court also confirmed that the court’s guidance ruling did not preclude litigation of NEPA compliance in Case 1649. (AA:13:78:3112-3117.)

I. County Agencies’ Writ Petition to This Court for an Order Scheduling the CEQA Cases.

The County Agencies were concerned about the trial court’s resistance to adjudicating CEQA. On December 29, 2008, after numerous unsuccessful attempts to secure a CEQA trial, the County Agencies¹⁹ filed a petition for writ of mandate in this Court asking it to take original jurisdiction. (RJN:3:55-59, 77-84.) On January 15, 2009, the County Agencies again requested the trial court set a CEQA trial. (RA:4:49:897.)

¹⁹ POWER also filed a similar writ petition (3 Civil C060728).

At the January 22, 2009, status conference, the trial court expressed its expectation that it would not adjudicate the CEQA claims if the QSA-Contracts were invalidated on other grounds.²⁰ (RT-1/22/09:6:1594-1595, 1597-1598.) The trial court's orders reiterated its belief that invalidation of the QSA-Contracts would "moot" CEQA. (AA:13:79:3131.) The trial court also set a trial schedule identifying three phases of trial: 1A (Case 1649), 1B (Case 1656), and 1C (Cases 1653 and 1658). (AA:13:79:3137.)

This Court, after receiving from IID a copy of the trial court's orders the very day they were issued, denied the County Agencies' writ petition on the purported assurance that the trial court had finally set trial dates and, arguably on the mistaken belief that the CEQA claims would actually be heard at trial. (*County of Imperial v. Superior Court (Metropolitan Water Dist.)*, 3 Civil C060725 (Feb. 5, 2009).)

J. Trial Court Rejected the County Agencies' Motions on the CEQA Merits.

The trial court's January 30 orders, over the County Agencies' objections, also set a schedule for the *seventh* round of dispositive motions. (AA:13:79:3133.) The County Agencies requested clarification that such motions would *not* include merits of the CEQA claims. (Supp.AA:160:1628:39816-39817.) IID responded that permissible dispositive motions were not limited, and environmental issues were not "immune" from challenge. (Supp.AA:160:1636:39898.)

The trial court responded that CEQA claims would not be treated differently or excluded from the types of dispositive motions that could be filed. (AA:13:80:3149.) The County Agencies again sought clarification to

²⁰ SDCWA suggested there may not "end up being a CEQA trial" after the validation trial. The Air District objected. (RT-1/22/09:6:1586, 1594-1595, 1599.) The County later explained that even if the QSA-Contracts are voided, the EIRs remain valid and later QSA approvals could be "tacked on" to those defective EIRs. (RT-5/27/09:6:1672-1673.)

ensure (before expending significant resources) that CEQA peremptory writs in Cases 1653 and 1656, and motions for summary adjudication on CEQA defenses in Case 1649, would be considered; IID objected. (RA:4:50:906-910; Supp.AA:161:1643:40114.) The trial court did not respond. Thus, the County appeared at Cuatro Del Mar's discovery motion hearing in March 2009 to solicit the trial court's response as to whether CEQA peremptory writs could be filed; the trial court still did not respond. (RT-3/5/09:6:1622.)

Therefore, the Air District filed an MSJ in Case 1649 on CEQA and CAA defenses. (RA:5:56:1116-1125; RA:5:57: 1126-1177.) Other parties also filed motions on environmental claims and defenses.²¹ The trial court *sua sponte* issued an order in April 2009, denying the County Agencies' motions as "premature." (AA:14:99:3593.) The trial court did not dismiss the Water Agencies' CEQA motions as "premature."

The Air District filed a motion to revise the orders. (RA:6:70:1495-1514; RT-5/27/09:6:1669.) IID opposed the motion. (RA:6:68:1458-1485.) The trial court granted the motion, in part, to allow the Air District to re-file a motion in Case 1649 on its CAA defense; the motion was denied as to the CEQA/NEPA claims. (AA:15:101:3629.) The Air District re-filed its motion on its CAA claims. (RA:7:82:1653-1663.)

K. Trial Court Confirmed Jurisdiction to Adjudicate Federal Contracts and Federal Affirmative Defenses in Contested Matter 147.

In August 2009, the trial court ruled on the Air District's motion for summary adjudication on its CAA defense in Case 1649. (AA:25:173:

²¹ *E.g.*, SDCWA/MWD motion to dismiss Case 1656 under CEQA (Supp. AA:180:1731:44970-45000); MWD/CVWD motion for partial judgment on the pleadings in Case 1649 as to NEPA and CAA denials and defenses (RA:5:60:1317-1346; RT-8/20/09:6:1751-1781); and CVWD/MWD MSJ in Case 1658, on CEQA grounds. (Supp.AA:172:1684:42928-42960; RT-8/20/09:6:1790-1795.)

6533-6537; AA:25:181:6656-6668.) In Contested Matter 147, the court denied the motion, finding facts in dispute, but ruled it had jurisdiction to adjudicate CAA defenses in Case 1649. (AA:25:181:6656-6657, 6663.) The trial court also denied CVWD/MWD's and SDCWA's motions in Case 1649, wherein they argued the trial court lacked jurisdiction over the United States and to adjudicate the CRWDA's NEPA and CAA compliance. (AA:25:177:6628-6630.)

L. Trial Phase 1A and the United States' Attempted Special Appearance.

The County Agencies submitted opening trial briefs for phases 1A, 1B, and 1C in September 2009 (including briefing on CEQA, NEPA, and CAA defenses). (AA:33:194:8880-8938; RA:9:112:2439-2484; RA:10:118:2710-2768.) In September 2009, the trial court issued a final issues list, moving the CAA defenses to phase 1C. (AA:26:185:6805.) The County Agencies submitted opposition trial briefing in October 2009. (RA:35:207:9293-9343; RA:12:125:3068-3108; RA:12:131:3307-3364.)

On October 29, 2009 (10-days before trial), the United States attempted a "special appearance" to contest the trial court's jurisdiction over the CRWDA and its compliance with federal laws. (AA:36:216:9700-9711.) The County Agencies objected and moved to strike. (RA:13:135:3551-3581.) While MWD opposed (joined by SDCWA and CVWD) and argued at the hearing against the motion, the United States neither opposed the motion nor appeared at oral argument. (RA:13:137:3586-3600; RA:13:138:3601-3607; RT-11/19/09: 9:2543-2544, 2564-2569.) The trial court granted the motion and reconfirmed its jurisdiction. (RT-11/19/09:9:2577.)

During the month long trial in November 2009, the Air District showed that an invalid QSA-JPA necessitated the invalidation of the other QSA-Contracts and environmental documents (AA:40:242:10769-10875; AA:44:259:11829-11976; RT-11/19/09:9:2579-2651; RT-11/30/09:10/11:

2951-3038), and that invalidation of the QSA-Contracts would not “moot” the environmental claims (RT-11/30/09:10/11:2965-2968, 3035-3038).

3. TRIAL COURT’S JUDGMENT AND APPEALS.

A. Trial Court Invalidated the QSA-Contracts After Phase 1A Trial.

On December 10, 2009, the week before trial phase 1B, the trial court issued a tentative ruling invalidating 12 of the 13 QSA-Contracts, and vacating the remaining trial phases and environmental claims as moot. (AA:46:267:12339-12365.) The County Agencies contested the mootness determination. (AA:46:270:12377-12384; RT-12/17/09:12:3337-3340.)

On January 13, 2010, the trial court issued a 52-page final statement of decision affirming its tentative ruling. (AA:47:292:12706-12757.) The County Agencies suggested phrasing for the judgment to void the environmental approvals. (AA:47:294:12767-12779.)

The trial court’s proposed judgment dismissed Cases 1653, 1656, 1558, and the environmental claims in 1649 as moot, but did not void the EIRs. (AA:48:301:12864-12868.) The County Agencies against contested the mootness determination in the proposed judgment, which did not void the EIRs. (AA:48:303:12875-12885; RT-2/11/10:12:3416-3417.) The trial court entered its final judgment on February 11, 2010, without making the County Agencies’ requested changes. (AA:48:312:13071-13077.)

B. Appeals and Writ of Supersedeas Issued.

The Water Agencies and State appealed the judgment. (AA:48:313:13078-13092; AA:48:314:13093-13112; AA:48:315:13113-13118.) The County Agencies and POWER cross-appealed the judgment. (Supp.AA: 219:2062:54610-54626; Supp.AA: 219:2063:54627-54643.)

On March 1, 2010, the Water Agencies, Escondido, and VID filed a petition for writ of supersedeas requesting this Court stay enforcement of the judgment pending appeal. The State later filed its own petition. The

Water Agencies for the first time produced the phantom “draft QSA-JPA” (RJN:10:158-186.) The County Agencies opposed a stay without conditions preventing the Salton Sea’s elevation level from declining further. This Court granted the petition unconditionally, but expedited the appeal.

III. AIR DISTRICT’S RESPONSE TO APPELLANTS’ OPENING BRIEFS.

1. APPLICABLE STANDARD OF REVIEW.

On appeal of a validation judgment, the court examines the administrative record to determine whether substantial evidence supports the trial court’s findings. (*Poway Royal Mobilehome Owners Association v. City of Poway* (2007) 149 Cal.App.4th 1460, 1479.) Questions of law are reviewed *de novo*. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

2. THE TRIAL COURT PROPERLY RULED IT COULD INVALIDATE CONTRACTS WITH FEDERAL AND TRIBAL PARTIES.²²

SDCWA, CVWD, MWD, VID and Escondido advocate “conditional” jurisdiction that allows them to admit jurisdiction, try the case, and then deny jurisdiction if dissatisfied with the ruling. Jurisdiction should not be used to gain a free shot at a favorable outcome and a veto of the proceedings if the outcome is unfavorable.

