NO. C078249

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

CENTRAL DELTA WATER AGENCY, et al.,
Petitioners and Appellants,

v.

DEPARTMENT OF WATER RESOURCES, et al.,
Respondents and Appellees.

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

APPELLANTS' COMBINED REPLY TO RESPONDENTS' BRIEFS AND OPPOSITION TO KWB PARTIES' CROSS-APPEAL

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INTRODUCTION

In 2010, the Department of Water Resources ("DWR") certified an EIR for a project that it claimed had been approved in 1995. It then decided that, even though eight years of litigation followed by seven years of environmental review had passed, nothing had changed that required disturbing that prior approval. In DWR's mind, seven years of environmental review, hundreds of thousands of pages of a new EIR and associated documents, hundreds of comment letters by members of the public and other public agencies, multiple public hearings, and probably millions of dollars of work had been created, reviewed, and spent to merely affirm that the supposedly approved project should stay approved. DWR claims that this review was not retrospective because DWR maintained its discretion to adopt alternatives or mitigation measures. It just happened to choose not to.

Nothing in CEQA anticipates an environmental review process for a project that has already been approved. None of the procedures, the requirements, the meetings, the documents, the findings, or the decisions described in the law apply to an already-approved project. To say that it would be unusual to conduct seven years of environmental review, including the preparation and certification of an

entirely new EIR, for an already-approved project is an understatement. Such a thing has never happened before and no court has ever allowed it.

Such an environmental review has never taken place because it is against the law. The bedrock of CEQA—its core purpose—is to require public agencies to look before they leap. They must consider the environmental impacts of their proposed activities before they commit to them. No amount of technical nitpicking of the words contained in the statute can shake this foundational purpose of the law. It is core. It is immutable. It pervades every aspect of CEQA, giving meaning to the whole and to all of its parts.

The interpretation of the law advanced by Respondents DWR, the State Water Project Contractors ("SWP Contractors"), and Kern Water Bank Authority, et al. ("KWB Parties") conflicts with this core purpose. It suggests that a court has the power to order an agency to not comply with the law after finding that it had been violated. It suggests that there is real value in a retrospective environmental review and that an agency would never be unduly influenced or pressured to continue to operate a project pursuant to an approval that already exists.

Perhaps DWR and the SWP Contractors are right (although our Supreme Court does not agree). But even if a retrospective environmental review could satisfy CEQA's "look-before-you-leap" purpose, there is no way it could ever satisfy another core purpose of CEQA: to assure a skeptical public that their public servants are complying with the law, and duly considering the environmental impacts of their actions before they commit to them. DWR certainly did not satisfy this purpose in this case. Members of the public have been complaining about the sham nature of this environmental review from the moment they learned of its specifics, just as the plaintiffs in the earlier *PCL v. DWR* litigation complained about the same thing before it was even commenced.

In fact, skepticism of DWR's commitment to an honest review of the Monterey Amendments goes as far back as 1995 with DWR's ill-fated and illegal attempt to pawn that review off on the Central Coast Water Authority. It goes back to the secret contract negotiations in Monterey themselves. It goes back to the 11th-hour secret agreement among the contractors and DWR to implement the Monterey Amendments despite the fact that the *PCL v. DWR* litigation had not yet concluded—closing escrow on the Kern Water Bank

transfer just six days before judgment was entered by the trial court, with no notice given to the litigants in that case, despite the fact that the amendments themselves stated that they would not go into effect until after the conclusion of all litigation. (196:99488-89.)

DWR knew all of this when it chose to not approve or reject the Monterey Plus Project in 2010. But the value of the Monterey Amendments and the Kern Water Bank transfer—at least to the SWP Contractors and the KWB Parties, if not to DWR as well—is apparently so great that it chose to do whatever it could to avoid subjecting its authorization of the contract amendments to a certain validation challenge. It chose to debase CEQA and to ignore its purpose in the hopes that it could convince the courts, if not the public, that too much time had passed and that the water was literally over the dam. Its efforts should not be rewarded. It should be required, once and for all, to comply with CEQA, and the Monterey Amendments should, for the first time ever, be subject to legitimate public and legal scrutiny.

This Combined Reply and Opposition first addresses the contentions raised in the Response Briefs by DWR, SWP Contractors, and KWB Parties. These arguments are divided into four sections that

correspond with Sections I - IV of Appellants Central Delta Water Agency, et al.'s ("CDWA") Opening Brief. CDWA's Opposition to KWB Parties' Cross-Appeal then follows in Section V.

ARGUMENT

I. DWR VIOLATED CEQA BY FAILING TO MAKE A PROPER PROJECT DECISION

DWR failed to properly approve or reject the Project in the manner required by CEQA. (Appellants' Opening Brief ("AOB") at pp. 31-53.) The Project is a set of contract amendments, and after completing the EIR required by the *PCL* trial court, DWR was required to approve or disapprove the amendments. DWR failed to do either.

DWR responds by first arguing that CDWA waived this issue because it supposedly made a contradictory argument in the trial court. (DWR Brief at pp. 31-32.) DWR next argues that it did in fact make a "decision" on the Project and that this decision complied with CEQA. (DWR Brief at pp. 32-36.) DWR then argues that the *PCL* trial court expressly left, or at least intended to leave, the earlier Monterey Amendment approvals in place, making a new decision unnecessary. (*Id*. at pp. 36-38.) Finally, DWR argues that no

prejudice flowed from any possible error in DWR's decision, making any error harmless. (*Id*. at pp. 38-39.)

None of these arguments is persuasive. First, CDWA did not waive the issue: The statement relied upon by DWR was contained in a joint stipulation that expressly applied only to the Time-Bar Defenses Trial, and not any other aspect of this action, let alone these CEQA claims. Second, CDWA never argued that DWR failed to make "a decision," but rather that it failed to make a *lawful* decision required by CEQA—a decision to either approve or reject the Project, following the completion of environmental review.

Betraying this Court's expectation that DWR's completely new EIR would inform its decision on the entire project, and DWR's commitment in the Settlement Agreement to make the Monterey Amendment an integral component of its new project, DWR irresponsibly treated the Monterey part of "Monterey Plus" as a *fait accompli* incapable of authentic rejection in 2010. DWR's euphemism in its Final EIS—that it was merely "continuing to operate" under the Monterey Amendment—cannot conceal its fundamental departure from the interactive process of review and decision required under CEQA, which requires the lead agency to

complete its environmental review before making its final decision on the project as a whole. (See *County of Inyo v. City of Los Angeles* (1984) 160 Cal.App.3d 1178, 1185 [CEQA requires an "interactive process of assessment and responsive modification that must be genuine"].)

Third, although the *PCL* trial court's 2003 writ of mandate ("PCL Writ") and Interim Implementation Order did not expressly void or expressly leave in place prior approvals grounded on the decertified 1995 EIR, the writ and order in context deprived DWR of any legal authority to support the continued existence of its 1995 project approval. Every other action taken by the court supported (and even required) the voiding of the approvals, since they required new findings, as well as new *decisions* accurately recorded in a new notice of determination. The court did not allow the decertified EIR to serve as the operative CEQA document for any part of the project decision, and instead recorded DWR's commitment in the Settlement Agreement that its approvals would not rely on the decertified EIR. The court authorized the Monterey Amendments on an interim basis only, pending the new environmental review.

Moreover, the Court did not make any findings of severance or find that DWR had complied with CEQA—findings that plainly would have been required in order for a project approval to remain in place after the *PCL* trial court found that DWR had violated CEQA.

Finally, prejudice certainly did flow from DWR's failure to properly approve or reject the Project: Not only did DWR's efforts turn the CEQA review process into a meaningless exercise, but some members of the public were likely misled into believing that the contract amendments were immune to a validation challenge.[1]

A. CDWA Did Not Waive the Issue of Whether DWR Made a Decision to Approve or Disapprove the Project as CEQA Requires

CDWA did not waive the issue of whether DWR failed to make a proper decision complying with CEQA. DWR contends that CDWA

[1] DWR also argues that the Notice of Determination ("NOD") is not itself DWR's decision document on the Project. (DWR Brief at p. 35-36.) For the purposes of CDWA's CEQA argument, though, the distinction between the NOD and the agency's approval is irrelevant. The NOD is the legally operative document for CEQA purposes, and was properly cited by CDWA for its statement of DWR's decision on the Project, and specifically for DWR's failure to properly approve or reject the Project under CEQA. (AOB at p. 31.) Whether the NOD is the legally operative decision document or not under validation law is potentially relevant only to CDWA's validation argument, as discussed in Section III below.

made a contradictory argument below, but DWR's contention is incorrect. (See DWR Brief at pp. 31-32.)

The statement DWR relies on for its waiver argument was made in a joint stipulation filed for the Time-Bar Defenses Trial (the first of two trials held in the trial court below), where CDWA stated that "[t]he third contract that resulted from the original Monterey Agreement is the Monterey Plus Amendments, which is the subject of Plaintiffs' Validation and Mandamus causes of action." (DWR Brief at p. 31; AA27:6623-24.) But by its own express terms, the joint stipulation "pertain[ed] only to the Statute of Limitations Affirmative Defense Trial;" it did not extend to the CEQA cause of action. (AA27:6627.) CDWA thus waived nothing with respect to its CEQA cause of action by making this statement in the context of the Time-Bar Defenses Trial on the validation causes of action. (See generally *Adams v. Paul* (1995) 11 Cal.4th 583, 593 [plaintiff may plead alternative theories with inconsistent allegations].)

CDWA's CEQA claims are, and have always been, about DWR's improper attempt to skirt its legal obligation to either approve or reject the Project *after* preparing an EIR that complies with CEQA. This was true of CDWA's petition and complaint, it was true of

CDWA's briefing on the CEQA claims in the trial court, and it remains true in its briefing on appeal. As stated in the First Amended Petition and Complaint:

> The EIR fails to acknowledge the need to make new decisions on multiple issues, including whether or not to approve the Monterey Plus Amendments, whether to adopt an alternative to the proposed Project and/or to increase mitigation for the Project, or whether to adopt no project at all.
>
> (AA1:141, ¶ 180.)

CDWA maintained this theory of liability in its brief in the CEQA trial before the trial court, challenging the EIR's description of the Project as "continuing to operate under the Monterey Amendments" (AA31:7856), challenging the EIR's failure to describe a necessary project approval (AA31:7857), and challenging the EIR's failure to recognize that the *PCL v. DWR* litigation voided the 1995 approval and required a new approval. (AA31:7859.)

DWR contends, in a footnote, that CDWA's argument on appeal "is similar to, but conceptually distinct, from its trial arguments" because it focuses on the "form" of DWR's decision, as opposed to the EIR's project description. (DWR Brief at p. 32, fn. 15.) DWR's attempted distinction is meritless. The issue is, and always has been,

whether DWR's failure to make a proper project decision—to either approve or reject the Project—violated CEQA. Whether that legal violation is expressed in terms of DWR's failure or the EIR's failure (or both) is irrelevant; both are intertwined and the facts and law are identical either way. DWR notably makes no claim that the facts or the legal analysis would be in any way different.[2]

B. DWR's "Decision" Was Not a *Proper* CEQA Decision

DWR expressly refused to approve the contract amendments that were the subject of the EIR, asserting that continuing to operate the SWP under the amendments "does not require re-approval or re-execution of the Monterey Amendment or the Settlement Agreement." (1:58; 23:11169.) DWR's position is contrary to CEQA.

While DWR is correct that "[n]o particular form of approval is required" under CEQA (DWR Brief at p. 32, quoting *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 506), *some* form of post-EIR approval is essential before a

[2] Moreover, even if it were a theory raised for the first time on appeal, it is a pure question of law on undisputed facts and thus is cognizable on appeal. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742; *Cal Sierra Const., Inc. v. Comerica Bank* (2012) 206 Cal.App.4th 841, 851 ("A legal argument may be raised for the first time in a new trial motion or on appeal 'so long as the new theory presents a question of law to be applied to undisputed facts in the record.'".)

project can go forward in compliance with CEQA. The essence of CEQA is the requirement that an EIR be prepared *before* a project is approved so that the EIR can "serve its intended function of guiding and informing decision makers." (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 130 ["Save Tara"); see AOB at p. 31-34.) But DWR instead has treated the EIR as a sham that would serve no guidance function whatsoever. By expressly refusing to approve the contract amendments after certification of the EIR, and asserting instead that its 1995 approval of the amendments continues in effect, DWR is confessing to a CEQA violation, for it is fundamental that a decision approving a project "must be *preceded,* not *followed,* by CEQA review." (*Save Tara*, *supra*, 45 Cal.4th at p. 134 (italics original).)

DWR next argues that CDWA "proceeds from the false premise that DWR did not make a new decision…." (DWR Brief at p. 33.) This argument, however, is itself based on a false premise: CDWA never argued that DWR made no decision, but rather that its decision to continue the Project by relying on its pre-EIR approval instead of making a new decision to approve the amendments was not a *proper* decision under CEQA. (AOB at pp. 31-54 [Argument entitled "I.

DWR Violated CEQA by Failing to Make a Proper Project Decision."].) It was not a proper decision because, by its own terms, it was not a decision to approve the contract amendments that constitute the Project and that are the subject of the EIR. (1:58; 23:11169 [DWR's decision was not a "re-approval or re-execution of the Monterey Amendment"].)

Third, DWR argues that CEQA gives discretion to lead agencies to determine how they will carry out projects. (DWR Brief at p. 34-35.) But while lead agencies have some discretion in making project decisions, as reflected in Guidelines § 15092, subd. (a), this discretion is not unfettered. An essential limitation on an agency's discretion is that an agency may not, under any circumstance, engage in the type of retrospective analysis that DWR attempted here. (AOB at pp. 33-34.) "[A]n agency has no discretion to define approval so as to make its commitment to a project precede the required preparation of an EIR." (*Save Tara*, *supra*, 45 Cal.4th at p. 132.)

Moreover, DWR's argument fails to consider the nature of this Project. It is explicitly an amendment to a contract, not the performance of already-existing terms of a contract. (See AOB at pp. 31-32.) While an EIR created for a contract amendment must

consider the environmental impacts of performing the terms of the amendment (i.e., the whole project), that does not permit an agency to ignore its initial duty to approve entering into the contract amendment in the first place. And it is this approval of the amendment that CEQA explicitly mandates must occur after the preparation of the EIR, not before.

C. The *PCL* Trial Court Did Not Leave the Monterey Amendment Approvals in Place

While DWR focuses on the *PCL* Writ's absence of express language voiding the Monterey Amendment approvals, what is more telling—and far more legally significant—is the *PCL* Writ's absence of any language leaving those approvals in place, particularly the absence of the findings of severability and compliance with CEQA that would be required for any approvals to have been left in place. Moreover, what was contained in the *PCL* Writ, the Interim Implementation Order, and the Settlement Agreement all speaks to voiding the approvals, not leaving them in place. At worst, these documents are ambiguous as to the approvals, and as such they must be interpreted by this Court to have complied with the law, and CEQA clearly prohibits purely retrospective analyses.

1. The *PCL* Writ Was Not a Limited Writ

This Court held in the *PCL v. DWR* appeal that the entire EIR for the Monterey Amendment project must be decertified. (*Planning and Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892, 926 ["*PCL v. DWR*"].) With the entire EIR decertified, the only way the *PCL* trial court could find that any portion of the Monterey Amendment project (or any portion of its approval) to be in compliance with CEQA was if it found that an EIR was not required for that portion in the first place. This is because whenever a court finds a CEQA violation, it must void all previous approvals of the project unless it makes express findings that the project activities subject to the CEQA violation are severable from other activities complying with CEQA, that severance will not prejudice the remedial steps required to comply with CEQA, and that the remainder of the project activities comply with CEQA. (Pub. Resources Code § 21168.9, subd. (b); *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 287.) The *PCL* trial court did not and could not make these findings because the Monterey Amendments clearly required an EIR. (See *PCL v. DWR*, *supra*, 83 Cal.App.4th at p. 907 [ordering the preparation of an EIR by DWR].)

