

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

**COUNTY OF IMPERIAL
RESPONDENT'S AND CROSS-APPELLANT'S BRIEF**

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| 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 | |
| CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): <input type="checkbox"/> INITIAL CERTIFICATE <input checked="" type="checkbox"/> SUPPLEMENTAL CERTIFICATE | |
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1. This form is being submitted on behalf of the following party (name): County of Imperial

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): |
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- (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 22, 2010

Antonio Rossmann

 (TYPE OR PRINT NAME)



 (SIGNATURE OF PARTY OR ATTORNEY)

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SUMMARY AND PRAYER FOR RELIEF

On the surface [the Quantification Settlement Agreement] appeared to meet the new pattern of demand in the watershed. At a signing ceremony on October 16, held on the crest of Hoover Dam, Interior Secretary Gale Norton allowed herself to get carried away with enthusiasm. “With this agreement, conflict on the river is still,” she declared.

As an expression of blind optimism this approached Neville Chamberlain’s vision of peace at Munich....

(M. HILTZIK, COLOSSUS: HOOVER DAM AND THE MAKING OF THE AMERICAN CENTURY (2010) 398-399.)

A double tragedy brings the County of Imperial (county) to this Court. The first is the failure of California and its four Colorado River water agencies in the Quantification Settlement Agreement (QSA)-related agreements¹ to produce a responsible realignment of the river, one that respected the county from which the water will be taken and which will bear the brunt of an unresolved ecological disaster in the Imperial Valley and at the Salton Sea. The second is the nearly unbearable burden the county had to endure in seven years of litigation to get here, and even then without securing full adjudication of the merits. Justice is not served when the historians redress the wrongs before the courts.

¹ The county uses “QSA” or “state-QSA” to mean the specific three-state-party contract identified as exhibit E in the validation complaint. “QSA-related” refers to all contracts invalidated in superior court.

The county did not seek this fight. As the Imperial to San Diego water transfer, largest in American history, began to take shape, the county worked not to frustrate it, but to facilitate and improve it. National and state politicians have touted the transfer as a model for the future; the county tried to make it so.

The principal appellants have instead fostered disaster. Rather than holding themselves accountable for the QSA agreements' enormous risks, the water agencies at the eleventh hour elicited from the State an "unconditional" promise of financial responsibility that resides only on paper. The county supports the superior court's conclusion that this institutional sleight of hand merited invalidation as an unconstitutional promise lacking support in an appropriation.

The county's cross-appeal challenges even deeper failure of the State and the Colorado River water agencies. In the renegotiation of the QSA and transfer following the State Water Resources Control Board (state board) hearings, the county was deliberately excluded from the legislative and administrative transactions that culminated in the QSA-related agreements.

Thus while the county's cross-appeal necessarily addresses the substance of compliance with the Water Code and California Environmental Quality Act (CEQA), beneath the substance lies a foul process in need of this Court's correction. As many times as this Court has venerated the benefits of public participation in vital resource-allocation decisions, the appellant-and-cross-respondent State and water agencies have disrespected its teachings. The grave constitutional and statutory flaws of the QSA at bottom resulted not from lack of brilliance or dedication, but lack of respect for the most-affected people.

With so much at stake, those public officials entrusted with California's use of the Colorado River should be expected to live up to Judge Cardozo's characterization of the worthy trustee, "not honesty alone, but the punctilio of an honor the most sensitive."² That standard fell far short of realization here, with fatal flaws flowing as could be expected from transactions conducted behind closed doors, documents privately held.

In contrast to the strength and swagger of the appellant water institutions, the respondents and cross-appellants can appear as "eccentrics, castoffs," but in the end "teammates."³ Respondents divide into three camps: Imperial Valley landowners and water users who dissent from IID's decisions, environmental advocates, and the two Imperial County public agencies. Their sometimes-divergent interests converge in seeking this Court's relief. Starting out as strangers, they have informed each other's efforts here.

While the county has not involved itself in the dispute among the landowners and their water district, these landowners nonetheless remain the county's constituents as well. In that capacity, the county suffers from the unfair treatment to which the water agencies have subjected them. The Morgan/Holtz parties' account of foul process will inform the Court's address of the county's claims of foul substance. The Barioni/Krutzsch parties, by addressing the QSA-related agreements in venerable common-law doctrine, supplement the county's defense of the superior court's

² *Meinhard v. Salmon* (1928) 249 N.Y. 458, 463-464.

³ *They Really Are Giants*, N.Y. Times, November 3, 2010, p. A26 (editorial).

judgment. Cuatro del Mar stands out as the party that provoked the superior court's constitutional inquiry and adjudication. POWER adds to the county's environmental claims the perspective of those affected by the QSA on the urban coast.

This brief first presents the county's defense of the superior court's reasoning and result invalidating the QSA-related contracts, and the court's jurisdictional determinations. The county then turns to its two broad claims on cross-appeal: the QSA's and water transfer's failure to accord the county the protections established in the Water Code's wheeling statute, and the failure of the water agencies to comply with CEQA. These claims arise as defenses to IID's validation complaint and as petitions for mandate; in the former they also reach the Colorado River Water Delivery Agreement (CRWDA) executed by the four water agencies and Secretary of Interior.

Because the superior court adjudicated the wheeling claim, it is ripe here. The CEQA claims, fully briefed in superior court, present issues of law based on finally certified records, which this Court can substantively review and decide them as well. Given that seven years of litigation have failed to produce an address of their merit, and the extraordinary potential of CEQA's mandate to shape future reallocations of California's Colorado River water supply, the Court is asked to finally resolve them now, rather than waiting for the public health and environmental crisis that would accompany the Salton Sea's decline.

Finally, the county seeks definitive relief. As the county agencies argued in response to the water agencies' petition for supersedeas (pp. 59-63), decades of experience counsel that water law claims be adjudicated

with deserving restraints on unlawful water allocations. Until the Court decides the substantive issues, the scope of appropriate relief cannot be known. Given the extraordinary importance of this proceeding and its history, the Court is asked to consider separate briefing and hearing on relief, after issuing its merits decision, but before finality in this Court.

At a minimum, however, should the appeal be rejected, or the cross-appeal be sustained, or both, the Court should order the most modest but effective measures to restore the Imperial Valley to its condition in October 2003. As detailed in the county agencies' supersedeas response (pp. 63-65), the county agencies advocate judicial orders to maintain the Salton Sea at the level of -230.5 msl, pending the establishment of more meaningful measures ensuring compliance with the Court's ultimate judgment. In no event should the water agencies continue "business as usual," refusing to include the county as an equal.

**INCORPORATION OF BRIEFS AND
STATEMENT OF THE CASE**

The county hereby incorporates the entirety of the brief of respondent and cross-appellant Imperial County Air Pollution Control District (air district), including its glossary and notes on citation form.

The county also incorporates, for purposes of its prayer for relief, the Imperial County and Imperial County APCD (county agencies) responses and oppositions to the two petitions for unconditional writ of supersedeas (supersedes responses).

The county incorporates as its statement of the case the statement in the air district brief at pages 6-24 of that brief.

COUNTY OF IMPERIAL RESPONDENT'S BRIEF

I. IN THIS APPEAL FROM FINAL JUDGMENT, THIS COURT EXERCISES INDEPENDENT *DE NOVO* REVIEW OF THE APPELLANTS' SUBSTANTIVE CLAIMS, AND REVIEWS INDISPENSABLE PARTY DETERMINATIONS FOR ABUSE OF DISCRETION.

A. Appellants Timely Appealed from a Final Judgment.

The county adopts IID's statement of appealability (OB 2, ¶ 1); appellants (IID, CVWD, SDCWA, MWD, Vista, Escondido, and State) timely appealed the February 11, 2010 judgment, which finally disposed in superior court of all the claims in cases 1649/875, 1656/878, and 1658/879, in which the county is respondent and cross-appellant.

B. Appellants Properly Invoke this Court's De Novo Independent Review of their Substantive and Jurisdictional Claims.

The county agrees with appellants that their substantive claims present questions of law on undisputed facts, and should therefore be reviewable *de novo* in this Court's exercise of independent judgment. The same review applies to jurisdictional issues: the authority of this Court over federal officials, contracts and federal law compliance. Also reviewed *de novo* are determinations of "necessary parties" under subdivision (a) of Code of Civil Procedure section 389, and "recipient of approval" under Public Resources Code section 21167.6.5.

C. Three Water Agency Appellants Properly Agree that Ultimate Resolution of an Indispensable Party Claim is Reviewed for Abuse of Discretion.

The county concurs with appellants that "this Court reviews the trial court's determination under section 389, subdivision (b) regarding

indispensable parties for abuse of discretion. (*County of Imperial* [v. *Superior Court* (2007) 152 Cal.App.4th 13,] 25)” (SDCWA/CVWD/MWD OB 129.)

II. THE SUPERIOR COURT PROPERLY DETERMINED THAT THE STATE COULD NOT CONSTITUTIONALLY COMMIT TO FUND UNQUALIFIED DEMANDS FOR SALTON SEA MITIGATION.

A. The Court Properly Discounted the State’s Attempt to Avoid Invalidation by Disavowing the Salton Sea Commitment that Produced the QSA Contracts.

In superior court a startling flaw became obvious in the “unconditional” State commitment that brought the QSA back from near-collapse. As the superior court ruled, “tremendous pressure existed to get this deal done by [the legislative deadline of] October 12, 2003,” but the “wording of the QSA-JPA was not settled at the time of the IID Board’s formal approval on October 2, 2003.” (AA:47:292:12740.) Four days later, then-Director Robert Hight of the State’s Department of Fish and Game (DFG) warned that the draft QSA-JPA’s Salton Sea commitments amounted to a “blank check” exceeding what the State could deliver. (AA:13:92:03288) The QSA-JPA, and due to its critical nature the entire QSA, “still had substantive terms remaining to be negotiated” on October 6, 2003. (*Id.*) In the next several days, the three water agency signatories⁴ succeeded in their “apparent attempt to make the State’s commitment to pick up any environmental mitigation cost shortfall more certain than had

⁴ The “three agencies” referred to here are SDCWA, CVWD, and IID – an intentional absence of MWD. A different threesome submitted the three-agency appellants’ brief (SDCWA/CVWD/MWD), and yet a different triumvirate signed the QSA (all but SDCWA, an asserted QSA co-lead agency). See subsection VIII.A.2 & fn. 58, *infra*.

been provided by the California legislature in Senate Bill 654.” (AA:47:292:12740.)

The final QSA-JPA executed on October 10, 2003—the only version in the administrative record⁵—prompted the superior court’s finding of unconstitutionality. In section 9.2, the State accepted sole responsibility to implement and pay for environmental mitigation requirements (EMRs) for the Salton Sea exceeding the level (\$133 million in 2003 present value) assigned to the three water agencies (with no contribution from MWD). The State made an “unconditional contractual obligation” to cover the remaining mitigation costs, even disclaiming the “event of non-appropriation” as a defense. (Vol-8:Tab-172:AR3:CD1:10457.)⁶

The QSA-JPA confirmed that the agencies’ own commitments in the QSA “*would not have been made*” without the State’s financial promise, which provided the “*principal mechanism*” for ensuring compliance with federal and state environmental laws (Vol-8:Tab-172:AR3:CD1:10457.) The superior court found that validating the QSA agreements in reliance upon this empty paper commitment would “nullify” the requirement of article XVI, section 7 of the California Constitution, that the State cannot

⁵ IID concedes on appeal that it discovered an October 2, 2003 draft of the QSA-JPA prior to trial, but *concealed it from the superior court*, and did not disclose it until the February 2010 declaration of John Penn Carter in support of supersedeas. RJN:Exh.10:154-186. That concession contradicts the representation of IID’s counsel at trial that at the time of its approval, the JPA was merely in outline form. RT-11/12/09:8:2299; RT-12/16/09:12:3308. This draft, if authentic, confirms dramatic differences between the agreement IID’s directors approved and the agreement as finally executed, addressing such key matters as the scope of mitigation responsibility and the rights of outsiders.

⁶ Under section 9.2, the DFG director also serves on a three-member commission tasked with making reasonable determinations on the amount of costs and liabilities. Vol-8:Tab-172:AR3:CD1:10457.

enter contractual obligations not backed by appropriation. (AA:47:292:12742 (citing *White v. Davis* (2002) 108 Cal.App.4th 197, 230); see sections II.B-II.D, *infra*.) (In *White v. Davis* (2003) 30 Cal.4th 528, the California Supreme Court found merit in the appellate ruling cited here and ordered its publication, even though it partially reversed a preliminary injunction issue not pertinent here.)

In superior court the State construed the QSA-JPA's "unconditional" commitment as if transforming the Salton Sea into a desert mirage.⁷ In pretrial, the State effectively conceded the unlawfulness of section 9.2 as written. (AA:22:119:05590, 05614.) Later at trial, the State took both sides of the question: answering "yes" when the court asked whether "the State is "contractually committed" to pay for EMRs, even at a cost of "*billions of dollars*" (RT-11/24/09:10:2858; AA:47:292:12743 (emphasis added)), yet also claiming the State's representative on the QSA-JPA committee could unilaterally block the disbursement of funds, if, for example, "*mitigation is necessary but there isn't any 'money' in the checkbook for the State.*" (AA:47:292:12743; RT-11/24/09:10:2858 (emphasis added).)

On appeal, all appellants recast the State's duty as perhaps the most highly conditioned "unconditional" commitment in California history.⁸ They disingenuously portray the State's financial obligation as "unconditional," yet subject to multiple contingencies; "not conditioned"

⁷ "The West has been as notable for mirages as for realization of dreams." W. STEGNER, *THE AMERICAN WEST AS LIVING SPACE* (1987) 3.

⁸ Ironically, after unsuccessfully attempting to persuade the superior court that their readings of the QSA-JPA and Constitution are correct, appellants now criticize the court for paying too much attention to statements of attorneys representing *their side of the case*. See SDCWA/CVWD/MWD OB 40.

upon an appropriation, yet dependent upon legislative action. But the State undermines its own promise, openly defying efforts to translate its paper commitment into actual expenditure.⁹

The superior court, construing section 9.2's "unconditional" promise as written and in context,¹⁰ properly refused to "sanction a way" for the State to "contract around the Constitution." (AA:47:292:12742.) To avoid a nugatory promise, for example, the court understood the State commissioner's power to reject mitigation funding as confined to decisions "reasonably made." (AA:47:292:12744.) But read as genuine, the State's boundless promise exceeded constitutional limits.

Even if, however, appellants succeeded in rendering the State's "commitment" more contingent—if for example, the State's duty were confined merely to seek appropriations, or embraced unilateral power to veto all mitigation-- that would render the State promise illusory, erasing the contractually-necessary "meeting of minds." This contractual "bait and switch" would also vitiate the State's Salton Sea obligation upon which the QSA parties principally relied for compliance with federal and state environmental law. In short, if the superior court had not interpreted the State's unconditional promise literally, it would have been forced to find the QSA-JPA contract illusory, and null. Either way, the agreement cannot be valid.

⁹ State OB 23 ("If the State's representative does not agree to mitigation expenses over the limit, then the State's obligation will not be triggered").

¹⁰ The trial court concluded that even if costs ran to "millions or billions," "[e]veryone negotiating the QSA JPA Agreement would have reasonably understood" it to unconditionally commit the State to "pick up the entire tab" for EMRs exceeding the capped contribution, "notwithstanding the State's budget, appropriations, or other controls over expenditures." AA:47:292:12471.

1. The QSA-JPA Contract Must Be Construed Under the Rules of Contract, not Legislative Interpretation

Contractual interpretation effectuates the parties' mutual intention. (Civ. Code, § 1636; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) Courts must "give force and effect to every provision and avoid an interpretation that 'renders some clauses nugatory, inoperative or meaningless.'" (*People v. Doolin* (2009) 45 Cal.4th 390, 413, fn. 17 (emphasis added).)

Appellants misapply the standard for facial challenges to *legislative enactments*, which are constitutional if the court "can conceive" of applications not entailing "an inevitable collision with and transgression of" the constitutional provision. (*Taxpayers for Improving Public Safety v. Schwarzenegger [TIPS]* (2009) 172 Cal.App.4th 749, 769 (quoting *People v. Harris* (1985) 165 Cal.App.3d 1246, 1255-56); see also SDCWA/CVWD/MWD OB 39-40.) Contrary to the water agencies, *City of San Diego v. Rider* (1996) 47 Cal.App.4th 1473, 1490 recognizes, as did the superior court, that a contract is construed as lawful "if it can be done without violating the intention of the parties." (*Id.* (citing Civ. Code, § 1643); AA:47:292:12744; cf. SDCWA/CVWD/MWD OB 41).¹¹

Here, the final QSA-JPA never received approval of the water agencies' own decision-making bodies, much less the Legislature. Procedural irregularities surrounding the water agency boards' enactment of

¹¹ In *City of San Diego*, the facility lease, unlike the QSA-JPA contract, became part of an ordinance. 47 Cal.App.4th at 1490. SDCWA, CVWD and MWD (OB 41) apparently confuse this decision with *Rider v. City of San Diego* (1998) 18 Cal.4th 1035.

the QSA, and the county's exclusion at key stages of decision-making, underscore the need to apply the correct rules.¹²

2. The State's Unconditional Salton Sea Commitment Proved Indispensable to Securing the QSA Contracts.

The State's Salton Sea mitigation promise, recorded in section 9.2 of the QSA-JPA, makes the State solely responsible for the payment of EMRs exceeding the water agencies' cost limit of \$133 million in 2003 present value. Section 9.2, provides:

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

(Vol-8:Tab-172:AR3:CD1:10467 (emphasis added).)

Without the State's unconditional obligation, the QSA would not have been executed. (Vol-8:Tab-171:AR3:CD:1:10444.) The water

¹² After the IID 3-2 approval on October 2, the QSA-JPA contract was still not in final form; but IID staff and counsel did not return to the board for approval. The QSA was "approved" by CVWD on September 24, 2003, by SDCWA on September 25, 2003, and considered by MWD as of September 23, 2003 (through its executive secretary's stamp on minutes, without an approval resolution or findings). Vol-9:Tab-207:AR4-08-1027-35098 to 35142. The record lacks the version of the QSA-JPA approved by IID. The version attached to the Carter declaration (RJN:Exh.10:158-186), while not authenticated as the version IID approved, is from the same date as IID's approval.

agencies' commitments "would not have been made without the promises of the State as documented in this [QSA-JPA] Agreement." (Vol-8:Tab-172:AR3:CD1:10458 (emphasis added).)¹³ Section 1.2(23) of the Environmental Cost Sharing Agreement (ECSA) affirms the water agencies' understanding that the State's mitigation duty is an "unconditional contractual obligation ... not dependent on any further state action" and that these parties "are relying on the State Obligation in order to comply with the extensive state and federal requirements that mandate Environmental Mitigation Requirements." (Vol-8:Tab-173:AR3:CD1:10542.) Because the QSA-JPA defines EMRs very broadly, the State's obligation covers compliance with federal laws protecting air, water, and endangered species, in addition to CEQA and NEPA. (Vol.-8:Tab-173:AR3:CD1:10539.)

The State's obligation addressed what the superior court termed the "most significant environmental issue faced in the QSA process": dangerous declines in the Salton Sea. (AA:47:292:12738 (describing sea as "environmental Chernobyl").) Rapidly escalating salinity threatens the Salton Sea ecosystem. (*Id.*) But the QSA will substantially reduce the quantity of water entering the Imperial Valley through the All American Canal. Reductions in sea level from the project threaten to produce a toxic "dust bowl" and replicate the nation's worst PM₁₀ air quality sources, those at Owens Dry Lake. (See Air District OB 2, 70-71, 84, 100.)¹⁴

¹³ Two of three IID directors who voted for the QSA later confirmed that they would have voted "no" if not for the State's unconditional commitment. RJN:Exh.5:117-118; RJN:Exh.6:133, 134, 135. If mitigation were contingent on future funding, the Interior Secretary would also probably not have executed the CRWDA. Vol-1:Tab-15:AR2:CD3: 07021.

¹⁴ Mitigation of the environmental devastation caused by water transfers at Owens Lake cost about \$300 million (for controlling air pollution alone), plus the costs of mitigation water (about \$16 million to \$17 million annually) and maintenance costs (\$10 million annually before infrastructure, and \$25 million annually after the infrastructure). Vol-4:Tab-69:AR3:CD18:522452-522454.

The costs of addressing consequences to the Salton Sea concededly may reach billions of dollars.¹⁵ In September 2003, MWD Director Harris noted that costs to keep the Salton Sea from “turning into a dust bowl” exceeded \$2.5 billion or more, and that while MWD would escape liability by having it transferred to the State, “the State is broke.” (Vol-8:Tab-144:AR4-08-1028-35151.) (*Id.*)¹⁶ More recently, the Resources Agency estimated Salton Sea restoration costs at \$8.9 billion. (Supp.AA:123:1221:030531.)

In 2003, the QSA water agencies projected mitigation costs of \$178 million, \$193 million, and \$200 million.¹⁷ These do not even include restoration costs, which may still emerge as a component of mitigation.¹⁸

¹⁵ DOI and DFG also estimated Salton Sea restoration costs in the billions. AA:14:92:03359-03361, 03390. DFG Director Hight stated that “[w]ith each year the passes, restoration of the Sea becomes more difficult, and likely more expensive. If the water transfer occurs without restoration, the sea elevation will drop dramatically and will likely cause air quality problems. Cost estimates to restore the Sea range from \$.5 to 1.5 billion.” AA:14:92:03390.

¹⁶ As the air district’s discussion of CEQA mitigation shows (OB §§ IV.2.E, IV.5.C), the appellants cannot portray these cost projections as “conservative” or the “worst case scenario.” The referenced sources (IID OB 41; SDCWA OB 57) assume the availability of fallowing and even analyze the wrong district. Air District OB 116. They do not mention the numerous respects, exhaustively analyzed by the air district, in which the water agencies dramatically understated project impacts, feasible mitigation, and the time frame for mitigation.

¹⁷ Vol-8:Tab-173:AR3:CD1:10536 (\$178 million); Vol-7:Tab-134:AR3:CD7:70265 (\$193 million); AA:14:192:3343 (\$200 million).

¹⁸ See Air District OB §IV.5.C.iv (restoration as omitted feasible mitigation measure). The 2003 Salton Sea Restoration Act (SB 277) identifies the following objectives for restoration: (1) Restoration of long-term stable aquatic and shoreline habitat for the historic levels and diversity of fish and wildlife that depend on the Salton Sea; (2) Elimination of air quality impacts from the restoration projects; (3) Protection of water quality. Fish & Game Code, § 2931. The superior court did not resolve the issue of whether mitigation also included restoration. AA:47:292:12739.

The 2003 law authorizing the QSA-JPA (SB 654) caps the water agencies' further funding for restoration at \$30 million, while leaving the State responsible for potential billions in shortfall. In the October 2, 2003 version of the QSA-JPA (RJN:Exh.10:159 (§1.1c)), mitigation *includes* restoration. Thus the IID directors' approval arose from the expectation that the State would fully fund restoration.

3. The State Improperly Redefined its Unconditional Salton Sea Commitment, an Indispensable Component of the Contracts to Be Validated, As Hypothetical and Heavily Contingent.

The State and water agencies have taken, charitably, an evolving position on section 9.2's "unconditional" commitment. In response to Cuatro's motion for summary judgment, the State recognized the constitutional infirmity:

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

(AA:22:119:05590, 05614 (emphasis added).)¹⁹ The State portrayed the contract as erroneous, claiming the State needed only to "seek" an appropriation. (AA:22:119:05614-05615.)

¹⁹ As the county noted at trial, this concession was not the position of an individual deputy attorney general, but "the authoritative vote, voice, if you will, of the State." RT-12/1/09:11:3171. None of the other appellants contested this concession.

At trial, the State conceded a virtually limitless contractual commitment, yet suggested that the State's representative could effectively veto mitigation funding. (AA:47:292:12741-12743.) The superior court asked the State's counsel about the tension between its "seek an appropriation" statement and IID's assertion at trial that there is a continuing appropriation. (RT-11/24/09:10:2853-2854.) The State's response described its earlier position as a "mistake." (RT-11/24/09:10:2856.)

The court also asked the State's attorney "if there is any need, *the State is contractually committed to step forward and pay all of the Environmental Mitigation Costs, no matter how high they may go, even if it's billions of dollars.* That's the contractual obligation that you say the State has made, and that they are not looking to take any position different, then." The State's attorney responded "yes." (RT-11/24/09:10:2858; AA:47:292:12743 (emphasis added).) But later in the same hearing, the same counsel portrayed this theoretical "obligation" as not requiring actual payment. Counsel ultimately turned section 9.2's State obligation into an oxymoron: an *unconditional obligation* that is also *subject to conditions*. (RT-11/24/09:10:2867.)

On appeal, the State recognizes a nominal "obligation to pay" under section 9.2, but also renders it innocuous. The provision, it posits, "provides only that the State's *obligation to pay*—which is distinct from the *manner in which the obligation will be paid*—is unaffected by whether there is, or is not, an appropriation." (State OB 3-4 (emphasis added).)

a. Conferring Absolute “Veto Power” on the State Commissioner Would Remove the State’s Unconditional Obligation.

