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

CASE NO. C078249

CENTRAL DELTA WATER AGENCY, et al.,
Petitioners-Central Delta Appellants & Cross-Appellees,

v.

DEPARTMENT OF WATER RESOURCES, et al.,
Defendants and Respondents; and.

ROLL INTERNATIONAL CORPORATION, et al.,
Real Parties in Interest & Cross-Appellants

On Appeal From the Superior Court of Sacramento
The Hon. Timothy M. Frawley, Presiding,
Case No. 34-2010-80000561

COMBINED RESPONDENTS' BRIEF AND OPENING CROSS-APPELLANTS' BRIEF OF RESPONDENTS AND CROSS-APPELLANTS KERN WATER BANK AUTHORITY; ROLL INTERNATIONAL CORPORATION; PARAMOUNT FARMING COMPANY LLC; WESTSIDE MUTUAL WATER COMPANY; TEJON RANCH COMPANY; DUDLEY RIDGE WATER DISTRICT; SEMITROPIC WATER STORAGE DISTRICT; TEJON-CASTAC WATER DISTRICT; AND WHEELER RIDGE-MARICOPA WATER STORAGE DISTRICT

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Attorneys for Real Parties in Interest, Respondents and Cross-Appellants Roll International Corporation; Paramount Farming Company LLC; Westside Mutual Water Company; and Respondent Tejon Ranch Company

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Attorneys for Real Parties in Interest Respondents and Cross-Appellants Kern Water Bank Authority; Dudley Ridge Water District; Semitropic Water Storage District; Tejon-Castac Water District; and Wheeler Ridge-Maricopa Water Storage District

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, THIRD APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: C078249
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Robert D. Thornton, Esq., State Bar No. 72934 Nossaman LLP 18101 Von Karman Avenue, Suite 1800 Irvine, CA 92612 TELEPHONE NO.: 949-833-7800 FAX NO. *(Optional):* 949-833-7878 E-MAIL ADDRESS *(Optional):* rthornton@nossaman.com ATTORNEY FOR *(Name):* Respondent/Cross-Appellant, Roll International Corp.	Superior Court Case Number: 34-2010-80000561-CU-WMGDS *FOR COURT USE ONLY*
APPELLANT/PETITIONER: Central Delta Water Agency, et al. RESPONDENT/REAL PARTY IN INTEREST: Department of Water Resources, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* [✔] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party *(name)*: Roll International Corporation

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)	The Wonderful Company LLC	Successor to Roll Global LLC which is successor to Roll International Corporation.
(2)	Wonderful Legacy Inc.	Owner of more than 10% interest to The Wonderful Company LLC.
(3)	Stewart and Lynda Resnick Recovable Trust dated 12/27/88	Owner of more than 10% interest in The Wonderful Company LLC.
(4)		
(5)		

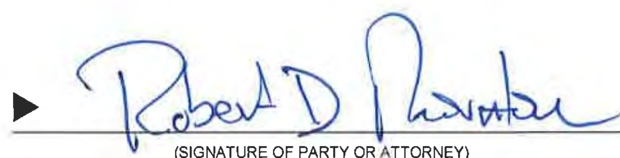
[ ] Continued on attachment 2.

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: January 27, 2016

Robert D. Thornton

(TYPE OR PRINT NAME)

▶ 

(SIGNATURE OF PARTY OR ATTORNEY)

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APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
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ATTORNEY OR PARTY WITHOUT ATTORNEY (*Name, State Bar number, and address*): Robert D. Thornton, Esq., State Bar No. 72934 Nossaman LLP 18101 Von Karman Avenue, Suite 1800 Irvine, CA 92612 TELEPHONE NO.: 949-833-7800 FAX NO (*Optional*): 949-833-7878 E-MAIL ADDRESS (*Optional*): rthornton@nossaman.com ATTORNEY FOR (*Name*): Respondent/Cross-Appellant, Paramount Farming Company	Superior Court Case Number: 34-2010-80000561-CU-WMGDS *FOR COURT USE ONLY*
APPELLANT/PETITIONER: Central Delta Water Agency, et al. RESPONDENT/REAL PARTY IN INTEREST: Department of Water Resources, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Paramount Farming Company

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)	Wonderful Orchards LLC	Successor to Paramount Farming Company.
(2)	Wonderful Orchards Holdings LLC	Wonderful Orchards LLC holding company.
(3)	Wonderful Legacy Inc.	Owner of more than 10% interest in The Wonderful Company LLC.
(4)	Stewart and Lynda Resnick Revocable Trust dated December 27, 1988	Owner of more than 10% interest in The Wonderful Company LLC
(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).

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APPELLANT/PETITIONER: Central Delta Water Agency, et al. RESPONDENT/REAL PARTY IN INTEREST: Department of Water Resources, et al.	*FOR COURT USE ONLY*

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [✔] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party *(name)*: Western Mutual Water Company

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)	Wonderful Orchards LLC	Member of Western Mutual Water Company.
(2)	Wonderful Nut Orchards LLC	Member of Western Mutual Water Company.
(3)	Wonderful Pomegranate Orchards LLC	Member of Western Mutual Water Company.
(4)	Wonderful Pistachios & Almonds LLC	Member of Western Mutual Water Company.
(5)	Wonderful Citrus LLC	Member of Western Mutual Water Company.

[X] Continued on attachment 2.

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Robert D. Thornton
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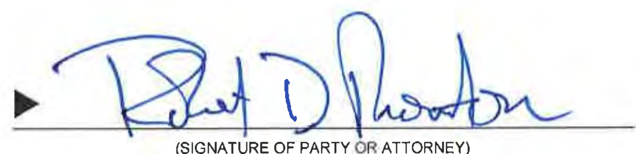

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Attachment 2

Full name of interested entity or person	Nature of interest *(Explain)*:
(6) Wonderful Citrus II LLC	Member of Western Mutual Water Company
(7) Tulare Acquisition Company LLC	Member of Western Mutual Water Company
(8) Stewart A. Resnick Family Trust of 1985	Member of Western Mutual Water Company
(9) RF Nut Ranches LLC	Member of Western Mutual Water Company
(10) RF Citrus Ranches LLC	Member of Western Mutual Water Company
(11) Vintage Nurseries LLC	Member of Western Mutual Water Company
(12) Wonderful Orchards LLC	85% interest

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ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: Robert D. Thornton, Esq., State Bar No. 72934 Nossaman LLP 18101 Von Karman Avenue, Suite 1800 Irvine, CA 92612 TELEPHONE NO.: 949-833-7800 FAX NO. *(Optional)*: 949-833-7878 E-MAIL ADDRESS *(Optional)*: rthornton@nossaman.com ATTORNEY FOR *(Name)*: Respondent/Cross-Appellant, Tejon Ranch Company	Superior Court Case Number: 34-2010-80000561-CU-WMGDS **FOR COURT USE ONLY**
APPELLANT/PETITIONER: Central Delta Water Agency, et al. RESPONDENT/REAL PARTY IN INTEREST: Department of Water Resources, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one)*: [✔] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party *(name)*: Tejon Ranch Company

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)	Tejon Ranch Co., a Delaware corp.	Parent company of Tejon Ranch Company
(2)	Tejon Ranchcorp (California)	Operating company, landowner and wholly owned subsidiary
(3)	Towerview LLC	Owns 12.99% of Tejon Ranch Co.
(4)	Third Avenue Management, LLC	Owns 11.09% of Tejon Ranch Co.
(5)		

[ ] Continued on attachment 2.

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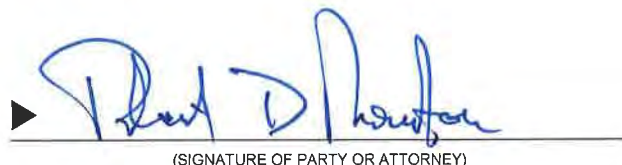
Robert D. Thornton

(TYPE OR PRINT NAME)



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ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): STEVEN M. TORIGIANI, ESQ. SBN 166773 THE LAW OFFICES OF YOUNG WOOLDRIDGE, LLP 1800 30TH STREET, 4TH FLOOR BAKERSFIELD, CA 93301 TELEPHONE NO.: 661-327-9661 FAX NO. (Optional): E-MAIL ADDRESS (Optional): storigiani@youngwooldridge.com ATTORNEY FOR (Name): Respondent/Cross-Appellant, Kern Water Bank Auth	Superior Court Case Number: 34-2010-80000561-CU-WMGDS FOR COURT USE ONLY
APPELLANT/PETITIONER: Central Delta Water Agency, et al. RESPONDENT/REAL PARTY IN INTEREST: Department of Water Resources, et al.	
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1. This form is being submitted on behalf of the following party (*name*): Kern Water Bank Authority

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)		
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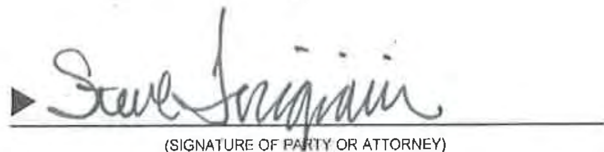
Date: JANUARY 27, 2016

STEVEN M. TORIGIANI

(TYPE OR PRINT NAME)



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APPELLANT/PETITIONER: Central Delta Water Agency, et al. RESPONDENT/REAL PARTY IN INTEREST: Department of Water Resources, et al.	
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1. This form is being submitted on behalf of the following party *(name)*: Dudley Ridge Water District

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

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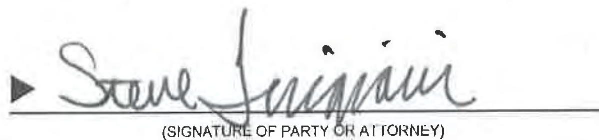

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

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APPELLANT/PETITIONER: Central Delta Water Agency, et al. RESPONDENT/REAL PARTY IN INTEREST: Department of Water Resources, et al.	
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1. This form is being submitted on behalf of the following party (*name*): Semitropic Water Storage District

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

	Full name of interested entity or person	Nature of interest *(Explain)*:
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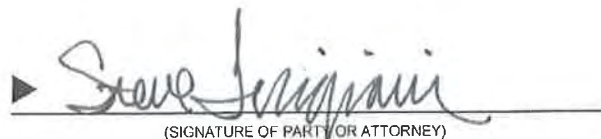
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APPELLANT/PETITIONER: Central Delta Water Agency, et al. RESPONDENT/REAL PARTY IN INTEREST: Department of Water Resources, et al.	
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1. This form is being submitted on behalf of the following party (*name*): Tejon-Castac Water District

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

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

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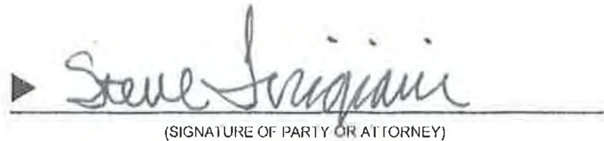
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APPELLANT/PETITIONER: Central Delta Water Agency, et al. RESPONDENT/REAL PARTY IN INTEREST: Department of Water Resources, et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [✓] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (name): Wheeler Ridge-Maricopa Water Storage District

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

26

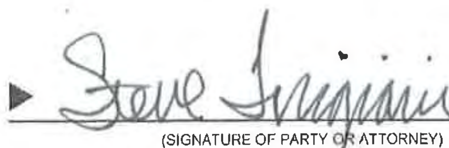
	Full name of interested entity or person	Nature of interest (Explain):
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] 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: JANUARY 27, 2016

STEVEN M. TORIGIANI
(TYPE OR PRINT NAME)



(SIGNATURE OF PARTY OR ATTORNEY)

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GLOSSARY

AA	Appellants' Amended Appendix
AOB	Appellants' Amended Opening Brief
AR	Administrative Record
Attachment A Amendments	Amendments to SWP contractors' long-term water supply contracts with DWR, including changes required by the Settlement Agreement
Authority	Kern Water Bank Authority
CBD	Center for Biological Diversity
Central Delta Appellants	Plaintiffs and Appellants Central Delta Water Agency, South Delta Water Agency, Center for Biological Diversity, California Water Impact Network, California Sportfishing Protection Alliance, Carolee Krieger and James Crenshaw
CEQA	California Environmental Quality Act, Pub. Resources Code, §21000, *et seq.*
Contractors	The current 29 local and regional water agencies that have long-term water supply contracts with DWR for the delivery of State Water Project water
C-WIN	California Water Impact Network
DWR	Department of Water Resources
EIR	Environmental Impact Report

GLOSSARY

Final EIR	Final Environmental Impact Report
Kern Fan Element Lands	20,000 acres of land previously owned by DWR in Kern County, transferred to the Kern County Water Agency in December 1995
Kern Water Bank	The water bank located in Kern County, owned and operated by the Authority
Kern Water Bank Parties	Real Parties in Interest, Respondents and Cross-Appellants, Roll International, Paramount Farming Company LLC, Westside Mutual Water Company, Kern Water Bank Authority, Dudley Ridge Water District, Semitropic Water Storage District, Tejon-Castac Water District, Tejon Ranch Company, Wheeler Ridge-Maricopa Water Storage District
Land Transfer Agreement	Agreement for the transfer of the Kern Fan Element Lands
Monterey Amendments	1995 Amendments to State Water Project contractors' long-term water supply contracts
PCL lawsuit or First CEQA Lawsuit	*PCL v. DWR*, filed to challenge the 1995 EIR
PCL Plaintiffs	Plaintiffs in *PCL v. DWR*, the Planning & Conservation League, Plumas County Flood Control and Water Conservation District, and Citizens Planning Association of Santa Barbara County, Inc.

GLOSSARY

PCL v. DWR	*Planning and Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892
RA	Respondents' Appendix
RJN	Request for Judicial Notice
Settlement Agreement	The 2003 Settlement Agreement entered into by the parties in *Planning & Conservation League v. Department of Water Resources*
SWP	State Water Project
Validation Act	Code of Civil Procedure, § 860, *et seq.*
1995 EIR	1995 Monterey Amendments Environmental Impact Report
2003 Act	Stats. 2003, ch. 295, § 8, Final Validating Act of 2003
2003 Order	The CEQA order issued by the *PCL v. DWR* trial court in 2003, following the Settlement Agreement
2003 Writ	The writ of mandate issued by the *PCL v. DWR* trial court in 2003, following the Settlement Agreement
2010 EIR	Final Environmental Impact Report encompassing both the Monterey Amendments and the Settlement Agreement

Respondents and Cross-Appellants here (collectively, "Kern Water Bank Parties"), who below were Real Parties in Interest, Kern Water Bank Authority, Dudley Ridge Water District, Paramount Farming Company LLC, Roll International Corporation, Semitropic Water Storage District, Tejon-Castac Water District, Tejon Ranch Company, Westside Mutual Water Company, and Wheeler Ridge-Maricopa Water Storage District, submit the following in response to the Appellants' Amended Opening Brief.

I. INTRODUCTION AND SUMMARY.

The 20-Year Saga of the Monterey Amendments. Twenty years ago, the Department of Water Resources ("DWR")[1] and 27 of 29 state water contractors signed the "Monterey Amendments" to the State Water Project water delivery contracts – beginning the long and complex history of events underlying the current lawsuit. The 20 years of litigation that followed includes four trial court judgments, a decision of this Court, years of mediation, a settlement agreement, dismissal of the first reverse validation lawsuit, two Environmental Impact Reports ("EIR"), and a final judgment in the prior California Environmental Quality Act ("CEQA") lawsuit.

In the most recent stage of this saga, the trial court below conducted two bench trials – one on Appellants' ("Central Delta Appellants") reverse validation causes of action and one on their CEQA cause of action. The trial court ruled that the reverse validation causes of action (second and third) were barred by statutes of limitation, the doctrine of laches and other

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[1] The Kern Water Bank Parties have attempted to minimize the use of acronyms. A glossary of terms used in the brief is provided above at pages 28 – 30.

time-bar defenses. Next, following a trial on the CEQA (first) cause of action, the trial court denied all but one of the dozens of Central Delta's CEQA claims, and issued a limited writ of mandate requiring DWR to prepare a revised EIR focused on the sole and narrow CEQA error identified by the court.

Reasons to Affirm Judgment. The Superior Court's judgment should be upheld for the following reasons:

- The reverse validation claims (second and third causes of action) are time-barred by the Validation Act statute of limitations;
- The reverse validation claims are barred by the doctrines of laches and mootness;
- The reverse validation claims are barred by the Final Validating Act of 2003;
- The trial court was correct in deciding against Central Delta Appellants on all of the CEQA claims (first cause of action) appealed here;
- On the cross-appeal, the trial court should have dismissed Central Delta Appellants' CEQA claims on the grounds of res judicata; and
- The trial court should have ruled that the Center for Biological Diversity does not have standing for failure to exhaust its administrative remedies.

The Importance of the Monterey Amendments & Kern Water Bank to Management of State Water Resources Cannot be Overstated. The Monterey Amendments are critical to management of the State's water resources – particularly in drought conditions such as California has experienced over the last four years. (AA28:6849, 6856 [Sunding Decl.

¶¶ 18, 31-32][2].) Despite the statewide importance of the Monterey Amendments, the Central Delta Appellants seek to invalidate the Amendments and unwind dozens of complex transactions and water management decisions.

As just one example of the complex transactions authorized by the Monterey Amendments, DWR transferred land to the Kern County Water Agency for the possible construction of a water bank in Kern County ("Kern Water Bank") – a facility that stores water underground in wet years for recovery and use in dry years for agriculture, urban (in the Kern County area) and environmental purposes. The Kern Water Bank provides the California Central Valley with an insurance policy against drought, reduces demands on the State Water Project ("SWP") and surface reservoirs, reduces use of native groundwater, and provides over seven thousand acres of wetland habitat for migratory birds and other wildlife, including several threatened and endangered species. The Kern Water Bank is recognized as one of the most successful and important groundwater banking projects in the western United States. (AA28:6828-6829, 6834 [Parker Decl., ¶¶ 19-20, 30].)

Considerable, Uncontroverted Evidence at Trial Supports the Trial Court's Time-Bar And CEQA Decisions. There was extensive (and uncontested) evidence admitted at trial of substantial reliance by Kern Water Bank Parties and the public on the Kern Water Bank for nearly 15 years before the Central Delta Appellants filed this lawsuit. In addition to

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[2] Citations to documents in Central Delta Appellants' Amended Appendix are described as (AA[Vol.#]:[Bate stamp #]); citations to documents in the Joint Appendix of Respondents and Cross-Appellants ("RA") are described as (RA[Vol.#]:[Bate stamp #]); citations documents in the CEQA Administrative Record are described as (AR[Vol.#]:[Page#]); and citations to trial exhibits are to (RA[Ex.#]).

the legal invalidity of the Central Delta Appellants' arguments, the strong evidentiary showing is substantial evidence in support of the judgment. Under the substantial evidence standard, the Court "must . . . view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.)

We address the facts and issues below as follows: (1) the trial court procedures; (2) underlying facts regarding the issues on appeal; (3) facts introduced into evidence in the time-bar defense phase of the trial below; (4) response to Central Delta Appellants' arguments on the trial court's time-bar decision; and (5) the Kern Water Bank Parties' cross-appeal on res judicata and the standing of the Center for Biological Diversity.

II. THE PROCEDURE BELOW.

The operative complaint is the First Amended Complaint, filed June 4, 2010 (AA1:99-172.) The first cause of action was based on CEQA, the second cause of action was a reverse validation action, and the third cause of action was a writ of mandate argument duplicative of the reverse validation action. Prior to trial, the Superior Court denied a motion for judgment on the pleadings regarding the CEQA claim based on res judicata.[3] The trial court's rulings on the res judicata defense are the subject of the cross-appeal. (AA36:9136, 9145-9146.)

Trial was conducted in phases: (1) first a phase on time-bar affirmative defenses including statutes of limitation, laches, the Validating Act of 2003 and mootness, (2) a second phase on the CEQA cause of action based on review of a voluminous administrative record, and (3) a remedies phase concerning the single CEQA error identified by the trial court.

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[3] Cross-Appellants re-asserted the res judicata defense at trial.

(AA31:7724.) Pursuant to the parties' stipulations, the trial court conducted the reverse validation trial and the CEQA remedies hearing based upon extensive declarations and exhibits filed with briefs. (AA12:2821-2829.)

At the conclusion of the trial on time-bar defenses, the trial court issued a statement of decision concluding that the reverse validation causes of action were barred by the time-bar defenses. (AA30:7626-7665.) At the conclusion of the trial on the CEQA cause of action, the trial court ruled in favor of DWR, other respondents, and real parties in interest on twenty-four out of twenty-five of the CEQA claims. On one issue, the court ruled in favor of the Central Delta Appellants, concluding that the EIR produced in 2010 in response to an earlier peremptory writ of mandate ("2010 EIR") did not adequately evaluate the potential impacts of the operation of the Kern Water Bank on groundwater. The trial court then conducted a remedy phase, resulting in instructions to prepare a revised EIR to address the single error in the 2010 EIR. (AA36:9132-9146.)

The remedies portion of the case and the resulting writ also incorporated the parties' settlement in the coordinated case of *Rosedale Rio-Bravo Water District, et al. v. California Department of Water Resources, et al.*, Kern County Superior Court Case No. S-1500-CV-270635 ("*Rosedale*"). The settlement agreement between Rosedale and the Kern Water Bank Authority ("Authority") commits the Authority to implement an Interim Operations Plan for the Kern Water Bank that (among other things) requires mitigation for negative impacts on groundwater wells operated by landowners near the Kern Water Bank. The trial court incorporated the Interim Operations Plan into the writ of mandate. (RA16:3448-3460. [2014 writ of mandate with attached operations plan].)

As authorized by Public Resources Code section 21168.9, the Superior Court did not vacate DWR's approvals of the Monterey Amendments, including the transfer of the Kern Water Bank lands. The trial court directed DWR to prepare a revised EIR focused on the sole error identified by the trial court. (AA36:9133-9134.)

