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

CENTRAL DELTA WATER AGENCY, et al., Plaintiffs and Appellants, **v.** **DEPARTMENT OF WATER RESOURCES,** Defendant and Respondent, **ROLL INTERNATIONAL, et al.,** Real Parties in Interest and Appellants, **ALAMEDA COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT, ZONE 7, et al.,** Real Parties in Interest and Respondents.	Case No. C078249 Sacramento County Superior Court No. 34-2010-80000561-CU-WM-GDS

Appeal from the Judgment of the Superior Court, County of Sacramento
The Honorable Timothy J. Frawley, Judge

DEFENDANT AND RESPONDENT'S BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, THIRD APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: C078249
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APPELLANT/PETITIONER: CENTRAL DELTA WATER AGENCY, et al. RESPONDENT/REAL PARTY IN INTEREST: DEPT. OF WATER RESOURCES	
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*): DEPARTMENT OF WATER RESOURCES

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

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

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

☐ Continued on attachment 2.

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

Date: January 27, 2016

Eric M. Katz
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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GLOSSARY

AA	Appellants' Amended Appendix
AOB	Appellants' Amended Opening Brief
AR	Administrative Record
Authority	Kern Water Bank Authority, a joint powers authority created to develop, own and operate the Kern Water Bank
CDWA	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.*
CEQA Guidelines	Cal. Code Regs., tit. 14, §§ 15000 et seq.
the Contracts	The 27 Monterey Amendments as executed between 1995 and 1999 (AA 13:3060 - 20:4803), and the Kern Fan Element Transfer Agreement executed on December 13, 1995 (AA 20:4804-4829)
Cross Appellants	Roll International, Paramount Farming Company, Westside Mutual Water Company, Kern Water Bank Authority, Dudley Ridge Water District, Semitropic Water District, Tejon-Castac Water District, Wheeler Ridge-Maricopa Water Storage District, and Kern County Water Agency
DWR or Department	Department of Water Resources

GLOSSARY
(continued)

KFE	Kern Fan Element
long-term contracts	The substantially identical long-term water supply contracts between DWR and the 29 SWP contractors first executed in 1960, as amended
Monterey Agreement	The 1994 agreement reached in the City of Monterey between DWR and SWP contractor representatives which was a global resolution of the Article 18 dispute and other long simmering issues. (AA 21: 5238-5249)
PCL	Planning and Conservation League, the plaintiffs in the 1995 lawsuit challenging the Monterey Agreement EIR
PCL	*Planning and Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892
Project	The Monterey Amendment and the Settlement Agreement
Project Decision	DWR Director's May 4, 2010 decision to carry out the Project
RT	Reporter's Transcript
SWP	State Water Project
SWP contractors	The currently 29 local and regional water agencies that have long-term contracts with DWR for the delivery of SWP water

GLOSSARY
(continued)

2003 Order	The CEQA order issued by the PCL trial court in 2003 following the Settlement Agreement. CDWA refers to this order as the "Interim Implementation Order." (AA 21:5015-5018)
2003 Writ	The writ of mandate issued by the PCL trial court in 2003 following the Settlement Agreement. (AA 21:5004-5005)

INTRODUCTION

Fifteen years ago the Department of Water Resources (DWR) embarked on a comprehensive environmental review of the Monterey Amendment following this court's decision in *Planning and Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892 (*PCL*). This review also included additional actions that DWR agreed to implement after settling the *PCL* case (Settlement Agreement) to improve the State Water Project's operations and increase its transparency to the public. Together the Monterey Amendment and the Settlement Agreement formed the Monterey Plus project (Project).

DWR engaged in a unique and open process to produce the Monterey Plus EIR, during which PCL plaintiffs participated directly in its preparation. Following an extensive public process, DWR's Director concluded that the Project would result in few significant adverse impacts; those impacts were mitigated where feasible; and the Project would have many positive environmental and policy benefits. He then made the decision to carry out the Project.

Plaintiffs and Appellants Central Delta Water Agency, et al. (collectively, CDWA) challenged the Project. The trial court correctly found that CDWA's challenge in 2010 to the legal validity of the underlying contracts executed between 1995 and 1999 was time-barred because it came years too late. The trial court also found that the Monterey Plus EIR fully complied with CEQA except with respect to its analysis of one potential impact (which DWR does not challenge here). The trial court then properly exercised its discretion under CEQA to issue a limited writ of mandate which allowed DWR to continue operating the State Water Project pursuant to the Monterey Amendment while DWR revises the Monterey Plus EIR.

The judgment should be affirmed.

STATEMENT OF FACTS

I. THE STATE WATER PROJECT (SWP)

In the early 1960's, the Legislature created and the voters authorized the SWP's construction and operation. (AA[1] 24:5777; *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1154-1155.) DWR operates the SWP to deliver water to about 25 million Californians from Napa Valley to San Diego, and to irrigate about 750,000 acres of farmland. (AA 24:5777.)

DWR then entered into standardized long-term contracts with 31[2] local and regional water contractors. (AA 21:5190-5237 [example of original long-term contract].) These SWP contractors were classified as either urban or agricultural, depending on the primary use the contractor served. The Metropolitan Water District of Southern California signed its long-term contract with DWR on November 4, 1960, which the Supreme Court validated. (*Metropolitan Water District of So. Cal. v. Marquardt* (1963) 59 Cal.2d 159, 170.)

In simplified form, the long-term contracts provide that DWR will deliver available SWP water to SWP contractors up to the amount listed on "Table A" (the table attached to each long-term contract) subject to regulatory and environmental restrictions, and SWP contractors will pay DWR the cost of constructing and operating the SWP. (AA 24:5919-5920.) The SWP contractors' obligation to pay arises even if DWR does not deliver any water. (AA 21:5204-5206 [Art. 22].) SWP contractors have paid DWR hundreds of millions of dollars over the years. (E.g., AA

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[1] Citations to the Appellants' Amended Appendix are as follows: AA [volume]:[pages].

[2] Two agencies subsequently transferred their long-term contracts to other SWP contractors; there have been 29 SWP contractors since 1992. (AA 24:5920.)

26:6468, 6474.) The parties originally anticipated that once fully constructed the SWP would annually deliver a little more than 4 million acre-feet of water, then known as the minimum project yield (or firm yield or safe yield). (AA 21:5195 [Art. 1(k)], 5200 [Art. 16(a)].)

DWR not only agreed to deliver Table A water when available, but also to "offer to sell and deliver" *surplus* water on an annual basis when available. (AA 21:5203-5204 [Art. 21].) Surplus water is SWP water in excess of all SWP contractors' Table A requests and appropriate holdover storage, subject to regulatory and environmental restrictions. (*Id*.) The original long-term contracts did not have the provision later known as Article 21(g) concerning restrictions on the sale of surplus water, which is discussed further below. (*Id*.) The long-term contracts simply provided that DWR "shall" provide surplus water when available.

Agricultural and groundwater replenishment uses had first priority to surplus water. (AA 21:5218.) Agricultural contractors' priority to surplus water compensated in part for the fact that they would be shorted first in times of shortage.

II. EARLY SWP OPERATIONS, SURPLUS WATER, AND THE KERN WATER BANK

In the early 1960's, DWR and the SWP contractors recognized that the SWP would be able to deliver more water than the urban contractors needed in the next few decades. The urban contactors did not anticipate requesting their full Table A amounts until 1990 or later. (AA 24:5920; AA 26:6371-6374.) The agricultural contractors in the Central Valley, however, could use—for irrigation and groundwater replenishment—all this surplus water in those years. (AR[3] 2:665; AR 23:11143-11144.) A

[3] Citations to the CEQA administrative record are as follows: AR [volume]:[page].

practice developed whereby agricultural contractors could contract with DWR for surplus water up to five years in advance. These five-year contracts became known as "scheduled surplus water." (*Id.*)

In an amendment to the original long-term contracts executed by most SWP contractors in 1964, the parties agreed to a new provision that later became Article 21(g). The portion of Article 21(g)(1) quoted below was meant to prevent agricultural contractors from growing reliant on scheduled surplus water:

> In providing for the delivery of surplus water to contractors pursuant to this subdivision, the State shall refuse to deliver such surplus water to any contractor to the extent that the State determines that such delivery would tend to encourage the development of an economy within the area served by such contractor which would be dependent upon the sustained delivery of water in excess of the contractor's maximum annual entitlement.

(AR 23:11144.)[4]

"Article 21(g)(1) was designed to prevent the establishment of permanent agricultural crops based on Article 21's provision for delivery of scheduled surplus water." (AR 2:518.) Because DWR is required to first supply all SWP contractors' demands for water up to their maximum Table A amounts when available before delivering any surplus water, it was expected that the amount of surplus water available to agricultural contractors would gradually diminish and eventually disappear over several decades as urban contractors' Table A amounts and requests rose in the 1980's. (AR 2:665; 23:11144.)

These expectations came to pass. With the exception of the 1977 drought year, DWR was able to meet 100 percent of contractors' Table A

[4] Although Article 21(g) contains many other provisions, for ease of reference, DWR refers to this sentence in Article 21(g)(1) as "Article 21(g)."

requests from the SWP's inception in 1962 through 1989. (AR 23:11131, 11212.) But by the mid-1980's, urban contractors began requesting their full Table A amounts. (AR 2:517-518.) DWR could no longer schedule surplus water deliveries to agricultural contractors. DWR's last delivery of scheduled surplus water occurred in 1986. (AR 23:11198.)[5] By then, Article 21(g) had fulfilled its purpose, as no agricultural contractor had ever claimed that it had a right to the continued delivery of surplus water that was superior to the urban contractors' demand for Table A water. (AR 2:665-666.)

In the 1980's DWR acquired about 20,000 acres of farmland in Kern County, known as the Kern Fan Element (KFE) lands, with the intent of developing a groundwater bank there. (AR 2:739-740.) After fallowing the land and conducting various feasibility and design work, DWR halted work on the project in 1993. (AR 22:10983-10985; AR 26:12493.)