Appellants posit that the second sentence of section 9.2 provides the State “veto power” over mitigation funding. The State’s brief confirms its intention to construe the state commissioner’s veto power as absolute. Mitigation payments would be conditioned on the commissioner’s belief the State did not have the ability to pay. (State OB 24-27.) The State’s construction would render its “unconditional” obligation nugatory, because it would allow the state commissioner to block payment even for reasonable mitigation obligations. (Compare *People v. Doolin*, 45 Cal.4th at 413, fn. 17 (courts must avoid an interpretation that “renders some clause, nugatory, inoperative or meaningless); *Third Story Music v. Waits* (1995) 41 Cal.App.4th 798, 808 (contract provision for promoter to market a singer’s work “at its election,” deemed “textbook example of an illusory promise).)

The superior court therefore came close to holding the QSA-JPA an illusory promise. The court salvaged the agreement from “illusory” status only by focusing on section 9.2’s statement that determinations of the Commission “shall be reasonably made,” as well as the implied covenant of good faith and fair dealing inherent in all contracts. (AA:47:292:12741.) The court’s reading would allow a majority vote of commissioners to determine reasonable mitigation expenses, but not permit the State to avoid performance on mitigation at its “unrestricted pleasure.” (*Id.* (citing *Pease v. Brown* (1960) 186 Cal.App.2d 425, 431).) As detailed below (§II.A.4), if the provision were construed to provide a veto, as the State requests, it would undermine the “meeting of minds” for the QSA-JPA and mitigation

for CEQA compliance.

b. Conditioning Mitigation on the Outcome of Appropriations Requests Would Vitate the State's Promise.

All the appellants also argue that the State's mitigation commitment should be understood differently when "harmonized" with section 14.2, which provides:

If the Authority anticipates that the Environmental Mitigation Cost Limitation will be exceeded within two years, then the Authority shall submit a written notice to the State stating the reasons for that anticipation, as well as estimates of the projected cost of remaining Environmental Mitigation Requirements. The State will seek, with the support of the other Parties, to obtain Legislative appropriation approval sufficient to satisfy the State obligation, if any, for costs of the Environmental Mitigation Requirements as soon as it appears that the expenditures of the Authority are within \$5,000,000 of the Environmental Mitigation Requirement Cost Limitation, so long as the Authority has encumbered the total amount owed pursuant to Article IX by the CVWD, the IID and the SDCWA.

(Vol-8:Tab-172:AR3:CD1:10471.)

But nothing in that text, which establishes a procedural approach for further legislative efforts to secure funding, suggests that the "unconditional" commitment in section 9.2 is optional. Suggesting an appropriation-requests procedure does not mean that the State can avoid its unconditional promise if these requests deliver no appropriations, or insufficient funds. Far from "harmonizing" these provisions, appellants' approach would make illusory the promise to make section 9.2's

commitment survive regardless of appropriations. (Vol-8:Tab-172:AR3:CD1:10467.)

c. The State's Commitment Cannot Be Defined by Speculation that Mitigation Needs Would Disappear.

Appellants also base their constitutional defenses on wishful thinking. Having earlier refused to execute the QSA contracts without the State's funding commitment, they now posit that, under a variety of hypothetical scenarios, the State's money might not be necessary at all.

The appellants' veneer of unity breaks down here. IID wonders if MWD will eventually be compelled to make some payments, while the State and the other three water agencies wonder whether IID can be forced to modify their operations. (IID OB 41; State OB 24; SDCWA/CVWD/MWD OB 57.) The appellants offer drastically different time estimates in which mitigation must be performed.²⁰ And as now shown, their assumptions and expectations about Salton Sea restoration reveal even greater inconsistencies in defense of the State.

The appellants' speculative scenarios underscore their deep divergence of perceived responsibilities if the QSA-JPA's central mitigation commitments are circumvented. First, some of the appellants (notably *not* joined by IID) speculate that IID can be forced under section 9.3 of the QSA-JPA to make modifications that reduce remaining mitigation costs. But these appellants do not mention that change comes only "provided that" six demanding limiting conditions are met, including

²⁰ See IID OB 34 (35-45 year term); SDCWA/CVWD/MWD OB 58 (15-year term); State OB 23 (15 years).

IID's own approval, approval by wildlife agencies, environmental compliance, no new fallowing, and proof the modification is "capable of reasonable implementation." (Vol-8:Tab-173:AR3:CD1:10546 (ECSA, § 4.2(2.)) The conditions under which the State could compel IID to reduce operations are sufficiently complex to virtually ensure years of further conflict between these current allies before any mitigation costs could be reduced.

Second, the State and SDCWA/CVWD/MWD (again, not joined by IID) improperly apply a 15-year limit on mitigation water being sent to the Salton Sea, based upon the State Board's analysis of a timetable for *restoration*. Under this theory, either a restoration plan will be in place 15 years from the 2003 approval, or the sea will simply die. But IID anticipates a *mitigation* compliance period of up to 45 years, possibly reduced by ten years. (See IID OB 33-34.)

This exchange shows that major conflict among the currently-allied appellants will likely erupt before any obligations could hypothetically be reduced. Moreover, the State's use of 15-year time frame irreparably truncates its mitigation promise. The QSA-JPA creates binding obligations that will remain in effect despite speculation about the possible outcome of future restoration decisions. Section 4.3(3) of the ECSA provides that the mitigation funding obligations of the State and the three water agencies "shall continue as long as Environmental Mitigation is necessary to mitigate any continuing impacts that last beyond termination." (Vol-8:Tab-173:AR3:CD1:10547.) In addition, the QSA-JPA's Payment Schedule (Exhibit C) anticipates compliance *through 2047*. (Vol-8:Tab-172:AR3:CD1:10528 to 10531.)

Incredibly, appellants even posit that funds the three water agencies committed for Salton Sea *restoration* might be redirected to mitigation. (Vol-8:Tab-172:AR3:CD1:10459; see also Fish & G. Code, §§ 2081.7(e), 2932.5 (state role).) But even MWD has conceded that restoration costs may well run to billions, and any funded commitment to a federal restoration plan is speculative. Thus, the “restoration fund” presents another example of a potentially boundless State funding responsibility not supported by an existing fund or legislative allocation. In addition to limiting the three agencies’ mitigation and restoration funding (respectively, \$133 million and \$30 million), the QSA-JPA allocates the “remaining financial and other risks associated with the Environmental Mitigation Requirements *and Salton Sea Restoration Costs* to the State.” (QSA-JPA contract, Recital K (Vol-8:Tab-172:AR3:CD1:10458) (emphasis added).)

Finally, one point on which appellants agree offers ominous perspective on their proposed final solution to mitigation financing: that mitigation costs for the Salton Sea might evaporate entirely if the sea *declines so precipitously that the sea can no longer be feasibly restored.*²¹ But allowing the sea to die would simply make matters more dangerous and costly. (Air District OB, §IV.5.C) Invalidating the QSA until it meets constitutional standards ensures that the State and water agencies do not simply “run out the clock” on the sea’s future.

²¹ IID OB 43 (“the demise of the Salton Sea could make certain mitigation unnecessary to ‘preserve’ a dead habitat”); ²¹ SDCWA/CVWD/MWD OB, 58-59 (“if the Salton Sea becomes unable to sustain life at the early end of the state board’s estimate, the need for mitigation from transfer project impacts could be significantly lessened”); State OB 24 (“it would be pointless to try to arrest part of the sea’s decline if it is going to disappear altogether”).

4. Redefining the State's Unconditional Commitment Would Produce an Illusory QSA-JPA Promise, Defeating Contract Formation.

Assuming, *arguendo*, that the appellants secure a reinterpretation of section 9.2's "unconditional contractual obligation" to make it more conditional or contingent, they would only sail from death by Scylla to death by Charybdis. For example, if the state commissioner voted against reasonable mitigation on the ground that funds were lacking, it would render its QSA-JPA promise illusory, confirming that the agreement lacked a genuine "meeting of the minds." Likewise, if the State's commitment were reinterpreted as only requiring the State to "seek" an appropriation, it would undercut the premise of section 9.2 that the State's obligation is "not conditioned" upon an appropriation.

A contract is illusory if performance is conditioned on some fact or event that is wholly under the promisor's control, and bringing it about is left wholly to the promisor's own will and discretion. (*Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 15; *Third Story Music v. Waits*, 41 Cal.App.4th at 808.) That rule would apply here if the terms "unconditional" and "not conditioned" are allowed to mean the reverse of what they say. (See Vol-8:Tab-172:AR3:CD1:10457.) SDCWA/CVWD/MWD agree, opining that their construction of section 9.2 must be accepted because "otherwise the contract would be illusory." (OB 50.)

In this event, the QSA-JPA and other QSA-related agreements would fall as lacking in mutuality.

5. Redefining the State's Unconditional Commitment Would Eliminate the Promised Salton Sea Mitigation.

The air district's brief (§IV.5.C) cogently presents the impending environmental disaster that lacks effective mitigation, particularly in air quality. Should the appellants succeed in reinterpreting the State's Salton Sea commitment as a contingent obligation, or as an obligation that be avoided if the State "seeks" allocations that do not materialize, they would remove whatever flimsy basis remains for asserting compliance with federal and state environmental laws. Recital H of the QSA-JPA is directly on point: "Neither the QSA or these conserved water transfers could be implemented without compliance with extensive state and federal environmental laws, and *this Agreement including the State Obligation is the principal mechanism for ensuring that required mitigation under those laws for these transfers will be fully paid for.*" (Vol-8:Tab-172:AR3:CD1:10458 (emphasis added).)

B. The California Constitution's Debt Limitation and Appropriation Provisions (Article XVI, Sections 1 and 7) Constrain Executive Decision-Makers from Making Unbounded Promises.

The superior court's determination of invalidity is rooted in two of the oldest and best-established constitutional principles. Article XVI, section 7 of the California Constitution provides that "[m]oney may be drawn from the treasury only through an appropriation." The issue of appropriation also relates to the debt limitation provision in article XVI, section 1. Article XVI, section 1 in pertinent part prevents the Legislature from creating "in any manner" debts or liabilities "which shall, singly or in the aggregate with any previous debts or liabilities, exceed the sum" of

\$300,000.²² Like the parallel provision constraining local government (article XVI, section 18), article XVI, section 1's constraint on state action exceeding the debt limit serves the "underlying purpose" of ensuring that government will "operate within its means." (*TIPS*, 172 Cal.App.4th at 761 (explaining the debt limit rule).)

TIPS relied upon *Nougues v. Douglass* (1857) 7 Cal. 65, which describes the constitutional constraint as mandatory and not directory. (7 Cal. at 76.) The key principle, "paying as you go," avoids burdening the public and future generations with the consequences of enduring promises the State cannot keep. (*TIPS*, 172 Cal.App.4th at 761-762.) Section 7 embodies centuries-old concern about abuse of executive power, restraining attempts to make unconditional financial commitments that evade the realities of legislative appropriation.

As reaffirmed in *White v. Davis*, 108 Cal.App.4th at 230, section 7's proscription on commitments lacking lawful appropriation is "taken from the United States constitution," and embodies longstanding constraints on manipulative executive power. It constrains the state agencies here from signing paper commitments that circumvent the legislative prerogative to determine "how, when, and for what purposes" public funds should be applied. (*Humbert v. Dunn* (1890) 84 Cal. 57, 59.) By controlling "unbounded" executive power, the doctrine helps "secure regularity, punctuality and fidelity" in public disbursements, and "constitutes a most useful and salutary check upon profusion and extravagance, as well as

²² Where that threshold is exceeded, and is not subject to a wartime exception to "repeal invasion or suppress insurrection," this provision generally requires two-thirds vote of both legislative houses and a majority vote from participants in a primary or general election. Cal. Const., art. XVI, § 1.

upon corrupt influence and public peculation.” (*Office of Personnel Management v. Richmond* (1990) 496 U.S. 414, 427 (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (3d ed. 1858) § 1348.)²³

C. The State’s Unconditional Commitment in the QSA-JPA, which it Cannot Meet in Law or Fact, Rendered the QSA-JPA Unconstitutional.

As the party bearing the burden of proof in its validation action, IID must demonstrate that the QSA-JPA’s approach to mitigation funding will fall within constitutional limits on debts and appropriations. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.App.4th 826, 861.)

The superior court’s validation decision here is firmly rooted in section 7’s historic concern about preventing executive gamesmanship. The State’s unconditional paper commitment to provide Salton Sea funding would “undermine” section 7’s appropriation requirement. (See *White*, 108 Cal.App.4th at 714.)

The water agencies disingenuously suggest that the trial court erred by considering compliance with both sections 1 and 7 of article XVI. First, IID affirmatively invoked the relationship between sections 1 and 7 *in its own trial brief*. (AA:35:210:09453.) Second, the superior court properly connected the debt limitation and appropriation provisions (AA:47:292:12742.) California cases recognize that the state can incur valid contractual obligations” in two ways pertinent here: (1) by legislative

²³ The analogous federal appropriations clause, in article I, section 9, clause 7 of the Constitution, is so powerful that even erroneous advice given to a federal employee on the extent of disability payments could not authorize the disbursement of funds lacking an appropriation. *Richmond*, 496 U.S. at 427.

authorization where the liability created will not cause aggregate state liabilities to exceed \$300,000 . . . or (2) by legislative authorization supported by an appropriation. (*Walsh v. Board of Administration* (1992) 4 Cal.App.4th 682, 698-699 (citing sections 1 and 7); *White*, 108 Cal.App.4th at 225-226).)

The superior court therefore had the “right and duty” to “decide the effect and extent” of constitutional restrictions as it addressed the QSA’s validity. (*Nougues*, 7 Cal. at 69.) The undisputed record here demonstrates an abrogation of the constitutional “pay as you go” principle. First, the QSA-JPA unconditionally commits the state to pay for all EMRs beyond the three water agencies’ 2003 cap of \$133 million set in section 1.1(b) of the QSA-JPA. (Vol-8:Tab-172:AR3:CD1:10459.) Section 9.2 makes the state “solely responsible” for amounts exceeding this limit, confirms that this contractual obligation is “unconditional,” and disclaims appropriation as a condition or defense. (Vol-8:Tab-172:AR3:CD1:10467.)

Second, the QSA-JPA leaves no doubt that the State’s unconditional commitment was indispensable to secure the water agencies’ agreement to the QSA. Their mitigation commitments, even as capped, would otherwise not have been made. (Vol-8:Tab-172:AR3:CD1:10458 (QSA-JPA, Recital K).)

Third, the ECSA confirms that the State’s “exclusive responsibility” over the agencies’ mitigation cap was necessary “to ensure compliance with all federal and state environmental laws, including but not limited to the federal Endangered Species Act, federal Clean Air Act, and federal Clean Water Act.” (Vol-8:Tab-173:AR3:CD1:10539; see also Vol-8:Tab-173:AR3:CD1:10542.) Indeed, the State’s QSA-JPA commitments were

necessary for *both mitigation and restoration*. They “allocate[d] the remaining financial and other risks associated with the Environmental Mitigation Requirements and Salton Sea restoration costs to the State.” (Vol-8:Tab-172:AR3:CD1:10458.)

Fourth, as summarized above, the State and water agencies were well aware, and confirmed in their agreement, that mitigation costs alone would likely far exceed the water agencies’ \$133 million cap, and that total liability could run into the billions. Yet the QSA-JPA provides no available source to fund this already-made, yet boundless commitment.

Lastly, notwithstanding the above, the State considers itself under no obligation to pay for mitigation that exceeds \$133 million or to restore the Salton Sea. (AA:22:119:5614-5615.) The State has suggested that it may simply “seek” an appropriation (AA:22:119:5614-5615), and recognized that if California lacks “money in the checkbook,” these promises may well not be honored. (RT-11/24/09:10:2859; see also State OB 23 (“if the State’s representative ‘does not agree’ with mitigation expenses over the limit, then the State’s obligation may not be triggered”).)

This record overwhelmingly vindicates the superior court’s concern about how gamesmanship—paper expressions of unbounded commitments, followed by denials based on budgetary realities—can be used here to frustrate effective mitigation. (AA:47:292:12742; see *Chester v. Carmichael* (1921) 187 Cal. 287, 289 (criticizing the executive’s lack of accountability).) If validated, other executive agencies could follow the QSA parties and rely on “magic language” that the State’s commitment is an “unconditional contractual obligation” not “conditioned” upon legislative appropriation, bolstered by expressions of uncertainty about the

exact amounts involved. By this formula, section 7's constitutional limits would be "easily gutted." (AA:47:292:12742.) In sum, the State unconditionally created an "aggregate indebtedness" violating the "pay as you go" principle. (See *TIPS*, 172 Cal.App.4th at 778 (quoting *Starr v. City and County of San Francisco* (1977) 72 Cal.App.3d 164, 173).)

D. No Exceptions to the State's Constitutional Debt Limit and Appropriation Rule Apply.

The State and water agencies propose spurious analogies to cases allowing limited exceptions to the standard constitutional rules governing debt limits and appropriations. But they miss the "fundamental principle" underlying these exceptions: "the constitutional debt limit does not apply so long as *no long-term debt has been created in a given year to pay for that year's current expenses where that debt is to be paid from the governmental entity's future general funds.* (*TIPS*, 172 Cal. App.4th at 765 (emphasis added).) Nothing provides that assurance here. The QSA framework records a cost projection in the ECSA (\$178 million in 2003 dollars) that exceeds the sum total of alternate mitigation funds by at least \$15 million and perhaps much more, even if liability runs in the billions. Future general funds, and future generations, will be left to cover the enormous costs associated with Salton Sea mitigation and restoration. (Vol-8:Tab-173:AR3:CD1:10536.) That stark reality precludes reliance on any of the exceptions, which are not meant to override the purpose of debt limits "to force government to live within its means and not saddle future generations with the cost of current obligations." (*TIPS*, 172 Cal.App.4th at 765.)

1. Not a Special Fund.

The water agencies (*not* the State) in their appellate briefs reinvent the history of the QSA-JPA, portraying mitigation financing as a non-issue due to DFG's century-old preservation fund.²⁴ (See *Board of Fish and Game Commissioners v. Riley* (1924) 194 Cal. 37, 39 (funds came chiefly from hunting and fishing licenses, and collection of fines).) While the water agencies rely heavily on DFG's preservation fund as a continuously appropriated "special fund" available at the time of QSA approval pursuant to SB 654 (2003), the superior court correctly dispatched this theory as "pure fantasy." (AA:47:292:12745-12747.) The appellants, and particularly IID, provide a lengthy and irrelevant statutory analysis suggesting that in 2003, a now-deleted version of Fish and Game Code section 13320 classified the fund (also known as the Fish and Game Fund) as a continuing appropriation, rather than a fund requiring further legislative approval.²⁵ Notably, counsel for the State never suggested that DFG viewed this fund as a viable source for the specific State mitigation commitments secured in the QSA-JPA.

This theory fails in multiple respects. First, the agencies never even attempt to identify how this limited fund would line up with the QSA's demanding projected mitigation costs, even assuming *arguendo* that it can

²⁴ These funds, whose sufficiency is never shown in the water agencies' records, must somehow have eluded DFG's own director when he expressed worry about the State's "blank check." AA:13:92:03288.

²⁵ See IID OB 26-31: Vol-9:Tab-208:AR3:CD14:400274-400275 (SB 317); Vol-9:Tab-209:CD14:400286 to 400291 (SB 654); AA:35:211:09565-09579.

cover excess mitigation costs as distinct from restoration costs.²⁶ IID's "undisputed evidence" consists of three pages of raw data providing selective fund figures, with no analysis in context of their sufficiency to resolve the QSA's mitigation impasse. (IID OB 31; see also AA:33:191:08769, 08770, 08795.)

Second, the water agencies never compare how the allocations in the fund line up with the myriad existing and continuing objectives that also must be served in the fund's continuing operation. (See Fish & Game Code, § 13230 ("all necessary expenses incurred in carrying out this code and any other laws for the protection of birds, mammals, reptiles, and fish).") Indeed, IID concedes "*there is no doubt DFG was historically underfunded as compared to its spending desires.*" (IID OB, p. 31 (citing *Coastside Fishing Club v. California Resources Agency* (2008) 158 Cal.App.4th 1183, 1197-1198).) By contrast, courts applying a "special fund" theory have inquired whether a fund ensures "no possibility" of drawing on prohibited revenues. (*Board of State Harbor Comm'rs v. Dean* (1953) 118 Cal.App.2d 628, 632; see also *TIPS*, 172 Cal.App.4th at 774 (role of general funds was "undetermined").)

Finally, the water agencies cannot demonstrate that DFG preservation funds could fulfill the State's "unconditional" promise in the QSA-JPA, even when the issue arose in October 2003. Then-DFG Director Hight's concern about the State's "blank check" would have been

²⁶ SB 654 funds, to the extent allocated, are directed to restoration as distinct from mitigation of QSA related impacts. Vol-8:Tab-172:AR3:CD1:10482. Even assuming *arguendo* such funds could be used here and a specific appropriation could be made, no evidence is available that the requisite "surplus" is available. AA:33:08795-08796; AA:45:260:12036-12038.

irrelevant if the preservation fund had been available and remotely adequate. (AA:13:92:03288.) Precisely because the long-standing preservation fund and every other available source could not come close to meeting the parties' own projections of mitigation requirements, the three water agencies made clear in the QSA-JPA and ECSA their central reliance on the State's mitigation promise.

2. Not a Contingent Debt.

The water agencies—who earlier announced their reliance on the *unconditional* nature of the State's mitigation commitment—also disingenuously attempt to portray that same commitment as a “contingent debt.” The extremity of this position deserves emphasis. They turn the doctrine into a major gamble, positing that because the exact amount of the State's existing and potentially billion-dollar commitment is not yet known, it should be treated in the manner of leases and contingent contracts.

That attempt fails on multiple levels. First, unlike the small body of cases involving a genuine contingency—for example, a multiyear contract in which payments correspond to services provided in each passing year—the QSA parties have identified at the outset their own projected mitigation costs (from \$178 to \$193 million) over many years on which they have expressly relied, but not fully accounted for in their identified mitigation funding.²⁷ As discussed above, the full amount likely will be far more rather than less.

²⁷ See Vol-8:Tab-173:AR3:CD1:10536; Vol-8:Tab-173:AR3:CD1:10557-10572.

The paradigm of contingent obligations involve a lease, where both work and payment for future years are contingent (e.g., *City of San Diego*, 47 Cal.App.4th at 1473), or an offer of future contracts in which the identity of contractors and extent of their work remain unknown (e.g., the early case involving state payments for coyote pelts, *Bickerdike v. State* (1904) 144 Cal. 861). In the QSA, the decades-long projections of specific mitigation needs, and the complexity of those measures, are leagues different from yearly leases, and present far greater risk of injury from the lack of a secure appropriation.²⁸

The State's Salton Sea mitigation cannot be cured on an annual basis, and instead fixes in advance a decades-long commitment to an ongoing mitigation plan. The appellants' briefs lack any credible assurances that State payments would be limited to less than \$300,000, or that the budget will always cover the State's obligation. Contrary to IID's suggestion, section 4.3(3) of the ECSA does not suggest that the obligations may be segmented. It ensures that even if the transfer and acquisition agreements later terminate, the State's and water agencies' mitigation obligations "shall continue as long as Environmental Mitigation is necessary to mitigate any continuing impacts that last beyond termination." (Vol-8:Tab-172:AR3:1:10499.) This is dramatically different from cases in which payments for rentals, coupled with payments for other debts and liabilities, would not exceed income and revenue in a given year. (See *City of Los Angeles v. Offner* (1942) 19 Cal.2d 484, 487.)

²⁸ These characteristics are also absent from the "indemnity" cases cited by appellants, none of which resemble the QSA. See, e.g., *Fratessa v. Roffy* (1919) 40 Cal.App. 179; *Barceloux v. Donohoe* (1930) 109 Cal.App. 260; *Prudential-LMI Commercial Insurance v. Superior Court* (1990) 51 Cal.3d 674, 695. Here, the State's Salton Sea funding commitment would provide the *principal* revenue for mitigation and restoration over the life of the project. Vol-8:Tab-172:AR3:CD1:10458 (emphasis added).

The present case more closely resembles ones in which commitments to fund open-ended and potentially unlimited amounts have violated constitutional debt limits. Indeed, considerably more bounded debts have been found to violate the Constitution. (See, e.g., *Chester v. Carmichael*, 187 Cal. at 290; *Mahoney v. San Francisco* (1927) 201 Cal. 248, 263-264.) These cases do not suggest that the constitutional principle can be ignored simply because the public entity's commitment to contractual obligation may not involve the immediate payment of funds. (See *TIPS*, 172 Cal.App.4th at 777 (“the fact that a financing scheme involves periodic payments for periodic use of facilities does not necessarily bring it within the contingency exception”).)

Appellants' theory that the State's present and unconditional contractual commitment has no significance under article XVI, section 7 merely because the QSA-JPA does not on its terms call in “current payments” (SDCWA/CVWD/MWD OB 38) should be construed in light of the State's concession that it has a present and binding contractual commitment that will remain in force even where liability is in the billions of dollars. (RT-11/24/09:10:2858; AA:47:292:12743.) Under this distortion of the “pay as you go” principle, a binding State commitment that could enormously compound California's budget deficit would be construed as less problematic than a city's unconstitutional conditional sales contract for goods or services. (See, e.g., *Chester*, 187 Cal. at 287-290; *City and County of San Francisco v. Boyd* (1941) 17 Cal.2d 606, 616 (distinguishing *Chester* and noting that a city “does not have the power to incur an obligation against the city to make future payments for the purchase price

of land, in default of which payments the city would forfeit its right to purchase and lose all sums theretofore paid”).)²⁹

Neither law nor logic supports this faulty formula for constitutional compliance. When the State, as here, has “incur[red] an obligation” to make future payment mitigation costs as specified in the QSA-JPA, the present inability to discern eventual liability does not vitiate the need for constitutional compliance. (*Boyd*, 17 Cal.2d at 616; see also *TIPS*, 4 Cal.App.4th at 699 (emphasis added) (“[u]nder our Constitution, the creation of an enforceable contract with the State requires compliance with the constitutional debt limitation”).