The trial court issued its final Judgment and Findings and Peremptory Writ of Mandate on November 24, 2014. (AA37:9201-9204, 9205-9208; RA16:3448-3460.)

The Central Delta Appellants appealed from the trial court's judgment and later filed a separate appeal from the Superior Court's denial of their motion for attorneys' fees. (AA37:9225-9234.)

III. UNDERLYING FACTS.[4]

A. The 1994 Monterey Agreement Statement of Principles Implemented Through the 1995 Monterey Amendments Contracts.

During the 1960's, as the State Water Project ("SWP") was being constructed, DWR entered into long-term water supply contracts with 31 urban and agricultural SWP Contractors ("Contractors"). (AA31:7707-7708.) The annual maximum amount of SWP water that DWR agreed to deliver to Contractors is described in "Table A" of the contracts. (AA31:7708.) The amount of water allocated to the various Contractors is referred to as the annual "Table A" amount. (*Ibid.*) Each Contractor must

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[4] To avoid duplication with the briefs of other respondents, in this combined responding and cross-appeal brief, the Kern Water Bank Parties focus on the detailed and complex procedural and evidentiary record supporting the trial court's decision that the Central Delta Appellants' reverse validation claims are barred by several statutes of limitation and by the doctrines of laches and mootness.

pay for its proportional share of SWP costs reflected in the Contractor's Table A amount -- ***even if*** little or no water is delivered as has occurred on several occasions and for the last several years in a row. (*Ibid.*) The amount of water that the SWP can deliver annually depends on a number of factors including hydrology, water quality, and extensive environmental and other regulatory constraints. (*Ibid.*) For example, a complex set of state and federal environmental regulations govern the operation of the SWP and control the amount of all SWP water that may be available for allocation and eventually delivery in any particular year. (See AR23:11302-11317 [discussion of environmental regulations].) The regulations protect water quality and endangered and threatened species in the Feather River, the Sacramento River, the Sacramento River-San Joaquin River Delta, and the San Francisco Bay. (See AR1:229-233; 2:573-574.) The stringent environmental regulations make it all the more important that the State has the flexibility to deliver water in wet years for storage south of the Delta. The Monterey Amendments provide that flexibility.

The SWP has not delivered the Contractors' full Table A amounts on a reliable basis due, in part, to the fact that the SWP was never fully constructed, and due to the above environmental regulations. (AR23:11302-11317; AA31:7709-7710.) Prior to the Monterey Amendments (described *infra*), agricultural Contractors bore the brunt of SWP shortages under the "agricultural first" shortage provision of Article 18(a), which resulted in severe financial hardship. (AA28:6901-6904 [Taube Decl.].) Urban contractors, in turn, were not able to access and store surplus water in wet years as insurance against future droughts.

Due to threats of litigation arising in part over how shortages were allocated during the six-year 1987-1992 drought, representatives of several Contractors signed the "Monterey Agreement" statement of principles in

1994. (AR26:12493; AA31:7711.) Beginning in 1995, DWR and 27 SWP Contractors entered into amendments to their individual SWP long-term water supply contracts (known collectively as the "Monterey Amendments"). (AA31:7712, AA13:3060-20:4747 [Exs. 1-27], AA31:7713, AA15:3640 [Kern County Water Agency Monterey Amendment].) Among other things, the Monterey Amendments made changes to Article 18 of the SWP contracts governing the allocation of SWP water in times of shortage. The amendment to Article 18 allocates shortages proportionally among the Contractors. (AA31:7712.)

The Monterey Amendments also provided for the transfer of 130,000 acre-feet of Table A amounts from agricultural to urban contractors, and provided contractors with the flexibility to store water outside of a contractor's service area. (AA21:5248-5249; AR23:11164-11165 [Description of water management practices].) The tools employed to address the limitations on the SWP are similar to the management tools (e.g., water transfers, water banking) included in the Quantification Settlement Agreement to address limitations applicable to delivery of water from the Colorado River. (See *In re Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 788-789.)

B. The Land Transfer for a Local Water Bank.

Article 52 of the Monterey Amendments provides for the transfer of about 20,000 acres of land owned by DWR in Kern County (commonly called the "Kern Fan Element Lands") to the Kern County Water Agency. (E.g., AA15:3674 [Ex. 10], AA28:6903.) The agreement for transfer of the Kern Fan Element Lands ("Land Transfer Agreement")[5] is dated

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[5] DWR's brief defines this as the "KFE Transfer Agreement."

December 13, 1995. (AA20:4804.) The deed conveying the land to the Kern County Water Agency was recorded on August 9, 1996. (AA31:7714, AA20:4853 [Ex. 31].) The Kern County Water Agency transferred most of the land to the Authority – a public joint powers authority established by five public water agencies and a mutual water company pursuant to the Joint Exercise of Powers Act.[6] (AA20:4804-4829; Gov. Code, § 6500, *et seq*.; AA31:7715, AA28:6830, RA5:1089-1127 [Ex. 3001].)

As partial consideration for the land transfer, members of the Authority relinquished 45,000 acre-feet of annual Table A amount for permanent retirement by DWR. (AA31:7714, AA28:6905.) As a result, DWR no longer had a contractual requirement to deliver the relinquished 45,000 acre feet. (AA28:6905-6907.) At the time, the value of one acre-foot of SWP Table A was at least $1,000. (*Ibid*.) Before its retirement, the 45,000 acre-feet yielded significant amounts of water for agricultural use. (*Ibid*.) After the Authority obtained the Kern Fan Element Lands, it proceeded to invest tens of millions of dollars to build the infrastructure of the Kern Water Bank and millions of dollars more to store water and to operate the Kern Water Bank. (AA28:6822-6839.)

C. *Planning and Conservation League v. DWR.*

In December 1995, the Planning and Conservation League ("*PCL*") and others (collectively "*PCL* Plaintiffs") sued to challenge the 1995 Monterey Agreement EIR ("1995 EIR") ("*PCL* lawsuit"). (AA31:7715.) In addition to CEQA claims, the amended complaint in the *PCL* lawsuit included a reverse validation cause of action seeking to invalidate the

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[6] The Kern County Water Agency retained a small part of the land received from DWR, but the difference is not material here.

Monterey Amendments and the Land Transfer Agreement between DWR and the Kern County Water Agency. (AA20:4843.) The Central Delta Appellants were parties in that reverse validation action because such *in rem* actions are brought against "all persons interested." (Code Civ. Proc., §§ 860, 863.) Jurisdiction against all persons interested was invoked in the *PCL* lawsuit (see Code Civ. Proc., § 861) through publication of the summons (AA20:4847-4852 [Ex. 30]).

On August 15, 1996, the trial court entered judgment against the *PCL* plaintiffs. (AA31:7716.) This Court reversed in *Planning and Conservation League v. Department of Water Resources* ("*PCL v. DWR*") (2000) 83 Cal.App.4th 892. (AA20:4837 [Ex. 32].) The Court held that DWR was required to prepare a new EIR for the Monterey Amendments, and that the trial court had erroneously dismissed the reverse validation cause of action on procedural grounds. (*Ibid*; AA31:7716.) This Court, however, declined *PCL* Plaintiffs' request to order DWR and the other defendants to set aside their approvals of the Monterey Amendments and the Land Transfer Agreement. (AA31:7717, AA20:4911, 4915 [Ex. 33].)

D. 2003 *PCL* Lawsuit Settlement Agreement, Peremptory Writ of Mandate and 2003 Order.

In 2003, following years of mediation with retired Judge Weinstein, the *PCL v. DWR* parties and other interested parties entered into a settlement agreement (the "Settlement Agreement"). (AA20:4920-5000 [Ex. 34].) The Settlement Agreement required DWR to prepare a new EIR as lead agency consistent with this Court's opinion on the CEQA causes of action. (AA31:7717.)

As to the Land Transfer Agreement, the court-approved Settlement Agreement unequivocally states that ***the Authority***: "***shall retain title*** to the [Kern Water Bank] Lands." (AA20:4948, emphasis added.) The

Authority contributed to the settlement by, among other things, agreeing to additional restrictions on the use of those lands and by foregoing its right to develop 490 acres of the property. (AA20:4948-4949.)

The Agreement states that "this Settlement Agreement is not intended to and shall not affect the continuing effectiveness of the Kern Environmental Permits." (AA20:4940.) "Kern Environmental Permits" is defined to include the many permits, approvals and agreements issued to the Kern Water Bank Authority to construct and operate the Kern Water Bank – including a 75-year agreement and associated permits from the U.S. Fish and Wildlife Service and the California Department of Fish and Game. (AA20:4932, 4991-4992.)

The Settlement Agreement ***required dismissal of the reverse validation claim*** of the *PCL* lawsuit. If certain conditions were met,[7] the Settlement Agreement precluded refiling of the reverse validation cause of action or a new cause of action challenging the validity of the Monterey Amendments or the Land Transfer Agreement:

> [P]laintiffs covenant and agree not to refile the Validation Cause of Action, nor any new cause of action relating thereto, nor a new claim challenging the validity of the Monterey Amendment (or any portion thereof) or the Kern Fan Element Transaction.

(AA20:4956 [¶ VII.E].) On November 12, 2003, the Superior Court entered an order dismissing the reverse validation (fifth) cause of action, as provided by the Settlement Agreement. (AA21:5019-5021 [Ex. 38].)

The trial court also entered a peremptory writ of mandate ("2003 Writ") as to the CEQA issues only. (AA21:5004-5005 [Ex. 35].) The 2003 Writ was in the same form as Exhibit 3-B to the Settlement Agreement.

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[7] The conditions were timely met. (AA28:6837 [Parker Decl., ¶¶ 41, 42].)

(AA20:4997-4998.) The 2003 Writ directed that the certification of the 1995 EIR be set aside. Importantly, the 2003 Writ did not set aside or change the status of any approval, authorization, contract or land transfer concerning the Monterey Amendments. (*Ibid.*)

On June 6, 2003, the Superior Court entered an order approving the Settlement Agreement titled: "Order Pursuant to Public Resources Code Section 21168.9" ("2003 Order"). (AA21:5015-5018 [Ex. 37].) The 2003 Order was in the same form as Exhibit 3-A to the Settlement Agreement. (AA20:4993-4996.) The 2003 Order included a finding that "the ***actions*** described in this 2003 Order, including the actions taken in compliance with the [Writ], ***comprise the actions necessary*** to assure DWR's compliance with [CEQA]."[8] (AA21:5016, ¶ 5, emphasis added.) The Superior Court retained jurisdiction over the ***CEQA causes of action*** until discharge of the 2003 Writ, but importantly ***did not*** retain jurisdiction over the dismissed reverse validation causes of action. (AA21:5017.)

No provision of the Settlement Agreement, the 2003 Writ, or the 2003 Order invalidated or set aside the Monterey Amendments or the Land Transfer Agreement. (AA21:5004-5005 [Ex. 35], 5015-5018 [Ex. 37].) Nor did they characterize the Authority's "title" as interim or temporary, nor condition discharge of the 2003 Writ on the issuance of new or further authorizations of existing or new contracts or deeds. (*Ibid.*)

DWR and the other defendants in the *PCL* lawsuit did not accept any language in the Settlement Agreement, or related documents that would have changed the legal status of their water delivery contracts (including the Monterey Amendments) to "interim." The defendants in the *PCL*

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[8] Such "actions," as specified in the 2003 Writ and 2003 Order, did not include setting aside or changing any approval, authorization, contract or title transfer.

litigation expressly rejected the form of the writ proposed by the *PCL* Plaintiffs that would have required DWR approval of new contract amendments. (AA13:3003-3009 [Ex. 2007].) Similarly, a statement jointly-issued by the *PCL* Plaintiffs and the defendants summarizing "key components" of the Settlement Agreement principles is clear that the Settlement Agreement did not invalidate DWR's approval of the Monterey Amendments or the Land Transfer Agreement, or render those approvals interim or temporary in any way. (AA23:5668-5669 [Ex. 48].) The joint statement states that Kern Water Bank "will remain in local ownership" and will ***operate*** "as it has" with additional restrictions. (*Ibid*.)

As to ***operation*** of the Monterey Amendments and the Kern Water Bank, the 2003 Order did say that, "***[i]n the interim***, until DWR files its return in compliance with the Peremptory Writ of Mandate and this Court orders discharge of the Writ of Mandate, the ***administration and operation*** of the State Water Project and [transferred land] shall be conducted pursuant to the Monterey Amendments . . . as supplemented by the Attachment A Amendments . . . and the other terms and conditions of the Settlement Agreement." (AA21:5017 [Ex. 37], emphasis added.) The 2003 Order also provided that SWP operations (as provided in the Monterey Amendments and the Settlement Agreement) would ***not*** be enjoined in the "interim" period – the time between issuance and discharge of the 2003 Writ. [9] (*Ibid*.)

The Settlement Agreement tolled the statute of limitations relating to the reverse validation cause of action until the date forty-five (45) days after filing of the Notice of Determination in the continuing CEQA case,

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[9] Both the 2003 Order and 2003 Writ expressly refer to CEQA and Public Resources Code section 21168.9 in their title and body. Neither refers to the Validation Act, Code of Civil Procedure sections 860, *et seq*.

but ***only as to the named PCL Plaintiffs*** (which do not include any of the Central Delta Appellants in this action). (AA20:4956-4957 [Ex. 34].) The 45-day period applicable to the *PCL* Plaintiffs expired on June 19, 2010. (AA21:5107 [Ex. 41].)

Finally, under the Settlement Agreement, *PCL* Plaintiffs received numerous benefits, in addition to the additional restrictions on the Kern Water Bank lands and other items described in the joint statement. (AA23:5668-5669.) The Settlement Agreement:

- Established an "EIR Committee" chaired by DWR, which included an equal number of representatives of the *PCL* Plaintiffs and the SWP Contractors, to provide advice and recommendations to DWR in connection with preparation of the new EIR. (AA20:4937.)
- Provided $300,000 to the *PCL* Plaintiffs' for participation in DWR's preparation of the new EIR, including participation on the EIR Committee charged with collaborating on the scope and content of the 2010 EIR. (AA20:4940.)
- Required DWR to pay $5.5 million to the *PCL* Plaintiffs to implement the Settlement Agreement. (AA20:4952.)
- Required DWR to pay $8 million to *PCL* plaintiff Plumas County Flood Control and Water Conservation District, primarily for watershed improvements. (AA20:4943.)
- Required DWR and the SWP Contractors to sign "Attachment A Amendments," to their SWP long-term water supply contracts, as described below. (AA20:4954.)

E. The Attachment A Amendments.

Within sixty (60) days of the Settlement Agreement, DWR and signatory SWP Contractors were required to execute "Attachment A

Amendments," in the form attached to the Settlement Agreement. (AA20:4931, 4954.) The Attachment A Amendments do not amend or restate the Monterey Amendments. (AA21:5006-5014 [Ex. 36] [Kern County Water Agency Attachment A Amendment, dated May 28, 2003].)

The Attachment A Amendments had two limited purposes. The first was to delete the word "entitlement" in favor of "Table A" in the Contractors' long-term water supply contracts. (AA21:5008-5012.) The second purpose was to add a "new Article 58" to the Contractors' water supply contracts "addressing the dependable annual supply of [SWP] water to be made available" by existing facilities. (AA21:5009.) Except for Article 58, the changes described in Attachment A were solely "for clarification purposes" and did not change any rights, obligations or limitations on liability in the water supply contracts. (AA21:5013.) The Attachment A Amendments do ***not*** state that they were intended as any form of "reenactment" or "reauthorization" of the Monterey Amendments or Land Transfer Agreement.[10]

F. The Property Upon Which the Authority Financed, Built and Operates the Kern Water Bank.

The Central Delta Appellants' lawsuit challenged, *inter alia*, the validity of DWR's 1995 agreement to transfer approximately 20,000 acres located southwest of Bakersfield to the Kern County Water Agency. (AA20:4808 [Ex. 28].) In 1996 DWR transferred the lands to the Kern County Water Agency, which, in turn, transferred almost all of the same property to the Authority. (AA20:4853 [Ex. 31] [Kern County Water

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[10] Central Delta Appellants do not criticize or challenge the validity of the Attachment A Amendments or Article 58. (Central Delta Appellants' Amended Opening Brief at pp. 65, 73; AA31:7723.)

Agency Deed]; RA5:1089-1127 [Ex. 3001] [Authority Deed].) As detailed above, the Authority's member entities relinquished or caused the permanent relinquishment of 45,000 acre-feet of valuable SWP Table A entitlement worth at least $1,000 per acre foot ($45 million). (AA28:6905-6906.)

The Authority developed a habitat conservation plan committing to conservation of thousands of acres of wildlife habitat, obtained necessary permits, financed, and eventually constructed the Kern Water Bank[11] on those lands. (AA28:6820-6828, 6830-6836.)

After the Superior Court's approval of the Settlement Agreement and dismissal of the reverse validation causes of action, the Authority approved and sold $27 million in bonds and made additional investments to construct and operate the Kern Water Bank. (AA28:6838-6839.) The substantial reliance by the Authority and its members on the Settlement Agreement, are described in declarations admitted into evidence at trial (AA28:6798-6934 [Kern Water Bank Parties' declarations]), particularly in the Declaration of Jonathan Parker (AA28:6815-6841). (AA31:7726 [All Kern Water Bank Parties' exhibits and declarations admitted].) The importance of Kern Water Bank operations is further detailed in evidentiary declarations submitted in connection with the CEQA cause of action remedy hearing held in 2014. (AA34:8345-36:9095.) Central Delta Appellants submitted ***no evidence*** below to refute this vast amount of evidence on the time-bar issues.

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[11] Contrary to uncontested evidence, Central Delta Appellants repeatedly characterize the Kern Water Bank, as if it had been fully constructed by DWR before the land transferred to the Authority. (E.g., AOB, p. 16.) Because the issue is irrelevant to this appeal, the erroneous characterization is not discussed further in this brief.

G. Discharge of the 2003 Writ.

DWR certified the second EIR (the 2010 EIR) on February, 2010, and filed its Notice of Determination on May 5, 2010. (AA21:5107 [Ex. 41].) DWR filed its return to the Writ on June 3, 2010. (AA25:6199 [Ex. 52].) The *PCL* Plaintiffs did not oppose DWR's return or discharge of the 2003 Writ. (AA26:6309-6311 [Ex. 53].) The Superior Court discharged the 2003 Writ on August 27, 2010. (AA21:5187 [Ex. 44].) The Superior Court's order discharging the writ of mandate states:

> The Court finds that Defendants and Respondents Central Coast Water Authority and Department of Water Resources have fully complied with the terms of the Peremptory Writ of Mandate issued on May 20, 2003 in the above-entitled case ("Writ").

(AA21:5187 [Ex. 44].) No one appealed the 2010 order discharging the 2003 Writ and the Superior Court's order is a final judgment that the 2010 EIR complied with CEQA.

The Central Delta Appellants were not parties in the *PCL* litigation CEQA cause of action, even though several of the Central Delta Appellants participated in the administrative proceedings and were affiliated with the *PCL* Plaintiffs (see section on cross-appeal p. 98, *infra*).[12] Some of the officers of the *PCL* Plaintiffs, however, including Central Delta Appellant Carolee Krieger, were also officers of certain *PCL* Plaintiffs and participated actively in the *PCL* litigation. (AR115:58961-58966 [Comment letter from *PCL* Plaintiff Citizens Planning Association of Santa Barbara Officer Carolee Krieger on Draft Water Reliability Report]; AA1:100-171 [First Amended Petition verified by Carolee Krieger],

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12 Because the reverse validation action was in rem, they were deemed parties to the validation cause of action.

AA20:4830-4846 [*PCL* litigation First Amended Complaint showing Citizens Planning Association as a plaintiff].) The Central Delta Appellants never sought to appear in the *PCL* litigation CEQA cause of action. Instead, the Central Delta Appellants waited 14 years before filing the current action.

H. The Current Action.

Central Delta Appellants filed this action on June 3, 2010 – more than 14 years after DWR's approval of the Monterey Amendments and more than six years after the dismissal of the *PCL* litigation's reverse validation action. (AA1:1-77; AA1:99-172 [First Amended Complaint].) The first cause of action alleges CEQA violations in the 2010 EIR. The second and third causes of action – a reverse validation action and a writ of mandate cause of action, respectively – challenge events that occurred 20 years ago – specifically "the validity of the fee-simple transfer between DWR and [Kern County Water Agency] that conveys, in a two-step transaction, the Kern Water Bank from the State to [the Authority] . . . ." (AA1:159, ¶ 307.)

I. Specific Time-Bar Affirmative Defense Facts.

1) Evidence Supporting Trial Court's Decision Regarding the Statute of Limitations Defense.

DWR, the Kern Water Bank Parties and the Contractors plead in their answers to the Central Delta Appellants' complaint that the second and third causes of action were time-barred because the actions were filed more than a decade too late. At trial, the Kern Water Bank Parties presented substantial evidence supporting the time-bar defenses, all of which was admitted into evidence by the trial court. (AA30:7648-7649.) This evidence is described in § III.D, *supra* at pages 40-45.

Among the evidence that the trial court admitted was extrinsic evidence relating to the interpretation of the Settlement Agreement (including the 2003 Writ and 2003 Order). (AA31:7738-7740) For example, the court admitted the Joint Statement issued on behalf of all parties to the Settlement Agreement. The Joint Statement listed "key components" of the Settlement Agreement including that the Kern Water Bank would "remain in local ownership" and continue to be operated "as it has" but subject to additional restrictions on use. (AA31:7720, 7738-7739, AA23:5606 [Ex. 48].) The court also admitted several percipient and expert declarations and exhibits offered by the Authority and other parties. (E.g., AA31:7726, AA28:6794-6934 [Declarations], RA5:1089-11:2458 [Exs. 3001-3038].) The evidence supporting the trial court's judgment regarding the statute of limitations defense is discussed in additional detail in the brief of Respondent Department of Water Resources.

