

C064293

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

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

**QSA COORDINATED CIVIL CASES**

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From Sacramento County Superior Court  
Judicial Council Coordination Proceeding No. JCCP4353  
The Honorable Roland L. Candee, Judge

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**RESPONDENT / CROSS-APPELLANT POWER'S BRIEF**

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COURT OF APPEAL, <b>THIRD</b> APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: <p style="text-align: center; font-weight: bold;">C064293</p>
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APPELLANT/PETITIONER: Imperial Irrigation District, et al.  RESPONDENT/REAL PARTY IN INTEREST: <b>POWER</b>	
<b>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</b> (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE	
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1. This form is being submitted on behalf of the following party (name): POWER

2. a.  There are no interested entities or persons that must be listed in this certificate under rule 8.208.

b.  Interested entities or persons required to be listed under rule 8.208 are as follows:

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

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

Continued on attachment 2.

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

Date: November 23, 2010

Michael B. Jackson

(TYPE OR PRINT NAME)

  
 (SIGNATURE OF PARTY OR ATTORNEY)

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

There are no interested persons or entities to list in this Certificate of Interested Entities or Persons submitted in behalf of Respondent POWER.

Dated: November 24, 2010

LAW OFFICES OF  
MICHAEL B. JACKSON

By:



Michael B. Jackson

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## GLOSSARY OF TERMS

**af.** Acre-feet.

**afa.** Acre-feet per Annum.

**BOR.** Bureau of Reclamation

**CDFG.** California Department of Fish and Game.

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

**County.** County of Imperial.

**CRWDA.** Colorado River Water Delivery Agreement: Federal Quantification Settlement Agreement for purposes of Section 5(B) of Interim Surplus Guidelines among the U.S. (through the Secretary), IID, CVWD, MWD, and SDCWA (*Also referred to as Federal QSA*)

**CVWD.** Coachella Valley Water District.

**DWR.** California Department of Water Resources.

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

**EIR.** Environmental Impact Report.

**EIS.** Environmental Impact Statement.

**Federal QSA.** Colorado River Water Delivery Agreement: Federal Quantification Settlement Agreement for purposes of Section 5(B) of Interim Surplus Guidelines among the U.S. (through the Secretary), IID, CVWD, MWD, and SDCWA

**HCP.** Habitat Conservation Plan.

**ICAPCD.** Imperial County Air Pollution Control District.

**IID.** Imperial Irrigation District.

**KAFY.** Thousand acre-feet per year.

**MMRP.** Mitigation Monitoring and Reporting Program.

**MWD.** The Metropolitan Water District of Southern California.

**NCCP.** National Communities Conservation Plan.

**NEPA.** National Environmental Protection Act.

**NOD.** Notice of Determination.

**NOP.** Notice of Preparation.

**PEIR.** Programmatic Environmental Impact Report for the Implementation of the Colorado River Quantification Settlement Agreement.

**QSA.** The term “QSA” collectively refers to the *State Quantification Settlement Agreement*, the federal

*Quantification Settlement Agreement*, and other related agreements totaling thirty-five in number which describe the transfer of water between the IID and the other Water Agencies. These agreements are all part of the overall quantification, settlement, and transfer of waters agreed to by the many parties to the QSA and related agreements. The subset of the thirteen QSA agreements that was sought to be validated in Case 1649 proceeding is referred to herein as the “QSA-Validation Agreements.”

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

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

**SDCWA.** San Diego County Water Authority.

**State.** State of California agencies including Department of Fish and Game and Department of Water Resources.

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

**SWP.** State Water Project.

**SWRCB.** California State Water Resources Control Board.

**Transfer Agreement.** Agreement for Transfer of Conserved Water by and between IID and SDCWA, including Amendments 1 through 3 and the Revised Fourth Amendment.

**USFWS.** U.S Fish and Wildlife Service.

**VID.** Vista Irrigation District

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

**Water Transfer Project.** The IID/SDCWA Water Conservation and Transfer Project.

## **CITATION FORMAT PROTOCOL**

**Appellant's Appendix**

AA:[vol.]:[tab]:[page(s)]

**Reporters' Transcript**

RT:[vol.]:[page(s)]

**Administrative Record**

AR[record#]:[disc#]:[DocBates#]

## CROSS-APPELLANT POWER'S OPENING BRIEF

*So off went the Emperor in procession under his splendid canopy. Everyone in the streets and the windows said, "Oh, how fine are the Emperor's new clothes! Don't they fit him to perfection? And see his long train!" Nobody would confess that he couldn't see anything, for that would prove him either unfit for his position, or a fool. No costume the Emperor had worn before was ever such a complete success.*

*"But he hasn't got anything on," a little child said.*

*"Did you ever hear such innocent prattle?" said its father. And one person whispered to another what the child had said, "He hasn't anything on. A child says he hasn't anything on."*

*"But he hasn't got anything on!" the whole town cried out at last.*

*The Emperor shivered, for he suspected they were right. But he thought, "This procession has got to go on." So he walked more proudly than ever, as his noblemen held high the train that wasn't there at all.<sup>1</sup>*

As with the Emperor and his noblemen, so to the IID, MWD, CVWD, SDCWA, and the State of California haughtily march forward to the Appellate Court holding aloft the imaginary canopy of environmental protection to mitigate the impacts of the nation's largest water transfer. Like the little child and the townsfolk in this classic fairytale, the trial court has observed that the Emperor indeed has no clothes. Respondent water agencies in their opening briefs provide no further support for their contention that the imaginary garments are anything but mere illusions.

### I. INTRODUCTION.

#### A. CASE OVERVIEW AND POWER POSITION.

Cross-Appellant Protect Our Water and Environmental Rights ("POWER") is an unincorporated association established in October 2003, whose purpose is to protect and preserve the environmental resources of the Imperial Valley, with an emphasis on water resources. POWER'S concern

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<sup>1</sup> *The Emperor's New Clothes*, Hans Christian Andersen

over the adverse environmental impact which will result from the QSA's transfer of hundreds of thousands of acre-feet of water from the Imperial Valley to southern California's urban areas led to their filing of a Petition for Writ of Mandate on November 6, 2003.

#### **B. POWER CROSS-APPEAL.**

The trial court's judgment on February 11, 2010 in the QSA Coordinated Proceeding addressed four of the eleven original coordinated cases: (1) *Imperial Irrigation District v. All Persons*, Case No. 04CS00875/ECU01649,<sup>2</sup> filed on November 5, 2003, amended November 12, 2003 and September 14, 2007 ("Validation Action" or "Case 1649"); (2) *POWER v. Imperial Irrigation District et al.*, Case No. 04CS00877/ECU01653, filed on November 7, 2003, amended November 23, 2004 ("Case 1653"); (3) *County of Imperial v. Metropolitan Water District of Southern California et al.*, Case No. 04CS00878/ECU01656, filed on November 10, 2003, amended August 12, 2004 ("Case 1656"); and, (4) *Morgan, et al. v. Imperial Irrigation District, et al.*, Case No. 04CS00879/ECU01658, filed on November 10, 2003 ("Case 1658"). POWER is a plaintiff in Case 1653.

The trial court in its ruling on Case 1649 voided and invalidated twelve of the thirteen QSA-Contracts on the basis that the State of California's open-ended commitment under the QSA-JPA regarding mitigation and restoration of the Salton Sea was unconstitutional. The trial court concurrently dismissed the CEQA writ cases, Cases 1653, 1656, and 1658 as moot. POWER contends that the trial court properly ruled that the referenced QSA-Validation Agreements in Case 1649 are invalid, but that the trial court erred in dismissing the CEQA writ cases as moot.

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<sup>2</sup> The Imperial County and Sacramento County Superior Court case numbers are identified.

POWER timely filed a cross-appeal of the trial court's dismissal of Case 1653 in March, 2010 as did the County and ICAPCD. POWER, like the County Agencies, contends that the trial court erred in ruling that the CEQA writ cases are moot and should have ruled that the environmental documentation tied to the QSA-Contracts' are also void. Without such a ruling, POWER is prejudiced in that the Water Agencies will be able to rely on defective environmental documents if at some time in the future the present defects in the QSA-Contracts are cured.

The specific issues raised by POWER in its cross-appeal are as follows:

- (1) Did the trial court err in limiting the issues, and not hearing and deciding the writ petitions in Cases 1653 and 1656?
- (2) Did the trial court err in not issuing writs on the merits in Cases 1653 and 1656?
- (3) Did the trial court err in dismissing Cases 1653 and 1656 as moot?

The answer to all of these questions is "yes." POWER will address these questions in this brief. POWER joins, and incorporates herein, Imperial County' opening cross-appellant's brief ("County Brief"), that addresses these questions. (Cal. Rule Court, Rule 8.2000(a)(5).)

## **II. FACTUAL BACKGROUND.**

The Decision on pages 18-37 (AA:47:292:12723-12742) provides a generally accurate description of the factual history leading up to the IID's approval of the QSA agreements and the Water Transfer EIR/EIS. The following paragraphs emphasize some of the more important historical points relevant to POWER's case.