A. Contracts with the Federal Government Are Validatable in State Court Under the Water Code.

IID asserted in its complaint that Water Code sections 22670, 22762, 23225, Government Code section 53511, 43 U.S.C. §390uu, and the Validation Statute, Code of Civil Procedure section 860 et seq., allowed it to seek validation of the QSA-Contracts. (AA:6:38:1477, 1494; Supp.AA: 4:22:972-973.) Water Code sections 23225 and 22762 warrant attention.

²² The Air District reserves the right to reply to any opposition relating to issues also raised by cross-appeal.

At least since 1917, California law allows irrigation districts to submit contracts with the United States to California's superior court for validation. (Water Code § 23225, Stats.1917, c. 160, p. 245, §3, amended in 1961 to refer to the Validation Statute). The California Attorney General's opinion is that contracts with BOR are validatable in State courts under Water Code section 23225. (9 Op.Atty.Gen. 61, 2-7-47.)

United States courts recognize California courts' jurisdiction to conduct validation proceedings for irrigation district contracts with the United States pursuant to Water Code section 23225. (*Ivanhoe Irrigation District v. All Parties & Persons (Ivanhoe I)* (1957) 47 Cal.2d 597, 606, reversed on other grounds sub nom., *Ivanhoe Irrigation District v. McCracken* (1958) 357 U.S. 275; *U.S. v. CVWD* (1953) 111 F.Supp. 172.) IID's 1932 Colorado River water contract with the United States was validated in Imperial County Superior Court under Water Code section 23225, as was CVWD's contract with DOI for the Coachella Canal. (Vol-1:Tab-2:AR3:CD30:114729-114733; Vol-1:Tab-1:AR3:CD30:114770; *CVWD*, 111 F.Supp. at 174-175.) Appellants would have this Court overturn validation law in existence since 1917.

Water Code section 22762 was added by SB 482 in 2002, allowing IID to determine the validity of the State-QSA or any contract-related action that implements or is referenced in the State-QSA. (Water Code, § 22762; AA:19:110:4968.) The CRWDA and Allocation Agreement are referenced in the State-QSA. (AA:3:1:702-705.) CVWD, MWD, and SDCWA supported the enactment of Water Code section 22762, even suggesting language to broaden the scope of contracts that could be validated. (AA:20:110:5225, 5335-5336, 5343-5346.) Now, CVWD, MWD, and SDCWA ask this Court to nullify the very law they previously sought to have enacted.

B. Jurisdiction Over Persons Is Not Required in an *In Rem* Proceeding.

SDCWA, CVWD, and MWD claim jurisdiction over the res is not sufficient to render a validation judgment because the court still needs to acquire *in personam* jurisdiction over interested parties. There is no legal authority requiring both *in rem* and *in personam* jurisdiction in validation.

Validation is an *in rem* proceeding. (Code Civ. Proc., § 860; Supp.RA:1:5:24-146.) The court obtains jurisdiction over the res – the QSA-Contracts – as opposed to persons or parties. (*PCL*, 83 Cal.App.4th at 924-925; *Coachella Valley Mosquito and Vector Control Dist. v. City of Indio* (2002) 101 Cal.App.4th 12, 18; Code Civ. Proc., § 870(a).)

Jurisdiction is acquired by newspaper publication of the summons and is completed after the date specified in the summons. (Code Civ. Proc., §§ 860-862.) “Notice to all the world ‘suffices to make the claimants to the property parties to the action’ and the resulting judgment conclusive as against all the world.” (*Katz v. Campbell Union High School Dist.* (2006) 144 Cal.App.4th 1024, 1031-1032 *citing* *Lee v. Silva* (1925) 197 Cal. 364, 368-369.) Only failing to publish a summons compliant with the statutory requirements deprives the court of jurisdiction over all interested parties. (Code Civ. Proc., § 861.)

Appellants’ argument is fundamentally flawed because it is premised on the misconception that IID sued the federal government and Tribes, and that they are accordingly required to appear. However, no persons are sued in an *in rem* proceeding. (*Bernardi v. City Council* (1997) 54 Cal.App.4th 426, 434, fn.8, 439.) This Court properly concluded no parties are required to appear, other than the one bringing the action in validation, because there are no “indispensable parties.” (*PCL*, 83 Cal.App.4th at 921-923, 925; *Katz*, 144 Cal.App.4th at 1032.) Thus, the trial court found that “there are no indispensable parties to a validation action other than the public agency

seeking validation” and rejected Appellants’ arguments that the United States and Tribes had to be present to invalidate the QSA-Contracts. (AA:6:29:1417; AA:47:292:12722.)

In *California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, non-Indian gaming interests sued the State for ratifying compacts granting tribes exclusivity over casino-type gaming. The Court determined that the appeal of the trial court’s decision was untimely because the amended compacts between the State and tribes were validatable under Government Code section 17700 and should have been the subject of a reverse validation action brought within 60 days of AB 687’s ratification of the amended compacts. (*Id.* at 1430-1432.) The Court said it did not need to decide whether the tribes were necessary and indispensable parties because this issue related to the complaint and not a reverse validation action. (*Id.* at 1433.)

C. **Appellants Admitted The Trial Court’s Jurisdiction in their Validation Answers and are Barred from Raising the Issue.**

SDCWA, CVWD, MWD VID and Escondido expressly *admitted* and *prayed for* the trial court’s jurisdiction over all of the QSA-Contracts – a critical fact conspicuously omitted from their briefs.²³ (AA:6:21:1308, 1316-01317; AA:6:22:1329, 1337; AA:6:24-1348, 1352-1353; AA:6:25:1357, 1365; AA:6:26:1368, 1376.) The State also admitted state-court jurisdiction was proper. (AA:5:3:1090, 01096.) Appellants never demurred to the complaint on the ground the trial court lacked jurisdiction to

²³ MWD, CVWD, VID, and Escondido attempt to recast their denial of one of the laws under which IID brought the validation action, §390uu, as a blanket denial of all jurisdiction. But, it is clear from their answers that they otherwise *admitted* validation of the QSA-Contracts was proper in State court under the other laws asserted in the complaint.

invalidate the 3-QSA-Contracts.²⁴ When SDCWA, MWD and CVWD moved to remove the Validation Action from Imperial to Sacramento they showed that Case 1649 was properly brought in Imperial County. (Supp.AA:14:99:3435-3436; Supp.AA:7: 71:1587; Supp.AA:15:108:3505-3506; Supp.AA:23:303:5534-535; Supp. AA:23:320:5737-5738.)

SDCWA, CVWD, MWD, VID and Escondido cannot now contest jurisdiction because they admitted the trial court's jurisdiction in their answers. (*Fairbanks v. Woodhouse* (1856) 6 Cal. 433, 434; *Hibernia Sav. & Loan Soc. v. Boyd* (1909) 155 Cal. 193, 197; *Ingalls v. Bell* (1941) 43 Cal.App.2d 356, 368 [admissions in answer are binding on defendant].) Their answers are binding judicial admissions of state court jurisdiction over all of the QSA-Contracts. (*Lifton v. Harshman* (1947) 80 Cal.App.2d 422, 431-432, disapproved of on other grounds in *Pao Ch'en Lee v. Gregoriou* (1958) 50 Cal.2d 502, 505.) These Appellants are now estopped from asserting a contrary position. (Evid. Code, § 623 [estoppel by own statement or conduct]; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489; *DRG/Beverly Hills v. Chopstix Dim Sum Café* (1994) 30 Cal.App.4th 54, 59 [equitable estoppel]; *Jogani v. Jogani* (2006) 141 Cal.App.4th 158,169 [judicial estoppel invoked when a party's inconsistent behavior will result in a miscarriage of justice].)

The Tribes had personal service and published notice of IID's Validation Action. (Supp.AA:6:49:1278-1280; RA:1:2:14-18.) Neither the Tribes nor the federal government made a special appearance to contest the proceedings *before* jurisdiction was completed on January 20, 2004. (AA:1:1:1; Supp.AA:11:93:2698.) The Tribes' responded to the complaint by filing a notice of sovereign immunity that Appellants improperly cast as supporting their claim that the court lacked jurisdiction. However, the

²⁴ The 3-QSA-Contracts are the CRWDA, Allocation Agreement, and Conservation Agreement. (AA:5:19:1270-1272.)

Tribes' supported a finding by the trial court of validity for all 13 QSA-Contracts and expressly reserved the right to *participate* in the proceeding to argue in favor of validation. (AA:5:4:1102.) In other words, the Tribes recognized the state court's authority to grant the relief they desired, and affirmatively requested the trial court grant that relief.²⁵

D. The County Agencies Dropped Their Opposition to the Trial Court's Exercise of Jurisdiction In Reliance Upon the Appellants' Answers and Conduct.

Ironically, it was the County Agencies that questioned IID's ability to seek validation in the federal government's absence. The County Agencies wanted assurance that State court was the proper venue before expending significant resources. Thus, the County Agencies demurred to the first amended complaint when IID added jurisdiction under 43 U.S.C. 390uu, questioning whether the United States needed to waive sovereign immunity. (Supp.AA:18:200:4430-4431; RA:1:5:49; AA:1:1:7; Supp.AA:1:47.) At IID's urging, the trial court overruled the demurrer except for finding the complaint was uncertain as to NEPA. (AA:5:17:1193-1194.)

IID responded by filing a "provisional" second amended complaint that again expanded the scope of the validation action for all possible matters affecting validity. (Supp.AA:67:739:16522, 16549, 16560, 16566-16567.) IID intended to eliminate any conceivable defense or claim that would preclude the trial court from considering compliance with federal laws and the validity of the QSA-Contracts in the federal government's absence. (Supp.AA:72: 865:17975-17983.)

The County Agencies opposed filing the second amended complaint, concerned about the inclusion of NEPA in the absence of the federal government. (Supp.AA:69:793:17101-17102; Supp.AA:68:777:16920-

²⁵ The Tribes' attorneys, Karshmer & Associates, were on the trial court's master service list and should have received all documents filed during the validation proceeding. (*See e.g.*, Supp.AA:124:1235:30769.)