III. THE ROAD TO MONTEREY

From 1990 onward, with rising urban contractor demand, heightened regulatory restrictions, and the fact that not all originally contemplated SWP facilities were built, the SWP was increasingly unable to supply all the Table A amounts requested by SWP contractors. (AR 23:11151, 11198, 11212.) The long-term contracts contained various provisions to address SWP operations during times of shortage and abundance.

In times of temporary shortage, Article 18(a) required DWR to first curtail water deliveries to agricultural contractors before curtailing deliveries to urban contractors. (AA 21:5201-5202 [Art. 18(a)].) During the temporary shortages of the early 1990's, DWR cut Table A deliveries to

[5] DWR's deliveries of unscheduled surplus water from 1987 to 1995 were also modest, accounting for only 1.6 percent of DWR's total deliveries. (AR 23:11198.)

agricultural contractors and delivered no surplus water to them either. (AR 23:11131, 11212.) Yet, agricultural contractors were required to pay DWR for the SWP's costs even when the SWP delivered little or no water for them to sell to fund their obligations. (AA 21:5204-5206 [Art. 22].) For example, although Kern County Water Agency's Table A amount for agriculture in 1991 was over 1 million acre-feet, DWR was able to deliver only 8,965 acre-feet. (AA 26:6372, 6398.) Nonetheless, the Agency was contractually obligated to and did pay DWR more than $37 million. (AA 26:6480.) This caused significant financial problems for Central Valley farmers, and the potential for default threatened.

If DWR declared a "permanent shortage," Article 18(b) provided that the SWP's "minimum project yield" and each SWP contractors' corresponding Table A amount could be permanently reduced. (AA 21:5202.) During the drought of the early 1990's, some agricultural contractors believed that DWR should so declare, while urban contractors believed Article 18(b) had not been triggered. (AA 22:5288-5290; AR 23:11151-11152.) "The threat of litigation loomed." (*PCL*, at p. 901.)

IV. THE 1995 MONTEREY AMENDMENT

In 1994, DWR and SWP contractor representatives met in Monterey and reached agreement on a global resolution of the Article 18 and other long simmering issues in order to avert potentially costly and disruptive litigation (Monterey Agreement). (*PCL*, at p. 901; AR 23:11152-11153; AA 21:5238-5249, 22:5290.) The Monterey Agreement was then translated into an amendment to the long-term contracts known as the Monterey Amendment. (AR 23:11153; e.g. AA 15:3640-3703.) "The underlying fundamental purpose of the Monterey Agreement and the Monterey Amendment is to resolve conflicts and disputes between and among the urban and agricultural SWP contractors and the Department about water allocation and related issues pertaining to the management and

financing of the SWP. One key objective of the Monterey Agreement and the Monterey Amendment is to facilitate water management practices and water transfers that improve reliability and flexibility of SWP water supplies in conjunction with local supplies. The primary focus of the Monterey Amendment is on how the Department will allocate and how the contractors may be able to increase the flexibility and reliability of the available SWP water." (AR 1:193.)

Some of the Monterey Amendment's key provisions include:

- Elimination of the urban contractors' preference to Table A water in times of shortage, and the agricultural contractors' priority to surplus water; hereafter, all contractors share equally in times of shortage and plenty;
- Agricultural contractors transfer 130,000 acre-feet of Table A amounts to urban contractors and permanently retire another 45,000 acre-feet;
- DWR transfers about 20,000 acres of fallowed farmland then-known as the KFE lands to local Kern County entities so that they could attempt to develop a groundwater bank; and
- Providing Southern California SWP contractors flexibility to access SWP water in local SWP reservoirs, and providing all SWP contractors with more flexibility as to where they can store water.

(AR 23:11158-11166; AA 21:5248-5249.) Additionally, the parties also rewrote Article 21. Because scheduled surplus water had not existed in practice for eight years, all "surplus" water would hereafter be known as "interruptible water" that would be available, if at all, without notice and only for short periods of time (daily or weekly). (AR 2:518; AR 23:11160, 11162-11163.) No contractor could schedule, and therefore plan, to receive surplus water because of its highly intermittent availability.

A joint powers agency composed of two SWP contractors prepared an EIR on the Monterey Agreement, which DWR certified in 1995 as a responsible agency. (AR 537:256598-256977.) DWR's Director then signed the 27 separate Monterey Amendments between 1995 and 1999,[6] and executed a separate contract to transfer the KFE lands to Kern County Water Agency known as the KFE Transfer Agreement. (AA 20:4804-4829.) The executed Monterey Amendments and the KFE Transfer Agreement are collectively referred to herein as "the Contracts."

V. THE *PCL* LITIGATION

A group of plaintiffs led by the Planning and Conservation League (PCL) filed a lawsuit in 1995 alleging that the Monterey Agreement EIR violated CEQA and that the Contracts were an invalid transfer of a "reservoir" prohibited by the Water Code. (AA 20:4830-4846.) As an in rem reverse validation action that binds all persons, whether parties to the case or not, the PCL plaintiffs published notice of their reverse validation lawsuit and invited all interested parties to participate. (AA 20:4847-4852; Code Civ. Proc., §§ 861, 861.1, 862, 869.)

In 2000, this court found that the Monterey Agreement EIR was invalid because it was prepared by the wrong lead agency, and because a no project alternative should have included invocation of Article 18(b) to permanently reduce Table A amounts. (*PCL*, at pp. 919-920.) This court rejected the PCL plaintiffs' contention that its opinion required that the underlying Contracts be set aside, and instead directed the trial court to consider the appropriate CEQA remedy. (AA 20:4904, 4910-4914; *PCL*, at p. 926, fn. 16.)

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[6] The first were executed on December 13, 1995 (e.g., AA 15:3640-3703), and the last was executed on August 4, 1999 (AA 19:4673-4736).

VI. THE SETTLEMENT AGREEMENT

The *PCL* parties then engaged in extensive mediated settlement discussions which led to the comprehensive Settlement Agreement. (AR 23:11153.) The Settlement Agreement required DWR to prepare a new EIR analyzing the Monterey Amendment and KFE Transfer Agreement, *plus* a number of other changes to the long-term contracts and other structural changes to make its operations more transparent to the public (the Monterey Plus EIR). (AR 25:12405-12487.) These additional Settlement Agreement terms included, among others:

- Another amendment (set forth in "Attachment A" to the Settlement Agreement) to the long-term contracts to change nomenclature from "entitlement" to "Table A amount" (AR 25:12417, 12441-12442, 12464-12468);
- Addition of Article 58 requiring DWR's bi-annual preparation of a "Reliability Report" to provide DWR's estimate of how much water each SWP contractor will receive in the future in different water year types, regardless of their Table A amount. (AR 25:12443, 12467, 12469; AA 27:6512-6614.) This report is to guard against a potential "paper water" problem—the possibility that local planners made land use planning decisions on the mistaken belief that DWR always delivers to SWP contractors their full Table A amounts every year.[7] The Reliability Report is mailed to every local planning agency in the state; and

[7] DWR devoted an entire chapter in Monterey Plus EIR to study the potential "paper water" issue. (AR 24:11744-11755; AR 2:504-544.) DWR concluded that (1) there was no evidence that local planners in fact made erroneous planning decisions based on Table A amounts, and (2) the

(continued…)

- Any significant future amendment to the long-term contracts will be negotiated in a public forum. (AR 25:12473.)

The PCL parties jointly drafted a proposed writ of mandate (AA 21:5004-5005, the "2003 Writ") and proposed order (AA 21:5015-5018, the "2003 Order"[8]), which the PCL trial court issued as jointly proposed.

Also, after DWR transferred the KFE lands to local Kern County entities in 1995, the Kern Water Bank Authority (Authority), a public entity created to construct and operate the Kern Water Bank, some of whose members had given up Table A amounts, spent millions of dollars to develop that property into a functioning groundwater banking facility known as the Kern Water Bank. (AR 26:12509-12513.) The Kern Water Bank serves to store water available in times of plenty to help ease demands during times of shortage. (AR 26:12509, 12518-12526.) The Settlement Agreement provided that the Authority would retain title to the Kern Water Bank and DWR would study its impacts in the Monterey Plus EIR. (AR 25:12425-12426, 12435.)

The Settlement Agreement also created an unprecedented process for DWR, as lead agency, to prepare the Monterey Plus EIR. The "EIR Committee" was created to "provide advice and recommendations to DWR in connection with the preparation of the" new EIR. (AR 25:12418, 12423.) The EIR Committee, comprising four PCL petitioner representatives and four SWP contractor representatives, functioned between 2002 and 2010, met dozens of times, and generated more than

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(…continued)
Project, through the Reliability Report, reduced the chance that this error could be made, if at all, in the future. (AR 22:10982-10983.) That finding is not challenged on appeal.

[8] CDWA refers to the 2003 Order as the "Interim Implementation Order". (AOB at p. 21.)

16,000 pages of correspondence. (AR 1:198; AR 23:11117; AR 166:83118-AR 196:99970.)

VII. THE MONTEREY PLUS EIR

DWR released the 2,200-page draft Monterey Plus EIR in 2007. (AR 23:11008-27:13305.) DWR explained that it prepared the EIR "to evaluate the environmental impacts of the proposed project and to decide whether to continue operating under the proposed project: the Monterey Amendment and the Settlement Agreement, . . . or to decide to implement one of the alternatives to the proposed project." (AR 23:11116.) No Project Alternative 1 was a return to pre-Monterey Amendment long-term contract terms and not implementing any of the Settlement Agreement provisions. (AR 24:11832.)[9]

Among the almost 6,000 pages of comments DWR received[10] (AR 28:13618-38:19461) was the suggestion that DWR should have interpreted Article 21(g) in the no project alternative in a way that would have limited or precluded Article 21 deliveries, and that some or all of the otherwise surplus water should remain in the Delta. In responses to comments, DWR described how limiting the delivery of otherwise available Article 21 water is not consistent with DWR's contractual obligation to deliver surplus water when available, and would not meet project objectives. (AR 2:520-522.) In the final Monterey Plus EIR, DWR nevertheless analyzed the environmental impacts of invoking Article 21(g) to reduce or eliminate deliveries of surplus water. (AR 2:522-525.) The analysis disclosed the

[9] Because there was legitimate debate as to precisely what it would mean to return to pre-Monterey Agreement contract terms, DWR analyzed four versions of the no project alternative. (AR 24:11832-11833.) The trial court found this approach appropriate. (AA 33:8242-8243.)