DWR essentially ignores the absence of any findings of severance and CEQA compliance, instead mischaracterizing CDWA's argument as a "sweeping pronouncement that CEQA prohibits limited writs." (DWR Brief at p. 61). But CDWA has never made any such pronouncement or argument, and the question is not whether limited writs are permitted under CEQA. Rather, the question is whether *this* writ was a limited writ, leaving some approvals in place. For the reasons stated below and in the AOB, it is not. (AOB at pp. 40-43; 115:58929-30 [AA21:5004-05].)

KWB Parties argue that courts have broad equitable discretion to craft CEQA remedies, including the discretion to leave project approvals undisturbed. (KWB Parties Brief at pp. 70-80.) But KWB Parties make the same mistake as DWR by stopping there, looking only at the first part of section 21168.9 and not offering any analysis or discussion of subdivision (b) and its restriction of a court's discretion to craft a limited writ. (Pub. Resources Code § 21168.9, subd. (b).)

The findings required by subdivision (b) articulate and defend the core purpose of CEQA: to ensure that public agencies and the public make informed decisions before committing to a project. If a

project component (including an approval) cannot stand on its own without violating CEQA—if it has significant impacts that have not been analyzed in a valid and certified EIR, for instance—subsection (b) clearly requires that project component to be set aside.

a. Section 21168.9 Is Clear on its Face that Findings Regarding Severance and CEQA Compliance Are Required

KWB Parties observe that "section 21168.9 states on its face that courts retain the discretion to keep project approvals in effect where the court finds a CEQA error. This should be the end of the analysis." (KWB Parties Brief at p. 70.) But this cannot be the end of the analysis, as section 21168.9 also states on its face that this discretion is limited to only those instances where the court makes certain required findings: (1) that the portion of the project or approval to remain is severable from the rest of the project; (2) that severance will not prejudice complete compliance with CEQA; and (3) that the portion of the project or approval that will remain is in compliance with CEQA. (Pub. Resources Code § 21168.9, subd. (b).) DWR's and KWB Parties' failure to address this language in their analyses of the text of section 21168.9 fatally undercuts their arguments. (DWR Brief at p. 61; KWB Parties Brief at p. 70.)

Subdivision (b) is not just a procedural check-off—it is a significant constraint on a court's equitable powers. (Pub. Resources Code § 21168.9, subds. (b), (c) ["*Except as expressly provided in this section*, nothing in this section is intended to limit the equitable powers of the court."] [emphasis added].) Under section 21168.9, a court may leave a project approval in place, but *only if* the court can find that the approval complies with CEQA while standing on its own. (*Ibid*.)

There is no question that the *PCL* Writ contains no findings related to severance and CEQA compliance required by subdivision (b). (115:58929-30 [AA21:5004-05].) Nor does the document say anything about the project approvals—whether they are voided or left in place. (*Id*.) So how should the *PCL* Writ be interpreted to affect the Monterey Amendment approvals, given that this Court, in *PCL v. DWR*, ordered the entire EIR decertified? (*PCL v. DWR*, *supra*, 83 Cal.App.4th 892, 926.)

Absent evidence to the contrary, it must be assumed that the court intended to issue a valid and lawful writ. (*Graham v. Graham* (1959) 174 Cal.App.2d 678, 686; *In re Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 797-798.) A writ that

leaves project approvals in place while striking down the environmental review *on which the approvals rest* would violate a core tenant of CEQA: that environmental review must precede a project approval. (*Save Tara*, *supra*, 45 Cal.4th at 132.) And a writ that purports to be a limited writ, leaving approvals in place but not containing any findings of severance or CEQA compliance would also violate CEQA. (Pub. Resources Code § 21168.9, subd. (b).) Based on the plain language of section 21168.9, then, the only lawful interpretation of the *PCL* Writ (which contains no explicit language regarding the approvals) is that it voided the approvals.

b. Caselaw Universally Supports the Requirement of Findings of Severability and CEQA Compliance in All Limited Writs

KWB Parties next look to caselaw for support of their argument, but because KWB Parties again ignore CDWA's entire argument concerning section 21168.9, subd. (b), they end up arguing against the same straw-man as DWR. A careful reading of the caselaw, one that recognizes and considers the whole of section 21168.9, including subsection (b), affirms CDWA's argument that a

limited writ that seeks to leave project approvals in place must include findings of severability and CEQA compliance.

KWB Parties first discuss *Golden Gate Land Holdings*, stating that the case "expressly rejects" CDWA's argument. (KWB Parties Brief at p. 71; *Golden Gate Land Holdings, LLC v. East Bay Regional Park Dist*. (2013) 215 Cal.App.4th 353 ["*Golden Gate Land Holdings*"].) But KWB Parties do not cite this express language, and they cannot, because it does not exist. Although the trial court in *Golden Gate Land Holdings* left one of the agency's approvals (for the condemnation resolution) in place after finding CEQA violations and voided another approval, the court did so only after explicitly making the findings required by section 21168.9, subdivision (b), including that the severed approval did not violate CEQA. (*Golden Gate Land Holdings*, *supra*, 215 Cal.App.4th at 370-71.) The court of appeal upheld the trial court's decision to leave that approval in place, noting that the trial court made the proper finding of CEQA compliance of the approval. (*Id*. at p. 375.)

It is true that the petitioners in *Golden Gate Land Holdings* argued, similarly to CDWA here, that "CEQA specifically requires environmental review before project approval so as to inform the

agency's decision making process." (*Id*. at p. 371.) But it is not this argument that the court of appeal rejected, as KWB Parties claim. (KWB Parties Brief at p. 71-72.) Rather, the argument that was rejected was "that the trial court was without authority, in this case, to issue a limited writ." (*Golden Gate Land Holdings*, *supra*, 215 Cal.App.4th at 371.) And the reason the argument was rejected was not because CEQA allows environmental review to follow a project approval or because it allows a court to leave an approval in place based on voided environmental review, but because the approval at issue *required no environmental review in the first place*:

> However, Golden Gate also overlooks that it is undisputed that an EIR is not required to condemn property for open space or park purposes alone. …Accordingly, the trial court stated, in its statement of decision, that it had 'not found the portion of the project consisting of the [District's] acquisition of property to be in noncompliance with CEQA.'
>
> (*Id*. at p. 375.)

This is the third finding the trial court was required to make under section 21168.9 in order to permit the approval to remain in place. (*Id*. at p. 371; Pub. Resources Code § 21168.9, subd. (b).) The approval was permitted to remain in place because it was severable, because severance would not prejudice compliance with CEQA, and

because leaving the approval in place would not violate CEQA since the approval did not require environmental review in the first place. (*Id*.)

The same cannot be said for the approvals by DWR that are at issue in this Appeal. Here, DWR reviewed and certified an EIR and approved (as a responsible agency) the project the EIR analyzed. (*PCL v. DWR*, *supra*, 83 Cal.App.4th at p. 902.) The EIR was decertified by the court, leaving the approval with no environmental review on which to stand. (*Id*. at 926; AA21:5004.) An EIR cannot be prepared that analyzes an approval that has already been made; such a process turns CEQA on its head and makes it into a "meaningless exercise." (*Mountain Lion Foundation v. Fish & Game Com*. (1997) 16 Cal.4th 105, 107; *Natural Resources Defense Council v. City of Los Angeles* (2002) 103 Cal.App.4th, 268, 271; *Save Tara*, *supra*, 45 Cal.4th at pp. 135-136.) The *PCL* trial court could not sever the approval from its environmental review, it could not find that severance would not prejudice complete compliance with CEQA, and it could not find that the approval, after the EIR was decertified, would comply with CEQA. (Pub. Resources Code § 21168.9, subd. (b).) It did not make the required findings because it could legally do

so; it did not leave the approvals in place because it could not legally do so.

KWB Parties double down on what appears to be willful blindness to subdivision (b) in their discussion of *Preserve Wild Santee v. City of Santee*. (KWB Parties Brief at p. 74; *Preserve Wild Santee v. City of Santee*, *supra*, 210 Cal.App.4th at p. 288.) KWB Parties quote the following sentence in the court's discussion of the plaintiffs' contention that all approvals must always be voided when CEQA violations are found:

> Such a rigid requirement also conflicts with the language in section 21168.9, subdivision (b), limiting the court's mandates to only those necessary to achieve CEQA compliance

(*Preserve Wild Santee*, *supra*, 210 Cal.App.4th at p. 288, KWB Parties Brief at p. 74.)

KWB Parties inexcusably fail to insert ellipses at the end of the sentence and omit the critical second half of the sentence that completely supports CDWA's argument:

> …and, if the court makes specified findings, to only "that *portion* of a determination, finding, or decision" violating CEQA. (Italics added.)

(*Preserve Wild Santee*, *supra*, 210 Cal.App.4th at p. 288.)

A court may limit its mandate to a portion of a determination, finding, or decision *if the court makes specified findings*. (*Id*.) It does not take a very big logical leap to realize that the inverse must be true: If the court cannot make those specified findings, it may not limit its mandate to only a portion of a determination, finding, or decision.

KWB Parties also misread *POET*, claiming that "the Court did not vacate the Air Resources Board's approval of the regulation…" (KWB Parties Brief at p. 76.) In fact, the opposite is true; the court did void the approval:

> …we conclude that the circumstances of this case justify an order directing ARB to set aside its approval of the LCFS regulations. Voiding the defective approval clears the way for ARB to implement an approval that complies with CEQA.

(*POET, LLC v. California Air Resources Board* (2013) 218 Cal.App.4th 681, 760.)

The discussion by the court that follows concerns whether the regulations may remain in place and operative despite the fact that the agency's approvals of those same regulations were voided by the court. (*Id*. at pp. 760-762.) The discussion is in the context of discussing the relationship between section 21168.9, subd. (a)(2), regarding suspending project activities, and subd. (c), regarding the

court's equitable powers. (*Ibid*.) As the court makes clear, there is a difference between voiding the approval of a regulation and suspending the operation of the regulation:

> To summarize our statutory interpretation, we conclude that a court's decision to *void the approval* of a regulation, ordinance or program does not necessarily require the court to invalidate or suspend the *operation* of the regulation, ordinance or program.

(*Id*. at p. 761, emphasis added.)

Because the suspension of a project activity is different than voiding its approval, the court had no cause to discuss subdivision (b)'s required findings for a limited writ. (*Id*. at p. 760.) Thus, in the court's mind, what it ordered was not a limited writ in the sense that a severable project component was allowed to remain (after the court determined that compliance with CEQA would not be compromised and that the remaining portion would not violate CEQA) (Pub. Resources Code § 21168.9, subd. (b)), but rather a "normal" writ and judicial order that voided the EIR certification and all project approvals while allowing some parts of the project—the regulation—to remain in effect under the court's equitable powers. (*Id*. at pp. 760-762.) This describes exactly the *PCL* Writ and CDWA's

arguments in support. *POET*, far from "expressly rejecting" CDWA's position, fully and firmly affirms it.

County Sanitation District appears to be the only published decision that describes an approval whose environmental review was found to violate CEQA that was allowed to remain in effect without all of the required findings of subdivision (b) (the court made a finding regarding severance but not the two other findings regarding CEQA compliance). (*County Sanitation District #2 of Los Angeles v. County of Kern* (2005) 127 Cal.App.4th 1544, 1604-05.) But the case is not the ringing endorsement of leaving approvals in place that KWB Parties may wish it to be: the parties had agreed that "the heightened treatment standards should remain operative *pending*" the county's completion of a new EIR and "*approval* of whatever replacement version of the biosolids ordinance is generated as a result of completing the EIR." (*Id*. at p. 1604, emphasis added.) In other words, the parties agreed that a new approval would be required, based on the new EIR. The court confirmed the finding of severability and then determined that equities favored the approach suggested by the parties. (*Ibid*.) This is very different than the *post facto* review that KWB Parties interpret the *PCL* Writ to have ordered

here. While the *County Sanitation District* court held that "immediately voiding" the approvals was not required, deciding to "allow[] the status quo to continue," it did so only "pending the completion of an EIR," when a new approval was required to be made. (*Id*. at p. 1605.) The parallels to the *PCL* trial court's writ and order are obvious, and *County Sanitation District* does not upset the fundamental rule that CEQA review must precede a valid approval, not follow it, even when part of a remedy ordered by a court.

2. The *PCL* Writ Mandated a Proper Project Decision

The *PCL* Writ required DWR, acting for the first time as lead agency, to make new findings, new "decisions," and issue a new notice of determination. (115:58930 [AA21:5005].) DWR desperately grasps at the writ's use of "decision," arguing that because the court mandated a "decision" and not an approval or a disapproval, DWR was free to turn CEQA on its head and conduct a completely meaningless—and illegal—retrospective environmental review for a project which it had already approved. (DWR Brief at pp. 32-33.)

DWR's far-fetched interpretation lacks any basis in CEQA or in the *PCL* Writ. Despite DWR's claim to the contrary, the writ never "expressly left in place" the approvals, instead providing for only

interim operation of the SWP under the amendments until the EIR was completed. (DWR Brief at p. 37; 115:58930 [AA21:5005].) DWR bases most of its argument, however, on its contention that the *PCL* Writ does not expressly void the Project approvals, despite admitting later that "[n]othing in the PCL Writ speaks to the Contracts at all." (DWR Brief at pp. 37, 51.)

Leaving a project approval in place while ordering an agency to re-do its environmental review would be not just "highly unusual," as the Superior Court found, but illegal, as the Opening Brief explains. (AA36:9136; AOB at 28-30, 36-37.) Yet DWR argues that the *PCL* trial court's silence as to the project approvals should be interpreted as an implied intent to leave them in place. This is illogical: a court's silence should be interpreted as pursuing the usual course—the lawful course—not the highly unusual and unlawful course. To the extent the *PCL* trial court's writ and order are ambiguous, they must be construed in a way that makes them lawful, and it would be unlawful under CEQA for the *PCL* trial court to permit DWR to prepare an EIR for a project that was already approved. (AOB at 28-30, 36-37.)

3. The Interim Implementation Order Provided for the Temporary Authorization of the Project Only

DWR next attempts to explain away the clear language in the Interim Implementation Order that provides for the *interim* authorization of the Monterey Amendments, *pending* the discharge of the *PCL* Writ, as merely acknowledging DWR's unfettered discretion to make whatever "decision" it wished at the end of the CEQA process. (DWR Brief at p. 37.) But as discussed above and in the Opening Brief (AOB at pp. 33-34), CEQA expressly limits an agency's discretion in formulating its "decision," requiring an agency to consider the environmental impacts of a project before approving the project, not after. As such, DWR never possessed under CEQA the discretion to define its "decision" as being to merely continue with the status quo, without approving the project.

DWR attempts to walk a tightrope with this argument, but it cannot avoid the inevitable logical trap. While further attempting to dismiss this "slender clause," DWR makes a remarkable, and fatal, admission:

> The 2003 Order is best read, as the trial court found, to affirm that the Contracts remained in existence *for that time period* [while a new EIR was being prepared]. 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*.

(DWR Brief at p. 52, emphasis added.) Thus, even DWR is forced to admit that the contract amendments continued in effect for no longer than the period of EIR preparation. For the amendments to have effect after that time, DWR would have to affirmatively approve and adopt them after reviewing and certifying the new EIR.