2) Evidence Supporting the Trial Court's Decision Regarding the Laches Defense.

Reliance and Change of Position. The Kern Water Bank Parties submitted extensive, ***uncontested*** evidence supporting their laches defense. First, the evidence documents the timing of important events and the Kern Water Bank Parties' considerable reliance on the Land Transfer Agreement, the Settlement Agreement, the 2003 Writ, and 2003 Order. (See generally AA28:6815-6841 [Parker Decl.].) For example, as consideration of the transfer of land worth approximately $22.5 million (AA28:6862 [Sunding Decl., ¶¶ 47-49]), the Authority's members permanently relinquished 45,000 acre feet of Table A amount. (AA28:6821, 6830 [Parker Decl., ¶¶ 5, 22].) The relinquished Table A amount had an approximate value, at the time, of between $45 million ($1,000 per acre foot) and $54 million ($1,200 per acre foot). (AA28:6905-6906 [Taube Decl., ¶ 18], AA28:6857-

6861 [Sunding Decl., ¶¶ 35-46].) The Authority and its members have relinquished water that would have been available under that Table A for the last 20 years. (AA28:6906 [Taube Decl., ¶ 19].)

Second, the Authority and its members expended over $27 million in initial costs to construct the Kern Water Bank. (AA28:6836 [Parker Decl., ¶ 38].) Construction improvements included a six mile canal, water recharge basins, extraction wells and pipelines. (AA28:6834-6836 [Parker Decl. ¶¶ 6, 31-38].) To finance the construction, the Authority obtained a line of credit from Bank of America for $21 million and borrowed an additional $5 million. (*Id.* at ¶¶ 33-34.)

Third, the Authority and its members incurred debt and substantial additional expenses in reliance on the Settlement Agreement and the dismissal of the reverse validation lawsuit. The Settlement Agreement, for example, expressly resolved all issues regarding the Authority's ownership of the Kern Water Bank lands. The Settlement Agreement provided unequivocally that the Authority "shall retain title to the . . . lands." (AA20:4948 [Ex. 34]; AA28:6836-6837 [Parker Decl., ¶¶ 39-42].) The Settlement Agreement also erased any doubt about the continued effectiveness of the environmental permits regarding the construction and operation of the Kern Water Bank. (AA20:4948 [Ex. 34]; AA28:6836-6837 [Parker Decl., ¶¶ 39-42].) In reliance on the Settlement Agreement and the dismissal of the reverse validation lawsuit, the Authority issued and sold $27 million in debt in the form of public bonds. (AA28:6838-6839 [Parker Decl., ¶¶ 43-46].) The proceeds from the bonds repaid the Bank of America loan and funded additional Kern Water Bank capital improvements. (*Ibid.*) The bond issue relied upon the Authority having good title to the land. (AA28:6838 [Parker Decl., ¶ 43].) After the issuance and sale of the bonds, the Authority invested an additional

$13 million in capital improvements for the operation of the Kern Water Bank lands. (AA28:6838-6839 [Parker Decl., ¶¶ 43-46].)

As of December 31, 2011, the Authority still owed approximately $17.28 million on the bonds, which are not scheduled to be repaid until 2028. Including owed interest on the DWR loan, the Authority continues to owe a total debt of more than $20 million, all premised on clear title to the Kern Water Bank lands. (AA28:6840 [Parker Decl., ¶¶ 48-49].)

Fourth, third parties also have relied on the Kern Water Bank. At the time of the time-bar trial, the Authority had stored in the Kern Water Bank nearly one million acre feet of water that is owned by the Authority's members. (AA28:6823 [Parker Decl., ¶ 9].) The stored water is used to support agricultural production in dry years when other water sources are not available. (AA28:6908-6910 [Taube Decl. ¶¶ 24-27], AA28:6823-6824 [Parker Decl., ¶ 10], AA28:6822, 6834 [Parker Decl., ¶¶ 7, 30].) Some of the water stored in the Kern Water Bank provides a municipal water supply for the City of Bakersfield and Kern County. (AA28:6803-6807 [Beard Decl., ¶¶ 5-16].)

Fifth, the Authority itself also expended substantial additional funds to implement the Kern Water Bank's environmental programs. The Habitat Conservation Plan approved by the California Department of Fish and Game and the U.S. Fish and Wildlife Service requires the Authority to protect and manage thousands of acres on the Kern Water Bank property as habitat for endangered and threatened species and other wildlife. (AA28:6824-6828, 6830-6834 [Parker Decl., ¶¶ 11-20, 23-29].) The Authority provided promissory notes, secured by deeds of trust, totaling $500,000, to insure compliance with the commitments in the Habitat Conservation Plan. (AA28:6824 [Parker Decl., ¶¶ 11].) The Parker Declaration, at ¶¶ 11-49, describes the work expended in those efforts in detail. (AA28:6824-6840.) The Authority made extensive commitments to

the protection and management of the Kern Water Bank lands for wildlife conservation purposes, including the establishment of a 3,267 acre habitat conservation bank dedicated to the protection of wildlife habitat. (AA28:6839-6840 [Parker Decl., ¶ 47], AA28:6922-6924 [White Decl., ¶ 23].) In consideration of the establishment of the habitat conservation bank, the U.S. Fish and Wildlife Service and the California Department of Fish and Game issued conservation credits that may be used by the Authority or third parties as mitigation for impacts to wildlife habitat. The Authority has transferred at least 1,221 of the wildlife conservation credits to third parties, enabling third parties to apply the conservation credits in reliance on the agreements implementing the habitat conservation plan. (AA28:6839-6840 [Parker Decl., ¶ 47], AA28:6922-6924 [White Decl., ¶ 23].) The Authority also engaged in extensive remediation and removal of contaminants on the land. (AA28:6825-6826 [Parker Decl., ¶ 13].)

Public Benefit. In addition to the foregoing evidence of reliance, the Kern Water Bank Parties submitted substantial evidence showing that the public benefitted from the Kern Water Bank. The Kern Water Bank is important to the economy of California's Central Valley because the reliability of the water supply it provides supports high value, annual and perennial crops. (AA28:6846-6849 [Sunding Decl., ¶¶ 12-17].) The economy supported by the Kern Water Bank includes $2 billion directly from crops, another $16 billion indirectly, and about 92,000 jobs. (*Ibid*.) As a result of the Kern Water Bank, employment has remained higher than it otherwise would have during recent droughts. (AA28:6851-6854 [Sunding Decl., ¶¶ 21-29].) Further, the existence of water storage in Kern County and the Monterey Amendments has had a positive effect elsewhere in the state. (AA28:6855-6856 [Sunding Decl., ¶¶ 30-34].)

Construction of the Kern Water Bank resulted in important environmental benefits for the region and the state. (AA28:6815-6829

[White Decl., ¶¶ 8-31], AA28:6824-6829 [Parker Decl., ¶¶ 11-20].) These benefits include water conservation, endangered and sensitive species protection, creation of wetland habitat for migratory birds, permanent conservation easements, and remediation of toxins and other contaminants found on the land. (AA28:6815-6829 [White Decl., ¶¶ 8-31], AA28:6824-6829 [Parker Decl., ¶¶ 11-20].) At least 34 endangered or threatened plant and animal species have been protected along with many other species of concern. (AA28:6915-6917 [White Decl., ¶¶ 8-12].) Wetlands created by the Kern Water Bank for migratory birds and other wildlife provide another special benefit. (AA28:6826-6827 [Parker Decl., ¶ 15], AA28:6917-6921 [White Decl., ¶¶ 13-21].) The Kern Water Bank is a critical part of the State's system of wildlife refuges for those birds and other federal and state environmental initiatives. (AA28:6919-6920, 6925-6929 [White Decl., ¶¶ 17, 26-31].) Surveys conducted by the Authority document use of the Kern Water Bank lands by at least 77 endangered or threatened species and from 10-34 "sensitive species." (AA28:6827 [Parker Decl., ¶ 16].) The Kern Water Bank is a nationally-recognized model for water conservation and habitat conservation. (AA28:6828-6829, 6834 [Parker Decl., ¶¶ 19-20, 30].) [AA28:6925-6929 [White Decl., ¶¶ 26-31].)

Third Party Reliance and Change of Position. In addition to the Authority and its members, the positions of other parties have changed as a result of the Monterey Amendments. Due to the decrease in demand for Table A amount by Authority members, the proportionate share of water available under Table A for all other SWP Contractors increased. (AA28:6857 [Sunding Decl., ¶ 37], AA28:6905-6906 [Taube Decl., ¶¶ 18-19].) Thus, members of the Authority have received less water over the years from the SWP than they would have in the absence of the Kern Water Bank. Even in dry years, the amount of SWP water lost by members of the

Authority due to this retirement has been substantial. (AA28:6906 [Taube Decl., ¶ 19.)

In reliance on the Monterey Amendments, numerous other changes in the SWP and water transactions throughout the state have occurred since 1995. For example, the Monterey Amendments changed the relative proportion of SWP water that could go to urban versus agricultural uses in times of shortage. (AA15:3648 [Ex. 10, ¶ 15 (Art. 18)].) Through the Monterey Amendments, some 130,000 acre-feet of Table A amount could be transferred from agricultural to urban contractors. (AA15:3675 [Ex. 10, ¶ 24 (Art. 53)].) Consequently, as an example, one urban contractor received a transfer of 41,000 acre-feet of Table A entitlement from Real Party Wheeler Ridge-Maricopa Water Storage District ("Wheeler Ridge") in Kern County. (AA28:6909 [Taube Decl., ¶ 26].) Wheeler Ridge would not have transferred the amount if not for the Authority's ownership of the Kern Water Bank lands and the existence of the Kern Water Bank, and the Kern County Water Agency would not have approved transfers of its Table A amounts out of Kern County but for the Monterey Amendments. (*Ibid*; AA28:6813-6814 [Bucher Decl., ¶¶ 4-7].)

The transfer of water from agricultural to urban users provides enhanced reliability of water supply for municipal uses. (AA28:6865-6866 [Sunding Decl., ¶¶ 52-54].) The transfer of the 130,000 acre-feet of agricultural water to urban uses authorized by the Monterey Amendments provides additional supply reliability for up to 158,000 homes or other municipal uses. (*Ibid.*)

Growers within the areas served by the Kern Water Bank have made crop decisions based upon the existence of the Kern Water Bank and the Monterey Amendments. The declarations of Melanie Aldridge and Loren Booth explain how growers in Wheeler Ridge purchased land and made significant long-term investments in permanent crops, partially relying on

the ability to obtain water from the Kern Water Bank. (AA28:6799-6800 [Aldridge Decl., ¶¶ 7-10], AA28:6810-6811 [Booth Decl., ¶¶ 9-12], AA28:6909-6910 [Taube, Decl., ¶ 27].) The declaration of Dr. Sunding confirms the trends of reliance on water banking to protect against disruptions in water deliveries. (AA28:6846-6849 [Sunding, Decl., ¶¶ 12-17].) Invalidation of the Monterey Amendments and the several other transactions leading to the Kern Water Bank would lead to "dire consequences" and "irreparable damage" to growers. (AA28:6909-6910 [Taube Decl., ¶¶ 27-28], AA28:6800-6801 [Aldridge Decl., ¶ 11], AA28:6811 [Booth Decl., ¶ 13].)

Finally, as set forth in Dr. Sunding's declaration, the financial structure of the region could be heavily damaged by invalidation. (AA28:6864-6865 [Sunding Decl., ¶¶50-51].) Properties bearing perennial crops, depend on a stable source of water from the Kern Water Bank and need substantial capital investment; that investment is financed by lending from third parties. The security for such financing is the property and its crops. If there is no longer a source of water to keep crops alive during droughts, then not only will the property owner not be able to pay off the financing because the crops die, but the security will be rendered far less valuable. This could lead to financial instability and, in some cases, bankruptcy for up to $2.8 billion of capital financing in the region. (AA28:6864-6865.)

The Central Delta Appellants submitted ***no evidence*** whatsoever in response to the overwhelming evidence of reliance by Kern Water Bank Parties on the Monterey Amendments and other facts supporting the trial court's decision that the reverse validation actions were barred by laches.

IV. STANDARD OF REVIEW.

A basic tenet of appellate review is the presumption of correctness of the trial court's decision. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Many of the issues in this case turn on evidence that the trial court considered. The Court of Appeal is required to affirm the trial court decision if there was substantial evidence to support the trial court's ruling. (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.) The Court "must . . . view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor." (*Jessup Farms v. Baldwin*, *supra*, 33 Cal.3d at p. 660.) "[A] party 'raising a claim of insufficiency of the evidence assumes a 'daunting burden'" (*Wilson v. County of Orange*, *supra*, 169 Cal.App.4th at p. 1188, quoting, *Whiteley v. Philip Morris, Inc*. (2004) 117 Cal.App.4th 635, 678 [11 Cal. Rptr. 3d 807].)

The substantial evidence rule applies even if the testimony below, as here, was admitted on paper—through declarations—as opposed to through live witness testimony. (*Desert Outdoor Advertising v. Superior Court* (2011) 196 Cal.App.4th 866, 868, fn. 1.) The Court may affirm the trial court judgment if it is correct on any theory. (*In re Quantification Settlement Agreement Cases, supra,* 201 Cal.App.4th at p. 805.)

In addition to these basic principles, standard of review issues in this case are somewhat specific to the individual issues discussed *infra*. Consequently, Kern Water Bank Parties discuss the standards of review within each section below.

V. THE REVERSE VALIDATION CLAIMS ARE TIME-BARRED.

The second and third causes of action, the reverse validation claims, are barred by several time-bar defenses: the statutes of limitations, laches, the Final Validating Act of 2003, and mootness.

A. In Appealing the Time-Bar Defenses, Central Delta Appellants Rely on Evidence Not Properly Before This Court.

Central Delta Appellants' time-bar arguments fail because they rely on evidence not admitted into evidence by the trial court during the time-bar proceedings, which are therefore not properly before this Court.

"[A]n appeal reviews the correctness of a judgment as of the time of its rendition, ***upon a record of matters which were before the trial court for its consideration***.'" (*In re Zeth S.* (2003) 31 Cal.4th 396, 405, emphasis added; see also *Doers v. Golden Gate Bridge, Highway and Transportation Dist.* ("*Doers*") (1979) 23 Cal.3d 180, 184, fn. 1 ["As a general rule, documents not before the trial court cannot be included as part of the record on appeal."].) Evidence admitted at the time-bar trial was limited by stipulation of the parties, consisting only of documents previously identified by the parties or admitted by the trial court. (AA12:2745.) Central Delta Appellants filed a post-trial motion to reopen the trial record and a request for judicial notice, seeking to bring before the trial court two additional documents not admitted into evidence at the time-bar trial. (AA30:7366-7392, 7480-7482.) The trial court expressly rejected Central Delta Appellants' motion and request. (AA30:7625; see also AOB at pp. 67-70, 74 [citing to exhibits not admitted or considered by the trial court].)

Central Delta Appellants conflate the time-bar ***trial*** record and the CEQA ***administrative*** record, asking this Court to use the CEQA record to

rule on time-bar issues in clear contravention of controlling law. (E.g., AOB at p. 50, citing AR194:98885, 28:13630-13632, 199:101131; *In re Zeth S.*, *supra*, 31 Cal.4th at p. 405; AA12:2745; AOB at pp. 35-51 [CEQA arguments], 66, 69 [references to CEQA arguments in time-bar arguments].) The time-bar evidentiary record never included the entire CEQA administrative record. Central Delta Appellants' time-bar arguments depend on their CEQA arguments, which rely on documents not properly before this Court or the trial court in the time-bar trial (e.g., AOB at p. 50, citing AR194:98885, 28:13630-13632, 199:101131). (*In re Zeth S.*, *supra*, 31 Cal.4th at p. 405; *Doers*, *supra*, 23 Cal.3d at p. 184, fn. 1.) Central Delta Appellants' time-bar arguments should be rejected as based on improper evidence.

B. The Claims are Barred by Validation Act Statutes of Limitation.

1) Standard of Review for Statutes of Limitation.

The Court of Appeal is required to affirm the trial court decision if there was substantial evidence to support the trial court ruling. (*Wilson v. County of Orange*, *supra*, 169 Cal.App.4th at p. 1188.) The substantial evidence standard of review applies here because the trial court's decision on the reverse validation causes of action is based, in part, on the consideration of conflicting extrinsic evidence admitted at trial.

2) The Reverse Validation Cause of Action is Barred by the 60-Day Statute of Limitations in Code of Civil Procedure Sections 860, *et seq*.

The second cause of action of the Amended Complaint is a reverse validation action. The procedures applicable to validation and reverse

validation actions are set forth at California Code of Civil Procedure sections 860, *et seq.*[13] Section 860 provides:

> A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an action . . . to determine the validity of such matter. The action shall be in the nature of a proceeding in rem.

(Code Civ. Proc., § 860.)

Central Delta Appellants assert the "other law" authorizing this case is Government Code sections 17700, subdivision (c), 53510 and 53511. (AA1:158 [Amended Complaint, ¶¶ 304-305].)

Any person other than the concerned government agency may also bring an action to determine the validity of such matter, termed a reverse validation action, "within the time . . . specified in Section 860." (Code Civ. Proc., § 863.) Central Delta Appellants are thus subject to the same 60-day limitation as DWR or Kern County Water Agency would have been, had they sought to validate their actions.

Further, "section 869 says [a person who could bring a reverse validation action] ***must*** do so or be forever barred from contesting the validity of the agency's action in a court of law." (*City of Ontario v. Superior Court* (1970) 2 Cal.3d 335, 341, emphasis in original.) "As to matters 'which have been or which could have been adjudicated in a

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[13] Even if the validation statute of limitations period did not apply, because the relevant events took place so long ago, all other possibly applicable statutes of limitations would long since have expired. (See Code Civ. Proc., § 318 [five years, recovering possession of real property], § 319 [five years, title actions], § 337 [four years, action upon instrument in writing], § 338 [three years, action upon a liability created by statute, or upon fraud or mistake], § 340 [one year, for a forfeiture].)

validation action, such matters – including constitutional challenges – must be raised within the statutory limitations period in section 860 *et seq.* or they are waived.'" (*California Commerce Casino*, *Inc. v. Schwarzenegger* (*"Commerce Casino"*) (2007) 146 Cal.App.4th 1406, 1420, quoting *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 846-847.) That includes the constitutional claim in this case for improper gift of public funds. (*Friedland v. City of Long Beach, supra,* 62 Cal.App.4th at pp. 846-847.) The bar also applies to a claim that a contract is void. (See, e.g., *Starr v. City and County of San Francisco* (1977) 72 Cal.App.3d 164.)

The limitations period begins "upon the ***existence of any matter*** which under any other law is authorized to be determined" pursuant to the validation statutes. (Code Civ. Proc., § 860, emphasis added.) A contract is deemed to come into existence upon authorization. (Code Civ. Proc., § 864.) Even if a contract is not immediately implemented, the date that contract was authorized still triggers the 60-day statute of limitations. (*Commerce Casino*, *supra*, 146 Cal.App.4th at pp. 1430-1432.)

Here, the contracts Central Delta Appellants seek to invalidate are the Monterey Amendments and the Land Transfer Agreement. (AA12:2781 [Stipulation, ¶ I B 1].) The first Monterey Amendments were signed in December 1995 and the last in August 1999. The Land Transfer Agreement is dated December 1995. This action was filed in June 2010 – more than ***10 years after*** the last of the Monterey Amendments, more than ***13 years after*** the actual transfer of the lands from DWR to the Kern County Water Agency, and more than ***14 years after*** the Land Transfer Agreement and the first group of Monterey Amendments. Any dispute over whether the authorization occurred with the execution of the contract or some earlier action of the government entity is irrelevant in this case as the latest of those dates falls outside the limitations period. Regardless of

what Central Delta Appellants here could argue was the trigger date, the 60 days expired and the action is barred.

The public policy behind the 60-day statute of limitations supports the Kern Water Bank Parties' position here. In *Commerce Casino*, *supra*, 146 Cal.App.4th at p. 1420-1421, the Court explained:

> [A] central theme in the validating procedures is speedy determination of the validity of the public agency's action . . . . The validating statutes should be construed so as to uphold their purpose, i.e., the acting agency's need to settle promptly all questions about the validity of its action.

That public policy could not be better illustrated than in this case, where the Central Delta Appellants challenge actions upon which numerous government agencies and others relied for over 14 years.

3) Central Delta Appellants' Arguments With Respect to the Statute of Limitations are in Error.

Central Delta Appellants make three arguments to avoid the statute of limitations: (a) they argue, contrary to the trial court finding, that the 2003 Writ voided or must necessarily be deemed to have voided the Monterey Amendments and the Land Transfer Agreement, and that the Monterey Amendments and the Land Transfer Agreement only went into effect in 2010; (b) Central Delta Appellants also argue that CEQA required the Superior Court to void the approval of the Monterey Amendments and the Land Transfer Agreement, in 2003; and (c) finally, Central Delta Appellants claim to rely on the "reenactment rule" (AOB at pp. 65, 72-73, citing *Barratt Am., Inc. v. City of Rancho Cucamonga* ("*Barratt Am., Inc.*") (2005) 37 Cal.4th 685, 704). Each of the three arguments is erroneous.

a) The Monterey Amendments and Land Transfer Agreement Went into Effect No Later than 1996 and Were Not Voided in the Settlement Agreement.

The Central Delta Appellants' first argument is wrong as a matter of law, and also ignores the relevant evidence. As an initial matter, there was nothing ambiguous about what the *PCL v. DWR* trial court ordered. The Monterey Amendments and Land Transfer Agreement were not voided. To the contrary, the court made it clear that the Authority "shall retain title to the [Kern Water Bank] Lands." (AA20:4948.) The court dismissed the reverse validation part of the *PCL* litigation. (AA21:5019-5021 [Ex. 35].)