[10] DWR did not receive comments from appellant Center for Biological Diversity during the public comment period, and never received any comments from appellant James Crenshaw. (AA 33:8234.)

potential positive and adverse environmental impacts of this pre-Monterey Amendment operational scenario. (*Id.*)

DWR's Director certified the final Monterey Plus EIR in February 2010. (AR 22:10924-10927.) Some of the key conclusions include:

- The Project did not have any significant impacts during the historical period of 1996 to 2003 (AR 22:10935);
- The Project could result in modest additional pumping from the Delta under certain scenarios in the future (2003-2020), but any impacts to Delta fish species would be reduced to a less-than-significant level by complying with existing and future environmental regulatory permits and processes (AR 1:377-378; 22:10937-10940); and
- The Project could have potentially significant impacts in the future (2003-2020) associated with the construction of potential new groundwater banking facilities and the potentially more severe drawdown of two Southern California reservoirs (AR 22:10945-10957, 10988-10996).

The Monterey Plus EIR also identified and adopted feasible mitigation measures, none of which required changes to the long-term contracts. (AR 22:10935-10960.)

In accordance with CEQA and the 2003 Writ, on May 4, 2010, DWR's Director decided to carry out the Project (Project Decision). (AR 22:10924-11005.) DWR's Director also instructed the Department as to *how* it should carry out the project: "by continuing to operate under the existing Monterey Amendment . . . and the existing Settlement Agreement . . . in accordance with the terms of those documents as previously executed by the Department and the other parties to those documents." (AR 22:10932.)

On May 5, 2010, the Department announced its Project Decision by filing a notice of determination with the Office of Planning and Research. (AR 22:11002-11007; Pub. Resources Code, § 21108, subd. (a).)[11] The PCL trial court discharged the 2003 Writ on August 27, 2010. (AA 21:5187.)

STATEMENT OF THE CASE

CDWA filed the operative first amended petition for writ of mandate and complaint on June 4, 2010. (AA 1:99-169.) The first cause of action claims that the Monterey Plus EIR violates CEQA, and the second and third causes of action claim that the Contracts are invalid. (*Id*.)

The trial court first conducted a one-day bench trial on DWR's and Real Parties in Interest's time-bar affirmative defenses to the reverse validation causes of action. (AA 12:2714; AA 27:6615-6652; AA 12:2821-2829; RT[12] 45-186.) The trial court found that those causes of actions were time-barred. (AA 30:7626-7665.)

The trial court then conducted another one-day bench trial on CDWA's CEQA claim. (AA 12:2714; RT 218-312.) CDWA raised 25 theories of CEQA error, ranging from alleged errors in the project description, to baseline, to alternatives, to project impacts. (AA 31:7843-7902.) The trial court rejected all of CDWA's claimed CEQA errors, except for one with respect to DWR's analysis of the Kern Water Bank operations' potential future impacts on groundwater and water quality. (AA 33:8224-8250.) The appropriate CEQA remedy for this single error was the subject of extensive separate briefing and a subsequent hearing. (AA 33:8260–AA 36:9122; RT 313-370.) The trial court issued a ruling on

[11] Further undesignated statutory references are to the Public Resources Code.

[12] Citations to the Reporter's Transcript are as follows: RT [page].

the appropriate remedy (AA 36:9132-9146) and a limited writ of mandate. The limited writ (i) severed the Kern Water Bank operations from the SWP operations, (ii) ordered DWR to decertify the Monterey Plus EIR, and (iii) directed DWR to revise the Monterey Plus EIR only as necessary to address the Kern Water Bank future operations issue. (AA 37:9205-9208.)

Judgment was entered. (AA 37:9201-9204.) CDWA's appeal and Cross Appellants' cross appeal followed. (AA 37:9225-9251.)[13]

STANDARD OF REVIEW

I. STANDARD OF REVIEW FOR CEQA CLAIMS

Judicial review of an agency's compliance with CEQA is limited to assessing whether there was a prejudicial "abuse of discretion" which "is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (§ 21168.5.) "Substantial evidence" means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Cal. Code Regs., tit. 14, § 15384.)[14] The substantial evidence test applies to a lead agency's "conclusions, findings, and determinations and to challenges to the scope of an EIR's analysis of a topic . . . because these types of challenges involve factual questions." (*City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 898.)

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[13] Appellant Center for Biological Diversity also filed a second appeal, Case No. C080572, of the trial court's denial of its motion for attorney's fees.

[14] The Natural Resources Agency's regulations implementing CEQA, known as the CEQA Guidelines, are afforded "great weight except where they are clearly unauthorized or erroneous." (*Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, 448, fn. 4.)

Guided by the constitutional principle of separation of powers, courts defer to state agencies' substantive factual decisions. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426-427.) "The court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document." (*Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 392 (*Laurel Heights I*).) In reviewing an EIR, the court's focus is on the document's adequacy, completeness, and good faith effort at full disclosure. (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1390; Cal. Code Regs., tit. 14, § 15151.)

A public agency's decision to certify an EIR is presumed correct, and the challenger has the burden of proving otherwise. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 530.)

A trial court's issuance of a CEQA remedy pursuant to Public Resources Code section 21168.9 is reviewed for abuse of discretion. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 287.)

II. STANDARD OF REVIEW FOR VALIDATION CLAIMS

As in any civil litigation, CDWA bore the burden of proof at trial to establish each element of its claim. (Evid. Code, § 500.) One element of CDWA's reverse validation claim was that a "matter" subject to validation came into "existence" during the 60 days before the suit was filed. (Code Civ. Proc., § 864.)

The trial court's conclusion that CDWA failed to meet its burden was based on writings and parol evidence to interpret those writings. (AA 30:7660-7662.) The appellate court reviews the trial court's conclusions based on conflicting parol evidence for substantial evidence. (*Roden v. Bergen Brunswig Corp.* (2003) 107 Cal.App.4th 620, 624-625; *In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 746-747.)

SUMMARY OF ARGUMENT

1. There was no CEQA error in the form of DWR's Project Decision. In accordance with CEQA and the 2003 Writ, at the end of the Monterey Plus EIR process, DWR's Director decided to carry out the Project. He appropriately determined that the Department could carry out the Project by "continuing to operate" the SWP pursuant to the existing Contracts because the *PCL* trial court left the Contracts in place.

2. DWR appropriately defined the no project alternatives to not include invocation of Article 21(g) to prohibit or limit delivery of surplus water, as CDWA proposes. Article 21(g) was not part of the original long-term contracts, and had relevance to a particular issue only between 1964 and 1986 when surplus water was available for scheduled delivery years in advance. By 1995, when the Monterey Agreement was executed, Article 21(g) had no relevance since the last delivery of scheduled surplus water was made in 1986. The EIR explained that CDWA's interpretation of Article 21(g) was not consistent with the long-term contracts. (AR 2:521.) Nonetheless, DWR met CEQA's information disclosure goals because it analyzed the potential environmental impacts of invoking Article 21(g) to entirely eliminate or limit deliveries of surplus water. (AR 2:520-525.)

3. The trial court correctly found that CDWA's reverse validation causes of action were time-barred because the Contracts were "authorized" when executed between 1995 and 1999 and were validated in 2003 when the PCL plaintiffs dismissed their challenge to them. DWR's Project Decision in 2010, which did not require re-execution or re-authorization of the Contracts, did not bring a new "matter" into "existence" that could be challenged under the validation statute.

4. Public Resources Code section 21168.9 gave the trial court discretion to leave project approvals in place while DWR revises the

Monterey Plus EIR to more fully address a single potential impact. The trial court did not abuse its discretion in so ordering here.

ARGUMENT

I. DWR MADE AN APPROPRIATE DECISION IN MAY 2010 ON THE MONTEREY PLUS PROJECT

CDWA spends 23 pages arguing—for the first time in this case—that DWR has not yet made a decision to approve or carry out the Monterey Plus project. (Appellants' Amended Opening Brief (AOB) at pp. 31-54.) Not only is this an impermissible new argument, but CDWA is wrong.

CDWA's entire argument rests on the fact that when DWR's Director made his Project Decision, DWR was operating the SWP pursuant to the Contracts in accordance with the 2003 Writ, which authorized it to do so. CDWA objects to the Director's phrasing, in which he stated that DWR would carry out the Project by "continuing to operate. . .", but this phrasing simply reflects the factual context in which he made his decision. The Director's Project Decision clearly expresses his policy decision to carry out the Project. There was no error in his phasing because CEQA does not require that an agency's project decision take any particular form.

A. CDWA Waived Its Argument That DWR Did Not Make an Appropriate Decision By Arguing the Contrary at Trial

CDWA waived its new argument that DWR did not make a decision on the proposed Project in 2010 because it asserted a contradictory argument below. During the validation trial, CDWA argued that DWR, in fact, authorized the Contracts when DWR's Director signed the May 4, 2010 notice of determination. (AA 27:6623-6624 ¶ 5 ["This contract was

authorized by DWR when DWR approved the Project with its issuance of a Notice of Determination dated May 4, 2010, …"].)[15]

While an appellant can raise a new legal theory on appeal that is based on undisputed facts, an appellant cannot argue a wholly contradictory theory. CDWA waived its new theory by asserting a contradictory theory below. (*DiCola v. White Bros. Performance Products* (2008) 158 Cal.App.4th 666, 676 ["A party is not permitted to change his position and adopt a new and different theory on appeal"]; *Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360, 380, fn. 16 [court can decline to review new theories not raised below].)