Where the executive entity has entered into a binding contractual commitment creating “full and complete liability” upon its execution, the contract is void. (*Dean v. Kuchel* (1950) 35 Cal.2d 444, 447.) None of appellants’ cases suggest otherwise. In *White*, the court addressed the interplay of the constitutional appropriation standard and labor statutes, invoking article XVI, section 7 against efforts to compel payment of more than the amount authorized. (*White*, 108 Cal.App.4th at 226-227.) Appellants misconstrue a routine reference in *White* to *contract law* to propose a major new exception to “pay as you go.” But whether contracts “*may be conditioned* upon the eventual accrual of funds in a specified source” under general contract law (108 Cal.App.4th at 226 (emphasis added)) is inapposite to the constitutionality of the QSA-JPA, which by its express terms in section 9.2 creates an *unconditional* and binding promise

²⁹ Viewed through this lens, the State’s suggestion that instead of current invalidation it could simply later face damage suits—in which by its concession liability could potentially run to the billions of dollars—simply reinforces the “pay as you go” problem, rather than identifying a way around it. See State OB 27-28. As IID has recognized in its brief (p. 35), “even judgment collection would require an appropriation.”

that is *not dependent* on the outcome of any future appropriation. The appellants' cases nowhere suggest that "pay as you go" can be transformed into "pay sometime later, if the State decides not to veto the payment."³⁰

III. THE SUPERIOR COURT PROPERLY ASSERTED CONCURRENT JURISDICTION OVER THE FEDERAL PARTIES AND FEDERAL CLAIMS ARISING FROM THE QSA.

SDCWA/CVWD/MWD and the Vista/Escondido parties contend that the superior court failed to obtain jurisdiction over the United States, or over the Indian Bands and Indian Water Authority that are part of the San Luis Rey settlement. Notably, IID does not support these contentions.

The county's arguments here apply to the validation action (case 1649) only, and confirm that by timely answer challenging the validity of the CRWDA and transfer agreement, the county agencies can secure judgment on their validation claims (violations of CEQA and California wheeling statute) that binds the United States, in addition to the four California water agencies. (Contra, SDCWA/CVWD/MWD OB, part VIII; Vista/Escondido OB section III.B.) Federal reclamation law expressly waives federal sovereign immunity in this Court, and in this case, a proceeding to confirm a reclamation contract. As to the Indian Bands,

³⁰ See, e.g., *Los Angeles v. Offner*, 19 Cal.2d at 486 (approving city lease for an incinerator, but distinguishing *Chester* and other cases where leases were subterfuges for installment contracts creating present obligation exceeding constitutional limits); *Dean*, 35 Cal.2d at 447 (extending *Offner* to leases with option to purchase, but only where payments are confined to each year, and payment is only for consideration furnished that year); *Rider v. City of San Diego*, 18 Cal.4th at 1049 (distinguishing "subterfuge" cases from city's lease arrangement for a stadium, which provided "contemporaneous consideration" and ensured that if the arrangement ended, the city's obligation would "abate"); *TIPS*, 172 Cal.App.4th at 775 ("the fundamental question is the nature of the obligation undertaken by the state to the bondholders"); *Metropolitan Water District v. Marquardt* (1963) 59 Cal.2d 159, 201 (all payments contingent on future services provided).

section III.D below establishes that they separately consented to the superior court and this Court's jurisdiction. Federal-party and Indian-band jurisdiction in the *in rem* validation action also vitiates the separate argument that the United States and Indian Bands are indispensable parties to that proceeding. (Contra, SDCWA/CVWD/MWD OB, part X; Vista/Escondido OB section III.A, III.C.)

In contrast to this part III, part IV assumes *arguendo* that the federal and tribal parties have not been brought within this Court's validation proceeding (case 1649), and also acknowledges that the federal and tribal parties are not within the county's mandate proceeding against the QSA (case 1656). Part IV establishes that, nonetheless, these cases can proceed here.

A. IID's Validation Complaint Properly Asserted State-Court Jurisdiction Over Federal Parties and Federal-Law Claims.

In most respects but one this coordinated proceeding has unfortunately placed the County of Imperial and its progeny Imperial Irrigation District at odds – unfortunate, in that both entities share virtually identical electorates, and should unite in their resolve to secure mitigation in the Imperial Valley for the realignment of California's Colorado River water use that benefits the urban water agencies. Nonetheless, the county and IID agree that IID has properly asserted jurisdiction against the CRWDA and all parties to that agreement. In its operative second amended validation complaint, IID asserted jurisdiction based on sections 22670, 22762³¹ and 23225³² of the California Water Code, section 53511 of the

³¹ “An action to determine the validity of the Quantification Settlement Agreement defined in subdivision (a) of Section 1 of Chapter 617 of the Statutes of 2002, or any action regarding a contract entered into that implements, or is referenced in, that Quantification Settlement Agreement,

California Government Code, sections 860 and following of the California Code of Civil Procedure, and section 390uu of title 43, United States Code. (IID Second Amended Complaint, preface and ¶ 40, AA:6:38:01477, 01493.) Responding to the county's demurrer filed 13 September 2004 that IID's first amended complaint was uncertain as to its assertion of federal law compliance, IID's second amended complaint expressly seeks validation of the CRWDA approved by the Secretary of Interior (*id.*, ¶ 26, AA:6:38:01489), and expressly alleged the validity of the CRWDA as being in compliance with all laws, including "Federal Environmental Laws" (*id.*, ¶ 42, AA:6:38:014893-01494).

The county's answer to the second amended complaint initially challenged IID's assertion of jurisdiction. But after further reflection as demonstrated in its subsequent pleadings (e.g., County's Brief on Scope of Validation (June 25, 2008) RA:1:15:00269-00271), and in light of the post-demurrer decision in *Orff v. United States* (2005) 545 U.S. 596, the county joined IID in its assertion of jurisdiction over the CRWDA. Because jurisdiction lies over the *res* of that contract, *in personam* jurisdiction is not necessary for the action to proceed to a binding judgment. (*Planning and Conservation League v. Department of Water Resources* [*PCL v. DWR*] (2000) 83 Cal.App.4th 892, 925.)

By compliance with or conformity to the California Water and Government Code provisions referenced in IID's second amended

may be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure."

³² "An action to determine the validity of any [federal] contract and bonds may be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure."

complaint, that complaint embraced the validity or invalidity of the CRWDA, and “all persons,” necessarily including all parties to the CRWDA, whether or not they personally appeared in IID’s validation proceeding.

B. Congress Expressly Waived Sovereign Immunity to Be Bound by IID’s Complaint to Validate a Federal Reclamation Contract.

Section 390uu of title 43, United States Code provides that

Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section may be brought in any United States district court in the State in which the land involved is situated.

IID’s second amended complaint in validation, that of a federal reclamation contractor, properly invoked this provision to assert jurisdiction over the United States to validate the CRWDA, a contract executed pursuant to the federal reclamation act. (CRWDA, recital D (AA:1:1:00028).)

Notably, the waiver does not require that the validation proceeding be brought in federal court; it *may* be brought there. As argued by IID below (Supp.AA:0127981 to 012982), and by IID and SDCWA in characterizing the QSA proceeding to a Nevada federal court (see footnote 35, *infra*) *Tafflin v. Levitt* holds:

Under this [federal] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent to adjudicate claims arising under the laws of the United States.

...
This deeply rooted presumption in favor of concurrent state jurisdiction is, of course, rebutted if Congress *affirmatively ousts* the state courts of jurisdiction over a particular federal claim.

...
This grant of federal jurisdiction ... “provides that suits of the kind described ‘*may*’ be brought in the federal district courts, not that they *must* be.” [Citation.] Indeed, “[i]t is black letter law ... that the mere grant of jurisdiction to a federal court *does not operate to oust a state court* from concurrent jurisdiction over the same cause of action.

(1990) 493 U.S. 455, 458-461 (emphases added).

The California Supreme Court agrees: “Because the term ‘may’ is permissive, the plain language of the statute indicates that [a party] has the option of [taking the permissive action], without being required to do so.” (*Lonicki v. Sutter Health Central* (2008) 43 Cal. 4th 201, 212.)

In further answering the question of whether, contrary to its plain meaning “may” should be read “must,” the history of section 390uu’s enactment becomes helpful.³³ This provision was enacted as section 221 of Public Law 97-293. (96 Stat. 1261, 1271-1272.) In the House version of the bill proposing the law, H.R. 5539, section 206 included the language of section 390uu as ultimately enacted. (See H. REP. NO. 97-458 (Mar. 15, 1982) p. 6, RJN:Exh.1(B):7.) On the Senate side, however, section 14 of S. 1867 originally specified that a confirmation proceeding could be brought: “in the United States district court ... and *only* in such district *Exclusive jurisdiction* for such suit is hereby vested in the United States District

³³ The cited Congressional materials appear as RJN:Exh.1:1-14.

Court.” (S. REP. NO. 97-373 (Apr. 29, 1982) p. 5, RJN:Exh.1(A):3 (emphasis added).) The Senate text also authorized the reviewing court to “reform the contract,” if necessary, to conform with the representations that the Secretary of Interior may have made to induce it. (*Id.*; see also RJN:Exh.1(A):4.)

The Senate version changed substantially, however, on July 16, 1982, when Senator Wallop introduced a floor amendment that substituted the House language for section 14’s exclusive federal jurisdiction, while retaining the power of the court to reform the contract. (128 CONG. REC. 16636 (July 16, 1982), RJN:Exh.1(C):9.) Remarks by Senator Metzenbaum supported “the House language, which is much more satisfactory and simply waives the sovereign power of the Federal Government as far as suits against it” (*Id.* at 16637, RJN:Exh.1(C):10.) The bill so amended passed the Senate that day. (*Id.* at 16650, RJN:Exh.1(C):11.)

But when time came to reconcile the Senate and House versions in conference, the legislators adopted the House language without the provision for judicial reform of the contract being confirmed. (S. REP. NO. 97-568 (Sep. 22, 1982) p. 33, RJN:Exh.1(D):14.) Long before conference, however, neither chamber had accepted, and the Senate expressly rejected, a confinement of the waiver to *exclusive* federal court jurisdiction.

Thus, section 390uu accomplishes that waiver in state as well as federal court. Congress has waived sovereign immunity for reclamation projects in both federal and state courts. (*In re Uintah Basin* (Utah 2006) 133 P.3d 410, 418-420.) The leading U.S. Supreme Court case on dual jurisdiction recognized the necessity for state court jurisdiction because

federal immunity from state court proceedings “could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts.” (*Colorado River Water Cons. Dist. v. United States* (1976) 424 U.S. 800, 811 (quoting Senate report on McCarran Amendment).) *Colorado River Water Conservancy District* rejected the United States’ assertion of implied sovereign immunity for adjudication of sensitive Native American reserved rights in light of that potential for material interference. Similarly here, application of sovereign immunity to the United States could frustrate timely entry of validation judgment on the CRWDA binding on state and federal water agencies. (Compare 424 U.S. at 819-820.)

Indeed, Congressional waiver in this Court is founded in IID’s practical need to secure a determination on the CRWDA’s validity. That contract, while not a “new or amended contract” for the purposes of the 1982 Reclamation Reform Act of 1982 (CRWDA ¶10(d), (AA:1:1:00035)), is by virtue of the Boulder Canyon Project Act still a reclamation contract with an irrigation district. (See CRWDA, recital D (AA:1:1:00028).) While the state-party QSA may not include signatories that are deemed units of the State, other reclamation contracts in the West are made directly with state agencies.³⁴ Without a state waiver of its sovereign immunity, suit against an unwilling state could not proceed in federal court because of the eleventh amendment. (See *Alden v. Maine* (1999) 527 U.S. 706.) Here,

³⁴ For example on the Colorado River, United States (Ikes) – Arizona (Osborn) Water Delivery Contract (Feb. 11, 1944); United States (Fortas) – Nevada (Carville) Water Delivery Contract (Mar. 30, 1942) [reprinted in R. WILBUR & N. ELY, *THE HOOVER DAM DOCUMENTS* (1948) pp. A559, A597]. Noteworthy in the Utah *Uintah Basin* case, both the federal and state governments imposed one jurisdictional objection after another, attempting to evade judicial review altogether. 133 P.3d 410.

adjudication of the pivotal QSA-JPA does involve DFG, presumably qualified to object to federal-court adjudication of state-law claims against it. (*Id.*) Thus jurisdiction over federal reclamation contracts and the United States must lie in state court so that confirmation or validation of those contracts, in other than general stream adjudications, can bind the Government throughout the West.³⁵

In historical fact, IID has been here before. IID's first example remains its state-court validation of its December 1, 1932 federal contract with the Secretary of Interior, *Hewes v. All Persons*, Imperial Super. Ct. No. 15460 (July 3, 1933). (Vol-1:Tab-2:AR3:CD30:114729 to 114733.) The judgment in that proceeding initiated by Hewes and his fellow IID directors decreed that in addition to IID's directors, "the officers of the United States of America ... were fully, duly, and lawfully authorized to enter into and execute said contract for and on behalf of ... the United States of America" (Vol-1:Tab-2:AR3:CD30:114729, 114732.) None of the opponents of this validation, including CVWD, objected to the

³⁵ *Consejo de Desarrollo Economico de Mexicali v. United States* (D. Nev. 2006) 438 F.Supp. 1207, frequently cited by three water agencies for the premise that section 390uu does not waive immunity in state court (SDCWA/CVWD/MWD OB, p. 92), is similarly unavailing. The United States did not advance that argument; private plaintiffs did. *Id.* at pp 1229-1230. More fundamentally, the Ninth Circuit vacated the cited district court opinion. (9th Cir. 2007) 482 F.3d 1157, 1174.) SDCWA in that case argued that anyone with NEPA complaints against the QSA-related agreement in that case not only could, but *had to*, raise it by answer to the validation complaint in the Sacramento Superior Court. RA:7:88:01857-01858).

The middle-of-the-night insertion into the 2006 Tax Relief Act of a mandate to complete the All-American Canal (SDCWA/CVWD/MWD OB 111-115; Vista/Escondido OB 33-35) does not apply; the canal lining has been completed, and is not at issue here.

Imperial Superior Court's assertion of jurisdiction; neither did the United States assert an objection.³⁶

Indeed, the seminal California water validation proceeding, *Ivanhoe Irr. Dist. v. All Parties (I)* (1959) 47 Cal.2d 681, reversed sub nom. *Ivanhoe Irr. Dist. v. McCracken* (1960) 357 U.S. 275, adjudicated in state court the federal law validity of a contract with the United States. That adjudication took place with the United States voluntarily electing not to appear as a party, but also voluntarily appearing as *amicus curiae* in support of the contract. (See *Ivanhoe Irr. Dist. v. All Parties (II)* (1960) 53 Cal.2d 692, 699.) The United States, though "named" in the California validation proceeding only as part of "all parties and persons," did not object to the jurisdiction of the California superior or appellate courts to decide the federal question.³⁷

C. Without the Congressional Waiver of Sovereign Immunity, Validation of the Federal Agreements Would Not Be Possible.

Three water agencies and Vista/Escondido argue that the federal government did not waive sovereign immunity, and therefore, in the water agencies' words, "[i]n the absence of the U.S. the validity of the federal

³⁶ The *Hewes* validation proceeding is described at *United States v. Imperial Irr. Dist.* (9th Cir. 1977) 559 F.2d 509, 524.

³⁷ MWD claimed below that the present case "is different from the situation in *Ivanhoe*, which makes clear that the actions of the federal government were not at issue in that case." AA:33:195:08969, citing *Ivanhoe II*. MWD missed the point, however, for it is in *Ivanhoe I* that the vital federal action – imposition of the 160-acre limit law – was adjudicated in the California and United States Supreme Courts. That is the exemplar applicable to the Secretary's approval of the CRWDA. The remand in *Ivanhoe II* involved more modest state laws issues, "not before the court" in *Ivanhoe I*, 53 Cal.2d at pp. 727-728. On appeal, MWD and its cohorts now fallaciously claim that because the *Ivanhoe I* trial court allowed the United States to appear as *amicus curiae* there, "thus" the *California Supreme Court* "recognized" a federal non-waiver. SDCWA/MWD/CVWD OB 95. *Ivanhoe* does show, however, that the United States is capable of defending a reclamation contract in state court.

agreements cannot be adjudicated.” (SDCWA/CVWD/MWD OB 95; Vista/Escondido OB 56 (superior court “committed prejudicial error by invalidating the Allocation Agreement in their absence”).)

If the superior court or this Court were to lack jurisdiction to invalidate the federal agreements, the California courts would similarly lack jurisdiction to validate them. Below, SDCWA and CVWD incredibly argued that because the superior court lacked jurisdiction over the federal agreements, they “are deemed validated by operation of law.” (AA:27:190:07016.) The proper remedy, were the water-agency third-party claims of United States immunity sustained, would have been to timely strike from IID’s validation complaint the prayer for validation of federal agreements.

D. By Arguing the Merits in the Superior Court, the Indian Bands Also Consented to the Court’s Jurisdiction.

While the United States has through section 390uu expressly consented to this Court’s jurisdiction, the Indian Bands have accomplished the same result by a different path. Although served both personally and by publication with IID’s summons and complaint in validation (RA:1:2:00016-00017; AA:5:4:01101), which included an assertion of jurisdiction over the res of the allocation agreement (AA:1:1:00002), the bands did not within the return date on the summons, or at any other time, move to quash service of that summons or move to dismiss for lack of jurisdiction.

The bands could have contested jurisdiction without making a general appearance by filing a motion to quash along with a demurrer or motion to dismiss for lack of jurisdiction. (Code Civ. Proc., §§ 18.10(a)(1);

430.10(a); 581(b)(5); see *Goodwine v. Superior Court* (1965) 63 Cal.2d 281, 484-485.) Yet, rather than follow this well-established procedure for asserting tribal sovereign immunity, the bands took no such action. (Compare, e.g., *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 244; *Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal.App.4th 1, 4; *American Vantage Cos. v. Table Mountain Rancheria* (2002) 103 Cal.App.4th 590, 594.)

If a party seeks relief on any basis other than lack of jurisdiction – that is argues to the merit of the case, or seeks relief on the merits – a general appearance is made and sovereign immunity waived. (*Great W. Casinos v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1416-1419; *California Overseas Bank v. French American Banking Corp.* (1984) 154 Cal.App.3d 179, 184.) “What is determinative is whether defendant takes a part in the particular action which in some manner recognizes the authority of the court to proceed.” (*Sanchez v. Superior Court* (1988) 203 Cal. App. 3d 1391, 1397.)

In their “special appearance” dated January 20, 2004, the bands explicitly *recognized the authority of the court to proceed, took a position on the merits of the case, and argued for specific relief:*

The Bands and the Indian Water Authority support a finding by the Court that each of the contracts referred to in the First Amended Complaint are valid, legal, and binding in their entirety, and are in conformity with all applicable provisions of law. The Bands and the Indian Water Authority individually and collectively reserve the right to seek leave of the court to participate in this proceeding as amicus curiae to argue for validation of the contracts and other matters.

(AA:5:4:01102.)

By failing to file a motion to quash service of summons within the return date, and affirmatively recognizing the ability of the court to adjudicate the validity of the subject contracts, the bands lost their ability to assert immunity from the superior court's jurisdiction.

Moreover, in support of the water agencies' supersedeas petition, an attorney for the Indian Water Authority, acting also with express authority of the four Indian Bands, asserted that the "Indian Water Authority and the Bands support a stay so that the Allocation Agreement will continue to be implemented during the pendency of this appeal." (RJN:Exh.7:38-39 (Decl. of Stephanie Zehren-Thomas 114-115.) The declarant also argued factual assertions about and interpretations of the allocation agreement. (RJN:Exh.7:39-41.)

Amplify have the Indian Bands acknowledged this Court's authority and advocated actions that the Court should take. They have consented to this Court's jurisdiction.

IV. THE SUPERIOR COURT PROPERLY DECLINED TO FIND THE UNITED STATES AND INDIAN BANDS "INDISPENSABLE PARTIES" TO THE COUNTY'S CEQA CLAIMS AND DEFENSES.

Assuming *arguendo* that both the United States and Indian Bands have been found immune to this Court's jurisdiction, their absence does not deprive this Court of jurisdiction to adjudicate the county's claims and defenses against a claim of "indispensable parties." (Contra, SDCWA/CVWD/MWD OB, sub-section VIII.D.4, part X; Vista/Escondido OB, sections III.A, III.C). The superior court's judgment to reject a finding of indispensability must stand unless shown to be an abuse of discretion. (*County of Imperial*, 152 Cal.App.4th at 25; *Deltakeeper v. Oakdale Irr. Dist.* (2001) 94 Cal.App.4th 1092, 1106.)

A. Because neither the United States nor Indian Bands Can Be Deemed “Recipients of Approval,” Their Absence Cannot Justify Dismissal of the County Agency CEQA Claims.

The first test of party indispensability in CEQA claims is in section 21167.6.5 of the Public Resources Code, which “excludes nonrecipients of approval from dismissal under [Code of Civil Procedure] section 389.” (*County of Imperial*, 152 Cal.App.4th at 32.) Only when a CEQA challenger fails to name a recipient of approval must the court reviewing an indispensable party defense balance the factors of section 389, subdivision (b). (*Id.*)

SDCWA/CVWD/MWD cannot secure dismissal of case 1656 on indispensable party grounds, because neither the United States nor the Indian Bands received an “approval” from the three parties³⁸ that signed the QSA at issue in that case. While the PEIR for the QSA was relied upon by at least two of the signatories³⁹ to enter into the QSA and also sign the CRWDA, those California entities did not thereby grant an approval either to the United States or the bands. Confusing the state-law and state-party QSA with the federal-law allocation agreement, the superior court mistakenly determined that because the county was in case 1656 challenging the allocation agreement (which it was not), the United States and bands had to be considered recipients of a state-approval (which, even

³⁸ One triumvirate of water agencies (SDCWA, CVWD, MWD) raise the indispensable party argument here, but a different triumvirate actually signed the QSA (IID, CVWD, MWD). Yet a different triumvirate formed the QSA-JPA (IID, CVWD, SDCWA). SDCWA, not authorized to sign the QSA, nonetheless claims co-lead agency status for the QSA PEIR. See part VIII.A, *infra*.

³⁹ As shown in subsection VIII.A.5.b, *infra*, the record fails to establish that MWD rendered CEQA findings in approving the QSA.

if the county were challenging the allocation agreement, they were not). (Supp.AA:188:1855:046818-046829.)

Accordingly, the county's entitlement to relief on its CEQA claims in both cases 1649 and 1656 is not barred by the indispensable party doctrine.

B. Even if the Allocation Agreement Were Set Aside, the Indian Bands Would Continue to Receive their Water Deliveries.

Even if the Allocation Agreement is invalidated along with the related QSA agreements, the obligation of the United States to provide water to the Indian Bands will remain in place, and the bands must continue to receive water, pursuant to independent legislation and agreements.

First, the 1988 San Luis Rey Water Rights Settlement Act (Vol-9:Tab-181:AR3:CD24:722134 to 722139), directs the Secretary of Interior (Secretary) to annually provide 16,000 acre-feet of non-local water to benefit the Indian Bands and Vista/Escondido. (Vol-9:Tab-181:AR3:CD24:722135 to 722136 (Settlement Act, §§106, 107).)

Second, as amended in 2000, the settlement act expressly confirms the United States' delivery obligation in fulfillment of its trust responsibility to the Indian Bands. Section 106(f) of the settlement act provides that "[n]otwithstanding any other provision of law, in order to fulfill the trust responsibility to the Bands, the Secretary, acting through the Commissioner of Reclamation, *shall permanently furnish annually*" the 16,000 acre-feet referenced in the original version of the Settlement Act. (Pub. L. 106-377, Appendix § 211, 114 Stat. 1441A-70 (emphasis added).) Vista and Escondido provide the text of this provision and confirm that

“[t]he provision of such water by the federal government to the San Luis Rey Settlement Parties was ordered to occur ‘notwithstanding any other provision of law.’” (Vista/Escondido OB 10 & exh. B.) Since not even other laws could extinguish this continuing obligation, it could hardly be removed by the invalidation of the QSA executed three years later.

Third, the Secretary’s obligation to carry out the All American Canal Lining Project exists “[n]otwithstanding any other provision of law....” (Tax Relief and Health Care Act of 2006, Pub. L. 109-432, 120 Stat. 2922, § 395 (a); see also Vista/Escondido OB 12 and exh. C.) Moreover, “[t]he canal lining project has been completed.” (Vista/Escondido OB 9.)⁴⁰

Fourth, section 2.10 of the allocation agreement expressly recognizes that the United States’ obligation to deliver water to the Indian Bands and Vista/Escondido under the settlement act is an existing obligation, not a duty created by the agreement.

