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

CASE NO. C078249

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

v.

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

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

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

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Castaic Lake	*Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210
CBD	Center for Biological Diversity
CD Opp.	Central Delta Appellants Combined Reply to Respondents' Briefs and Opposition to KWB Parties' Cross-Appeal
Central Delta Appellants or Central Delta	Plaintiffs and Appellants Central Delta Water Agency, South Delta Water Agency, Center for Biological Diversity, California Water Impact Network, California Sportfishing Protection Alliance, Carolee Krieger and James Crenshaw
CEQA	California Environmental Quality Act, Pub. Resources Code, §21000, *et seq.*
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Consumer Advocacy	*Consumer Advocacy Group v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675
Cross-Appellants	Roll International, Paramount Farming Company LLC, Westside Mutual Water Company, Kern Water Bank Authority, Dudley Ridge Water District, Semitropic Water Storage District, Tejon-Castac Water District, Wheeler Ridge-Maricopa Water Storage District
C-WIN	California Water Impact Network
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Lodi	*Citizens for Open Gov. v. City of Lodi* (2012) 205 Cal.App.4th 296
Monterey Amendments	1995 Amendments to State Water Project contractors' long-term water supply contracts
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PCL lawsuit or *PCL v. DWR*	*Planning and Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892, filed to challenge the 1995 EIR
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Silverado Modjeska	*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282

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1995 EIR	1995 Monterey Amendments Environmental Impact Report
2003 Order	The CEQA order issued by the *PCL v. DWR* trial court in 2003, following the Settlement Agreement
2003 Writ	The writ of mandate issued by the *PCL v. DWR* trial court in 2003, following the Settlement Agreement
2010 EIR	Final Environmental Impact Report encompassing the Monterey Amendments and the Settlement Agreement
2010 Judgment	2010 Judgment of Superior Court in *PCL v. DWR* discharging 2003 Writ of Mandate and Holding that DWR Complied with 2003 Writ

I. INTRODUCTION.

A. Reply to Central Delta's Theory of Perpetual CEQA Litigation.

The Central Delta Appellants argue that a final judgment in a CEQA case concluding that the agency complied with CEQA does not bar a second lawsuit on the same CEQA claims adjudicated by the final judgment in the first CEQA lawsuit. The practical implications of Central Delta's argument are profound: Agencies will be subject to perpetual CEQA lawsuits re-asserting CEQA claims previously adjudicated in a final judgment entered after the agency's return to the writ of mandate and after the court discharged the prior writ.

Central Delta argues that CEQA's exacting and elaborate remedy, writ return and writ discharge proceedings are mechanical exercises that do not adjudicate whether the agency complied with CEQA. Under Central Delta's reasoning, the *PCL* plaintiffs could have filed a new CEQA lawsuit challenging DWR's certification of the 2010 EIR – despite the fact that the *PCL* Plaintiffs consented to DWR's writ return, and despite the fact the Superior Court held a hearing on the return to the 2003 Writ, discharged the 2003 Writ, and entered a final judgment that DWR complied with CEQA. This is not the law.

The text and structure of section 21168.9 compels the conclusion that the Legislature intended the detailed remedy and writ return procedures in section 21168.9 to prevent the potential for endless rounds of litigation concerning an agency's compliance with CEQA. (*Silverado Modjeska Recreation and Park District v. County of Orange* ("*Silverado Modjeska*") (2011) 197 Cal.App.4th 282, 297-301 [Res judicata bars second CEQA lawsuit after court discharged the writ and entered judgment].)

The 2003 Writ required DWR to prepare and certify a new EIR regarding the Monterey Plus Project ("Project") consisting of the Monterey Amendments plus a few provisions of the Settlement Agreement (including the Attachment A Amendments). DWR and the *PCL* Plaintiffs collaborated for seven years on the new EIR. The *PCL* Plaintiffs participated actively in the development of the scope and content of the 2010 EIR throughout the seven year remedial EIR process. (AR114:58652; RA4:949-954 [RJN, Ex. I].)The *PCL* Plaintiffs consented to DWR's return to the writ. (AR114:58651-58653; RA4:942-948 [RJN, Ex. I [PCL Plaintiffs' Consent to Entry of Order Discharging Writ]].) After considering DWR's return, the Superior Court 2010 Judgment concluded that DWR complied with the 2003 Writ.