B. CDWA's Argument Is Legally Unsupported Because CEQA Does Not Mandate the Form That an Agency's Decision on a Project Must Take

Not only is CDWA's argument barred, it is legally incorrect. CEQA provides a lead agency with discretion as to how it will manifest its decision on a proposed project. The Supreme Court expressly held, "No particular form of approval is required." (*Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 506.) This holding is consistent with the CEQA Guidelines which define "approval" in an open-ended and flexible way as "the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person." (Cal. Code Regs., tit. 14, § 15352, subd. (a).) The Guidelines reflect the reality that lead agencies can make a "decision"

[15] During the CEQA trial, CDWA had three theories as to why the Monterey Plus EIR's *project description* was erroneous: the Monterey Plus EIR (1) incorrectly described the proposed project, (2) failed to describe all necessary project approvals, and (3) failed to state that the prior project approvals were voided. (AA 31:7855-7862.) CDWA has abandoned these arguments on appeal. CDWA's new argument on appeal, that the *form* of DWR's decision on the Project was deficient (AOB at p. 31), is similar to, but conceptually distinct, from its trial arguments.

to "commit themselves to a definite course of action" in a myriad of different ways depending on the particular agency and particular project. Nothing in this definition of approval, or any case law interpreting it, dictates how the lead agency must express its decision regarding a CEQA project.

C. CDWA's Argument is Factually Unsupported Because DWR Made a Decision on the Project

CDWA proceeds from the false premise that DWR did not make a new decision at the end of the Monterey Plus Project process. The argument is unsupported. There can be no dispute that the Monterey Plus EIR plainly described the proposed project: "The proposed project is the Monterey Amendment and the Settlement Agreement." (AR 23:11158.) DWR could not describe the proposed project more directly. The Monterey Plus EIR also plainly described the no project alternative: operation of the SWP pursuant to the pre-Monterey Amendment contracts and not implementing the Settlement Agreement. (AR 24:11832-11833.) The draft EIR disclosed that the "EIR will be used . . . to evaluate the environmental impacts of the proposed project and to decide whether to continue operating under the proposed project: the Monterey Amendment and the Settlement Agreement, … or to decide to implement one of the alternatives to the proposed project." (AR 23:11116.) There can be no reasonable confusion as to what was under consideration in the Monterey Plus EIR.

After the Monterey Plus EIR was certified, DWR staff prepared a proposed decision memorandum for the Director's consideration recommending the "proposed project." (AR 22:10928-11007.) The Director accepted the recommendation and took the actions required by CEQA to implement his Project Decision. The Director:

1. Adopted findings and directed DWR to implement the feasible mitigation measures;

2. Adopted a statement of overriding considerations;
3. Adopted a reporting and monitoring program;
4. Directed DWR as to how to carry out the project; and
5. Executed a notice of determination documenting the decisions noted immediately above, and directed staff to file it with the Office of Planning and Research.

(AR 22:10931-10932.) The above constitute all of the findings and decisions CEQA requires a lead agency to make at the conclusion of an EIR process. (Remy et al., Guide to CEQA (11th ed. 2007) ch. 10:O, p. 403.)

D. CEQA Gives the Lead Agency Discretion As To How It Will Carry Out a Project

CDWA's argument that DWR erred in determining that it could carry out the Project by "continuing to operate" pursuant to the already executed Contracts, as opposed to carrying out the Project by "approving, enacting and adopting" the Contracts (AOB at p. 31), is not well founded. The CEQA Guidelines expressly give the lead agency discretion as to how it will approve or carry out a project. (Cal. Code Regs., tit. 14, § 15092, subd. (a) ["After considering the final EIR and in conjunction with making findings under Section 15091, the lead agency may decide whether or how to approve or carry out the project"].)

Here, because the *PCL* trial court had not enjoined or voided the Contracts, the Director made a commonsense and practical decision as to "how" DWR would "carry out the project." (AR 22:10932.) Nothing in CEQA required DWR to decide to carry out the Project in any particular way, and certainly nothing required DWR to go through the legally unnecessary exercise of re-executing each of the already executed Contracts. DWR's Director made a specific finding that the Settlement Agreement

"does not require re-approval or re-execution" of the Contracts. (AR 22:10987.)

E. DWR's CEQA Notice of Determination Does Not Constitute DWR's Decision on the Project

Changing course to assert that DWR did, in fact, make a decision in May 2010, CDWA erroneously asserts that DWR's 2010 *notice of determination* is the document in which DWR's *decision* on the project was made. (E.g., AOB at p. 31.) The *notice* of determination, as the plain language implies, was not the decision itself; it was a document in which DWR communicated the decision it already made.

A notice of determination's purpose is to "alert the public about environmental decisions." (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 43.) CEQA and its Guidelines make it clear that a notice of determination is distinct from a lead agency's earlier decision on a project. For example, the only legal effect of filing a notice of determination is to start a 30-day statute of limitations period. (§ 21167, subd. (b).) If no notice of determination is filed, then the statute of limitations is "180 days from the date of the public agency's decision to carry out or approve the project." (§ 21167, subd. (a).) CEQA thus contemplates that an agency can make a decision on a project without ever preparing a notice of determination.

The CEQA Guidelines also support the notion that a project decision precedes filing a notice of determination. The Guidelines state, "The lead agency shall file a Notice of Determination (Rev. 2011) within five working days after deciding to carry out or approve the project." (Cal. Code Regs., tit. 14, § 15094, subd. (a).) Because a notice of determination is to be filed up to five days *after* a decision is made, it necessarily follows that the lead agency's actual decision had been made up to five days *before* the notice is filed.

Case law also recognizes that a notice of determination is distinct from the lead agency's project decision. (E.g., *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 962 ["A notice of determination or exemption may only be filed *after* the agency makes a decision to carry out or approve the project"].)

CDWA's underlying assumption that DWR's 2010 notice of determination is its decision on the Monterey Plus Project is erroneous. For the same reasons, CDWA's argument that DWR's *1995* notice of determination was its approval of the Contracts (and that the PCL trial court's 2003 Writ requiring DWR to set aside its 1995 CEQA notice of determination necessarily set aside its approval of the Contracts), is without merit.

F. CDWA's Arguments As To the Effect of the PCL Litigation are Red Herrings

CDWA's argument all flows from the false premise that DWR did not make a decision at the end of the Monterey Plus CEQA process. As discussed above, DWR did make a new Project Decision, rendering those arguments moot.

In brief, however, CDWA's argument that CEQA requires that an EIR be completed before a lead agency makes a decision on a project is true so far as it goes. (AOB at pp. 33-34.) That general statement of CEQA law as to an original EIR has no application here because, as discussed *infra* in Section IV, CDWA fails to address Section 21168.9 and the body of case law that also recognizes that a trial court has authority to leave earlier project approvals in place while the agency complies with CEQA. As the trial court found, DWR's Project Decision was made against the unique procedural and factual circumstances in which the PCL trial court allowed the Contracts to remain in place while DWR prepared the Monterey Plus EIR. (AA 33:8236-8237.)

DWR's 2010 Project Decision also fully complied with the 2003 Writ. The PCL trial court so found when it discharged the 2003 Writ on August 27, 2010. (AR 115:58957 [DWR "fully complied with" the 2003 Writ].) As discussed *infra* in Section III.C, the 2003 Writ and 2003 Order did not void project approvals; they were expressly left in place. Whether or not the 2003 Writ contained required severance findings, it is plain that the parties and the PCL trial court intended to leave the Contracts in place.

Nor did the 2003 Order automatically take the Contracts out of existence as soon as DWR made a new decision on the Project, requiring DWR as a matter of law to reauthorize or re-execute the Contracts if DWR approved the Project. (AOB at p. 66.) The trial court rejected this theory, finding that the 2003 Order did not so order. (AA 33:8237; see also Section III.C, *infra*.) The fact that the PCL trial court authorized DWR to operate the SWP pursuant to the Contracts on an "interim" basis simply acknowledged that DWR could take whatever steps it deemed appropriate at the end of the new CEQA process. (AR 115:58930 ["[T]his Writ of Mandate shall not limit or constrain the lawful jurisdiction and discretion of the Department of Water Resources"]; § 21168.9, subd. (b) [Any CEQA order "shall include only those mandates which are necessary to achieve compliance with" CEQA]; § 21168.9, subd. (c) ["Nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way"].)

Finally neither the Settlement Agreement nor the "no project" definition prohibited DWR from electing to carry out the Project as it did. (AOB at pp. 46-54.) As discussed above, DWR made a new Project Decision in May 2010. (Section I.C, *supra*.) The trial court grasped that DWR accurately described the Project and the practical result of what would occur if DWR decided to carry it out:

> Because DWR was operating pursuant to the Monterey Amendment while the new EIR was being prepared, the EIR accurately described the practical result of carrying out the proposed Project as "continuing" to operate the SWP pursuant to the Monterey Amendment, and accurately described the "no project" alternatives as returning to operation of the SWP in accordance with the pre-Monterey Amendment long-term water supply contracts. Therefore, DWR correctly determined that it could carry out the Project simply by deciding to continue operating under the Monterey Amendment.

(AA 33:8236.) The trial court's conclusion that the EIR contained an accurate project description applies equally to the form of DWR's decision.

G. No Prejudicial Error Flowed From the Project Decision

For all the reasons discussed above, the form of DWR's Project Decision complied with CEQA. Nonetheless, even if did not, the judgment should be affirmed because any error in the syntax did not amount to prejudicial error. CEQA errors are not presumed to be prejudicial. (§ 21005, subd. (b).) Only errors that "undermine informed public participation or decisionmaking" are prejudicial. (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 926-927.)