Finally, the United States’ permanent trust obligation to the Indian Bands, noted in settlement act section 106(a) of the Settlement Act, remains independently of the allocation agreement. (See *United States v. Mitchell* (1983) 463 U.S. 206, 225 (discussing the United States’ trust duty to the Indian Bands).) In sum, the United States must continue to deliver water benefitting the Indian Bands by virtue of a separate agreement, express federal legislation, and an underlying trust duty that cannot and will not be removed even if the QSA and allocation agreement are invalidated.

⁴⁰ Completion of the canal lining vitiates the Supremacy Clause arguments of SDCWA/CVWD/MWD (OB 104-114) and Vista/Escondido (OB 30-42), since neither delivery to the Indian Bands nor canal lining are now threatened.

For all these reasons, regardless of the claimed immunity of the United States and Indian Bands *as parties to the allocation agreement*, those parties cannot be deemed “necessary” to defeat the county’s claims and defenses addressing the CRWDA, QSA, and transfer agreement. (Code Civ. Proc., § 389, subd. (a).) First, in their absence, “complete relief” still can be accorded among those already parties. The water agencies challenged in case 1656 did not render decisions directed at the United States or Indian Bands, and their presence is not necessary to provide that relief. The United States and bands claimed no protected interest that would as a “practical matter” be impaired or impeded; the United States’ obligation to provide water to the bands would remain, as would the bands’ right to receive water under existing laws and agreements. To the extent that the United States and bands have an interest in the state water agencies’ decision-making, they share with these agencies, and appellants Vista/Escondido, an interest in upholding the approvals. (See *Deltakeeper*, 94 Cal.App.4th at 402.) Appellants also fail to demonstrate that adjudication in the absence of these parties would leave any existing parties subject to inconsistent obligations.

C. Even if the Bands Were Considered Necessary Parties, Other Factors Also Defeat the Third-Party Campaign To Render Them Indispensable.

Even if the Indian Bands were considered necessary, that factor does not require a conclusion that the bands are indispensable, thereby forcing dismissal of the county’s claims against the dishonest environmental assessment of the QSA. As in *People ex. rel. Lungren v. Community Redevelopment Agency* (1997) 56 Cal.App.4th 868, the public interest in adjudicating these claims outweighs the impact to the bands of proceeding

in their absence. Here, as shown by the capable Vista/Escondido opening brief, those two entities share precisely the Indian Bands' interest in preserving the allocation agreement, and have competently advanced that interest.

If the county's QSA claims and defenses were dismissed because of the bands' absence, that would enable the QSA PEIR to escape any judicial review and accountability, and leave the county with no adequate remedy. (See *County of Imperial*, 152 Cal.App.4th at 39 (relying upon availability of alternate remedy).) Relying on *Manygoats v. Kleppe* (10th Cir. 1977) 558 F.2d 556, 559, and its observation that sustaining a tribe's claim of indispensability would mean that "[n]o one, except the Tribe, could seek review of an environmental impact statement," the *Lungren* court followed *Manygoats* and concluded, "in equity and good conscience the case should and can proceed without the presence of the Tribe as a party." (56 Cal.App.4th at 884.) *Lungren* thus concluded that the superior court's order of dismissal had *abused* discretion. In the present case the superior court's refusal to dismiss must be honored as well within that court's discretion.

D. The Six-Year Delay in Challenging IID's Assertion of Jurisdiction Disallows Misuse of the "Indispensable Parties" Doctrine to Waste the Other Parties' Litigation Investment.

To invoke the indispensable parties doctrine, the court must determine whether "in equity and good conscience" the action should proceed. (Code Civ. Proc., § 389, subd. (b).) Courts must "be careful to avoid converting a discretionary power or a rule of fairness in procedure into an arbitrary and burdensome requirement which may thwart rather than accomplish justice." (*Lungren*, 56 Cal.App.4th at 875 (citing *Bank of America v. Superior Court* (1940) 16 Cal.2d 516, 521); see also *Riverwatch v. Olivenhain Municipal Water District* (2009) 170 Cal.App.4th 1186,

1216.) Fairness and equity are the core principles. (See *Bank of America*, 16 Cal.2d at 521.) Avoidance of a “harsh application” of indispensable parties doctrine is particularly important in CEQA actions, because “[t]he public has a right to insist on the adequacy of the environmental document upon which the agency makes its decision....” (*County of Imperial*, 152 Cal.App.4th at 26.)

Here, the fairness and equity principles embodied in section 389(b) would be severely compromised if the indispensable parties doctrine precluded the resolution of the CEQA claims and defenses. The three water agencies now relying upon “indispensible parties” doctrine allowed years to pass, and countless hours of court and attorney time to accumulate, before raising it. Despite the plethora of pretrial motions Metropolitan brought or joined in between 2004 and 2009, not until the eve of trial did the district move to test its jurisdictional orthodoxy. As Metropolitan explained in chiding its less-sophisticated opponent, “The County fails to appreciate the *incremental* nature of motions practice and judicial decision-making, i.e., one issue and motion at a time.” (Supp.AA:74:882:018313 (emphasis MWD’s).)

Why would Metropolitan save its foundational issue for last, rather than having it determined by an immediate demurrer or motion to dismiss? Only two answers makes sense: to bet on the outcome, that validation or termination of the substantive challenges would result in the superior court, banking that outcome with no one the wiser; or in the alternative, to force the challengers into years of expense and delay before springing the jurisdictional trap.

To the same effect, the United States emerges as even less deserving of claimed immunity than the water agencies. Despite personal service of

the validation complaint at the outset, it remained silent for years – like Metropolitan waiting to see if the state parties could shake the challengers, rather than moving to quash the personally-served summons and thereby enabling early review of its jurisdictional assertion. The United States only showed up after the county relied on its silence as a factor defeating Metropolitan’s jurisdictional claim (AA:35:209:09419-09420) – and at that with an assertion of immunity unconnected to the statutory base on which IID asserted and the county defended the Congressional waiver of sovereign immunity (AA:36:216:09700). The United States, like Metropolitan, only advanced its argument long after the QSA challengers had invested years of effort and expense in the superior court.

The superior court prudently relied on MWD’s delay as evidence of inequitable conduct that forecloses the sustaining of MWD’s third-party indispensable party claim. (Supp.AA:188:1855:046827-046828.) For the same reason, the conduct of the United States militates against finding it any more indispensable. The United States had the opportunity, within the time required by California procedure, to either move to quash summons or remove the IID validation case to federal court.⁴¹

⁴¹ Metropolitan and others cite *Hartman Ranch Co. v Associated Oil Co.* (1937) 10 Cal.2d 232, 265, and other cases to assert that the “objection that an indispensable party has been omitted may be raised at any time.” SDCWA/CVWD/MWD OB 141. Remarkably, they omit the rest of the sentence: “*by the trial or appellate court of its own motion if the parties fail to make the objection.*” (*Id.*) These authorities, rooted in the courts’ ultimate duty to *protect* fairness and equity, do not support the water agencies’ third-party gamesmanship to defeat merits resolution of long-pending CEQA claims.

E. Even if the Allocation Agreement is Deemed Independent of the QSA-JPA, the Remaining Dependency of the CRWDA, QSA, and Transfer Agreements Supports their Invalidation.

Finally, if the water agencies succeed in their advocacy of treating the allocation agreement as separate from the other contracts at issue in IID's validation complaint, that leaves at issue the validity of the CRWDA, QSA, and transfer agreement. (See Vista/Escondido OB 21-29 (allocation agreement separate from CRWDA and QSA); SDCWA/CVWD/MWD OB 85 ("expressly designed to operate even in the absence of the QSA itself"), 93 ("*U.S. commitment to deliver water for the benefit of the Indian Bands does not terminate*") (emphasis theirs).)

Even if the QSA-JPA's assertion of unconditional state Salton Sea responsibility lacked connection to or motivation for formation of the allocation agreement, the QSA-JPA remains connected to the CRWDA, QSA and transfer agreement. Indeed, IID would not have signed them but for the State's unconditional (and unconstitutional) assumption of that liability. (Vol-8:Tab-172:AR3:CD1:10458 (emphasis added); see also RJN:Exh.5:114-132; RJN:Exh.6:133-137.) On that ground the superior court's validation judgment against the three contracts stands. Moreover, with the allocation agreement treated as separate from the QSA, the jurisdictional objections advanced by Vista/Escondido, for themselves or as third-party advocates for the Indian Bands, do not disable this Court from setting aside on CEQA grounds the state-party QSA, state-party transfer agreement, and state-party approvals of the CRWDA.

COUNTY OF IMPERIAL CROSS-APPELLANT'S BRIEF

V. THE COUNTY'S CROSS APPEAL QUALIFIES FOR MERITS CONSIDERATION.

A. The County Timely Cross-Appealed from Final Judgments.

As stated in part I, the State, four water agencies, and Vista/Escondido parties by February 23, 2010 timely perfected their appeal from the superior court's February 11, 2010 final judgment. The judgment disposed of all of the county's defenses and claims pending in IID's validation proceeding (case 1649/875), and in the county's writ proceedings (1656/878) and POWER (1658/879).

The time for cross-appeal extends 20 days beyond the superior court's notice of the initial appeal. (Cal. Rules of Court, rule 8.108, subd. (f).) Separately, appeal from a validation judgment or order must be filed within 30 days of entry of judgment. (Code Civ. Proc, § 870, subd. (b); *PCL v. DWR*, 17 Cal.4th at 267.) The county timely filed its cross-appeal on March 9, 2010, within 20 days of the filing of the first appeal, and if necessary within 30 days of the entry of the validation judgment. The county appeals the judgment in its disposition of validation (case 1649/875) and the mandate petitions in which it acted as petitioner (case 1656/878) and intervenor (case 1658/879).

B. The County Raised its Cross-Appeal Claims in the Administrative Review of the QSA and Water Transfer.

The county persistently presented during the extended QSA-related proceedings each of the merits claims presented here.

For example, on May 3, 2000, two years before issuance of the *draft* EIRs, the county requested of water transfer EIR lead agency IID that it be included as a responsible agency that would use the EIR “to render or withhold the legally-required finding that the water transfer will not unreasonably affect the overall economy or the environment of the county from which the water is being transferred” (citing Water Code section 1810). (Vol-3:Tab-52:AR4-04-334-20588 to 20589.) On July 6, 2000, the county made the identical request to the QSA “co-lead” agencies. (Vol-3:Tab-52:AR4-04-334-20582 to 20583.)

Similarly, the county questioned the designation of four water agencies as “co-lead” agencies for the QSA programmatic EIR (PEIR) once it learned of that decision. (Vol-5:Tab-74:AR4-06-435-28154.) The county requested MWD, the agency actually preparing the QSA PEIR, to provide a copy of any lead agency agreement, as well as evidence of submitting the lead agency issue to the State Office of Planning and Research (OPR) or any OPR determination of the lead agency status. (Vol-5:Tab-74:AR4-06-435-28154.) (See Pub. Res. Code § 21165, subd (a); CEQA Guideline, § 16000 (authorizing public agencies to secure OPR advice on or approval of lead agency status).) The water agencies defended their “co-lead” designation.” (Vol-5:Tab-74:AR4:4-06-435-28159), but the county never received a response to its other inquiries until preparation of the administrative record in superior court.

Following completion of the draft EIRs and hearing of them at the state board, the county expressly requested preparation of supplemental EIRs. (RJN:Exh.11A:188.)

As best evidence that the county properly exhausted its remedies, the final QSA PEIR and final water transfer EIR both purported to respond to these claims. (See, e.g., Vol-5:Tab-74:AR4-06-435-28159 to 28162; Vol-4:Tab-73:AR3:CD12:204978 to 204986.)

Prior to the IID board's October 2, 2003 final action on the QSA and water transfer agreement, members of the public were not provided an opportunity to comment on the final (second) addenda to either the QSA PEIR or transfer EIR. (Vol-8:Tab-161:AR3:CD3:30101-30103.) The IID directors themselves indisputably did not receive the addenda until they were brought into the hearing room that day. (Vol-8:Tab-161:AR3:CD3:30103.) The county did not receive these addenda until *one month* later, on the eve of the running of the CEQA statute of limitations. (Vol-9:Tab-179:AR4-08-1071-35543 to 35544; Vol-9:Tab-180:AR4-08-1071-35545.) As discussed in part II, *supra*, the final QSA-JPA postdated the water agencies' final project decisions. Under these circumstances, the county cannot be charged with the duty to exhaust a remedy not available. (Pub. Res. Code, § 21177, subd. (e); *Mani Bros. Real Estate v. City of Los Angeles* (2007) 153 Cal.App.4th 1385; see Contested Matter ("CM") 146, AA:25:180:06647-06649.)

C. The County's Claims, Being Those of Failure to Proceed as Required by Law, Should Be Sustained by this Court's Independent De Novo Review.

The county's cross-appeal addresses compliance with both the California wheeling statute (Water Code sections 1810-1814) and CEQA. The county agencies' appeal to interpret the wheeling statute presents an issue of law, reviewable here de novo. (*Metropolitan Water Dist. v. Imperial Irr. Dist. [MWD v. IID]* (2000) 80 Cal.App.4th 1403, 1423.)

In CEQA cases, courts adjust their scrutiny to the nature of the alleged defect: one of factual inadequacy, or failure to proceed as CEQA requires. (*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (quoting *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1236).) Each issue raised here involves failure to proceed as the law requires. Identifying the appropriate lead agency presents a “question of law requiring *de novo* review.” (*PCL v. DWR*, 83 Cal.App.4th at 906.) Similarly, failure to describe a stable and consistent “no project” alternative represents failure to proceed as required by law. (*County of Inyo v. City of Los Angeles (Inyo III)*, 71 Cal.App.3d 185.) A failure to analyze growth impacts similarly falls as failure to proceed lawfully. (*Vineyard*, 40 Cal. 4th at 435.)

VI. THE CALIFORNIA WHEELING STATUTE FORBIDS USE OF THE COLORADO RIVER AQUEDUCT TO TRANSFER IMPERIAL VALLEY WATER TO SAN DIEGO, UNLESS THE IMPERIAL COUNTY BOARD OF SUPERVISORS FINDS THE TRANSFER ENVIRONMENTALLY AND ECONOMICALLY ACCEPTABLE.

California’s wheeling law, sections 1810-1814 of the Water Code, includes a vital condition protecting the county from which water will be taken by one party and delivered to a second party through an aqueduct operated by a third party. In authorizing and requiring Metropolitan to make its aqueduct space available to IID and San Diego for their transfer, the Legislature expressly conditioned the transfer on this requirement:

This use of a water conveyance facility is to be made ... without unreasonably affecting the overall economy or the environment of the county from which the water is being transferred.

(Wat. Code, § 1810, subd. (d).) This provision cannot be deemed accidental, incidental, or concealed. However, the superior court rejected Imperial County's claims that the law applied to the QSA's principal transfer, and that the county's board of supervisors forms the logical and proper agency to render the finding of unreasonable economic or environmental effects.

A. Because the Superior Court Ruled on the County's Wheeling Claim, that Claim Must Be Reviewed Here on Cross-Appeal.

The county agencies raised the lack of compliance with the wheeling statute as affirmative defenses in IID's validation case 1649, and by petition in the county's mandate case 1656. The county's affirmative defenses in case 1649 alleged:

1. Specifically, IID and SDCWA failed to obtain from the County, or ensure that the County could make, findings regarding the socio-economic impacts of the transfer, despite the fact that the transfer involves wheeling of water from IID to SDCWA via the facilities of the Metropolitan Water District.

(RA:1:10:00191.)

3. The Quantification Settlement Agreement (described in paragraph 30) is invalid because the parties to that agreement reached the agreement without complying with the requirements of Water Code sections 1810-1814. Specifically, the [QSA] parties failed to obtain from the County, or ensure that the County could make, findings regarding the socio-economic impacts of the transfer, despite the fact that the QSA involves wheeling of water through the facilities of the Metropolitan Water District.

(RA:1:10:00192.)

In Case 1656, the county's first amended petition alleges:

35. In approving the QSA, respondents and each of them refused to recognize that they were required to comply with Water Code sections 1810-1814, and on that ground failed to implement those sections.

36. Respondents thereby breached their duty under Water Code section 1810 to include in the QSA and its components, including the Transfer Agreement, a requirement to avoid unreasonable economic or environmental effect within the County of Imperial as determined by the County of Imperial.

(Supp.AA:44:528:010802.)

While correctly deciding that the transfer of IID allocation through MWD's Colorado River Aqueduct (CRA) for the benefit of SDCWA was a "wheeling" arrangement, the trial court erroneously determined that: (1) not all wheeling is subject to the wheeling statute; (2) the county agencies' claims and affirmative defenses were directed at the "exchange agreement," which is not one of the contracts at issue in either case 1649 or 1656 and which the court held has been validated by operation of law; and (3) the wheeling statutes did not give the county the authority to make the "without unreasonably affecting" determination required by subsection 1810(d). (See CM 44, AA:5:17:01223-01224; CM 45, AA:5:17:01224-01226; CM 58, AA:6:29:01422-01423; CM 138, AA:23:133.06042-06050.)

The county agencies cross-appealed from the superior court's final judgment incorporating the contested matter rulings denying the county agencies' claims that water could not be transferred from Imperial Valley to San Diego through the CRA without the county supervisors rendering the finding specified in subsection 1810(d). (Supp.AA:219:2062:054613.) Because the superior court denied these claims on the merits, they are

properly before this Court on the merits. (*Zeitlin v. Arnebergh* (1963) 59 Cal. 2d 901, 908.)

B. Water Code Subsection 1810(d) Requires that the Transfer Not Produce Unreasonable Environmental or Economic Effects in Imperial County.

The wheeling statute was written to ensure that together with the benefits of maximizing the use of aqueduct capacity, protection also be afforded to the environment and economy of the county from which transferred water originates. The requirement that “use of a water conveyance facility is to be made . . . without unreasonably affecting the overall economy or the environment of the county from which the water is being transferred” reflects the Legislature’s deliberate intent (and, to secure the bill’s passage, need) to protect counties of water origin. Use of an aqueduct to benefit others than the aqueduct owner necessarily creates the risk of harm previously not contemplated; to prevent that harm the affected county itself must find the use acceptable.

As the wheeling bill (AB 2746) proceeded to its first legislative hearing, the potential for environmental or economic impact in the county of transfer origin became evident, in light of Inyo County’s experience with Los Angeles’ extraction of Owens Valley water. After 12 years of litigation in this Court, Inyo and Los Angeles reached a tentative agreement to govern Los Angeles’ Owens Valley groundwater extraction. (See *County of Inyo v. City of Los Angeles (VI)* (1984) 160 Cal.App.3d 1178.) The wheeling law was presented to the Legislature in the same year this Court authorized the Inyo-Los Angeles experiment. To Inyo County, the prospect that a third party could force and then use the Los Angeles Aqueduct to transport privately-extracted Owens Valley groundwater

threatened to vitiate the limitations on extractions negotiated with Los Angeles. (Supp.AA:175:1714:043689-043690.)⁴²

To address this concern, the bill was amended prior to its first committee vote to exclude water originating in Inyo and Mono Counties. (Supp.AA:174:1714:043484, Supp.AA:175:1714:043690.) Subsequently, however, an individual who proposed exactly the type of transfer that threatened Inyo County succeeded in securing the bill author's removal of that provision after the bill cleared the Assembly. (Supp.AA:174:1714:043487, Supp.AA:175:1714:043690, 043694, 043701.) When Inyo County became aware of that action, after the fact, it forcefully protested to the author and the Senate. (Supp.AA:175:1714:043690-043691, Supp.AA:176:1714:043754, 043831.) As a consequence, a substitute provision was inserted, that which became section 1810, subdivision (d). (Supp.AA:174:1714:043490, Supp.AA:175:1714:043691.) Inyo County then supported the bill, and it successfully cleared the Senate and into enactment.⁴³ (Supp.AA:174:1714:043495, Supp.AA:175:1714:043691, Supp.AA:176:1714:043761.)

The area-of-origin protection embraced in subdivision (d), indispensable to the wheeling law's enactment (see

⁴² Judicial notice of the legislative history of Water Code sections 1810-1814 was requested by the county, air district, MWD and SDCWA, and granted by the superior court. AA:23:133:06050. This legislative history properly informs the Court's interpretation of the wheeling statute's open questions. *MWD v. IID*, 80 Cal.App.4th at 1425.

⁴³ Inyo County's opposition to the wheeling law cannot be deemed trivial or insignificant. So strongly did the Governor deem protection of the 1984 Inyo-LA agreement that after AB 3567 was enrolled and discovered to threaten the pact, the Governor for that reason alone vetoed the measure. Supp.AA:175:1714:043745.

Supp.AA:176:1714:043767, 043791 (author touting to the Governor and editors the bill's support by Inyo, Mono, and environmentalists) must therefore be applied in this case to protect the county's interest in its environment and economy.

C. The County Supervisors Are Best Positioned and Authorized to Render the Environmental and Economic Findings.

The wheeling statute requires that for a third-party transfer to take place through a non-party's aqueduct

In making the determinations required by this article, the respective public agency shall act in a reasonable manner consistent with the requirements of law to facilitate the voluntary sale, lease, or exchange of water and shall support its determinations by written findings.

(Wat. Code, § 1813; see *Sierra Club v. City of Hayward* (1981) 28 Cal.3d 840; *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.) This cross-appeal now requires judicial identification of the "respective public agency" to make the county impact findings. Here this Court must honor the Legislature's intent to protect counties of transfer origin from water transfers proposed by others. (See *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 256.)

Among the possible agencies to render the county impact findings are the owner of the conveyance facility, the transferor of the water, the transferee of the water, the State Water Resources Control Board, or the county board of supervisors themselves. By choosing the term "respective public agency," the Legislature signaled that the different findings required by the wheeling statute would not necessarily all be made by the same agency.

Thus, while the Legislature assigned particular findings (“amount of unused capacity,” “operation and maintenance,” and “fair compensation”) to the “public agency owning the water conveyance facility” (Wat. Code, § 1812), that delegation did *not* include determination of environmental or economic effects in the county of origin. That distinction is both sensible and enforceable; the aqueduct owner knows the details of its facility, and bears responsibility for its physical and financial integrity. But with respect to environmental or economic effects in a distant county of origin, the aqueduct owner cannot be deemed so competent. Endowing the aqueduct owner with county impact determinations would lead to arbitrary findings; an owner wishing to frustrate wheeling based on its own interests would be motivated to find adversity in the county of origin whether there or not; conversely an aqueduct owner desiring to wheel would be motivated to understate the adversity uphill. The aqueduct owner fails as candidate to render the subdivision (d) findings.

For the same reasons, neither the transferor nor transferee of water has been entrusted with the county impact findings. Consummating their deal for mutual self interest inherently motivates adverse impact in the county of origin to be understated.

As to the State Water Resources Control Board, its duties with respect to water transfers are defined in other provisions of the Water Code, and do not include express determination of environmental effects within a county. (See Wat. Code, §§ 386, 1727, 1736.) Nor is it clear that the state board’s jurisdiction will be invoked in every wheeling in California. The state board in reviewing the IID-SDCWA transfer, therefore expressly declined to assert wheeling authority for itself (Vol-6:Tab-112:AR3:CD18:526906), a jurisdictional disclaimer entitled to weight here.

(See *North Gualala Water Co. v. State Water Resources Control Bd.* (2006) 139 Cal.App.4th 1577, 1590.)

The county and its board of supervisors, in contrast, bear the constitutional duty to protect the economy and environment of the residents and resources within their jurisdiction. (Cal. Const., art. XI, § 7; see *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166.) In contrast to other potential local or state agencies, the county board is most familiar with the environmental and economic conditions. And as elected officials representing the entire county, the board is most democratically accountable (*Baldwin*, 31 Cal.App.4th at 181), thereby best poised to evaluate a proposed wheeling's economic and environmental costs and benefits, and thereby determine its reasonableness.

Thus, in specifically authorizing the fallowing component of the QSA, the Legislature in 2002 conditioned IID's authority to fallow, and exonerated liability for Salton Sea impacts caused by that fallowing, provided:

the district shall consult with the Board of Supervisors of the County of Imperial and obtain the board's assessment of whether the proposed land fallowing conservation plan includes adequate measures to avoid or mitigate unreasonable economic or environmental impacts in the County of Imperial.

(Wat. Code, § 1013(b)(2).) The Legislature thus recognized the County of Imperial as most competent to assess in-county environmental and economic QSA-related transfer impacts. Harmonizing this mandate with the duty to render identical findings in the wheeling statute, as the Court should do (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1095), the IID-

SDCWA transfer cannot proceed without the county's findings as specified in Water Code section 1810.⁴⁴

D. The Wheeling Statute Applies to the IID-SDCWA Transfer.

1. The Statute Expressly Includes Exchanges and Sales as Well as Transfers.

In superior court the water agencies asserted that the IID-to-San Diego transfer is not covered by the wheeling law because the legal mechanism for transporting San Diego's transferred water to San Diego is characterized as an "exchange agreement." (RA:5:62:01375-01377.) Yet by its own terms, the wheeling law embraces exchanges. Section 1 of chapter 918, 1984 statutes (enacting the wheeling law) specifies that "sales, leases, or *exchanges* of water are to be made ... without unreasonably affecting the overall economy of the area from which the water is being transferred." (Supp.AA:174:1714:043496 (emphasis added).) Water Code section 1813 also provides that "the determinations required by this article" shall be "consistent with the requirements of law to facilitate the voluntary sale, lease or *exchange* of water" (Supp.AA:174:1714:043496 (emphasis added).) On its face the legislation does not turn on the legal mechanism by which water from one party for the benefit of another is transported in a third party's aqueduct.