16921.) After IID filed a motion seeking permission to file the second amended complaint, the trial court disagreed with the County Agencies, and allowed the complaint to be filed. (Supp.AA:75:909:108555-108571; AA:6:33:1454-1455; AA:6:37:1471.) The other Appellants did not support the County Agencies; they also did not oppose the filing of the complaint or demurrer when it was filed.

Still concerned about a belated assertion of sovereign immunity, the County Agencies again raised in their answers the court's jurisdiction over the 3-QSA-Contracts to which the federal government was a party, and federal law compliance. (AA:7:40:1533-1534, 1537-1538, 1541, 1543-1545; AA:7:39:1518, 1523, 1527, 1529-1530.) IID filed its Jurisdiction MSA on May 27, 2008, asserting the trial court had jurisdiction and the federal government was not an indispensable party. (Supp.AA:140:1387:034885-034902.) SDCWA, CVWD, MWD, VID and Escondido did not oppose the Jurisdiction MSA or support the County Agencies' position.

The Jurisdiction MSA required the County Agencies to decide whether to continue contesting jurisdiction after four unsuccessfully years of doing so. Appellants' admissions of jurisdiction and failure to take any affirmative action to dispel the court's jurisdiction over QSA-Contracts were crucial to the County Agencies' decision.

At the May 29, 2008, status conference, the County Agencies informed the court and parties they no longer contested jurisdiction and would so stipulate with IID. (RT-5/29/08:4:1125.) SDCWA, CVWD, MWD, VID and Escondido were silent, never indicating disagreement with the court's exercise of jurisdiction over the QSA-Contracts. IID concurred with the County Agencies' suggestion. (RT-5/29/08:4:1126.) Accordingly, the County Agencies did not file an opposition to the Jurisdiction MSA and re-confirmed their position that jurisdiction was proper in their scope of validation brief. (RA:1:15:273.)

Appellants' arguments below show their jurisdictional claims are motivated by the invalidity decision. As long as the trial court validates the QSA-Contracts, Appellants claim it has jurisdiction; but if not, they argue the court lacks jurisdiction. (AA:46:271:12388, 12391; AA:46:274:12427-12428.) According to Appellants, if the state court lacks jurisdiction, the 3-QSA-Contracts are validated-by-operation-of-law. (AA:26:187:6928; AA:27:190:6970-6971, 7015-7016; AA:33:195:8947, 8970, 8973-8974.)

Appellants' position is nonsense because the 3-QSA-Contracts must be within the scope of contracts that could be the subject of a direct or reverse validation lawsuit – which these Appellants now deny. (*City of Ontario v. Superior Court* (1970) 2 Cal.3d 335, 341-342; *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 851.) This Court, in order to accept Appellants' disingenuous argument, would have to believe that *after* the 3-QSA-Contracts were allegedly already validated-by-operation-of-law, Appellants would file answers and engage in more than six-years of costly litigation to defend the validity of already-validated contracts.

The hypocrisy of Appellants' position is further revealed in their answers to the County Agencies' lawsuit, entitled *People of the State of California Ex Rel Imperial County Air Pollution Control District et al. v. United States Department of Interior et al.*, USDC Southern Dist., Case No. 09 CV 2233 BTM PCL. Appellants in this case (IID, SDCWA, CVWD, and MWD) intervened as defendants claiming, among other things, that *the federal court lacks jurisdiction and the case is barred by the doctrine of sovereign immunity.* (RJN:4:101-113.) Appellants not only disagree with state court jurisdiction, but apparently believe *no* court can adjudicate claims involving contracts to which the federal government is a party.

E. VID and Escondido Failed to Participate at Trial and Deserve No Special Accommodation.

While VID and Escondido supported validation of the Allocation Agreement, they were absent from the proceedings, and did not attend trial, content to sit on the sidelines and rely upon liaison counsel given their “relatively limited” interest. (Supp.AA:44:534:10927-10928; AA:5:16:1186; AA:34:200:9154; AA:36:218:9743; AA:37:226:9870-9871; M/H.RA:3:14:693; RT-11/9/09:7:1933-1934.) Only *after* the trial court issued its tentative decision did they suddenly reengage, apparently shocked the trial court would invalidate the Allocation Agreement without their participation and without considering a host of new issues they neglected to brief or raise at trial. (AA:46:271:12386-12392.)

Escondido and VID also argue the Allocation Agreement should not be invalidated because there were no specific challenges to the agreement. But, merely seeking validation of the QSA-Contracts, including the Allocation Agreement, does not guarantee validation. Even when there is no opposition, there is still an obligation to establish the QSA-Contracts are valid. (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1301.)

Here, numerous parties challenged the complaint’s allegation that the QSA-Contracts were valid (AA:6:20:1293-1294; AA:6:23:1344-01345; AA:6:27:1383-1385; AA:6:28:1403-1404; AA:7:39:1527; AA:7:40:1541; AA:7:41:1553-1555); the trial court found the 3-QSA-Contracts were within the scope of validation (AA:25:181:6656-6657); and, the scope of issues for trial encompassed all QSA-Contracts, including the Allocation Agreement (AA:26:185:6788-6791, 6799-06801, 6807-6811, 6798-6805, 67991, 6814). Assuming the trial court would rubberstamp the Allocation Agreement’s validity and ignore the issues is not a sufficient justification to reverse the trial court.

Appellants also claim the trial court was pre-empted from invalidating the Allocation Agreement by Congress' 2006 supplement to the San Luis Rey Water Rights Settlement Act. There were at least five separate opportunities for Appellants to file motions after Congress passed the 2006 Supplement to remove the Allocation Agreement from validation, but they never did. (RT-10/11/07:3:625-630; RT-2/5/08:3:731-827; RT-5/1/08:4:898-978; RT-1/22/09:6:1539-1608; RT-4/2/09:6:1646-1667.) SDCWA, MWD, and CVWD brought over 50 motions during the course of the proceeding and would not have hesitated to bring such a motion if the trial court lacked jurisdiction over the Allocation Agreement.

3. **THE TRIAL COURT PROPERLY DETERMINED IT HAD JURISDICTION TO ADJUDICATE THE CAA.**

Not surprisingly, Appellants seek the preclusive effect of validation as to any matter that was or could have been validated, without actually litigating the merits. Appellants attack the trial court's ruling in Contested Matter 147 (AA:25:181:6656-6657) that "[c]laims of invalidity under federal laws could be raised in validation actions..." Contested Matter 147 was the trial court's ruling on the Air District's motion for summary adjudication to invalidate the CRWDA because the Secretary failed to comply with the CAA.

A. **The Validation Complaint and Affirmative Defenses Put Federal Law Compliance at Issue.**

As discussed in Sections II.2.C. and II.2.D., IID expanded the scope of the validation action to specifically put compliance with federal laws at issue. Appellants *admitted* in their answers allegations of federal law compliance, and never demurred to the complaint on that ground. (AA:6:24:1353; AA:6:21:1317; AA:6:22:1337; AA:6:25:1365; AA:6:26:1376.) Appellants are therefore estopped from asserting a contrary

position. (Evid. Code, § 623; *City of Long Beach*, 3 Cal.3d at 489; *DRG/Beverly Hills*, 30 Cal.App.4th at 59; *Jogani*, 141 Cal.App.4th at 169.)

The Air District disputed IID's allegations about federal law compliance and raised defenses (including NEPA and CAA compliance) showing why the QSA-Contracts could not be validated. (AA:7:40:1535-1536, 1541-1543, 1545.) Timely answering and denying IID's allegations suffices to challenge the full scope of issues raised by the complaint, even if not specifically pled. (Code Civ. Proc., §§ 431.1, 861.1.) These denials and affirmative defenses were sufficient, and "properly put[] such matters at issue." (AA:47:292:12716, 12722, 12752.)

Consideration of all issues that go to validity is necessary "to settle promptly all questions about the validity of its action." (*Friedland*, 62 Cal.App.4th at 842; *CVWD*, 111 F.Supp. at 177-179 [whether the Secretary had authority to execute a contract with CVWD for the Coachella Canal goes to validity].) IID never demurred to the Air District's answer. Rather, IID wanted the trial court to "hold...that any and all legal and factual objections and challenges to the validity of the Contracts are expressly denied" and, "permanently enjoin and restrain all persons from the institution of any action or proceeding challenging the adoption and/or validity of any or all of the Contracts, or any other matter adjudicated or which could have been adjudicated in this action." (AA:6:38:1494-1495.)

The scope of validation and its preclusive effect go hand in hand. Indeed, the trial court stated: "[t]o the extent that matters before the Court – i.e., the scope of the validation actions – are limited, so will the Court's determination of validity. The two must be consonant." (AA:47:292:12716.)

i. Statutory Violations Invalidate the QSA-Contracts.

Failing to comply with statutory requirements is a ground for invalidating the QSA-Contracts. (*Fontana Redev. Agency v. Torres* (2007) 153 Cal.App.4th 902, 911-914.) Statutory compliance is expressly within the scope of IID's complaint which asks the court to determine that each portion of the QSA-Contracts are valid, legal and binding, and conform with all applicable laws. (AA:6:38:1495.) The trial court recognized that "a contract cannot come into existence without execution by those parties whose agreement is prerequisite to such existence." (AA:25:181:6658.)

The QSA-Contracts' legality and statutory compliance cannot be determined by solely examining what IID did or did not do because IID is not the only contract signatory, and is not the only party accepting responsibility for fulfilling statutory requirements for the QSA-Contracts. For example, all of the parties to the CRWDA represented that they had full power and authority to enter into the agreement.²⁶ (Vol-8:Tab-164:AR3:CD1:10281.) As discussed in Section IV.6, CAA compliance is a statutory requirement the Secretary must have complied with before she had legal authority to approve the State-QSA and execute the CRWDA. To determine statutory compliance, IID properly requested the court "examine and inquire into the adoption and the validity of the contracts" without limitation. (AA:6:38:1494.)