Here, CDWA only claims that DWR's Director should have said in his Project Decision to "approve, enact and adopt" the Contracts, rather than instructing the Department to carry out the project by "continuing to operate" under the Contracts. (AOB at p. 31.) DWR made specific findings disclosing its conclusions with respect to the form of its Project Decision. (AR 22:10986-10987.) Any alleged error in the form of the Director's Project Decision did not undermine public participation or informed decisionmaking. CDWA identified none. Certainly, no environmental impact flows from the syntax used. Nor could there be any confusion as to what decision was before DWR and what decision it was making. Thus, neither CDWA nor anyone else was prejudiced by the form

of the Director's Project Decision. (*Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 203; *Neighbors of Cavitt Ranch v. County of Placer* (2002) 106 Cal.App.4th 1092, 1102.)

II. DWR ADEQUATELY ADDRESSED ARTICLE 21(G) IN THE NO PROJECT ALTERNATIVES AND THE FINAL EIR

CDWA next claims that the Monterey Plus EIR fails as an informational document because the no project alternative does not include invoking Article 21(g) to deliver little or no surplus water on the assumption that such deliveries, if made, would tend to encourage the development of an economy dependent upon the sustained delivery of surplus water. (AOB at pp. 54-64.) CDWA's claim fails for two reasons.

One, DWR included invocation of Article 21(g) in two of the four no project alternatives. (AR 24:11832-11833.) DWR just did not invoke Article 21(g) in the manner suggested by CDWA. CDWA's proposed interpretation of Article 21(g) was not an "existing condition" because it was not part of DWR's operational practice; nor was it part of DWR's "reasonable forecast of future events" because by 1995 Article 21(g) had outlived its intended purpose for almost a decade. (Cal. Code Regs., tit. 14, § 15126.6, subd. (e)(2).) DWR's conclusion as to what constitutes the no project condition must be affirmed as it is supported by substantial evidence. (*North Coast Rivers Alliance v. Kawamura* (Dec. 2, 2015, C072067) __ Cal.App.4th __ [pp. 28-29].)

Two, even if the no project alternative should have included invocation of Article 21(g) in the way that CDWA suggested, the final Monterey Plus EIR fulfilled its informational purposes by including a detailed discussion of the potential environmental impacts of operating the SWP after invoking Article 21(g) to reduce or eliminate surplus water deliveries. (AR 2:520-525.) As the trial court concluded, this analysis provided the public and decisionmakers with the information necessary to

evaluate CDWA's proposed version of pre-Monterey Amendment operations. As such, as the trial court concluded, there was no prejudicial error. (AA 33:8245.)

A. CEQA's No Project Alternative Requirements

CEQA requires that a proposed project be viewed against alternatives, including a "no project" alternative. (*Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549, 576.) The CEQA Guidelines provide that "the 'no project' analysis shall discuss the *existing conditions* at the time the notice of preparation is published ... as well as *what would be reasonably expected to occur* in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services." (Cal. Code Regs., tit. 14, § 15126.6, subd. (e)(2), italics added.) "The existing conditions supplemented by a reasonable forecast, are characterized as the no project alternative." (*PCL*, at p. 911.) "[W]here the EIR is reviewing an existing operation or changes to that operation, the no project alternative is the existing operation." (*Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 253.)

B. CEQA Did Not Require DWR to Include Invocation of Article 21(g) In a Particular Way In a No Project Alternative

Given the legitimate debate as to what it would mean for DWR to operate the SWP pursuant to the pre-Monterey Amendment long term contracts, DWR considered four different iterations of the no project alternative with different SWP operational permutations in each. In DWR's reasoned judgment, implementation of Article 21(g) as CDWA proposed was correctly not included in the no project alternative because, unlike Article 18(b), Article 21(g) was a complete dead letter by 1995.

1. Article 21(g) was not an existing condition or a reasonably foreseeable future condition

A few years after the original long-term contracts were signed, the parties agreed to a new provision which would later become Article 21(g). That provision was included to expressly foreclose any reliance argument agricultural contractors might make that they had come to count on scheduled surplus deliveries in the 1970's and 1980's while urban contractors' Table A requests were low. Article 21(g) informed agricultural contractors that, once urban contractors' Table A demands increased, as expected, their receipt of scheduled surplus water would be subordinated to urban contractors' Table A demands. As such, they should not develop economies in the 1960's and 1970's that relied on the sustained delivery of scheduled surplus water, because those supplies were temporary. By 1987, that condition occurred, and no scheduled surplus water has since been delivered. Having fulfilled its intended purpose, DWR and the contractors chose to eliminate the historical relic provision in Article 21(g) from the long-term contracts going forward. (See Statement of Facts, Section II, *supra*.)

This is wholly unlike the question at issue in *PCL* regarding Article 18(b). When the Monterey Amendment was executed in 1995, there was significant disagreement, even among the contractors, as to whether Article 18(b) could or should be invoked to declare a permanent shortage to reduce all Table A amounts. (AR 23:11151-11152.) While reasonable parties in 1995 could and did differ as to the viability of implementing Article 18(b), all parties to the long-term contracts agreed that by 1995 Article 21(g) no longer had meaning or impact. (AR 2:517-520, 666.) DWR reasonably found that, by 1995, "it was unlikely that anyone thought that intermittent Article 21 water would be used to support development of an economy in agricultural or [urban] areas." (AR 2:518.) Thus, CDWA's proffered

interpretation of Article 21(g) was not included in the no project scenario because it was not a "plausible construction." (*PCL*, at pp. 911-913.) This was true whether or not the Monterey Amendment was adopted.

"CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR. Each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 566.) Whether Article 21(g) was an existing condition or should have been reasonably expected to occur is predominantly a factual question. (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 312-313 [substantial evidence standard applied to range of alternatives issues].) Consequently, DWR's conclusion that invocation of CDWA's version of Article 21(g) was neither an existing condition nor reasonably expected to occur is a question of fact reviewed for substantial evidence. (*Vineyard, supra*, 40 Cal.4th at p. 426.) Substantial evidence supports DWR's conclusion that invocation of Article 21(g) to reduce or eliminate deliveries of surplus water was not currently part of and would not be part of DWR's operation of the SWP in the future. (AR 2:517-520, 666.)

2. Article 21(g) was not part of the original long-term contracts, and therefore Article 18(b) was not adopted to work with Article 21(g)

CDWA's misunderstanding of the history of Article 21(g) infects its entire argument. CDWA asserts that Article 21(g) was a "critical check[] and balance[] that had been *built into the SWP when it was first proposed* and presented to the citizens of California for their approval, by ballot initiative, *in the early 1960s*." (AOB at p. 1, italics added.) That is categorically wrong. Article 21(g) did not exist when the SWP was "first proposed"; it did not come into existence until a few years after the voters approved Burns-Porter Act in 1960, and after the original SWP contract

was validated by the California Supreme Court in 1963. CDWA's contention that "Article 21(g) made Article 18(b) work" (AOB p. 56) fails for the same reason—Article 18(b) was drafted to operate without Article 21(g) even existing. (AR 23:11143-11144; 2:518.)

When the long-term contracts were originally executed in the early 1960's, Article 21 simply provided that when the supply of water exceeds total entitlements for that year, DWR "shall offer to sell and deliver such surplus water" on a year-to-year basis. (AA 21:5203-5204.) There was no limitation on the use of surplus water. Contrary to CDWA's argument, the language that later became Article 21(g) was not present in the original long-term contracts. (AR 23:11144.)

C. Even If Not Including Article 21(g) In a No Project Alternative Was Error, the Error Was Not Prejudicial Because DWR Analyzed and Disclosed the Consequences of Invoking CDWA's Version of Article 21(g)

Even though DWR appropriately declined to define the no project alternative as including invocation of CDWA's version of Article 21(g), DWR nonetheless analyzed what the environmental effects would be of returning to pre-Monterey Amendment contracts *with* invocation of CDWA's interpretation of Article 21(g). (AR 2:520-525.) DWR's analysis assumed that it would invoke Article 18(b) and deliver only 1.9 million acre-feet of water, and it would also invoke Article 21(g) to prohibit either all or most deliveries of Article 21 water. (AR 2:522.) Thus, the Monterey Plus EIR fully disclosed a SWP operational scenario that reduced total deliveries to a reduced minimum project yield of only 1.9 million acre-feet. (*Id.*)

DWR disclosed that such an operational scenario could have both positive and negative environmental consequences. In summary, DWR assumed that reduced deliveries would mean less DWR pumping from the

Delta, and consequently lower fish mortality. (AR 2:525.) That potential positive impact on Delta fish could be diminished or eliminated because DWR also assumed that the federal Central Valley Project would inversely increase its pumping from the Delta, as its operations would be less constrained due to DWR's more limited pumping. (AR 2:524-525.) Further, DWR assumed that delivery of less SWP water would cause SWP contractors to seek alternative supplies, which itself could have adverse impacts on groundwater and other surface stream diversions. (AR 2:524.) If SWP contractors did not obtain alternative supplies, the reduced overall supply could have adverse impacts due to reduced irrigation and reduced economic activity. (*Id.*)

The trial court correctly found that this analysis "provides additional information to the public and to decisionmakers on the effects of not delivering water to SWP contractors that would otherwise be available under Article 21." (AA 33:8245.) The trial court concluded, "[t]he EIR's analysis of this scenario is not perfect, but it is sufficient to make an informed decision on the Project, particularly where, as here, all of the parties to the SWP contracts believe such interpretation is not reasonable or enforceable." (*Id.*)

Courts do not look for technical perfection in an EIR's discussion, but for "adequacy, completeness, and a good faith effort at full disclosure." (Cal. Code of Regs., tit. 14, § 15151; § 21005, subd. (b) [CEQA errors are not presumed to be prejudicial]; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712 [CEQA errors are prejudicial only if "the failure to include relevant information precludes informed decisionmaking and informed public participation."].) The trial court found that the final EIR met this standard, and consequently that omitting invocation of CDWA's version of Article 21(g) in a no project alterative was not prejudicial because it did not preclude informed decisionmaking or

informed public participation. (AA 33:8245.) The conclusion that the EIR's treatment of Article 21(g) is not prejudicial is consistent with recent cases reaching similar conclusions in similar circumstances. (E.g., *Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, 463-465 [lead agency's error in establishing a baseline was not prejudicial]; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 925-927 [failure to include information in the draft EIR was not prejudicial when the issue was considered at the public hearing before the EIR was certified].) The final EIR's discussion of the potential impacts of invoking Article 21(g) fully satisfied CEQA's public participation and informed decisionmaking goals. As such, any error in not including invocation of Article 21(g) in a formal no project alternative was not prejudicial.