⁴⁴ After section 1810 was enacted to include subdivision (d), Inyo County represented to the Legislature that it would make the determination of unreasonable environmental or economic impact within its borders. Supp.AA:175:1714:043691. Ultimately the Inyo supervisors by county code amendment established a conditional-use-permit requirement to enable the county to render the section 1810 findings for water proposed for transfer out of county through the Los Angeles Aqueduct; Los Angeles agreed to be bound by the county's determination. Inyo County Code, §18.77.000, subd. (G); see generally Inyo County Code, ch. 18.77; RJN:Exh.:2:15-22.

2. Assemblymember Katz Promoted the Wheeling Law as Applicable to Exchanges and Sales.

The wheeling law does not embrace “exchanges” by accident. The bill’s author repeatedly promoted the legislation as applicable to water exchanges, transfers, and sales. (Supp.AA:175:1714:043706, 43728.) That expression conforms to the author’s intent to have the measure apply as broadly as possible, to ensure that clever draftsmanship did not enable an aqueduct owner to evade the law’s mandate that unused capacity be made available to other parties. But breadth is a two way street: just as the wheeling law’s mandate for use of available capacity applies to exchanges, so does its environmentally and economically protective provision in section 1810, subdivision (d).

Moreover, AB 2746’s author consistently presented the bill as *allowing*, not just mandating, wheeling arrangements. In his April 9, 1986 letter to the Assembly committee chair Mr. Katz described AB 2746 as “provid[ing] a process for use of unused capacity in canals and aqueducts.” The Assembly member continued, “Existing law already allows joint use of water *development* facilities which have unused capacity. This bill *allows* agencies and individuals to use each others’ *conveyance* facilities when there is room.” (Supp.AA:175:1714:043521 (emphases added).) The fact sheet accompanying the letter further provides that the bill “[a]llows those agencies which *now are not authorized to sell unused capacity in the conveyance facility the right to do so.*” (Supp.AA:175:1714:043523.) An August 22, 1986 fact sheet similarly states that “AB 2746 is needed [because] [t]here is no legislation which sets forth a rational process for how existing public canals and water conveyance facilities can be used.” (Supp.AA:176:1714:043767.) In urging the Governor to sign AB 2746 Mr.

Katz reiterated that the “bill sets forth a procedure for joint use of the excess capacity in publicly owned canals and aqueducts,” but “only if such use will not harm the economy or the environment.” (Supp.AA:176:1714:043791.) Nowhere in the letter does the bill’s author express that the statute’s environmental and economic protections only apply to involuntary wheeling arrangements. (Supp.AA:176:1714:043791.)

Moreover, as MWD admitted in its letter to Mr. Katz prior to the bill’s enactment, AB 2746 would make wheeling agreements compulsory if the conditions set forth in section 1810 were satisfied. (Supp.AA:175:1714:043518.) MWD thus characterized the wheeling statute as constituting a “mandatory club being held over [its] head.” (Supp.AA:175:1714:043518.) MWD’s “voluntary agreement” to wheel the water through its facilities as required by section 1810 does not immunize the IID-SDCWA water transfer from the requirements of subsection 1810(d), nor make the findings required by section 1813 merely “voluntary.”⁴⁵

3. The Transfer and Exchange Agreements Beneficially Transfer Ownership to San Diego Before the Water Enters the Colorado River Aqueduct.

The IID-to-San Diego transfer involves three parties: IID as selling transferor, San Diego as buying transferee, and Metropolitan as third-party

⁴⁵ SDCWA and MWD argued at trial that SDCWA was not utilizing “unused capacity” in the CRA and therefore the subsection 1810(d) findings were not required. RA:6:79:01620. Not only is this assertion contrary to the legislative history; the CRA of course had “unused capacity” – the 600,000 AFA that MWD would lose under the Secretary’s enforcement of 4.4 – the very empty space in the CRA that the QSA was designed to fill. Vol-9:Tab-187:AR4-03-238-14821.

transportation provider. The wheeling law's criteria for subdivision (a) of sections 1810 and 1811 are met. The reality is masked, however, by the parties' need to characterize the transaction's intermediate steps in different ways to address both California and federal law. From the perspective of the State, IID, and San Diego, under state law IID's water is being conveyed to San Diego; that is the essence of the change of point of diversion, use, and place of use that framed the State Water Board's approval of the transfer. (State Water Resources Control Board WRO 2002-0013 (changing place of diversion to Lake Havasu), Vol-6:Tab-113:AR3:CD18:527005-527006.) And that suffices to invoke the state-law wheeling statute.

From the perspective of the Secretary and MWD, however, San Diego lacks legitimacy to take delivery of the water from the Colorado River. As *Arizona v. California* (1963) 373 U.S. 546, 579-580, makes clear, no California party comes to the river but through contract with the Secretary, and San Diego lacks such privity. Metropolitan is the only coastal urban party authorized to receive the water from the river. In its triangular relationship with IID and Metropolitan, therefore, San Diego occupies the traditionally uncomfortable position of the short side; not only must San Diego purchase transportation from Metropolitan, it must also purchase the latter district's ability to divert the transferred water at Lake Havasu.⁴⁶ As now will be shown, the legal gymnastics required to effectuate the transfer, understandable as they may be, cannot be invoked to defeat the legal reality— of which Water Code section 1810 is a part — that

⁴⁶ As explained in a Metropolitan fact sheet to its directors “SDCWA and MWD enter into exchange for SDCWA to receive Colorado River without Section 5 contract.” Vol-9:Tab-205:AR4-08-1014-35005. Section 5 is that of the Boulder Canyon Project Act, the provision enforced at 373 U.S at 579-580.

wheeling of IID's water to San Diego is what the water agencies are propounding. The water transferred through Metropolitan's aqueduct, while "made available" to Metropolitan during that transit, represents transferred IID water that does not belong to Metropolitan, but is dedicated to San Diego.

4. The CRWDA and QSA-Related Agreements Specify that the Transferred Water Made Available Benefits and Is Attributed to San Diego.

In the CRWDA the Secretary recognizes that the transferred water she authorized Metropolitan to divert at Lake Havasu is "for the benefit of San Diego." (*Op. cit.*, ¶ 4.c., Vol-8:Tab-164:AR3:CD1:10276.) Thus, to the extent that the water agencies in their present effort to write section 1810 out of the transfer argue that the water while in the CRA is "made available" to Metropolitan under the exchange agreement (RA:6:79:01624), the CRWDA reflects both Secretarial and all-California-water-agency recognition that beneficial entitlement to the water remains with San Diego.

Under state law, the QSA and transfer agreement similarly recognize that San Diego (not Metropolitan) takes beneficial use of the water at Imperial Dam (Vol-1:Tab-14:AR3:CD1:11177) and with the state board's approval, it (not Metropolitan) is authorized to divert IID's transferred

water at Lake Havasu. (Vol-6:Tab-113:AR3:CD18:527006.)⁴⁷ While the exchange agreement requires San Diego to “make available” its transferred water to Metropolitan (*op. cit.*, ¶ 3.1(a), Vol-9:Tab-210:AR3:CD1:10948), the water does not become Metropolitan’s;⁴⁸ it remains San Diego’s to possibly be exchanged for Metropolitan’s other supplies at the terminus of the Colorado River Aqueduct.⁴⁹ (*Id.*, ¶ 3.2(a), Vol-9:Tab-210:AR3:CD1:10950.)

5. The Transfer Agreement and IID-San Diego State Water Board Petition Define the Transportation of the Transferred Water as Wheeling.

IID advanced at superior court the simplistic assertion that “the exchange agreement is not a wheeling agreement.” (RA:6:64:01389.) The terms of the wheeling law do not recognize this claimed distinction. IID’s argument is particularly misplaced when the transfer agreement is examined. In that agreement, IID and San Diego refer to the exchange agreement as “wheeling,” and use the phrase “wheeling rate” to define the

⁴⁷ Thus the state-law QSA does not characterize IID’s transfer of its conserved water to San Diego as “making that water available” to Metropolitan – in contrast to IID “making water available” to Metropolitan and Coachella for their own use. Compare *op cit.*, ¶ 2.1(6) with ¶¶ 2.1(5) and (7); Vol-8:Tab-168:AR3:CD1:10300. Instead, paragraph 2.1(6) of the QSA provides that the transfer agreement governs IID’s transaction. That agreement, in turn, is quite specific: when IID transfers water to San Diego by reducing its diversion at Imperial Dam, “[t]he [*San Diego*] Authority accepts responsibility for the Conserved Water at Imperial Dam.” Transfer Agreement, ¶ 6.5 (emphasis added), Vol-1:Tab-14:AR3:CD1:11177.

⁴⁸ The exchange agreement provides that the exchange water is not Metropolitan’s, but for all purposes characterized as an “independent local supply.” Exchange agreement, ¶ 4.1, Vol-9:Tab-210:AR3:CD1:10954.

⁴⁹ The wheeling is not undone by the exchange agreement’s assertion that Metropolitan can deliver the transferred water any old way it chooses. RA:5:62:01376. There is only one way to get transferred IID Colorado River water credited to San Diego: through the Colorado River Aqueduct. Vol-9:Tab-184:AR3:CD15:500651.

costs that San Diego must pay to bring the IID water there. (Transfer Agreement, fourth amendment, condition 1.B (“Wheeling. The Authority and MWD have executed the Exchange Agreement on or before the QSA Closing Date ...”) (underline in original), Vol-8:Tab-167:AR3:CD1:11343; *Id.*, art. 1 (redefining the “Actual Wheeling Rate” for “*wheeling* water from Lake Havasu to the Conveyance Path Terminus” in San Diego) (underline in original, italics added), Vol-8:Tab-167:AR3:CD1:11343.)

And in their transfer petition to the state board, IID and San Diego jointly represented, under the title “Wheeling Arrangements,” “ ... the [San Diego] Authority must obtain, from the MWD or otherwise, the ability *to wheel* the amount of conserved water through the MWD’s Colorado River Aqueduct (“CRA”) to San Diego County.” (Vol-1:Tab-19:AR3:CD15:500013 (emphasis added).)

6. The Water Agencies Expected that the Wheeling Statute Applies.

Virtually alone among major California water agencies, San Diego was a principal proponent of the wheeling law as it advanced through the Legislature. (Supp.AA:175:1714:043588, 043704-043705, 043707-043708.) As San Diego County’s legislative analysis showed, the bill would serve that county by disabling Metropolitan from withholding approval to use its aqueduct to transport water conserved and transferred by IID. (Supp.AA:175:1714:043588, 043708.) San Diego ultimately obtained the benefit of the wheeling law’s enactment to secure its needed use of the CRA.

The water agencies further acknowledged their operation under the wheeling statute by participating as adversaries in *MWD v. IID*, 80 Cal.App.4th 1403. By the time that litigation matured, of course, the IID-to-San Diego transfer had been negotiated in 1998. In anticipation of that transfer, Metropolitan, relying on the authority and standards of the wheeling statute, and expecting to effect its wheeling by the transfer agreement, set a fixed wheeling rate and then sought its judicial validation. As the appearance of counsel and opinion's introductory paragraphs display, Metropolitan's principal opponents were IID and San Diego. (*Id.* at 1406-1407.)

Significantly, none of the protagonists in Metropolitan's wheeling rate validation contested the applicability of the wheeling statute to the anticipated IID-to-San Diego transfer. Both sides invoked the wheeling statute in support of their positions; the statute provided the field on which the contest was waged and determined. (See also Vol-9:Tab-183:AR3:CD6:62527 (Metropolitan and Assemblymember Katz disagree about terms of the wheeling statute, but agree that the water to San Diego would be "wheeled" pursuant to that law).)

Furthermore, the four-agency QSA PEIR cites subsection 1810(d) as part of the "regulatory framework" addressing potential "economic effects associated with water transfers" and recognizes that subsection 1810(d) mandates that "[u]nreasonable effects on the overall economy of the area from which the water is being transferred must . . . be avoided." (Vol-3:Tab-52:AR4-04-334-20399.) Likewise, the IID-SDCWA transfer agreement lists sections of the wheeling statute as in effect on the execution date of the agreement (Vol-1:Tab-14:AR3:CD1:11298), and adopts the

definitions in the wheeling statute as its own. (See, e.g., Vol-1:Tab-14:AR3:CD1:11143, 11162.)

Finally, in its case-in-chief at the state board's hearing on the transfer, San Diego's general manager verified on direct examination that the exchange agreement "is a transportation agreement whereby San Diego will receive the water from Imperial." (Vol-9:Tab-192:AR3:CD18:521553.) On cross-examination, the general manager confirmed that the transferred water was not blended into Metropolitan's own supplies, that the exchange agreement was a wheeling agreement, and that it "was not used to avoid the findings required by Water Code Section 1810." (Vol-9:Tab-192:AR3:CD18:521584.)

Accordingly, all available indicia point to one conclusion: the wheeling statute applies to the IID-to-San Diego transfer. IID stands, in the legislative definition (Wat. Code, §1811, subd. (a)), as a public agency with a contract for sale of water to San Diego that was conditioned upon acquisition of Metropolitan's CRA capacity to convey the water to San Diego.

E. Because the QSA and Transfer Agreement Should Be Set Aside for Failure to Comply with the Wheeling Statute, the County Did Not and Need Not Challenge the Subsidiary MWD-SDCWA Exchange Agreement.

All three water agencies argued below that the exchange agreement has not been the target of a validation proceeding, and more particularly that it is too late to challenge it now. (RA:5:62:01373-01376; RA:6:64:01389.) In contested matter 138, the trial court determined that the County must direct its wheeling claim at the MWD/SDCWA exchange

agreement. As written above, the exchange agreement serves the purpose of enabling the transfer to take place in the fog of the separate federal and state mandates governing Colorado River water use in California. Even if valid, however, the exchange agreement does not exonerate the water agencies from compliance with the wheeling statute's protective provisions.

The transfer agreement lists portions of the wheeling statute as the operative law in effect affecting the contract, acknowledging the applicability of the wheeling statute to the IID-SDCWA water transfer. The QSA PEIR cites subsection 1810(d) as part of the regulatory framework affecting water transfers. (Vol-3:Tab-52:AR4-04-334-20047, 20399.) The transfer agreement, not the exchange agreement, sets forth the impact analysis and approvals needed before the transfer could go forward. (See, e.g., Vol-1:Tab-14:AR3:CD1:11186 to 11188.) Nonetheless, although the QSA and transfer agreement acknowledge that CEQA, NEPA, and Endangered Species Act compliance are conditions of operation, those contracts fail to make compliance with Water Code subsections 1810(d) and section 1813 a condition precedent for the transfer of IID water through MWD's CRA to SDCWA. On those grounds the contracts must be set aside with mandate to include the wheeling statute requirements, sufficient relief for the county here.

F. Because of the County's Authority under the Wheeling Statute, the Two EIRs' Preparers Should Have Recognized the County as a CEQA Responsible Agency.

CEQA defines a "responsible agency" as a "public agency, other than a lead agency which has responsibility for carrying out or approving a project." (Pub. Res. Code, § 21069.) A responsible agency "includes all public agencies other than the lead agency which have discretionary

approval power over the project.” (CEQA Guideline, § 15381.) Because responsible agencies have discretionary approval power over all or part of the project, they must exercise judgment or deliberation.⁵⁰

Because of the county’s duty and authority to render the subdivision (d) findings with respect to both the QSA and transfer agreements, the county should have been recognized and respected as a responsible agency. Moreover, before either the QSA transfer or EIRs became truly “final” at their last revision in October 2003, new legislation similar to section 1810 endowed the county with discretionary authority to allow the use of fallowing to generate water “conserved” for the IID transfer and QSA. (Wat. Code, § 1013, subd. (b)(2); see part VI.C, *supra*.)

The Legislature thus doubly assigned Imperial County the responsible agency role with respect to the QSA and transfer, before either EIR became final and beyond the power of amendment. Yet neither the QSA nor the transfer EIRs honored the county’s request to be included as a responsible agency. The failure of the EIRs’ preparers proved prejudicial, as reflected in the EIRs’ inadequate assessment of environmental impacts within the county’s jurisdiction, detailed in parts VIII and IX, *infra*, and in the air district’s brief part IV.4.

⁵⁰ See, e.g., *Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 174; see also *Lexington Hills Assn. v. State of California* (1988) 200 Cal.App.3d 415, 431; *Central Delta Water Agency v. State Water Resources Control Board* (2004) 124 Cal.App.4th 245, 274; *Riverwatch v. Olivenhain Municipal Water District*, 170 Cal.App.4th at 1206.

VII. BECAUSE THE TRIAL COURT FAILED TO DO SO, THIS COURT SHOULD ADJUDICATE THE COUNTY'S ENVIRONMENTAL CLAIMS ON THEIR MERITS.

Seven years ago the county timely filed two mandate petitions to challenge the failure of the QSA and transfer agreement agencies to conduct a rational and honest environmental assessment of the largest water transfer in California history. Soon after, in response to IID's validation complaint asserting that selected QSA agreements had complied with CEQA, the county agencies timely answered that complaint, asserting as defenses the invalidity of the QSA and transfer agreements, flowing from CEQA noncompliance. Regrettably, the superior court persistently refused to adjudicate these claims, whose prompt resolution the Legislature has commanded. (Pub. Res. Code, §§ 21167.1, 21167.4.)

The county agencies' CEQA claims challenge the fundamental dishonesty of EIRs deliberately written to mask the environmental consequences of the transfer, in both places of origin and destination, and evade assignment of mitigation responsibilities to the urban water agencies that stand to benefit from the transfers at the expense of the Imperial Valley environment.

The superior court's six-year failure to evaluate the QSA's deficient environmental assessments, culminating in an erroneous dismissal of these fully-briefed claims as moot, calls for this Court to render that judgment while time remains to address the QSA's most ominous environmental legacy. The QSA and state board anticipated a 15-year window to stabilize the Salton Sea; nearly half that period has been wasted with the QSA's operation premised on fallacious but uncorrected EIRs.

Colorado River water agencies, both within California and in sister states, have claimed that the QSA has become indispensable, denigrating

the superior court's moderate warning that the QSA has remained at risk for all these intervening years. (AA:7:46:01655, ¶ 2 ("The QSA and associated transfers are not beyond this Court's reach").) The State's statutory duty to compensate for Salton Sea mitigation references and incorporates the still-to-be-adjudicated transfer EIR.⁵¹ Moreover, the ultimate cost of the State's "unconditional" Salton Sea commitment in the QSA-JPA, discussed in part II, may prove to be even greater once the CEQA claims are adjudicated and the deficiencies of the water agencies' impact assessment and mitigation are made clear.

These risks must be read in light of the State's and water agencies' opening-brief assertions that mitigation costs for the Salton Sea might be reduced if the sea declines so precipitously that it can no longer be feasibly restored. (See fn. 21, *supra*.) Time has become even more essential in addressing the QSA's CEQA deficiencies. Issuing warnings that were absent when this litigation was commenced, the Salton Sea Authority now runs a "doomsday clock" counting down to the sea's abyss of irreversible decline http://www.saltonsea.ca.gov/ltnav/why_countdown.html (last visited Nov. 16, 2010) :

⁵¹ Section 3, chapter 654, statutes of 2003, defines the "environmental mitigation requirements" to be compensated by the State as those measures required as a result of the environmental review process "described in the final Environmental Impact Report/Environmental Impact Statement for the Imperial Irrigation District Water Conservation and transfer project certified by the Imperial Irrigation District on June 28, 2002, as modified and supplemented by the addendum thereto"

Countdown to Disaster

2602

**Days Left to Save The Salton Sea
(this ticker counts down a day at a time for 15 years)**

The Legislature has commanded, and the courts have enforced, CEQA's mandate that CEQA cases be promptly resolved. (Pub. Res. Code, §§ 21167.1, 21167.4; *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 500.) The court of appeal has held that "CEQA challenges, with their obvious potential for financial prejudice and disruption, must not be permitted to drag on to the potential serious injury of the real party in interest." (*Board of Supervisors v. Superior Court* (1994) 23 Cal.App.4th 830, 837.)

But while the cases to date address the cost of delay to project proponents, the Public Resources Code and public policy speak in broader terms: the cost to society generally, and to the environment as well as private profit, imposed by allowing CEQA claims to fester unresolved. In this proceeding the QSA and transfer proponents have traded places with truculent opponents, not seeking prompt resolution, but perpetuating delay, lest their environmental dishonesty be called to account. The superior court refused to honor *seven* requests to adjudicate the CEQA merits and issue peremptory writs sought on the CEQA claims.⁵² Then, after initially allowing pre-trial motions on the CEQA merits, the superior court abruptly decided not to adjudicate them, deferring briefing and resolution until trial.

⁵² See *County of Imperial v. Superior Court (MWD)*, 3 Civil C060725 (petition reciting frustration of efforts to secure hearings on mandate petitions): RJN:Exh.3:55-59.

(AA:14:9903592-03594.) Finally, subsequently *ordering* briefing on the CEQA merits, the superior court non-meritoriously discarded those claims as moot. (AA:48:312:13072.)

Against this reality the County of Imperial maintains that this Court can and should provide judgment on the merits of its cross-appeal.

A. If the Water Agencies' Appeal is Sustained, the Environmental Claims Must Be Adjudicated to Produce a Final Judgment.

The superior court's judgment focused on the constitutionality of the State's funding commitment, and finding invalidity of all but one of the QSA contracts on that ground, dismissed the environmental claims as moot. If on the water agencies' appeals this Court reverses that judgment and concludes that the QSA cannot be so invalidated, then the remaining unresolved claims must be promptly resolved to produce a final judgment of validity or invalidity. In particular, if the QSA and water transfer were determined free of any constitutional infirmity, they would then require evaluation of conformity to CEQA's environmental assessment and mitigation duties.

For reasons stated in the preamble to this part VII and in section VIII.D below, these issues should not be remanded to the superior court for determination. These issues can and should be resolved under aegis of the county agencies' cross appeals in this Court.

B. Even if the Water Agencies' Appeal is not Sustained, the Environmental Claims Are Not Moot.

1. Dismissal of the Environmental Claims without Setting Aside the EIR Certifications Failed to Provide Effective Relief.

California courts impose a rigorous burden on respondent agencies seeking to dismiss CEQA claims or defenses as moot. A case only “becomes moot when a court ruling can have no practical effect or cannot provide the parties with effective relief.” (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 454 (citing *Californians for Alternatives to Toxics v. Department of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1069).) In *Lincoln Place*, where tenants had sought to prevent landlords from proceeding with evictions and to compel the enforcement of mitigation measures, the court held that resolution of the unlawful detainer issues did not “resolve the issue of CEQA compliance,” which remained relevant to enforcement of mitigation.

Lincoln Place relied heavily on *Californians for Alternatives to Toxics*, which reversed a trial court’s finding of mootness even though the annual pesticide program renewals challenged in the action had already expired. (136 Cal.App.4th at 1070.) The court also noted that the matter was of continuing public interest and was likely to recur. In that case, as the county requests here, the appellate court addressed the CEQA mandamus claims on the merits even though the trial court had not addressed them. (*Id.*)

Most recently, the California Supreme Court in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116 refused to deem a CEQA action moot even though the EIR which petitioners sought was prepared and

certified while the matter was on appeal. *Save Tara* drew upon earlier cases warning that project proponents and respondents cannot insulate projects from timely CEQA challenge by conducting post-approval environmental review, or even by partly or fully completing the project.⁵³ The Court noted that petitioners had also sought to set aside other approvals that remained unresolved. Those involved an earlier public-private development agreement contingent on CEQA compliance, which had in practical terms committed the respondent city to the project. Petitioner, the Court found, “can still be awarded the relief it seeks, *an order that the City set aside its approvals.*” (*Id.* at 127 (emphasis added).)⁵⁴

Like the housing project in *Save Tara* but with vastly wider statewide repercussions, the QSA project challenged by the county involves the intersection between two sets of approvals, one of which the superior court declined to address. In addition to challenging the validity of the project, the county’s writ petitions requested that the court set aside the water agencies’ approval decisions, including those certifying the environmental review documents as prepared in accordance with CEQA.

Here, the superior court refused the county’s requests to set aside agency certifications of the QSA environmental documents. In its comment on the proposed judgment, the county and air district specified the 18

⁵³ See, e.g., *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1202-1204 (partial construction of project did not moot appeal, where the project could still be modified, reduced or mitigated); *Woodward Park Homeowners Association v. Garreks* (2000) 77 Cal.App.4th 880, 888 (project completion did not moot appeal, since the project could be modified or removed).

⁵⁴ The Supreme Court ordered that relief, thereby ensuring that if the city reapproves the development agreement, it will do so with the benefit of EIR review.

agency approvals and underlying EIRs that should have been set aside.⁵⁵ The superior court could have provided this effective relief, but did not. Accordingly, the county can still be provided the “relief it seeks,” the set-aside of these approvals. (*Save Tara*, 45 Cal.4th at 127.)