4. The Settlement Agreement Prohibited DWR from Committing to the Project before Completing Environmental Review

All of the reasons set forth above conclusively foreclose DWR's argument that the *PCL* Writ was a limited writ and that the 1995 approvals of the contract amendment continue in effect to this day. But if more were needed, the Settlement Agreement also makes clear that a new approval was required after completion of the EIR. The Settlement Agreement provided that the new EIR would analyze the "*potential* impacts" of the "*proposed* project." (115:58864 [AA20:4937], emphasis added.) It also provided for the *interim* authorization of the project, *pending* new environmental review. (115:58863 [AA20:4936]; 58883 [AA20:4955].) DWR makes much

of the absence of any express language setting aside the project approvals, while conveniently ignoring the absence of any language leaving the approvals in place; the absence of any language severing project components; and the absence of any findings that remaining project components (like the approvals) satisfy CEQA. (DWR Brief at p. 50-51; 115:58864-65 [AA20:4937-38].) Just as the parties knew how to set aside the approvals, they knew how to leave them in place, too. In this agreement, they did neither—at least not expressly.

What the Settlement did expressly state was that DWR would be required to fully comply with CEQA. (115:58890 [AA20:4962].) As discussed above, CEQA does not permit retrospective environmental review for a project that has already been approved. Because CEQA does not permit it, under the terms of the Settlement Agreement, DWR could not do it.

DWR points to the tolling agreement for support, stating that "there was no reason for the PCL plaintiffs to reserve their rights to maintain a validation challenge to non-existent Contracts." (DWR Brief at p. 50.) The tolling agreement is an obvious insurance measure for the *PCL* plaintiffs, in the event that—however unexpectedly—the original contract authorizations somehow survived

and were actionable. Such insurance would be prudent in an agreement that leaves the fate of the contract authorizations to implicit language and the operation of law (and, as discussed below, to future litigation).

In fact, the Settlement Agreement contains just such an insurance provision that benefits DWR: portions of DWR's payment obligations to the *PCL* plaintiffs could be suspended "[i]f litigation is commenced by anyone challenging CEQA compliance for, or the validity of, any Monterey Amendment…" and terminated "[i]f any such litigation results in a final judgment that invalidates any Monterey Amendment…." (115:58871 [AA20:4953], 58881 AA20:4963].) These clauses are not restricted to litigation filed by the *PCL* plaintiffs (who exclusively enjoy the benefit of the tolling agreement, whatever that is worth), but rather anticipate litigation challenging the validity of the contracts filed by "*anyone*." If the Settlement Agreement clearly left the contract authorizations in place, such a contingency would be impossible for anyone other than the *PCL* plaintiffs, and there would be no reason to include a provision like this in the Agreement.

KWB Parties' assertion that "[n]o provision of the Settlement Agreement… characterize[s] the Authority's 'title' as interim or temporary…" is in error. (KWB Parties Brief at p. 42; see also pp. 62-64.) In fact, the Settlement Agreement does characterize the transfer of title of the KWB lands as temporary, contingent on several future events, including the conclusion of all litigation related to the transfer:

> The restrictions in this Section V shall become final only upon (1) filing of the Notice of Determination following the completion of New EIR, (2) discharge of the writ of mandate in the underlying litigation as provided below, and (3) conclusion of all litigation in a manner that does not invalidate an Monterey Amendment (or any portion thereof) or the Kern Fan Element Transaction.
>
> (115:58879 [AA20:4951].)

Although the provision regarding the KWB's title is contained in a separate paragraph from other paragraphs that describe "restrictions," with a separate paragraph heading, the paragraph headings are explicitly not part of the agreement, and cannot serve to exclude the title provision from the finality provision that is in the same section. (115:58876 [AA20:4948]; 115:58893 [AA20:4965] ["All headings in this Settlement Agreement are included for convenience and reference only and shall not constitute a part of this

Settlement Agreement for any purpose."].) The finality provision specifies *all of Section V*, not just subsection B, and thus the restriction regarding title contained in subsection A is subject to the finality provision. (115:58876 [AA20:4948].)

There is no reason under the plain language of the Settlement Agreement to not regard the title provision in Section V as a restriction. The paragraphs that follow (under the subsection heading entitled "Restrictions on Use of KWB Lands") regard, in turn, the use of the KWB lands as a water bank, other SWP uses, non-SWP uses, the use of 490 acres specified in the Habitat Conservation Plan, the application of the Habitat Conservation Plan to the KWB lands, and environmental review for any future land use changes. (*Id*. at pp. 115:58877-78 [AA20:4949-4950].) Who shall hold title and who shall be permitted to operate and administer the KWB are similar operational restrictions.

Because the transfer of title is a restriction that becomes final after all litigation regarding the KWB has concluded, it does not confirm the intent of the *PCL* parties to leave the Monterey Amendment approvals (including the KWB transfer) in place. Nonetheless, even if the Settlement Agreement provisions are not

considered "restrictions," and thus not explicitly subject to the finality provisions of the agreement, the *PCL* parties' agreement in the Settlement Agreement that title remain with the KWB Parties still does not prove the parties' intent as to the approvals. This is because title is not the same thing as an approval; deciding who should hold title for a particular period is not the same thing as an approval of the project.

Title for the KWB lands had to be held by somebody during the new environmental review process. It made sense for the parties to agree that KWBA would retain title during this period, because it already held title and because the *PCL* parties agreed to maintain the status quo pending the completion of the new environmental review. (115:58863 [AA20:4936]; 115:58883 [AA20:4955].) Title could always be transferred back to DWR if DWR chose to reject the Project. In the meantime, somebody had to hold it.

The same logic applies to the Kern Environmental Permits. KWB Parties contend that the Settlement Agreement's statement that the agreement shall not affect the continuing effectiveness of the Kern Environmental Permits is proof that the parties intended the KWB transfer (and the rest of the Monterey Amendment approvals) to be

permanent. But the Settlement Agreement's statement regarding the environmental permits is nothing more than confirmation that, so long as the KWB continued to function as a water banking facility, the environmental permits would remain in place—no matter who owned or controlled it. (115:58866-67 [AA20:4939-40].) The permits themselves are transferrable to and binding on successors and assignees, with no approval required by other parties for any transfer or assignation of interest. (RA7:1664.) The interim implementation of the Monterey Amendments, and the unorthodox temporary ownership and control by KWBA of the KWB, required KWBA to be able to fully operate the water bank. This included the ability to secure necessary regulatory permits and authorizations. The parties agreed to honor those commitments (which went through separate environmental review), but that does not mean the parties committed to the permanent transfer of the KWB or the permanent authorization of the Monterey Amendments.

5. This Court Should Interpret the *PCL* Writ, Interim Implementation Order, and the Settlement Agreement De Novo

DWR and KWB Parties contend that this Court should review the Superior Court's interpretation of the *PCL* Writ, Interim

Implementation Order, and Settlement Agreement based on substantial evidence, because the Superior Court considered parol evidence in interpreting what it considered to be ambiguous documents. (DWR Brief at p. 29; KWB Parties Brief at p. 58.) That is not the correct standard of review. This Court should review and interpret these documents de novo: The interpretation of written instruments like judicial orders and contracts "is solely a judicial function … unless the interpretation turns upon the credibility of extrinsic evidence, even when conflicting inferences may be drawn from uncontroverted evidence." (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 439, citing *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865, 866, fn. 2.)

The evidence considered by the Superior Court was undisputed, in the form of uncontroverted writings in the Administrative Record and uncontroverted writings introduced by DWR and the Real Parties for the Time-Bar Defense Trial. (AA30:7648.) CDWA did not and does not challenge the credibility, authenticity, or validity of any of the evidence considered by the Superior Court. The Superior Court had no better ability to judge the credibility of and weigh the uncontroverted writings than this Court. This Court must therefore

independently interpret the *PCL* Writ, the Interim Implementation Order, and the Settlement Agreement, and consider, at its discretion, the introduced extrinsic evidence. (*Parsons v. Bristol Devel. Corp.*, *supra*, 62 Cal.2d at pp. 865-866; *Milazo v. Gulf Ins. Co*. (1990) 224 Cal.App.3d 1528, 1534.)

DWR cites two cases for its proposition that the Superior Court's interpretation of introduced parol evidence is based on substantial evidence, to which this Court must defer. (DWR Brief at p. 29, citing *Roden v. Bergen Brunswig Corp*. (2003) 107 Cal.App.4th 620, 624-625 and *In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 746-747.) But these cases merely state the rule that an appellate court defers to a trial court's interpretation of *conflicting* parol evidence only, not non-conflicting evidence like undisputed writings: "[W]hen ... the competent parol evidence is not conflicting, construction of the instrument is a question of law, and the appellate court will independently construe the writing." (*Roden v. Bergen Brunswig Corp*., *supra*, 107 Cal.App.4th at pp. 624-625 [quoting *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166].)

KWB Parties argue that the parties disagree on the inferences to be drawn and this gives cause to defer to the Superior Court's

conclusions. (KWB Parties Brief at p. 67.) But just because the documents may lend themselves to conflicting inferences (and/or just because the parties in the litigation draw conflicting inferences from them) does not change this Court's de novo review:

> It is only when conflicting inferences arise from conflicting evidence, not from uncontroverted evidence, that the trial court's resolution is binding. The very possibility of conflicting inferences, actually conflicting interpretations, far from relieving the appellate court of the responsibility of interpretation, signalized the necessity of its assuming that responsibility.

(*Medical Operations Management, Inc. v. National Health Laboratories, Inc*. (1986) 176 Cal.App.3d 886, 891 [quoting *Parsons v. Bristol Devel. Corp.*, *supra*, 62 Cal.2d at p. 866, n.2]; see also *Winet v. Price, supra*, 4 Cal.App.4th at p. 1166, n. 3 ["Where the evidentiary facts are undisputed, and only the inferences to be drawn therefrom are disputed, an appellate court must independently construe the written language"].)

Moreover, that the extrinsic evidence is in the form of written instruments is not dispositive; it is the *undisputed nature* of the writings that requires de novo review. (*Milazo v, Gulf Ins. Co., supra*, (1990) 224 Cal.App.3d at p. 1534; *Parsons v. Bristol Devel. Corp*., *supra*, 62 Cal.2d at pp. 865-866; see KWB Parties Brief at p. 69; see

CDWA Brief at p. 30.) But the fact that the extrinsic evidence was in written form confirms that the Superior Court was not better suited to interpret and weigh the evidence than this Court.

KWB Parties cite to several cases which they believe support their position that a reviewing court must defer to a trial court's conclusions even with regards to uncontested or undisputed writings, but these cases all deal with conflicting *factual* evidence, like stipulated facts, not uncontested written instruments. (KWB Parties Brief at pp. 68-69.) Stipulations of facts are very different than contracts or judicial orders: they describe facts that the parties agree the trial court should consider in deciding a case. The facts may be described in an uncontested (even jointly drafted) written instrument, but it is still the trial court's role to weigh the facts against other evidence and to judge their credibility. An appellate court defers to this kind of factual determination by a trial court. (*Winograd v. Am. Broadcasting Co*. (1998) 68 Cal.App.4th 624, 632-33.)

KWB Parties' reliance on *Winograd* for support of their argument is thus mistaken. (KWB Parties Brief at pp. 68-69.) In *Winograd*, the plaintiffs argued that a set of facts stipulated to by the attorneys in the courtroom and recorded by the court reporter should

be reviewed de novo by the appellate court because they were in written form. (*Winograd, supra*, 68 Cal.App.4th at pp. 632-33.) The appellate court disagreed, ruling that the stipulated facts were not subject to the normal de novo review for writings because they were actually "a colloquy on the record between the court and two counsel, occurring in the context of a particular procedural posture which reflected upon the parties' respective motivations." (*Ibid*.) The trial court had also considered the conduct of the attorneys that was subject to differing interpretations. These facts led the appellate court to defer to the trial court's interpretation and assessment of that evidence, rather than reviewing it de novo. (*Ibid*.)

McKinney v. Kull, also cited by KWB Parties, similarly involves a set of stipulated facts. (*McKinney v. Kull* (1981) 118 Cal.App.3d 951, 955-56; KWB Parties Brief at p. 68.) Like the court in *Winograd*, the *McKinney* court applied the "rule of conflicting inferences," which states that "[w]here different inferences may reasonably be drawn from undisputed evidence, the conclusion of the jury or trial judge must be accepted by the appellate court." (*Id*., quoting 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 254, p. 4245; *Winograd*, *supra*, 68 Cal.App.4th at p. 633.) The *McKinney*

court noted, though, that the "rule of conflicting inferences has to do with inferences of *fact*, derived from other facts." (*McKinney*, *supra*, 118 Cal.App.3d at p. 955.) In this case, like *Winograd*, the "writing" was a stipulated *fact*, which formed the basis for an inference of other facts, not a written instrument involving questions of law.

Two other cases cited by KWB Parties involve stipulated facts: *Horseman's Benevolent & Protective Assn v. Valley Racing Assn*. (1992) 4 Cal.App.4th 1538, 1560 and *Ferris v. Los Rios Community College Dist*. (1983) 146 Cal.App.3d 1, 7, while the other cases cited by KWB Parties also involve conflicting fact evidence, not written instruments. (*In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 746-747 [conflicting expert testimony]; *CNA Casualty of Cal. v. Seaboard Surety Co*. (1986) 176 Cal.App.3d 598, 616 [conflicting evidence weighed by trial court].)

Thus, even though the Superior Court relied on extrinsic evidence to aid its interpretation of the PCL Writ, the Interim Implementation Order, and the Settlement Agreement, this Court's review of these documents must be de novo because the extrinsic evidence was all in the form of uncontroverted written instruments.

6. Extrinsic Evidence Demonstrates a Lack of Mutual Intent as to Project Approvals

While DWR discusses some of the extrinsic evidence considered by the Superior Court, it ignores the 2002 Memorandum, discussed in CDWA's Opening Brief, that demonstrates that there was no mutual intent as to the project approvals. (DWR Brief at p. 51; AOB at 48-50; 199:101143-47 [AA13:3003-07] ["2002 Memorandum"].) The 2002 Memorandum (contained in the Administrative Record and introduced in the Time-Bar Defense Trial) unambiguously indicates that there was *no mutual intent* of the parties to either leave the approvals in place or to void them. The *PCL* parties punted on this issue, agreeing to disagree, and agreeing only to leave the question up to a future court to decide. (199:101144-07 [AA13:3004-07] ["On this point, plaintiffs and defendants agreed that it would be up to a future court, if third parties filed suit, to decide whether such an NOD would constitute a new approval as that concept is embodied in the validation statutes."].)

KWB Parties incorrectly dismiss the 2002 Memorandum as merely expressing the *PCL* plaintiffs' *post-settlement* intent as to the approvals, despite the fact that the document was obviously written

before the Settlement Agreement. (KWB Parties Brief at p. 65; 199:101143-47; [AA13:3003-07].)

The 2002 memorandum, addressed to the assigned mediator and authored by the *PCL* defendants, reflected the *PCL* defendants' perspective of the then-active settlement negotiations. Although it is a self-serving portrayal of the *PCL* defendants' intent, and thus not reliable, it contains descriptions of the *PCL* plaintiffs' positions and quotes from letters by the *PCL* plaintiffs' counsel that clearly contradict KWB Parties' current litigation position that the parties possessed mutual intent as to the Monterey Amendment approvals. (199:101143-47 [AA13:3003-07].)