Further, the *PCL v. DWR* court entered a writ commanding the preparation of a new CEQA document, but nothing about that writ changed the fully authorized status of the Monterey Amendments or Land Transfer Agreement. While the 2003 Writ set aside the certification of the 1995 EIR, it did not set aside any approval, authorization, contract or land transfer. (AA20:4997-4998.) The later 2003 Order was for the purpose of obtaining DWR's compliance with the 2003 Writ, but said nothing about voiding prior agreements such as the Monterey Amendments or Land Transfer Agreement. (AR115:58931-58934 [Pub. Resources Code section 21168.9 Order, approving of Settlement Agreement].)

The 2003 Order implemented the Settlement Agreement which stated explicitly that it "is not intended to and shall not affect the continuing effectiveness of the Kern Environmental Permits." (AR115:58867.) Among many other approvals of the operation of the Kern Water Bank, the "Kern Environmental Permits" include an agreement and associated permits approved by the state and federal wildlife agencies authorizing the Kern Water Bank Authority to operate the Kern Water Bank in accordance with its Habitat Conservation Plan for ***75 years***. (AA20:4932, 4940, 4991-4992; AA28:6824-6828, 6830-6834 [Parker Decl., ¶¶ 11-20, 23-29]; see

also RA7:1586-1667 [Habitat Conservation Plan Implementation Agreement, noting at § 8.1 that the term of the agreement is 75 years].) Central Delta Appellants' argument that the contracts were "temporary" is not only contrary to the express promise in the Settlement Agreement that the Authority "shall retain title," but it is also contrary to the express provisions of the Settlement Agreement that the Agreement "shall not affect the continuing effectiveness" of the 75-year permits and agreement with the wildlife agencies.[14]

As the trial court observed, the parties clearly knew how to craft language in clear terms that set aside project approvals, but they did not. (AA31:7737.) There is simply no provision in the relevant documents that sets aside the parties' contracts or approvals. Central Delta Appellants are asking this Court for something that cannot be done: to add terms which they now wish were there, but that are not. (See *Levi Strauss & Co. v. Aetna Casualty & Surety Co.* ("*Levi Strauss*") (1986) 184 Cal.App.3d 1479; Code Civ. Proc., § 1858.)

To the extent that Central Delta Appellants' argue that there are ambiguities in the documents, the extrinsic evidence proves them wrong. The extrinsic evidence includes: (i) the joint settlement statement that the Kern Water Bank Lands shall remain in local ownership; and (ii) the Authority's subsequent statements and conduct, including issuance of bonds and significant additional Kern Water Bank construction shortly after

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[14] Among other requirements the agreement with the wildlife agencies requires the Authority to grant permanent conservation easements each year to the California Department of Fish and Game. (RA7:1694 [Kern Water Bank Conservation Bank Agreement, § 5.3].) Obviously, the Authority could not grant permanent conservation easements to the Department of Fish and Game if its title to the property was "temporary."

the Settlement Agreement, indicating that its title was not temporary. (AA23:5669, AA28:6836-6838, AA13:3014.)

The Central Delta Appellants seize upon the word "Interim" in the 2003 Order to argue that it means, contrary to all the other events and language just noted, that the right to operate the Kern Water Bank pending the 2010 EIR was only interim and that therefore the Monterey Amendments and Land Transfer Agreement had their approvals invalidated. Central Delta Appellants do not explain how this could possibly be the case in the face of (i) the undisputed fact that the title remained vested in the Authority, (ii) that the Superior Court dismissed the reverse validation cause of action in the *PCL* litigation, and (iii) the Settlement Agreement prohibited refiling of the reverse validation action. Rather, the Central Delta Appellants focus only on a single word, out of context, and ignore the strong evidence to the contrary.

The word "interim" in context did not vacate any approvals of the Monterey Amendments. The 2003 Order merely said: "***In the interim***, until DWR files its return in compliance with the Peremptory Writ of Mandate and this Court orders discharge of the Writ of Mandate, the administration and operation of the State Water Project and [transferred land] shall be conducted pursuant to the Monterey Amendments . . ., as supplemented by the Attachment A Amendments . . . and the other terms and conditions of the Settlement Agreement." (AA21:5017-5018 [Ex. 37], emphasis added.) Central Delta Appellants jump to the unsupported conclusion that the single word "interim" means that the parties intended to render the contracts subject to the reverse validation action temporary.

The Settlement Agreement expressly segregated the CEQA issues from the other issues and ***dismissed the reverse validation (fifth) cause of action***. The word "interim" referred to how the SWP and Kern Water Bank would be ***operated***, a CEQA issue, ***but did not refer to the subject matter***

***of the PCL Plaintiffs' reverse validation cause of action*,** which was whether the underlying contracts were valid, legal contracts, which cause of action was dismissed.

Moreover, the Settlement Agreement expressly tolled the statute of limitations as to the named *PCL* Plaintiffs ***alone***. Such a provision would not have been needed if the *PCL v. DWR* parties meant "interim" to mean that the statute of limitations was otherwise tolled as to the world on a validation action. (See *In re Quantification Settlement Agreement Cases, supra,* 201 Cal.App.4th at p. 804 [Interpreting joint powers agreement so as not to render commitment to seek appropriation unnecessary].)

Finally, the Central Delta Appellants rely on *PCL* Plaintiffs' ***post-settlement*** disclosure of their alleged ***subjective*** intent in self-serving emails. (See, e.g., AOB at p. 49.) In fact, the evidence before the trial court demonstrated that "until [post settlement] no one ever suggested that the word 'interim' should be applied to the legal status of the Monterey Amendments." (AA13:3005.) Indeed, *PCL v. DWR* defendants refused to accede to *PCL* Plaintiffs' attempt to "renegotiate" the Settlement Agreement, and rejected *PCL* Plaintiffs' language in the proposed writ that suggested new contracts would be required. (AOB at p. 49; AA13:3005, 3007 [*PCL* defendants were willing to finalize the settlement documents, but only if the status of their contracts was unaffected by the word "interim"] [Ex. 3009].)

Thus, there was no mutual intent to make any contracts temporary, and *PCL* Plaintiffs' subsequently-disclosed (alleged) subjective intent with which the *PCL v. DWR* defendants never agreed is irrelevant under California's ***objective*** theory of contracts. (Civ. Code, § 1636; *In re Quantification Settlement Agreement Cases, supra,* 201 Cal.App.4th at p 798; *Founding Members of Newport Beach Country Club v. Newport*

Beach Country Club, Inc. ("*Newport Beach Country Club*") (2003) 109 Cal.App.4th 944, 956.)

There is nothing in the law related to the interpretation of documents to vary this result. For one thing, because these writings relate to substantially the same subject matter, parties and settlement transaction, they should be considered together. (Civ. Code, § 1642; *Holguin v. DISH Network LLC* (2014) 229 Cal.App.4th 1310, 1320-1321.) The writings must be given a reasonable interpretation and construed as a whole. (Civ. Code, § 1641; *In re Quantification Settlement Agreement Cases*, *supra*, 201 Cal.App.4th at p. 799; *Dow v. Lassen Irrigation Co.* (2013) 216 Cal.App.4th 766, 780-781.) Thus the Central Delta Appellants erroneously ignore all of the clear statements that the prior contracts and Land Transfer Agreement remained in place, and take the word interim out of context. The language of a contract is to govern its interpretation, if clear and explicit, and does not involve an absurdity. (Civ. Code, § 1638.) The clear language of the documents here thus should be given effect.

The fundamental goal of interpretation is to give effect to the parties' mutual intention, as determined by objective manifestations of intent, including the words used in the contract, as well as properly admitted extrinsic evidence of such objective matters as the circumstances surrounding the making of the contract and the subsequent conduct of the parties. (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912.) California recognizes the objective theory of contracts, thus "undisclosed intent or understanding is irrelevant to contract interpretation." (*Newport Beach Country Club*, *supra*, 109 Cal.App.4th at p. 956.) The question is what the parties' objective expressions of intent would lead a reasonable person to believe. (*Winograd v. Am. Broadcasting Co.* ("*Winograd*") (1998) 68 Cal.App.4th 624, 632.) Courts will not insert language which one of the parties now wishes were there. (*Levi Strauss*, *supra*, 184 Cal.App.3d at

p. 1486; Code Civ. Proc., § 1858.) Plainly, by the words of the documents and the extrinsic evidence, the parties' intent was to retain the validity of the prior contracts.

Central Delta Appellants acknowledge that the trial court supported the court's interpretation of documents by considering extrinsic evidence and that the parties disagree on the inferences to be drawn. (AOB at p. 30.) The Settlement Agreement, 2003 Writ and 2003 Order on their face do not expressly void any contract authorization. So Central Delta Appellants try to rely on extrinsic evidence to argue that the parties' agreement to use the word "interim," as to ***operations***, was an implied concession that the parties intended to void the contract authorizations. (See, e.g., AOB at pp. 48-49, citing AR199:101143-101147 [November 2, 2002 memorandum].) Even assuming, *arguendo*, that some extrinsic evidence supports Central Delta Appellants' argument (and there is none), there is substantial extrinsic evidence to the contrary, supporting the trial court's decision in this case. It is of "no consequence" that Central Delta Appellants attempt to draw an inference "other than that drawn by the trier of fact." (*Jessup Farms v. Baldwin*, *supra*, 33 Cal.3d at p. 660.)

The same November 4, 2002 memorandum Central Delta Appellants rely upon states that *PCL v. DWR* defendants "***never agreed, and would never have agreed to have***" settlement principles that converted the status of their contracts to interim, and that *PCL v. DWR* defendants rejected *PCL* Plaintiffs' proposed writ language that would have required new contracts. (AA13:3024, 3038.) The parties' joint statement about the Settlement Agreement lists "key components" of the settlement as including the Kern Water Bank remaining with the Authority and the Monterey Amendments remaining in place, but does not state that any authorizations or approvals were voided (or rendered temporary). (AA23:5605-5606 [Ex. 48]; see also *Santa Clarita Organization for Planning the Environment v. County of Los*

Angeles ("*SCOPE II*") (2007) 157 Cal.App.4th 149, 160 ["The Monterey Settlement Agreement did not make the Kern-Castaic transfer temporary"].) Also, Central Delta Appellants suggest there is a conflict between the Settlement Agreement, on the one hand, and the 2003 Writ and 2003 Order on the other, when they urge this Court to ignore the Settlement Agreement when determining the intent of the 2003 Writ and 2003 Order. (See, e.g., AOB at p. 50.)

Under these circumstances, when the parties argue conflicting extrinsic evidence, there is a disputed factual question and the substantial evidence rule applies: So long as the judgment below was supported by substantial evidence, the evidentiary conflict must be resolved in favor of the prevailing party, and any reasonable construction of the writing by the trial court will be upheld. (*In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 746-747, citing *Parsons v. Bristol Development Co.* ("*Parsons*") (1965) 62 Cal.2d 861, 865-866; *Winograd*, *supra*, 68 Cal.App.4th at pp. 632-633 [Substantial evidence standard applied to interpretation of stipulation put on the record]; see also *Horseman's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1560 [Intent was a factual question, when parol evidence admitted to aid interpretation of contract language].)

This Court and others have found a factual question and applied the substantial evidence standard in cases where conflicting inferences could reasonably be drawn, even when the evidentiary facts were admitted or not contradicted. (*McKinney v. Kull* (1981) 118 Cal.App.3d 951, 955-956 [Agreed upon facts subject to opposing inferences]; see also *Ferris v. Los Rios Community College Dist.* (1983) 146 Cal.App.3d 1, 7 [Even on a settled or stipulated record, where inferences are conflicting, it is for the trier of fact to resolve the conflict]; *CNA Casualty of Cal. v. Seaboard Surety Co.* (1986) 176 Cal.App.3d 598, 616 ["Where evidence is

undisputed, but different inferences may be drawn therefrom, we are not at liberty to make our own inferences and decide the case accordingly; the conclusion of the trial judge must be accepted . . . ."]; *Winograd*, *supra*, 68 Cal.App.4th at p. 632 [same].)

Central Delta Appellants argue that the substantial evidence rule does not apply when there is conflicting extrinsic evidence, if it is in "written form" only (AOB at p. 30), relying on *Milazo v. Gulf Ins. Co.* ("*Milazo*") (1990) 224 Cal.App.3d 1528 and *Parsons*, *supra*, 62 Cal.2d 861, for this exception. Neither case recognizes such an exception. *Milazo*, which involved interpretation of an insurance policy, does state in its standard of review section that de novo review applies "where there is no extrinsic evidence, where the extrinsic evidence is not conflicting or where the conflicting evidence is of a written nature only." (*Milazo*, *supra*, 224 Cal.App.3d at p. 1534.) Central Delta Appellants improperly emphasize the role of this language in that case.

The Court of Appeal's analysis otherwise did not address the "written nature" language or apply it; in fact, there was no extrinsic evidence whatsoever at issue in the case. (*Id*. at pp. 1534-1536.) Furthermore, the cases cited by *Milazo* do not contain that same language or involve extrinsic evidence. (See *Coopers & Lybrand v. Superior Court* (1989) 212 Cal.App.3d 524, 529 [Writ of mandate challenging trial court's overruling of demurrer]; *In re Shannon's Estate* (1965) 231 Cal.App.2d 886, 891 [De novo review applied where "there is no extrinsic evidence"].) Finally, *Parsons*, a case involving non-conflicting extrinsic evidence, also does not support Central Delta Appellants' position. To the contrary, *Parsons* indicates that de novo review is not appropriate where there is conflicting extrinsic evidence, without any reference to a "written form" exception to the substantial evidence rule. (*Parsons*, *supra*, 62 Cal.2d at pp. 865-866.)

b) CEQA Law Did Not Require the Trial Court to Void the Monterey Amendments or Land Transfer.

Next the Central Delta Appellants argue that, if the *PCL v. DWR* court did not actually void the prior approvals and contracts, it acted illegally under CEQA law which, Central Delta Appellants say, required the court to void the contracts. This argument is demonstrably wrong.

(1) CEQA's Remedy Statute Authorizes Courts to Keep Project Approvals in Effect.

Any analysis of the validity of the 2003 Writ and 2003 Order must begin with the terms of the CEQA remedy statute – Public Resources Code section 21168.9. On its face, if a court identifies a CEQA violation, section 21168.9 authorizes courts to keep some, none, or all project approvals in effect notwithstanding the CEQA violation. The Legislature provided courts with three options. One is to "mandate that the determination, finding, or decision be voided by a public agency, ***in whole or in part***." (Pub. Resources Code, § 21168.9, subd. (a)(1), emphasis added.) Another is simply to mandate that the lead agency take specific action to bring its decision into compliance with CEQA. (*Id.,* subd. (a)(3).)

The *PCL v. DWR* trial court implemented the (a)(3) option by mandating that DWR prepare a new EIR, but as explained *infra* neither the Settlement Agreement, the 2003 Writ, nor 2003 Order vacated the approval of the Monterey Amendments or the deed conveying the property. Rather, the 2003 Writ said the exact opposite! Public Resources Code section 21168.9 states on its face that courts retain the discretion to keep project approvals in effect where the court finds a CEQA error. This should be the end of the analysis. (*Torrey Hills Community Coalition v. City of San Diego* (2010) 186 Cal.App.4th 429, 440 ["If there is no ambiguity in the

language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.' [Citation.] 'Where the statute is clear, courts will not 'interpret away clear language in favor of an ambiguity that does not exist.' [Citation.]'"].)

(2) CEQA Case Law Confirms that Trial Courts Have Broad Equitable Discretion to Leave Project Approvals in Place – Including Where the Trial Court Does Not Make the Severability Findings of Section 21168.9, subdivision (b).

The Central Delta Appellants resort to a distorted, misleading and convoluted reading of section 21168.9 and the CEQA cases in attempting to maneuver around the express terms of section 21168.9. But this exercise does them no good. In fact, the leading case relied upon by Central Delta Appellants, *Golden Gate Land Holdings LLC v. East Bay Regional Park Dist.* ("*Golden Gate*") (2013) 215 Cal.App.4th 353, ***expressly rejects*** the same argument advanced by Central Delta Appellants here.

In *Golden Gate*, the owner of the Golden Gate Fields race track challenged a Park District's condemnation of Golden Gate property for a park and to construct a recreational trail. The trial court concluded that the Park District violated CEQA when it erroneously relied on a CEQA exemption. (*Golden Gate*, *supra*, 215 Cal.App.4th at p. 363.) Despite finding a CEQA violation, the trial court did not vacate the Park District's resolution authorizing the condemnation. Rather, it vacated ***only*** the portion of the Park District's resolution that relied on the purported CEQA exemption. (*Id.* at p. 364.)

Golden Gate appealed, arguing that the trial court's remedy "is antithetical to . . . CEQA and . . . [that] CEQA specifically requires environmental review ***before*** project approval so as to inform the agency's

decision making process." (*Golden Gate*, *supra*, 215 Cal.App.4th at p. 371, emphasis in original.) Golden Gate argued that "Since the [Park] District has not conducted any environmental review at all, no portion of its approval or project can conceivably be in compliance with CEQA." (*Id.* at p. 375.) The Court of Appeal rejected Golden Gate's argument:

> [A] ***reasonable, commonsense reading of section 21168.9*** plainly forecloses plaintiffs' assertion that a trial court must mandate a public agency decertify the EIR and void all related project approvals in every instance where the court finds an EIR violates CEQA. Such a rigid requirement directly conflicts with the 'in part' language in section 21168.9, subdivision (a)(1), which specifically allows a court to direct its mandates to parts of determinations, parts of findings, or parts of decisions.

(*Id* at p. 375-376, quoting, *Preserve Wild Santee v. City of Santee* ("*Preserve Wild Santee*") (2012) 210 Cal.App.4th 260, 288, emphasis added.) Relying on several other cases, *Golden Gate* concluded that trial courts retain broad equitable discretion to leave a project approval in effect (and to allow project activities to continue) notwithstanding the court's finding that the agency violated CEQA. (*Golden Gate*, *supra*, 215 Cal.App.4th at p. 374.)

The Court of Appeal also rejected Golden Gate's attempt to distinguish the other cases discussed in the Court of Appeal's opinion. The Golden Gate plaintiffs argued that the cases "deal with situations where the lack of CEQA compliance was partial or only affected one part of a project." (*Golden Gate*, *supra*, 215 Cal.App.4th at p. 374.) In ruling against the plaintiffs, the Court explained: "We reject Golden Gate's proposed distinction . . . ." (*Id.* at p. 375.)

Golden Gate discusses the legislative history of section 21168.9 and concludes that this too indicates that the Legislature did not intend to foreclose court's broad equitable discretion to fashion an appropriate remedy based on the facts and circumstances of each case. (*Golden Gate*, *supra*, 215 Cal.App.4th at p. 372, fn. 12.) Interpreting the original version of section 21168.9, the California Supreme Court held that courts retain broad equitable discretion to fashion an appropriate remedy in CEQA cases. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* ("*Laurel Heights I*") (1988) 47 Cal.3d 376, 422-424 [Authorizing construction and operation of university research facility notwithstanding CEQA violation].) *Golden Gate* concludes that the 1993 amendments expanded the trial court's discretionary authority:

> The 1993 amendments to section 21168.9 expanded the trial court's authority and 'expressly authorized the court to fashion a remedy that permits some part of the project to go forward while an agency seeks to remedy its CEQA violations. In other words, the issuance of a writ need not always halt all work on a project.'

(*Golden Gate*, *supra*, 215 Cal.App.4th at p. 372, quoting Remy et al., Guide to the Cal. Environmental Quality Act (10th ed. 1999).)

The cases decided after the 1993 amendment also conclude that trial courts have discretion to keep the agency approval in effect where the court found a CEQA violation. (*Preserve Wild Santee*, *supra*, 210 Cal.App.4th at p. 288; *POET LLC v. Cal. Air Resources Bd.* ("*POET*") (2013) 218 Cal.App.4th 681, 760-762; *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* ("*County Sanitation*") (2005) 127 Cal.App.4th 1544, 1605; *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960-961; *San Bernardino Valley Audubon Society v. Metropolitan Water Dist. of So. Cal.* (2001) 89 Cal.App.4th 1097, 1103-1105; *Californians for*

Alternatives to Toxics v. Dept. of Food and Agriculture ("*Californians for Alternatives to Toxics*") (2005) 136 Cal.App.4th 1, 22.)

Central Delta Appellants cite *Preserve Wild Santee*, *supra*, to claim that if portions of a project violate CEQA "in any way," and if the court does not make a severability finding, the "only proper remedy" is to void all project approvals. (AOB at p. 41.) *Preserve Wild Santee* says no such thing! In fact the Court stated: "we conclude the trial court correctly determined it had the authority under section 21168.9 to issue a limited writ." (*Preserve Wild Santee*, *supra*, 210 Cal.App.4th at p. 289.)[15]

In *Preserve Wild Santee*, the trial court initially issued a limited writ that did not vacate the project approvals. (*Preserve Wild Santee*, *supra*, 210 Cal.App.4th at p. 269.) On appeal plaintiffs contended that "whenever a trial court finds an EIR inadequate, the trial court must decertify the EIR and vacate all related project approvals." (*Id.* at p. 287.) Citing the text of section 21168.9, the Court of Appeal squarely rejected the argument concluding that "[s]uch a rigid requirement directly conflicts with the 'in part' language in section 21168.9, subdivision (a)(1) . . . [and] also conflicts with the language in section 21168.9, subdivision (b), limiting the court's mandates to only those necessary to achieve CEQA compliance" (*Id.* at p. 288.)[16]

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[15] The Court of Appeal ultimately did not reach the issue whether a limited writ was appropriate under the facts there because the trial court in subsequent proceedings had set aside the project approvals. (*Preserve Wild Santee*, *supra*, 210 Cal.App.4th at p. 290.)