The genesis of the QSA lies within three SWRCB rulings concerning the alleged waste and unreasonable use of water by the IID: (1) Decision 1600 "Decision Regarding Misuse of Water by Imperial Irrigation

District”, dated June 21, 1984 (AR1:CD5:501326-501401); (2) Water Rights Order 84-12 “Order Affirming Water Rights Decision 1600 and Denying Petitions for Reconsideration”, dated September 20, 1984 (AR1:CD5:501403-501430); and (3) Water Rights Order 88-20 “Order to Submit Plan and Implementation Schedule for Water Conservation Measures”, dated September 7, 1988 (AR1:CD5:501432-501480).

SWRCB Decision 1600 considered IID’s water use practices in response to a complaint filed by a landowner adjoining the Salton Sea whose land was threaten by rising water levels. The landowner alleged the increase in the level of the Salton Sea was caused by IID’s wasteful and unreasonable use of water. Following evidentiary hearings on the matter, the SWRCB concluded that IID’s failure to implement additional water conservation measures was unreasonable and constituted a misuse of water and directed IID to take several actions to improve its water conservation program. This conclusion was made by the SWRCB after their assessment of both the costs and benefits of implementing additional water conservation. The decision notes that one of the primary benefits of conserving water would be to make additional waters available to MWD whose own supplies to Colorado River water were likely to be curtailed in the near future. One noteworthy observation made by the SWRCB in Decision 1600 concerned the adverse impact of implementing water conservation measures on the Salton Sea:

Since IID contributes approximately 70 percent of the inflow to the Salton Sea, it is clear that irrigation drainage from IID will be a major factor governing the future level and salinity of the Sea. ... A long-term reduction of 100,000 to 400,000 afa in the IID contribution to Salton Sea inflow would have a significant effect on both the surface level and the salinity of the Sea.

(AR1:CD5:501389)

The condition of the Salton Sea and IID's water use and water conservation programs are manifestly linked. The reduction of inflows to the Salton Sea resulting from the implementation of any conservation and/or water transfer program have a direct impact on both the sea's level as well as its salinity content. The SWRCB's comment as noted above highlights the fact that the impacts to the Salton Sea resulting from the implementation of a water conservation plan by IID have been recognized as a key factor since the very inception of deliberations concerning IID's water use and conservation needs. The SWRCB affirmed its judgment in Decision 1600 in Water Right Order 84-12 following a petition for reconsideration by the IID.

Subsequently, four years later in 1988, the SWRCB conducted further hearings into the status of IID's conservation efforts following an unsuccessful court challenge by IID regarding the SWRCB's jurisdiction in the matter (*Imperial Irrigation District v. State Water Resources Control Board*, (1986) 186 Cal. App. 3d 1160, 231 Cal. Rptr. 283). Included as part of the hearings was a review of the IID's December 2, 1986 "Water Conservation Program and Initial Water Transfer" and corresponding environmental documentation. Subsequent to the hearings, the SWRCB in Water Rights Order 88-20 again reiterated the need for IID to implement water conservation measures within the district. The SWRCB found that IID's proposed conservation of 367,900 acre-feet per annum "is a reasonable long-term goal which will assist in meeting future water demands." (AR1:CD5:501478) Of this conserved amount, IID proposed to transfer 250,000 acre-feet with the remainder being used to satisfy future demands within Imperial Valley. (AR1:CD5:501443) The SWRCB also directed IID to secure funding for the implementation of a water conservation program either internally or via a separate entity willing to finance the measures. (AR1:CD5:501479).

The significant impacts of a water conservation program on the Salton Sea and its surrounding environment were noted by the SWRCB in Water Rights Order 88-20:

IID prepared an Environmental Impact Report (EIR) for the proposed water conservation program which identified several adverse effects of implementing the program. With respect to the Salton Sea, the EIR recognizes that a reduction in inflow of agricultural return flow will result in a reduced elevation of the Salton Sea and an accelerated increase in salinity. At some point, increasing salinity levels will interfere with the survival of the fishery. ... Implementation of additional water conservation measures will also result in a reduction of existing wetland habitat along the Salton Sea shoreline. The EIR states that the reduction in habitat could cause significant damage to terrestrial wildlife, especially the Yuma Clapper Rail, a federally designated endangered species and California designated rare avian species.

(AR1:CD5:501461/501462)

The costs of additional water conservation were described in Water Rights Order 88-20 as follows:

For purposes of the EIR, it was assumed that a conservation program would entail construction expenditures of \$300 million and annual operation and maintenance expenses of \$20 million.

(AR1:CD5:501463)

In retrospect, the estimated costs of IID's conservation program as described in the SWRCB's Water Rights Order 88-20 (\$300 million and annual operation and maintenance expenses of \$20 million) are exceedingly low even in terms of the 1988 dollar amounts. One wonders whether the SWRCB would draw the same conclusions as to the need for water conservation measures by IID in light of current cost estimates, particularly those associated with mitigating the impacts of the water transfer on the Salton Sea.

Given the SWRCB's mandates to conserve water, IID pursued negotiations with MWD which led to the December 22, 1988 "Agreement for the Implementation of a Water Conservation Program and Use of Conserved Water" between IID and MWD encompassing approximately 100,000 acre feet per year (AR1:CD5:503654-503713) and later with SDCWA which led to the April 29, 1998 "Agreement for Transfer of Conserved Water by and between Imperial Irrigation District and San Diego County Water Authority" encompassing 300,000 acre feet per year (AR1:CD5:503047-503247); the sum total exceeding that which they had previously committed to transfer.

In September 1999, co-lead agencies IID and BOR filed a Notice of Intent and a Notice of Preparation of an EIR/EIS for the IID/SDCWA Water Conservation and Transfer Project (AR1:CD1:100030-100042) covering the transfer of up to 300,000 acre feet per year to SDCWA and other designees.

Three public hearings were held on the transfer EIR/EIS on April 2, 2002; April 3, 2002; and April 4, 2002 (AR1:CD2:200007-200011) during which both oral and written testimony was submitted concerning the insufficiency of the EIR/EIS and environmental impacts associated with the transfer project. On June 28, 2002, IID certified the EIR/EIS for the IID/SDCWA transfer.

IID's continuing concerns as to the proposed water transfers environmental mitigation costs and the economic impacts of land fallowing led the Board to reject a comprehensive QSA settlement agreement among the water parties on December 9, 2002 on a 3-2 vote. The supporting environmental documentation for the QSA (Addenda to the original EIR/EIS, CEQA Findings and Statements of Overriding Considerations, and MMRP) were also rejected at this meeting (AR1:CD3:300479-300486.) Despite IID's rejection of the QSA agreement and its supporting

environmental documentation during its December 9, 2002 meeting, the IID nevertheless adopted the addenda to the EIR/EIS and PEIR, CEQA Findings and Statements of Overriding Considerations, and MMRPs at its December 31, 2002 meeting. (AR1:CD3:300415-300417; (AR1:CD3:32108-32110.)

New negotiations were held at the start of 2003 to resolve the differences between the water agencies perspectives concerning impacts to the Salton Sea under the QSA. The crux of the matter concerned the fact that the environmental mitigation costs associated with the Salton Sea exceeded the amount the Water Agencies were willing to pay. (AR3:CD5:50519.) As a result of these negotiations the basis of a new QSA deal was formed in September 2003 wherein the State would agree to pay for the environmental mitigation costs exceeding \$133 million and MWD would be allowed to purchase Salton Sea mitigation water from DWR with no responsibility for mitigation of the water transfer. (AR3:CD1:10080-10091; AR1:CD9:600566-600639; AR3:CD7:70164-70165.) Three bills (SB 277 – Ducheny; SB 317 – Keuhl; and, SB 654 – Machado) were passed to facilitate the proposed changes to the QSA with the provision that the QSA agreement be executed by October 12, 2003. (AR1:CD4:400282-400285; AR1:CD4:400274-400281; AR1:CD4:400286-400291.) A second set of addenda to the EIR/EIS replacing those approved on December 31, 2002 was also prepared by IID in September 2003. (AR1:CD414:400126-400128.) The County and other members of the public requested the opportunity to review the new agreements and CEQA/NEPA documents. (AR3:CD7:70101-70102; AR3:CD7:70067-70069; AR3:CD7:70073-70075; AR1:CD4:400258-400267.) However, neither the QSA nor addenda were circulated for public review and comment.

On October 2, 2003, IID approved the QSA, and re-approved and re-certified the EIR/EIS, as modified and supplemented by the second set of addenda. (AR1:CD4:400127-400128) As discussed later in this brief, key terms within the draft QSA-JPA agreement provided to the IID Board were still being negotiated after the IID Board's October 2, 2003 approval: Most significantly, the State's unconditional agreement to pay for all mitigation funding shortfalls exceeding \$133 million. (AA:38:236:10359; AA:47:292:12744; AR1:CD9:600566-600639.)

On October 10, 2003, representatives of IID, MWD, SDCWA, CVWD, and the State of California signed the QSA agreements (including the revised QSA-JPA agreement among IID, SDCWA, CVWD, and the State of California) on behalf of their respective agencies, (AR1:CD9:600239-600278.) Eleven cases were filed against the QSA, including the cases at issue in this appeal (Cases 1649, 1653, 1656, and 1658).