KWB Parties incorrectly quote the document as stating "**until [post-settlement]** no one ever suggested that the word 'interim' should be applied to the legal status of the Monterey Amendments." (KWB Parties Brief at p. 65, quoting AA13:3005 [emphasis added].) The correct quote is "**until now**, no one ever suggested…," with "now" being November, 2002—*before* the Settlement Agreement was signed. (199:101145 [AA13:3005] [emphasis added].)

KWB Parties' confusion likely stems from the fact that the *PCL* parties initially agreed to a series of "Settlement Principles" prior to

crafting and ratifying the Settlement Agreement. (199:101143-44 [AA13:3003-04].) These Settlement Principles do not appear in the record, were not introduced into evidence, and have no binding effect. (See 115:58891 [AA:20:4963] [Settlement Agreement's integration clause at ¶ G].) They appear to have been an initial non-binding agreement that governed the later, formal settlement negotiations. Nonetheless, the *PCL* defendants argued to the mediator in the 2002 Memorandum that the *PCL* plaintiffs' positions, more fully articulated in 2002, represented a "retreat" from the principles and "caused the breakdown in the settlement process." (199:101143-44 [AA13:3003-04].)

Whether or not the *PCL* plaintiffs' position was in fact a retreat from the earlier agreed-upon principles is irrelevant, as the controlling document is the final Settlement Agreement, not the earlier Settlement Principles. But it is not clear—even from this self-serving memorandum drafted by the *PCL* defendants—that the *PCL* plaintiffs' position on the need for the approvals to be voided was a retreat at all. The memo recites three Settlement Principles, describing the first two as:

> (1) Plaintiffs and defendants first agreed that the Monterey Amendments would remain effective contracts between DWR and the SWP contractors.
>
> (2) Plaintiffs and defendants then agreed that the SWP could be operated in accordance with the Monterey Amendments while the new EIR was prepared and during the return on the writ proceedings…

(199:101143-44 [AA13:3003-04].)

Even if the first settlement principle is accurately described in this memo (and there is no evidence that it is), agreeing that "the Monterey Amendments would remain effective contracts" is not the same thing as agreeing that DWR's approvals of those contracts would remain in place and be validated. As CDWA has consistently argued throughout this litigation, and as the *PCL* plaintiffs clearly contended as far back as 2002, under the Settlement Agreement the contracts would "remain effective contracts" *during the interim period only*, pending new approvals by DWR at the conclusion of the new environmental review.

The 2002 Memorandum, far from supporting DWR's and KWB Parties' position, is in fact a statement against their interests. It makes clear that there was *no mutual intent* with regards to the Monterey Amendment approvals. Apparently the *PCL* plaintiffs believed the approvals would be void while the *PCL* defendants believed they

would remain in place. Thus the *PCL* defendants' statement that they would never agree to setting aside the approvals may provide evidence of *their* intent, but it is not evidence of the *PCL plaintiffs'* intent. (199:101144-07 [AA13:3004-07].) To the extent the parties agreed to anything regarding the approvals, they agreed only to disagree and to leave the question of the approvals in the hands of a later court, in a later action, filed (maybe) by future parties. (199:101146 [AA13:3006].)

DWR's cited evidence does not disturb this conclusion. The Settlement Agreement, as DWR itself points out, "said nothing about setting aside the Contracts." (DWR Brief at p. 50.) But the Settlement Agreement said nothing about leaving the approvals in place, either, and said nothing about severing the approvals or about their compliance with CEQA if allowed to remain in place. (115:58863-69 [AA20:4936-42]; 115:58876-86 [AA20:4948-58].)

DWR cites to the Joint Statement issued by the *PCL* parties describing the settlement and listing its key components. (DWR Brief at p.51.) While the Joint Statement does not state that the approvals were voided, it also does not state that the approvals would remain in place. And while the Joint Statement states that "The Kern Water

Bank will remain in local ownership and will operate as it has, but will be subject to additional restrictions on use," (115:58846 [AA23:5669]), the Joint Statement also states that "The State Water Project will be operated pursuant to the Monterey Amendments and new amendments *pending completion of the new EIR and termination of the litigation*." (*Ibid*, emphasis added.) Rather than evidencing any mutual intent as to the approvals, the Joint Statement evidences *a lack of mutual intent* by not mentioning the approvals at all while including inconsistent statements regarding the Kern Water Bank and the entire Monterey Amendments.[3] (*Ibid*.)

Due to the clear lack of mutual intent by the parties as to the effect of the *PCL* litigation on the Monterey Amendment approvals, this Court should not find that the parties plainly intended to violate CEQA by leaving the approvals in place while mandating new environmental review. Rather, this Court should interpret the Writ, Interim Implementation Order, and Settlement Agreement in a lawful

[3] The Joint Statement's language regarding the KWB does not demonstrate any intent by the parties to make the KWB transaction permanent, either: the "additional restrictions" mentioned in the Joint Statement include the "restriction" regarding title and operation of the bank that become final only upon conclusion of all litigation regarding the Monterey Amendments. (See Section I.C.4, above; 115:58876, 79 [AA20:4948, 51].)

and valid way and find that the approvals were necessarily voided by the Superior Court.

7. By Specifically Defining the Project's No-Project Alternative, this Court Required DWR to Either Approve or Reject the Monterey Amendments

This Court defined the "no-project" alternative as the retention of the pre-Monterey Agreement contracts, including Article 18(b) of the contracts. (*PCL v. DWR*, supra, 83 Cal.App.4th at p. 898 [describing "implementation of article 18, subdivision (b), as a 'no project' alternative"].) By defining the new EIR's no-project alternative as including the implementation of a contract provision that the project sought to delete, this Court necessarily defined the Project as including the deletion of that contract provision. (AOB at pp. 51-54.) DWR summarily dismisses this point without addressing it (DWR Brief at pp. 37-38), revealing the thinness and logical failure of its argument: it is the *project* that requires an approval if it is to occur, not the *no-project* alternative.

Under CEQA, the no-project alternative is where "doing nothing" is described. (*PCL v. DWR*, *supra*, 83 Cal.App.4th at 911; Guidelines § 15126.6(e)(1).) By mandating that the no-project

alternative include Article 18(b) as a legally valid and enforceable contract term, this Court confirmed that the no-project alternative is *the SWP contracts as they existed before the 1995 Monterey Amendments*—i.e., the contracts as they existed before deletion of Article 18(b) and the other changes set forth in the Monterey Amendments.

The EIR's definition of the Project is consistent with this Court's holding: "The proposed project is the Monterey Amendment and the Settlement Agreement." (23:11158.) Although the *PCL* trial court permitted the SWP to continue interim operations under the unlawful amendments (unlawful because they had been approved without a valid EIR) pending preparation of a new EIR, that did not make the unlawful amendments the status quo, no-project alternative for CEQA purposes. The no-project alternative remained the SWP contracts as they existed before the 1995 Monterey Amendments. Thus, in order to delete Article 18(b) and to adopt the other contract amendments, DWR had to affirmatively approve the Project.

D. DWR's Failure to Make a Proper Project Decision Was a Prejudicial Abuse of Discretion

DWR attempts to minimize its failure to either approve or disapprove the Project as, at worst, a mere "error in syntax." (DWR Brief at p. 38.) It contends there is no "confusion as to what decision was before DWR and what decision it was making" (*id*.), but that contention is belied by this litigation, in which the parties dispute those very issues.

DWR's phrasing of its decision as "continuing to operate under the existing Monterey Amendment… and the existing Settlement Agreement" (22:10932) was an attempt to evade review under both CEQA and the validation statutes. For CEQA purposes, DWR's phrasing made it appear to the public that DWR was choosing a "no-action" alternative, not approving the contract amendments constituting the Project. DWR's evasive phrasing obscuring both the nature of the Project and its decision strikes at the heart of CEQA: to enable the decisionmaker and the public to "ascertain the environmental consequences of a project before giving approval to proceed." (*Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549, 564-565; see AOB at pp. 33-34.) Members of the public were

certainly prejudiced and confused, to the detriment of CEQA's twin goals of informed public participation and informed decisionmaking. (*Save Tara*, *supra*, 45 Cal.4th at pp. 135-136; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 926-927.)

DWR's non-approval decision also attempted to foreclose validation challenges by making it appear that it validly approved the contract amendments—the Project—not after the EIR but years earlier. It has pursued that meritless argument throughout this litigation to the prejudice of CDWA. Moreover, other members of the public may have intended to challenge the validity of the amendments but been deterred by DWR's claim that its "decision" was not an approval.

II. THE EIR FAILED TO ANALYZE THE IMPLEMENTATION OF ARTICLE 21(g)(1) IN THE NO-PROJECT ALTERNATIVES

DWR defends its failure to include an analysis of the implementation of Article 21(g)(1) of the original SWP contracts (which the Project proposed to delete) in any of the four no-project alternatives on the basis that the provision "was a complete dead letter by 1995." (DWR Brief at p. 40.) As such, according to DWR, Article

21(g)(1) was not an existing condition or a reasonably foreseeable future condition and therefore was not required to be included in the EIR's no-project alternatives.

This argument is essentially identical to the failed argument DWR made in the *PCL v. DWR* litigation 16 years ago defending its similar refusal to consider implementation of Article 18(b) in that EIR's no-action alternatives. (*PCL v. DWR*, *supra*, 83 Cal.App.4th at pp. 909-917.) This Court should reject DWR's Article 21(g)(1) argument for exactly the same reasons it rejected DWR's Article 18(b) argument: DWR is not the arbiter of the legal effect of Article 21(g)(1), and it cannot arbitrarily exclude the provision from its CEQA analysis. DWR failed to analyze Article 21(g)(1) in its no-project alternatives, and its failure to do so was prejudicial.

A. Article 21(g)(1) Was an Existing Contract Term that DWR Was Required to Analyze in the EIR

As it did in the first *PCL* appeal with respect to Article 18(b), DWR again claims that because it interprets a contract term to have no effect, the term is not an existing condition that needs to be included in the no-project alternative. (DWR Brief at p. 41; *PCL v. DWR*, *supra*, 83 Cal.App.4th at pp. 909-917.) But as this Court previously

held, the EIR is not the place to determine, nor is DWR the arbiter of, the legal effect of a contract term. (*Id.* at p. 913.) If the term is in the contracts, then it is an existing condition (or a reasonably foreseeable future condition), and if the provision can be "plausibly construed in a manner that would result in significant environmental consequences, its elimination should be considered and discussed in the EIR." (*Id*.)

The *PCL* holding is law of the case that governs this Court's review of the EIR's failure to analyze Article 21(g)(1). DWR must analyze the environmental impacts of retaining or deleting this existing contract term, just as it was required to analyze retaining or deleting Article 18(b): "[T]he question was not whether [the contract term] was likely to be implemented in the near future, but what environmental consequences were reasonably foreseeable by retaining or eliminating [the provision]." (*PCL v. DWR*, *supra*, 83 Cal.App.4th at 915.)

DWR claims that "CDWA's proffered interpretation" of Article 21(g)(1) was not a plausible construction, and then claims that "[w]hether Article 21(g)(1) was an existing condition or should have been reasonably expected to occur is predominantly a factual question." (DWR Brief at pp. 41-42.) But DWR cites only a general

discussion of the standard of review of an agency's selection of a *range of alternatives* for support—it cites nothing that states that the plausibility of an interpretation of a contract term, in the context of a no-project alternatives analysis, is a factual question for which the agency gets deference. (*Id*., citing *Citizens for Open Government v. City of Lodi*, (2012) 205 Cal.App.4th 296, 312-313.) DWR ignores the single case that is precisely on point on this question and is law of the case here: *PCL v. DWR*. In *PCL v. DWR*, this Court independently determined that PCL's construction of Article 18(b) was plausible, without deferring to DWR's interpretation of the provision. (*PCL v. DWR*, *supra*, 83 Cal.App.4th at p. 913.)

The Contractors similarly argue that the EIR's no-project alternatives are factual determinations that must be reviewed under the substantial evidence standard.[4] (Contractors' Brief at pp. 56-58, 70-74.) The Contractors do cite *PCL v. DWR*, but ignore the context

[4] The Contractors also devote an entire section of their brief to the argument that the EIR analyzed a reasonable range of alternatives. (Contractors' Brief at pp. 84-85.) The Contractors misunderstand why the alternatives analysis is inadequate. CDWA does not, as the Contractors suggest, seek "analysis of even more no-project scenarios." (*Id*. at p. 84.) Rather, the problem is that there is not even one no-project alternative that includes invocation of Article 21(g)(1) as an existing condition or reasonably foreseeable future condition. (Opening Brief at p. 55.) The deficiency is qualitative, not quantitative.

of that case's discussion of SWP contract terms as no-project conditions. (*Id*. at 57.) *PCL v. DWR* does indeed say that a no-project description "is a factually based forecast of the environmental impacts of preserving the status quo." (*PCL v. DWR*, *supra*, 83 Cal.App.4th at p. 917.) This does not mean, however, that a lead agency is free to ignore or exclude existing contract terms that are part of existing or reasonably foreseeable future conditions. On the contrary, this Court found that because DWR had not properly analyzed Article 18(b) either as part of the "no project description" or in the alternatives analysis, the EIR failed in its basic purpose "to fully inform the decision makers and the public of the environmental impacts of the choices before them." (*Id.* at pp. 918-20.) This inadequacy is not a matter of substantial evidence, but represents a failure to proceed in the manner required by law. (*Id*. at pp. 911-912, 916, 917-918, 920.)

DWR and the Contractors contend that Article 21(g)(1) is a "complete dead letter" and a "'historical relic' with no relation to Article 18(b) and without any current relevance." (DWR Brief at p. 40; Contractors' Brief at p. 75.) While DWR very clearly wants Article 21(g)(1) to be a dead letter, its desire is not determinative of the provision's meaning and does not excuse it from its duty under

CEQA to analyze the provision's consequences. It is not for DWR to decide what the legal meaning of Article 21(g)(1) is; that is a question of law to be ascertained from the writing itself. (*Parsons v. Bristol Devel. Corp.* (1965) 62 Cal.2d 861, 865-66, *citing* Civ. Code §§ 1638-39; *PCL v. DWR*, *supra*, 83 Cal.App.4th at p. 913.) DWR's duty is to analyze the term's plausible meaning in order to best ascertain the potential significant effects of deleting it from the contracts. (*PCL v. DWR*, *supra*, 83 Cal.App.4th at p. 913.)

DWR has repeatedly admitted that CDWA's interpretation of Article 21(g)(1)—that the provision applies to all surplus water, not just "scheduled" surplus water—is not only plausible, but *accurate*. The Final EIR's master response to comments regarding Article 21 states that "[b]ecause 'extra surplus water' [a.k.a. unscheduled water] was included in Article 21, Article 21(g)(1) was also applicable to this water supply." (2:665.) And in a 2009 letter the DWR director, responding to criticisms of the draft EIR, stated that:

> [The *PCL*] Plaintiffs contend that the AFEIR misinterpreted Article 21 (g)(1) in explaining that the limitations of 21(g)(1) were intended to apply to "scheduled" water. Plaintiffs state that the "provision, while covering 'scheduled' agricultural surplus water, is not limited to the variety; it also applies to interruptible water."

> …
> The Department agrees with Plaintiffs' statement that Article 21(g)(1) also applied to interruptible water (now called Article 21 water).
>
> (196:99711.)

Given this concession, there is no basis for DWR's contention that CDWA's interpretation of Article 21(g)(1) is implausible.