If any signatory did not have authority to enter into the contract, it ceases to exist, is void, and cannot be validated. (*White v. Davis* (2002) 108 Cal.App.4th 197, 229 [contract entered into by governmental entity without constitutional or statutory authority is void and unenforceable]; *First Street Plaza Partners v. Los Angeles* (1998) 65 Cal.App.4th 650, 661

²⁶ The PEIR presents another example. The four Water Agencies' decided to be "co-lead" agencies and, as such, they all had to comply with CEQA.

[no contract formation when City Charter requirements not met]; *ETSI Pipeline Project v. Missouri* (1988) 484 U.S. 495, 555 [Secretary lacked authority to execute contract].) Accordingly, the trial court properly ruled the actions of other QSA-Contract signatories bearing on validity are relevant and must be considered. (AA:25:181:6658; AA:47:292:12710.)

ii. Failure of Mandatory Pre-Requisites Invalidate the QSA-Contracts.

Failing to meet a contractual condition predating performance can invalidate a contract because such failure means the contract never came into existence. If the condition fails to occur after performance has begun, the contract ceases to exist. (Civ. Code, §§ 1436, 1439; *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313; *Beverly Way Associates v. Barham* (1990) 226 Cal.App.3d 49, 54-55.)

Statutory and contractual conditions precedent are encompassed in the scope of IID's complaint which seeks to "establish that all factual and legal prerequisites to their validity have been satisfied, and will eliminate any and all objections or defenses of any type" and "find that all conditions, things and acts required by law to exist, happen or be performed precedent to and including the execution of the Contracts have existed, happened, and been performed in the time, form and manner required by law." (AA:6:38:1477, 1494.) Compliance with state and federal laws was an express condition precedent in some of the QSA-Contracts. (Pub. Res. Code, § 21002, 21002.1; 42 U.S.C. § 7506(c)(1); ICAPCD Rule 925(A.); Supp.AA:184:1808:45880; Vol-8:Tab-168:AR3:CD1:10291, 10308-10309; Vol-8:Tab-169:AR3:CD1: 10346; Vol-8:Tab-170:AR3:CD1:10378-10379; Vol-8:Tab-172:AR3:CD1: 10458; Vol-1:Tab-14:AR3:CD1:11139.)

B. The United States is Not An Indispensable Party.

Appellants assert the United States is a necessary and indispensable party in order to adjudicate whether the QSA-Contracts were executed in compliance with the CAA. Appellants' assertion fails because it assumes there are indispensable parties in validation; the law says otherwise. (*PCL*, 83 Cal.App.4th at 921-923, 925; *Katz*, 144 Cal.App.4th at 1032.) There is no basis for Appellants' attempt to rewrite *PCL* such that all parties whose actions are at issue are necessary and indispensable. *PCL* was clear that there are *no* indispensable parties in validation. (83 Cal.App.4th at 925.)

Appellants suggested "solution" in the trial court was the filing of multiple reverse validation actions. (Supp.AA:144:1423:35829.) There are a total of 15 signatories to the QSA-Contracts (RA:2:16:296); thus, in addition to Case 1649, at least 14 other reverse validation lawsuits would have to be brought over the same QSA-Contracts.²⁷ Yet, when a reverse validation action for the entire QSA was brought in Imperial County, in Case 1643, IID obtained its dismissal, as discussed in Section III.4.A.i, by claiming that a reverse validation action cannot exist if a validation action on the same matter is already pending. (RA:2:16:299-300.)

C. The Presence of BOR is Not Necessary to Determine Whether the Secretary Lacked Authority to Execute the CRWDA.

If, as Appellants claim, CAA compliance is determined on the basis of an administrative record, then the presence of the federal agencies should not be necessary because the record is intended to speak for the agency's actions. The federal government's absence is not the answering defendants' fault and should not insulate the QSA-Contracts from invalidation. The

²⁷ For example, there are three parties to the State-QSA, IID, MWD, and CVWD. Under Appellants' theory, three separate lawsuits would have to be brought in three counties (Imperial, Los Angeles and Riverside) over the same contract.

federal government chose (as it may under the Validation Statutes) not to answer and defend the federal law defenses or support validation of the QSA-Contracts. (Supp.AA:6:49:1278-1280; RA:1:2:14-18.)

Appellants, who were in control of the administrative record and had a duty to ensure it was complete, have known since December 21, 2004, that the Air District's answer included CAA defenses. (RA:1:4:34; *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 372-373.) Appellants knew the trial court agreed the actions of contract parties other than IID were at issue, given the trial court's rulings on motions to augment the administrative record and validation scope. (AA:10:66:2100-2102; AA:10:68:2132-2134.) Thus, the fact that Appellants ignored the full scope of claims in preparing the administrative record should not be a justification for this Court to avoid CAA claims.

D. The County Agencies Are Not Required to Bring a Second Lawsuit Under the APA in Order to Answer and Dispute the Complaint's Allegations.

Appellants contend CAA non-compliance claims may only be asserted by bringing a separate lawsuit under the APA because Congress only waived sovereign immunity for claims brought under the APA. Appellants' assertion is incorrect. Federal courts do not have exclusive jurisdiction over federal law compliance. The APA is intended to provide a cause of action where subject matter jurisdiction exists under 28 U.S.C. section 1331 (giving district courts jurisdiction of civil actions arising under the laws of the United States). (*Conservation Law Foundation v. Busey* (1st Cir. 1996) 79 F.3d 1250, 1261.)

Here, by the publication of the summons (Code Civ. Proc., § 861), jurisdiction in this case already exists over the res – the QSA-Contracts – as opposed to persons envisioned by the APA. Thus, jurisdiction is not necessary under 28 U.S.C. section 1331. State courts have adjudicated

federal law compliance issues in validation. (*See, e.g., Cal. Statewide Communities Development Authority v. All Interested Persons et al.* (2007) 40 Cal.4th 788, 810; *Ivanhoe*, 47 Cal.2d 597, 606.)²⁸

State courts may assume jurisdiction over a federal issue so long as Congress has not expressly stated otherwise. (*Gulf Offshore Co. v. Mobil Oil Corp.* (1981) 453 U.S. 473, 477.) There is a strong presumption that state courts enjoy concurrent jurisdiction over federal issues. (*Id.* at 478.) It is presumed that Congress does not intend to displace existing state authority. (*Tafflin v. Levitt* (1990) 493 U.S. 455, 466.) “To give federal courts exclusive jurisdiction over a federal cause of action, Congress must, in an exercise of its powers under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction.” (*Yellow Freight System, Inc. v. Donnelly* (1990) 494 U.S. 820, 823.)

Congress did not intend for the federal courts to have exclusive jurisdiction over the CAA. The CAA was enacted in 1970 (amended in 1977 and 1990) and established a joint state and federal program to address the nation’s air pollution. (*See Environmental Council of Sacramento v. Slater* (E.D. Cal. 2000) 184 F.Supp.2d 1016, 1018-1020 [discussion of CAA conformity requirements].) CAA compliance places primary responsibility for enforcing the SIP on the State and/or local air district. (42 U.S.C. §§ 7401 et seq., 7407, 7410.)

Under Section 176(c) of the CAA, “[n]o department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan [SIP].” (42

²⁸ *See also Consolidated Fire Protection Dist. v. Howard Jarvis Taxpayers’ Assn.* (1998) 63 Cal.App.4th 211, 221; *Cota v. County of Los Angeles* (1980) 105 Cal.App.3d 282, 287-288; *Robbins v. Sonoma Flood Control and Water Conservation Dist.* (1956) 138 Cal.App.2d 291, 299-300.

U.S.C. § 7506(c)(1); Rule 925(A.) [Supp.AA:184:1808:45880].) Congress imposed this requirement to prevent federal entities from frustrating the attainment or maintenance of the NAAQS.

The CAA conformity regulations at issue are codified in the Air District's conformity regulation, Rule 925. (Supp.AA:204:1930:50953-50969.) EPA approved Rule 925 – General Conformity, as part of the SIP, effective June 22, 1999. (Supp.RA:2:19:377-380.) The approval of Rule 925 into the SIP results in the SIP criteria and procedures governing general conformity determinations under the CAA instead of the Federal rules at 40 C.F.R. Part 93, Subpart B.²⁹ (*Id.*)

The Air District is a county air pollution control district organized and existing under the California Health and Safety Code (Health & Saf. Code, §§ 40100 et seq.), and is the exclusive local agency responsible for comprehensive air pollution control within Imperial County. Appellants ignore that the Air District is vested with independent authority to adopt and enforce the SIP. (Health & Saf. Code, §§ 39002 et seq., 40000 et seq., 40910 et seq.) California Health and Safety Code section 41513 grants the Air District the authority to bring a civil action in the name of the people of California to enjoin violations of its orders, rules, or regulations. (Rule 105 [Supp.AA:184: 1808:45924].) Thus, the Air District is not required to comply with the APA to assert non-compliance with its rules.

Appellants also seek to impose a non-existent procedural requirement that the County Agencies bring a separate lawsuit under the APA in order to answer IID's complaint and challenge the QSA-Contracts' validity for failure to comply with federal laws. An answer that denies allegations in the complaint is sufficient to controvert the material allegations and put "at issue" all important matters alleged in the complaint

²⁹ Thus, Appellants' reliance on this subpart is in error.

the defendant does not want to admit. (Code Civ. Proc., § 431.1.) There is no requirement that the Air District first comply with the APA before it can deny IID's allegations of federal law compliance or assert defenses.

Moreover, when IID and SDCWA raised this erroneous argument below, the County pointed out that these same agencies' advanced an inconsistent position in *Consejo de Desarrollo Economico de Mexicali v. United States* (D. Nev. 2006) 438 F. Supp. 2d 1207. (RA:7:88:1856-1858.) In the *Consejo* case, IID and SDCWA argued:

- “[T]he APA is not the exclusive source of private rights of action and waivers of sovereign immunity. Nothing in the APA mandates that NEPA challenges can only be brought under the APA.” (Supp.RA:2:18:331.)