### **III. BECAUSE THE TRIAL COURT FAILED TO DO SO, THIS COURT SHOULD ADJUDICATE POWER'S ENVIRONMENTAL CLAIMS ON THEIR MERITS.**

Seven years ago POWER timely filed a mandate petition to challenge the failure of the QSA and transfer agreement agencies to conduct a complete environmental assessment of the largest water transfer in California history. Regrettably, the superior court persistently refused to adjudicate this claim. The superior court's six-year failure to evaluate the QSA's deficient environmental assessments calls for this Court to make this environmental decision now. The QSA created a 15-year window to stabilize the Salton Sea; nearly half that period has been wasted with the QSA's operation premised on these inadequate EIRs. The State's duty to compensate for Salton Sea mitigation is premised on the still-to-be-adjudicated transfer EIR.

The Legislature has commanded, and the courts have previously enforced, the CEQA 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.) Regrettably, the superior court has enabled the efficacy of the water agencies' strategy, refusing to honor *seven* attempted motions to issue peremptory writs sought on the CEQA claims.<sup>3</sup> Against this reality POWER joins with the County ICAPCD to maintain 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 ruled only 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 in deciding the water agencies' appeals this Court reverses that judgment and concludes that the QSA cannot be so invalidated, then the remaining unresolved claims would need to be resolved to produce a final judgment of validity or invalidity. For reasons stated below, these issues should not be remanded to the superior court for determination.

**B. EVEN IF THE WATER AGENCIES' APPEAL IS NOT SUSTAINED, THE ENVIRONMENTAL CLAIMS ARE NOT MOOT.**

California courts have consistently imposed 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

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<sup>3</sup> See *County of Imperial v. Superior Court (MWD)*, 3 Civil C060725, in which the County recited the frustration of efforts to secure hearings on the mandate petitions.

(citing *Californians for Alternatives to Toxics v. Department of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1069).) In *Lincoln Place*, the court noted 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 p. 1070.) The court also noted that the matter was of continuing public interest and was likely to recur. In that case, as POWER and the County request 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 that 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.<sup>4</sup> 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

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<sup>4</sup> 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).

Court found, “can still be awarded the relief it seeks, *an order that the City set aside its approvals.*” (*Id.* at p. 127 (emphasis added).)<sup>5</sup>

The Transfer EIR challenged by POWER involves project approvals which the superior court declined to address. The POWER writ petition 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 POWER’s request to set aside agency certifications of the QSA environmental documents and refused to consider the petition’s requested injunctive relief.

Absent set-aside of the documents and their certification, the water agencies could simply re-certify the existing documents, claiming that the next-round QSA’s impacts have already been assessed; re-certify the existing documents and add an addendum, claiming (as the water agencies have in this proceeding with respect to their post-2002 actions) that the addenda do not require recirculation to outside public agencies or the public for further review and comment (see CEQA Guidelines, § 15164); or, 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 scenarios afford POWER the 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 reliance on them in subsequent environmental reviews.

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<sup>5</sup> 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.

(*Accord, Friends of the Santa Clara River v. Castaic Lake Water Agency* (2002) 95 Cal.App.4th 1373, 1387.)

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 incomplete 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 return at the bidding of the water agencies.

**C. EVEN IF THE ENVIRONMENTAL CLAIMS ARE NOW MOOT, WELL-RECOGNIZED EXCEPTIONS SUPPORT THEIR ADJUDICATION ON THE MERITS.**

Three recognized exceptions to the dismissal of moot claims 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 the merits).)

This proceeding places at issue the largest water transfer proposed in California history. At either end of the transfer, the predominant public interests are those of the environment: 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 Southern California. Claims testing the environmental compliance of vast inter-basin 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, themselves, also implicate environmental decision-making statewide. Compliance with CEQA has been repeatedly found of such public importance as to warrant adjudication even if arguably 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).)

For reasons stated above, the environmental claims will almost certainly recur among the present parties to this proceeding. A renegotiated QSA and transfer will require environmental documentation. 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 p. 473; *San Diego Trust & Savings Bank v. Friends of Gill*, 121 Cal.App.3d at p. 209.)

**D. THIS COURT SHOULD ADJUDICATE THE ENVIRONMENTAL CLAIMS AND NOT REMAND THEM FOR YET MORE DELAY IN THE SUPERIOR COURT.**

Because of the trial tactics of the water agencies, 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 POWER, the county

agencies, and other environmental claimants to brief them there. Because these claims will be addressed in this Court by the same standard of review as if done at trial, 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 hundreds of 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 and is now before the Court. This Court can proceed to the merits. (Accord, *Californians for Alternatives to Toxics*, 136 Cal.App.4th at p. 1070; *Watershed Enforcers*, 185 Cal.App.4th at p. 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 environmental impacts at the Salton Sea (Stats. 2003, ch. 654, § 3, footnote 1, *supra*). And in this proceeding, the seven-year delay rises to the greatest magnitude of prejudice to the environment, given the findings of the State and its water board that only eight more years remain to determine the mitigation and restoration of the Salton Sea.

#### **IV. POWER'S OPENING ARGUMENTS IN SUPPORT OF CROSS-APPEAL.**

##### **A. THE WATER TRANSFER EIR/EIS DOES NOT COMPLY WITH CEQA.**

The EIR/EIS for the Water Transfer Project fails to comply with the requirements of CEQA in regards to it's consideration of alternatives to the Project, evaluation of impacts to population and housing, improper use of a baseline by which to assess project impacts, failure to re-circulate a revised draft after significant changes were made to the project, and failure to adequately analyze air quality impacts. Furthermore, the CEQA process was compromised in that the final documents critical to informed decision making were not provided to the public and the IID Directors prior to the final approval of the EIR/EIS.

The purpose of an EIR is to give the public and government agencies the information needed to make informed decisions, thus protecting "not only the environment but also informed self-government." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d at p. 564.) The EIR is the heart of CEQA, and the mitigation and alternatives discussion forms the core of the EIR. (*Id.*) The water agencies in their quest to approve the QSA water transfers prior to the arbitrary October 12, 2003 deadline for final action under the 2003 QSA legislation<sup>6</sup>, abandoned their responsibility to properly comply with the State's environmental laws.

##### **B. INADEQUATE RANGE OF ALTERNATIVES**

The Water Transfer EIR/EIS fails to consider a reasonable range of alternatives to the Proposed Project which meet the project's goals and

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<sup>6</sup> SB277 (Ducheny), SB317 (Keuhl), and SB654 (Machado) (AR1:CD4:400282-400285; AR1:CD4:2400274-400281; and AR1:CD4:400286-4000291 respectively.) An extension of the October 12, 2003 deadline in SB 317 was never considered.

objectives and have less significant impacts on the environment. The proposed project and alternatives selected for consideration in the EIR/EIS represent a monochromatic view of the QSA parties' water conservation and supply needs, and fall far short of CEQA's goal to protect the environment.

The CEQA Statutes provide:

The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.

(Public Resources Code §21002)

The statutes also provide that “[t]he purpose of an EIR is to identify the significant environmental effects of a project, identify alternatives to the project, and indicate ways the significant effects can be avoided.” (Public Resources Code §21002.1(a))

The proper means by which project alternatives are to be identified and considered within an EIR are set forth within the CEQA guidelines as follows:

An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decision making and public participation. An EIR is not required to consider alternatives which are infeasible. The lead agency is responsible for selecting a range of project alternatives for examination and must publicly disclose its reasoning for selecting those alternatives. There is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason.

(CEQA Guidelines §15126.6)

The Water Transfer EIR/EIS fails to meet the requirements of the CEQA guidelines in these regards and it is clear that the “rule of reason” test when applied to the range of feasible alternatives available to satisfy project purposes and objectives has not been met. The process of selecting the alternatives begins with the establishment of project objectives by the lead agency. “A clearly written statement of objectives will help the lead agency develop a reasonable range of alternatives to evaluate in the EIR and will aid the decision makers in preparing findings. ... The statement of objectives should include the underlying purpose of the project.”

(CEQA Guidelines § 15124)

The Water Transfer Project’s goals and objectives in the “Project Purpose, Need, and Objectives” section of the EIR/EIS are separately described from the perspective of IID, SDCWA, and two of the participating federal agencies (“BOR” and “USFWS”). (Water Transfer EIR/EIS, p. 1-2 (AR1:CD6:508310)) In regards to the two federal agencies, the EIR/EIS states that for the BOR, “the underlying purpose and need for the Proposed Project is to facilitate implementation of the IID/SDCWA Transfer Agreement and the QSA.” (*Id.*) This singularly exclusive description is wholly lacking and is tantamount to making the statement that “the purpose of the project is to implement the project.” The language used to describe the project goals from the USFWS perspective is equally unavailing – “For USFWS, the underlying purpose and need for the HCP is to minimize and mitigate the effects of the Proposed Project on covered species.” (*Id.*) By failing to state the project’s goals in general terms, the EIR/EIS prevents itself from providing an honest evaluation of the universe of available alternatives and preordains the outcome of the environmental review process.