DWR also argues that because Article 21(g)(1) was incorporated into the long-term contracts as an amendment a few years after the original contracts were signed, it is somehow not a valid contract term.[5] (DWR Brief at pp. 42-43.) But it is wholly irrelevant whether Article 21(g)(1) was part of the original contracts or was added as an amendment later—it is still a valid contract term either way which the EIR must address and analyze.

The Contractors further claim that CDWA's position regarding Article 21(g)(1) "would have the tail wag the dog," and "would elevate Article 21(g)(1) above all other terms in the SWP contracts."

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[5] DWR's brief misrepresents CDWA's argument, incorrectly quoting CDWA as stating "that Article 21(g) was a 'critical check[] and balance[] that had been built into the SWP *when it was first proposed*…" (DWR Brief at p. 42.) In fact, CDWA stated, "The Monterey Amendments eliminated critical checks and balances that had been built into the SWP system when it was first proposed…" (CDWA Brief at p. 15.) This statement is entirely accurate, not "categorically wrong" as DWR would have it.

(Contractors' Brief at p. 75.) The Contractors' fears are wholly unfounded. Evaluating what would happen if DWR gave effect to a contract term does not mean elevating that term above all others in the SWP contracts; it means giving that term meaning in the context of the entire contract. And while the tail may plausibly impart motion to the rest of the dog, that is not reason for pretending the tail does not exist.

Article 21(g)(1) is an existing contract provision that the Project deletes. CDWA's construction of the provision is plausible, and under that construction significant environmental effects would result if it were deleted. These effects must be analyzed in the EIR.

B. The No-Project Alternatives Do Not Evaluate Invocation of Article 21(g)(1)

DWR and the Contractors both claim the EIR included invocation of Article 21(g)(1) in two of the four no-project alternatives. (DWR Brief at p. 39; Contractors' Brief at pp. 63-65.) These claims are contradicted by the EIR itself, as well as by the remainder of DWR's and the Contractors' arguments, which make clear that DWR did not analyze the invocation of Article 21(g)(1) in the no-project alternative—whether in the manner suggested by

CDWA or any other manner. (See DWR Brief at pp. 40-43 [explaining that DWR viewed Article 21(g)(1) as a dead letter, not an existing condition or reasonably foreseeable future condition], 43 ["DWR appropriately declined to define the no project alternative as including invocation of CDWA's version of Article 21(g)…"]; Contractors' Brief at 75 [arguing actual text of Article 21(g) should be ignored as it is a "'historical relic with no relation to Article 18(b) and without any current relevance."].) The only sense in which the no-project alternatives "considered" Article 21(g)(1) was to reject it as a meaningless artifact that need not be considered. In no sense do any of the no-project alternatives actually *analyze* invocation of Article 21(g)(1), and DWR and the Contractors point to nothing in the EIR analyzing invocation of Article 21(g)(1).[6]

[6] Because the EIR did not analyze invocation of Article 21(g)(1), the Contractors' assertion that CDWA failed to set forth in its brief the EIR's nonexistent analysis of invocation of Article 21(g)(1) is baseless. (Contractors' Brief at pp. 69-70.) CDWA discharged any obligation to review record evidence on this point by reviewing and citing the record evidence, expressly acknowledging that none of the no-project alternatives included invocation of Article 21(g)(1). (CDWA Brief at p. 55.)

C. No Substantial Evidence Supports DWR's Caricatured Analysis of the Invocation of Article 21(g)(1)

DWR and the Contractors claim that even if DWR erred in not including the invocation of Article 21(g)(1) in the no-project alternative analysis, it "fully satisfied CEQA's public participation and informed decisionmaking goals" because the Final EIR's responses to comments contained an analysis "that 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." (DWR Brief at pp. 43-45; Contractors' Brief at pp. 87-89.) This limited analysis was "not presented as an alternative or as a modification of any alternatives discussed in the DEIR, but as clarification of why the Department rejected the approach as an alternative." (2:521.) More importantly, it was not an analysis of CDWA's interpretation of Article 21(g)(1), or of any other plausible interpretation of that provision. The plain language of Article 21(g)(1) simply does not state that all or most surplus water deliveries must be prohibited if the provision is invoked. Instead, Article 21(g)(1) states:

> 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 with 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.

(25:12125.) Thus, DWR failed to analyze the interpretation of Article 21(g)(1) actually at issue here, under which the delivery of surplus water would be restricted to only those uses that would not encourage the development of permanent economies. This plausible interpretation—based on the plain meaning of Article 21(g)(1)—is nowhere to be found in DWR's limited and caricatured analysis.

The analysis of Article 21(g)(1) that DWR did perform, in which it discussed the impacts that might result from the elimination of all or most surplus water deliveries, assumes the result of DWR's interpretation of implementing the contract term without supporting that assumption with any evidence, let alone substantial evidence. (*See Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2008) 40 Cal.4th 412, 426-427; Pub. Resources Code § 21082.2, subd. (c).) The analysis is thus useless; it does not matter what the impacts of eliminating all or two-thirds of surplus

water are if the EIR fails to explain or demonstrate why that much water would be eliminated.

The record contains no evidence that the invocation of Article 21(g)(1) will result in the elimination of all or most surplus water deliveries. (CDWA Brief at p. 63, citing 2:660-82 [FEIR discussion of Article 21 containing no evidence that the invocation of Article 21(g)(1) would result in all or most surplus water deliveries being eliminated].) Yet DWR and the Contractors fail to address this deficiency at all, instead just doubling down on the Superior Court's unsupported conclusion that DWR's analysis, although "not perfect, … is sufficient to make an informed decision of the Project…" (DWR Brief at p. 44; Contractors' Brief at pp. 87-88; AA33:8245.)

DWR looked at no evidence or analysis regarding the potential use of surplus water to support permanent economies. (5:518-519.) DWR first misinterpreted the comments and the plain meaning of Article 21(g)(1), posing the question as being between existing economic dependency and future economic dependency. (5:518; see CDWA Brief at pp. 59-60.) DWR then stated that performing this misconceived analysis "would be difficult and would require consideration of many factors" and that "it is questionable whether the

Department has the ability or the authority" to conduct it. (5:518-19.) That is an admission that DWR did not perform the analysis, not evidence that it did.

The closest DWR gets to any "evidence" in support of its conclusion that the invocation of Article 21(g)(1) would result in the elimination of all or most deliveries of surplus water are conclusory assertions that a "strong case could be made that full deliveries of SWP water up to current delivery volumes, regardless of classification of the water, would support existing economic development, not new development," (5:519); that "it was unlikely that anyone thought that intermittent Article 21 water would be used to support development of an economy in agricultural or M&I areas," (2:505); and that "the Department is not aware of any local water supplier or local governmental agency that relies upon 'the sustained delivery of surplus water' to support the development of a local economy." (2:506.) These assertions amount to nothing more than "argument, speculation, [and] unsubstantiated opinion or narrative," and therefore do not qualify as substantial evidence. (Pub. Resources Code § 21082.2, subd. (c).) DWR's analysis of the environmental impacts that might result from eliminating all or most surplus water is thus

meaningless, and fails to provide the good faith effort at full disclosure and analysis that CEQA requires. (Guidelines § 15151.)

The Contractors argue further that CDWA is guilty of "an untenable and disingenuous flip-flop" and that CDWA "fully intended its interpretation of Article 21(g)(1) to result in a significant reduction in SWP pumping and SWP water deliveries." (Contractors' Brief at p. 80; see also pp. 81-83.) Not only is this rhetoric an erroneous characterization of CDWA's criticism of the EIR's analysis, but it is irrelevant to this Court's CEQA review. The EIR is a disclosure document, "the mechanism prescribed by CEQA to force informed decision making and to expose the decision making process to public scrutiny." (*PCL v. DWR*, *supra*, 83 Cal.App.4th at p. 910.) The relevant question is whether DWR satisfied CEQA's requirements, not CDWA's views on how the SWP should be administered.

The Contractors take their mistaken understanding of what CDWA seeks in demanding compliance with CEQA and conclude that the EIR's analysis in response to comments, with its flawed and unsupported assumptions, "described exactly what CDWA wanted." (Contractors' Brief at p. 83.) What members of the public, including CDWA, have wanted from the beginning is for the Article 21(g)(1) to

be properly included in the EIR's no-project alternative analysis. (32:15923-24; 196:99486-87; AA31:7790-91; AA32:8087-89.) It's not enough to say "we interpret your comment to seek the elimination of all or two-thirds of surplus water deliveries; here is what will happen if we do that." The analysis must also include the analytical reasoning and the evidence that leads to the conclusion that the implementation of Article 21(g)(1) will result in those assumed reductions. The EIR provides none of this reasoning or evidence—it jumps to the conclusion without any analysis.

III. PLAINTIFFS' VALIDATION CLAIMS ARE NOT TIME-BARRED

As discussed in CDWA's Opening Brief (AOB at pp. 31-54) and in Section I, above, DWR's 1995 approvals of the Monterey Amendments did not survive this Court's decertification of the 1995 EIR and the *PCL* trial court's *PCL* Writ and Interim Implementation Order. Thus, the Monterey Amendments have not yet been authorized on a permanent basis and are operating, at best, pursuant to the *PCL* trial court's interim authorization. CDWA's validation action is thus an alternate theory of liability that the Court need reach only if it concludes that DWR's 2010 decision was a valid project approval for

the Monterey Plus Project. If this Court finds that DWR's 2010 decision constituted a valid project approval under CEQA, then the decision also constituted a contract approval actionable and timely under validation law.

A. CDWA's Argument Relies Only on Evidence Properly Before This Court

KWB Parties seek to have CDWA's entire time-bar argument rejected as based on evidence not introduced in the time-bar defenses trial. (KWB Parties Brief at 57-58.) CDWA agrees that this Court should only consider evidence properly before the Superior Court (and any properly judicially noticed documents) when considering the time-bar defenses arguments. While CDWA referenced its CEQA argument in its time-bar defenses argument (CDWA Brief at p. 66, 69), and does so again in this Combined Response, it did (and does) so for the purposes of referencing the legal argument, while separately citing the relevant exhibit numbers and appendix citations. KWB Parties take issue with just three documents cited in CDWA's CEQA argument: AR194:98885, AR28:13630-13632, and AR199:101131. CDWA agrees that these documents should not be considered as part

of the Court's determination of this claim, as they were not introduced as evidence before the Superior Court.

B. DWR's Determination to Approve the Monterey Amendments, Not Its Signature on the Contract Amendments, Is the Action Subject to Validation

DWR contends that the Monterey Amendments were authorized for the purposes of validation law between 1995 and 1999 when the DWR director signed each contract (DWR Brief at p. 47); that because the contracts remained in existence, its decision in 2010 "did not require re-executing the contracts" (*id*. at p. 53); and thus its 2010 project decision was not an authorization subject to validation. (*Ibid*; see also pp. 51-53.) But there is a difference between a contract's execution and an agency's authorization of that action; it is the agency's authorization that is actionable, not the contract execution. (Code Civ. Proc. § 864; *Smith v. Mt. Diablo Unified School Dist*. (1976) 56 Cal.App.3d 412, 416-17.) Thus, the fact that the contract amendments were not re-executed in 2010 does not demonstrate that DWR did not re-authorize them.

In this case, because DWR's 1995 authorization was in the form of its 1995 Notice of Determination ("1995 NOD") and Findings for the Monterey Amendments project, both of which were voided by the

PCL trial court, the 2010 NOD and Findings for the Monterey Plus Project constitute DWR's re-authorization of the previously-signed contract amendments.

DWR argues that because it acts through its director, and not a "governing body," DWR authorizes contracts only when the Director signs them. (DWR Brief at pp. 46-47.) First, the Director is properly considered the "governing body" of DWR under validation law. (Code Civ. Proc. § 864.) It makes no difference if that governing body is a single person. Second, there is no reason why the Director could not authorize the execution of a contract separately from signing it, as would normally happen with a governing board or commission.

That is in fact what happened here. The Director signed the 1995 NOD and Findings for the Monterey Amendments project, approving that project and authorizing the execution of the Monterey Amendments. This is evidenced in the 1995 NOD and Findings themselves, of which CDWA has sought judicial notice. (See CDWA's Request for Judicial Notice.) It is also evidenced by a document that was entered into evidence by the Superior Court, a single page from the 1995 Findings:

A. The Director hereby finds and certifies:

> 1. The Monterey Agreement EIR is adequate under CEQA for the Department's approval of the Amendments as a responsible agency; and,
>
> 2. The Director has reviewed and considered the information within the Monterey Agreement EIR prior to approving the Amendments; and,
>
> 3. The Director ***has determined*** to approve the Amendments with the mitigation described below;
>
> …

(AA25:6302 [excerpt of 1995 Findings for Monterey Amendment project (emphasis added)]; see AA25:6200, fn 1 [identifying and authenticating the document].)

This page from the 1995 Findings makes clear that DWR authorized the execution of the contract amendments prior to, and separate from, signing them: "The Director hereby ***finds and certifies***… [that he] ***has determined*** to approve the Amendments…." (AA25:6302, emphasis added.) It also makes clear that the Director's approval of the Monterey Amendments project under CEQA also constituted his authorization of the execution of the amendments, and thus was actionable under validation. This is how the NOD and Findings were issued in 1995—the operative date for the *PCL* validation action—even though many of the contracts were not actually signed until 1996, 1997, and 1999. (See AA14:3254; AA14:3318; AA14:3382; AA16:3706; AA16:3770; AA17:3964;

AA17:4028; AA17:4092; AA18:4222; AA18:4286; AA18:4350; AA17:4156; AA20:4740; AA19:4673.)

C. The *PCL* Writ, Interim Implementation Order, and Settlement Agreement Voided the Prior Contract Authorization and Required a New Authorization

By decertifying the Monterey Amendments EIR and ordering a new NOD and new Findings, the *PCL* trial court necessarily voided DWR's 1995 NOD and Findings. (See Section I, above; AA21:5005 [*PCL* Writ]; AA21:5017 [Interim Implementation Order]; AA20:4957, 4962 [Settlement Agreement where DWR agreed to file a new NOD after preparing and considering a new EIR, while fully complying with CEQA].) It does not matter that the contracts were never torn up, or that DWR never re-signed the contracts after making its decision on the Monterey Plus Project in 2010; after the *PCL* trial court issued the *PCL* Writ and Interim Implementation Order, the signed contracts were conditioned on *future* valid and lawful DWR approval of their execution.

If a contract is dependent on a future action by an agency in order to become finally and validly authorized, it is the date of that future action that determines the date those contracts become subject to validation. (*California Commerce Casino, Inc. v. Schwarzenegger*

(2007) 146 Cal.App.4th 1406, 1433, n.17.) The court allowed the contracts to remain in place, but only *pending* new approvals being made that would (or would not) follow the new environmental review. DWR's issuance of a new NOD and Findings in 2010, approving the Monterey Plus Project, thus constitutes its authorization (or reauthorization) of the Monterey Amendments themselves.

KWB Parties contend that the dismissal of the *PCL v. DWR* validation action (with a tolling agreement permitting the *PCL* plaintiffs to refile) demonstrates the parties' and the *PCL* trial court's intent to validate the contracts. (KWB Parties Brief at p. 64-65.) But this logic applies equally to the parties' and the court's intent to *void* the approvals: if the approvals were voided by the litigation, there was no reason to maintain the validation action against those approvals, and thus the action should be dismissed. (AA20:4956.) And as discussed in Section I.C.4, above, the tolling provision was clearly clearly insurance against contingencies that the parties could not control themselves. (AA20:4956-57.)