III. CDWA'S REVERSE VALIDATION CLAIMS WERE TIME-BARRED

The trial court correctly found that CDWA's 2010 reverse validation challenge to the Contracts was time-barred because the Contracts were already validated in 2003 when PCL dismissed its reverse validation challenge.

A. The Validation Statute Provides the Exclusive Procedure by Which Matters Subject to Validation Are Conclusively Decided

The validation statute, Code of Civil Procedure sections 860 through 870.5, establishes a process by which a public agency can know, with certainty and within a short time period, that a "matter" is valid and forever immune from subsequent attack. (Code Civ. Proc., §§ 860 et seq.) "Matters" subject to validation include public contracts that relate directly to a state agency's bonds. (Gov. Code, § 17700, subd. (a); Code Civ. Proc., § 860; *Cal. Commerce Casino, Inc. v. Schwarzenegger* (2007) 146

Cal.App.4th 1406, 1429-1430.) The parties stipulated, and the trial court agreed, that the Contracts were subject to validation. (AA 27:6621 ¶ 3 and 6624 ¶ 11; AA 30:7652-7653.)

A matter may be validated if a public agency files an action to obtain a judicial determination of the matter's validity. (Code Civ. Proc., § 860). Alternatively, a member of the public can file a "reverse" validation challenge seeking a judicial declaration that a public agency's action is invalid. (*Id*. § 863). Either way, conclusion of a validation or reverse validation action binds "all persons" because they are in rem actions. (*Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 843; Code Civ. Proc., §§ 860, 863, 869.) Immunity from later challenges includes all types of challenges, whether based on common law, statute or constitution. (*Cal. Commerce Casino, Inc., supra,* 146 Cal.App.4th at p. 1420.)

A matter can also be conclusively validated if no person files a validation action within 60 days of the "matter" coming into "existence." (Code Civ. Proc., § 869.) Contracts are "deemed to be in *existence* upon their *authorization*." (*Id*. § 864, italics added.) Contracts are "deemed authorized as of the date of adoption by the governing body of the public agency of a resolution or ordinance approving the contract and authorizing its execution." (*Id*.) Because DWR acts through its Director and not through a governing body, it necessarily skips the intermediate step of having a governing body authorize someone (like a general manager) to later execute a contract and instead moves directly to have its Director authorize contracts by executing them. Thus, for entities like DWR that do not have governing bodies, contracts must be deemed to be authorized no later than when they are signed.

If no timely validation action is filed, the matter is conclusively validated. (Code Civ. Proc., §§ 860, 863, 869 ["No contest . . . of any thing or matter under this chapter shall be made other than within the time and

the manner herein specified"]; *Embarcadero Mun. Improvement Dist. v. County of Santa Barbara* (2001) 88 Cal.App.4th 781, 790 [60-day limitations period intended "to further the important policy of speedy determination of the public agency's actions"]. This is so "whether [the matter] is legally valid or not." (*City of Ontario v. Superior Court (Duck)* (1970) 2 Cal.3d 335, 341-42; see also *Colonies Partners, L.P. v. Superior Court (The Inland Oversight Committee)* (2015) 239 Cal.App.4th 689, 692-695 [contract remained validated despite later discovered evidence that county supervisor accepted bribe to approve it].)

B. The Contracts Came Into Existence Between 1995 and 1999, and Were Validated in 2003

DWR executed each of the Contracts between 1995 and 1999. (AA 13:3060 – 20:4829.) Because contracts "shall be deemed to be in *existence* upon their *authorization*" (Code Civ. Proc., § 864, italics added), each of those contracts came into "existence" between 1995 and 1999 when DWR's Director "authorized" them by signing them. Thus, the Contracts were subject to validation no later than 60 days after their execution. (*Id.* § 860.)

In their 1995 lawsuit, the PCL plaintiffs claimed that the Contracts were invalid because the Water Code prohibited DWR from transferring the KFE lands. (AA 20:4843.) As required by the validation statute and pursuant to court order, in April 1996 the PCL plaintiffs published a summons in the newspaper directed to "all persons interested" and informing them that they could contest the validity of the Contracts by appearing in the *PCL* action. (AA 20:4847-4850.) The *PCL* trial court's jurisdiction over the validity of the Contracts was complete as of May 2, 1996, the date specified in the summons. (*Id.*; Code Civ. Proc., §§ 861, 861.1, 862.) CDWA did not so appear.

As part of the Settlement Agreement, the PCL plaintiffs dismissed their reverse validation lawsuit in 2003.[16] (AA 20:4956-4957.) The PCL plaintiffs' dismissal of its reverse validation challenge to the Contracts terminated all persons' ability to challenge the Contracts' validity because a reverse validation lawsuit is "an in rem action whose effect is binding on the agency and on all other persons." (*Committee for Responsible Planning v. City of Indian Wells* (1990) 225 Cal.App.3d 191, 197.) Thus, the Contracts were validated by operation of law no later than 2003. As the trial court correctly found, no new lawsuit challenging the validity of the Contracts can ever be pursued. (AA 30:7649-7662; Code Civ. Proc., § 869 ["No contest . . . of any thing or matter under this chapter shall be made other than within the time and the manner herein specified"]; see also *Friedland, supra,* 62 Cal.App.4th at pp. 849-850.)

C. The 2003 Writ and 2003 Order Did Not Take the Contracts Out of Existence

CDWA concedes that the Contracts were validated, but argues that the *PCL* litigation caused those Contracts to go out of existence, and that new contracts came into existence upon DWR making a new Project Decision in May 2010. The trial court soundly rejected that unfounded and novel argument.

Like the PCL plaintiffs did in their 1995 complaint, CDWA also alleges in its 2010 complaint that the Contracts are invalid because DWR lacked authority to transfer the KFE lands. (Compare AA 20:4843 with AA 1:158-164, esp. 1:163 ¶ 339.) In an effort to avoid the fact that a

[16] The dismissal was subject to a tolling agreement, which provided that the statute of limitations relating to the PCL plaintiff's validation cause of action was tolled, as to the PCL plaintiffs only, until 45 days after DWR filed a notice of determination on the Monterey Plus EIR. (AA 21:5019-5021; AR 25:12443-12444.)

validation lawsuit is timely only if filed within 60 days of a contract coming into "existence" because its execution was "authorized" (Code Civ. Proc., §§ 860, 864, 869), at trial CDWA asserted a theory whereby the previously validated Contracts came into existence a second time in 2003 pursuant to the 2003 Order, and then came into existence a third time in May 2010 when DWR filed a notice of determination on the Monterey Plus EIR. (AA 27:6622-6624 ¶¶ 1-5.) In the binding stipulation of facts and contentions filed with the trial court, CDWA alleged:

1. The Contracts went out of existence in 2003 pursuant to the 2003 Order;
2. Those contracts immediately came back into existence on an interim basis and were authorized by the Settlement Agreement and 2003 Order while the Monterey Plus EIR was prepared from 2003 to 2010 (the alleged "second" contracts); and
3. The second contracts went out of existence, and then a new third set of contracts immediately came back into existence upon DWR's filing of a notice of determination on the Monterey Plus EIR on May 5, 2010 (the alleged "third" contracts). It is only this alleged third contract "which is the subject of Plaintiffs' Validation and Mandamus Causes of Action." (AA 27:6623-6624 ¶ 5.)

The trial court rejected CDWA's three contract theory. (AA 30:7626-7665.) The court found no evidence that the Settlement Agreement parties agreed to take the Contracts out of existence, that the *PCL* trial court ordered that the Contracts go out of "existence", or that CEQA required it.

1. The Settlement Agreement parties did not agree to take the Contracts out of existence

The Settlement Agreement is a comprehensive agreement resolving all of the disputes between the *PCL* parties concerning the Monterey

Agreement EIR. (AA 20:4963-4964.) The PCL parties jointly drafted the form of the 2003 Writ and 2003 Order they would ask the trial court to enter, and attached those proposed documents to the Settlement Agreement. (AA 20:4955, 4993-4998.) Here, the trial court found that while DWR agreed to prepare a new EIR and make a new CEQA determination, "nowhere in the Settlement Agreement did the parties agree to invalidate the [] Contracts." (AA 30:7657-7660.) The trial court is correct.

Among the other indicia the trial court relied on was the fact that the Settlement Agreement expressly required DWR to set aside its certification of the Monterey Amendment EIR (AA 20:4998), but said nothing about setting aside the Contracts. (AA 30:7660.) The parties knew how to specify that a prior agency action would be set aside; had they wanted to also set aside the Contracts, they obviously knew how to do so. It is also telling that when the Settlement Agreement required that an agency action be set aside, the parties did not rely on an unstated operation of law to achieve the desired result; the parties expressly required DWR to take affirmative action to do so. The PCL parties did not leave significant actions to happen by silent implication.