Descriptions of the project objectives from IID's and SDCWA's perspectives are likewise tainted. On page 1-3 of the "Project Purpose, Need, and Objectives" section of the Water Transfer EIR/EIS, the statement is made that "[t]he water conservation and transfer component of the Proposed Project is defined by the negotiated contractual provisions of two separate agreements: the IID/SDCWA Transfer Agreement and the proposed QSA." (AR1:CD6:508311) This objective is likewise recited within Appendix D of the EIR/EIS ("Imperial Irrigation District Conservation and Transfer Project EIR/EIS Alternatives Analysis Report") where it is stated that "IID's underlying objective for the Proposed Project is to meet the terms of, and implement, the IID/SDCWA Transfer Agreement, the QSA, and the Habitat Conservation Plan (HCP)." (AR1:CD6:509781) Here, again, it is clear that the goal of the environmental review is to implement the components of a previously negotiated water transfer agreement between IID and SDCWA as expanded by the proposed QSA as opposed to objectively considering the satisfaction of more general water conservation and supply objectives and needs of the respective agencies.

The EIR/EIS does, admittedly, make one attempt to describe a broader objective for the project in its discussion. However, it limits that description with a series of unreasonably and narrowly defined conditions which prevent the consideration of other alternatives. The EIR/EIS states that the proposed project provides a means for IID "to conserve water" which allows them to "respond to the State Water Resources Control Board (SWRCB) ... directive that IID develop and implement a conservation program, and they protect IID's water rights." (*Id.*) However, the discussion then continues on with a list of four specific objectives, all of which describe the specific attributes of the IID/SDCWA Transfer Agreement.

The four objectives are:

- To conserve water and transfer it in a market-based transaction that provides payments to IID to fund a water conservation program, including the cost of on-farm and system improvements, environmental mitigation costs, and other implementation costs.
- To develop a water conservation program that includes the voluntary participation of Imperial Valley landowners and tenants so that on-farm conservation measures, as well as water delivery system conservation measures, can be implemented.
- To implement a water conservation and transfer program without impairing IID's historic senior-priority water rights, in a manner consistent with state and federal law.
- To provide an economic stimulus to Imperial Valley's agricultural economy and the surrounding community.

(AR1:CD6:508311)

Although CEQA requires that an EIR contain a clear and concise statement of objectives that will determine the range of alternatives that are selected for detailed analysis (CEQA Guidelines §15142(b)), CEQA also demands that the statement of objectives not be so narrowly defined as to preclude consideration of viable project alternatives. (*Kings County Farm Bureau v. City of Hanford* 221 (1990) Cal.App.3d 692) Adequate alternatives can only be identified if the project objectives accurately reflect the actual project purpose and need. The EIR/EIS by including these specific conditions in the project objective statements improperly reduces the spectrum of viable alternatives.

Appendix D to the Water Transfer EIR/EIS (*Imperial Irrigation District Conservation and Transfer Project EIR/EIS Alternatives Analysis Report*) presents the analysis performed to identify the range of feasible alternatives considered by the EIR/EIS. (AR1:CD6:509777:509818) As with the discussions presented within the text of the EIR/EIS, the project objectives identified here also tie back to the implementation of the

IID/SDCWA Transfer Agreement and the QSA. The specific criteria in the analysis to eliminate alternatives from further consideration are recited below:

Project Objectives Criteria:

C1. Will the alternative provide SDCWA with a reliable source of water to assist in diversifying its water supply sources and meeting projected demands in average and dry years. A core objective of the Proposed Project is to reduce SDCWA's reliance on water from MWD, and to protect it from severe shortages during drought periods. An alternative that does not aid in achieving that objective would be eliminated from further consideration.

C2. Will the alternative implement a meaningful and substantial conservation program consistent with SWRCB directives without impairing IID's historic water rights. In both Decision 1600 (SWRCB 1984) and Order 88-20 (SWRCB 1988), SWRCB instructed IID to develop and implement a meaningful water conservation plan and noted that conservation in excess of 300,000 KAFY is a reasonable long-term goal of the plan. To pass this criterion, alternatives must provide a substantial conservation plan and preserve IID's historic water rights.

Reduction of Impact Criteria:

C3. Will the alternative reduce the environmental impacts of the Proposed Project? The purpose of the alternatives analysis is to identify alternatives that minimize the impacts of the Proposed Project; therefore, when applying this criteria [sic], the following should be considered:

1) Does the alternative reduce or avoid the potential significant impacts of the Proposed Project (water quality, biological, recreation and aesthetic impacts to the Salton Sea)? (If not, it can be ruled out), and (2) Does the alternative result in new, potentially significant impacts that were not associated with the Proposed Project (this is a factor in determining feasibility). Overall, an alternative should have "substantial environmental advantages."

Feasibility Criteria:

C4. Is the alternative technically feasible and reliable? To pass this criterion, an alternative must utilize proven technology and be designed to ensure reliability of operation.

C5. Is the alternative institutionally and legally feasible? To pass this criterion, an alternative must not face major obstacles from governmental agencies to obtaining discretionary permits and approvals that are necessary to implement the alternative.

C6. Can the alternative be implemented within a timeframe that fulfills SDCWA reliability requirements? SDCWA currently needs to enhance its reliability to protect its customers from drought; therefore, an alternative that could take up to 10 years to develop and construct would not meet this criteria. Additionally, timing is a critical element of the SDCWA/IID Water Transfer Agreement, the QSA and the California 4.4 Plan.

Other Criteria:

C7. Does the alternative meet the transfer objectives of the QSA? To meet this criterion, an alternative must include transfer of up to 100KAF to CVWD and/or MWD.

(AR1:CD6:509783:509785) [emphasis added]

Were it not for this last criterion, it might have been possible to develop an adequate scope of alternatives for consideration given the more reasonable terms of the other stated criteria. However, the very specificity of this criterion was used to eliminate other more reasonable alternatives with lesser environmental impacts from being considered in the EIR/EIS. This is evident when one considers the three alternatives which were included in the EIR/EIS:

- 1) A 130 KAFY water conservation and transfer described as a “scaled back version of the Proposed Project and includes only the minimum amount of water transfer allowable under

the terms of the IID-SDCWA Transfer Agreement (130 KAFY). This alternative would not implement the QSA provisions for transfer of up to 100 KAFY to CVWD and/or MWD. The 130 KAFY would be conserved using on-farm irrigation system improvements only.” (AR1:CD6:509796)

2) A 230 KAFY water conservation and transfer described as “being similar to the Proposed Project, except that the minimum primary transfer amount is transferred to SDCWA under the IID/SDCWA Transfer Agreement (130 KAFY), and 100 KAFY is transferred to CVWD and/or MWD pursuant to the QSA. Thus, the total amount of water conserved and transferred is reduced to 230 KAFY rather than to 300 KAFY ... Conservation could be accomplished using any combination of conservation measures.” (AR1:CD6:509797)

3) A 300 KAFY water transfer using fallowing as the exclusive conservation method and described as “similar to the Proposed Project, except that fallowing lands within the IID water service area is the exclusive means of conserving up to 300 KAFY for transfer.” (AR1:CD6:509797)

Ignoring the fact that the first alternative (130 KAFY) and the third alternative (300 KAFY fallowing transfer) do not on their own admission meet criteria C7 and C2 (and hence they were ultimately deemed unsatisfactory in the EIR/EIS), what is obviously missing from this list are any alternatives where waters conserved by IID are used for beneficial use within it’s own boundaries or alternatives where water conservation within the urban water agencies boundaries are used to satisfy their own future needs. Each of these alternatives supposes a transfer of water from IID to SDCWA. While the attractiveness of jointly solving the water conservation needs of IID and water supply needs of SDCWA through a conserved water transfer are clearly obvious, that does preclude the requirement to consider other alternatives which do not require a transfer. Similarly, alternatives whereby the respective agencies needs were satisfied through partial

transfers of conserved water could also have been considered. The advantage of these other alternatives is that they each represent an opportunity to lessen the significant environmental effects of proposed project on the Salton Sea and its environment by reducing the amount of flows diverted from the sea under the Proposed Project.

**1. The Transfer EIR's Fabricated "No Project" Analysis Concealed the QSA's Overarching Purpose to Fill MWD's Colorado River Aqueduct.**

Rather than complying with CEQA's informational mandate to provide an adequate no-project description, the transfer EIR/EIR instead intentionally obfuscates the drastic and inevitable loss in water supply without the proposed transfer. In their trial briefs the water agencies asserted that the EIR "describes the No Project alternative in detail." (IID 1C Opening Brief, p. 36 [11 IC Appx. 121:02880].)

Totally lacking in the no-project description is the highly foreseeable no-project reality of a reduction of approximately 600,000 AFY of water to MWD, or the reduction of 200,000 AFY of water to SDCWA. [See AR 1: CD10:101804\_1433; IID 1C brief, pp. 36-38 [11 IC Appx.:121:02880-02882].] The no project description, which fails to 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*, (2000) 83 Cal. App. 4th 892 at p. 91 (emphasis added).)