[16] The court concluded that two earlier opinions refusing to allow for a limited writ were of limited value because they either did not discuss section 21168.9 in detail or in full. (*Preserve Wild Santee*, *supra*, 210 Cal.App.4th at p. 289, criticizing *Bakersfield Citizens for Local Control v.*

County Sanitation held that Kern County violated CEQA when it approved a biosolids ordinance. Following *Laurel Heights I*, the court held "a remedy less severe than immediately voiding the heightened treatments may be ordered if supported by equitable principles." (*County Sanitation*, *supra*, 127 Cal.App.4th at p. 1605.) The court concluded that in light of (1) the parties' concurrence, (2) the authority given courts by section 21168.9, and (3) equitable considerations, the ordinance would remain in effect. (*Ibid*.)

Despite finding an EIR regarding a pest control program to be "substantially flawed," in *Californians for Alternatives to Toxics* the Court declined to vacate the project approval or to order injunctive relief. (*Californians for Alternatives to Toxics*, *supra*, 136 Cal.App.4th at p. 22.) The Court remanded the case to the trial court to determine "appropriate relief pursuant to section 21168.9." (*Ibid.*)

Finally, in *POET* the Court found that the Air Resources Board violated CEQA by approving an air quality regulation before complying with CEQA, by improperly delegating CEQA compliance to the Air Resources Board's Executive Officer, and by deferring adoption of required mitigation measures. (*POET*, *supra*, 218 Cal.App.4th at pp. 725-726, 731, 740.) Nevertheless, the Court declined to vacate the air quality regulation or to enjoin the regulation. *POET* expressly affirmed the conclusion in *County Sanitation* that courts have discretion under section 21168.9 to preserve the status quo as reflected in the choice of the parties in a settlement agreement. (*POET*, *supra*, 218 Cal.App.4th at p. 763, fn. 56.)

As the Central Delta Appellants argue here, the plaintiffs in *POET* argued that CEQA required the Court to vacate the approval of the

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City of Bakersfield (2004) 124 Cal.App.4th 1184 and *LandValue 77*, *LLC v. Bd. of Trustees of Cal. State University* (2011) 193 Cal.App.4th 675.)

regulation because the Court could not make the severability findings in section 21168.9, subdivision (b). Indeed, the Court acknowledged that it could not separate the part of the regulation that complied with CEQA and the part that violated CEQA. (*POET*, *supra*, 218 Cal.App.4th at pp. 760-761.) Nevertheless, the Court did not vacate the Air Resources Board's approval of the regulation, concluding that courts retained the equitable discretion to keep project approvals in place – even in circumstances where the court could not make severability findings of section 21168.9, subdivision (b):

> Another question of statutory interpretation is whether section 21168.9, either expressly or impliedly, prohibits courts from allowing a regulation, ordinance or program to remain in effect pending CEQA compliance. We have found no express prohibition. In addition, we conclude that such a prohibition should not be implied because section 21168.9, subdivision (c) states that the equitable powers of the court are subject only to limitations expressly provided in section 21168.9. We interpret the reference in subdivision (c) to "equitable powers" to include "the court's inherent power to issue orders preserving the status quo." Thus, under section 21168.9, subdivision (c), courts retain the inherent equitable power to maintain the status quo pending statutory compliance, which permits them to allow a regulation, ordinance or program to remain in effect.

(*Id.* at p. 761 [citations omitted]; quoting *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 341.)

Thus, *POET* expressly rejects the Central Delta Appellants' claim that CEQA prohibits courts from issuing a limited writ unless the court makes the severability findings of section 21168.9, subdivision (b).

Consistent with the plain language of section 21168.9 and the above cases, the *PCL v. DWR* trial court exercised its discretion not to void the Monterey Amendments, the Land Transfer Agreement or the deed. The trial court did so based on (1) the Settlement Agreement which was the product of extensive mediated negotiations, (2) section 21168.9, and (3) equitable considerations.

As in *County Sanitation*, *Californians for Alternatives to Toxics* and *POET*, many equitable considerations supported the *PCL v. DWR* trial court's discretion to leave the contract authorizations in place for validation purposes. For example, the Settlement Agreement negotiated by the parties proposed that the Monterey Amendments, the Land Transfer Agreement and the deed remain valid and unrevoked. The Settlement Agreement provided substantial benefits for all parties and for the public. These benefits included millions of dollars for the Plumas watershed programs; *PCL* Plaintiffs' participation in the development of the 2010 EIR; removal of "entitlement" from the water supply contracts (the "Attachment A Amendments"); and restrictions on the Kern Water Bank lands including an agreement not to develop several hundred acres commercially. (RA11:2355-2359 [Kern Water Bank Parties Ex 34 to Time-Bar Trial Brief].)

In exchange for the above public benefits, the Settlement Agreement provided DWR, the Contractors, and the Authority with certainty regarding the validity of their contracts and title, and dismissal of the reverse validation cause of action. The considerations provided to the Contractors and the Authority, of course, also provide substantial public benefits including water supply reliability for the 23 million Californians served by the State Water Project. The *PCL* trial court's decision to issue a limited writ in 2003 is within the court's broad equitable discretion under section 21168.9 and the CEQA cases discussed above.

The 2003 Writ is also consistent with cases recognizing that in actions brought under the Validation Act (Code Civ. Proc., §§ 860 *et. seq*.) and another statute, courts should harmonize the statutes to achieve the fundamental legislative objective to promptly and finally resolve the validity of public agency decisions subject to validation. (See *Hills for Everyone v. Local Agency Formation Com. of Orange County* (1980) 105 Cal.App.3d 461, 466 [Harmonizing CEQA and Validation Act to conclude that "the validity of a completed municipal annexation . . . may be tested only by an in rem proceeding under the validating statute or by a quo warranto proceeding."].)

In accordance with the Settlement Agreement, the *PCL* trial court dismissed the reverse validation cause of action. (AA21:5019-5021 [Ex. 38].) Thus, the *PCL* trial court was within its discretion to harmonize the CEQA remedy reflected in the 2003 Writ with the dismissal of the Validation Act challenge to the validity of the Monterey Amendments and the Land Transfer Agreement.

In summary, the CEQA cases confirm the "reasonable, commonsense reading of section 21168.9" that courts retain broad equitable discretion to frame a CEQA remedy; including keeping all project approvals in effect. The 2003 Writ was well within the *PCL* trial court's discretion.

(3) None of the Cases Cited by Central Delta Impose a "Default" CEQA Remedy.

Ignoring the controlling authority of the cases discussed above, Central Delta Appellants argue that CEQA imposes on the trial court a "default" remedy to revoke the agency approval. There is no "default" remedy in the text of section 21168.9. No reported decision refers to a "default" remedy.

The cases relied upon by the Central Delta Appellants to support their argument do not conclude that CEQA imposes a default or a "one size fits all" remedy. Rather, the cases cited by the Central Delta Appellants stand for the unremarkable proposition that, under section 21168.9 and equitable principles, a court has discretion to void agency approvals of a project where the agency did not comply with CEQA.

Kern Water Bank Parties have never argued that CEQA precludes a trial court from exercising its discretion to void project approvals. Section 21168.9, subdivision (a)(1), clearly leaves discretion to the trial court to void agency approvals as one of several available remedies. Rather, Kern Water Bank Parties assert that the trial court in *PCL v. DWR* clearly ***did not*** void the authorization of the Monterey Amendments, the Land Transfer Agreement or title to the Kern Fan Element Lands.

In *Save Tara v. City of West Hollywood* ("*Save Tara*") (2008) 45 Cal.4th 116, cited by the Central Delta Appellants, the Supreme Court held that a city's approval of a "conditional agreement" with a low-income housing developer constituted a project "approval" under CEQA and thus required CEQA compliance. *Save Tara* simply stands for the proposition that an agency may not approve a project with significant effects on the environment without first complying with CEQA. Nothing in *Save Tara* addresses the trial court's discretion to fashion a remedy pursuant to section 21168.9 and the court's inherent equitable powers. The issue was simply not before the *Save Tara* court.

There is also an obvious distinction between the facts in *Save Tara* and the facts here. In *Save Tara,* the city approved the housing project without first preparing any CEQA document. (*Save Tara*, *supra*, 45 Cal.4th at pp. 123-124.) Here, an agency prepared an EIR although the court subsequently ordered preparation of a remedial EIR after the Settlement Agreement. In the other cases relied upon by Central Delta

Appellants, the courts simply elected to exercise their discretion under section 21168.9(a)(1) to void the agencies' project approvals under the particular facts and circumstances in each case.

Kern Water Bank Parties' argument does not conflict with the CEQA principle that a project approval should follow EIR certification. Kern Water Bank Parties do not argue that the existence of legally valid contracts precluded DWR from exercising whatever discretion it had to make a project decision after certification of the 2010 EIR. Pursuant to the Settlement Agreement and the 2003 Writ and 2003 Order, DWR retained the discretion, for example, to adopt appropriate feasible mitigation measures applicable to the operation of the SWP. In fact, DWR adopted such mitigation measures. (AR22:10935-10960.) Contrary to Central Delta Appellants' argument, the *PCL v. DWR* trial court's decision to keep the Monterey Amendments and Land Transfer Agreement in effect did not render DWR's 2010 EIR a meaningless paper-pushing exercise.

CEQA requires state agencies to prepare and certify an EIR "which they propose to carry out." (Pub. Resources Code, § 21100, subd. (a).) DWR did just that with the preparation and certification of the 2010 EIR – precisely as directed in the 2003 Writ.

c) The Monterey Amendments and Land Transfer Agreement Were Not "Reenacted" Within the Meaning of *Barratt American*.

Finally, Central Delta Appellants make a so-called "reenactment" rule argument under *Barratt American, Inc.*, *supra*, 37 Cal.4th 685, 704. Central Delta Appellants' argument appears to be that the circa 1995 Monterey Amendments were reenacted and reauthorized by DWR's conditional approval of the interim Attachment A Amendments in 2003, and (so the argument goes) the statute of limitations to challenge the

validity of all contracts did not begin to run until the Attachment A Amendments became final. (AOB at pp. 65, 71-75.)

As an initial matter, the Court should reject this argument because the Central Delta Appellants presented no such theory to the trial court below. (See AA28:7019-7063, 31:7843-7910, 32:8182-8210 [Central Delta Appellants' trial brief and reply brief].) The Central Delta Appellants are precluded from raising this new theory now. (*Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1519.)

Moreover, Central Delta Appellants' argument is based on a factually flawed premise. The argument assumes, in error, that the Attachment A Amendments amended and/or restated the Monterey Amendments, and that the finality or validity of the Monterey Amendments depends on the finality or validity of the Attachment A Amendments. Rather, the Attachment A Amendments amended the Contractors' water supply contracts (not the Monterey Amendments) "for clarification purposes" and added a new Article 58 to those contracts; matters not amended by the Monterey Amendments. (AA21:5006-5014.) While the "Attachment A Amendments" do not become binding on the Contractors until, among other things, conclusion of all litigation challenging the Monterey Amendments – an express condition of the Settlement Agreement (AA20:4954-4955 [¶ VII.B].) – there is no such condition on the Monterey Amendments.

In any event, the argument has no merit. First, *Barratt American, Inc.* involved an express reenactment of an ordinance, building fees, which could therefore be challenged at the time of reenactment. (*Barratt Am., Inc.*, *supra*, 37 Cal.4th at pp. 703-704.) The validation procedure applied because Government Code section 66022, subd. (a), allows validation of an ordinance "adopting a new fee or service charge, or modifying or amending an existing fee or service charge." In contrast, the statute under which

Central Delta Appellants seek reverse valuation in this case, Government Code section 17700, subd. (a), does not contain the same language of "modifying or amending," upon which the *Barratt American, Inc.* Court relied. And even if it did, the statute would not matter because the Monterey Amendments were neither modified nor amended.

The local agency in *Barratt American, Inc.* took action to extend the "duration" of the fee which it had a continuing duty to only impose to the extent it did not exceed the estimated reasonable costs of providing the services for which the fees are charged. (*Ibid.*) Unlike the situation in *Barratt American, Inc.*, authorization of the Attachment A Amendments did not restate, change or extend the duration of the Monterey Amendments and DWR has no such continuing duty of accounting. Therefore, the concern in *Barratt American, Inc.* – that "there would be no effective enforcement mechanism to ensure that local agencies are complying with their [continuing] duty to reduce the fees if revenues exceed actual costs" – is not present here. (*Ibid.*)

Central Delta Appellants acknowledge this discrepancy in their theory, but suggest the Court should ignore it because the situations are somewhat similar. (AOB at p. 73.) There is no similarity between this case and *Barratt American, Inc.* To begin, the Monterey Amendments and Land Transfer Agreements are not ordinances and statutes subject to the reenactment rule, but, instead, are contracts. Importantly, the evidence summarized earlier does not support the claim that the Settlement Agreement provided that all the matters subject to the validation action would be deemed reenacted or reauthorized when the Attachment A Amendments were adopted in 2003. Substantial evidence supports the trial court's finding that the parties did not intend to and did not "reenact" or "reauthorize" the Monterey Amendments.

That is especially clear because the Land Transfer Agreement was consummated by deeds, first to Kern County Water Agency and then to the Authority. (RA1:146-186 [Ex. 4] [Deed executing Land Transfer Agreement from DWR to Kern County Water Agency]; RA5:1089-1127 [Ex. 3001] [Deed Transferring Land from Kern County Water Agency to the Authority].) Were Central Delta Appellants' theory correct, they would have to say that title had not vested in the Authority. Yet documents at the time of the Settlement Agreement expressly stated that the Authority had good title to the Kern Water Bank lands. (AA20:4948 ["[The Authority] shall retain title to the [Kern Water Bank] Lands."].)

Finally, if Central Delta Appellants' "reenactment" theory were correct, then DWR and the Contractors would face the absurdity of potential new validation actions challenging their water supply contracts, including prior amendments, with every new amendment. This is flatly inconsistent with the intention of the Validation Act – to provide a short 60-day period to challenge public agency actions and provide certainty as to their validity for the benefit of bondholders and others. Under the Central Delta Appellants' reasoning, the validity of the original State Water Project delivery contracts could be challenged every time any portion of the contracts are amended notwithstanding that the California Supreme Court validated the contract over 50 years ago. (*Metropolitan Water Dist. of So. Cal. v. Marquardt* (1963) 59 Cal.2d 159, 170.) The statewide implications of such a result are breathtaking.

d) Central Delta Appellants' Arguments Are Barred As A Collateral Attack On A Final Judgment.

In making the above arguments, the Central Delta Appellants argue that the 2003 Writ and 2003 Order issued by the trial court in *PCL v. DWR* exceeded the Superior Court's jurisdiction. Central Delta Appellants ask

this Court to re-write the 2003 Writ and 2003 Order to say something that they plainly do not. The erroneous nature of this argument is discussed immediately above, but the argument is also barred as an invalid collateral attack on the *PCL v. DWR* court's judgment. A judgment in excess of jurisdiction is considered "voidable" and cannot be collaterally attacked in this action. (*County of Los Angeles v. Harco Nat. Ins. Co.* (2006) 144 Cal.App.4th 656, 661-662.)

4) The Third Cause of Action, for Writ of Mandate, Is Barred By the Same Statutes of Limitation.

The third cause of action is time-barred for the same reasons as the second reverse validation cause of action -- even though styled as a "mandate" action. (*Commerce Casino*, *supra*, 146 Cal.App.4th at pp. 1414-1416 [Three constitutionally based legal theories pled in causes of action styled as writ of mandate, declaratory and injunctive relief, should have been raised in action and were barred by 60-day reverse validation statute of limitations].) The nature of the governmental action being challenged rather than the basis for the challenge is what determines the applicable procedure. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22-23; *Hills for Everyone v. LAFCO* (1980) 105 Cal.App.3d 461, 468.)

Nor did Central Delta Appellants gain anything by adding a demand in their prayer for constructive trust or injunctive relief. These are not substantive rights, but rather remedies. An action seeking to establish a constructive trust is subject to the limitation period of the underlying substantive right. (*Embarcadero Mun. Improvement Dist. v. County of Santa Barbara* (2001) 88 Cal.App.4th 781, 793.) The same is true of a request for injunctive relief. (*Commerce Casino*, *supra*, 146 Cal.App.4th pp. 1414-1416.)

C. The Reverse Validation Claims are Barred by the Final Validating Act of 2003.

A less familiar group of uncodified statutes called the "validating acts," specifically the Final Validating Act of 2003 (hereafter "2003 Act"), provides additional reasons as to why both title to the property and the Monterey Amendments are deemed valid because a statute of limitations has expired. (RA10:2323-2330 [Ex. 3029]; Stats. 2003, ch. 295, § 8.)

In a practice dating back more than 50 years, the California Legislature typically passes three annual validating acts that retroactively cure the legal deficiencies of public agencies' actions. The text of the acts is similar year-to-year. Such legislation protects public lenders and private investors from the chance that an error or legal omission may undermine the integrity of a public bond or other public action. They also protect public credit ratings, thereby reducing borrowing costs and saving taxpayers money. (Stats. 2003, ch. 295, § 8 ; Lee, *Curing Bond Errors and Saving Taxpayers Money* (2008) 39 McGeorge L. Rev. 477, 479-480.) Although a number of the acts could be applicable here, as each validates anything taking place "heretofore," not just during the prior legislative session, trial focused on the 2003 Act. (Stats. 2003, ch. 295, § 8; RA10:2323-2330 [Ex. 3029].)

The 2003 Act provides that, in addition to any other applicable statutes of limitations and laches, all suits challenging public agency actions within the scope of that act must be brought within six months of the act's effective date. (Stats. 2003, ch. 295, § 8.) The 2003 Act covers essentially all of the state's public bodies, including DWR, the Kern County Water Agency, and the Authority. (*Id*., § 2, subd. (a).)

One provision cures the legal defects of any public agency action that the legislature could have authorized before the action was taken. (*Id*., § 7, subd. (a).) Importantly here, it also validates all public bonds, as well

as all public acts and proceedings "for, or in connection with, the authorization, issuance, sale, execution, delivery, or exchange of bonds[.]" (*Id*., § 6.) The term "bonds" is defined broadly to include "all instruments evidencing an indebtedness of a public body" for any public purpose, including all instruments evidencing the borrowing of money in anticipation of taxes, revenues, or other income, and "all instruments funding, refunding, replacing, or amending any thereof of any indebtedness." (*Id*., § 2, subd. (b).) This means the 2003 Act validates not just bonds, but also other interconnected public actions that make the issuance and repayment of the bonds possible. (See, e.g., *Aughenbaugh v. Bd. of Supervisors of Tuolumne County* (1983) 139 Cal.App.3d 83 [holding that validating act cured legal deficiencies of municipal bonds, and also cured the legal deficiencies of a water charge that exceeded the statutory limit, because the water charge provided the repayment source for the bonds].)

Because the 2003 Act applies to both bonds and other interconnected public actions to make the issuance and repayment of bonds possible, it applies not only to the bonds issued by the Authority in reliance on the Monterey Amendments and Land Transfer Agreement, but also to the other actions taken to make repayment of those bonds possible. This means that the Central Delta Appellants' challenge to the Monterey Amendments and the Land Transfer Agreement had to be brought, at the latest, within six months of the enactment of the 2003 Act. Further, all of the acts taken by the Authority in reliance upon the Monterey Amendments and the Land Transfer Agreement were beyond challenge six months after they were taken.

In November 2003, the Authority issued bonds to finance the past and future development of Kern Water Bank facilities. (AA28:6838 [Parker Decl., ¶ 43].) The land transfer was an integral part of these bonds,

their repayment scheme, and their purpose. The Authority's payment obligation associated with the bonds' issuance is secured by a deed of trust on the land. (*Ibid.*) Thus the land transfer and deed, as well as the bonds, were a subject of the 2003 Act.

The 2003 Act has a six-month statute of limitations. "Any action or proceeding contesting the validity of any action or proceeding heretofore taken under any law, or under color of any law, [that falls within the scope of the validating act] . . . not effectively validated by the prior provisions of this act and not otherwise barred by any statute of limitations or by laches shall be commenced within six months of the effective date of this act; otherwise each and all of these matters shall be held to be valid and in every respect legal and incontestable." (RA10:2323-2330 [Ex. 3029], § 8; *Las Tunas Beach Geologic Hazard Abatement Dist. v. Superior Court* (*Malibu*) (1995) 38 Cal.App.4th 1002, 1015 [holding suits challenging actions covered by a validating act must be brought within six months of the validating act's effective date].)

The 2003 Act went into effect on January 1, 2004. (AA21:5019-5023 [Ex. 3029], § 8.) Therefore, any suit was required to be filed by July 1, 2004. Central Delta Appellants filed their suit on June 4, 2010, nearly ***six years*** later. Accordingly, the suit is barred by the 2003 Act.

The 2003 Act did exclude from its scope any matters that were the subject of immediately pending litigation when the act went into effect, and for 30 days after. (RA10:2323-2330 [Ex. 3029], § 7, subd. (c).) However, that exclusion does not apply here. An action is deemed commenced when the complaint is filed, and is deemed pending until "its final determination." (*Peter v. Bd. of Supervisors* (1947) 78 Cal.App.2d 515, 521, citing Code Civ. Proc., § 1049.) Pursuant to the Settlement Agreement, the court dismissed the *PCL* reverse validation cause of action in November 2003. (RA1:281-286 [Ex. 8] [Request for Dismissal of Fifth

Cause of Action and Order of Dismissal, entered November 12, 2003].) Thus, when the 2003 Act went into effect on January 1, 2004, no litigation challenging title to the Kern Water Bank lands was pending and, therefore, that exception was not applicable.