The fact that the PCL plaintiffs agreed to dismiss their reverse validation challenge to the Monterey Amendment, subject to a tolling agreement, is further evidence that the *PCL* parties intended to validate those Contracts as a condition of settlement. (AA 20:4956, 30:7658.) If the parties intended for the Settlement Agreement to automatically take the Contracts out of existence, there was no reason for the PCL plaintiffs to reserve their right to maintain a validation challenge to non-existent Contracts. Similarly, if the *PCL* parties intended DWR's decision on the Project would have to bring *new* contracts into existence, there would have been no need to toll the PCL plaintiffs' right to refile a reverse validation action challenging the validity of the *original* Contracts. They would

simply have the right, as would all parties, to file a new validation action when DWR brought the new contracts into existence.

The trial court also found it persuasive that the *PCL* parties issued a joint statement announcing the settlement and listing its "key components." (AA 23:5668-5669.) If the *PCL* parties intended for the Settlement Agreement to invalidate the Contracts—one of the PCL plaintiffs' key objectives (AA 20:4843, 4910-4914)—one would have reasonably expected it to be included as a "key component." (AA 30:7660-7661.) Its absence indicates that the parties did not intend that significant result. (*Id*.)

Also persuasive is the fact that the PCL defendants told the mediator prior to executing the Settlement Agreement that they would "never" agree to a writ that required DWR to set aside project approvals. (AA 13:3005; AA 30:7661 [trial court finding this evidence persuasive].) CDWA would have this court believe that the PCL defendants intended that the Settlement Agreement would do precisely what they told the mediator they would never accept.

All of the above supports the trial court's conclusion that the *PCL* parties did not intend that the Settlement Agreement would take the Contracts out of existence for purposes of the validation statute.

2. The *PCL* trial court did not take the Contracts out of existence

CDWA next argues that even if the PCL parties did not intend the Settlement Agreement (and its attached 2003 Order and 2003 Writ) to take the Contracts out of existence, the plain meaning of the 2003 Order and 2003 Writ did so anyway. Neither document supports CDWA's position.

Nothing in the 2003 Writ speaks to the Contracts at all. (AA 21:5004-5005.) The PCL trial court did not issue a writ requiring DWR to set aside the Contracts. As discussed above, the only action that the 2003 Writ

required to be set aside was DWR's certification of the Monterey Agreement EIR. (AA 21:5005.)

Likewise, nothing in the 2003 Order set aside the Contracts. (AA 21:5015-5018.) In the 2003 Order, issued pursuant to Public Resources Code section 21168.9, the PCL trial court (i) reversed the prior judgment, (ii) approved the Settlement Agreement, (iii) issued the 2003 Writ, (iv) prohibited DWR from approving any new projects based on the decertified EIR, and (v) ordered that "*[i]n the interim*, until DWR files a return in compliance with the [2003 Writ] and this court orders discharge of the [2003 Writ], the administration and operation of the State Water Project and Kern Water Bank Lands shall be conducted pursuant to [the Contracts]." (AA 21:5016-5017.)

CDWA seizes on the phrase "in the interim" as the sole basis for the assertion that the Contracts were voided, but brought back into existence for a short period, only to go out of existence by operation of law upon the conclusion of the Monterey Plus EIR. This supposed series of significant legal effects is too heavy a result to hang on this slender clause. The affirmative statement that DWR could continue operating the SWP pursuant to the Contracts while a new EIR was being prepared, instead, avoided any suggestion that the court was issuing a section 21168.9(a)(1) order to void project approvals. The 2003 Order is best read, as the trial court found, to affirm that the Contracts remained in existence for that time period. What DWR would do at the end of the Monterey Plus EIR process was unknown and unknowable. Hence, the 2003 Order did not authorize DWR to operate pursuant to the Contracts indefinitely even after the Monterey Plus EIR was completed. As the trial court found, the parties understood that at the end of the Monterey Plus EIR process, DWR "might proceed in a number of different ways including, potentially, seeking

further amendments to the long-term water supply contracts." (AA 30:7659.)

CDWA also argues that the 2003 Order's requirement that DWR file a new notice of determination following completion of the Monterey Plus EIR must mean that the PCL trial court intended for that CEQA document to constitute DWR's approval of the Contracts. (AOB at pp. 67-68.) Fundamental contract law refutes this assertion. DWR authorized each of the Contracts when its Director executed them. (E.g., AA 15:3703; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 188(1), p. 222 [signing a contract signals formal acceptance].) Issuing a CEQA notice of determination is not a means of authorizing a contract.[17]

3. CEQA did not mandate that decertification of the Monterey Agreement EIR automatically required the Contacts to go out of existence

As discussed in Section IV, *infra*, CEQA does not mandate that a trial court void project approvals every time it issues a CEQA remedy. And regardless of what CEQA should have required, as discussed above, the fact is that the PCL trial court did not void the Contracts. As the trial court found, the time to object to the contents of the 2003 Writ or 2003 Order has long passed. (AA 30:7660.) The PCL trial court discharged the 2003 Writ in 2010 without objection. (AA 30:7660.)

[17] In a footnote, CDWA cites to two documents that the trial court excluded from evidence as allegedly supporting their conclusion that DWR's 1995 CEQA notice of determination constituted its authorization of the Monterey Amendment. (AOB at p. 68, fn. 5.) As more fully stated in DWR's concurrently filed opposition to CDWA's request, DWR opposes the request because CDWA does not challenge the trial court's evidentiary ruling excluding them from evidence, and because they are irrelevant.

D. DWR's 2010 Notice of Determination Did Not Bring a New Matter Into Existence

The validation statute is only triggered when a public agency approves a contract and authorizes its execution. (Code Civ. Proc., § 864.) On its face, DWR's Project Decision did not authorize DWR's execution of a contract. (AA 21:5032.) The simple reason for this was because the Contracts had already been executed between 1995 and 1999 and were still in existence pursuant to the Settlement Agreement and 2003 Order. DWR reasonably determined that carrying out the Project did not require re-executing the Contracts. (AA 21:5087-5088.) DWR's Project Decision to continue operating the SWP pursuant to the previously executed contracts was not an event that triggered the validation statute.

E. DWR's Execution of the 2003 "Attachment A" Amendments Did Not Reauthorize the Contracts

CDWA makes a wholly new argument on appeal in a last ditch attempt to find an action that it can redefine to be an authorization of a contract within 60 days of their filing the petition and complaint to save their reverse validation causes of action. CDWA claims that DWR's 2003 execution of a different amendment to the long-term contracts, known as the "Attachment A" amendments, reauthorized the Monterey Amendment, and that the reauthorization sprang into existence on May 5, 2010. (AOB at pp. 71-76.) CDWA's argument is supported by neither the facts nor the law.

In the Settlement Agreement, DWR and the SWP contractors agreed to amend the long-term contracts to redefine various terms, including redefining the term "Annual Entitlement" to "Table A amount" and similar nomenclature changes. (AA 20:4977-4981.) The *PCL* parties agreed that these revisions were "solely for clarification purposes and that such amendments are not intended to and do not in any way change the rights,

obligation or limitations on liability of the State or the District …." (AA 20:4980-4981.)[18] The Attachment A amendments were required to be signed within 60 days of the Settlement Agreement's effective date, and therefore were authorized by DWR and the respective SWP contractors when they were signed in 2003. (AA 20:4954-4955.) The Settlement Agreement provided that the Attachment A amendments would be effective on an "interim" basis when executed, and would be deemed "final" upon conclusion of all litigation surrounding the validity of Monterey Amendment. (*Id.*)

The Attachment A amendments are separate contracts from the Monterey Amendments. For example, the "Monterey Amendment" to the long-term contract between DWR and the Kern County Water Agency is more specifically Amendment No. 23 and was signed on December 13, 1995. (AA 15:3640-3703.) The "Attachment A" amendment to the Kern County Water Agency contact is Amendment No. 35, and was signed on May 3, 2003. (AA 21:5006-5014.) They are simply separate contracts.

CDWA asks this court to characterize DWR's 2003 execution of the Attachment A amendments and its 2010 Project Decision to continue operating pursuant to those amendments, as a reauthorization of the Monterey Amendments which, under the validation statute, purportedly sprang into existence in May 2010 upon DWR's filing the CEQA notice of determination on the Monterey Plus project. (AOB at p. 74.) There is no textual support for this proposed interpretation. Nothing in the Settlement Agreement or in the Attachment A amendment itself says that the Attachment A amendments reauthorize the Monterey Amendment. While

[18] The Attachment A amendment also included the requirement to bi-annually prepare a Reliability Report, which the parties agreed was a substantive change because DWR was not previously required to report this report. (AA 20:4980-4981.)

certain Settlement Agreement actions, including the Attachment A amendments, do not become "final" so long as litigation over the Monterey Amendment continues, there is no basis to conclude that the 2003 Attachment A amendments reauthorized the Monterey Amendments, and certainly not that they did so in May 2010 years after the parties executed them. (See *Smith v. Mt. Diablo Unified Sch. Dist.* (1976) 56 Cal.App.3d 412, 417 ["It must be reiterated that the finding of 'existence' of a contract, as defined in [the validation statute], has no bearing on the question of validity or enforceability of that contract under the applicable laws."].)

CDWA's attempt to analogize these facts to *Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, fails. That case involved a city's annual adoption of a development fee ordinance pursuant to the Mitigation Fee Act, Government Code section 66000 et seq. Under the Act, a city can charge development fees only as necessary to cover the cost of the service provided. (*Id*. at p. 691; Gov. Code, § 66014, subd. (a).) If fees charged to developers in one year create excess revenue, the city is required to lower fees the next year to make up for the prior year's overcharge. (*Id*. at p. 703; Gov. Code, § 66016, subd. (a).) The Supreme Court concluded that the city's fee ordinance requires an annual accounting, and an independent decision each year that the prior year's fees did not result in a surplus and that the present year's fee schedule is set at a level designed to cover only the cost of service. (*Id.* at pp. 703-704.) Even if a city readopts the prior year's fee schedule without change, the court found that the city is still making a new determination, based on new data, that the fees are appropriately set and the prior year's fees did not result in surplus or deficit. (*Id*.) As a result, each year the city's decision embodied in that year's fee ordinance is subject to challenge under the validation statute.