The transfer EIR avoids assessment of the true no-project alternative by conflating it with the independent concept of "baseline". 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 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 conditions-- in this case, a full Colorado River Aqueduct -- the separate concept of the “no project” description requires an additional level of analysis: comparison of the project not just to the baseline, but also to the “no project” alternative, to “assist the decision maker and the public in ascertaining *the environmental consequences of doing nothing.*” (*PCL v. DWR*, 83 Cal. App. 4th at p. 911 (emphasis added); CEQA Guidelines, § 15126.6, subd. (e)(1).)

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(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 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* it seems to

*assume the filling of the ... aqueduct.” (Inyo III, 71 Cal. App. 3d at p. 199 (emphasis added).)*

**2. The EIR postulated a no-QSA stable water supply by reliance on speculative alternative sources of water.**

The transfer EIR further avoids an honest comparison of the project and no-project alternatives by baldly assuming that speculative alternative sources of water can be substituted for the transfer water if the project is not approved. 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 decision-making under CEQA.” (*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 432; see also *Stanislaus Natural Heritage*, 48 Cal.App.4th at p. 199 (same).)

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. 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 Water supplies. [AR 4: 4-04-330-18304.] 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. [AR 4: 4-04-330-18304, 4-04-330-18305.]

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.” [AR 4: 4-330-204987.] 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.” [AR 3: 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 pp. 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 decision making under CEQA.” (*Vineyard*, 40 Cal.4th at p. 432; see also *Stanislaus*, 48 Cal.App.4th at p. 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 p. 1238 n. 16.)

**3. In contrast to the EIRs, MWD’s petition for supersedeas reveals the no-project reality of sharply curtailed water supply in Southern California.**

The water agencies’ statements in support of supersedeas from this Court expose their fallacious reliance on these speculative sources in the Transfer EIR. 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. (“Supersedeas Petition”), p. 18.)

The 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.” (Supersedeas Petition, p. 22.)

**4. In contrast to the water agencies’ EIRs, the Bureau of Reclamation’s IA EIS recognizes enforcement of the California 4.4 mafa 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 the federal authorization to implement the QSA and related components—rejects 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.*” [AR 1: 203161 (emphasis added).] Additionally, the QSA PEIR’s analysis of the use of desalination technology found 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.” [AR 3: 201139.]

**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 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 honesty “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 p. 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.” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 361 (citing *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal. App. 4th 99, 118).) This “failure to provide enough information to permit informed decision-making is fatal.” (*Laurel Heights*, 47 Cal. 3d at p. 361.)

### **C. FAILURE TO ADEQUATELY CONSIDER IMPACTS ON POPULATION AND HOUSING**

The Water Transfer EIR/EIS provides a schizophrenic discussion as to the Project’s impacts on population and housing. The EIR/EIS at times admits that the Project facilitates population and housing growth, but then later ignores these admissions and concludes the Project doesn’t impact growth.

Public Resources Code section 21100(b)(5) and section 15126 (d) of the CEQA Guidelines require that project impacts on population and housing be considered. Section 15126.2(d) of the Guidelines describes this requirement as:

Discuss 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).

The EIR/EIS provides dozens of contradictory conclusions in regards to the water transfers impacts on population and housing in what should have been a straightforward analysis on the matter. For example, the following discussion is provided in the “Purpose and Need, Objectives, and Background” section to the EIR/EIS:

More than 2.8 million people, or approximately 90 percent of San Diego County’s total population, receive their water through SDCWA. This number is expected to increase by an additional 1 million by 2015. ... Current projections by SDCWA indicate that total annual water demand within its service area will increase during the next 20 years from approximately 526 KAFY in 1995 to approximately 787 KAFY in 2015. Although some enhancement of local water resources during that period is anticipated, imported water must continue to provide the majority of the region’s total water supply. ... Currently, all water imported by SDCWA is purchased from MWD. ... SDCWA has determined that it needs to examine alternate water sources to meet a portion of the region’s imported water requirements and to bolster the reliability of its water supply.

(AR1:CD6:508321, 508325) [emphasis added]

It is evident from the context of this discussion that SDCWA’s need for IID’s conserved water transfer as an alternative water source is directly

tied to their needs to satisfy projected increases in demands from population growth. Another example is provided in Section 5 “Other CEQA and NEPA Considerations of the EIR/EIS where it is stated:

As noted earlier, the MWD service area continues to grow in population. The QSA would ensure that the service area continues to receive reliable water supplies even as the amount of water available to California from the Colorado River is reduced.

(AR1:CD6:509130) [emphasis added]

Similar hints of the Project’s impacts on population and housing are also provided in Section 5 of the EIR/EIS concerning the CVWD service area where it is stated:

To the extent that increased water supply reliability may be a factor influencing growth, the Proposed Project would not be growth inducing because these supplies will be used to improve the Coachella Valley’s ongoing groundwater overdraft condition. ... This additional water as a result of the Proposed Project will be used solely to offset the valley’s existing groundwater overdraft.

(AR1:CD6:509131) [emphasis added]

The dishonesty of the conclusion that the Project would not be growth inducing is revealed several lines down where it is noted that:

CVWD will undertake efforts to reduce its dependence on groundwater whether the Proposed Project is implemented or not. CVWD has other sources of water available that would support the region’s projected growth in the absence of the Proposed Project.

(AR1:CD6:509131) [emphasis added]

One wonders whether the argument will be made when it comes to developing these other “sources of water” that they too are not growth inducing because they will be used to off-set overdraft conditions within the Coachella Valley and “CVWD has a QSA water transfer source

available that would support the region's projected growth." Drawing imaginary lines through a water agencies portfolio to distinguish separate water supplies is as effective as drawing imaginary lines across the surface of a water body with the expectation that the waters will respect the delineation.

The EIR/EIS attempts to sweep aside the document's conflicting statements concerning the population and housing issue in its "Growth-inducing Impacts" section with the delusional conclusion that the Proposed Project has no impacts upon population and housing because "no additional water would be supplied." (AR1:CD6:509127) It would seem obvious to even the casual reader that a "water transfer", especially one which has been heralded as the nation's largest agricultural to urban transfer, results in additional supplies of water to at least the receiving end of the transfer. This concept is ignored in the EIR/EIS. Instead, the reasoning provided as to why no "additional water would be supplied" is that the Water Transfer Project merely replaces the anticipated loss of MWD's rights to surplus waters of the Colorado River resulting from the development of Arizona and Nevada's apportionments to the river. However, this reasoning is flawed for two reasons. First, MWD's rights to surplus Colorado River waters and IID rights to Colorado River water are two very different rights. IID's rights are higher in priority than MWD's rights to surplus waters and represent a more secure and reliable right.<sup>7</sup> The reliability of a water right extends through to the reliability of a water supply, and the reliability of that supply has a direct bearing on a community's ability to satisfy population demands and housing. Second, the localized impacts of the

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<sup>7</sup> The respective rights of the parties to the Colorado River are described in the "California Seven Party Agreement of 1931" (AR1:CD5:501786-501791) and the Supreme Courts ruling in *Arizona v. California*, 373 U.S. 546 (1963), 376 U.S. 340 (1964), 383 U.S. 268 (1966), 439 U.S. 419 (1979), 466 U.S. 144 (1984), 531 U.S. 1 (2000), and 547 U. S. 150 (2006).

water transfer project on housing and population within the individual water agency boundaries must still be considered. The transfers of water to SDCWA and CVWD under the Project apart from the historic deliveries of water by MWD to these agencies create new opportunities for growth not previously available under MWD's less secure water rights. The failure of the EIR/EIS to acknowledge and analyze the impacts of this reality violates CEQA.

One must wonder whether this failure is intentional as opposed to simply an oversight on behalf of the authors. The recitals to the 1998 IID/SDCWA water transfer agreement that serves as the foundation for the Proposed Project candidly note that one of the purposes of the transfer is to accommodate growth:

The Authority [SDCWA] seeks to acquire an independent, reliable, alternate long-term water supply to provide drought protection and to accommodate anticipated growth in municipal, domestic, and agricultural uses.

(AR1:CD9:600012) [emphasis added]

SDCWA's 2000 Urban Water Management Plan (UWMP) also identifies the IID/SDCWA water transfer as contributing 200,000 acre-feet to the total projected supplies of 772,000 acre-feet and 813,000 acre-feet for the years 2015 and 2020 respectively to meet SDCWA's future growing water demands.<sup>8</sup> (AR1:CD7:514074) The value of this transfer to growth is recognized in the plan's statement that:

Water transfers have emerged as one of the Authority's greatest potential resources for meeting future demands. ....  
In 1998, the Authority signed a historic agreement with the IID for the long-term transfer of conserved Colorado River

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<sup>8</sup> SDCWA's historical water use as noted in the 2000 UWMP are 1998 (562,225 acre-feet), 1999 (619,409 acre-feet), and 2000 (695,000 acre-feet). (AR1/CD9/514022).

water to San Diego County. The Authority-IID Water Conservation and Transfer Agreement will increase the reliability of the Authority's future imported water supplies.