The land transfer occurred in August 1996, and was reflected on the Kern County Assessor's maps and on the tax rolls. (RA10:2340-2343; 11:2361-2472 [Exs. 3031, 3036-3039]; AA28:6933 [Zuiderveld Decl., ¶ 10].) The transfer would not have been validated by the validating acts that the Legislature passed between 1995 and 2003, because the *PCL* validation action would have constituted pending litigation. However, once *PCL* was dismissed as to the validation cause of action, the land transfer was validated by the next validating act that went into effect, the 2003 Act (and by every validating act thereafter until 2010). (*People ex rel. Desert Hot Springs County Water Dist. v. Coachella Valley County Water Dist.* (1965) 232 Cal.App.2d 685, 694 [A validating act's pending-litigation exclusion only applied to matters that are being contested before a court having the power to render a final judgment decreeing the (in)validity of the public agency action].)

The Central Delta Appellants do not challenge the applicability of the 2003 Act to these transactions on appeal, other than to make the same argument as they did for the statutes of limitations and laches – that the agreements did not go into force until 2010 after the return to the 2003 Writ. The reasons Central Delta Appellants' argument is erroneous are discussed *supra*, and apply with equal force here.

D. Substantial Evidence Supports the Trial Court Determination that the Second and Third Causes of Action Are Barred by Laches.

1) The Defense of Laches.

Laches is a defense to the "claims" of a plaintiff. (*Transwestern Pipeline Co. v. Monsanto Co.* (1996) 46 Cal.App.4th 502, 520.) Here the claims are those reflected in the second and third causes of action of the Amended Complaint, which are that the land transfer and the Monterey Amendments are invalid. "The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." (*Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4th 1245, 1267-1268, citing *Conti v. Bd. of Civil Service Comrs.* (1969) 1 Cal.3d 351, 359 [laches applied against plaintiff in CEQA action]; *Johnson v. City of Loma Linda* (*"Johnson"*) (2000) 24 Cal.4th 61, 67.) When such factors are present, it becomes inequitable to afford the relief requested. (*Schellinger Brothers v. City of Sebastopol*, *supra*, 179 Cal.App.4th at pp. 1267-1268.) In this case both acquiescence and prejudice to the Respondents are present, as are the other elements of a laches defense.

2) Standard of Review Regarding Laches.

"Generally, a trial court's laches ruling will be sustained on appeal if there is substantial evidence to support the ruling." (*Johnson*, *supra*, 24 Cal.4th at p. 67.) A subsequent Court of Appeal case harmonized two lines of authority, recognizing that prior to *Johnson* some cases applied an abuse of discretion standard, but stated "there are circumstances" where the substantial evidence standard should apply, such as "[i]n cases such as this, where the finding of laches is made after trial, the proper appellate focus is the evidence in support of the finding." (*Bono v. Clark* (2002) 103

Cal.App.4th 1409, 1417.) That is exactly the situation here; abundant evidence was adduced demonstrating laches, while the Central Delta Appellants submitted ***none*** in response.

3) Laches is Applicable to All Aspects of the Second and Third Causes of Action.

Laches is applicable where equitable relief is sought. (*Brown v. State Personnel Bd.* (1985) 166 Cal.App.3d 1151, 1158.) With respect to both the second and third cause of action, Central Delta Appellants seek only equitable relief: a writ of mandate (AA21:5177-5178 [Amended Complaint, Ex. 42, Prayer, ¶ 1, AA21:5177 and ¶ 5, AA21:5178); injunctions (*id*. at ¶ 2); declaratory relief with respect to the invalidity of agreements (*id*. at ¶¶ 3-4, AA21:5177); and imposition of constructive trust (*id*. at ¶ 6]). Laches is a proper defense with respect to each of those types of relief. (*San Bernardino Audubon Society v. City of Moreno Valley* (1996) 44 Cal.App.4th 593, 605 [writ of mandate]; *Vesper v. Forest Lawn Cemetery Assn.* (1937) 20 Cal.App.2d 157, 165-166 [injunctive relief]; *Golden v. City of Oakland* (1975) 49 Cal.App.3d 284, 293 [declaratory relief]; *Martin v. Kehl* (1983) 145 Cal.App.3d 228, 241 [constructive trust].)

4) Laches is Available Even When a Statute of Limitations Has Not Run.

Central Delta Appellants seek to ignore the laches defense in one short paragraph on page 76 of their Amended Opening Brief, arguing that "this action challenges contract amendments that were authorized in 2010 and . . . [Central Delta Appellants'] validation and mandamus actions are not time-barred or barred by laches." (AOB at p. 76.) That is, Central Delta Appellants repeat their erroneous theory that the statute of limitations

did not begin to run until 2010, implying that the period for consideration of laches did not begin to run until then.

Whether the statute of limitations has run is irrelevant. Numerous cases hold that even where no statute of limitations has run, laches is still available as an affirmative defense. (*Holt v. County of Monterey* (1982) 128 Cal.App.3d 797, 801 ["Where the unjustified delay has operated to the injury of another, as here, the defense of laches may be successfully invoked even though the lapse of time is less than the applicable period of limitations."]; *People v. Dept. of Housing & Community Development* (1975) 45 Cal.App.3d 185, 195 ["Laches may apply independently of any statute of limitations."]; *Martin v. Kehl*, *supra*, 145 Cal.App.3d at p. 241 ["We recognize that laches may bar relief in equity irrespective of whether the statute of limitations has run on the action at law. (See 7 Witkin, Summary of Cal. Law [(8th ed. 1974)] Equity § 14, p. 5239.)"]; *Smith v. Sheffey* (1952) 113 Cal.App.2d 741, 744 ["[T]he statute of limitations does not control equity in applying the principle of laches . . . ."].)

The concept is especially apt in this case. The transactions challenged in the second and third causes of action, the Monterey Amendments and the Authority's acquisition of the Kern Fan Element Lands, occurred in 1995 and 1996. The Central Delta Appellants could have challenged their validity at that time. Indeed, that is what the *PCL* Plaintiffs did in ***1995***.

Then in 2003, the Settlement Agreement and the Superior Court's entry of orders facilitating the Settlement Agreement resolved any doubt in anyone's mind as to the validity of the Monterey Amendments and the land transfer. Central Delta Appellants did not seek to challenge the validity of the Monterey Amendments or the Land Transfer Agreement at that time either. Rather, the Central Delta Appellants waited until 2010, ***14 years after when they first could have filed their lawsuit***. In the interim, both

between 1996 and 2003, and especially after 2003, Respondents and other members of the public relied extensively on the Kern Water Bank, and then on the affirmance of the underlying transactions' validity in 2003, as detailed in the "Underlying Facts" section above. The trial court determination of laches is supported by substantial evidence.

Also, if an appellant fails to support a point with reasonable argument, the Court may treat the argument as waived. (*Salas v. Cal. Dept. of Transportation* ("*Salas*") (2011) 198 Cal.App.4th 1058, 1074.) As Central Delta Appellants have cited no authority, and virtually no argument, in support of their opposition to the application of the defense of laches by the trial court, their argument is deemed waived, and the trial court's decision should be affirmed for that reason as well.

5) The Elements of Laches Were Established.

The Central Delta Appellants submitted ***no evidence*** below challenging the proof of the elements of laches, and they cite to none in their Amended Opening Brief. For that reason alone, the judgment should be affirmed. (*Salas*, *supra*, 198 Cal.App.4th at p. 1074.) In any event, as established by the factual exposition above, there was abundant evidence of all elements of laches to satisfy the substantial evidence test and to support the trial court's decision.

As to the element of unreasonable delay, laches is fundamentally a factual inquiry. (*San Bernardino*, *supra*, 44 Cal.App.4th at p. 605.) The unreasonableness of the delay is a matter of discretion for the trial court. (*Lewis v. Superior Court of Los Angeles County* (1968) 261 Cal.App.2d 736, 740.) There is no specific number of days, months, or years that necessarily result in an application of laches, but rather each situation must be judged on its own merits. (*Ibid.*) There was substantial evidence to

support the unreasonableness of the delay; this is especially true in view of the fact that the Central Delta Appellants submitted no counter evidence.

Laches requires either prejudice to the defendants or acquiescence in the act about which plaintiff complains. (*Schellinger*, *supra*, 179 Cal.App.4th at pp. 1267-1268; *Conti*, *supra*, 1 Cal.3d at p. 359.) There was substantial evidence that both elements are present in this case. Central Delta Appellants acquiesced by doing nothing for 14 years, and also by doing nothing for 6 years after the Settlement Agreement. Central Delta Appellants cannot claim they knew nothing about the factual circumstances. Knowledge can be shown by constructive knowledge. (*Garstang v. Skinner* (1913) 165 Cal. 721, 727.) Constructive knowledge is knowledge of circumstances that would have put a prudent person upon inquiry. (Civ. Code, § 19.) As a matter of law, they were deemed to have been sued in the *PCL* action, as that *in rem* case was against all persons interested and given notice by proper publication of summons. (RA1:268-274 [Ex. 7] [Verification of Publication of *PCL* litigation Summons Pursuant to Code of Civil Procedure sections 861.1 and 863]; Code Civ. Proc., § 861.)

In any event, the Central Delta Appellants had actual knowledge of the Monterey Amendments. The individual who verified the complaint on behalf of Appellant California Water Information Network ("C-WIN") is Ms. Carolee Krieger. (RA2:514 [Ex. 18, p. 30].) C-WIN admits Ms. Krieger was aware of the Monterey Amendments in 1995, quoting her as saying: "*In 1995 I held a meeting in my carport because I had just gotten a copy of the proposed Monterey Amendments to the State Water Project and was publicizing how bad these amendments to the state's water contracts were, and how expensive SWP water would be for Santa Barbara County.*" (RA10:2347-2350 [Request for Judicial Notice ("RJN"), Ex. 3033], citing C-WIN's website at http://www.c-win.org/carolee-

krieger-remembers-dorothy-green.html [italics in original].) Other evidence further established that fact, and that at least one other Appellant had similar early knowledge. (RA10:2340-2343, 2344-2346; RA11:2355-2359, 2360 [RJN, Ex. 3031, 3032, 3034, 3035].)

Respondents may demonstrate prejudice from the delay, in order to meet that element of the laches defense. (*In re Marriage of Fellows* (2006) 39 Cal.4th 179, 183.) Not only is prejudice an issue for Respondents, it was for other members of the general public. A party has been prejudiced if the party changes its position in a way that would not have occurred if the plaintiffs had not delayed. (*Magic Kitchen LLC v. Good Things Internat. Ltd.* (2007) 153 Cal.App.4th 1144, 1161.) A classic example is the expenditure of money for improvements. (*Bresnahan v. City of Pasadena* (1975) 48 Cal.App.3d 297, 305 [improvements by lessee].) The Central Delta Appellants stood by watching and waiting for 14 years after the deed was recorded, and six years after the Settlement Agreement, while the Authority's members invested tens of millions of dollars in the development, construction and operation of the Kern Water Bank; gave up at least $45 million in water entitlements; spent more than $40 million on capital improvements; and incurred bond and other financial obligations of more than $32 million of which about $20 million was outstanding at time of trial. (AA28:6835, 6841, 6905.)

In sum, there was abundant evidence presented below of the elements of laches, evidence that was not refuted at all by the Central Delta Appellants. The evidence meets the substantial evidence standard.

E. The Action is Also Barred by Mootness.

Alternatively, the Court might view these time-bar issues as issues of mootness. Affirmance is correct on any theory, not just the trial court's

reasons. (*Muller v. Fresno Community Hospital & Medical Center* (2009) 172 Cal.App.4th 887, 906-907.)

A case may be deemed moot when the passage of time or acts of the parties have deprived the action of life. (1 Schwing, California Affirmative Defenses (2011 Ed.) § 22:2, p 1360.) A court evaluating the question of mootness is not required to take the case as a whole, but may conclude that some issues presented are moot while others are still active. (See, e.g., *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1541.) The key question in determining whether a case is moot is whether the court can effectively award the relief sought. (*Wilson & Wilson v. City Council of Redwood City* ("*Wilson*") (2011) 191 Cal.App.4th 1559, 1574.) If events have rendered the court unable to award effective relief, the controversy is moot and dismissal is proper. (*Wilson*, *supra*, 191 Cal.App.4th at p. 1586.)

That is the situation here. As the trial court recognized, so many things have happened here that it would be impossible for a court to unravel. Many of the things that have happened are permanent or irreversible. After 15 years, 45,000 acre feet of water entitlement has been relinquished; the Kern Water Bank has been built and substantial amounts of water stored; transfers of water entitlement have been made; money has been spent and borrowed; the environment has been improved; and agreements have been made. ***The Kern Water Bank has become integral to the management of the water resources of the State and protection against drought***. (AA28:6849, 6856 [Sunding Decl. at ¶¶ 18, 31-32].) Generally speaking then, the same laches issues can be viewed in light of the mootness affirmative defense. As a practical issue, the events contemplated by the Monterey Amendments have happened.

There is an even more specific application of mootness. The completion of and payment for public works projects by public agencies, or

the issuance and sale of bonds for a public works project, moots any challenge to the agency decision that authorized the work, or to any contracts issued under such authorization. (See *Crangle v. City Council of the City of Crescent City* ("*Crangle*") (1933) 219 Cal. 239; *Jennings v. Strathmore Public Utility Dist.* ("*Jennings*") (1951) 102 Cal.App.2d 548.)

The plaintiff in *Crangle* sought to cancel and set aside a resolution adopted by the defendant City Council awarding a contract for street improvements pursuant to the Acquisition and Improvement Act of 1925. (*Crangle*, *supra*, 219 Cal. at p. 240.) But subsequent to the filing of the suit, and before the matter was appealed to the California Supreme Court, the work under the contract was completed, the contractor was paid in full through bonds issued under the Improvement Act, and the bonds were in the hands of innocent purchasers not party to the proceeding. (*Id.* at p. 241.) Further, the Improvement Act provided that all bonds issued pursuant thereto were, by their issuance, "conclusive evidence of the regularity, validity and legal sufficiency of all proceedings . . . in any wise pertaining thereto," and no action could thereafter be maintained to set the bonds aside, or to prevent the payment thereof. (*Ibid.*) The effect of this statutory provision was to preclude effective relief on the plaintiff's claims:

> Should it be finally determined that the resolution awarding said contract was invalid and should be canceled and annulled, such an adjudication would not in any way wipe out the improvement already completed, nor would it invalidate the bonds issued in payment of said improvements. The bonds would continue to be a valid lien upon all property in said district, including that claimed by the plaintiff, and the owner thereof would be subject to assessment to pay his proportion of said bonded indebtedness.

(*Id.* at pp. 241-242.) The court therefore found that plaintiff's challenges to the City Council's decision had become moot. (*Id.* at p. 242.)

The *Crangle* court dealt with the Acquisition and Improvement Act of 1925, and not the validation statutes found at Code of Civil Procedure §§ 860, *et seq*. However, in the absence of an agency-initiated validation proceeding and a timely "interested person"-initiated reverse validation proceeding, the effect of the validation statutes is precisely the same as the Acquisition and Improvement Act provision discussed in *Crangle*: the agency action becomes immune from attack whether it is legally valid or not. (*Commerce Casino*, *supra*, 146 Cal.App.4th at p. 1420, citing *City of Ontario v. Superior Court* (1970) 2 Cal.3d 335, 341-342; *Friedland v. City of Long Beach*, *supra*, 62 Cal.App.4th at p. 851 [other citations omitted].)

Once the deed was recorded, challenges to the Land Transfer Agreement and the Monterey Amendments, to the extent they set the land transfer in motion, became moot. (*Rams Gate Winery LLC v. Roche* (2015) 235 Cal.App.4th 1071, 1079 [recognizing that it is a principle of California law that "where a deed is executed in pursuance of a contract for sale of land, all prior proposals and stipulations are merged, and the deed is deemed to express the final and entire contract between the parties."].)

VI. THE JUDGMENT WITH RESPECT TO THE CEQA CLAIMS REJECTED BY THE TRIAL COURT SHOULD BE AFFIRMED.

The Central Delta Appellants raised numerous claims below that the 2010 EIR violated CEQA. The trial court decided against them with respect to all but one of the claims. The trial court's judgment in that respect is supported by substantial evidence and should be affirmed. To avoid repetition, the Kern Water Bank Parties join in the arguments submitted by DWR and the State Water Contractors in their Respondents' Briefs.

VII. CROSS-APPEAL: THE CHALLENGE TO THE 2010 EIR IS BARRED BY RES JUDICATA; AND CENTRAL DELTA APPELLANTS LACK OF STANDING TO BRING THIS LAWSUIT.

A. Introduction and Summary.

After 14 years of litigating CEQA compliance regarding the Monterey Amendments, the Superior Court entered its August 27, 2010 judgment in the *PCL* lawsuit that the second EIR – the 2010 EIR – complied with CEQA. (AA21:5187.) No appeal was taken from the Superior Court judgment. The judgment is now final and no longer appealable.

Ignoring that judgment, the Central Delta Appellants filed this new litigation challenging the adequacy of the 2010 EIR under CEQA. However, the doctrine of res judicata (or claim preclusion) bars this challenge to the 2010 EIR.

The Kern Water Bank Parties raised the issue by way of motion for a judgment on the pleadings, which the court denied, and reasserted the res judicata defense at trial. The Superior Court below characterized the res judicata issue as a "close question," but nevertheless ruled that the 2010 CEQA judgment did not bar Central Delta Appellants' new CEQA lawsuit. Relying on *Planning and Conservation League v. Castaic Lake Water Agency* ("*Castaic Lake*") (2009) 180 Cal.App.4th 210, the Superior Court reasoned that the original 1995 CEQA lawsuit (resulting in a writ of mandate requiring the preparation of the 2010 EIR), and Central Delta Appellants' 2010 CEQA lawsuit are different "causes of action," and thus constitute two "primary rights." (RA5:1063 [10/12/11 MJP Ruling at p. 6].)

The Superior Court's ruling is in error as a matter of law. *Castaic Lake* is in conflict with California Supreme Court cases applying the long-standing "primary right" doctrine and rejecting the "transactional approach"

to res judicata (exactly the approach that the trial court applied). (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795; *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 909, fn. 13.)

Castaic Lake is also in conflict with several decisions of this Court holding that a final judgment adjudicating an EIR's compliance with CEQA bars subsequent CEQA challenges to the EIR. (*Federation of Hillside Canyon Assn. v. City of Los Angeles* ("*Federation of Hillside Canyon*") (2004) 126 Cal.App.4th 1180, 1202-1206 [Second CEQA lawsuit barred by judgment in first CEQA lawsuit]; *Ballona Wetlands Land Trust v. City of Los Angeles* ("*Ballona Wetlands*") (2011) 201 Cal.App.4th 455, 481 [Challenges in second CEQA lawsuit that "could have been asserted before the entry of judgment in the prior proceeding" are barred]; *Silverado Modjeska Recreation and Park Dist. v. County of Orange* ("*Silverado Modjeska*") (2011) 197 Cal.App.4th 282, 297-301 [Second CEQA lawsuit barred by discharge of writ in first CEQA lawsuit]; *Citizens for Open Gov. v. City of Lodi* ("*Lodi*") (2012) 205 Cal.App.4th 296, 324-328 [Second CEQA challenge to issues adjudicated in first challenge barred].)

The Superior Court below concluded that the plaintiffs in both the *PCL* and this lawsuit pursued their lawsuits on behalf of the public and thus demonstrated a "common interest in the enforcement of CEQA." (RA5:1066 [10/12/11 Ruling on MJP at p. 9].) Once again relying on *Castaic Lake*, the Superior Court nevertheless concluded that the plaintiffs in the two CEQA lawsuits were not in privity because the *PCL* Plaintiffs consented to discharge of the writ of mandate and did not file a second lawsuit. (RA5:1067 [11/12/11 Ruling on MJP at p. 10].)

The Superior Court's reasoning inevitably will result in perpetual CEQA litigation over an agency's compliance with CEQA. Indeed, the reasoning of the court below would allow a CEQA petitioner in the first lawsuit to consent to the discharge of the CEQA writ, and then turn around

and file a second CEQA lawsuit. This is not the law. (*Silverado Modjeska*, *supra*, 197 Cal.App.4th at 297-301.)

Agencies throughout the state will be faced with the prospect of entering into a settlement agreement with one set of CEQA plaintiffs representing the public; participating in years of collaboration with the plaintiffs on the remedial EIR; and having the CEQA plaintiffs consent to the discharge of the writ and entry of final judgment that the agency complied with CEQA -- only to then have a "new" set of CEQA plaintiffs begin the CEQA litigation anew.

B. Jurisdiction Over Cross-Appeal.

This Court has jurisdiction over the cross-appeal regarding the trial court's denial of the pre-trial motion. (Code Civ. Proc., § 906; see *Oskooi v. Fountain Valley Regional Hospital* (1996) 42 Cal.App.4th 233, 237.) The court also has jurisdiction to consider the issue as an additional reason to affirm the judgment below. (Code Civ. Proc., § 906; Eisenberg, Civil Appeals and Writs, Exception – limited review to determine prejudicial error against appellant ¶ 8:196, p. 8-155 ["This statutory exception is intended to permit respondents to assert a legal theory that may result in affirmance notwithstanding appellant's contentions."].) The matter was raised by way of cross-appeal as a protective cross-appeal in the event the Court should deem it necessary.

C. Statement of Facts.

This Statement of Facts focuses on the facts relevant to the res judicata and standing issues in the Kern Water Bank Parties' Cross-Appeal. In 1995, on behalf of DWR, the Central Coast Water Agency prepared and certified an EIR for the Monterey Amendments. (RA3:659-669 [RJN, Ex. A [Excerpt of 1995 Monterey Agreement EIR]].) In or about

December 1995, DWR and 27 of 29 SWP Contractors incorporated the Monterey Amendments into their SWP contracts.