D. KWB Parties' Argument Deprives DWR of Its Discretion to Reject the Project, Which Would Violate CEQA

KWB Parties state that their argument "does not conflict with the CEQA principle that a project approval should follow EIR certification." (KWB Parties Brief at p. 80.) But then KWB Parties hedge: they state that the "existence of legally valid contracts" did not preclude "DWR from exercising *whatever discretion it had* to make a project decision after certification of the 2010 EIR." (*Id*., emphasis added.) While suggesting that DWR was free to adopt mitigation measures "applicable to the operation of the SWP," KWB Parties are silent as to DWR's discretion to adopt project alternatives, including the no-project alternative. (*Id*.)

KWB Parties have previously made their position quite clear, however: they believe, and have consistently argued, that their ownership and control of the KWB is untouchable, enshrined in the terms of the Settlement Agreement, and thus DWR could not and cannot consider any alternative that would divest KWB Parties of the KWB as part of any post-settlement environmental review. This position was made explicitly clear in a 2005 letter from KWB Parties' counsel to *PCL* plaintiffs' counsel:

> It is preposterous to think that (a) the KWBA Participants would have given up 45,000 acre feet of Table A in exchange for KWB, which was then worth at least $45 million; (b) then invest approximately $35 million of their money in improving the KWB and stored their water in the bank, and then (c) significant investment having been made within the Participants boundaries to plant permanent crops in reliance upon the KWB, **and then there would be serious consideration of evaluating alternatives which would divest KWBA and its Participants of this asset** which is now an integral part of the agricultural economy of Kern and Kings Counties. Furthermore, it is very clear from the Settlement Agreement that although the environmental effects of transfer and operation of the KWB to the KWBA were going to be fully evaluated by DWR in performing an "independent study" and any significant adverse affects are to be mitigated by DWR as required by CEQA, the Settlement Agreement, which is part of the Section 21168.9 Order specifically provides that the ownership and operation of the KWB is to vest with KWBA.

(AA13:3014 [2005 Letter from Ernest Conant (counsel for KWBA then and now) to counsel for *PCL* plaintiffs].)

As evidenced by its briefing in this Appeal, KWB Parties have not deviated from this position. It cannot be clearer that the environmental review that KWB Parties argue was mandated by the *PCL* trial court was nothing more than "a meaningless paper-pushing exercise." (KWB Parties Brief at p. 80.) KWB Parties' arguments should not be followed.

E. Plaintiffs' Validation Action Is Not Time-Barred Because DWR Reauthorized the Monterey Amendments

Finally, even if the *PCL* Writ, the Interim Implementation Order, and this Court's judgment directing that the EIR be decertified had not voided the 1995 contract approvals, DWR's 2010 decision would still be a new approval because it included approval of the Attachment A amendments, which did not exist and were not approved in 1995 and were not subject to any environmental review or project approval until the 2010 EIR and NOD.

This argument is a purely alternative argument that the Court need reach only if it were to determine that DWR's authorization of the Monterey Amendments was not voided in 2003. (CDWA Brief at p. 71.) In that event, DWR's authorization of the Attachment A Amendments, made in 2010 when the agency completed its environmental review and approved the Monterey Plus Project, was also a reauthorization of its earlier approvals of the earlier Monterey Amendments. DWR's authorization for both sets of amendments was identical, expressed in a single NOD and a single Findings, with DWR stating that it had decided to continue operation under the Monterey Amendments and the existing Settlement Agreement (which

include the Attachment A Amendments). (AA21:5103 [2010 NOD]; AA21:5031 [2010 Findings].)[7]

DWR argues that the Attachment A Amendments and the Monterey Amendments were "wholly separate contract amendments," and therefore the reasoning of *Barratt American* does not apply. (DWR Brief at p. 56-57; *Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685.) But DWR's "decision to continue to operate" was the same decision for all of the contract amendments. (AA21:5103; 5031.) In this context, even if DWR's earlier authorization of the Monterey Amendments was not voided in 2003, the agency's single decision in 2010 to "continue to operate" functioned to both authorize the Attachment A Amendments *and* to reauthorize the Monterey Amendments.

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[7] CDWA's argument regarding the reauthorization of the Monterey Amendments is not raised for the first time on appeal, as DWR alleges. (DWR Brief at p. 54; CDWA Brief at p. 71-75.) CDWA raised the issue in their time-bar defenses briefing (AA28:7034, n. 4) and in more detail in CDWA's objection to the Superior Court's proposed ruling on the time-bar defenses. (AA30:7403-05; see AA30:7624 [Superior Court's overruling of objection as having been adequately addressed and, to the extent it was a new legal argument, as not being required to be addressed]; see AA30:7661, n. 15 [Superior Court's Ruling on Time Bar Defenses addressing reauthorization argument].) To the extent this Court determines it is a new issue, however, this Court should consider it as it is a question of law on undisputed facts. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742.)

F. CDWA Does Not Seek to Collaterally Attack a Final Judgment

KWB Parties argue that CDWA's argument constitutes a collateral attack on a final judgment, based on the misconception that CDWA alleges that the *PCL* trial court exceeded its jurisdiction. (KWBA Brief at pp. 83-84.) CDWA's argument is not that the *PCL* trial court exceeded its jurisdiction, but rather that, barring explicit language to the contrary, the *PCL* Writ and the Interim Implementation Order must be interpreted to have complied with the law, and thus they must be interpreted to have voided the approvals. (See CDWA Brief at pp. 35-51.) This is not a collateral attack on the *PCL v. DWR* final judgment.

G. Respondents' Other Theories Should Be Rejected

Respondents' other theories regarding the timeliness of the Third Cause of Action, the applicability of the 2003 Validating Acts, laches, and mootness (KWB Parties Brief at pp. 84-97) are all based on the theory that the authorization of the Monterey Amendments occurred at the latest in 2003. Because this action challenges contract amendments that were authorized in 2010, the transfer of the KWB

was not subject to the 2003 Validating Acts and CDWA's validation and mandamus actions are not time-barred, barred by laches, or moot.

1. The Validating Act of 2003 is Inapplicable Because this Action Challenges the 2010 Contract Amendments

KWB Parties claim that CDWA's claims are barred by the Validating Act of 2003, which "protects public lenders and private investors from the chance that *an error or legal omission* may undermine the integrity of a public bond or other public action." (KWB Parties Brief at pp. 85-88 (emphasis added).) Such legislation appears to be inapplicable on its face because it is designed to correct an "error or legal omission" and not a substantive violation of the law, as CDWA has alleged in the present matter (CDWA is challenging substantive violations of the California Constitution, Civil Code, and Water Code). KWB Parties cite *Aughenbaugh v. Bd. Of Supervisors of Tuolumne County* (1983) 139 Cal.App.3d 83 for the premise that a validating act can cure the legal deficiencies of a municipal bond and water charge that exceeded a statutory limit, but that court explicitly stated that defects of a "constitutional magnitude" could not be cured. (*Id*. at p. 91 [citing *Watkinson v. Vaugh* (1920) 182 Cal. 55, 58].)

But this distinction ignores the larger problem: KWB Parties invoke the Final Validating Act of 2003, which was passed seven years prior to DWR's final authorization of the Monterey Amendments in 2010. A 2003 validating statute, whatever its purpose, could not validate a 2010 action such as that challenged by CDWA.

2. The Second and Third Cause of Action Are Not Barred by Laches

KWB Parties carry "the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Cal. Evidence Code § 500.) Here, the burden of proof rests with the KWB Parties to provide sufficient facts that laches apply to the present action. The burden of proving laches falls on the party claiming the defense, and prejudice is never presumed but must be affirmatively demonstrated. (*Miller v. Eisenhower Med. Ctr.* (1980) 27 Cal. 3d 614, 624.)

The defense of laches requires a showing of (1) unreasonable delay and (2) either acquiescence in the act about which plaintiff complains, or prejudice to the defendant resulting from delay. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68.) Whether

laches exists is a question of fact for the trial court to determine. (*San Bernardino Valley Audubon Society v City of Moreno Valley* (1996) 44 Cal.App.4th 593, 605.) At its most basic level, "laches suggests no more than a failure to be timely or diligent." (*Tustin Comm. Hospital v. Santa Ana Comm. Hospital* (1979) Cal.App.3d 889, 895.) However, the "'generally accepted doctrine' is that laches is not a mere matter of time but is principally a question of 'the inequity of permitting a claim to be enforced, this inequity being founded on some change in the condition or relations of the property or the parties.'" (*Id.,* quoting 2 Pomeroy on Equity Jurisprudence (5th ed. 1941) § 419d, p. 177.)

a. CDWA Did Not Unreasonably Delay Its Challenge to the 2010 Project

CDWA did not delay in bringing its challenge to the Monterey Plus Project, filing its action only thirty days after the Monterey Plus Project was finally authorized by DWR on May 4, 2010. (AA21:5107.) KWB Parties therefore cannot demonstrate an unreasonable delay in CDWA's challenge to the 2010 Monterey Plus Project.

The reasonableness of delay is fact-specific to a given matter; "there is no hard-and-fast rule as to the length of time […]" (*Lewis v.*

Superior Court for Los Angeles County (1968) 261 Cal. App. 2d 736, 740.) In the present case, delay is measured from the date at which CDWA could have initiated its challenge to the present action. CDWA filed its action only thirty days after DWR's May 4, 2010, approval of the Project; the decision could not have been challenged sooner than May 2, 2010, because DWR had not yet approved the Project and authorized on a final basis the contract amendments. (AA21:5028; 5107.)

KWB Parties' argument is based on the theory that CDWA should have instead challenged the 1995 Monterey Amendment and KWB transfer project, and/or the 2003 Settlement Agreement, claiming that CDWA's 2010 action constitutes an unreasonable delay in challenging these earlier agreements. (KWB Parties Brief at 91-94.) However, the 1995 authorization of the Monterey Amendment and KWB transfer was voided as a result of the *PCL v. DWR* litigation, which required DWR to make a new authorization of the Monterey Amendments after completing its new CEQA review. DWR's final authorization of the Monterey Plus Project occurred on May 4, 2010, as expressed in the agency's issuance of the NOD. (AA21:5107.)

In further proof of the timeliness of CDWA's action, laches typically cannot lie when a party brings a claim within the statute of limitations: "It is an elementary principle that there can be no laches in delaying proceedings to enforce a claim 'if it is brought within the period of limitation, unless there are some facts or circumstances attending the delay which have operated to the injury of the defendant.'" (*California State Auto. Asso. Inter-Insurance Bureau v. Cohen* (1975) 44 Cal. App. 3d 387, 392-393.) Re-stated, if a party brings a timely action within the statute of limitations, it is presumptively *not* an unreasonable delay, unless the delay relates to circumstances which harm defendant. The validation statute forming the basis of CDWA's Second Cause of Action contains a strict 60-day statute of limitations. (Code Civ. Proc. § 860.) CDWA brought its action well within this statute of limitations, again demonstrating that there was no delay in bringing this action.

KWB Parties next assert that laches is available even where a statute of limitations has not run. (KWB Parties Brief at p. 91.) While it is theoretically possible to find laches despite filing within an applicable statute of limitations, the cases relied upon by KWB Parties are inapposite. In *Holt v. County of Monterey* (1982) 128 Cal.App.3d

797, 799-800, the specific plan for a condominium project had been approved on a permanent basis, but the plaintiff challenged the adequacy of the related (and previously-approved) general plan two years after its approval. Here, the Monterey Plus Project was approved on an interim basis pending proper environmental analysis, and CDWA challenged the action at the first available opportunity: when DWR's final authorization of the Monterey Plus Project occurred. In *People v. Dept. of Housing & Community Development* (1975) 45 Cal.App.3d 185, 200, a citizen received a permit from an agency under the mistaken belief that the agency performed its environmental review responsibilities, and was told that the environmental impacts were negligible; the Monterey Plus Project, on the other hand, was only granted approval on an interim basis due to significant environmental concerns.[8]

[8] In *Martin v. Kehl* (1983) 145 Cal.App.3d 228, the defendants did not show the requisite undue delay, acquiescence, or prejudice, and in *Smith v. Sheffey* (1952) 113 Cal.App.2d 741, the court held that plaintiff clearly had knowledge and acquiesced to the defendant's dominion over the land foreclosed upon, unlike the plaintiffs in this action, who never acquiesced to the Monterey Plus Project.

b. There Was No Acquiescence and No Prejudice

Because there was no undue delay in CDWA's challenge to DWR's approval of the 2010 Monterey Plus Project, there is no need to determine whether there was any acquiescence on the part of CDWA or any prejudice to any party. (*Johnson,* 24 Cal.4th at p. 68 [laches requires undue delay *and* acquiescence or prejudice].) Nonetheless, KWB Parties cannot show acquiescence to the Monterey Plus Project, as CDWA actively participated in the public review process and commented on the proposed project. (See, e.g., RA11:2360 [letter of South Delta Water Agency]; see *City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277, 1287) [comments submitted prior to approval, followed by timely challenge, demonstrates neither delay nor acquiescence].)

As for prejudice, a plaintiff's delay must have caused a material change in the *status quo ante* in order for prejudice to be found for laches. (*Brown v. State Pers. Bd.* (1985) 166 Cal.App.3d 1151, 1159.) By the terms of the Settlement Agreement, the *PCL* plaintiffs were allowed to maintain their validation action until after DWR completed

its environmental review. (11:4957.) In other words, the *status quo ante* includes the explicit provision for a validation challenge following the completion of the Monterey Plus EIR. As a result, there was no change in the *status quo ante* created by CDWA's actions, and the KWB Parties are precluded from asserting prejudice. (See *Brown*, *supra* 166 Cal.App.3d at p. 1159.)

c. SWP Contractors' Extrinsic Evidence Supports Awareness of a Future Challenge

The 2002 Memorandum demonstrates that KWB Parties were aware in 2002, before signing the 2003 Settlement Agreement, that DWR's anticipated review of the Monterey Plus Project could be subject to a future validation challenge. (AA13:3003-07.) As discussed in Section I.C.6, above, The 2002 Memorandum demonstrates that Real Parties, including KWB Parties, anticipated another validation challenge: "Plaintiffs and defendants agreed that it would be up to a future court, if third parties filed suit, to decide whether such an NOD would constitute a new approval as that concept is embodied in the validation statutes." (AA13:3007.) Given that Real Parties anticipated future validation litigation, specifically occurring after the new EIR for the new project was complete, there

can be no surprise—and no prejudice—that such litigation did, in fact, occur.

3. CDWA's Action Is Not Barred by Mootness

KWB Parties additionally claim that CDWA's claims should be barred under the doctrine of mootness. (KWB Parties Brief at pp. 94-97.) The basic argument in this section is that "so many things have happened here that it would be impossible for the court to unravel," but that is simply not the case. (*Id*. at p. 94.) This defense must fail, as it is entirely within the court's equitable powers and the validation statute to set aside the authorization of the Monterey Plus Project, including the KWB transfer and modifications to the bond repayments. The disposition of expenditures made pursuant to the interim operation of the Monterey Plus Project is properly addressed at the relief stage of this action, but does not present a bar to relief.

The proper mootness standard in a CEQA action and whether CDWA may still be awarded the requested relief, or if it is impossible to do so, was identified in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 127-128. The *Save Tara* court found that relief could still be granted in a CEQA action because the court could still set aside the agency's approvals. (*Id*.) The Court here can still set aside

DWR's authorization of the Monterey Plus Project. The impossibility argument put forth by KWB Parties is patently false: the Monterey Plus Project would not be impossible to unravel, as its status has been in doubt ever since it was first proposed; DWR operated the SWP pursuant to the pre-Monterey contracts for over thirty years already; and ultimately, exactly what would need to be unraveled is completely unknown at this time. In regards to the KWB transfer, returning to state control what rightfully belongs to the state is emphatically not a moot issue, and any interim expenditures undertaken by real parties may be addressed at the relief stage.