The 2010 Judgment is final. This Court should conclude in accordance with well-established law that the 2010 Judgment operates as res judicata bar to Central Delta's CEQA cause of action.

B. Privity of the *PCL* Plaintiffs and the Central Delta Appellants.

Central Delta does not contest that Central Delta and the *PCL* Plaintiffs were in privity throughout the 15 years of the *PCL* litigation -- from the filing of the *PCL* lawsuit in 1995 to DWR's 2010 return to the 2003 Writ. It would be impossible for Central Delta to do so given the fact *PCL* filed the lawsuit on behalf of the public, and that several of the Central Delta principals were officers in *PCL* Plaintiff organizations, and who participated actively in the *PCL* litigation. Central Delta's only response on the privity issue is that the *PCL* Plaintiffs somehow severed the privity when the *PCL* Plaintiffs consented to the DWR's return to the writ of mandate.

Contrary to Central Delta's claim, the *PCL* Plaintiffs never abandoned their representation of the public interest. Instead, the *PCL* Plaintiffs succeeded in obtaining the Settlement Agreement, which bound DWR to the detailed and complex seven-year process of review and dispute resolution for preparation of the 2010 EIR. Only at the conclusion of this lengthy process did the *PCL* Plaintiffs consent to DWR's return to the 2003 Writ. An entity representing the public interest that aggressively and competently litigates its claim, and enters into a settlement agreement providing substantial public benefits, does not "abandon" its representation of the public interest. *(Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association* ("*Seadrift Assn.*") (1998) 60 Cal.App.4th 1053; *Consumer Advocacy Group, Inc. v. ExxonMobil Corp.* ("*Consumer Advocacy*") (2008) 168 Cal.App.4th 675, 690.)

C. The Center for Biological Diversity Does Not Have Standing.

The Central Delta Appellants do not contest the Kern Water Bank Parties' argument that the Center for Biological Diversity ("CBD") lacks standing because CBD failed to exhaust its administrative remedies. The failure of the Central Delta Appellants to offer any contrary factual or legal argument speaks volumes.

CEQA prohibits a CEQA lawsuit absent an objection to the project by the plaintiff during the public comment period on the draft environmental impact report. Central Delta Appellant CBD failed to submit any comment objecting to DWR's decision until **nineteen months** after the comment period on the EIR had closed. (AA33:8234.) (*Central Delta Water Agency v. State Water Resources Control Board* (2004) 124

Cal.App.4th 245, 273-274.) The Court should therefore dismiss CBD as a party in the CEQA cause of action.

II. THE 2010 FINAL JUDGMENT DETERMINED THAT DWR COMPLIED WITH CEQA AND THEREFORE BARS CENTRAL DELTA'S CEQA LAWSUIT.

A. The "Primary Right" Here Is DWR's Compliance with CEQA Concerning the Monterey Amendments.

1) The 2010 Judgment Adjudicated the Primary Right of DWR's Compliance With CEQA Concerning the Monterey Project.

A "primary right" is "plaintiff's right to be free from the particular injury suffered." (*Mycogen Corporation v. Monsanto Company* (2002) 28 Cal.4th 888, 904.) A single primary right may include multiple legal theories and remedies to address violations of the primary right. *(Panos v. Great Western Packing Company* (1943) 21 Cal.2d 636, 637.)

The applicable primary right injury here is determined by the terms of CEQA. CEQA requires state agencies to "prepare . . . an environmental impact report on any project which they propose to carry out or approve that may have a significant effect on the environment." (Pub. Resources Code, § 21100.) "In a CEQA proceeding, the right to ensure the lead agency's compliance with CEQA's substantive and procedural requirements with respect to a particular environmental impact is a primary right." (*Silverado Modjeska*, *supra*, 197 Cal.App.4th at p. 298.) Thus, the "primary right" here is DWR's compliance with CEQA concerning the Monterey Amendments Project evaluated in the 2010 EIR and adjudicated in the 2010 Judgment.

Central Delta argues that (1) CEQA's procedural and substantive obligations are distinct primary rights, and (2) DWR's ***compliance with CEQA*** as required by ***the 2003 Writ*** is a separate and distinct "primary

right" from DWR's obligation ***to comply with the 2003 Writ***. (CD Opp., p. 110-111.) The argument makes no sense.