- “IID filed a validation suit to validate in state court its reclamation contracts with the United States, including the Allocation Agreement. Anyone that wanted to allege that noncompliance with NEPA made the Allocation Agreement invalid could and should have done so in the pending state court validation action.” (Supp.RA:2:18:331.)

- “Nothing precludes state courts from addressing NEPA challenges.” (Supp.RA:2:18:336.)

- Plaintiffs who tried to contest NEPA compliance for the Allocation Agreement in a separate federal action, rather than in Case 1649, were accused of “an attempt to forum shop.” (Supp.RA:2:18:357.)

IID and SDCWA appear willing to represent to whatever court they are in that some *other* court can adjudicate environmental compliance claims to avoid adjudication of environmental compliance altogether.

4. **THE TRIAL COURT PROPERLY DETERMINED INVALIDATION OF THE QSA-JPA REQUIRES INVALIDATION OF THE OTHER CONTRACTS.**

A. **The Court Can Invalidate the QSA-Contracts Even Though the Entire QSA Was Not Sought to be Validated.**

IID argues the QSA-Contracts may be validated, but not invalidated, because they are inextricably intertwined to 22 other QSA agreements that were not included in the validation complaint and were, instead, purportedly validated-by-operation-of-law. (IID AOB, pp. 51-57.) As the trial court noted, because IID's own complaint seeks judicial validation of the QSA-Contracts, "[i]t necessarily follows that IID's position, and its position throughout this lengthy and costly litigation, is that the Court has the authority to determine the validity of these agreements. 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." (AA:47:292:12749.) Thus, IID erroneously suggests that opponents would spend millions of dollars and seven years in litigation when the only possible outcome is a rubberstamping of the QSA-Contracts' validity.

i. ***IID's Actions and the Lack of Public Transparency and Notice Contributed to this Validation Action Including Some, But Not All of the QSA.***

IID purposefully included only 13 of the 35-total QSA contracts in Case 1649. There was no public notice of which QSA contracts were *not* included in Case 1649. Some of the final QSA contracts were never reviewed by the public because copies were not available and/or the contracts were only in outline or draft form when approved by IID at its October 2, 2003, meeting. (Vol-8:Tab-161:AR3:CD3:30102-30103; Vol-7:Tab-137:AR3:CD14:400131-400132 [attaching incomplete list of QSA

contracts]; Vol-8:Tab-163:AR4-08-1055-35347/35350; Vol-8:Tab-162:AR3:CD2:20042; AA:34:199:9030; AA:47:292:12722, 12740-12741.

Further, the subject matter or *res* of the validation complaint (the QSA-Contracts) was never served with the complaint. The Water Agencies included in their supersedeas appendix a copy of the first amended complaint *with* copies of all the exhibits (the 13 QSA-Contracts), and *without* the proof of service, to suggest the QSA-Contracts were served with the complaint. (AA:1-4:1:1-1079.) However, the proof submitted to this Court by the County Agencies shows the first amended complaint was never served with exhibits. (RA:1:2:14.) Because the original and second amended complaints were not served with exhibits, validation opponents did not have copies of the QSA-Contracts IID sought to validate until the administrative records were produced. (AA:6:38:6:1496-1508.)

Ironically, the trial court determined that the 22 “missing” QSA contracts IID excluded from its complaint may have been a matter properly challenged in Case 1643. Case 1643 was a reverse validation action filed shortly after Case 1649 (AA:47:292:12711-12712), but was dismissed in December 2003 by the Imperial County Superior Court (which assumed Cases 1649 and 1643 covered the same contracts) after IID sought to quash publication of the summons. (AA:47:292:12711-12712; RT-3/8/03:1:2, 13-14.) In doing so, IID presented a misleading scope of its validation complaint (RT-12/8/03:1:12), from which it now seeks to exploit and benefit from. (AA:47:292:12711-12712.)

The unfortunate truth was that Case 1649 encompassed only some, but not all, of the QSA contracts that were within the scope of Case 1643.³⁰

³⁰ Counsel for Cuatro del Mar pointed out: “[F]or IID to, you know, surgically remove by not including the IID DWR Contract, obligations are incorporated by reference into all of these interrelated contracts, all signed on the same day, ignores the reality of the situation.” (RT-5/29/08:4:1020.)

But for IID's actions in dismissing Case 1643, the trial court would have had before it all 35-QSA contracts.

ii. *The Trial Court Could Not Find that Any of the Missing 22 QSA Contracts Were Validated by Operation-of-Law.*

It is legally incorrect to assume, as IID does, that the missing 22-QSA contracts are now validated-by-operation-of-law. This consequence can only apply when no validation action has been brought, the 60-day statute of limitations period has run, and "only where an agency's action is eligible for validation under the validation statutes. Not all actions are so eligible. The scope of the authorizing statutes, including Water Code section 22762, must be applied to make such a determination." (AA:47:292:12711.) Even as to the 13 QSA-Contracts, the trial court determined that Contract M involving flooding at the Salton Sea did not fall within the Validation Statutes.³¹ (AA:47:292:12719-12721.)

The trial court was frustrated by the notion that validation may occur when no action is brought, the contracts have not been the subject of any constitutionally required due process, and the contracts are otherwise void or abhorrent to public policy. (AA:47:292:12714-12715.) The trial court observed that validation law appeared to ignore the body of law regarding matters that cannot come into existence, because they are void, and, hence, cannot as a matter of law be validated. (AA:47:292:12715.)

The trial court determined that if it applied validation law in isolation, then the *Friedland*, 62 Cal.App.4th 835, holding would apply. With respect to matters which have been or which could have been adjudicated in a validation action, such matters must be raised within the statutory limitations period in Code of Civil Procedure section 860 et seq., or they are waived. (AA:47:292:12715.) As such, the trial court found that

³¹ SDCWA, CVWD, and MWD confirm this in footnote 44 of their opening brief. Thus, IID's claim the trial court validated Contract M is incorrect.

“[t]o the extent that the validation statutes apply to the IID-DWR³² Agreement, and as the 60-day limitations period under the validation statutes has expired and no direct or reverse validation action on that agreement was brought, or if brought, remains pending, the Court finds that that agreement, as with other similarly situated ‘matters’, have been validated by operation of law.” (*Id.*) The trial court recognized it did not decide whether the Validation Statutes applied to the IID-DWR Agreement, and that *Friedland* did not address the situation when a contract is void. (*Id.*) IID’s theory fails, as these issues had to be resolved, but were not.³³

Validation and contract laws are not mutually exclusive. While the trial court observed that the validation statutes appeared silent on the voidness issue, contract “law is clear that time does not confirm a void act. (Civ. Code § 3539.)” (AA:47:292:12714.) An illegal contract is void; it cannot be ratified by any subsequent act, and no person can be estopped to deny its validity. (*Black Hills Investments, Inc. v. Albertson’s, Inc.* (2007) 146 Cal.App.4th 883, 896.)

The trial court properly relied on *Reno vs. American Ice Machine Co.* (1925) 72 Cal.App. 409, in finding a void contract cannot be ratified. In *Reno*, the court found that because the issuance of the stock to the plaintiff during the term of his employment was void, the contract for the issuance of the stock was equally void. (*Id.* at 410-412.) The *Reno* Court’s rationale is applicable here:

[T]here remains the steadfast rule of law that one may not ratify a void contract—a contract contrary to an

³² The QSA-Contracts included agreements between IID-DWR-MWD to sell the mitigation water for the Salton Sea to MWD. (Vol-9:Tab-177:AR3:CD1:10893-10912; Vol-9:Tab-176:AR3:CD1:10080-10091.)

³³ As an elementary matter, the trial court lacked jurisdiction over the missing 22-QSA contracts and could not render a decision as to the validity of these contracts because they were not in the published notice. (*Katz*, 144 Cal.App.4th at 1031-1032.)

express statute. This is one of the distinctions between void and voidable contracts. The doctrines of estoppel by conduct and ratification have no application to a contract which is void because it violates an express mandate of the law or the dictates of public policy. Such a contract has no legal existence for any purpose, and neither action nor inaction of a party to it can validate it, and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity.

(*Id.* at 413; *Wood v. Imperial Irrigation Dist.* (1932) 216 Cal. 748, 757-759.) The trial court also found the IID-DWR Agreement explicitly contemplated invalidation (or other termination) of the State-QSA: “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 [State] QSA, referred to in Recital 1, remain in effect.’” (AA:47:292:12749.) Thus, when the trial court invalidated the State-QSA, the terms of the IID-DWR Agreement caused it to terminate as well.

The IID-DWR Agreement also relied upon: (1) State’s obligation in the invalidated QSA-JPA (Article 3.5); (2) DWR assuming responsibility for Salton Sea mitigation costs relating to the transfer of the water under the QSA-JPA; and, (3) the Secretary delivering water under the invalidated CRWDA.³⁴ (Vol-9:Tab-177:AR3:CD1:10893-10899.) Failure of a contractual condition that predates performance means the contract ceases to exist. (Civil Code, §§ 1436, 1439.) The DWR-MWD Agreement contained the same provisions, except for the QSA-JPA. (Vol-9:Tab-176:AR3:CD1:10080-10087.) Thus, a contract without legal existence cannot be validated, and a contract that is extinguished by its own terms cannot be kept alive merely because it was not challenged in validation.

³⁴ In fact, IID concedes it did not include the IID-DWR Agreement in the validation action because it has unfulfilled conditions precedent and DWR had yet to conduct CEQA review.