Absent set-aside of the documents and their certification, the water agencies could in the next round of QSA-formulation:

(a) Simply re-certify the existing documents, claiming that the next-round QSA’s impacts have already been assessed;

(b) Re-certify the existing documents and add an addendum, claiming (as the water agencies have in this proceeding with respect to their post-2002 actions⁵⁶) that the addenda do not require recirculation to outside public agencies or the public for further review and comment (see CEQA Guidelines, § 15164);

(c) Re-certify the existing documents and add a supplemental or subsequent EIR, claiming that the only environmental matters deserving of further public and judicial review are those contained in the supplemental or subsequent analysis (see CEQA Guidelines, § 15163 (EIR supplement may be circulated without its underlying draft or final EIR).)

None of these plausible scenarios afford the county the effective relief to which it is entitled and has labored for seven years in this proceeding: setting aside the certifications of the QSA program and water transfer project EIR, which would preclude unlawful reliance on them in subsequent environmental reviews. (Accord, *Friends of the Santa Clara*

⁵⁵ These resolutions are listed in the record at AA:47:294:12772-12774.

⁵⁶ To reiterate: IID’s board of directors purported to approve the QSA agreements on October 2, 2003, before the terms were finally fixed, and to do so in reliance on two EIR addenda that were presented to the directors at the hearing. See part V.B, *supra*.

River v. Castaic Lake Water Agency (2002) 95 Cal.App.4th 1373, 1387 (setting aside water transfer EIR that relied upon later-decertified program EIR.)

2. Failure to Provide Effective Relief Would Invite Further Disputes over the Status of Faulty Environmental Documents.

The QSA and this litigation have now proceeded for seven years, without answering whether legally adequate environmental review supported the QSA approvals. Under the superior court's truncated judgment, the CEQA claims and defenses "are not only likely to recur, but are actually *still in controversy between the same parties.*" (*National Parks & Conservation Assn. v. County of Riverside* (1996) 42 Cal.App.4th 1505, 1513, n.4 (emphasis added).) That is because, assuming the existing QSA contracts, or some of them, are invalidated, without setting aside the EIR certifications and EIRs themselves, the EIRs would likely regenerate, hydra-like, at the bidding of the water agencies who made clear in the superior court their desire to keep the analyses and certifications alive. (RT-12/17/09:12:3333-3335.) Setting aside the approvals and EIR certifications would remove that risk.

3. The Environmental Claims Must Be Adjudicated to Resolve All Claims Presented in the Validation Proceeding.

Adequacy of the two EIRs has been placed at issue not only by mandate petitions but also by the answers in validation. A validation judgment, by its terms shall

become and thereafter be forever binding and conclusive, as to all matters therein adjudicated or *which at that time could have been adjudicated*, against the agency and against all other persons ...

(Code Civ. Proc, § 870, subd. (a) (emphasis added).) Without setting aside the EIR certifications and EIRs themselves, the water agencies could argue the superior court’s validation judgment perpetuates the ability of the EIR proponents to rely on them in future proceedings, and disabling future litigation of their merit. For that reason the validation statute obligates the adjudicating court to rule on the merit of the CEQA claims.

C. Even if the Environmental Claims Were Now Moot, Well-Recognized Exceptions Support Their Adjudication on the Merits.

Assuming *arguendo* that the CEQA claims were moot, three recognized exceptions to the dismissal of moot claims would apply to this proceeding: “where the case presents an issue of broad public interest that is likely to recur, where there may be a recurrence of the controversy between the parties, and when a material question remains for the court’s determination.” (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473 (court lacked authority to order a supplemental EIR because the city rendered no discretionary approval, but nonetheless applied mootness exception to adjudicate need for supplemental EIR).)

1. The County’s Environmental Claims Are of Broad Public Interest.

This proceeding places at issue the largest water transfer proposed in California – and the nation’s – history. At either end of the transfer, the predominant public interests are those of the environment: prevention of a national-scale air quality hazard; the sustainability of the Salton Sea, California’s largest interior lake, forming a vital link in the hemispheric migration of endangered wildlife; and the water supply of and potential for future growth in the Southern California coastal metropolis. Claims testing

the environmental compliance of vast interbasin water projects inherently implicate the broadest public interest. (See *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419; *Watershed Enforcers v. Department of Water Resources* (2010) 185 Cal.App.4th 969; *County of Inyo v. City of Los Angeles (II)* (1976) 61 Cal.App.3d 91; *County of Inyo v. Yorty (I)* (1973) 32 Cal.App.3d 795.)

The environmental claims also implicate environmental decision-making statewide. The “lead agency” claim tests whether a consortium of water agencies can collectivize their environmental analysis and thereby avoid individual responsibility for their environmental impacts; the “baseline” claim tests whether environmental impacts and mitigation can be moderated by postulating a synthetic “future baseline” instead of facts now on the ground; the “no project” claim tests whether the four Colorado River-dependent water agencies can ignore the reality that without their transfer and reallocation, the Law of the River confines California to the 4.4 MAFY allocation to which it committed in 1929, leaving the Colorado River Aqueduct able to withdraw only half its physical capacity.

Compliance with CEQA, the heart of the county agencies’ environmental claims, has been repeatedly found of such public importance as to warrant adjudication even where technically moot. The “principles involved in interpretation of CEQA are of public importance and are likely to arise in the future.” (*Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation and Park District* (1994) 28 Cal.App.4th 419, 427 (lead agency challenge resolved).)⁵⁷

⁵⁷ See also *Mountain Lion Coalition v. Fish & Game Comm’n* (1989) 214 Cal.App.3d 1043, 1045, n.2 (issue of CEQA compliance a matter of public importance, supporting adjudication of merits); *San Diego Trust & Savings Bank v. Friends of Gill* (1981) 121 Cal. App. 3d 203, 209 (same). Nothing

2. The Environmental Claims Raised by the County Agencies Will Likely Recur Between Them and the QSA Proponents.

For reasons stated in sub-sections VII.B.1 and VII.B.2, above, the environmental claims will almost certainly recur among parties to this proceeding. A renegotiated QSA and transfer will require environmental documentation. At trial the water agencies, particularly Metropolitan, labored mightily to keep the superior court from setting aside the existing environmental documents and their certifications (RT-12/17/09:12:3333-3335), inescapably inferring that the water agencies intend to preserve and rely on those documents and certifications in whatever water agency proceedings follow this Court's judgment. The environmental claims having been fully briefed in the superior court, and briefed by cross-appellants here; their resolution is presently compelled. (See *Cucamongans United*, 82 Cal.App.4th at 473; *Friends of Gill*, 121 Cal.App.3d at 209.)

3. Material Questions Remain for the Court's Resolution.

For reasons stated in sub-section VII.B.3 *supra*, the validation defenses place at issue the environmental claims, whose resolution is demanded so that the validation judgment can fulfill its statutory purpose of resolving all claims that were raised by the parties to the validation proceeding.

prevents courts from adjudicating a CEQA issue despite another dispositive ruling. (See, e.g., *Fullerton Joint Union High School v. State Board of Education* (1982) 32 Cal.2d 779 (Education Code, CEQA compliance); *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 792 (general plan consistency, CEQA compliance).

D. This Court Should Adjudicate the Environmental Claims and Not Remand Them for Yet More Delay in the Superior Court.

This proceeding remained in the superior court for more than six years. Because of the persistent reluctance of the superior court to address the environmental claims, they did not receive merits consideration in that time – notwithstanding the substantial investment of the county agencies and other environmental claimants to brief them there. Because these claims will be addressed *de novo* in this Court by the same standard of review as if done at trial, with no deference to the judgment of the superior court (*Vineyard*), this Court can and should address them now.

1. The Environmental Claims Are Fully Briefed and Supported by a Complete and Certified Record.

Cross-appellants and cross-respondents among them devoted 950 pages in their superior court trial briefs to the now-dismissed environmental claims. The certified record in the superior court, consisting of the CEQA record of proceedings in both the QSA program and transfer EIR decisions, was admitted into evidence there (RT-11/9/09:7:1943) and is now before the Court. This Court can proceed to the merits. (Accord, *Californians for Alternatives to Toxics*, 136 Cal.App.4th at 1070; *Watershed Enforcers*, 185 Cal.App.4th at 978.)

2. The Environmental Claims Deserve to be Promptly Resolved.

Seven years after the claims were asserted in mandate petitions and answers to validation, the environmental claims that frame the transfer of water from the Imperial Valley to urban Southern California deserve resolution – not only to honor CEQA’s specific command for promptness (Pub. Res. Code, §§ 21167.1, 21167.4), but also because the unevaluated

transfer EIR frames the State's consideration of air quality impacts at the Salton Sea (Stats. 2003, ch. 654, § 3, footnote 51, *supra*). Here the seven-year delay rises to the greatest magnitude of prejudice to the environment, given the postulates of the State and its water board that only eight more years remain to put a restoration plan in place. (Vol-6:Tab-113:AR3:CD18:526924; see also footnote 21, *supra*.)

3. The Environmental Claims Qualify for this Court's Original Jurisdiction.

In opening their petition for supersedeas, cross-respondent water agencies describe the QSA portfolio as "vital water agreements for the entire State." (*Op. cit.* p. 2.) Vindication of the cross-appellants' claims means that "[c]ritical water supplies for Southern California would be curtailed." (*Ibid.* p. 37.) And in their own words, the water agencies confirm that the appeals to this Court "present substantial ... issues." (*Ibid.* p. 40.) Similarly, IID's opening brief confirms that "the State has a significant interest in the QSA." (*Op. cit.* p. 5.)

Of the county agencies' environmental claims, the QSA and transfer proponents themselves acknowledge that "dramatically declining habitat values at the Salton Sea ... could be worsened by conserved water transfers." (IID OB 4.)

This momentous dispute between the county of water origin and the water agencies seeking transfer to the urban metropolis, of hundreds of thousands of acre-feet annually, would amply qualify for this Court's exercise of original jurisdiction. (See *Inyo I*, 32 Cal.App.3d at 797, 815.) Nor could doubt remain, that if this Court were to exercise such jurisdiction, it would "forego further references to the superior court." (See

Inyo II, 61 Cal.App.3d at 95.) Indeed, the case for original jurisdiction may be stronger here than in *Inyo*, given the “large number” of persons (half the State’s population) affected by the QSA and the “tortuous litigation history” below, which has delayed CEQA resolution for “as long as several years.” (See *Industrial Welfare Comm. v. Superior Court* (1980) 27 Cal.3d 690, 699 (exercising original jurisdiction in a different context for reasons stated in quotations).)

The county agencies advance these points not to urge this Court to assert original jurisdiction; the case is properly here on appeal and cross-appeal from final judgment, and all the QSA claims, not just those of the environment, can be resolved in a unified appellate judgment. Nonetheless, under the *Inyo* precedent this proceeding independently qualifies for original jurisdiction if necessary, bespeaking the propriety and need for this Court on cross-appeal to resolve those environmental issues without further delay.

VIII. THE QSA AND TRANSFER EIRS FAIL TO DISCLOSE THEIR PROJECTS’ PROFOUND ENVIRONMENTAL CONSEQUENCES.

A. The QSA PEIR Erroneously Designates Four Agencies as “Co-Lead” Agencies,” Enabling the QSA’s Principal Beneficiary to Evade Its Environmental Responsibility.

1. Correct Assignment of the Lead Agency Duty Is Essential to Produce Accountability for Environmental Harm.

Proper lead agency assignment is “fundamental to the CEQA process as a whole.” (CEQA Guidelines, §15050 (discussion); *PCL v. DWR*, 83 Cal. App.4th at 903 (describing “crucial role” of lead agency);

see also *Friends of Cuyamaca Valley*, 28 Cal.App. at 426.) The lead agency, “responsible for the adequacy and objectivity” of the EIR (CEQA Guidelines, § 15088), must analyze project impacts, formulate alternatives and mitigation, respond to comments, and inform other decision-makers. That agency “plays a pivotal role in defining the scope of environmental review, lending its expertise to areas within its particular domain, and in ultimately recommending the most environmentally sound alternative.” (*PCL v. DWR*, 83 Cal.App.4th at 904; see *Save San Francisco Bay Assoc. v. San Francisco Bay Conservation and Development Commission* (1992) 10 Cal.App.4th 908, 922.)

Erroneous lead agency assignment vitiates the “meticulous process designed to ensure that the environment is protected.” (*PCL v. DWR*, 83 Cal.App.4th at 911.) Environmental review by the wrong lead agency is a sufficient ground to set aside an EIR; the proper lead agency may choose to address CEQA issues in a “completely different and more comprehensive manner.” (*Id.* at 920.) CEQA’s “one lead agency” rule must be construed to accord the “fullest possible protection” to the environment within the reasonable scope of statutory language. (*Mountain Lion Federation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112; see also *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1443 (this is CEQA’s “foremost principle”).)

2. Assignment of the QSA Program EIR to Four “Co-Lead Agencies” Concealed the Single Agency with Principal Responsibility for the Project.

The QSA PEIR review intentionally evaded identifying the proper lead agency, using a “co-lead agency” designation unauthorized under CEQA and unsupported in decades of CEQA jurisprudence. Four

agencies—including SDCWA, which did not even sign the QSA—entered into a “lead agency agreement,” which asserted that each one qualified as lead agency and deemed all four “co-lead agencies.” (Vol-9:Tab-185:AR4-03-158-12713 to 12715; Vol-9:Tab-198:AR3:CD3:32097.)⁵⁸ Later, in response to public comment that the EIR should be prepared by a single lead agency (e.g., Vol-3:Tab-57:AR4-06-435-28154; Vol-5:Tab-74:AR4-06-435-28204), the agencies asserted, without analysis, that all four “shared principal responsibility,” and that the co-lead agency approach would “reduce paperwork.” (Vol-5:Tab-74:AR4:4-06-435-28159.)

This novel designation of “co-lead agencies” produced a foundational CEQA error. The lead agency is “the public agency which has the principal responsibility for carrying out or approving” the project. (Pub. Res. Code, § 21067; CEQA Guidelines, § 15367; *Fullerton Joint Union High School Dist*, 32 Cal.3d 779, 794). The lead agency concept requires one agency to accept principal responsibility. “[W]here a project is to be carried out or approved by more than one public agency, one public agency shall be responsible for preparing an EIR or negative declaration for the project. This agency shall be called the lead agency.” (CEQA Guidelines, § 15050(a) (emphasis added); see also *PCL v. DWR*, 83 Cal.App.4th at 905; *City of Redding v. Shasta Local Agency Formation Com.* (1989) 209 Cal.App.3d 1169, 1174.) The role of the lead agency is “so significant” that CEQA “proscribes delegation.” (*PCL v. DWR*, 83 Cal.App.4th at 907; see also *Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770, 779.)

⁵⁸ Three other agencies did sign the QSA: MWD, IID, and CVWD. Vol-8:Tab-168:AR3:CD1:10317.

Lead agency status is earned not by collusion but by assigning the agency in the “best position” to fulfill “the underlying purpose of an EIR...to analyze and inform regarding adverse effects to the environment as a whole.” (*PCL v. DWR*, 83 Cal.App.4th at 907; see also Pub. Res. Code, § 21061.) Once that agency is identified, a voluntary agreement with other agencies cannot dilute its lead agency obligations. In *PCL v. DWR*, DWR and six local water contractors designated a local joint powers authority as lead agency for restructuring State Water Project contracts. The signatories postulated that because their joint action was needed, they had “shared principal responsibility.” (*PCL v. DWR*, 83 Cal.App.4th at 905.) This Court rejected that theory, and declined to review the contractors’ agreement deferentially. (*Id.*) “Neither the language of the statute nor the facts of this case support a so-called shared principal responsibility.” This Court found it “incongruous” that a “private settlement agreement” could usurp DWR’s lead agency duty. (*Id.* at 906.)

In *City of Sacramento v. State Water Resources Control Board* (1992) 2 Cal.App.4th 960, this Court found that the former Department of Food and Agriculture (DFA) should have served as lead agency for rice pesticide plans, even though the Regional Water Quality Control Board reviewed and approved them. The court concluded that DFA, which devised the plans, exercised principal responsibility over their review, formulation and approval, and was best positioned to assess the environmental effects of the whole action. (*Id.* at 973.) Other CEQA decisions are in accord with this approach. (*Fullerton*, 32 Cal.3d at 795; *Friends of Cuyamaca Valley*, 28 Cal.App.4th at 427.) As discussed below in subsection VIII.C.4, MWD, as the agency with the broadest authority and as the principal QSA beneficiary, should have been the lead agency.

The attempt to share this responsibility with three other “co-lead” agencies concealed MWD’s obligation to mitigate project impacts, producing a serious failure to proceed as CEQA requires.

3. The “Cooperative Efforts” Guideline Does Not Exonerate the Environmental Duty of the Agency with Principal Responsibility.

The four “lead” agencies claimed plenary authority to avoid designating any of them as the “one” lead agency with “principal” responsibility, relying in superior court on the “cooperative efforts” guideline. That theory is fundamentally flawed. Nothing in the “cooperative efforts” guideline abrogates the “one lead agency” rule; its purpose is to “enable most agencies to determine for themselves which agency is the appropriate lead agency,” avoiding dispute resolution before the Office of Planning and Research.⁵⁹ (CEQA Guidelines, § 15051 (discussion) (emphasis added).)

The co-lead lead agencies’ argument evades section 15050(a)’s “one lead agency” requirement, wrongly turning the “cooperative efforts” CEQA guideline, section 15051(d), into a sweeping exception to the single lead agency requirement.

Section 15051(d) provides as follows:

Where the provisions of subdivisions (a), (b), and (c) leave two or more agencies with a substantial claim to be the Lead Agency, the public agencies may by agreement designate *an agency* as the Lead Agency. An agreement may *also provide*

⁵⁹ CEQA section 21165 and the CEQA Guidelines (§§ 16000, *et seq.*) authorize OPR dispute resolution in hard cases, which was neither sought nor granted in this case. See part V.B, *supra*.

for cooperative efforts by two or more agencies by contract, joint exercise of powers, or similar devices.

(Emphases added; See also M. REMY, ET AL., GUIDE TO CEQA (11th ed. 2007) 54.) The reference to “cooperative efforts” creates *no exception* to the standard lead agency rule, and the provisions are easily harmonized. Where more than one agency has a “substantial claim” to serve as lead, the first sentence of section 15051(d) allows a lead agency agreement to designate “an agency” as lead agency, with others serving as responsible agencies. The second sentence simply allows such agreements to provide for “cooperative efforts” among lead and responsible agencies. It therefore enables lead and responsible agencies to collaborate, rather than endorsing more than one lead agency under CEQA.

4. MWD Should Have Been Designated As the Lead Agency for the QSA PEIR.

Even assuming, *arguendo*, that the “one lead agency” rule can be finessed in the abstract by agency consensus, that premise could not govern here. Only one agency, MWD, could assert a “substantial claim” to lead agency status.

First, the record repeatedly demonstrates that MWD acted as the agency with “principal responsibility” for conducting the QSA program review and bringing the program EIR to completion. For example:

- The lead agency agreement directs MWD alone to enter into the “time and materials” contract with EIR consultant SAIC, acting for all four agencies. (Vol-9:Tab-185:AR4-03-158-12715.)

- SAIC submitted its “scope of work” proposals solely to MWD, and in it described consultation and contacts only with MWD. (Vol-9:Tab-199:AR4-06-413-26561.)

- MWD’s agreement for SAIC’s consulting services provides that “[a]ll services for this agreement shall be performed at the request of Metropolitan’s Agreement Administrator,” who “will establish a timetable for completion of services, and any due date” for “preliminary work or reports” sent to MWD. (Vol-9:Tab-199:AR4-06-413-26536.) The consultant “shall be responsible to Metropolitan for all services to be performed under this agreement.” (Vol-9:Tab-199:AR4-06-413-26536.)

- MWD, along with member agency SDCWA, combined to provide half the EIR budget. (Vol-9:Tab-185:AR4-03-158-12720.) SDCWA played a far smaller role than MWD in EIR preparation.

- MWD apprised its ostensible co-lead agencies of developments in EIR preparation, such as the need for additional consultant costs. IID’s General Manager even described MWD as the entity “acting as the lead agency” in arrangements with the EIR consultant preparing the QSA EIR.⁶⁰

- CVWD did not act as a “lead” agency. At one point, CVWD’s general manager expressed concern to MWD that unless MWD provided cost data and completed a contract amendment, IID would prevent

⁶⁰ The memorandum noted that under the lead agency agreement “*MWD, acting as the lead agency, contracted with SAIC “to prepare the QSA PEIR at a cost of \$597,193. MWD has now informed IID that an additional \$450,000 will be required to complete work on the QSA PEIR.”* Vol-9:Tab-191:AR4-04-317-17104 (emphases added).

its staff from working on the EIR.⁶¹ CVWD's letter stated that "[a]s contract administrator for the project, it is the Metropolitan Water District's responsibility to take care of all these administrative details." (Vol-9:Tab-189:AR4-08-760-33374.)

Second, the record corroborates the conclusion of Herb Guenther, Arizona's Director of Water Resources, that MWD is the "primary beneficiary" of the QSA. (Vol-9:Tab-204:AR4-08-991-34841.) California's Colorado River Water Use Plan (the "4.4 Plan") reflects the reality that through MWD, its CRA provides "over 50 percent of the water used in southern California," but California's basic Colorado River apportionment of 4.4 MAFA⁶² is "substantially less than [MWD's] historic diversion levels," which were roughly a million acre-feet higher than that figure in the past decade. (Vol-9:Tab-186:AR3:CD15:501958.) The "key to the plan" is the "voluntary conservation and transfer of IID agricultural and irrigation water" to MWD and its member agency SDCWA. (Vol-9:Tab-186:AR3:CD15:501933.)⁶³

⁶¹ IID in turn accused CVWD of delay, exhorting it to "develop a strategy and time schedule" for completing its work on environmental and ESA compliance documents for "its portion of the QSA project." Vol-9:Tab-190:AR3:CD7:71929.

⁶² See, e.g., *Arizona v. California* (1963) 373 U.S. 546; see also Vol-9:Tab-194:AR3:CD18:521655; Vol-9:Tab-193:AR3:CD:18:521251-521252; Vol-9:Tab-187:AR4-03-238-14819 (due to *Arizona v. California*, MWD's firm supply fell from 1.212 million acre-feet to 550,000 acre-feet).

⁶³ That water would "be transferred to the urban areas by the MWD and SDCWA," ostensibly to "replace the surplus and unused Colorado River water no longer available to California." Vol-9:Tab-186:AR3:CD15:501958. The California Plan lists the "IID/SDCWA Transfer" and "MWD/SDCWA Exchange" within MWD's water budget. Vol-9:Tab-186:AR3:CD15:501909.

Most importantly, the transferred water is delivered to MWD at its point of Colorado River diversion, and MWD's Colorado River Aqueduct (CRA) conveys the water to its place of use; only MWD's contract with the Secretary of Interior makes the QSA possible.⁶⁴ MWD described the QSA as "providing a reliable mechanism for additional agricultural to urban water transfers benefiting Metropolitan." (Vol-7:Tab-143:AR4-07-513-30473.) SDCWA identified "three primary benefits to Southern California and Metropolitan" from the QSA, including (1) a projected 5.7 million acre-feet of water through 2016, (2) "greater certainty" of Colorado River deliveries to MWD, and (3) "water quality value" from additional Colorado River water to blend with SWP water. (Vol-9:Tab-203:AR4-06-483-30058.)

The "elephant in the bathtub" forcing the QSA is the otherwise imminent major loss of *MWD's* Colorado River deliveries.⁶⁵ MWD historically "filled its aqueduct to capacity," averaging 1.2 million acre-feet per year from the Colorado River, largely due to interruptible "surplus" water supply (Vol-9:Tab-187:AR4-03-238-14820; see also Vol-4:Tab-73:AR3:CD12:204979.) But without the QSA, MWD would risk having its firm supply reduced to around 600,000 AFY, half its previous average. (Vol-9:Tab-187:AR4-03-238-14821.)⁶⁶ As the QSA's driving force, owner

⁶⁴ Vol-8:Tab-164:AR3:CD1:10283; see generally *MWD v. IID*, 80 Cal.App.4th at pp. 1409-1415.

⁶⁵ Under the Seven Party Agreement, those amounts include 550,000 AFY of priority 4 allocation and 662,000 AFY of priority 5 water, both ranked below the priority 3 allocation held by IID, and priority 5 below the 4.4 MAFY line.

⁶⁶ See also Vol-3:Tab-52:AR4-04-334-20448; Vol-9:Tab-193:AR3:CD18:521251, 521252 (without QSA program, reduction of MWD's Colorado River deliveries to 660,000 AFY in normal years).

of the plumbing and contract with the Secretary, and chief beneficiary, MWD stands in the “best position,” institutionally and financially, to assess and mitigate project impacts. (See *City of Sacramento*, 2 Cal.App.4th at 973.)

Finally, in both its service counties and population, MWD as the water agency signatory to the QSA serves the broadest area in the regional transfer program, including San Diego, and in that capacity holds the greatest ability to assess and mitigate impacts. MWD provides 1.7 billion gallons of water a day to nearly 19 million customers in parts of 5,200 square miles of Los Angeles, Orange, San Diego, Riverside, San Bernardino, and Riverside Counties. (See <http://www.mwdh2o.com/mwdh2o/pages/about/about01.html> (as of September 15, 2010).) MWD’s service area includes all counties implicated in the QSA except Imperial County, which will face the program’s greatest adverse impacts. (See Vol-9:Tab-206:AR4-07-510-30436.) MWD must therefore bear “principal responsibility for an agreement” that “substantially restructures distribution” of water throughout the region. (See *PCL v. DWR*, 83 Cal.App.4th at 907.)