(AR1:CD7:514040) [emphasis added]

And last, but not least, the 1998 IID/SDCWA petition to the SWRCB for the proposed transfer explicitly states its purpose is to provide an “independent, reliable, alternate long term supply for drought protection and to accommodate anticipated growth in domestic, municipal and agricultural uses in San Diego.” (AR1:CD5:500041) [emphasis added]

The argument presented within the EIR/EIS that the water transfers are not growth inducing (having no impacts on population and housing) allows the benefiting urban water agencies to evade accountability for the environmental damage they will produce in the Imperial Valley. By ignoring the immense economic benefits provided to their jurisdictions by the water transfers, the urban agencies are able to rationalize a limited responsibility as to mitigating the significant adverse impacts of the transfer project on the Salton Sea and Imperial Valley. The failure of the EIR/EIS to acknowledge the Project's impacts on population and housing and the economic benefits it bestows upon the urban agencies deprived decision makers of the knowledge necessary to properly consider the balancing of the Project's environmental needs. An agency fails to proceed in a manner required by law when the EIR does not adequately apprise all interested parties of the project's true scope for intelligent weighing of its environmental consequences. (*Communities for a Better Environment*, (2010) 184 Cal.App.4th at 82.)

#### **D. INADEQUATE BASELINE**

The Water Transfer EIR/EIS inappropriately uses a projected hypothetical baseline in regards to the Salton Sea that does not reflect

existing conditions when the NOP was published. CEQA Guidelines section 15125(a) establishes the requirement for the baseline analysis as follows:

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 . . . This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant . . . .”

The Water Transfer EIR/EIS inappropriately uses a projected hypothetical future elevation of the Salton Sea that is lower than that which existed when the NOP was published and as a result the impacts to the environment and the Salton Sea are greatly understated. The Water Agencies speculate that the water level of the Salton Sea will decline in the future even if no water transfers were to occur. (AR1:CD6:508425, 508427) However, CEQA does not permit a baseline to factor in assumptions, projections, or hypothetical scenarios about what may occur in the future. (*County of Amador*, 76 Cal.App.4th at 955.)

The Water Transfer NOP for the EIR/EIS was issued in September 1999. (AR1:CD6:508425) The elevation of the Salton Sea at the time of the NOP for the Water Transfer EIR/EIS was approximately -228 mean sea level (“msl”). (AR1:CD6:508426, 508427). This is the elevation that should have been used in conducting the EIR/EIS baseline analysis.

Instead, the Water Agencies assume a speculative future baseline of -235 feet msl for the Water Transfer EIR/EIS. The use of the hypothetical baseline does not allow for the impacts of the Water Transfer Project to be accurately assessed or calculated and are relevant to the EIR’s analysis concerning water, biology, recreation, air quality, aesthetics, and, cultural resources. The fact that the project impact analysis relied upon a faulty

hypothetical baseline renders the alternatives analysis likewise flawed. (*County of Amador*, 76 Cal.App.4th at 953.)

The significance of this failure is most poignantly illustrated in considering the air quality impacts resulting from the water transfers. Assuming a baseline elevation of -235 msl for the Salton Sea, the EIR/EIS predicts that the water transfers will reduce the elevation of the Salton Sea to between -245 feet msl and -250 feet msl. Having started at a baseline elevation of -235 feet msl, the EIR/EIS makes the assumption that no project mitigation is required for air quality impacts on the shoreline of the Salton Sea above -235 feet msl and thus no mitigation is provided. The EIR/EIS assumes that if there is any need for mitigating air quality impacts above this elevation that responsibility lies with other parties (presumably the adjacent landowners) on the premise that the Salton Sea would naturally have dropped to this elevation without the water transfer project. However, one must consider the reality that the Salton Sea elevation was 7 feet higher than the -235 msl elevation prior to the water transfers. If the hypothetical projections about the future baseline elevation of the sea do not come to fruition and no reduction in the elevation were to occur under baseline conditions, the postulated drop in the sea level from pre-project elevations (-228 feet msl) would require no mitigation until elevation -235 feet msl was reached. Hence, the direct impacts to air quality resulting from a receding shoreline posed by the water transfer between -228 feet msl and -235 feet msl are left entirely unmitigated.

The baseline is the standard by which all impacts, mitigation, and project alternatives are measured. (*County of Amador*, 76 Cal.App.4th at 953.) The importance of a proper baseline is paramount because without it, “analys[is] of impacts, mitigation measures, and project alternatives become impossible.” (*Id.* at 952-953; CEQA Guidelines, §§ 15125, 15126.2(a).)

Under CEQA, the physical existing conditions at the time the notice of preparation (“NOP”) is published constitute the “baseline physical conditions” for measuring impacts. (*City of Carmel-by-the Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 246; *Envtl. Planning & Info. Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354; *County of Amador*, 76 Cal.App.4th at 952; *Galante Vineyards*, 60 Cal.App.4th at 1122; *Woodward Park Homeowners Ass’n, Inc. v. City of Fresno* (2007) 149 Cal.App.4th 892, 691.)

The NOP and NEPA Notice of Intent for the EIR/EIS was issued in September 1999. (AR3:CD10:101804\_0139.) The baseline in the EIR/EIS was not determined as of the NOP dates for all resource areas. (AR3:CD10:101804\_0214/101804\_0215.) Instead, the Water Agencies produced internally inconsistent EIRs by fabricating a hypothetical baseline for the Salton Sea – which assumed the Sea’s decline and demise. (AR4-06-435-27338/27340, 27364, 27381; AR3:CD10:101804\_0213/101804\_0215.) This has the effect of making the environmental impacts appear less severe than if compared to the existing conditions at the time the NOPs were published. Ironically, appellant DFG, as well as EPA and the California Air Resources Board (“ARB”), objected to the use of the hypothetical baseline. (AR4-06-435-27753/27755; AR3:CD12:205202, 205204, 205224).

The hypothetical baseline provided a false basis for measuring and analyzing environmental effects, understated the scope of the impacts and mitigation necessary, and obstructed full disclosure. As the court in *Bakersfield Citizens for Local Control*, declared:

[T]he danger created by providing understated information subverts an agency’s ability to adopt appropriate and effective mitigation measures, skews its perspective concerning the benefits of the particular projects under

consideration and precludes it from gaining a true perspective on the consequences of approving the project.

*(Bakersfield Citizens for Local Control, 124 Cal.App.4th at 1217, citing San Franciscans for Reasonable Growth v. City and County of San Francisco (1984) 151 Cal.App.3d 61, 80.)*

CEQA does not permit a baseline to factor in assumptions, projections, or hypothetical scenarios about what may occur in the future. *(County of Amador, 76 Cal.App.4th at 955.)* Rather, future projections and assumptions should be part of the no-project alternative analysis in an EIR. *(CEQA Guidelines, § 15126.6(e)(2).)* The baseline environmental setting cannot be premised, in whole or in part, on hypothetical conditions, even if they were otherwise allowable under existing plans. *(San Joaquin Raptor Rescue Center, 149 Cal.App.4th at 658.)*

POWER disputed this baseline in the proceedings below. Shortly after trial, the California Supreme Court published its seminal baseline decision, *Communities for a Better Environment*, 48 Cal.4th 310, rejecting the same type of argument made by the water agencies herein. The California Supreme Court stated that by comparing the proposed project to what could happen, rather than to what was actually happening, the baseline was set not according to “established levels of a particular use,” but by “merely hypothetical conditions.” *(Id. at 322.)* An approach using hypothetical allowable conditions as the baseline should be rejected because “it results in ‘illusory’ comparisons that ‘can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts,’ a result at direct odds with CEQA’s intent.” *(Id.)* This case settles the baseline issue in favor of the County Agencies and POWER.

The actual existing conditions at the time the NOP for the PEIR was published state a baseline condition of the Salton Sea's elevation at approximately -227 mean sea level ("msl") (AR4-06-435-27340) and for the EIR/EIS a baseline elevation of -228 msl (AR3:CD10:101804\_0214/101804\_0215). This is the NOP baseline CEQA requires that the impacts, mitigation, and project alternatives be measured against.

Instead, by manipulating assumptions and fabricating futuristic hypothetical scenarios, impacts are measured from a declining Salton Sea elevation of approximately -234 to -237 msl for the PEIR (AR4-06-43527340, 27381) and -235 msl in the EIR/EIR (AR3:CD10:101804\_0214/101804\_0215). In comparing the NOP baseline condition of the Salton Sea's elevation to the hypothetical baseline used in the PEIR and the EIR/EIS, a -7 msl to -10 msl difference in the shoreline elevation results. A -7 msl difference results in an additional 16,000-acres of exposed area playa that is missing from the analysis and mitigation plan.<sup>9</sup> Measuring the project's impacts by comparing it to a hypothetical situation instead of the actual circumstances results in misleading reporting. (*Woodward Park*, 149 Cal.App.4th at 691, 707-708.) (AR4-06-435-27340.)