In *Fontana Redevelopment Agency*, 153 Cal.App.4th 902, the court refused to validate bonds because they violated a bond indebtedness limit, even though the bonds arose from an amendment to an owner participation agreement that was previously validated. (*Id.* at 913.) The court held it “cannot validate ongoing illegality. (*Stockton Morris Plan Co. v. Calif. Tractor & Equipment Corp.* (1952) 112 Cal.App.2d 684, 689-690, 247 P.2d 90.) Further, even when an illegal act may be immune from facial attack, it can be challenged under new factual circumstances. (*Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 768, 771-777).” (*Id.*) Thus, the missing 22-QSA contracts cannot be considered “valid” if they violate the law.

iii. *The 13 QSA-Contracts Can Be Invalidated Even if 22-Contracts are Missing From the Validation Complaint.*

The trial court found that even if one or more of the missing 22-QSA contracts were validated-by-operation-of-law, Article 3.6 of the IID-DWR Agreement (and presumably Article 3.5 of the DWR-MWD Agreement) supported its conclusion that these contracts did not limit the court’s jurisdiction to review the QSA-Contracts. (AA:47:292:12748-12749.)

IID, relying on *California Commerce Casino, Inc.*, 146 Cal.App.4th 1406, argues the trial court erred. The sections cited by IID refer to the court’s determination that plaintiffs’ complaint should have been a validation action. (*Id.* at 1410, 1414.) The court never ruled contracts validated-by-operation-of-law immunize other contracts timely challenged in validation from an invalidity decision. Rather, the court ruled the challenge to AB 687 challenged the validity of the compacts, and thus, the case should have been brought as a validation action. (*Id.* at 1430-1431.)

IID also argues this Court adopted the *California Commerce Casino* rationale in *Hollywood Park Land Company, LLC v. Golden State Transportation Financing Corporation* (2009) 178 Cal.App.4th 924. This

Court did cite passages from *California Commerce Casino* with approval, however, it was not for the proposition IID argues. Rather, this Court said it was persuaded by the analysis in finding that the plaintiffs' complaint was identical to the one in *California Commerce Casino* and, thus, this case was untimely for the same reason. (178 Cal.App.4th at 945-946.)

The trial court refused to legitimize IID's fanciful interpretations of law, and this Court should too. For example, the trial court believed if Section 9.2 of the QSA-JPA was validated,

executive agencies of the state can contract for amounts well over the constitutional debt limit where some amount is contingent but everyone knows there is a very real possibility that the debt limit amount will be exceeded by simply adding language saying the obligation is an unconditional contractual obligation of the State not conditioned upon an appropriation by the Legislature, contractually binding future legislators' hands in contravention of our Constitution. Which State agency would be the first to follow the logical import of judicial validation of such language and commit to a significant expenditure for which there is no available funding by simply adding the magic language that this commitment is an unconditional contractual obligation of the State not conditioned upon an appropriation by the Legislature? Informed contracting parties might add some uncertainty as to the exact amount of the expenditure, to bolster the 'contingency' defense. And thus, by formula established in the actual wording of the QSA documents and validated here, the Constitutional [sp] limits would be easily gutted.

(AA:47:292:12742, 12745.)

IID asks this Court to similarly "gut" validation and sanction a method so a plaintiff can reap the benefits of validation but not bear the risks. Which public agencies will be next to file incomplete validation actions to assure a favorable result? Because no public notice is required to identify the contracts *not* included in the validation action, it will be easy to

create the misleading impression that answering defendants will be able to challenge the validity of the entire action. But, by manipulating the scope of actions sought to be validated, opponents will find out too late that what they believed to be a validation lawsuit was in fact a futile exercise with a predetermined result.

B. Invalidation of the QSA-JPA Requires Invalidation of the Remaining QSA-Contracts.

i. The QSA-Contracts Would Not Have Been Executed Without the QSA-JPA.

The trial court properly concluded that invalidation of the QSA-JPA required invalidation of the remaining 11-QSA-Contracts:

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.)³⁵

The QSA would not have been executed without the QSA-JPA and the State's obligation to pay for mitigation exceeding \$133 million. (Vol-8:Tab-171:AR3:CD1:10444.) Two of three IID directors who voted in favor of the QSA have confirmed this in declarations. Bruce Kuhn attested that he relied upon the State's unconditional commitment for both mitigating and restoring the Salton Sea, and without these commitments he

³⁵ The trial court also rejected Escondido's and VID's argument that the Allocation Agreement (per Article 28) is sufficiently different from the other QSA-Contracts such that it can survive invalidation of the State-QSA and/or QSA-JPA. (AA:47:292:12750-12751.)

would not have voted for the QSA. (RJN:6:133-135.) Likewise, Rudy Maldonado also confirmed he too would not have voted for the QSA but for the State's unconditional obligation. (RJN:5:116-118.) IID is a party to all of the QSA-Contracts; because it would not have entered into the QSA without the State's commitment in the QSA-JPA, all of the QSA-Contracts must be invalidated. The trial court recognized this, stating it was unreasonable to claim the parties would have understood the State's obligation as being something other than the key contribution to getting the QSA deal done. (AA:47:292:12747.)

Contrary to SDCWA, CVWD, and MWD's desire to disregard the recitals and continue the QSA without the QSA-JPA, IID confirms the parties meant what they stated in QSA-JPA Recital H: that the QSA would not have been entered into without the State's obligation. (IID AOB, pp. 56-57.) As discussed in Section IV.2.A., the QSA-JPA is intended to ensure implementation of the mitigation in the EIR/EIS and PEIR. (See IID's diagrams showing the central role of the QSA-JPA, at AA:33:192:8845.) The QSA-JPA resolved the key obstacle to the QSA: mitigation funding. (Supp.AA:203:1925:50682-5063; AA:27:190:6989.) Thus, if the QSA-JPA is invalid, those environmental documents and project approvals that relied upon the EIRs must also be voided. The QSA cannot be allowed to proceed without adequately funded mitigation because this would destroy the integrity of the CEQA process.

ii. *The Validation Complaint and QSA-Contract Language Support Invalidation of the QSA-Contracts if the QSA-JPA is Void.*

IID set forth the concept that the QSA-Contracts were mutually dependent in Paragraph 23 of the complaint, which states: "The contracts described in paragraphs 26-28 (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.” (AA:6:38:1488 [emphasis added].)

The complaint’s allegation is consistent with the parties’ intentions to structure the QSA as a package deal. Each QSA-Contract settled issues necessary to create a global, comprehensive settlement of the disputes among the California Colorado River water users so that California would continue to have access to surplus Colorado River water in addition to its 4.4 mafy. (AA:33:195:8948-8956; AA.Supp:203:1925:50674-50677; AA:33:187:6913-6915; AA:27:190:6981; Vol-3:Tab-51:AR3:CD10:101804_0056.) Thus, the Water Agencies structured the QSA so that “all QSA water budget components, state and federal approvals [including DOI/BOR and SWRCB], permits and water contract amendments” would terminate if the QSA was terminated. (Vol-2:Tab-33:AR3:CD2:20641.)

As shown in the table below, the State-QSA is dependent on the mitigation funding provisions in the QSA-JPA. If the QSA-JPA is invalid, then the State-QSA is invalid. The State-QSA identifies all of the related agreements that incorporate, reference, or otherwise depend on it.³⁶ Thus, if the State-QSA is void, then all of these other contracts are void as well.

The CRWDA is a condition precedent to the State-QSA. (Vol-5:Tab-74:AR4-06-435-27302.) The CRWDA reflects the Secretary’s approval of the State-QSA and agreement to deliver water in accordance with the QSA.³⁷ (Vol-8:Tab-164:AR3:CD1:10274, 10283-10286; Vol-

³⁶ IID’s attorney declared under penalty of perjury that the water transfers are the core of the QSA agreements. (Supp.AA:97:1097:24240.) SDCWA, MWD, and CVWD admit on page 79 of their opening brief that at least 6-QSA-Contracts are expressly “coterminous” with the State-QSA.

³⁷ SDCWA, CVWD, and MWD claim the Water Agencies are bound to the CRWDA even if the water transfers are stopped. (AOB, at 84.) This is not consistent with the CRWDA’s delivery schedule that implements the QSA or MWD’s prior position that the water transfer is expressly conditioned upon the CRWDA. (Supp.AA:57:667:14018.)

9:Tab-178:AR3:CD1:10044; Vol-5:Tab-75:AR3:CD11: 203060, 203064.)

Without the State-QSA, there is no agreement among the State-parties to the CRWDA as to the Secretary’s delivery of California’s apportionment of Colorado River water.

In short, invalidation of the QSA-JPA has a domino effect on all the other QSA-Contracts. If the QSA-JPA is invalid, the State-QSA is invalid. If the State-QSA is invalid, so are all the others. If the CRWDA is invalid, the State-QSA is invalid, and so on.