The QSA PEIR lacks analysis showing the other three agencies to have a substantial claim of “principal responsibility” for the program in comparison to MWD. Nor did any of the other agencies make that showing during administrative review. Like the agencies in *PCL v. DWR*, the agencies here rely largely on the red herrings, rejected by the *PCL v. DWR*

court, of increasing “efficiency” and reducing “paperwork.”⁶⁷ IID, which appropriately served as the transfer EIR lead agency, never asserted it had a more substantial role than MWD in reviewing the broader QSA program; it acknowledged that MWD acted as the “lead agency” in the program review. (Vol-9:Tab-191:AR4-04-317-17104.) Similarly, CVWD asked for MWD to be even more assertive taking the lead, reminding MWD of its extensive duties as “contract administrator” for the four agencies. (Vol-9:Tab-189:AR4-08-760-33374.) SDCWA, which did not sign the QSA, and whose key duties relate to the transfer agreement, is a MWD member agency that receives “virtually all” its imported water supply from MWD. (Vol-4:Tab-73:AR3:CD12:204978.) In short, the other three clearly should have been responsible rather than lead agencies. Having failed, at the administrative level, to document that any agency other than MWD had a substantial claim to “principal” responsibility, the agencies cannot make that case *post hoc* in this Court.

5. Failure to Designate a Fully Accountable Single Lead Agency Produced a Prejudicially-Defective EIR.

a. Improper Lead Agency Assignment Enabled Defective Assessment of “No Project” and Growth Impacts.

Had MWD served as lead agency, in the wake of imminent loss of half its Colorado River allocation, filling its CRA would have been

⁶⁷ The agencies in *PCL v. DWR* also focused largely on convenience, assigning EIR preparation to a parochial local agency (Central Coast Water Authority) that had recently gone through CEQA review on another project. *PCL v. DWR*, 83 Cal.App.4th at 904. In proof that lightning can strike twice, the same consultant chosen to prepare the program EIR in *PCL v. DWR* was chosen for the QSA program EIR.

recognized as the principal program purpose.⁶⁸ Never held responsible for that true objective, MWD and the other water agencies allowed the QSA to proceed with a false no-project concoction (section VIII.B, *infra*), and without recognizing the program's intended purpose to supply growth in urban Southern California (section VIII.C, *infra*).

b. Improper Lead Agency Assignment Enabled MWD to Evade Its Duty to Principally Mitigate the QSA's Impacts in Imperial Valley.

The other of MWD's twin objectives in the QSA proceedings sought to minimize exposure to environmental mitigation costs, particularly for the Salton Sea. (Vol-8:Tab-144:AR4-08-1028-35146.) Here as well, MWD's evasion of lead agency status also realized its ambition to gain the QSA's principal benefit, while avoiding principal responsibility. The "fundamental purpose" of CEQA is to "inform the public and responsible officials of the environmental consequences of their decisions before they are made." (*PCL v. DWR*, 83 Cal.App.4th at 916; see also *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 195.) Allowing MWD's lead agency duties to dissolve into those of a collective enables MWD to avoid confronting its primary responsibility to mitigate QSA impacts: "the procedures required by this division [CEQA] are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such

⁶⁸ Vol-9:Tab-186:AR3:CD15:501958 ("Urban southern California has historically received in many years a full Colorado River Aqueduct delivery of approximately 1.25 million af and will continue to do so with these programs in place").

significant effects.” (Pub. Res. Code § 21002.)⁶⁹ (See Air District OB § IV.5.C.) Indeed, MWD’s escape was especially daring; it failed to render *any* CEQA project approval findings at all (Vol-5:Tab-79:AR4-05-379-25300 to 25301), a clear duty devolving on the single lead agency (see Pub. Res. Code, § 21081).

B. The QSA and Transfer EIRs’ Fabricated “No Project” Analysis Concealed the QSA’s Overarching Purpose to Fill MWD’s Colorado River Aqueduct.

1. The EIRs Failed to Assess the Reality of a No-QSA Half-Filled Colorado River Aqueduct.

Rather than providing an adequate no-project description, the transfer EIR clouds the drastic and inevitable loss in MWD water supply without the proposed transfer. In their trial briefs the water agencies asserted that the EIR “describes the No Project alternative in detail.” (RA:11:121:02880.) Yet the only information the EIR imparts on reductions in Colorado River water deliveries due to the Secretary’s enforcement of the Law of the River is the following:

The Secretary would continue to make deliveries of Colorado River water subject to existing legal requirements, including the Law of the River and the existing priority system. The Secretary would continue to complete annual review and approval of water orders from users of Colorado River water

⁶⁹ The QSA PEIR’s lead agency error also fatally infected the transfer EIR, because the transfer EIR expressly incorporates the QSA PEIR. Vol-3:Tab-51:AR3:CD10:101804 0056 (QSA PEIR as an “overall assessment” of projects within the QSA); Vol-4:Tab-73:AR3:CD12:204900 (QSA PEIR is incorporated by reference into the Transfer EIR). Under *Friends of the Santa Clara River*, 95 Cal.App.4th at 1387 (setting aside a water transfer EIR because it relied upon a later-decertified program EIR), the IID-SDCWA EIR also falls.

in the Lower Division States. This process would be completed pursuant to Title 43 CFR Part 417, to ensure that water orders are limited to amounts required for reasonable and beneficial use. Under the No Project alternative, it is likely that during normal years these reviews would be more detailed and involve greater scrutiny from Reclamation and interest by other Colorado River water users than in surplus years. In the absence of unused apportionment in the states of Arizona and Nevada, California would be required to reduce its use of 4.4 MAFY in a normal year. Past legal threats and challenges among California Colorado River water users related to reasonable and beneficial use would likely occur again in normal years under the No Project alternative.

(Vol-3:Tab-51:AR3:CD10:101804_1433.)

This paragraph earns “perverse admiration” (see *Healing v. California Coastal Comm.* (1994) 22 Cal.App.4th 1158,1168) for imparting virtually no probative information.⁷⁰ This no-project description lacks an expressly stated, yet highly foreseeable no-project reality of 600,000 AFY reduction of water to MWD, or 200,000 AFY reduction of water to SDCWA. (See Vol-3:Tab-51:AR3:CD10:101804_1433; RA:11:121:02880-02882.) This obtuse description, which does not inform the reader of the likely reduction by *half* of MWD’s Colorado River water supply, fails the CEQA standard: “straightforward and intelligible, assisting the decision maker and the public in ascertaining the environmental consequences of *doing nothing*.” (*PCL v. DWR*, 83 Cal.App.4th at 911 (emphasis added).)

⁷⁰ Indeed, when IID’s consultant prepared similar language for the Bureau of Reclamation EIS, Interior’s NEPA “guru” rejected it as needing “explanation and reconciliation.” RJN:Exh11(B):142.

The QSA PEIR avoids assessment of the true no-project alternative by conflating it with the independent concept of “baseline.” In response to comments, the final QSA PEIR asserts:

... the no-project scenario is not the appropriate baseline for analyzing the impacts of the potential growth-inducing impacts of the QSA The QSA PEIR used existing water supplies at the time the [notice of preparation] was published in 2000 as the baseline. Therefore the QSA’s maintenance of historic reliability of Colorado River water supplies was determined to not be growth-inducing.

(Vol-5:Tab-74:AR4-06-435-28161.) The conclusion drawn in the last sentence is fallacious; by equating analysis of the “baseline” with that of “no project,” the EIR conceals the reality that without the project, urban Southern California will not secure a greater or more reliable supply on which to predicate future growth.

Indeed, CEQA requires analysis of the environmental impacts of the proposed project against *both* the “baseline” *and* the “no project” alternative. The “no project” discussion (CEQA Guidelines, § 15126.6, subd.(e)) forms a separate element of the EIR, and is in addition to the “environmental setting,” or “baseline,” addressed in section 15125 of the CEQA guidelines. (CEQA Guidelines, § 15126.6, subd. (e)(1) (the mandated no project alternative analysis is different from the baseline analysis unless the two environmental settings are identical).) While the “baseline” generally refers to a snapshot of pre-project conditions⁷¹ -- in this case, a full CRA-- the separate concept of the “no project” description

⁷¹ CEQA Guideline § 15125 (An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced.... this “setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant”).

requires an additional level of analysis: comparison of the project not just to the baseline, but also to the “no project” alternative “of doing nothing.”

This “no project” analysis “shall discuss the existing conditions at the time the notice of publication is published . . . *as well as what would be reasonably expected to occur in the foreseeable future if the project were not approved.*” (CEQA Guidelines, § 15126.6, subd. (e)(2).) Thus, not only is the “no project” analysis not the equivalent of a “baseline analysis,” it is not limited to the conditions existing at the time the notice of preparation was published, as the QSA PEIR implies. Instead, the separate, and additional, no project discussion must address that which is reasonably foreseeable; in this case, the reduction by nearly half of Colorado River urban water supplies. By asserting otherwise, the QSA PEIR replicates the same mistake that drove EIR rejection in *Inyo v. Los Angeles*, and deserves what the Court commanded there: rejection of an EIR that simultaneously addresses a new project designed to fill an aqueduct, while “*at the same time ... assume the filling of the ... aqueduct.*” (*Inyo III*, 71 Cal.App.3d at 199 (emphasis added).)

2. The EIRs Postulated a No-QSA Stable Water Supply by Reliance on Speculative Alternative Sources of Water.

(i) Transfer EIR.

The transfer EIR further avoids an honest comparison of the project and no-project alternatives, baldly assuming that speculative alternative sources of water can be substituted for the transfer water if the project is not approved. (Vol-3:Tab-51:AR3:CD10:101804_0955, _0956.) However, CEQA requires that “future water supplies identified and analyzed must

bear a likelihood of actually proving available; speculative sources and unrealistic allocations ('paper water') are insufficient bases for decisionmaking under CEQA." (*Vineyard*, 40 Cal.4th at 432; see also *Stanislaus*, 48 Cal.App.4th at 199.)

The transfer EIR fails to show that anything other than speculative, wish-and-a-prayer sources exist to make up the water lost by the Secretary's enforcement of the Law of River absent the IID-SDCWA water transfer. The transfer EIR asserts that if the proposed transfers do not occur, SDCWA would "continue to rely upon delivery of its share of imported water from MWD," recycling, groundwater, and seawater desalination to address the inevitable "shortfall" in Colorado River supplies. (Vol-3:Tab-51:AR3:CD10:101804_0955.) The transfer EIR also claims that in the absence of the transfers, MWD can make up the water through similar means, water conservation, and water transfers. (Vol-3:Tab-51:AR3:CD10:101804_0955; _0956.) After *PCL v. DWR* placed the water agencies on notice that increased reliance on the doubly-oversubscribed SWP would risk dependence on phantom water, the transfer EIR failed to adequately justify or explain its speculative conclusions. (The Secretary of Interior agrees on this point, and expressly rejected the EIR approach in her own EIS, *on the very same project*. See subsection IX.B.4, *infra*.)

The transfer EIR itself elsewhere admits that "it appears that if seawater desalination is to be feasible, projects must be located in areas where environmental, power, and cost issues can be minimized. Such locations, if available, are limited in the San Diego region." (Vol-4:Tab-73:AR3:CD12:204987.) SDCWA's assertion that it can "continue to rely upon delivery of its share of imported water from MWD" is especially

specious, given that the transfer EIR admits that in the “absence of the Project [MWD’s Colorado River supplies] could be cut in half.” (Vol-4:Tab-73:AR3:CD12:204981.) As for reliance on MWD’s SWP “entitlement,” as *PCL v. DWR* made clear, the State Water Project cannot deliver more than half its projected supplies, making reliance on any additional entitlements as speculative as relying on “paper water.” (83 Cal.App.4th at 912-914.)

“These generalities, without details or estimates concerning the amount of water the programs might make available, are not a proper substitute for a discussion which allows ‘those who did not participate in [the EIR’s] preparation to understand and “meaningfully” consider’ the issue at hand.” (*California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1240-1241 (citing *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715, 721).) Moreover, “future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations (“paper water”) are insufficient bases for decisionmaking under CEQA.” (*Vineyard*, 40 Cal.4th at 432; see also *Stanislaus*, 48 Cal.App.4th at 199 (same).) Such reliance on speculative sources of water has been flatly rejected, as to simply assume the future availability of interim supply would turn CEQA “on its head.” (*California Oak Foundation*, 133 Cal.App.4th at 1238 n. 16.)

For these reasons, the transfer EIR’s fabricated and false “no project” assessment cannot stand.

(ii) QSA PEIR.

The PEIR at least acknowledges that under the “no-project” alternative, the “Department of Interior would enforce the Law of the River under its existing terms and require California to divert no more than 4.4 MAF during normal years. . . . [and] the diversions to MWD would be reduced from the baseline condition of approximately 1.25 MAFY to approximately 660 KAFY.” (Vol-5:Tab-74:AR4-06-435-27600.) Yet the PEIR never analyzes the impact these reductions will have on MWD’s and SDCWA’s service areas. Instead, it avoids this analysis by stating that “MWD and SDCWA would be expected to make up the shortfall of approximately 650 KAFY in Colorado River water supplies through other water management methods or supply options.” (*Id.*) These “other supply options” “*could* include increased recycling and conservation, and other methods including desalination of ocean water, and use of other supply options.” (*Id.* (emphasis added.))

These vague references to alternative sources fail to assess the impacts the project will have as compared to no-project effects. The PEIR asserts that in MWD’s and SDCWA’s service area the impacts of the project will be “generally equal” to that of the no-project alternative on population, housing, and employment (Vol-5:Tab-74:AR4-06-435-27607), land use and planning (Vol-5:Tab-74:AR4-06-435-27605), and even *water resources*. (Vol-5:Tab-74:AR4-06-435-27605.) In other words, the PEIR speculates that there is no difference between having, and not having, enough water for *three million people*.⁷²

⁷² Approximately 0.22 acre-feet of water is used per person per year in SDCWA’s service area, Vol-9:Tab-196:AR3:CD12:207195; 650 KAFY would supply 2,954,545.

The PEIR fails to justify or explain this implausible conclusion. It cryptically promises that MWD and SDCWA would “evaluate” other water supply options, “such as desalination of seawater, recycling, and conservation,” and that “MWD would continue to rely on its [State Water Project] entitlement and the delivery of [State Water Project] water to meet water demands in its service area.” (Vol-5:Tab-74:AR4-06-435-27607.) But the PEIR concludes that “desalination technology would not be technologically or economically feasible at this time given the volume of water being considered and the timeframe of the Proposed Project.” (Vol-5:Tab-74:AR4-06-435-27609.) As for water conservation and recycling, the PEIR only provides that these programs would consist of measures “over and above measures that are presently in place or planned” and “would depend” on various factors. (Vol-5:Tab-74:AR4-06-435-27609.) There is no discussion of what MWD’s State Water Project entitlements amount to, or the likelihood of actual delivery.

In response to comments criticizing the adequacy of this “no project” alternative analysis, the QSA PEIR reiterates that in the absence of the QSA, Southern California water supplies would be able to maintain their so-called historic levels because “MWD and SDCWA would *evaluate other water management actions . . .* to meet water demands.” (Vol-5:Tab-74:AR4-06-435-28161.) As for reliance on MWD’s SWP “entitlement,” as *PCL v. DWR* made clear, increasing reliance on such entitlements remains speculative. (83 Cal.App.4th at 912-914.)

Such generalities, speculative sources and unrealistic allocations, insufficient to support the transfer EIR, also fail the QSA PEIR.

3. In Contrast to the EIRs, MWD's Petition for Supersedeas Reveals the No-Project Reality of Sharply Curtailed Water Supply in Southern California.

In their trial briefs, the water agencies chastised the county's characterization of their speculative "assumptions as something they are not," and "specious." (RA:12:128:03215-03216.) MWD asserted that the county agencies' concerns were erroneous because alternatives were "*prepared in the event that the QSA is never implemented.*" (RA:12:128:03217 (italics in original).) MWD and SDCWA further accused the county of "ignor[ing] substantial evidence demonstrating MWD's and SDCWA's contingent water supply plans that would avoid water supply shortages" and claimed that "it is reasonably foreseeable that MWD and SDCWA would implement other water supply programs and actions if the Project were not approved, and *those contingent supply plans had already been developed.*" (RA:13:133:03456 (emphasis added).)

In this Court, by contrast, the water agencies' supersedeas petition exposes their fallacious reliance on these speculative sources in the transfer EIR and QSA PEIR. Despite the transfer EIR's assertion that SDCWA could "continue to rely upon delivery of its share of imported water from MWD," SDCWA admitted that it received nearly 30 percent of its water from two of the invalidated QSA agreements, and another 58 percent of its water from MWD. (Water Agencies' Supersedeas Petition, p. 18.) The supersedeas petition continues: "If the 30-day stay is not continued, MWD's QSA water supplied also will be impacted, likely resulting in a further reduction in SDCWA's water supplies," and that SDCWA "*has no alternative supplies available immediately or likely into the future to make up such a shortfall.*" (*Id.* (emphasis added).) Likewise, MWD admitted

that “MWD cannot assume that local supplies or additional efforts will make up for any loss in its Colorado River supplies.” (*Id.* at 22.)

4. In Contrast to the Water Agencies’ EIRs, the Bureau of Reclamation’s IA EIS Recognizes Enforcement of the California 4.4 MAFY Limitation, and Declines to Rely on Speculative Alternative Supplies.

Significantly, the Secretary of Interior in the separately-prepared EIS on the Implementation Agreement—the document supporting federal authorization to implement the QSA-related agreements at issue here—rejected the transfer EIR’s wish-and-prayer “no project” scenarios as speculative rather than “reasonably foreseeable”: “additional new [California] agency-specific projects responding to non-implementation of the [water transfers] and reduced water supply and reliability are *speculative*, and therefore, are *not part of the No-Action Alternative*.”⁷³ (Vol-5:Tab-75:AR3:CD11:203161 (emphasis added).) A federal NEPA “guru” expressly challenged the California EIR preparers for confusing baseline, no project, and existing conditions. (RJN:Exh.11(B):192 (“a source of confusion throughout the analysis”).)

5. The EIRs’ Dishonest Attempt to Equate “No Project” and “Project” Conditions Enabled the Water Agencies to Pretend Their Program and Project Produced No Environmental Consequences.

By obscuring the true no-project scenario and completely failing to compare the no-project and project alternatives in the MWD and SDCWA

⁷³ Even the QSA PEIR rejected the transfer EIR’s analysis of desalination-as-substitute, finding it “would not be technologically or economically feasible at this time given the volume of water being considered and the timeframe of the Proposed Project.” Vol-5:Tab-74:AR4-06-435-27609.

service areas, the water agencies failed “to give the public and government agencies the information needed to make informed decisions, [thereby] protecting ‘not only the environment but also informed self-government.’” (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162 (citing *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) Obviously, from the water agencies’ fictitious perspective, a project that makes no difference is a project that produces no new impacts.

This absence of transparency “renders the EIR defective as an informational document upon which the public and its officials can rely in making informed judgments.” (*California Oak Foundation*, 133 Cal.App.4th at 1242.) “When the informational requirements of CEQA are not complied with, an agency has failed to proceed in ‘a manner required by law’ and has therefore abused its discretion.” (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 118 (citing *Laurel Heights Improvement Assn. v. Regents of University of California (I)* (1988) 47 Cal.3d 376, 392).) This “failure to provide enough information to permit informed decisionmaking is fatal.” (*Laurel Heights I*, 47 Cal.3d at 392.)

C. The QSA and Transfer EIRs Conceal Their Program’s and Project’s Growth-Inducing Effects.

Public Resources Code section 21100(b)(5) and section 15126 subdivision (d) of the CEQA Guidelines requires that the “growth-inducing impact of the proposed project” must be considered. Section 15126.2(d) of the CEQA Guidelines clarifies that this mandates a discussion of:

The ways in which the proposed project *could foster economic or population growth*, or the construction of

additional housing, *either directly or indirectly*, in the surrounding environment. Included in this are projects which would *remove obstacles to population growth* (a major expansion of a waste water treatment plant might, for example, allow for more construction in service areas). Increases in the population may tax existing community service facilities, requiring construction of new facilities that could cause significant environmental effects. Also discuss the characteristics of some projects which may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively.

(Emphases added.) Thus, in order to satisfy CEQA, an EIR must address how the project may foster or remove obstacles to population growth. “It also is settled that the EIR must discuss growth-inducing impacts even though those impacts are not themselves a part of the project under consideration, and even though the extent of the growth is difficult to calculate.” (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 368.)

In raising the water agencies’ failure to comply with CEQA’s requirements for growth assessment, the county is not addressing the underlying political question of whether such growth in urban Southern California should occur. Rather, by calling for the assessment of growth that the law requires, the county hopes to illuminate the program’s and transfer’s environmental consequences for Imperial County and urban Southern California, and the consequent tremendous wealth transfer from the county to the urban coast, thereby defining meaningful and feasible mitigation, and building informed support for that mitigation to be provided by those who benefit. As the lower court proceedings illuminated, “environmental mitigation funding” was a key issue that “continued to separate the parties” and prevent the signing of the QSA agreements in 2002 (AA:47:292:12740; Vol-9:Tab-200:AR:3:CD6:60674 to 60675; Vol-

9:Tab-202:AR3:CD6:60684 to 60685; Vol-9:Tab-201:AR3:CD6:60682 to 60683), and this entire proceeding largely turns on the ability of QSA participants to assure a stable Salton Sea.

Indeed, the cost of mitigation almost derailed the QSA negotiations, and the attempted resolution – claiming or pretending that the State assumed unconditional responsibility for any shortfall in the mitigation funding – framed the trial court’s determination of unconstitutionality. Masking the immense benefits of the water transfers to the urban water agencies, which enable economic growth or the expectation of growth in their areas, allowed these agencies under the dishonest banner of “maintaining historic supply” to avoid funding their proportionate share of the mitigation costs.

1. In Its Reports and under Oath, in Contrast to the EIRs, SDCWA Admitted that Its Future Growth Depends upon the IID-SDCWA Water Transfer.

The transfer EIR and QSA PEIR assert that the 200,000 AFY supplied by IID to SDCWA will not impact growth because “no additional water would be supplied,” and because the water transfer merely “maintain[s] water supply reliability.” (Vol-3:Tab-51:AR3:CD10:101804_0952; Vol-5:Tab-74:AR4:4-06435-27625.) This completely disregards the reality SDCWA was facing: the reduction by nearly *half* of its much-needed imported water supply due to the Secretary’s enforcement of the Law of the River. Only through the water transfer did SDCWA overcome this obstacle to population growth and acquire an

additional 200,000 AFY it would not otherwise have.⁷⁴ The transfer EIR and QSA PEIR were therefore required to address the consequential impacts on growth. They failed to do so.⁷⁵

SDCWA buys the most water of any of MWD's member agencies, and purchased an average of 469,300 AFY from MWD from 1990 to 1999. (Vol-3:Tab-52:AR4-04-334-20190.) SDCWA estimated in 2001 that MWD supplies between 75 to 90 percent of its annual water supply requirements. (See *San Diego County Water Authority v. Metropolitan Water District [SDCWA v. MWD]* (2004) 117 Cal.App.4th 13; Vol-9:Tab-188:AR3:CD17:519799.) The water SDCWA obtains from MWD is a blend of SWP and Colorado River water, but the QSA PEIR recognizes that "the large majority of water delivered to SDCWA comes from the Colorado River." (Vol-3:Tab-52:AR4-04-334-20189.)

Under the Metropolitan Water District Act, SDCWA has a preferential right to 15 percent of MWD's water supplies, although it has consistently received about 25 percent of MWD's water supplies. (See Wat. Code App. § 109 *et. seq.* (section 135).) Although historically allowed prior to 2003, this over-delivery of water from MWD to SDCWA remained

⁷⁴ As discussed in subsection VII.B.2 above, the transfer EIR and QSA PEIR fail to demonstrate that alternative supplies would have been available without the project.

⁷⁵ As with no project, the federal officials overseeing the IA EIS expressly criticized their consultant's flawed growth analysis *of the same project*. County Agencies RJN:Exh.11(L):227: "pretty weak argument ... actually gives clear evidence that growth (from the present population of the San Diego Area) will occur"

Notably, CH2MHill served as IID's consultant to prepare both the transfer EIR and federal EIS. As the materials in the county agencies' RJN exhibit 11 reflect, on matters of both process (failure to prepare integrated final EIR) and substance (no project, growth inducement) BuRec broke away after the QSA and transfer EIRs were published in abbreviated but then-final form to meet an artificial June 2002 deadline.

uncertain, and reached a crisis point in 2001, when the SDCWA filed suit against MWD in San Diego Superior Court seeking “judicial confirmation of their entitlement and the removal of a threat to the security of their primary water supply.” (SDCWA Complaint (Case No GIC 761526), Vol-9:Tab-188:AR3:CD17:519794.)⁷⁶ SDCWA argued that the unreliability of water from MWD was a direct threat to the course of San Diego’s growth:

Metropolitan’s failure and refusal to establish policies and revenue classifications consistent with the purpose and intent of Section 135 as it was created by the Legislature, have created *great uncertainty* about how Metropolitan will allocate water and what its true cost is, and is *chilling needed water supply management and planning efforts* in Southern California generally, and in the service territory of SDCWA specifically.”