Central Delta's argument is that every separate legal ***theory*** advanced by any CEQA plaintiff is a separate "primary right." Under this view, every CEQA lawsuit involves multiple "primary rights" and res judicata will never operate as a bar to subsequent CEQA lawsuits that allege a new or different legal theory. The applicable facts and law applicable here demonstrate that Central Delta is incorrect. As the California Supreme Court concluded:

> [The primary right] must therefore be distinguished from the ***legal theory*** on which liability for the injury is premised: "Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief."

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

California's res judicata jurisprudence also expressly rejects Central Delta's claim that a primary right "is not distinct from a 'cause of action.'" (CD Opp., p. 108.) (*Panos v. Great Western Packing Co.*, *supra*, 21 Cal.2d at p. 639 ["It is immaterial that in a subsequent action [the plaintiff] alleges different acts of negligence which he was not permitted to prove in the prior action because they were not alleged in this [first] complaint."]; *Ideal Hardware and Supply Co. v. Dept. of Employment* (1952) 114 Cal.App.2d 443, 449 [primary right for res judicata purposes is different from cause of action for pleading purposes].) On multiple occasions, the Supreme Court considered and rejected the "transactional approach" to res judicata advocated by Central Delta here. (*Slater v. Blackwood* (1975) 15 Cal.3d

791, 795; *Mycogen Corp. v. Monsanto Co., supra,* 28 Cal.4th at p. 909, fn. 13 ["[W]e decline to reconsider our long-standing approach to res judicata."].)

The *PCL* lawsuit alleged "DWR has failed to act ***and will continue to fail to act*** to operate and manage the California Water Project . . . ***in violation of CEQA***." (AA20:4835 [¶ 11], emphasis added.) The 2003 Writ required DWR to prepare and certify an EIR that "complies with CEQA." (AR107:54996-54997; RA4:910-912 [RJN, Ex. F] [Peremptory Writ of Mandate].) Contrary to Central Delta's claim, the 2003 Writ did not make a distinction between CEQA's procedural and substantive mandates. DWR prepared and certified the 2010 EIR to both comply with CEQA's procedural and substantive requirements. The Superior Court's 2010 Judgment states:

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

(AA21:5187 [Ex. 44], emphasis added.) Thus, the Superior Court's 2010 Judgment ruled that DWR's certification of the 2010 EIR complied with CEQA – finally adjudicating the CEQA primary right regarding the Monterey Amendments. (*Federation of Hillside Canyon Associations v. City of Los Angeles* ("*Federation of Hillside Canyon*") (2004) 126 Cal.App.4th 1180, 1204 ["[T]he two [CEQA] proceedings involve the same primary right . . . . The primary right in both proceedings is the right to ensure the city's compliance with CEQA's ***substantive and procedural*** requirements." Emphasis added].)

2) Res Judicata Is Determined As of the Date of the 2010 Judgment.

Central Delta argues that a primary right is determined by the facts plead as of the date of the filing of the complaint in the first lawsuit. (CD Opp., p. 108.) A primary right is determined as of the date of the final judgment in the first lawsuit – ***not*** the date that the first lawsuit was filed. (*Eichman v. Fotomat Corporation* (1983) 147 Cal.App.3d 1170, 1177 [Res judicata bars a second lawsuit based on facts occurring before entry of judgment in the first lawsuit]; *Ballona Wetlands Land Trust v. City of Los Angeles* ("*Ballona Wetlands*") (2011) 201 Cal.App.4th 455, 481 [Challenges in second CEQA lawsuit that "could have been asserted before the entry of judgment in the prior proceeding" are barred].)

In *Eichman,* the franchisee of a photography store alleged that the franchisor committed ongoing unfair trade practices. The parties entered into a settlement agreement, and the court entered judgment to implement the settlement. The plaintiff then brought a second lawsuit based on new facts that it claimed to have discovered ***after*** the entry of judgment in the first lawsuit. The Court of Appeal concluded that res judicata barred the second lawsuit – notwithstanding plaintiff's allegation that defendant had concealed facts regarding the alleged unfair trade practices:

> The same primary right argued here was clearly also at stake in the Eichmans' first action against Fotomat. In both cases the harm alleged was economic injury caused by . . . company-owned stores enjoy[ing] a competitive edge over the franchise stores.

(*Eichman, supra,* 147 Cal.App.3d at p. 1175.)