QSA-Contract	Language Supporting Interrelatedness or Interdependence of QSA-Contracts
<p>Contract A: CRWDA between U.S. (DOI), IID, MWD, CVWD, and SDCWA</p>	<p>Recital C: “IID, CVWD, MWD, and SDCWA have entered into agreements relating to . . . their respective beneficial consumptive use of Colorado River water and desire that, for the term of this Agreement; Colorado River water be delivered by the Secretary in the manner contemplated in this Agreement.” (Vol-8:Tab-164:AR3:CD1:10274.)</p> <p>Section 6(b): “This Agreement will terminate on December 31, 2037, if the 1998 IID/SDCWA transfer program terminates that year.” (Vol-8:Tab-164:AR3:CD1:10277.)</p> <p>The Secretary’s agreement to deliver water approves and implements the State-QSA and water transfers. (Vol-8:Tab-164:AR3:CD1:10274-10277, 10283-10285; Vol-8:Tab-168:AR3:CD1:10299-10302; Vol-9:Tab-178:AR3:CD1:10045.)</p> <p>“Contract A is...clearly an integral part of the QSA and listed as a QSA related agreement in Contract E.” (AA:47:292:12718.)</p>
<p>Contract B: Allocation Agreement between the U.S., MWD, CVWD, IID,</p>	<p>Section 3.45: “[QSA]’ shall mean that agreement of the same name among IID, CVWD, and MWD.” (Vol-8:Tab-165:AR3:CD1:10206.)</p>

QSA-Contract	Language Supporting Interrelatedness or Interdependence of QSA-Contracts
SDCWA, San Luis Rey Bands, Escondido and others	<p>Section 4A.4: “SDCWA shall take delivery of water under this Allocation Agreement pursuant to the [CRWDA] [Contract A]...” (Vol-8:Tab-165:AR3:CD1:10211.)</p> <p>Section 5.1: “During the term of the [QSA], the Secretary shall determine the quantity of water available for allocation as a result of the Projects in accordance with Sections 5.2 through 5.6 herein.” (Vol-8:Tab-165:AR3:CD1:10211-10212.)</p> <p>Section 7.4: “During the term of the [QSA], the Secretary shall deliver water for the benefit of the San Luis Rey Settlement Parties...” (Vol-8:Tab-165:AR3:CD1:10217-10218.)</p> <p>“Contract B...facially references the QSA in multiple locations including having water delivered during the term of the QSA (para. 7.4), and is listed as a QSA related agreement in Contract E.”³⁸ (AA:47:292:12718.)</p>
Contract C: Conservation Agreement among BOR, IID, CVWD, and SDCWA	<p>Recital C: “IID, CVWD and [MWD] have negotiated a [QSA] that includes implementation of projects...” (Vol-8:Tab-166:AR3:CD1:10579.)</p> <p>Recital F: “The QSA is subject to the implementation of a mechanism to resolve and allocate environmental mitigation responsibility between the Parties on the terms and conditions set forth in that certain [ECSA] [Contract J] ...CVWD, IID, SDCWA, and the State of California have also entered into that certain [QSA-JPA]...” (Vol-8:Tab-166:AR3:CD1:10580.)</p>

³⁸ SDCWA’s General Manager declared under penalty of perjury that the Allocation Agreement and CRWDA were directly related to SDCWA obtaining water through the QSA. (Supp.AA:111:27719-27720.) IID’s participation in the Allocation Agreement was also conditioned upon the QSA. (Vol-6:Tab-110:AR3:CD7:70908.)

<p>QSA-Contract</p>	<p>Language Supporting Interrelatedness or Interdependence of QSA-Contracts</p>
	<p>Recital G: “CVWD, SDCWA and IID have agreed to substantial commitments of water, money and other valuable resources to implement the QSA, including but not limited to, this Agreement and other commitments of funds to mitigate environmental impacts of the QSA, including the water transfers and other activities. CVWD, SDCWA and IID, individually and collectively, would not have made these commitments but for the commitments of the State in the QSA JPA.” (Vol-8:Tab-166:AR3:CD1:10580.)</p> <p>“Contract C...mentions the QSA in various recitals, and is listed as a QSA related agreement in Contract E.” (AA:47:292:12718.)</p>
<p>Contract D: IID-SDCWA Agreement (Fourth Amendment) between IID and SDCWA</p>	<p>Recital A: “...The QSA and Related Agreements consensually establish the terms for the priority, use, and distribution of Colorado River Water among IID, Authority [SDCWA], MWD, and CVWD...” The QSA-Contracts are listed as the “Related Agreements.” (Vol-8:Tab-167:AR3:CD1:11342.)</p> <p>Recital B: “This Amendment is to modify certain aspects of the Agreement to be consistent with the terms and conditions of the QSA and Related Agreements [identified in Recital A]...This amendment is expressly conditioned upon the satisfaction or waiver of all terms and conditions of the QSA and the occurrence of the QSA Effective Date as defined in the QSA.” (Vol-8:Tab-167:AR3:CD1:11342, 11357-11358, AA:47:292:12750.)</p> <p>The QSA is a condition to the Amendment. (Vol-8:Tab-167:AR3:CD1:11343, 11356-11357.)</p>

<p>QSA-Contract</p>	<p>Language Supporting Interrelatedness or Interdependence of QSA-Contracts</p>
	<p>The State’s contribution to environmental mitigation is a condition of the transfer. (Vol-1:Tab-14:AR3:CD1:11186-11187; Vol-8:Tab-167:AR3:CD1:11358.)</p> <p>The following contracts are conditioned on the QSA. (Vol-8:Tab-167:AR3:CD1:11358.)</p> <p>“Contract D...is facially tied to the QSA, including the [QSA-JPA], and is listed as a QSA related agreement in Contract E.” (AA:47:292:12718.)</p>
<p>Contract E: State-QSA between IID, MWD, and CVWD</p>	<p>Recital G: “This Agreement and the Related Agreements are intended to consensually settle longstanding disputes...and to facilitate agreements and actions which will enhance certainty and reliability of Colorado River water supplies available to the Parties...” (Vol-8:Tab-168:AR3:CD1:10291.)</p> <p>Section 1.1 defines and incorporates the other QSA Contracts. (Vol-8:Tab-168:AR3:CD1:10292-10299.)</p> <p>The State-QSA is premised upon the signatories’ acceptance of the terms, conditions, and mitigation in the EIRs, and performance and payment of mitigation costs that are described in the EIRs, QSA-JPA, and ECSA. (Vol-8:Tab-168:AR3:CD1:10310.)</p> <p>“Contract E . . . facially calls itself the QSA...contains an Exhibit A setting out QSA related agreements, and contains an Exhibit B listing related agreements that are executed but contingent on permits, approvals or consents, or to be signed after QSA execution.” (AA:47:292:12718.)</p>

QSA-Contract	Language Supporting Interrelatedness or Interdependence of QSA-Contracts
<p>Contract F: MWD Acquisition Agreement between IID and MWD</p>	<p>Recital C: “This Agreement is one of several agreements executed and delivered...pursuant to the [QSA]...” (Vol-8:Tab-169:AR3:CD1:10346.)</p> <p>Contract F, sections 5.1(2) and 6.3(3), reference the QSA-JPA [Contract I]. (Vol-8:Tab-169:AR3:CD1:10349-10350.)</p> <p>Section 11.1(1)-(2): MWD’s rights and IID’s obligations under Contract F are conditioned upon satisfaction or waiver of QSA conditions precedent by the QSA closing date, and that each of the QSA related agreements are in full force and effect as of the Effective date.” (Vol-8:Tab-169:AR3:CD1:10352.)</p> <p>“Contract F...facially recites that it is executed pursuant to the QSA, mentions the QSA-JPA in multiple locations, and is listed as a QSA related agreement in Contract E.” (AA:47:292:12718.)</p>
<p>Contract G: CVWD Acquisition Agreement between IID and CVWD</p>	<p>Recital C: “This Agreement is one of several agreements executed and delivered...pursuant to the [QSA]...” (Vol-8:Tab-170:AR3:CD1:10378.)</p> <p>Contract G, section 6.5, 10.3, and 12.1 reference the ECSA [Contract J], and section 12.1 also references the QSA-JPA. (Vol-8:Tab-170:AR3:CD1:10385, 10387, 10389.)</p> <p>Section 9.1(1): CVWD’s rights and IID’s obligations under Contract G are conditioned upon satisfaction or waiver of QSA conditions precedent by the QSA closing date. (Vol-8:Tab-170:AR3:CD1:10386.)</p> <p>“Contract G...facially recites that it is executed pursuant to the QSA, mentions the QSA-JPA in multiple locations, and is listed as a QSA related agreement in Contract E.” (AA:47:292:12718.)</p>

QSA-Contract	Language Supporting Interrelatedness or Interdependence of QSA-Contracts
Contract H: Groundwater Storage Agreement between IID and CVWD	<p>Section 8.1: “This Agreement shall terminate . . . or concurrently with the termination of the [QSA].” (Vol-8:Tab-171:AR3:CD1:10443.)</p> <p>Section 10.1: “The Obligations of the Parties under this Agreement are subject to the IID/CVWD Acquisition Agreement [Contract G] becoming effective.” (Vol-8:Tab-171:AR3:CD1:10444.)</p>
Contract I: QSA-JPA Between the State (DFG), SDCWA, IID, and CVWD	<p>Recital H: “(n)either 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.” (Vol-8:Tab-172:AR3:CD1:10458; AA:47:292:12750.)</p> <p>Recital I: “The terms of the 1998 IID/SDCWA Transfer Agreement [Contract D] and the IID/CVWD Acquisition Agreement [Contract G] 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 [ECSA] [Contract J]...” (Vol-8:Tab-172:AR3:CD1:10458.)</p> <p>“Contract I is listed in Contract E as a QSA related agreement, and facially recites that it is the QSA-JPA referenced in the QSA and in the [ECSA].” (AA:47:292:12719.)</p>

QSA-Contract	Language Supporting Interrelatedness or Interdependence of QSA-Contracts
<p>Contract J: ECSA between SDCWA, IID, and CVWD</p>	<p>Recital A: “IID, MWD and CVWD have entered into the [QSA] [Contract E].” (Vol-8:Tab-173:AR3:CD1:10539.)</p> <p>Recital B: “IID and SDCWA have executed [the IID/SDCWA Transfer Agreement].” (Vol-8:Tab-173:AR3:CD1:10539.)</p> <p>Recital E: “The Parties and the State of California have executed the QSA-JPA as defined in the QSA...” (Vol-8:Tab-173:AR3:CD1:10539.)</p> <p>Section 1.1: “The terms with initial capital letters that are used in this Agreement shall have the same meaning as set forth in Section 1.1 of the QSA...” (Vol-8:Tab-173:AR3:CD1:10539.)</p> <p>“Contract J...is listed as a QSA related agreement in Contract E.” (AA:47:292:12719.)</p>
<p>Contract K: Amendment to the 1988 IID/MWD Agreement</p>	<p>Recital H: “The Parties desire to amend the Agreement as contemplated by the [QSA] [Contract E]...and the related Acquisition Agreements [Contracts F, G]...” (Vol-9:Tab-174:AR3:CD1:10336.)</p> <p>“Contract K...makes reference to the QSA in multiple locations, and specifically claims to be in furtherance of the QSA and related agreements.” (AA:47:292:12719.)</p>
<p>Contract L: Approval Agreement Amendment between IID, MWD, Palo Verde Irrigation District, and CVWD</p>	<p>Recital F: The Approval Agreement incorporates the Conservation Agreement [Contract C]. “[T]he Parties water rights may be exercised in any lawful manner consistent with the [QSA]...” (Vol-9:Tab-175:AR3:CD1:10926.)</p> <p>Recital I: “The Parties desire to amend the Agreement as contemplated by the [QSA] [Contract E]...and the related Acquisition Agreements [Contracts F, G].” (Vol-9:Tab-175:AR3:CD1:10926.)</p>