KWB Parties are correct that "as a practical issue, the events contemplated by the Monterey Amendments have happened," because the amendments were authorized on an interim basis in 2003. (KWB Parties Brief at p. 95.) But in 2010, after seven years of delay, DWR finally authorized the amendments on a permanent basis, and this is the Project challenged by CDWA's validation action. Regardless of what project components might have been implemented, this Court still has authority to set aside the agency's approval and fashion appropriate relief. (See *Woodward Park Homeowners Ass'n v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888 [holding that a

challenge to an already constructed project without proper environmental review was not moot because the court could still order the preparation of a proper EIR, which could result in modification of the project to mitigate adverse impacts or even removal of the project altogether].)

Lastly, KWB Parties claim that bond sales function to "moot" challenges to an agency decision "whether it is legally valid or not." (KWB Parties Brief at 97.) But the case cited, *Crangle v. City Council of the City of Crescent City* (1933) 219 Cal. 239, predates the current form of the validation statute, and dealt with bond actions which apparently could not be challenged due to the language of the "Improvement Act" under which the challenged bonds were issued. (KWB Parties' Brief at pp. 96-97, citing *Crangle*, 219 Cal. at p. 241.) In contrast, no such language can be found which precludes CDWA's present challenge to the Monterey Plus Project. KWB Parties are correct that the validating statute shields an agency action from challenge *after the statute of limitations has tolled,* but no such tolling had occurred on the 2010 Monterey Plus Project prior to CDWA's challenge.

A finding of mootness in the present action would justify an agency stalling to certify a remedial EIR as long as possible in order to insulate its decision from review. Such a ruling would be contrary to the nature of CEQA' s public review provisions. Moreover, under the impossibility standard of mootness, such a ruling would be entirely unnecessary. It is not too late: the Monterey Plus Project can and should be reconsidered; CDWA can and should be allowed to have their claims heard on their merits; and the proper remedy regarding interim expenditures should be determined at the appropriate stage.

IV. IN RULING THAT THE EIR WAS DEFICIENT WITH RESPECT TO THE KERN WATER BANK, THE TRIAL COURT WAS REQUIRED TO ORDER DWR TO VOID ITS PROJECT APPROVALS RELATING TO THE WATER BANK

DWR's argument that the Superior Court did not err in leaving in place the project approvals related to the Kern Water Bank transfer is based on its same straw-man argument, discussed above, that CEQA does not mandate all approvals be voided whenever a CEQA error is found. (DWR Brief at p. 60; see Section I.C, above.) CDWA never argued this and its argument is not based on this reasoning.

DWR discusses an "ever growing body of case law" that "recognizes the flexibility that CEQA affords a trial court to devise an appropriate remedy…" but once again completely ignores subdivision (b) of section 21168.9 and its requirement that anything short of the voiding of all approvals requires affirmative, explicit findings related to severance and CEQA compliance. (Pub. Resources Code § 21168.9, subd. (b).) Far from challenging this clear requirement under CEQA, every case that has addressed the issue has affirmed these requirements and their essential importance in any limited writ. (See CDWA Brief at p. 42-43; see Section I.C.1, above.)

The Superior Court erred by disregarding the requirement that a limited writ include a finding by the court that "the court has not found the remainder of the project to be in noncompliance with" CEQA. (Pub. Resources Code § 21168.9, subd. (b).) The "remainder of the project" is that part that remains after the portions of the project (or approvals) found to violate CEQA are severed in a limited writ. (*Ibid.*) In this case, the remainder of the project is the approval of the transfer, development, use, and operation of the Kern Water Bank, which the Superior Court allowed to remain in place after finding the environmental review upon which it was based to violate CEQA.

(AA36:9137-40; AA37:9206.) Under section 21168.9, subdivision (b), the Superior Court was required to make a finding that the Kern Water Bank approvals were in compliance with CEQA. (Pub. Resources Code § 21168.9, subd. (b).) While the Superior Court made findings regarding severance—that the *use and operation* of the Kern Water Bank is severable and that severance will not prejudice full and complete compliance with CEQA—the court conspicuously did not make the required finding that the remainder of the project—DWR's *approval* of the transfer, development, use, and operation of the Kern Water Bank—was in compliance with CEQA. (AA37:9206-07; Pub. Resources Code § 21168.9, subd. (b).)

The Superior Court did not make this required finding for the simple reason that it was impossible under the law. The Superior Court set aside the EIR's certification and ordered DWR to "correct the CEQA error with respect to the analysis of the potential impacts associated with the transfer, development, use and operation of the Kern Water Bank as a water banking and recovery project," pulling the environmental review out from under the approvals. Without valid environmental review, a project approval cannot stand. An

approval must follow environmental review, not precede it. (*Save Tara*, *supra*, 45 Cal.4th at 132.)

DWR misses the point of the Supreme Court's holding in *Save Tara* in its criticism of CDWA's reliance on the case. (DWR Brief at p. 61.) While the Supreme Court did not consider the scope of a trial court's discretion under section 21168.9, it did consider something far more fundamental and still very relevant to this case: the relationship of project approvals and environmental review. The Supreme Court unambiguously affirmed one of "CEQA's central commands": that environmental review must precede an agency's commitment to a project, not follow it. (*Save Tara*, *supra*, 45 Cal.4th at 132.) And just as "an agency has no discretion to define approval so as to make its commitment to a project precede the required preparation of an EIR," neither does a court. (See *ibid.*)

An agency must retain its full discretion to approve or reject a project throughout the CEQA process. (*Mountain Lion Foundation v. Fish & Game Com*. (1997) 16 Cal.4th 105, 117.) The *PCL* parties affirmed this, agreeing that nothing in the Settlement Agreement limited DWR's discretion under, or duty to comply with, CEQA. (25:12449.) This means DWR had full discretion to approve or reject

the Kern Water Bank transfer, regardless of whether the contracts had been previously validated or not. The approvals were not "immune from challenge," and DWR's discretion was broader than merely being able to "*seek to* reverse the transfer," as the Superior Court found. (AA36:9139, emphasis added.) That DWR's approval may have been previously validated, or that a new approval may be exposed to future validation liability, are both irrelevant under CEQA and should not have been factors in the Superior Court's decision.

But by leaving the approvals in place, the Superior Court seriously compromised DWR's discretion, adding weight to the great inertia that has set in on this Project that, even after twenty years, has yet to complete an environmental review that fully satisfies CEQA. The Superior Court has ordered a remedial EIR for a project that it believes to be "a *fait accompli*." (AA36:9139, n. 4.) That is not the way CEQA works. An EIR is not, and cannot be, "a document of post hoc rationalization." (*Save Tara*, *supra*, 45 Cal.4th at p. 136; see also *id*., pp. 135-136.)

The Superior Court was required to void DWR's approvals related to the Kern Water Bank. If it was determined not to "throw the entire SWP into complete disarray, smack in the middle of one of the

most severe droughts on record," it had the equitable power to permit the KWB to continue to operate as it had been while new environmental review was being conducted and pending a new decision by DWR. It had the power to allow KWBA to retain title to the lands and to allow performance of the associated permits and contracts to continue. In short, it had the power under equity to permit *interim operations* to continue *pending* the completion of the EIR, just as the *PCL* trial court did in 2003. But its equitable power was limited by CEQA, and one of those limitations is that it could not leave a project approval in place after voiding the environmental review on which that review stands. It was required to order DWR to void its approval, and to order DWR to make a new proper decision—either an approval or a rejection—of the Kern Water Bank transfer after complying with CEQA and completing its EIR process.

V. OPPOSITION TO KWB PARTIES' CROSS-APPEAL: CDWA'S LAWSUIT IS NOT BARRED BY RES JUDICATA

In their Cross-Appeal, KWB Parties attempt to halt this litigation on res judicata grounds. This argument is without merit and should be rejected by this Court just as it was by the court below.

Res judicata applies only where a party can demonstrate, "(1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties to the prior proceeding." (*Federation of Hillside and Canyon Assn. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202 ["*Federation of Hillside*"].) Having failed to make this showing multiple times before the Superior Court, KWB Parties now attempt to rewrite established California legal principles and ignore case law as well as the factual history of the *PCL* litigation.

Res judicata does not apply here because the second and third prongs cannot be met. CDWA has brought an entirely new action challenging the merits of an entirely new EIR by raising issues never previously litigated. Additionally, CDWA is not and cannot be in privity with the *PCL* plaintiffs because the *PCL* plaintiffs affirmatively and clearly abdicated their role of public agent and abandoned their intention to represent the interest of the general public.

A. CDWA's Cause of Action is Distinct from the Cause of Action Raised by *PCL* Plaintiffs

CDWA has alleged that the 2010 EIR violated CEQA, a distinct and new cause of action from the cause of action raised by the *PCL* plaintiffs who challenged the 1995 Monterey Amendments' CEQA violations. As the Superior Court made clear in its ruling on the Motion for Judgment on the Pleadings, "[s]ince the 1995 EIR and the 2010 EIR are factually distinct attempts to satisfy CEQA's mandates, it follows that the petition in the PCL Litigation and the petition here involve different causes of action for purposes of claim preclusion." (RA5:1063 [Ruling on Motion for Judgment on the Pleadings]; [citing *Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal. App. 4th 210, 228 ["*Castaic Lake"*].)

When defining the cause of action under the doctrine of res judicata in California, the primary rights theory applies. (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association* (1998) 60 Cal.App.4th 1053, 1067 ["*Citizens for Open Access*"].) As the Superior Court noted, a plaintiff's primary right is the right to be free from a particular injury, and an injury is defined in part by the set of facts or transaction from which the injury arose. (RA5:1062-63

[Ruling on Motion for Judgment on the Pleadings], citing *Silverado Modjeska Recreation and Park District v. County of Orange* (2011) 197 Cal.App.4th 282, 297-8 ["*Silverado Modjeska*"].) In cases challenging CEQA, the right to ensure the lead agency's compliance with CEQA's substantive and procedural requirements with respect to a particular environmental impact is a primary right. (See *id*.)

Here, CDWA is challenging deficiencies in DWR's 2010 EIR, which the *PCL* plaintiffs clearly could not have challenged in their 1995 petition for writ of mandate. After ruling for the *PCL* plaintiffs, the court issued a writ of mandate ordering decertification of the 1995 Monterey Agreement EIR and preparation of ***an entirely new*** EIR by a different agency. (RA15:3293-3295 [Peremptory Writ of Mandate in *PCL v. DWR*].) Just as in *Castaic Lake*, the two proceedings (the one filed in *PCL v. DWR* and this one) "involve distinct episodes of purported noncompliance regarding 'the same general subject matter,' namely, the public's statutory right to an adequate EIR…" (*Castaic Lake*, 180 Cal.App.4th at p. 228 [*quoting Yates v. Kuhl* (1955) 130 Cal.App.2d 536, 540].) Here, the two actions address materially different EIRs, and therefore involve distinct causes of action and two separate primary rights. (See *Castaic Lake, supra*, 180 Cal.App.4th at

p. 229; RA5:1062-3 [Ruling on Motion for Judgment on the Pleadings].)

Nonetheless, KWB Parties now argue that the Superior Court misapplied the primary right doctrine when determining whether res judicata applies. (KWB Parties Brief at p. 107.) This argument is without merit. First, the "primary right" theory is not distinct from a "cause of action" under res judicata as KWB Parties claim (KWB Parties Brief at p. 107) but instead helps guides the analysis for whether two causes of action are distinct enough to overcome res judicata. (*Panos v. Great Western Packing Co.* (1943) 21 Cal.2d 636, 639-40; *Silverado Modjeska*, *supra*, 197 Cal.App.4th at pp. 297-8.) Second, KWB Parties' argument that "a primary right is determined as of the date of the judgment in the first lawsuit—not the date that the first lawsuit was filed" conflicts with well-established case law. (KWB Parties Brief at p. 108.)

California courts have consistently held that "[r]es judicata is not a bar to claims that arise after the initial complaint is filed." (*Allied Fire Protection v. Diede Construction, Inc.* (2005) 127 Cal.App.4th 150, 155; see also *Yager v. Yager* (1936) 7 Cal.2d 213, 217.) "The general rule that a judgment is conclusive as to matters

that could have been litigated 'does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated [citations].'" (*Allied Fire Protection, supra,* 127 Cal.App.4th at p. 155 (*citing Kettelle v. Kettelle* (1930) 110 Cal.App. 310, 312).) This is because "a cause of action is framed by the facts in existence when the underlying complaint is filed," and not by facts that subsequently come into existence. (*Castaic Lake*, *supra*, 180 Cal.App.4th at p. 227.)

Third, the "primary right" raised by the *PCL* plaintiffs in their 1995 petition did not, as KWB Parties claim, include the new 2010 EIR's compliance with CEQA. (KWB Parties Brief at pp. 109-110.) The 2010 EIR clearly came into existence long after the *PCL v. DWR* action. The new EIR, prepared by a different lead agency and addressing a new and distinct project, created a wholly different set of facts and gave rise to a wholly different cause of action and primary right.

KWB Parties read far too much into the "comply with CEQA" language in the *PCL* Writ (KWB Parties Brief at pp. 109-11), which is common language in CEQA writs derived from Public Resources Code § 21168.9(b). The court in *Castaic Lake* observed that

"although the trial court in a mandamus proceeding ordinarily retains continuing jurisdiction to make any order necessary to enforce a writ it has issued, the petitioner may challenge the agency's action that purports to comply with the writ *in a new action*." (*Castaic Lake*, *supra*, 180 Cal.App.4th at 228, fn 11, citing *City of Carmel-by-the-Sea v. Board of Supervisors* (1982) 137 Cal.App.3d 964, 971 ["*City of Carmel-by-the-Sea*"].)

While the "comply with CEQA" language in the 2003 writ reaffirms the trial court's continuing jurisdiction to enforce its writ, including the CEQA compliance of the agency's actions (See *County of Inyo v. City of Los Angeles* (1976) 61 Cal.App.3d 91, 95), it in no way serves to make the return to writ procedure the exclusive jurisdiction for determinations of the CEQA compliance of actions taken in response to writs of mandate. The trial court in *PCL v. DWR* never made any finding regarding the merits of CEQA compliance in DWR's 2010 EIR, no administrative record was prepared for the trial court's review, there was no briefing on the merits before the discharge of the writ, and the language of the writ itself does not suggest that any such finding is possible or anticipated. (*PCL v. DWR,* 83 Cal.App.4th 892; RA12:2577-2583 [Consent to Entry of Order

Discharging Writ 6/4/2010]; RA15:3293-3295 [Peremptory Writ of Mandate in *PCL v. DWR*].)

The return to writ in *PCL v. DWR* merely affirms that setting aside the earlier EIR and preparing and certifying a new EIR complied with CEQA's procedural requirements, but nothing more. Whether that EIR complies with CEQA on the merits is simply not contemplated in the writ or the order discharging the writ. That question is to be raised elsewhere; whether in the same action or a wholly new one being the choice of the party bringing the challenge. (*City of Carmel-by-the-Sea*, *supra*, 137 Cal.App.3d at p. 971; *Castaic Lake*, *supra*, 180 Cal.App.4th at p. 228.) Discharge of the 2003 writ simply could not adjudicate the 2010 EIR compliance with CEQA and stop CDWA of their ability to subsequently challenge the 2010 EIR.