On December 27, 1995, the *PCL* Plaintiffs filed a petition for writ of mandate ("*PCL* lawsuit") against the Central Coast Water Agency and DWR, challenging the Monterey Agreement EIR under CEQA. (AA20:4830.) The *PCL v. DWR* complaint alleged that the *PCL* Plaintiffs filed their lawsuit "as private attorney general[s] to enforce important ***public rights*** and to confer substantial ***public benefit***." (AA20:4831 at ¶ 1, emphasis added.) It alleged "DWR has failed to act ***and will continue to fail to act*** to operate and manage the California Water Project . . . in violation of CEQA." (AA20:4835, at ¶ 11, emphasis added.)

Several of the Central Delta Plaintiffs in the current CEQA lawsuit, including the Central Delta Water Agency and the California Sportfishing Protection Alliance, participated in the administrative proceedings that resulted in the 1995 EIR that was challenged in the first suit (RA3:667 [RJN, Ex. A at p. 13]), but declined to participate in that action. At least one of the leading participants in the *PCL* lawsuit, Carolee Krieger, is an officer of one of the Central Delta Appellants in this case. (RA10:2344-2346; RT:1-44 [8/19/11 Transcript of hearing on motion for judgment on the pleadings].)

On August 15, 1996, the trial court in *PCL* lawsuit concluded that the Central Coast Water Agency was not the appropriate lead agency for the 1995 EIR, but nonetheless upheld the adequacy of the EIR. (See *PCL v. DWR*, *supra*, 83 Cal.App.4th at p. 903.) This Court partially reversed the trial court decision, however, holding that the 1995 EIR failed to adequately analyze the No Project Alternative. (*Id.* at p. 916.) This Court held that a new EIR was required, with DWR serving as the lead agency. (*Id.* at p. 926.)

In May of 2003, ***seven years after commencement of*** the first lawsuit, and ***three years*** after publication of the decision in *PCL v. DWR*, the *PCL* Plaintiffs, DWR and others entered into the Settlement Agreement. (AR115:58935; RA3:688-746 [RJN, Ex. C [2003 Settlement Agreement].) The Settlement Agreement, among other things, required DWR to prepare a new EIR for the Monterey Amendments. (RA3:705 [RJN, Ex. C at p. 9].) In an effort to ensure that "the New EIR be the product of a cooperative effort and comply with the requirements of CEQA and the direction of the courts in the underlying litigation," the Settlement Agreement established an EIR Committee including representatives of the *PCL* Plaintiffs. (RA3:706 [RJN, Ex. C at p. 10]; RA3:701 [RJN, Ex. C at p. 5].)

The Settlement Agreement also established a detailed dispute resolution procedure for disputes regarding the preparation of the new EIR. (RA3:710 [RJN, Ex. C at p. 14].) If the *PCL* Plaintiffs disagreed with DWR's proposed approach to a CEQA compliance issue, then they were required to refer that issue in writing to the Director of DWR. (*Ibid.*) If the *PCL* Plaintiffs' representatives disagreed with the Director's written decision, they could refer that issue in writing to the designated mediator. (*Ibid.*) The mediator would consider the parties' views and provide to the DWR Director a written advisory opinion on the issue; the Director would then make a final decision on the issue. (*Ibid.*) The *PCL* Plaintiffs could challenge the return if: (1) *PCL* Plaintiffs objected to the mediator based on one or more issues, (2) the mediator upheld that objection in his written advisory opinion, (3) the DWR Director rejected that advisory opinion in his final decision, and (4) the objections that the *PCL* Plaintiffs filed to the return to the writ of mandate were on the same grounds as the objection upheld by the mediator in his advisory opinion. (*Ibid*; RA3:727-728 [RJN, Ex. C at pp. 31-32].) The *PCL* Plaintiffs referred several issues to the DWR Director pursuant to the procedures set forth in the Settlement

Agreement. (AR196:99484; RA4:752-904 [RJN, Ex. D [Attachment G to 2010 EIR]].) After receiving the Director's written ruling, however, the *PCL* Plaintiffs elected to take no further action.

On May 20, 2003, the Superior Court entered its 2003 Order, approving the Settlement Agreement. (AR115:58931-58934; RA4:905-909 [RJN, Ex. E [CEQA Order Approving Settlement Agreement]].) At the same time, the Superior Court issued its 2003 Writ ordering: (1) Central Coast Water Agency to set aside its certification that the 1995 Monterey Agreement EIR was completed in compliance with CEQA; (2) DWR to set aside its certification, as responsible agency, that the 1995 Monterey Agreement EIR is adequate under CEQA; (3) DWR, as lead agency, to prepare and certify a new EIR; (4) DWR to make written findings and decisions and file a Notice of Determination identifying the components of the project analyzed in the new EIR upon completion and certification of the EIR; and (5) DWR, upon filing its Notice of Determination, to submit the new EIR, written findings, Notice of Determination, and such additional documents as the court may order, by way of return to the writ of mandate. (AR107:54996-54997; RA4:910-912 [RJN, Ex. F [Peremptory Writ of Mandate]].)

After the parties invested another seven years of further work, DWR filed its return to the 2003 Writ. (AR114:58638-58640; RA4:913-916 [RJN, Ex. G [DWR Return to Peremptory Writ of Mandate]].) The return states that DWR, as lead agency, prepared and certified the 2010 EIR in compliance with *PCL v. DWR*, CEQA, and the Settlement Agreement. (AR114:58639; RA4:917-941 [RJN, Ex. H [2010 EIR]].) On June 3, 2010, the *PCL* Plaintiffs consented to DWR's return to the writ of mandate. (AR114:58651-58653; RA4:942-948 [RJN, Ex. I [PCL Plaintiffs' Consent to Entry of Order Discharging Writ]].) Although the *PCL* Plaintiffs' consent declares that they believe the 2010 EIR to be deficient, they

actively participated in the preparation of the 2010 EIR. (AR114:58652; RA4:949-954 [RJN, Ex. I].) On August 27, 2010, the court entered an order discharging the 2003 writ of mandate. (RJN, Ex. K [Order Discharging Peremptory Writ of Mandate].) The order operates as a final judgment regarding the 2010 EIR's compliance with CEQA. A court order discharging a writ is a final, appealable order because it "relates to enforcement of a judgment." (*Stoneham v. Rushen* (1984) 156 Cal.App.3d 302, 306, fn. 1; *Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1601, fn. 4; see *Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252, 256.)

Referring to the 2003 Writ requiring Central Coast Water Agency and DWR to prepare an EIR that "complies with" CEQA, the order reads:

> The Court finds that Defendants and Respondents Central Coast Water Authority and Department of Water Resources have ***fully complied*** with the terms of the Peremptory Writ of Mandate issued on May 20, 2003 in the above-entitled case.

(AA21:5187 [Ex. 44], emphasis added.) Thus, the Superior Court judgment ruled that the 2010 EIR complied with CEQA.

D. Proceedings Below.

On June 24, 2011 Cross-Central Delta Appellants filed a motion for judgment on the pleadings requesting the Superior Court to determine that the First Cause of Action concerning CEQA in the Central Delta lawsuit was barred by res judicata. (RA3:620-625, 626-645 [MJP].) On October 12, 2011 the Superior Court issued its ruling denying the motion for judgment on the pleadings. (RA5:1058-1069.) On December 13, 2011, the Superior Court entered an order denying the motion for judgment on the pleadings. (RA5:1069-1082.)

Because the Superior Court denied the motion for judgment on the pleadings, in part, on the purported lack of privity, the Kern Water Bank Parties submitted requests for production of documents regarding communications between the plaintiffs in the *PCL* lawsuit and those in the current action, and a motion to compel production (RA12:2763-2765; RA13:2772-2898; RA15:3207-3223), with the purpose of obtaining discovery directly related to the issue of privity. The Superior Court denied the Kern Water Bank Parties' motion to compel the production of documents. (RA15:3415-3424.)

During the trial proceedings on the CEQA cause of action, the Kern Water Bank Parties renewed their claim that Central Delta Appellants' First Cause of Action (CEQA) was barred by res judicata. (AA32:7936.) The Superior Court rejected the Kern Water Bank Parties' res judicata claim without analysis by reference to the Superior Court prior ruling on the motion for judgment on the pleadings and rejected their lack of standing argument as to Center for Biological Diversity. (AA33:8234, 8236 [CEQA Ruling at p. 12].) On November 24, 2014 the Superior Court entered its judgment in this case. (AA37:9201.)

The Notice of Entry of Judgment was filed on December 1, 2014. (AA37:9209-9224.) Kern Water Bank Parties' Notices of Cross-Appeal were filed on January 20 and January 22, 2015. (AA37:9235-9248, 9249-9262.)

E. Standard of Review Regarding Res Judicata and Standing Defenses.

Whether the doctrine of res judicata applies to bar the Central Delta Appellants' CEQA cause of action is a question of law that is reviewed de novo on appeal. (*City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 228; see also *Noble v. Draper* (2008)

160 Cal.App.4th 1, 10 [employing de novo review in review of trial court's ruling dismissing claims on res judicata grounds.].) A reviewing court employs a de novo standard of review when determining compliance with Public Resources Code section 21177. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, see also *Scott v. Thompson* (2010) 184 Cal.App.4th 1506, 1510 [when relevant facts undisputed, standing is a question of law reviewed de novo].)

F. The Central Delta CEQA Lawsuit Is Barred by Res Judicata Because It Seeks to Enforce the Same Primary Right Finally Adjudicated by the 2010 Superior Court Judgment.

1) The Superior Court's Res Judicata Ruling Conflicts With Primary Right Jurisprudence.

Res judicata, or claim preclusion, prevents parties, and those in privity, from re-litigating a "primary right" that has been finally adjudicated. (*Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 972.) Res judicata does not simply bar re-litigation of issues that ***were*** actually litigated in the prior action; it also bars issues that "related to the subject matter and relevant to the issues, so that it could have been raised . . . ***despite the fact that it was not expressly pleaded or otherwise urged***." (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202, emphasis added; *Federation of Hillside Canyon*, *supra*, 126 Cal.App.4th at p. 1202.) The Supreme Court explained:

> The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had the opportunity to litigate the same matter in a former action . . ., and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation.

(*Panos v. Great Western Packing Co.* (1943) 21 Cal.2d 636, 637.)

California follows the "primary right" doctrine in determining whether a second lawsuit is barred by res judicata. A "primary right" for purposes of res judicata is distinct from a "cause of action" for pleading purposes:

> The primary right is simply the plaintiff's right to be free from the particular injury suffered. It must therefore be distinguished from the ***legal theory*** on which liability for the injury is premised: 'Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.' The primary right also must be distinguished from the ***remedy*** sought: 'The violation of one primary right constitutes a single cause of action though it may entitle the injured party to many forms of relief, and the relief is not confounded with the cause of action, one not being determinative of the other.'

(*Mycogen Corp. v. Monsanto*, *supra*, 28 Cal.4th at p. 904, quoting *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682, emphasis in original.)

A "primary right" under the res judicata doctrine is different from a "cause of action" for pleading purposes in that a "primary right" is not limited by the facts alleged in the first lawsuit. (*Panos v. Great Western Packing Co.*, *supra*, 21 Cal.2d at p. 639 ["It is immaterial that in a subsequent action [the plaintiff] alleges different acts of negligence which he was not permitted to prove in the prior action because they were not alleged in this [first] complaint."]; *Ideal Hardware and Supply Co. v. Dept. of Employment* (1952) 114 Cal.App.2d 443, 449 [primary right for res judicata purposes is different from cause of action for pleading purposes].)

The Superior Court incorrectly conflated a "cause of action" for pleading purposes with the "primary right" doctrine. The Superior Court

incorrectly reasoned that "[s]ince the 1995 EIR and the 2010 EIR are factually distinct attempts to satisfy CEQA's mandate, it follows that the petition in the [*PCL* lawsuit] and the petition involve different causes of action for purposes of claim preclusion." (RA5:1063 [10/12/11 MJP Ruling at p. 6].) The Superior Court failed to recognize that when the *PCL v DWR* trial court issued its judgment discharging the 2003 Writ, it fully and finally adjudicated that the ***2010 EIR*** complied with CEQA. All of the facts underlying the Central Delta Appellants' challenge to the 2010 EIR were operative at the time of the *PCL v. DWR* trial court's CEQA judgment. Thus, the Superior Court below erred in concluding that the Central Appellants' challenge involved new facts.

The Superior Court also erred in concluding that for res judicata purposes the "cause of action is framed by the facts in existence when the underlying complaint is filed." (RA5:1063 [10/12/11 MJP Ruling at p. 6].) A primary right is determined as of the date of the ***judgment*** in the first lawsuit – ***not*** the date that the first lawsuit was filed. (*Ballona Wetlands*, *supra*, 201 Cal.App.4th at p. 481 ["[A]ny challenges to an EIR . . . arising from facts in existence ***before the entry of judgment*** must be asserted in the proceedings before the entry of judgment. [¶] To do otherwise would undermine the finality of the judgment", emphasis added]; *Eichman v. Fotomat Corp.* (1983) 147 Cal.App.3d 1170, 1177 [res judicata bars a second lawsuit based on facts occurring before entry of judgment in the first lawsuit]; *Monterey Plaza Hotel L.P. v. Local 483* (9th Cir. 2000) 215 F.3d 923, 928 [holding that judgment in California state court lawsuit barred federal court claims where predicate acts charged in federal complaint occurred ***after*** the filing of state court lawsuit].)

The Superior Court also erred because the *PCL* lawsuit alleged that DWR was committing continuing CEQA violations regarding the Monterey Amendments. (AA20:4835 [¶ 11].) Thus, that action, on its face, was not

limited to the facts in existence at the time of the filing of the lawsuit, but included claims of injury to the plaintiffs' primary right of DWR's CEQA compliance as a result of DWR's actions subsequent to the filing of the *PCL* lawsuit.

2) The Primary Right – Compliance with CEQA – Is Determined by CEQA and by the 2003 Writ.

The applicable primary right injury here is determined by the statute and by the terms of the 2003 Writ. CEQA requires state agencies to "prepare . . . an environmental impact report on any project which they propose to carry out or approve that may have a significant effect on the environment." (Pub. Resources Code, § 21100.) "In a CEQA proceeding, the right to ensure the lead agency's compliance with CEQA's substantive and procedural requirements with respect to a particular environmental impact is a primary right." (*Silverado Modjeska*, *supra*, 197 Cal.App.4th at p. 298.)

CEQA includes unique procedures governing CEQA litigation to ensure that litigation concerning a CEQA primary right is addressed in one lawsuit. The Legislature amended CEQA on multiple occasions to prevent the potential for endless rounds of the CEQA litigation gamesmanship employed by the Central Delta Appellants in this case. CEQA imposes stringent deadlines on the filing of CEQA litigation and on the adjudication of CEQA lawsuits. (Pub. Resources Code, §§ 21167 [30 day statute of limitations], 21167.4, 21167.6 [expedited briefing and hearing], 21167.1 [preference over other civil actions], 21167.8 [mandatory settlement conference], 21166 [limitations on supplemental and subsequent EIRs].)

In the event that a court identifies a CEQA violation, CEQA requires a court to limit a writ to "include only those mandates which are necessary to achieve compliance with [CEQA] and only those specific project

activities in noncompliance with [CEQA]." (Pub. Resources Code, § 21168.9, subd. (b).) Importantly, in the event that a court finds a CEQA violation, CEQA ***requires*** the court to retain jurisdiction "over the public agency's proceedings by way of return to the peremptory writ of mandate until the court has determined that the public agency has complied with [CEQA]." (Pub. Resources Code, § 21168.9, subd. (b)(3).) The above provisions recognize that multiple CEQA claims or legal theories may be raised in a CEQA lawsuit, but that there is one "primary right" of CEQA compliance.

The *PCL* lawsuit alleged "DWR has failed to act ***and will continue to fail to act*** to operate and manage the California Water Project . . . ***in violation of CEQA***." (AA20:4835 [¶ 11], emphasis added.) The 2003 Writ required DWR to prepare and certify an EIR that "complies with CEQA." (AR107:54996-54997; RA4:910-912 [RJN, Ex. F [Peremptory Writ of Mandate].)

In 2010, the Superior Court issued a final judgment that the 2010 EIR prepared and certified by DWR addressed the primary right injury identified in the 2003 Writ and, with the concurrence of the *PCL* Plaintiffs, discharged the 2003 Writ. The Superior Court judgment states:

> The Court finds that Defendants and Respondents Central Coast Water Authority and Department of Water Resources have fully complied with the terms of the Peremptory Writ of Mandate issued on May 20, 2003 in the above-entitled case.

(AA21:5187 [Ex. 44].)

Thus, the judgment fully and finally adjudicated the "primary right" here – that the 2010 EIR comply with CEQA.

3) Controlling CEQA Cases Compel the Conclusion that the *PCL* Lawsuit and this Action Relate to the Same Primary Right.

With the sole exception of *Castaic Lake*, ***every*** reported decision addressing res judicata in CEQA cases has concluded that res judicata bars a second lawsuit that attempts to enforce an agency's compliance with CEQA that was finally adjudicated after the return to the writ in a prior lawsuit. The cases teach that even if two CEQA lawsuits allege different CEQA issues, there is only one injury (compliance with CEQA) and thus one primary right for res judicata purposes.

In *Silverado Modjeska*, in facts very close to those here, the Court held that res judicata barred a second CEQA lawsuit after the trial court discharged the writ in the first lawsuit and no party appealed the discharge of the writ. (*Silverado Modjeska*, *supra*, 197 Cal.App.4th at p. 298.) In the first CEQA lawsuit, the trial court issued a writ and entered judgment requiring the lead agency to prepare a supplemental EIR evaluating the project's water quality issues. In compliance with the writ, the county prepared a supplemental EIR.

Plaintiffs filed a second CEQA lawsuit challenging the supplemental EIR. The real party moved to discharge the writ issued in the first CEQA lawsuit. The trial court concluded that the county had complied with the writ, and with CEQA, and discharged the writ. Plaintiffs did not appeal from the order discharging the writ. (*Silverado Modjeska*, *supra*, 197 Cal.App.4th at p. 295.)

In the second lawsuit, the trial court held that the order discharging the writ barred plaintiffs' second CEQA lawsuit. The Court of Appeal affirmed, stating:

> The trial court's unambiguous ruling that the county complied with the commands of the writ and that in doing so, complied with CEQA . . .

> reflects the full adjudication of the issues and the primary right that plaintiffs sought to litigate in their [CEQA] cause of action in the [second lawsuit].

(*Silverado Modjeska*, *supra*, 197 Cal.App.4th at p. 298.)

In *Federation of Hillside Canyon*, the Court held that res judicata barred a second CEQA lawsuit where the court in the prior CEQA lawsuit identified a CEQA violation. The trial court denied the petition for writ of mandate in the first lawsuit, but the Court of Appeal reversed because there was no substantial evidence to support the city's findings regarding mitigation of transportation impacts. The trial court then ordered the city to vacate its approval of the project. The city adopted new CEQA findings regarding transportation impacts and re-approved the project.

The plaintiffs filed a second CEQA lawsuit again challenging the city's compliance with CEQA. The trial court rejected the second CEQA challenge and plaintiffs appealed. (*Federation of Hillside Canyon*, *supra*, 126 Cal.App.4th at p. 1194.) The Court of Appeal affirmed, holding that res judicata barred the second CEQA lawsuit. The Court reasoned that "the two [CEQA] proceedings involve the same primary right . . . . The primary right in both proceedings is the right to ensure the city's compliance with CEQA's substantive and procedural requirements" in connection with the project and the certified EIR. (*Id.* at p. 1204.) "Application of res judicata in those circumstances serves the purpose of the doctrine to prevent inconsistent rulings, promote judicial economy by preventing repetitive litigation, and protect against vexatious litigation." (*Id.* at p. 1205.)

In *Ballona Wetlands*, the Court held that res judicata barred a second CEQA challenge to an EIR "arising from facts in existence before the entry of judgment" in the first CEQA lawsuit. (*Ballona Wetlands*, *supra*, 201 Cal.App.4th at p. 481.) The plaintiffs in the first CEQA lawsuit challenged the EIR for a development project. The Court of Appeal held that the city

had violated CEQA, and ordered issuance of a writ vacating the city's EIR certification and requiring preparation of a revised EIR. The city revised the EIR in accordance with the Court's decision, and filed a return to the writ. Plaintiffs filed both a new CEQA lawsuit and objections to the return to the writ. The trial court overruled the objections and discharged the writ.

In the second CEQA lawsuit, the plaintiffs challenged the adequacy of the EIR's description of the project and the EIR's conclusions regarding land use consistency. (*Ballona Wetlands*, *supra*, 201 Cal.App.4th at p. 479.) The plaintiffs had not raised these arguments in the first lawsuit. Noting that CEQA required the trial court to retain jurisdiction over the first lawsuit pending the city's compliance with the writ of mandate, the Court held that the trial court's discharge of the writ and entry of a final judgment barred the second lawsuit's challenge to the adequacy of the EIR's project description and evaluation of land use impacts stating:

> [W]e conclude that any challenge to an EIR . . . arising from the facts in existence before the entry of judgment must be asserted in the proceeding before the entry of judgment. The failure to assert such a challenge before the entry of judgment . . . precludes a party from asserting the challenge in connection with post judgment proceedings . . . .

(*Id.* at p. 481.) The Court also concluded that plaintiffs could ***not*** avoid res judicata by timely filing a second CEQA lawsuit at the time of the return to the writ proceedings. "[T]hose challenges asserted in the [second lawsuit] could have been asserted before the entry of judgment in the prior proceeding" and thus were barred by res judicata. (*Ibid.*)

In *Lodi,* this Court held that res judicata applied to bar the plaintiffs in a subsequent lawsuit from challenging the water supply impacts of a shopping center adjudicated in a prior lawsuit. In the first lawsuit, the plaintiffs challenged the city's approval of an EIR regarding a shopping

center. The court determined that the EIR did not adequately analyze two impacts (energy, urban decay), but rejected other challenges (including water supply impacts). Rather than appeal, the city decertified the EIR and prepared and certified a revised EIR. The city filed a petition to discharge the writ issued in the first lawsuit, and the plaintiffs filed new lawsuits challenging the revised EIR.