QSA-Contract	Language Supporting Interrelatedness or Interdependence of QSA-Contracts
	<p>Section 13: “The [Amendments] will take effect upon the Effective Date as defined in the [QSA].” (Vol-9:Tab-175:AR3:CD1:10933.)</p> <p>Section 14: “The amendments made by this Amendment to the Approval Agreement will terminate and be of no force or effect upon the termination of the [QSA].” (Vol-9:Tab-175:AR3:CD1:10934.)</p> <p>“Contract L...facially recites that the parties desire to amend the Approval agreement as contemplated by the QSA and related agreements.” (AA:47:292:12719.)</p>

Until recently, Appellants represented to the trial court that the QSA-Contracts are “intertwined.” At the Case 83 demurrer hearing, IID claimed the Air District’s and SCAQMD’s proposed remedy should be rejected because it failed to recognize “the complexity of the agreements that are attached to the validation complaint, the QSA itself, the IID/San Diego transfer, the IID/Coachella transfer, the IID/Met transfer, the [CRWDA], the funding agreement for mitigation, and a variety of other agreements that are all before Your Honor. They are all intertwined. The settlements depend on each other.” (RT-2/5/08:3:817, 818.)

Likewise, SWRCB and SDCWA argued Case 83 must be dismissed because invalidation of the EIR/EIS and Water Order would “unravel” the QSA, water transfers, and CRWDA, thereby harming CVWD and MWD that were not named as real parties in the lawsuit. (Supp.RA:2:12:227-229; Supp.RA:2:13:253-255.) To the extent that the Water Agencies now argue invalidation of the QSA-JPA does not require invalidation of the remaining 11-QSA Contracts, this inconsistent position is barred. (Evid. Code, § 623; *City of Long Beach*, 3 Cal.3d at 89; *DRG/Beverly Hills*, 30 Cal.App.4th at 59; *Jogani*, 141 Cal.App.4th at 169.)

iii. *The State's Obligation Cannot Be Severed From the QSA-JPA To Make it Validatable.*

SDCWA, CVWD, and MWD argue QSA-JPA section 15.2 allows the parties to continue the agreement without the State's unconditional obligation in section 9.2, and the QSA does not terminate until 12-months after stoppage of conserved water (if the infirmity is not cured). Validation tests whether a contract is valid or not. Appellants fail to cite to any legal authority to support the court's ability to sever a term, let alone a material one, to find a contract valid. The trial court rejected this argument. (AA:47:292:12742-12743.)

The trial court found the QSA-JPA unconstitutional, so it is void. A void "contract has no existence whatever. It has no legal entity for any purpose, and neither action nor inaction of a party to it can validate it ..." (*Colby v. Title Ins. & Trust Co.* (1911) 160 Cal. 632, 644.) Thus, Appellants cannot use provisions of void contracts to revive them because void contracts cannot be given any effect. (*Garcia v. California Truck Co.* (1920) 183 Cal. 767, 770 [void contract is "a mere 'scrap of paper,' without binding force, that could be entirely disregarded without any rescission."].)

Severance would not be appropriate in any event. In *Santa Clara Valley Mill and Lumber Co. v. Hayes* (1888) 76 Cal. 387, the court, in invalidating an agreement, stated:

The very essence and mainspring of the agreement - the illegal object - "was to form a combination among all the manufacturers of lumber at or near Felton for the sole purpose of increasing the price of lumber, limiting the amount thereof to be manufactured, and give plaintiff control of all lumber manufactured..." This being the inducement to the agreement, and the sole object in view, it cannot be separated and leave any subject-matter capable of enforcement.... The good cannot be separated from the bad, or rather the bad enters into and permeates the whole contract, so that

none of it can be said to be good, and therefore the subject of an action.

(*Id.* at 393 [internal paragraph symbols omitted].) Here, the State's unconditional agreement was the key inducement to the parties executing the QSA and it cannot be separated from the package deal.

IV. AIR DISTRICT'S OPENING ARGUMENTS IN SUPPORT OF CROSS-APPEAL.

1. THE TRIAL COURT ERRED IN DENYING THE AIR DISTRICT'S MOTIONS TO INTERVENE IN CEQA CASES 1653 AND 1656.

The trial court erred in denying the Air District's intervention motions in Cases 1653 and 1656. (AA:7:53:1740-1747, 1751-1752.) The trial court's sole basis for denying the motions, that the Air District did not exhaust its administrative remedies, is based on a misapplication of the law.

A. The Trial Court's Ruling Denying the Air District's Intervention Motions is Inconsistent with its Ruling Dismissing the Air District's Case 83.

When the trial court dismissed Case 83 (now pending before this Court on appeal in related Case No. C059264), the court stated the Air District would be able to adjudicate its CEQA claims in Cases 1653, 1656, and 1658, and as defenses in Case 1649.³⁹ (AA:7:47:1671-1676.) The Air District moved to intervene in Cases 1653 and 1656. (Supp.AA:126:1281:31428-31452; Supp.AA:126:1283:31469-31493.) The Water Agencies opposed these motions, despite prior representations that these cases would be alternative forums for the Air District to adjudicate its CEQA claims.⁴⁰ (*See* Supp.RA:1:7:165; Supp.RA:1:8:194.)

³⁹ SWRCB represented in its demurrer papers in Case 83 that the Air District would be able to adjudicate its CEQA claims in the CEQA writ cases and in validation. (Supp.RA:1:6:151, 156-158.)

⁴⁰ The Water Agencies are barred from asserting inconsistent positions

During oral argument, the Air District provided the trial court with evidence showing its participation in the administrative process. (RT-5/1/08:4:922, 931-935.) The Air District also pointed out the Water Agencies did not object to party-status in Cases 1653 and 1656 at the time the trial court identified them as alternative forums. (RT-5/1/08:4:929.)

The trial court contradicted its Case 83 dismissal ruling by denying the intervention motions on the ground the Air District failed to exhaust its administrative remedies. (AA:7:53:1740-1747, 1751-1752.) The trial court's inconsistent rulings constitute prejudicial error, resulting in irreparable harm to the Air District.⁴¹ (*Neil Norman, Ltd. v. William Kasper & Company, Inc.* (1983) 149 Cal.App.3d 942, 949-950.) As a result of the trial court's dismissal of Case 83 and ruling denying intervention, validation became the only available forum for the Air District to adjudicate its CEQA claims (until the trial court declared the claims moot and eliminated all forums altogether).

B. The Air District Timely Objected to the EIR/EIS.

The trial court wrongly rejected the Air District's participation and comments to IID and SWRCB. Public Resources Code section 21177 provides that a party has until the close of the final hearing before the issuance of the NOD to object; the party need not have objected during the public comment period on the draft EIR. (*See also Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th 1109, 1121.) A party is also deemed to have exhausted administrative

under Evidence Code section 623 and the doctrines of equitable and judicial estoppel. *City of Long Beach*, 3 Cal.3d at 489; *DRG/Beverly Hills*, 30 Cal.App.4th at 59; *Jogani*, 141 Cal.App.4th at 169.

⁴¹ The trial court's denial of the motions denied the Air District party status in Cases 1653 and 1656, precluding the Air District from being able to raise evidentiary objections, of its appeal rights, fees and costs, and settlement authority in those cases. (RT-5/1/08:4:913, 915, 922.)

remedies if the objection is made before project approval, even after certification of the EIR. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199.)

The Air District participated in the EIR/EIS scoping process, which occurred before the projects were approved and an NOD issued. (RT-5/1/08:4:932.) On January 19, 2000, the Air District submitted a letter expressing concern “that the proposed water transfer will result in less water flow to the Salton Sea causing the Salton Sea to recede and create greater exposure of lakebed surfaces. A receding Salton Sea could create serious air pollution problems due to particulate emissions from the increased exposure of lakebed surfaces. Increased particulate emissions also pose a threat to public health.” (Vol-2:Tab-37:AR3:CD10:101534-101535; RT-5/1/08:4:931-932.) IID responded on March 29, 2000, inviting the Air District to attend a scoping meeting on April 17, 2000 (Vol-2:Tab-38:AR3:CD10:101573-101575), which the Air District’s counsel attended. (Vol-2:Tab-39:AR3:CD10:101447; RT-5/1/08:4:932-933.)

On April 25, 2002, the County’s Planning and Building Department sent extensive comments on the EIR/EIS on behalf of all County agencies. (Vol-4:Tab-62:AR3:CD7:71702-71729.) The County Board sent comment letters on both the EIR/EIS and PEIR. (Vol-5:Tab-81:AR3:CD11:200098-200101; Vol-5:Tab-82:AR3:CD11:200088-200093; Vol-5:Tab-76:AR2:CD3:08721-08723.) The County Board is the Air District’s Board. (Health & Saf. Code, § 40100; RT-5/1/08:4:934.)

The Air District participated in the SWRCB proceedings on IID’s and SDCWA’s joint petition. IID and SDCWA intended to address protests made to their SWRCB petition about environmental impacts caused by the water transfers through the EIR/EIS process. (Vol-2:Tab-48:AR2:CD3:08108; AA:33:192:8859; Vol-2:Tab-42:AR2:CD3:07952; Vol-2:Tab-43:AR2:CD1:01203-01204.) To that end, the SWRCB held 15-days of