B. Case Law Does Not Support Application of Res Judicata Here

KWB Parties attempt to paint *Castaic Lake* as an outlier and argue that all other cases addressing res judicata and CEQA affirm that res judicata is applicable here. However, KWB Parties repeatedly misinterpret and misapply these cases.

KWB Parties begin by citing *Silverado Modjeska* as a factually similar case where a court held "that res judicata barred a second CEQA lawsuit after the trial court discharged the writ in the first lawsuit and no party appealed the discharged of the writ." (KWB Parties Brief at p. 111 [citing *Silverado Modjeska* , *supra*, 197 Cal.App.4th at p. 295.) However, *Silverado Modjeska* is easily distinguishable. The trial court in the first action in *Silverado Modjeska* partially granted the petition for writ of mandate, ordering the preparation of a supplemental EIR for further discussion of only one issue. (*Id*. at 295.) In the discharge of writ proceedings, the parties prepared a "substantial administrative record … and extensively briefed" the supplemental EIR's compliance with CEQA. (*Ibid*.) Concurrently to this briefing, however, the *Silverado Modjeska* petitioners also filed a separate action alleging "Noncompliance with the Peremptory Writ of Administrative Mandamus," raising the same issues that were briefed and ultimately decided in the return to writ process for the first action. (*Id.* at 297-98.)

It was this second action (which strangely attempted to challenge the respondents' compliance with the first court's writ rather

than the supplemental EIR's compliance with CEQA) that was determined to be barred by res judicata. *Silverado Modjeska* stands for the proposition that a petitioner's second action, raising identical issues being concurrently litigated in a return to writ proceeding, gives rise to a finding of res judicata, which is not the issue before this Court. Here, the claims brought by CDWA have never been litigated or briefed and were in no way at issue in the return to writ proceeding on the *PCL v. DWR* action.

Similarly, KWB Parties cite to *Federation of Hillside* as providing further support for application of res judicata here. However, the present case is easily distinguishable from *Federation*. (KWB Parties Brief at p. 112 [citing *Federation of Hillside,* 126 Cal.App.4th at p. 1194].) In *Federation of Hillside,* the court applied the res judicata doctrine to a CEQA action filed after the issuance of a writ of mandate, ruling that the second action was barred because both actions were "based on the city's alleged failure to comply with CEQA with respect to *the same project*, *the same EIR*, and *substantially the same findings.*" (*Federation of Hillside*, *supra*, 126 Cal.App.4th at p. 1203 [emphasis added].) In *Federation of Hillside*, the first court never decertified the EIR; it rejected CEQA challenges

to the entire EIR and all but one of the findings, and merely ordered the agency to vacate its approval and adopt new findings on that single issue.

After the respondent satisfied this order by adopting new findings and again approving the project (relying on the same previously-certified EIR), the petitioner brought a second CEQA case that repeated claims regarding the EIR that had been previously litigated—and disposed of—in the first action. (*Id*. at pp. 1191-1192.) In contrast, here the *PCL* court found the 1995 EIR to be completely defective and ordered a new EIR from a different lead agency. (*PCL v. DWR*, 83 Cal.App.4th at p. 907.) The original EIR played no role in the new project review since a new EIR addressing a new and distinct project. The 2010 EIR created a wholly different set of facts and gave rise to a new cause of action.

Next, KWB Parties cite *Ballona Wetlands* for further evidence that res judicata bars a second CEQA challenge to an EIR arising from facts in existence before the entry of judgment" in the initial CEQA lawsuit. (*Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 463; KWB Parties Brief at p. 112 ["*Ballona Wetlands"*].) However, rather than providing support for KWB

Parties' claim that res judicata applies, a close reading of *Ballona Wetlands* demonstrates the opposite.

In *Ballona Wetlands*, the petitioners filed a petition for writ of mandate challenging an EIR. (*Ballona Wetlands*, *supra*, 201 Cal.App.4th at p. 463.) After petitioners succeeded in part on appeal, the trial court entered judgment and issued a peremptory writ of mandate ordering the respondent to vacate its earlier certification of the EIR and to revise the EIR. (*Id.* at p. 464.) The respondent subsequently filed a supplemental return to the writ of mandate with a revised EIR, to which petitioners filed objections as well as a new petition for writ of mandate. As part of their new petition for writ of mandate, the petitioners asserted new challenges based in part on facts *arising from the original EIR*. After a hearing on the merits, the trial court discharged the writ of mandate and petitioners appealed. (*Ibid.*) The appellate court dismissed some of petitioners' challenges contained in their new petition "because those challenges asserted in the new petition could have been asserted before the entry of judgment in the prior proceeding and the material facts have not changed." (*Id.* at p. 481.)

KWB Parties confuse the holding in *Ballona Wetlands* by equating the entry of judgment in CEQA cases with the return to writ process. As the court in *Ballona Wetlands* stated, "entry of judgment normally terminates a trial court's jurisdiction to rule on the merits of a case…, [b]ut a trial court retains jurisdiction to enforce the judgment." (*Id.* at p. 479, citations omitted.) The return to writ process thus "reflects the rule that a court issuing a peremptory writ of mandate retains jurisdiction to determine the adequacy of the return [to writ] and ensure full compliance with the writ" by the agency. (*Id.,* citing *City of Carmel-by-the-Sea,* 137 Cal.App.3d at p. 971; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 205.) The *Ballona Wetlands* court concluded that this retained jurisdiction of a trial court in a CEQA action "is limited to ensuring compliance with the writ of mandate." (*Id.* at p. 480.) The court's subsequent conclusion that "any challenge to an EIR or other agency action arising from facts in existence before the entry of judgment must be asserted in the proceeding before the entry of judgment" thus clearly refers not to facts that arise before a *return to writ* is entered, but rather only to facts that arise before the entry of judgment. (*Id.*)

In *PCL v. DWR*, the entry of the Order pursuant to Public Resources Code § 21168.9 and issuance of the peremptory writ of mandate both occurred in 2003. (Pub. Res. Code § 21168.9; RA12:2577-2583 [Consent to Entry of Order Discharging Writ, 6/4/2010]; RA15:3293-95 [Peremptory Writ of Mandate in *PCL v. DWR*].) In 2010, the *PCL* trial court discharged the writ pursuant to its authority to ensure compliance with the previously-entered judgment. (RA4:913-16 [Order Discharging Peremptory Writ of Mandate in *PCL v. DWR*].) In this action, as noted above, CDWA is challenging the EIR that was certified in 2010, a document that was drafted and certified subsequent to the 2003 judgment in *PCL v. DWR*.

The ruling in *Ballona Wetlands* also makes clear that it does not apply to facts such as the ones present here, because it states: "because those challenges asserted in the new petition could have been asserted before the entry of judgment in the prior proceeding and *the material facts have not changed*, [petitioners'] challenges to the project description and to the finding on land use consistency asserted in its latest petition for writ of mandate are barred by res judicata." (*Ballona Wetlands*, 201 Cal.App.4th at p. 481 (emphasis added).)

Here, the material facts have clearly changed and therefore KWB Parties' reliance on *Ballona Wetlands* is misplaced.

Lastly, KWB Parties cite *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 326 for the conclusion that issuance of the writ and final judgment serves as a bar to future litigation even if the EIR at issue in the first litigation is decertified. (KWB Parties Brief at p. 114.) However, the basis for the court in *City of Lodi* to conclude that res judicata applied was not the issuance of the writ and final judgment but rather that petitioners sought to file a new lawsuit using information that was "not new evidence" and brought claims "that were based on the same conditions and facts in existence when the original action was filed." (*Citizens for Open Government v. City of Lodi*, *supra*, 205 Cal.App.4th at p. 326-27.) Neither of these two conditions exist here.

Instead, as noted above, CDWA challenges a new 2010 EIR, prepared by a different lead agency and addressing a project which had substantially changed as a result of the *PCL v. DWR* litigation, relying upon a separate cause of action than that litigated in *PCL v. DWR*. Therefore, as the trial court noted multiple times, the second requirement of res judicata is not met and res judicata cannot bar

CDWA's current claims. (RA5:1058-1068 [Ruling on Motion for Judgment on the Pleadings]; RA16:3431-3446; AA36:9132-53 [Joint Ruling on Submitted Matters].)

C. CDWA Is Not in Privity with the Plaintiffs in the Prior *PCL* Lawsuit

To successfully mount a res judicata defense, KWB Parties must also show privity between "parties in the present proceeding or parties in privity with them were parties to the prior proceeding." (*Federation of Hillside*, *supra*, 126 Cal.App.4th at p. 1202.) KWB Parties fail to meet this burden. KWB Parties rely primarily on the argument that "[t]he 'privity' requirement is easily satisfied here because of the public interest nature of the CEQA claims prosecuted by the *PCL* Plaintiffs." (KWB Parties Brief at p. 115.) However, by doing so, KWB Parties misapply key case law and ignore the procedural and factual history of the *PCL* litigation.

Non-identical parties are in privity when petitioners' interests in the later action were adequately represented in the prior action. (*Citizens for Open Access*, *supra*, 60 Cal.App.4th at p. 1067.) CDWA does not dispute KWB Parties' assertion that both the CDWA and the *PCL* plaintiffs brought their actions against the Project on behalf of

the public. (KWB Parties Brief at p. 115-118.) No privity exists here however, because, just as in *Castaic Lake,* the *PCL* plaintiffs affirmatively and clearly abdicated their role of public agent and abandoned their intention to represent the interest of the general public. (*Castaic Lake,* 180 Cal.App.4th at p. 210.)

As the court in *Castaic Lake* made clear, if petitioners in the first proceeding abdicate their role of public agent and abandon their intention to represent the interest of the general public, privity cannot be established. (*Castaic Lake*, *supra*, 180 Cal.App.4th at p. 231.) The court in *Castaic Lake* cited actions and statements by the petitioners that "show[ed] a lack of incentive or resources to litigate a common interest." (*Id.*) Here, the *PCL* plaintiffs made similar statements in their Consent to Entry of Order Discharging Writ by stating their consent was "based solely upon and confined to respondents' verification that they have set aside their 1995 certifications… [and] should not be construed as a representation of the lawfulness of DWS's 2010 Monterey Plus EIR…." (RA12:2579 [Consent to Entry of Order Discharging Writ].) They further affirmatively "disavow[ed] any intent to act as representative of any others with respect to DWR's certification of the 2010 Monterey Plus EIR and approval of the

Monterey Plus project." (RA12:2580 [Consent to Entry of Order Discharging Writ].) The *PCL* plaintiffs, and the *PCL* plaintiffs alone, were restricted from judicially challenging the 2010 EIR until they engaged a complicated arbitration proceeding. (RA3:710 [Settlement Agreement by and among Parties to *PCL v. DWR*, see p. 14].)

KWB Parties attempt to distinguish the facts here from *Castaic Lake* by arguing that the petitioners in *Castaic Lake* voluntarily dismissed rather than enter into a settlement agreement. However, the court in *Castaic Lake* examined both the steps taken by the petitioners as well as the statements made before concluding there was no privity between the parties. This approach is consistent with other courts, who have closely examined the record before them for "even the hint of any abdication of the role of public agent by the parties to the prior litigation" when determining privity between parties. (*Citizens for Open Access*, *supra*, 60 Cal.App.4th at p. 1072.) The statements by the *PCL* plaintiffs were a clear abdication of the role of public agent and clear abandonment of any intention to represent the interest of the general public and far more direct than the abandonment recognized in *Castaic Lake.*

Rather than address these statements, KWB Parties instead claim, with no evidentiary support, that "[t]he *PCL* Plaintiffs, by contrast, never abandoned their representation of the public interest." (KWB Parties Brief 120.) As the Superior Court rightly concluded, "the PCL Plaintiffs ... brought their challenge to the 1995 EIR on behalf of the public, but then expressly disavowed and abandoned their role as public agent in the Consent to Discharge." (RA3:636 [Ruling on Motion for Judgment on the Pleadings], *citing Castaic Lake*, 180 Cal.App.4th at 231.)

Lastly, "[i]n the final analysis, the determination of privity depends upon the fairness of binding a party with the result obtained in earlier proceedings in which the party did not participate." (*Citizens for Open Access*, *supra*, 60 Cal.App.4th at p. 1070 [citing *Miller* v. *Superior Court* (1985) 168 Cal.App.3d 376, 384-385].) Here, any finding that CDWA was in privity with the *PCL* plaintiffs would be unfair, resulting in an injustice and adverse impacts on the public. (*Id.* at 1065 and 1074 [A res judicata defense will not be successful if "injustice would result," or if there would be an "adverse impact on the public"].) A finding of privity would make the 2010 Project EIR immune to challenge by *any* party, even though many

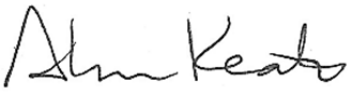
organizations and individuals stridently and timely complained of the EIR's failure to comply with CEQA. No court could review the concerns raised by those organizations and individuals, thereby unfairly depriving parties of their ability to challenge the 2010 EIR and ensure compliance with the law. Because KWB Parties fail to demonstrate that there was privity between CDWA in this action and the *PCL* plaintiffs, their res judicata defense must fail.

The fact is that DWR did not do its job properly in 1995, and was forced to try again. It did not complete that process until 2010, and once again was told that it had not complied with the law. So now it is trying a third time to properly disclose and consider the environmental impacts of the transfer, operation, and use of the Kern Water Bank. Any reliance by KWB Parties on the Kern Water Bank between 1995 and now has been entirely at their own risk, and should play no part whatsoever in this Court's determination of the legal issues raised in this appeal. This litigation deserves to be resolved on its merits, not on the false protests of parties who have financially benefited for two decades from DWR's failure to comply with the law.

CONCLUSION

The twenty years (and counting) that it has taken DWR to perform the environmental review that the law requires is the fault of DWR, not CDWA, and not the public. The State Water Project and the Monterey Amendments are important to the entire state, not just the Respondents in this appeal. This helps explain the controversy and vigorous opposition from other water agencies and members of the public that has accompanied the amendments from the very first day they came to light. For the above reasons and those described in CDWA's Opening Brief, CDWA respectfully requests that this Court find in their favor and reverse the judgment of the Superior Court.

RESPECTFULLY SUBMITTED,

DATED: March 28, 2016 BY: 

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CERTIFICATE OF COMPLIANCE

Pursuant to CRC Rule 8.520(c)(1), and (4), this brief contains 23,096 words, according to the word count feature of Microsoft Word 2010, and therefore complies with the 28,000 word limit for combined briefs.

/s/ Adam Keats
Adam Keats

PROOF OF SERIVCE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I, Effie Shum, declare: I am and was at the times of service hereunder mentioned, over eighteen (18) years of age, and not a party to this action. My business address is 303 Sacramento Street, 2nd Floor, San Francisco, CA 94111.

On March 28, 2016, I submitted the below listed document(s) entitled:

APPELLANTS' COMBINED REPLY RESPONDENTS' BRIEFS AND OPPOSITION TO KWB PARTIES' CROSS-APPEAL

through the TrueFiling system pursuant to the Court's Local Rule 5, which electronically served all counsel registered with TrueFiling.

In addition, I caused to be served the above-listed document(s) on the Sacramento County Superior Court, 720 9th Street, Sacramento, CA 95814 by enclosing a copy thereof in an envelope and depositing the sealed envelope with the United States Postal Service with the postage fully prepaid.

Further, I served a courtesy copy of the above-listed document(s) on counsel of interested parties via electronic mail, addressed as follows:

SEE ATTACHED ELECTRONIC SERVICE LIST

Executed on March 28, 2016, in San Francisco, California.

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

Effie Shum

Central Delta Water Agency et al. v. Department of Water Resources et al.
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