The second set of lawsuits claimed that the revised EIR failed to disclose cumulative water supply impacts. Plaintiffs claimed that "new facts and evidence" regarding the city's water supply had changed since the adjudication of the first lawsuit. Nevertheless, the trial court held that res judicata barred the plaintiffs from raising the water supply claim. (*Lodi*, *supra*, 205 Cal.App.4th at p. 323.) Notably, this Court concluded that the issuance of the writ and final judgment in the first lawsuit operated to bar the litigation of water supply issues in the second lawsuit, even though the city had decertified the first EIR in response to the writ. (*Ibid.*)

The above cases all stand for the straightforward proposition that res judicata bars a second CEQA lawsuit to require an agency to comply with CEQA where the trial court in the first CEQA lawsuit issued a final judgment adjudicating the primary right of agency compliance with CEQA. That is precisely the circumstance here. The *PCL* lawsuit challenged DWR's compliance with CEQA regarding its approval of the Monterey Amendments. The trial court issued a writ of mandate requiring DWR to comply with CEQA and to prepare a revised EIR. DWR complied with the trial court writ. The *PCL* Plaintiffs consented to DWR's return to the 2003 Writ. The trial court discharged the writ and no party appealed. Thus, the *PCL* lawsuit proceeded to a final judgment that the 2010 EIR complied with CEQA.

The *PCL* lawsuit and the Central Delta Appellants' CEQA action relate to the same primary right – the 2010 EIR's compliance with CEQA.

The Central Delta Appellants in the second lawsuit now ask the Court to assert jurisdiction over the same EIR that was the subject of the final judgment in the *PCL* lawsuit. The Central Delta Appellants' CEQA lawsuit is barred by res judicata.

4) The Central Delta Appellants Are in Privity With the Plaintiffs in the *PCL* Lawsuit.

Res judicata applies to the parties in the *PCL* lawsuit and to other parties that are in privity with them. The "privity" requirement is easily satisfied here because of the public interest nature of the CEQA claims prosecuted by the *PCL* Plaintiffs.

The *PCL* Plaintiffs' pursuit of their CEQA claims on behalf of the public is sufficient to show a "common interest" in enforcing CEQA. (*Castaic Lake*, *supra*, 180 Cal.App.4th at p. 230; *Consumer Advocacy Group v. ExxonMobil Corp.* ("*Consumer Advocacy*") (2008) 168 Cal.App.4th 675, 690.)

In *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Assn.* ("*Seadrift Assn.*") (1998) 60 Cal.App.4th 1053, the court held that privity is established where the prior plaintiffs purported to represent the public interest. The court held that "[w]here, as here, authority to pursue public rights or interests in litigation has been given to a public entity by statute, a judgment rendered is res judicata as to all members of the class represented." (*Id.* at p. 1073.)

In finding that an environmental group's action was precluded by a prior determination against a public agency representing the public interest, the court reasoned:

> We do not find any indication in the record of a direct interest of appellant in the current dispute that was unrepresented by the state agencies in the prior litigation. The members of appellant were also members, although unnamed, of the

> class of public citizens adequately represented by the state agencies in the [prior] actions. Appellant, even if not named or active as a party, would be bound by judgments in the same prior actions brought pursuant to statutory authority by a different ***citizens*** group acting in a representative capacity for the benefit of the public, or at least those members of it similarly situated to determine the same matter of public interest. [Citation] The result is no different because the ***government*** represented the interest of the public as a class in the prior actions.

(*Seadrift Assn.*, *supra*, 60 Cal.App.4th at p. 1073, emphasis in original.)

Similarly, in *Consumer Advocacy Group*, the Court of Appeal held that the environmental plaintiffs in a second lawsuit were in privity with another environmental group in the first lawsuit. (*Consumer Advocacy Group*, *supra*, 168 Cal.App.4th at p. 691.) The Court concluded that, as here, both sets of plaintiffs were purporting to represent the public interest in enforcing the environmental law at issue (Proposition 65). The Court concluded that the plaintiffs in the first lawsuit adequately represented the public where, as here, the plaintiffs settled the lawsuit. (*Id.* at p. 693.)

Thus, where one CEQA plaintiff group represents the public interest to enforce the primary right of CEQA compliance, a second set of CEQA plaintiffs is in privity, and are barred from re-litigating CEQA compliance. (See *Seadrift Assn.*, *supra*, 60 Cal.App.4th at pp. 1072-1073.) Privity exists to bar the second lawsuit particularly where, as here, the plaintiffs vigorously litigated the first lawsuit for over a decade, and obtained significant public benefits as a result of a heavily negotiated Settlement Agreement, and participated actively in the preparation and review of the remedial EIR.

The *PCL* Plaintiffs and the Central Delta Appellants here clearly have an identity of interest regarding CEQA enforcement sufficient to

establish privity. Both consist of nonprofit environmental organizations and other public entities alleging that their primary interest is to ensure that DWR complied with CEQA regarding the Monterey Amendments. Because the Central Delta Appellants here and the *PCL* Plaintiffs pursued claims on behalf of the public, that fact alone is sufficient to show a "common interest" in the enforcement of CEQA for purposes of a privity determination. (*Castaic Lake*, *supra*, 180 Cal.App.4th at p. 230.)

In the *PCL* Plaintiffs' First Amended Complaint For Declaratory And Injunctive Relief and Petition For Writ of Mandate ("Complaint"), the Planning and Conservation League represented that it "brings this action as private attorney general to enforce important public rights and to confer substantial public benefit." (AA18:4381 at ¶ 1.) On that basis, the *PCL* Plaintiffs invoked the private attorney general statute -- California Code of Civil Procedure section 1021.5. In doing so, the *PCL* Plaintiffs purported to represent the public interest.

The Central Delta Appellants are members of the class of public citizens and interests represented by the *PCL* Plaintiffs in the prior litigation. (See *Seadrift Assn.*, *supra*, 60 Cal.App.4th at p. 1073.) Because the *PCL* Plaintiffs brought their case in pursuit of public rights and interests, the judgment rendered is res judicata.

The judicial procedure established by CEQA highlights the public interest nature of CEQA litigation. A petitioner in a CEQA case is required to furnish a copy of the pleading to the Attorney General. (Pub. Resources Code, § 21167.7; Code Civ. Proc., § 388.) Providing notice in this manner allows the Attorney General to intervene on behalf of the public "in any . . . proceeding in which facts are alleged concerning pollution or adverse environmental effects which could affect the public generally." (Gov. Code, § 12606; see also *Schwartz v. City of Rosemead* (1984) 155 Cal.App.3d 547, 561.) The procedure provides the opportunity to the

Attorney General to assess whether the interests of the public in the enforcement of CEQA can be adequately represented by the named petitioners.

Where the Attorney General elects not to intervene, a private party can pursue litigation under the "private attorney general" doctrine, and seek reimbursement of attorneys' fees pursuant to Code of Civil Procedure section 1021.5. (See *Schwartz v. City of Rosemead*, *supra*, 155 Cal.App.3d at p. 561 ["If the Attorney General is properly served and elects not to intervene, then a plaintiff's pursuit of a lawsuit becomes presumptively necessary [under section 1021.5]."].) Section 1021.5 provides that a court may award attorney's fees to a successful party in any action which "has resulted in the enforcement of an important right affecting the public interest if . . . a significant benefit . . . has been conferred on the general public or a large class of persons." (Code Civ. Proc., § 1021.5.) "[L]itigation brought to enforce the provisions of CEQA . . . has been held to involve important rights affecting the public interest, and the private attorney general theory . . . applies to such suits." (*San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 754.)

The Central Delta Appellants were more than unnamed, passive members of the public during the *PCL* lawsuit and the seven years of administrative proceedings leading to the certification of the 2010 EIR. Several of the Central Delta Appellants participated in the public comment process for the 1995 EIR, including the Central Delta Water Agency, the California Sportfishing Protection Alliance, and Carolee Krieger, and raised in their comments many of the same issues raised by the *PCL* Plaintiffs in the *PCL* lawsuit. (AR100:51093-51104.) On behalf of the Citizens Planning Association of Santa Barbara County, which was a named plaintiff in the *PCL* lawsuit, Carolee Krieger submitted comments on the

1995 EIR. (AR529:253963 [noting that Citizens Planning Assn. submitted comments on June 11, 1995 and July 10 & 11, 1995], AR529:254037 [responding to Ms. Krieger's June 11, 1995 letter].) Ms. Krieger, moreover, now serves as President of C-WIN, another of the plaintiffs in ***this*** case. (AR28:13637-13638.)

While the Kern Water Bank Parties were denied the opportunity to discover evidence of privity, there is little doubt about its existence. For example, it could hardly have been a coincidence that just one day after *PCL* Plaintiffs filed their August 13, 2009 referral to DWR's Director under the Settlement Agreement, Central Delta Appellants just happened to submit their August 14, 2009 comment letter criticizing the draft EIR partially based on *PCL's* and C-WIN's comments, which were incorporated by reference. (AR196:99484-99493, 113:58264-58265.)

The *PCL* Plaintiffs, after appeal, obtained a writ of mandate from the Superior Court compelling compliance with CEQA. In response, DWR prepared the 2010 EIR; DWR accordingly filed its return to the court's writ of mandate. The *PCL* Plaintiffs consented to DWR's return. (AA32:7983 [RJN, Ex. I].) The *PCL* Plaintiffs' consent to the return, the culmination of many years of hard work, negotiation, and mediation, confirms the *PCL* Plaintiffs' vigorous representation of the interests of the public, including the Central Delta Appellants in this case. (See *Seadrift Assn.*, *supra*, 60 Cal.App.4th at p. 1072 ["That the prior litigation ended in a settlement rather than a successful judgment after trial does not diminish the worthiness of the effort. [Citation.] The settlement agreement was the product of a reasonable compromise, and does not carry with it even the hint of any abdication of the role of public agent by the parties to the prior litigation."].)

As a result of the *PCL* Plaintiffs' prosecution of their CEQA lawsuit, a formal procedure was established for review of the 2010 EIR, and for

resolution of disputes pertaining thereto. The *PCL* Plaintiffs secured a key role for the public as members of the EIR Committee. Vigorous representation of the public interest was thereby ensured. The Central Delta Appellants in this case are thus in privity with the *PCL* Plaintiffs. (See *Seadrift Assn.*, *supra*, 60 Cal.App.4th at pp. 1069-1072.)

Importantly, this situation differs dramatically from the one posed by *Castaic Lake*. There, the plaintiffs voluntarily dismissed their challenge to the earlier EIR and brought no challenge to the later EIR. (*Castaic Lake*, *supra*, 180 Cal.App.4th at p. 231.) In dismissing its action, one of the plaintiffs noted that, though it regarded the new EIR as defective, it lacked the funds to challenge the adequacy of the new EIR. (*Ibid.*) The court held that such statements displayed an "abdication of the role of public agent" and an "abandonment of 'its intention to represent the interests of the general public.'" (*Ibid.*) The court thus explained that its finding of a lack of privity was based on the previous petitioner's having dismissed its action and stating that it could no longer act as a representative. (*Id.* at p. 233.)

The *PCL* Plaintiffs, by contrast, never abandoned their representation of the public interest. Instead, the *PCL* Plaintiffs succeeded in obtaining the Settlement Agreement, which bound DWR to the detailed and complex seven-year process of review and dispute resolution for preparation of the 2010 EIR. Only at the conclusion of this lengthy process did the *PCL* Plaintiffs consent to DWR's return to the 2003 Writ.

The Superior Court subsequently ruled that the 2010 EIR satisfied the court's mandate to comply with CEQA. The painstaking procedure established by the Settlement Agreement produced the 2010 EIR, and the judgment entered thereon. No such procedure existed in *Castaic Lake*. The *PCL* Plaintiffs vigorously prosecuted the public interest in enforcing CEQA for 14 years. Privity is thereby established, and res judicata bars the CEQA claims in this case. As the Court of Appeal recognized:

> If the common interest of representing the public interest in a lead agency's compliance with CEQA were not sufficient to establish privity between two parties for purposes of res judicata, the lead agency's compliance with CEQA would be subject to continuing challenges by different parties asserting similar claims, in contravention of the legislative goal of avoiding delay and achieving prompt resolution of CEQA claims.

(*Silverado Modjeska*, *supra*, 197 Cal.App.4th at p. 299, fn. 10.)

The Central Delta Appellants and the *PCL* Plaintiffs are in privity as a matter of law. The Kern Water Bank Parties nevertheless sought to take discovery on the privity issue through a request for production of documents concerning communications between the *PCL* Plaintiffs and the Central Delta Appellants in the *PCL* lawsuit, subsequent settlement, and discharge of the 2003 Writ. (RA12:2763-2765; RA13:2772-2898; RA15:3207-3223.) The requested documents were clearly relevant and material to the privity issue. The Superior Court erred in its denial of the motion to compel. (*Associated Brewers Distributing Co. v. Superior Court* (1967) 65 Cal.2d 583, 588 [holding trial court's denial of motion to compel was unsustainable as the plaintiff could show materiality of the documents to its case].)

G. Even If Appellant Center for Biological Diversity Were Not in Privity with the *PCL* Plaintiffs, It Lacks Standing.

The Central Delta Appellants may argue that even if the other appellants were in privity and therefore subject to res judicata, Appellant Center for Biological Diversity ("CBD") is in a different position. While such an argument should not prevail, for the reasons set forth above, CBD is also disqualified from the suit because it lacks standing. The reason is that it failed to object timely to the CEQA approval.

1) A CEQA Petitioner Must *Timely* Object To the Approval of a Project

A CEQA petitioner must have timely objected to the approval of a project in order to have standing to maintain a CEQA lawsuit. CEQA provides, "[a] person shall not maintain an action or proceeding unless that person objected to the approval of the project orally or in writing during the public comment period provided by this division [CEQA] or prior to the close of the public hearing on the project before the filing of the notice of determination pursuant to Sections 21108 and 21152." (Pub. Resources Code, § 21177, subd. (b).) Compliance with Public Resources Code section 21177 "is a jurisdictional prerequisite to maintenance of a CEQA action." (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 791-792.) A plaintiff that fails to plead and prove a judicial exception to this requirement is precluded from pursuing a CEQA action. (*California Aviation Council v. County of Amador* (1988) 200 Cal.App.3d 337, 345.)

2) CBD Had Numerous Opportunities to Object.

DWR provided ample opportunities for public participation on the 2010 EIR and for CBD to object. A written comment period was open from October 22, 2007 to January 14, 2008. (AR27:13565, 110:56733, 194:98900.) Sixty-seven commenters and 568 email commenters availed themselves of the opportunity to submit 5,628 pages of written comments to DWR. (AR3:856-13:6486.) DWR also solicited public comment on the Draft EIR at four public hearings throughout the state in November and December 2007. (AR13:5925-6044).

3) CBD Did Not Timely Object.

CBD did not submit comments on the Project before the public written comment period closed on January 14, 2008, nor at any of the four

public hearings in November and December 2007. Not until August 14, 2009, nineteen months after the comment period closed, did CBD submit its comments. (AR113:58264-58265.)

The circumstances of this case are strikingly similar to those in *Central Delta Water Agency v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 245. In that case, the State Water Board conducted CEQA review on a water appropriation project. (*Id.* at p. 252.) The Board accepted written comments through a date certain, conducted a public hearing, and thereafter took the matter under submission. (*Id.* at p. 273.) A few months later, but before the Board certified the EIR and made its final decision on the project, the putative petitioner submitted written comments objecting to the project's approval. (*Ibid.*) After receiving the late-submitted comments, the Board certified the EIR and filed a notice of determination. (*Ibid.*) The Court found that submission of comments before an agency certified an EIR, but after the written and oral public comment periods closed, did not satisfy Public Resources Code section 21177(a)'s issue exhaustion requirement. (*Id.* at pp. 273-274.) In the same way, CBD's comments submitted after the close of the public comment period but before DWR certified the EIR do not satisfy section 21177(b)'s identity exhaustion requirement.

The trial court rejected Kern Water Bank Parties' standing argument, without citation to any case law, stating that CBD "timely objected to the project prior to the close of the public hearing on the project." (AA33:8234.) The trial court found it was "noteworthy" that CBD submitted its comments before completion of the EIR Committee referral process required by the Settlement Agreement in the separate *PCL* case, and before DWR's review of the Final EIR. (*Ibid*; AA20:4941.) The trial court cited to: CBD's comment letter dated August 14, 2009 (AR113:58264-58265) submitted one day after *PCL* Plaintiffs' August 13,

2009 referral of mediation issues to the Director of DWR (AR196:99484-99493) regarding the administrative draft Final EIR. Since there was no public hearing after the close of the public comment period, the trial court presumably construed Public Resources Code section 21177(b) as encompassing any objection before the lead agency completes its review of the Final EIR. The trial court's construction is contrary to the language of the statute and the case law.

Center for Biological Diversity v. California Dept. of Fish and Wildlife (2015) 62 Cal.4th 204, confirms that when no public hearing is held after the public comment period, as here, the question is whether plaintiffs' grounds for noncompliance were presented to the lead agency "during the public comment period provided by [CEQA]." (*Id.*, at p. 271.) While the plaintiffs in that case raised their claims during an extended public comment period, in ***this case*** CBD failed to object during ***any*** public comment period. (*Ibid.*)

For these reasons, CBD did not exhaust its administrative remedies and does not have standing to pursue this action. Therefore, the trial court erred and CBD must be dismissed.

H. Conclusion Regarding Cross-Appeal.

The Central Delta Appellants' CEQA cause of action is barred by res judicata. CBD does not have standing because it failed to timely object on CEQA grounds.

VIII. CONCLUSION. TWENTY YEARS OF LITIGATION IS ENOUGH.

Twenty years of litigation is enough. DWR and the other parties to the *PCL* lawsuit entered into a settlement agreement in 2003 to fully and finally resolve the validity of the Monterey Amendments. In 2003, the Superior Court dismissed the reverse validation lawsuit – fully and finally

confirming the validity of the Monterey Amendments and that the Kern Water Bank Authority holds good title to the Kern Water Bank property. In 2010, the *PCL* trial court issued a final judgment that the 2010 EIR complied with CEQA.

This Court's recent statement in other important water litigation is particularly applicable here:

> In the decade and more that has passed since the Quantification Settlement Agreement was finalized in 2003, it is likely that untold millions of dollars have been poured into litigation that has now come to naught. [] In addition to this drain on the public fisc of the various public agency parties to the litigation, state and federal courts have expended countless hours adjudicating these matters—hours that could have been devoted to the expeditious resolution of other cases.

(In re Quantification Settlement Agreement Cases (2015) 237 Cal.App.4th 72, 75-76, footnote omitted.)

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This Court should affirm the trial court's judgment and reject the Central Delta Appellants' attempt to unravel dozens of transactions that are central to the state's ability to manage its water supply for 23 million Californians and the most productive farm land in the world in times of drought.

Dated: January 27, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to CRC Rule 8.204(c)(4), this brief contains 27,562 words, according to the word count feature of Microsoft Word 2010, and therefore complies with the 28,000 word limit for responding briefs.

Dated: January 27, 2016

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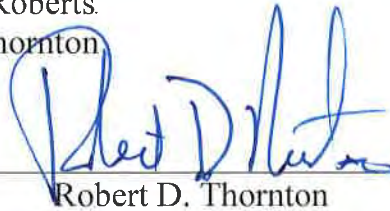

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PROOF OF SERVICE

The undersigned declares:

I am employed in the County of Orange, State of California. I am over the age of 18 and am not a party to the within action; my business address is 18101 Von Karman Avenue, Suite 1800, Irvine, CA 92612.

On January 27, 2016, I caused to be served the document(s) entitled:

1. COMBINED RESPONDENTS' BRIEF AND OPENING CROSS-APPELLANTS' BRIEF OF RESPONDENTS AND CROSS-APPELLANTS KERN WATER BANK AUTHORITY; ROLL INTERNATIONAL CORPORATION; PARAMOUNT FARMING COMPANY LLC; WESTSIDE MUTUAL WATER COMPANY; TEJON RANCH COMPANY; DUDLEY RIDGE WATER DISTRICT; SEMITROPIC WATER STORAGE DISTRICT; TEJON-CASTAC WATER DISTRICT; AND WHEELER RIDGE-MARICOPA WATER STORAGE DISTRICT; and

2. RESPONDENTS' AND OPENING CROSS-APPELLANTS' APPENDIX VOL. I THRU VOL. XVI on parties to the within action via the court's electronic filing system, TrueFiling portal, pursuant to LCvR 5(k), and by uploading a copy of the document(s) to be readily accessible online via sharefile.com, and providing the hyperlink to all parties in this action by electronic mail.

Electronic service addresses of persons served are as follows:

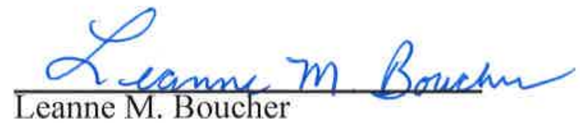
SEE ATTACHED SERVICE LIST

A copy of Respondents' Brief and Opening Cross-Appellants' Brief was served on the Clerk of the Sacramento County Superior Court, at 720 9th Street, Sacramento, CA 95814 via USPS First Class mail.

A copy of Respondents' Brief and Opening Cross-Appellants' Brief was electronically uploaded to the California Supreme Court via the Court's web portal.

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

Executed on January 27, 2016



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Central Delta Water Agency, et al. v. Department of Water Resources, et al.
Court of Appeal, Third Appellate District No. C078249

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