Barratt American, Inc. bears no resemblance to the present case. DWR's decision in May 2010 to continue with one contract amendment

(the Attachment A amendments), was not a reauthorization of wholly separate contract amendments (the Monterey Amendments) which were executed and authorized years earlier. The mere fact that some of DWR's Settlement Agreement obligations do not become "final" until the Monterey Amendment litigation is concluded does not transform the Attachment A amendment into a reauthorization of the Monterey Amendment.

F. The Trial Court Correctly Held That CDWA's Third Cause of Action for Writ of Mandate Was Barred

CDWA's third cause of action for writ of mandate seeking to invalidate the Contracts was barred because validation is the exclusive remedy to challenge public contracts subject to the validation statute. "Where the Legislature has provided for a validation to review government actions, mandamus is unavailable to bypass the statutory remedy after the limitations period has expired." (*Barratt American, Inc., supra,* 37 Cal.4th at p. 705; *Hills for Everyone v. Local Agency Formation Com. of Orange County* (1980) 105 Cal.App.3d 461, 468.) CDWA offers no legal argument or authorities in support of the assertion that the trial court erred in so concluding. (AOB at pp. 75-76; AA 30:7662-7663.)

Nor does CDWA challenge the trial court's conclusion that even if the Contracts are not subject to validation, the mandamus cause of action is still time-barred because it was filed more than 11 years after the last Contract was executed. (AA 30:7662-7663.) The four-year catch-all limitations period found in Code of Civil Procedure section 343 applies when no other limitation period does. (*Lasko v. Valley Presbyterian Hospital* (1986) 180 Cal.App.3d 519, 526 [Code of Civil Procedure section 343's limitations period applies to mandate proceedings when no limitations period does].)

The extent of CDWA's "argument" is that the mandamus cause of action survives if the court finds that (i) the Contracts are not subject to

validation and (ii) were authorized in 2010. (AOB at p. 76.) CDWA does not meet the first prong of its proposed test, as all parties, including CDWA, and the court agreed that the Contracts were subject to validation. (AA 27:6621, 6624; AA 30:7652-7653.) CDWA does not meet the second prong for the all same reasons discussed above as to why the Contracts were authorized between 1995 and 1999.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ISSUING A LIMITED CEQA REMEDY

A. The Trial Court's CEQA Remedy and the Standard of Review

The trial court rejected 24 of 25 of CDWA's claims of error, finding only that DWR's discussion of the potential impacts associated with the Authority's future use and operation of the Kern Water Bank was inadequate. (AA 33:8235-8250.) The trial court received extensive separate briefing and conducted a separate hearing on the appropriate CEQA remedy for this single violation pursuant to Public Resources Code section 21168.9. (E.g., AA 33:8260-36:9131; RT 313-370.) The trial court then issued a 15-page ruling explaining why it issued its chosen remedy (AA 36:9132-9146) and issued findings and writ of mandate (AA 37:9205-9208.)

The trial court found that the CEQA error is limited to the potential impacts from Kern Water Bank operations, and thus that portion of the EIR can be severed from the remainder of the Project. (AA 37:9206 ¶¶ 3-4.) The trial court also:

- ordered DWR to revise the Monterey Plus EIR to correct the one specific deficiency identified;
- required DWR and the Authority "to make a new determination regarding whether to continue the use and operation of the Kern

Water Bank by [the Authority], after compliance with CEQA"; and

- allowed DWR to continue operating the SWP pursuant to the Contracts and the Authority to continue operating the Kern Water Bank while DWR revised the Monterey Plus EIR. (AA 37:9207 ¶¶ 3-6.)

Over CDWA's objections, the trial court concluded that "[i]nvalidating the Project approvals is unnecessary and would throw the entire SWP into complete disarray, smack in the middle of one of the most severe droughts on record. The circumstances of this case do not warrant that degree of judicial intervention, . . ." (AA 36:9140.)

B. Section 21168.9 Authorized the Trial Court to Leave the Contracts In Place

CEQA expressly allows a trial court to leave project approvals in place. (§ 21168.9, subd. (a).) If a trial court identifies a CEQA error, Public Resources Code section 21168.9 provides that the trial court,

> shall enter an order that includes *one or more* of the following:
>
> (1) A mandate that the determination, finding, or decision be *voided* by the public agency, *in whole or in part*. …
>
> (2) …. a mandate that the public agency and any real parties in interest *suspend any or all specific project activity* or activities, …
>
> (3) A mandate that the public agency *take specific action* as may be necessary to bring the determination, finding, or decision into compliance with this division." (*Id*., italics added.)

In summary, the trial court's options are to (1) void a decision in whole or part (or not), (2) suspend certain project-specific activities (or not), and/or (3) take other specific actions (or not). (*Ibid*.) Because a trial court is not required to order any particular element, CEQA does not require a trial court to void any project approvals, let alone all project approvals.

CDWA's argument that CEQA necessarily requires that the Contracts be voided is inconsistent with the plain language in section 21168.9(a). As the trial court found, "Section 21168.9 expressly authorizes courts to fashion a remedy that permits project approvals to remain in place while an agency seeks to remedy its CEQA violation." (AA 36:9139.) Because CEQA gives the trial court the authority to employ this option, or not, it is plainly not mandatory that a court order that all agency "determinations, findings, or decisions" be voided.

An ever growing body of case law recognizes the flexibility that CEQA affords a trial court to devise an appropriate remedy under the particular circumstances of the case. Section 21168.9 was adopted in 1987, and the Supreme Court first interpreted it in *Laurel Heights I.* There, the Supreme Court found that an EIR for a university development project did not comply with CEQA and remanded the matter for additional CEQA analysis of particular impacts. (*Laurel Heights I, supra,* 47 Cal.3d at p. 423.) The Supreme Court found that the construction project could proceed while a new EIR was being prepared. (*Id*.) The court could not have allowed the university's construction contracts to remain in place, and construction to occur based on those contracts, if CEQA mandated that project approvals must always be voided anytime a court identifies any CEQA error.

A number of courts after *Laurel Heights I* have reached similar conclusions. (E.g., *POET, LLC v. California Air Resources Board* (2013) 218 Cal.App.4th 681, 756 ["In 1993, section 21168.9 was amended to expand the authority of courts to fashion a remedy that permits a part of the project to continue while the agency seeks to correct its CEQA violations"]; *Golden Gate Land Holdings LLC v. East Bay Regional Park District* (2013) 215 Cal.App.4th 353, 373 ["the trial court may allow a portion of the work to proceed while the agency is complying with CEQA."]; *County*

Sanitation Dist. No. 2 of Los Angeles County v. County of Kern (2005) 127 Cal.App.4th 1544, 1605 [same]; *San Bernardino Valley Audubon Society v. Metropolitan Water Dist*. (2001) 89 Cal.App.4th 1097, 1104-1105 [same].)

Preserve Wild Santee v. City of Santee (2012) 210 Cal.App.4th 260, 286-290, discussed in detail the propriety of a limited writ as authorized by section 21168.9. The court concluded that two earlier Fifth District opinions refusing to allow for a limited writ were of minimal value because they did not discuss section 21168.9 either in detail or in full. (*Id*. at p. 289, criticizing *Bakersfield Citizens for Local Control v. 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.) The *Preserve Wild Santee* court concluded that the plain language of section 21168.9 affords trial courts the discretion to leave project approvals in place. (*Id*.) CDWA's sweeping pronouncement that CEQA prohibits limited writs is not supported by the majority of case law.

The case CDWA principally relies on, *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, is inapplicable here. In *Save Tara*, the lead agency approved an agreement allowing private development without preparing an EIR at all. (*Id*. at p. 121.) The court concluded that an EIR was required, and under those facts ordered the underlying project approvals voided. (*Id*. at p. 143.) *Save Tara* had no reason to consider the scope of a trial court's discretion under section 21168.9 to leave project approvals in place after a lead agency prepares an EIR, but when the trial court finds that the EIR was defective in some manner. Nor did *Save Tara* disavow the limited writ remedy that *Laurel Heights I* allowed, despite extensively discussing the case.

C. The Trial Court Appropriately Exercised Its Discretion to Leave Project Approvals In Place

Having found that it had the authority to leave Project approvals in place, the trial court exercised its discretion to determine that it was appropriate to do so under the circumstances. (AA 36:9140.) A trial court's judgment as to how to employ its equitable powers is quintessentially a question reserved to the trial court's discretion. (*Golden Gate Land Holdings LLC*, *supra*, 215 Cal.App.4th at p. 368.) CDWA only argues (incorrectly) that the court *had no discretion*. (AOB at p. 77.) CDWA makes no attempt to argue that the trial court *abused its discretion* under the facts of this case, and therefore the argument is waived. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116.) Regardless, the trial court's chosen remedy was unquestionably not an abuse of discretion, as invalidating all Project approvals "would throw the entire SWP into complete disarray, smack in the middle of one of the most severe droughts on record." (AA 36:9140.)

CONCLUSION

DWR respectfully requests that the trial court's judgment be affirmed.

Dated: January 28, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **DEFENDANT AND RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 13,971 words.

Dated: January 28, 2015

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Attorney General of California

/s/ Eric M. Katz

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DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **Central Delta Water Agency v. Dept. of Water Resources**

Case No.: **C078249**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 28, 2016,

I electronically submitted the attached **DEFENDANT AND RESPONDENT'S BRIEF** through the TrueFiling system pursuant to the Court's Local Rule 5, which then electronically served all parties registered with TrueFiling.

In addition, I served a paper copy on the Sacramento County Superior Court, 720 9th Street, Sacramento, CA 95814.

In addition, I emailed an electronic copy to all parties, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 28, 2016, at Los Angeles, California.

Beatriz Davalos	/s/ Beatriz Davalos
Declarant	Signature

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