The impacts should be based on an 18 to 23 foot decline and not the 11 to 13 feet decline analyzed. The reduction in the Salton Sea's surface area should be based on 48,600 to 166,765 acres instead of the 33,200 to 43,800 acres analyzed. The impacts of increasing salinity should be

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<sup>9</sup> POWER recognizes that a -7 msl shoreline reduction may not result in a linear reduction in shoreline acreage exposed. The 16,000-acre number is, however, illustrative of the magnitude of the problem when the NOP baseline is not used as the starting point for the analysis.

analyzed based on 85,700 to 121,300 milligrams per liter (“mg/L”) instead of the 49,700 to 75,300 mg/L analyzed.

The conclusions of whether an impact is significant or the severity of the impact violates CEQA when it proceeds from a faulty baseline. (*Woodward Park*, 150 Cal.App.4th at 731; *San Joaquin Raptor Rescue Center*, 149 Cal.App.4th at 657-59.) The use of a faulty baseline also does not comport with the Water Agencies’ claims that the environmental analysis represented a “worst case” scenario. (See IIDA OB, pp. 40-41; SDCWA/CVWD/MWD AOB, pp. 57-58)

The impacts of each alternative were compared to the project’s impacts and an environmentally superior project was identified. (AR4-06-435-27604, 27621; AR3:CD10:101804\_1786, \_1795/ \_1796.) However, because the impacts of the project were understated having relied upon a faulty hypothetical baseline, the alternatives analysis is likewise flawed. (*County of Amador*, 76 Cal.App.4th at 953.)

**E. IID FAILED TO RECIRCULATE A REVISED DRAFT EIR/EIS & DOCUMENTS CRITICAL TO INFORMED DECISION MAKING WERE NOT PROVIDED TO THE PUBLIC AND IID DIRECTORS PRIOR TO APPROVAL**

The Water Agencies in their haste to secure a QSA agreement prior to the October 12, 2003 legislative deadline failed to provide the public with a meaningful opportunity to review and comment on the project’s environmental documentation and failed to provide the public and the IID Board of Directors critical information required to properly consider the project. Under CEQA, it is incumbent upon a lead agency to re-circulate 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.)

The duty under CEQA to re-circulate an EIR exists when substantial changes are proposed in the project, substantial changes occur with respect to the circumstances under which the project is undertaken, or new information of substantial importance is discovered. (CEQA Guidelines, § 15162(a).)

An addendum to an adopted negative declaration may be prepared if only minor technical changes or additions are necessary or none of the conditions described in Section 15162 calling for the preparation of a subsequent EIR or negative declaration have occurred. (CEQA Guidelines 15164 (b).)

Changes made to the QSA water transfer project after the June 2002 Final EIR/EIS were not “minor technical changes or additions” and can only be construed to be “significant” under CEQA. The fact that the negotiations leading up to the consideration of the QSA on October 2, 2003 by the IID Board required significant time and deliberation by the State, USFWS, BOR, and the Water Agencies beyond that which was originally considered leading up to the 2002 QSA transfer proposal and the fact that specific legislation was promulgated in 2003 to facilitate the final QSA program (SB 277 – Ducheny; SB 317 – Keuhl; and, SB 654 – Machado) speaks to the gravity of the QSA project changes.

Specific changes identified in the September 2003 Amended and Restated Addendum to the Water Transfer EIR/EIS (“Final Addendum”) include a reduction in the length of time mitigation water would be provided to the Salton Sea from nearly 30 years to just 15 years and the elimination of mitigation water to support the transfers of water to the CVWD. These changes are described within the Final Addendum as follows:

1.7.1 Changes to the Habitat Conservation Plan/Salton Sea Habitat Conservation Strategy. After the EIR/EIS was

certified, discussions among USFWS, CDFG, the QSA parties and interested state and federal agencies, including Reclamation (Reclamation), resulted in the refinement of the Salton Sea Habitat Conservation Strategy presented in the Final EIR/EIS. The Salton Sea Habitat Conservation Strategy, as presented in the Final EIR/EIS ...included the provision of mitigation water to the Salton Sea sufficient to offset the reduction in inflow to the Salton Sea caused by the Proposed Project and to maintain salinity in the Sea at or below 60 parts per thousand (ppt) until the year 2030.

Under the refined Salton Sea Habitat Conservation Strategy, mitigation water will be provided to the Salton Sea for the first 15 years of the Proposed Project to offset reductions in inflow due to the transfer of water to SDCWA. The reduction of inflows to the Salton Sea attributable to the approximately 240 KAF of water conserved via efficiency conservation measures during the first fifteen years and transferred to CVWD will not be offset by providing mitigation water to the Salton Sea.

(AR1:CD4:400051) [emphasis added]

The Final Addendum in its discussion regarding these changes focuses solely upon differences in impacts over the initial 15 year period and not through to 2030 or longer periods, presumably on the assumption that impacts after this time would be addressed through the State's promise to undertake restoration of the Salton Sea as outlined under SB 277 - Ducheny ("Salton Sea Restoration Act"). (AR1:CD4:400052) The Final Addendum concludes the differences over the short term are negligible. However, the differences in impacts over the longer term are given short shift. The only clue concerning the differences in impacts to the Salton Sea over the longer term is the observation on page 1-31 of the Final Addendum that the revised project will result in a Salton Sea elevation in the year 2077 of -247 feet msl as opposed to -240 feet msl, assuming a starting baseline elevation of -235 feet msl: This represents an additional 7

foot drop in elevation over the long term beyond the previously described 5 foot drop presented in the 2002 Final EIR/EIS. (AR1:CD4:400073) This represents an additional one hundred and forty percent drop in water elevation which can hardly be considered insignificant.

The Final Addendum to the EIR/EIS also includes changes to the water delivery schedule and terms (AR1:CD4:400053), the potential transfer of additional waters to satisfy the provisions of the Department of Interiors Interim Surplus Guidelines (ISG) (AR1:CD4:400055), the transfer of two 800,000 af increments of water to the Department of Water Resources (AR1:CD4:400057), and creation of a local entity through which socioeconomic impact payments would be made by SDCWA and IID. (AR1:CD4:400057). Each of these changes represents significant departures from the original project description presented in the 2002 Final EIR/EIS.

The failure to re-circulate a revised draft EIR/EIS deprived the public of the 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. The manner in which the Final Addendum to the EIR/EIS was adopted without public review was equally inept. The record reflects that not all of the relevant supporting QSA documents were available to the public or the IID Board of Directors until just before their vote on October 2, 2003. (AR1:CD4:400294-400296.) This later point was of concern to the trial court which noted “[t]here is evidence . . . that supports the . . . contention that the public may not have been provided an opportunity to review, or sufficient time to meaningfully review and comment on the relevant documents [the 2003 addendum].” (AA:25:180:06649.)

Indeed, the courts have consistently held that error is prejudicial if there is uninformed decision making and public participation. (*Protect the*

*Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1106; *Rural Land Owners Ass'n v. City Council* (1983) 143 Cal.App.3d 1013, 1022.) CEQA requires that decision makers and the public be fully informed of the environmental effects of a proposed project before the project is approved. (*Id.*) Here, the decision makers received the addendum just minutes before adopting it. This is a prime example of an improper “rubber stamp” approval (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121), and completely fails to meet CEQA's core requirement that decisions be based on thoughtful analysis, and that the public be adequately informed of the agency's thought process in arriving at a decision to approve an environmental document. (*San Joaquin Raptor Rescue Center et al., v. County of Merced* (2007) 149 Cal.App.4th 645, 685.)

#### **F. THE TRANSER EIR/EIS FAILED TO ADEQUATELY ANALYZE AIR QUALITY IMPACTS**

The greatest failure of the Water Transfer EIR/EIS in terms of public health is its failure to adequately analyze air quality impacts associated with the transfer's reduction in water flow to the Salton Sea. Just as the salinity of the Salton Sea will increase to the point where fish can no longer survive, airborne concentrations of particulate matter in the Imperial Valley generated from the newly exposed lakeshore sediments will increase to the point where the public's health and welfare are compromised.

POWER herewith incorporates those portions of the brief prepared by respondent and cross-appellant ICAPCD (pp. 110-138) concerning the failure of the EIR/EIS to provide an adequate analysis of air quality impacts.

The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment. (Pub. Res.

Code, §§ 21002, 21002.1(a).) The standard as to the adequacy of an EIR and its analysis is described in CEQA Guidelines section 15151:

An EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences.

The role of the court in reviewing an EIR is to ensure that the public and its responsible officials are adequately informed of the “environmental consequences of their decisions *before* they are made.” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal. 4th 1112, 1123 (*Laurel Heights II*), original italics.) "In reviewing an agency's determination, finding or decision under CEQA, a court must determine whether the agency prejudicially abused its discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. The CEQA Guidelines define “substantial evidence” as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.” (*Id.* at pp. 1132-1133).

Here it is clear that IID Board prejudicially abused its discretion in approving the EIR/EIS as it did not proceed in a manner required by law and the board’s determination as to the adequacy of the EIR/EIS in regards to air quality is not supported by substantial evidence. The simple reason for these failures is the fact the three documents critical to mitigating the air quality impacts of the project, although alluded to within the Water Transfer EIR/EIS, were neither complete nor properly considered by the public and the IID Board prior to the board’s determination. Those three documents are 1) the Quantification Settlement Agreement Joint Powers

Authority Creation and Funding Agreement (QSA-JPA); 2) the Habitat Conservation Plan for the IID Water Conservation and Transfer Project; and 3) the Environmental Cost Sharing, Funding, and Habitat Conservation Plan Development Agreement.