Here, the primary right is DWR's compliance with CEQA regarding the Monterey Amendments. Under section 21168.9, the "final judgment"

in the *PCL* lawsuit necessarily could not occur until after the entry of the 2010 Judgment that DWR complied with CEQA and with the 2003 Writ.

Under CEQA's unique remedy and writ return provisions, where the court orders additional CEQA compliance, the final judgment[1] necessarily occurs when the court issues its judgment discharging the writ of mandate and no appeal is taken. (Pub. Resources Code, § 21168.9.) In the event that a court finds a CEQA violation, CEQA ***requires*** the court to retain jurisdiction "over the public agency's proceedings by way of return to the peremptory writ of mandate until the court has determined that the public agency has complied with [CEQA]." (Pub. Resources Code, § 21168.9, subd. (b)(3).)

Central Delta argues that its lawsuit is not barred because its lawsuit challenges the EIR required by the 2003 Writ. (CD Opp., p. 107.) Central Delta's argument is contrary to the structure of section 21168.9 and other provisions of CEQA demonstrating that the Legislature intended to prohibit CEQA plaintiffs from filing repetitive CEQA lawsuits arising out of an agency's compliance with CEQA for the same project.

If a court identifies a CEQA violation, CEQA requires a court to limit the writ to "include only those mandates which are necessary to achieve compliance with [CEQA] and only those specific project activities in noncompliance with [CEQA]." (Pub. Resources Code, § 21168.9, subd. (b).) Importantly, when a court finds a CEQA violation, CEQA ***requires*** the court to retain jurisdiction "over the public agency's

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[1] An appealable judgment is also entered when a writ is issued. "Final judgment" as used in this specific context refers to the last judgment contemplated by Section 21168.9.

proceedings by way of return to the peremptory writ of mandate until the court has determined that the public agency has complied with [CEQA]." (Pub. Resources Code, § 21168.9, subd. (b)(3); See also, Pub. Resources Code, §§ 21167 [30 day statute of limitations], 21167.4, 21167.6 [expedited briefing and hearing], 21167.1 [preference over other civil actions], 21166 [limitations on supplemental and subsequent EIRs].) The above CEQA sections recognize that multiple CEQA claims or legal theories may be raised in a CEQA lawsuit, but that there is one "primary right" of CEQA compliance.

Central Delta's argument is contrary to cases holding that a new primary right is **not** created in circumstances where the court vacated the agency's prior project approval and ordered additional CEQA compliance. (*Silverado Modjeska, supra,* 197 Cal.App.4th 282, 297-301 [Second CEQA lawsuit barred by discharge of writ in first CEQA lawsuit]; *Federation of Hillside Canyon*, *supra*, 126 Cal.App.4th at p. 1204-1205; *Ballona Wetlands Land Trust, supra,* 201 Cal.App.4th 455, 481 [Challenges in second CEQA lawsuit that "could have been asserted before the entry of judgment in the prior proceeding" are barred]; *Citizens for Open Gov. v. City of Lodi* ("*Lodi*") (2012) 205 Cal.App.4th 296, 324-328 [Second CEQA challenge to issues adjudicated in first challenge barred].)

Central Delta fails in its effort to distinguish the above cases. Indeed, Central Delta makes a startling (and fatal) admission in its discussion of *Silverado Modjeska*.

In *Silverado Modjeska*, the trial court issued a writ and required the lead agency to prepare a supplemental EIR. The real party moved to discharge the writ. As here, the trial court concluded that the county had complied with CEQA and discharged the writ.

As Central Delta did here, plaintiffs then filed a second lawsuit "challenging the validity of the" supplemental EIR. *Silverado Modjeska*, *supra*, 197 Cal.App.4th at p. 295.)[2] The trial court held that the order discharging the writ barred plaintiffs' second CEQA lawsuit. The Court of Appeal affirmed, stating:

> The trial court's unambiguous ruling that the county complied with the commands of the writ and that in doing so, complied with CEQA . . . reflects the full adjudication of the issues and the primary right that plaintiffs sought to litigate in their [CEQA] cause of action in the [second lawsuit].

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

Central Delta effectively concedes that *Silverado Modjeska* controls here with the startling admission: "*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." (CD Opp., p. 113.) Central Delta's CEQA lawsuit seeks to invalidate the 2010 EIR – the same EIR that the Superior Court's 2010 Judgment found "fully complied" with the 2003 Writ, including the requirement to comply with CEQA.