(Vol-9:Tab-188:AR3:CD17:519812 (emphasis added).)

SDCWA serves 2.8 million people across a 1,420 square mile service area. (Vol-3:Tab-52:AR4-04-334-20190.) San Diego County anticipates a population increase of 900,000 people between 2000 and 2020, at an annual growth rate of about 1.5 percent. (Vol-3:Tab-52:AR4-04-334-20190.) In 2020, annual water demand is projected to reach 813,000 acre-feet – 30 percent, and approximately 200,000 acre-feet, more than 1999 demand. (Vol-9:Tab-187:AR4-03-238-14811.) Yet the continued uncertainty of Colorado River water supplies from MWD rendered SDCWA, by its own recognition, unable without the transfer agreements to meet its projected demands and future growth.

⁷⁶ SDCWA charged that MWD’s application of its section 135 preference was “inconsistent and arbitrary,” and that MWD was manipulating emergency water shortage declarations in order to allocate water without regard to SDCWA’s rights. Vol-9:Tab-188:AR3:CD17:519805. The court of appeal ultimately sustained MWD’s position. *SDCWA v. MWD*, 117 Cal.App.4th 13.

In SDCWA's 2000 Urban Water Management Plan (UWMP), the agency's average water year supply relies upon 200,000 acre-feet from the IID transfer in *addition* to 300,000 acre-feet of firm supply from MWD to meet demand from year 2015 forward. (Vol-9:Tab-187:AR4-03-238-14865.) Thus, by SDCWA's own estimates, the IID-SDCWA transfer will account for nearly a quarter of the agency's total water supply.

The Secretary's enforcement of California's Colorado River water apportionment, absent the water transfer, would result in MWD losing half of its previous normal year supplies, and a 600,000 AFY shortage. (Vol-9:Tab-187:AR4-03-238-14821.) As MWD's largest customer and member entity, without the water transfer, SDCWA could expect only approximately 300,000 acre-feet per year in firm supply from MWD. (Vol-9:Tab-187:AR4-03-238-14865; see also Vol-9:Tab-187:AR4-03-238-14829 (because of the "cloud on the reliability of a significant portion of San Diego's water supply" from MWD, SDCWA "must assume for planning purposes that its firm water supply from Metropolitan is limited to 303,630 AF").) However, SDCWA estimated in 2001 that *with* the transfer the agency would have a firm supply of 500,000 AFY of imported water -- a 66 percent increase in reliable water. Moreover, the total estimates reveal that SDCWA will receive on average nearly 50,000 acre-feet more per year than the 453,700 acre-feet it imported from MWD in 1999. (Vol-9:Tab-187:AR4-03-238-14865; Vol-3:Tab-52:AR4-04-334-20189 to 20190.)

Furthermore, by giving SDCWA a firm supply of higher priority water, the program and project increase the *reliability* of SDCWA's water supply. (See Vol-4:Tab-73:AR3:CD12:204982 ("The proposed transfer will convert a portion of the less reliable water currently used into a firm supply serviced by senior priority [Colorado River Water]"); Vol-4:Tab-

73:AR3:CD12:204983 (transfer “provides more reliable water”).) Whereas without the water transfer, SDCWA could only realistically expect 300,000 acre-feet per year in firm supply, from MWD, with the transfer SDCWA would have a firm supply of 500,000 AFY—a 66 percent increase in reliable water. Moreover, the total estimates reveal that SDCWA will receive on average nearly 50,000 more acre-feet per year than the 453,700 acre-feet it imported from MWD in 1999. (Vol-9:Tab-187:AR4:4-03-238-14865; Vol-3 Tab-52:AR4-04-334-20189, 20190.)

Yet the transfer EIR and QSA PEIR fail to address the impact this reliable water supply will have on growth, despite the testimony of SDCWA’s witness at the state board hearings that part of the need for reliable water supply “is to help accommodate projected growth.” (Vol-9:Tab-194:AR3:CD18:521870.) Moreover, IID and SDCWA themselves stated in their 1998 transfer petition before the state board that the proposed transfer from IID to SDCWA’s service area was to provide “independent, reliable, alternate long term supply for drought protection and to *accommodate anticipated growth* in domestic, municipal and agricultural uses in San Diego.” (Vol-1:Tab-19:AR3:CD15:500041 (emphasis added).)

SDCWA’s general manager initially denied growth in her state board testimony, until confronted with her transfer petition’s written statement of transfer purpose:

MR. ROSSMANN: [Ms. Stapleton’s direct testimony] doesn’t say anything about accommodating future growth?

MS. STAPLETON: Correct.

MR. ROSSMANN: You do not see that as part of the purposes of this transfer?

MS. STAPLETON: No, this is replacement supplies to supplies that we are collectively losing in the Metropolitan service area due to the 4.4 requirement.

* * * *

MS. STAPLETON: [Reading from IID-SDCWA petition] "Transfer of conserved water to Authority and acquisition of conserved water by Coachella and Met. Authority pays for conservation efforts for conserved water transferred to it. Coachella and Met pay for conserved water acquired by each. Authority needs independent, reliable, alternative long-term supply for drought protection *and to accommodate anticipated growth in domestic, municipal and agricultural uses in San Diego.* Coachella and Met require additional water to firm up reliability and supply for existing users."

MR. ROSSMANN: So it is my understanding that your application stated that this transfer was needed to accommodate increased agricultural use in San Diego County and future growth there.

MS. STAPLETON: We do not anticipate increased agricultural growth in San Diego County.

MR. ROSSMANN: Thank you. How about future growth?

MS. STAPLETON: Yes, we do anticipate future growth in our region.

MR. ROSSMANN: This transfer is intended to, pursuant to that application, to accommodate that future growth?

MS. STAPLETON: The water coming from Imperial we believe is replacement water. *The Authority does need an independent reliable alternative, long-term supply for ultimately the growth that we will experience in the next decades, yes.*

(Vol-9:Tab-192:AR3:CD18:521577, 521579 to 521580 (emphases added).)

IID and SDCWA also confirmed that "[w]ater transfers are beneficial and important for a number of reasons. They create a *new source of water* to meet increasing demands." (Vol-1:Tab-19:AR3:CD15:500080 (emphasis added); see also Vol-9:Tab-197:AR3:CD11:200161.) The largest water transfer in California history must recognize the growth and

economic power it creates among those who should be tasked to mitigate harm in the Imperial Valley.

2. Even without New Infrastructure, the QSA and Transfer Will Induce Growth in Southern California.

In their trial briefs, the water agencies attempt to construe only those projects that “create or extend infrastructure” as those that induce growth. (See, e.g., Vol-3:Tab-51:AR3:CD10:010804_0954; RA:13:133:03477, 03478.) This argument ignores the reality that not a pipeline itself, but the water that flows through it (such as the water supplied under the QSA), accommodates growth. (Cf. *Inyo I*, 32 Cal.App.3d at 806 (“considering the expanded groundwater extraction as a ‘project’ separate and divisible from the second aqueduct”).) As an expert on water supply and land use testified before the state board, more “water, especially imported water, does induce growth and urban expansion.” (Vol-9:Tab-195:AR1:CD18:522706.) SDCWA’s witness confirmed that San Diego would not be as large today without imported water. (Vol-9:Tab-194:AR3:CD18:521873.) By arguing that because the QSA and the IID-SDCWA water transfer do not create or extend infrastructure they do not induce growth in SDCWA’s service area (RA:10:113:02526), SDCWA’s advocates reject their own experts.

3. Concealment of the Growth-Inducing Impacts Enabled the Benefiting Urban Water Agencies to Evade Accountability for the Environmental Damage They Produce in the Imperial Valley.

CEQA requires that for an environmentally-significant project, the lead or responsible agency must find 1) mitigation will be provided, or 2) such mitigation is within the jurisdiction of another public agency and has

been or should be adopted by that agency, or 3) specific factors render mitigation infeasible. (Pub. Res. Code, § 21081(a).)

The transfer EIR's and QSA PEIR's evasion of population and growth impacts, coupled with the faulty "co-lead agency" construct, enabled MWD to escape formulation of rational mitigation plans that would fulfill the aspiration of its counsel at trial that "*the parties in the Q.S.A. I think were all operating under the notion that the beneficiary pays.*" (RT-11/24/09:TR:10:2909 (emphasis added).) If MWD could perpetuate its fantasy that the QSA and transfer provided no growth benefits in the urban water service area, then MWD could argue to the State, the Imperial Valley, and its own constituents -- as indeed so far it successfully has -- that MWD should not be expected to pay anything. And if beyond mitigation, MWD had to resort to "overriding considerations," it could avoid including growth as one of those considerations, knowing that urban growth at the cost of rural decay shapes the third rail of California water politics.

Indeed, so successfully did MWD evade its CEQA obligations that it did better than fabricate a false record on which to render findings; at the time of QSA approval, MWD did not render findings at all. (Vol-5:Tab-79:AR4-05-379-25300 to 25301; see also subsection VIII.A.5(b), *supra*, p. 103.)

For better or worse, the QSA program and its water transfer will foster urban population and growth, generating immense wealth among the receiving agencies and most of their 19 million customers. Full disclosure in the next EIR will justify assigning mitigation responsibilities to those beneficiaries, to prevent and cure the significant adverse impacts of the water transfer in Imperial County.

IX. BECAUSE THE 2002 QSA AND TRANSFER FINAL EIRS WERE SUBSTANTIALLY CHANGED BY POST-JUNE 2002 ADDENDA WITHOUT PUBLIC REVIEW, THEY SHOULD HAVE BEEN RECIRCULATED IN REVISED DRAFT FORM.

CEQA requires that a lead agency recirculate for public review revisions to a final EIR when significant new information is added to a previously certified final EIR. (Pub. Res. Code, §§ 21092.1, 21166; CEQA Guidelines, §§ 15088.5, 15162(a); *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813, 822-823 (recirculation required where “substantial changes” are added so that the public is not denied an “opportunity to test, assess, and evaluate the data and make an informed judgment . . .”).)

CEQA provides that certain events “trigger” the duty to recirculate after a final EIR is completed but before agency decision that relies on it. These “triggering” events include: (1) new significant environmental effects or a substantial increase in the severity of previously identified significant effects; (2) substantially changed circumstances producing severe significant impacts that were not previously addressed; and (3) new information of substantial importance, that was not known and could not have been known at the time the previous EIR was certified. (Pub. Res. Code, § 21166; CEQA Guidelines, § 15162(a).) An agency may only prepare an addendum, in contrast to a supplemental or subsequent EIR, if some minor technical project changes are contemplated and no significant impacts will result. (CEQA Guidelines, §§ 15153(d), 15164(a)-(b).)

As reflected in the statement of the case (Air District OB 4-23), not only did the QSA, water transfer, and their attendant environmental documentation change substantially between 2002 and final action in October 2003. The water agencies' process proved equally foul. Not only were the EIR addenda kept from the public and more specifically the county agencies; the *IID directors* did not even receive the addenda until minutes before their vote, coming into the hearing room still warm off the copying machines. (Vol-8:Tab-161:AR3:CD3:30103.) The county did not receive its copy of the addenda until *one month* later (Vol-9:Tab-179:AR4-08-1071-35543 to 35544; Vol-9:Tab-180:AR4-08-1071-35545), just a few days before the CEQA statute of limitations would have run.

Had the water agencies proceeded in the manner required by law, they would have treated the addenda as draft supplemental or subsequent EIRs, and circulated them to the public for a minimum review period of 45 days. (Pub. Res. Code, § 21092.1) And when the addenda became part of a supplemental final EIR, the lead water agencies would have been obligated to deliver them to the county and air district at least ten days before any of the water agencies could have acted on them. (Pub. Res. Code, § 21092.5 (duty to provide agency commentators ten days' notice before lead agency acts on final EIR).)

The county was not alone in seeking and expecting recirculation. The federal officials overseeing the concurrently-prepared EIS expected that the QSA and transfer EIRs would be recirculated as early as June 2002, and certainly by October 2002, when the program and transfer were modified substantially after IID "certified" completion of the rushed final EIRs. BuRec official Bruce Ellis complained that CH2MHill was under orders to complete the final transfer EIR by June 3, 2002, five weeks after

close of public comment; “Of course, this is completely ridiculous.” (RJN:Exh.11(K):225.) A June 2002 BuRec NEPA compliance plan noted that the “California parties *do not plan to supplement* the CEQA documentation”; but under the *less stringent* NEPA regulations “*whether or not to supplement is a close call.*” (RJN:Exh.11(A):188 (emphasis added).) By October BuRec had concluded, because of new impacts to piscivorous birds (i.e. pelicans), “[t]his will *almost certainly require recirculation* of the Transfer EIR/EIS for CEQA purposes.” (RJN:Exh.11(F): 212 (emphasis added).)

And yet, recirculation did not occur then, or since. IID’s attorneys in the Allen Matkins firm wanted assurance that

changes were not made which alter that Draft EIR/EIS so as to incorporate “significant new information” ... since this would require re-circulation of the Draft before adopting a Final EIR/EIS. It is apparent from our discussions that the standard BOR is applying for recirculation under NEPA is not as strict as the CEQA standard which governs IID. *We cannot jeopardize the CEQA certification* in the course of preparing the federal integrated Final EIR/EIS.

(RJN:Exh.11(M):229 (emphasis added to attorney’s directive).) The decision not to recirculate either the transfer EIR or QSA PEIR was called not on the merits, but by lawyers adhering to forensic deadlines.⁷⁷

⁷⁷ The Allen Matkins firm was in control in two other respects. First that firm maintained the EIR and EIS drafts in its offices; not even BuRec officials were allowed to have more than “a look” at their own EIS there or take copies. RJN:Exh.11(J):223. Second, IID was designated as custodian of the *common record* for both the federal and state transfer EIR/EIS, and *consciously excluded from the record produced to the superior court* the materials subsequently provided by BuRec in response to the air district’s FOIA request, which form exhibit 11 of the RJN. RJN Motion (Casey dec., ¶¶ 25-32).

A. After the 2002 Final EIR, the Salton Sea Mitigation Water Was Substantially Reduced, Producing Significantly More Severe Impacts.

The scope of Mitigation Strategy-2 in the QSA PEIR, providing mitigation water to the Salton Sea for 30 years, was reduced in the addendum. (Vol-7:Tab-137:AR3:CD14:400131_19 to 400131-20; Vol-3:Tab-52:4-04-334-20254; Vol-5:Tab-74:4-06-435-27423.) The water agencies concluded that a supplemental EIR was unnecessary, based on draft findings from DFG that were never circulated to the public. (Vol-7:Tab-137:AR3:CD14:400131_20.) Yet the change to Mitigation Strategy-2a produced a projected *greater drop of 12.2 foot in sea elevation*, and an ultimate *salinity level increase from 86.4 to 143.3 ppt*. (Vol-7:Tab-137:AR3:CD14:400131_24.) These vastly greater impacts, occasioned by significantly reduced amount and duration of mitigation water, required the preparation of a subsequent EIR. (*Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal.App.3d 357, 364-366.)

B. After the 2002 Final EIRs, the QSA and Transfer Project Descriptions Significantly Changed, Producing Vastly Expanded Water Exports.

When changes in the project are sufficiently substantial to require revisions of the EIR then a subsequent or supplemental EIR is required. (*City of San Jose v. Great Oaks Water Co.* (1987) 192 Cal.App.3d 1005, 1016-1017; *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Ass'n.* (1986) 42 Cal.3d 929, 937; *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1075-1083.)

Moreover, an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR. (*Mira Monte Homeowners Ass'n.*, 165 Cal.App.3d at 364-366 (citing *Inyo III*, 71 Cal.App.3d at 193).) If the program and project proponents wish to change the EIR “project definition,” the need for stability gives rise to a duty to recirculate.

The renegotiated QSA program and transfer project that resulted from the months of secret water agency meetings produced the drastic changes specified below, causing more severe impacts as detailed in the paragraphs below.

(1) When the 2002 final QSA PEIR and transfer EIS were certified, fallowing was prohibited as a method of creating conserved water. (Vol-3:Tab-51:AR3:CD10:101804_0062, 101804_0171 to 101804_0173; Vol1:Tab18:AR3:CD15:505519505522, Vol99:Tab182:AR3:CD15:505526-505531; Vol-1:Tab-14:AR3:CD1:11195.)

The impacts of conserving water by on-farm/delivery methods were not analyzed. (Vol-4:Tab-73:AR3:CD12:204905.) The finally-approved 2003 program and project, however, conserved water for 15 years by fallowing, followed later by on-farm/delivery methods. (Vol-7:Tab-136:AR3:CD14:400128_16,400128_35; Vol-4:Tab-73:AR3:CD12:204905.) Impacts to the Salton Sea differ depending upon the method used to create the conserved water. (Vol-4:Tab-73:AR3:CD12:204905.) The public had no opportunity to consider whether the EIR adequately evaluated the impacts of the changed program and project, and whether feasible mitigation could be installed for these new impacts.

(2) The project was expanded in the second addendum to the PEIR to include the IID/DWR/MWD contracts that provided for an additional transfer of 800,000 acre-feet of water. Due to that expansion of the project, this water, instead of becoming the mitigation water to the Salton Sea, would be sold to DWR, which in turn would sell it to MWD. (See Vol-7:Tab-137:AR3:CD14:400131_16 to 400131_18; Vol-7:Tab-136:AR3:CD14:400128_22 to 400128_24.) But the impact analysis of this major change was deferred. (Vol-7:Tab-137:AR3:CD14:400131_16 to 400131_18; Vol-7:Tab-136:AR3:CD14:400128_22 to 400128_24.) The inclusion of these new contracts would increase impacts because the contracts allows for mitigation water to cease. The public was deprived of an opportunity to demand an adequate analysis of the impacts caused by selling the Salton Sea's mitigation water to MWD. (See Vol-7:Tab-137:AR3:CD14:400131_16 to 400131_18 (denying need for subsequent EIR).)

(3) The SSCHS in the transfer EIR that involved sending mitigation water to the Salton Sea for 30 years to offset the reduction in inflows caused by the project (Vol-4:Tab-73:AR3:CD12:204937, 204959-204960) was replaced in the addendum with a water delivery schedule. (Vol-7:Tab-136:AR3:CD14:400128_16, 400128_35.) This change in the project produced a 7 foot drop in the sea's elevation, and a salinity level of 60 ppt arriving 11 years earlier. (Vol-7:Tab-136:AR3:CD14:400128_38.) The public was deprived of the opportunity to comment on the increasing severity of a significant effect arising from this change in the project.

(4) The final project no longer requires a Habitat Conservation Plan (HCP) for incidental take permits under federal and California endangered species laws (ESA and CESA). (Vol-4:Tab-73:AR3:CD12:204903;

Vol-7:Tab-136:AR3:CD14:400128_12, 400128_25-400128_26.) IID must use “best efforts” to prepare an HCP and obtain incidental take permits. (Vol-7:Tab-136:AR3:CD14:400128_26.) But as a result of this change, the public was deprived of commenting on the impacts of eliminating the requirement for an HCP.

(5) The revised water delivery schedule will increase water transferred by IID to CVWD (or alternatively, MWD) after mitigation water to the Salton Sea has stopped. (Vol-7:Tab-136:AR3:CD14:400128_18 to 400128_19, 400128_33 to 400128_34; Vol-7:Tab-137:AR3:CD14:400131_09, 400131_15.) In year 45 IID expects to transfer 103 KAF to CVWD (or MWD), when the 2002 final transfer EIR only contemplated 50 KAF, for a net export increase of 53 KAF. (Vol-7:Tab-136:AR3:CD14:400128_34.) Compared to the project analyzed in the 2002 QSA PEIR, the total amount of transferred water will significantly increase starting in 2021. (Vol-7:Tab-137:AR3:CD14:400131_15.) According to the addendum for the transfer EIR, mitigation water to the Salton Sea ceases in year 2019. (Vol-7:Tab-136:AR3:CD14:400128_16 to 400128_17, 400128_35.) The public was given no voice in commenting on the changes to the delivery schedule and consequent increased impacts.

(6) The expanded project in the transfer EIR addendum includes IID’s implementation of additional conservation measures, resulting in further in-valley loss of 72,000 AFA, to make MWD eligible for Interior’s special surplus waters under the ISG. (See Vol-7:Tab-136:AR3:CD14:400128_13 to 400128_14, 400128_20 to 400128_21.) The ISG establishes benchmarks for agricultural to urban transfers. (Vol-7:Tab-136:AR3:CD14:400128_20.) IID would then “backfill” water for the ISG benchmark years 2006, 2009, and 2012 in the event that MWD

does not receive water it expects from PVID's program. (Vol-7:Tab-136:AR3:CD14:400128_20.) The QSA PEIR addendum assumed an even larger project expansion: the addition of 145,000 AFA to meet the benchmarks in the ISG. (Vol-7:Tab-136:AR3:CD14:400131_18 to 400131_19.) The public was prevented from commenting on the impacts associated with the additional conservation measures needed for the ISG, and inconsistencies between the transfer EIR and QSA PEIR.

C. Between the final QSA PEIR and Addendum, Air Quality Impacts Were Upgraded from Less than Significant to Significant.

Between the QSA PEIR and its addendum, air quality impacts rose to a level of significance. In the QSA PEIR, the air quality impacts were determined to be less than significant. (Vol-4:Tab-74:AR4-06-435-27487.) In the Addendum, the air quality impacts were determined to be significant. (Vol-7:Tab-136:AR3:CD14:400131_120 to 400131_121.) Recognizing a new significant and un-assessed impact *per se* requires an EIR. (CEQA Guidelines, §15162(a).)

D. New Mitigation Measures Were Added to the Addenda.

A new mitigation measure was added to both addenda for biological resources, the construction of manmade roosting sites for the brown pelican in San Diego Bay and Santa Barbara Outer Harbor, because the HCP mitigation was not being completed. (Vol-7:Tab-136:AR3:CD14:400131_20 to 400131_21; Vol-7:Tab-137:AR3:CD14:400128_12, 400128_27.) The inclusion of the new measure in the addenda disabled the public from comment on whether this mitigation measure was feasible, would sufficiently meet its objective to

replace lost habitat and food sources in lieu of the HCP, and would not produce adverse impacts of its own. (See *County of Inyo v. City of Los Angeles (Inyo V)*, 124 Cal.App.3d 1 (mitigation must be feasible and not produce its own adversity).)

The QSA PEIR addendum included a new mitigation measure, the 4-step plan to mitigate air quality impacts. (See Vol-7:Tab-137:AR3:CD14:400131_21.) No public review or opportunity to comment attended the inclusion of this measure. As discussed in section IV.5.C.2 of the air district brief, significant undisclosed and unanalyzed impacts arise from the 4-step plan. CEQA requires that an EIR discuss the effects of mitigation measures, which was not done here. (CEQA Guidelines, §§ 15126.2(d), 15126.4(a)(1)(D).)

CONCLUSION

For reasons stated here, the Court should:

In case 1649/875: affirm the judgment of invalidation of the CRWDA, QSA, and transfer agreements, based on the superior court's statement of decision, and additionally on the failure of the QSA and transfer agreements to comply with Water Code section 1810 and CEQA; setting aside the contracts, their approval resolutions, and EIR certifications of adequacy;

In case 1656/878: direct issuance of writs of mandate to MWD, CVWD, IID, and SDCWA setting aside the QSA contract and transfer agreement, their approval resolutions, and EIR certifications of adequacy;

In case 1658/879: direct issuance of writs of mandate to IID and SDCWA, setting aside the transfer agreement, its approval resolutions, and EIR certification of adequacy.

The Court should additionally order that for reasons stated in the county agencies' responses to the supersedeas petitions, pending returns to the writs of mandate, each of the parties is enjoined from any action that allows the level of the Salton Sea to decline lower than -230.5 msl, as detailed at pages 63-65 of the county agencies' supersedeas response to the water agencies.

The Court should additionally entitle respondents and cross-appellants to an award of attorneys' fees pursuant to section 1021.5 of the Code of Civil Procedure, in an amount to be determined.

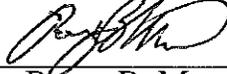
Dated: November 22, 2010

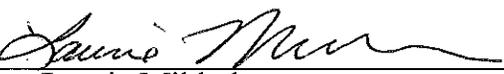
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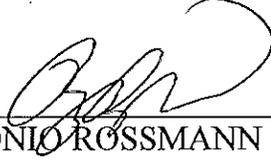
CERTIFICATE OF WORD COUNT

(Cal. Rule of Court, Rule)

The text of this **COUNTY OF IMPERIAL RESPONDENT'S AND
CROSS-APPELLANT'S BRIEF** consists of 34,178 words as counted by the
Microsoft Word word-processing program used to generate the brief.

Dated: November 22, 2010

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BY: 

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I, **Tiffany Poovaiah**, hereby declare under penalty of perjury as follows:

I am over the age of 18 years and am not a party to the within action. My business address is 380 Hayes Street, Suite One, San Francisco, California 94102.

On **November 23, 2010**, I served the following documents:

COUNTY OF IMPERIAL RESPONDENT'S AND CROSS-APPELLANT'S BRIEF

by first class mail postage (asterisks indicate persons served instead via Federal Express) prepaid at San Francisco, California by depositing in sealed envelope a copy to each of the following persons:

Executed on **November 23, 2010**, at San Francisco, California.

A handwritten signature in black ink, appearing to read 'Tiffany Poovaiah', written over a horizontal line.

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