**QSA-JPA Funding Agreement.** The QSA-JPA funding agreement is a 21 page agreement among the IID, CVWD, SDCWA, and the State of California through the Department of Fish and Game whose purpose is to allocate environmental mitigation costs associated with the Water Transfer Project<sup>10</sup> to the respective parties. (AR1:CD9:600566:600639) The QSA-JPA serves as the fundamental and essential means through which mitigation of the Water Transfer Project is to be achieved, and as such serves as one of the primary information sources by which the CEQA decision makers must determine the adequacy of the EIR/EIS.

The IID Board abused its discretion in approving the EIR/EIS in that it failed to make the QSA-JPA draft considered at the October 2, 2003 board hearing available to the public before the board acted. Here, likewise, the public was also deprived of opportunity to review the adequacy of the QSA-JPA agreement used to support the project's mitigation programs. No similar mitigation agreements were previously considered in the board's earlier approval of the June 2002 Water Transfer EIR/EIS and the inclusion of these agreements as part of the final project represents a substantial departure from what was previously considered by the public at that time. IID's failure to recirculate the EIR/EIS together with the QSA-JPA draft agreement left the public in a vacuous state as to the matter of the agreement.

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<sup>10</sup> The Water Transfer Project encompasses both the IID/SDCWA water transfer agreement and the IID/CVWD acquisition agreement.

Some insight into the absurdity of the IID Board's consideration of the QSA-JPA draft at the final QSA hearing on October 2, 2003 is contained within the comments of IID Directors Andy Horne and Stella Mendoza at the meeting as reflected in the minutes, the October 6, 2003 email from then Fish and Game Director Robert Hight, and the more recent revelations concerning the existence of a draft QSA-JPA in John Penn Carter's Declaration in Support of Petition for Writ of Supersedeas. Director Horne noted at the public hearing that "[s]ome of the documents are still marked draft; and some of them were just received this afternoon. Would like to have more time. We're being pressured." (AR1:CD4:400296) Director Mendoza wanted to "Delay decision on this issue until next Tuesday to allow more time for review of the documents." (*Id.*) Presumably the QSA-JPA was one of the documents that were just received by the Board in as much as most of the other QSA documents were previously available. Despite the crucial nature of the QSA-JPA agreement as they relate to mitigation, no where can it be found in the record that the public or the IID Board was provided with ample opportunity to review and consider them. Were such evidence to exist, one would assume that Appellants IID would have long since provided it.

In the October 6, 2003 email to representatives of IID (John Carter), MWD (Jeff Kightlinger), CVWD (Steve Robbins), and SDCWA (Scott Slater and Maureen Stapleton), Director of Fish and Game Hight noted his significant concerns with the draft QSA-JPA agreement which he had been presented with the day after IID's October 2, 2003 hearing:

We're still reviewing the JPA agreement received from SDCWA late Friday, October 3. Comments on the agreement should be forthcoming later today. In the meantime, I must present for your consideration two significant policy/legal issues which make it difficult for the State to agree to the agreement as drafted by SDCWA, CVWD, and IID.

1. The agreement creates a JPA governed by a Commission of four members, CVWD, IID, SDCWA and DFG. The agreement further provides that decisions, including all disbursements for mitigation purposes and reimbursements to CVWD, IID or SDCWA, from the \$133,000,000 will be made by a vote of three members of the Commission. (Paragraphs 2.2, 6.3, 6.4 and 10.3). This is not our understanding of the deal that was struck among the parties. Expenditures for mitigation purposes are to be as approved by the State member of the Commission, the Director of DFG.

2. The draft agreement provides that the State is “solely responsible” for all costs above the Environmental Mitigation Cost Limit. Such costs and liabilities of the State are to be “as determined by the Authority.” (Paragraph 9.2). We cannot agree that the State’s liability for costs above \$133,000,000 will be determined by a vote of the three other parties to the agreement. The State must be responsible for identifying and for funding those mitigation obligations, if any, which exceed the Environmental Mitigation Cost Limitation. In doing so, it is bound by other covenants in the agreement, including that of good faith and fair dealing, but as written the provisions are essentially a “blank check” for future mitigation purposes. (AA:13:92:3288)

That fact that substantive terms to the QSA-JPA agreement remained to be negotiated among the parties to the agreement subsequent to the October 2, 2003 hearing shows that proper consideration of the agreement by the IID Board was never provided. Proper consent to an agreement requires that both parties mutually agree to the terms of the agreement. (*Civil Code* §§1565, 1580). This was obviously not the case in regards to the QSA-JPA considering the comments of Director Hight. Mutual consent is one of the essential elements of a contract, and must, therefore, be pleaded and proved by the plaintiff. (*Leo F. Piazza Paving Co. v. Bebek & Brkich*, (1956) 141 Cal. App. 2d 226). Appellant IID has failed to do so.

**Habitat Conservation Plan for the IID Water Conservation and Transfer Project** The IID abused its discretion in approving the EIR/EIS

by relying upon the draft “Habitat Conservation Plan for the IID Water Conservation and Transfer Project (“HCP”)”, which was also still in the process of being negotiated at the time of its consideration. As is noted in the QSA Environmental Cost Sharing, Funding, and Habitat Conservation Plan Development Agreement (“ECSA”):

5.1. Approval of the HCP. Commencing with the Agreement Date, SDCWA and CVWD, in consultation and collaboration with IID, shall use their best efforts to cause the USFWS and the CDFG to approve, prior to December 31, 2006, a habitat conservation plan/natural community conservation plan (“HCP”) and related Permits which satisfy all of the standards and criteria described in Section 5.2.

(AR1:CD9:600527: 600565).

The HCP is a 690 page document that serves as the mitigation strategy for the Water Transfer Project EIR/EIS and yet its final approval was not made part and parcel of the EIR/EIS approval. Rather, the HCP was left as an outline for further review and revision by the agencies with no assurances that the specific measures outlined in the plan would be implemented.

**Environmental Cost Sharing, Funding, and Habitat Conservation Plan Development Agreement (“ECSA”)** The IID abused its discretion in approving the EIR/EIS by relying upon the an Environmental Cost Sharing, Funding, and Habitat Conservation Plan Development Agreement whose terms were also uncertain. The ESCA is a 38 page agreement among IID, SDCWA, and CVWD whose purpose is to commit the parties to cooperate in the preparation of the final HCP for the water transfer. To the extent that the HCP was not completed and approved as part of the EIR/EIS on October 2, 2003, the ECSA also fails to provide adequate evidence as to the sufficiency of the Water Transfer mitigation program.

**V. CONCLUSION.**

For reasons stated here, the Court should:

1. Direct issuance of writs of mandate to IID and SDCWA, setting aside the transfer agreement, its approval resolutions, and EIR certification of adequacy.

2. Additionally order that for reasons stated in the county agencies' responses to the supersedeas petitions, pending returns to the writs of mandate in the superior court, 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' response to the water agencies' supersedeas petition.

3. Additionally entitle respondents and cross-appellants, including POWER to an award of attorneys' fees pursuant to section 1021.5 of the Code of Civil Procedure, in an amount to be determined by the superior court.

Dated: 24 November 2010

Respectfully submitted,

By:   
Michael B. Jackson  
Attorney for POWER

## CERTIFICATION OF WORD COUNT

Under California Rule of Court 8.204(c)(1), the undersigned appellate counsel hereby certifies that, according to the word count of the computer program used to prepare POWER's Joint Respondent's and Cross-Appellant's Opening Brief, the Brief contains 13,992 words (excluding the caption page, table of contents, table of authorities, list of defined terms, certification of word count, and proof of service).

DATED: November 24, 2010

By:   
Michael B. Jackson  
Attorney for POWER

**PROOF OF SERVICE**

In Re: QSA Coordinated Civil Cases  
Court of Appeal, Third Appellate District Case No. C064293  
Sacramento County No. JCCP 4353

I declare that I am over the age of eighteen and not a party to the above-entitled action.

My business address is 429 W. Main Street, Quincy, California.

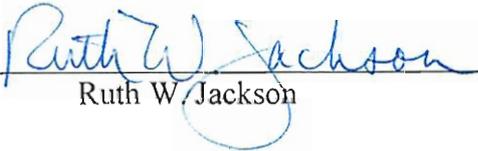
On November 24, 2010, I served on interested parties in the said action the attached

**RESPONDENT / CROSS APPELLANT POWER'S BRIEF**

by placing true copies in sealed envelopes, addressed as stated on the Court of Appeal's attached service list of November 23, 2010, with postage fully paid, and delivered them for collection and mailing via the United States Postal Service in Quincy, California.

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

Dated: November 24, 2010

  
Ruth W. Jackson

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Opinions

QSA Coordinated Civil Cases

Case Number **C064293**



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