Central Delta relies heavily on *Planning and Conservation League v. Castaic Lake Water Agency* ("*Castaic Lake*") (2009) 180 Cal.App.4th 210. As discussed in Kern Water Bank Cross-Appellants' opening brief, *Castaic Lake* incorrectly applied the primary rights doctrine and is in conflict with

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[2] Central Delta misstates the facts of *Silverado Modjeska* in claiming that the *Silverado Modjeska* plaintiffs second lawsuit did not seek to invalidate the supplemental EIR.

Silverado Modjeska and the several decisions of the Court of Appeal holding that a final judgment issued after a return to the writ bars subsequent CEQA challenges to the EIR adjudicated in the judgment. (KWB Br., p. 106-109.)

Central Delta argues that the project challenged in the *PCL* litigation and the project challenged by Central Delta are "distinct" projects under CEQA, and thus the *PCL* and the Central Delta lawsuits addressed two distinct primary rights. (CD Opp., p. 109.) A "new" CEQA project is not created when a court requires the agency to conduct additional CEQA review. If that were correct, then every remedial EIR and every supplement to an EIR required by a writ of mandate, would create a "new" project and thus a new "primary right".

The project that was (1) challenged in *PCL* litigation, and (2) the subject of the 2010 Judgment is the same project – the Monterey Amendments. CEQA defines the term "project" broadly. (Pub. Resources Code, §21065 ["'Project' means an activity that may cause a direct physical change . . . or a reasonably foreseeable indirect physical change in the environment."].) A "project" is the "whole of the action, which has the potential for resulting in . . . a change in the environment. . . ." (CEQA Guidelines, § 15378, subd. (a).) "The term 'project' does not mean each separate governmental approval." (CEQA Guidelines, § 15378, subd. (c).) Central Delta's argument that a "new" project is somehow created every time a court orders a remedial is inconsistent with CEQA's broad definition of "project" and with its limitations on *in seriatim* CEQA lawsuits reflected in the text and structure of section 21168.9.

The 2003 Writ did not magically create a new CEQA ***project***. Rather, it required DWR to prepare and certify a **new *EIR*** regarding the

very same Monterey Amendments evaluated in the 1995 EIR. The 2010 EIR also evaluated the additional provisions agreed to by the parties in the Settlement Agreement, including the so-called "Attachment A Amendments." (AA20:4931, 4954.) Neither the Attachment A Amendments or any other provision of the Settlement Agreement changed a single word of the Monterey Amendments challenged in the *PCL* litigation, and challenged again by Central Delta in this litigation.

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

Under Central Delta's reasoning, a new CEQA "project" is defined (and a distinct "primary right" is somehow created) every time that the parties to a CEQA lawsuit enter into a settlement agreement that requires the preparation of a new EIR, or that adds any new features or elements to a project. Central Delta's argument would eviscerate the legislative intent inherent in the text of section 21168.9 to narrow CEQA remedies and to preclude repetitive CEQA lawsuits regarding the same project. It is also contrary to the CEQA's definition of "project" as the "whole of the action," and providing that each separate agency discretionary action does not

constitute a separate "project" under CEQA. (CEQA Guidelines, § 15378, subd. (a), (c).)

B. Res Judicata Bars CEQA Claims That Could Have Been Asserted in the Writ Return Proceedings.

Central Delta next argues that the 2010 Judgment does not operate to bar Central Delta's CEQA lawsuit because Central Delta's arguments regarding the adequacy of the 2010 EIR were not briefed and argued in the return to writ proceedings. (CD Opp., p. 113.) Res judicata does not simply bar re-litigation of issues that ***were*** actually litigated in the prior action; it also bars all issues that are "related to the subject-matter and relevant to the issues, so that it ***could have been raised*** . . . ***despite the fact that it was not expressly pleaded or otherwise urged.***" (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202, emphasis added; *Federation of Hillside Canyon*, *supra*, 126 Cal.App.4th at p. 1202.)

The dispositive fact here is that the *PCL* Plaintiffs and Central Delta could have challenged the adequacy of DWR's compliance with CEQA in the 2010 return to writ proceedings, but they elected not to do so. The Central Delta Appellants had knowledge of, and several of the Central Delta organizations participated, in the administrative proceedings leading to the approval of the 1995 EIR and the 2010 EIR. (AR100:51093-51104.) On behalf of the Citizens Planning Association of Santa Barbara County (A named plaintiff in the *PCL* lawsuit), Carolee Krieger submitted comments on the 1995 EIR. (AR529:253963.) Ms. Krieger now serves as President of C-WIN, another of the plaintiffs in ***this*** case. (AR28:13637-13638.) Ms. Krieger claimed to be unhappy with the Settlement Agreement, but took no action to object to the Settlement Agreement, DWR's return to the 2003 Writ, or to the *PCL* Plaintiffs' consent to the DWR return.

The 2010 Judgment operates as res judicata, or claim preclusion, to bar subsequent CEQA challenges to the 2010 EIR, even though Central Delta's arguments were not briefed in the writ return proceeding.

C. The Return to Writ Proceeding Is the Exclusive Remedy for Determining an Agency's Compliance With CEQA After Issuance of a Writ of Mandate.

Central Delta argues the return to writ procedures in section 21168.9 are not the exclusive procedural mechanism for determining an agency's compliance with CEQA in response to a writ of mandate. (CD Opp., p. 110.) Central Delta's sole authority for this proposition is a footnote in *Castaic Lake, supra,* 180 Cal.App.4th 210, 228, fn 11, which, in turn, cites to *City of Carmel-by-the-Sea v. Board of Supervisors ("City of Carmel"*) (1982) 137 Cal.App.3d 964. (CD Opp., p. 110.)

City of Carmel does not control here because (1) it is not a res judicata case, (2) it is not a CEQA case, and (3) the Legislature enacted section 21168.9 establishing CEQA-specific CEQA remedy and writ procedures two years ***after*** *City of Carmel.* The CEQA-specific remedy and writ return procedures in section 21168.9 control over general remedy procedures considered in *City of Carmel.*

In *City of Carmel,* the City challenged a hotel use permit issued by the County of Monterey as a violation of state laws governing consistency of land use decisions with the County general plan. The trial court issued a writ of mandate requiring the County to make general plan consistency findings. In the writ return proceeding, the trial court determined that the County did not comply with the writ and issued a judgment invalidating the hotel permit. (*City of Carmel, supra,* 137 Cal.App.3d at p. 970.)

On appeal, the County argued the City was required to file a separate lawsuit to challenge the County's compliance with the writ. The Court concluded that the City could challenge the adequacy of the return to the writ either in the return to the writ proceeding or in a separate lawsuit. (*City of Carmel, supra,* 137 Cal.App.3d at p. 971.)

City of Carmel is inapposite for several reasons. First, it is not a CEQA case. Second, it does not discuss or address whether a final judgment entered after the return to the writ operates as a res judicata bar to another lawsuit. The City challenged the County's compliance with the writ in the return proceedings – ***not in a subsequent lawsuit***. Third, *City of Carmel* is a general plan case. It does not discuss the exacting and unique CEQA remedy and writ return procedures in section 21168.9. Fourth, the Legislature adopted section 21168.9 in 1984 -- two years ***after*** *City of Carmel.* The detailed CEQA remedy and return to the writ procedures in section 21168.9 govern over the general administrative mandamus, procedures considered in *City of Carmel.*

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

Central Delta does not dispute that for 15 years the *PCL* Plaintiffs aggressively and competently litigated the validity of the Monterey Amendments pursuant to CEQA and the private attorney general statute. (Code Civ. Proc., § 1021.5.) The *PCL* Plaintiffs' representation included multiple trial court proceedings, an appeal to this Court, years of mediation before retired Judge Weinstein, a vigorously negotiated settlement agreement, negotiation of the terms of the 2003 Writ and 2003 Order, and participation in a seven year administrative process leading to DWR's certification of the 2010 EIR.

Central Delta also does not contest that Central Delta and the *PCL* Plaintiffs were in privity throughout these 15 years -- from the filing of the *PCL* lawsuit in 1995, through the issuance of the 2003 Writ, to DWR's 2010 return to the 2003 Writ. Central Delta's only privity argument is that the *PCL* Plaintiffs consent to DWR's return to the writ somehow severed the privity between Central Delta and the *PCL* Plaintiffs. (CD Opp., p. 120.)

The Central Delta Appellants were more than unnamed, passive members of the public during the *PCL* lawsuit and the seven years of administrative proceedings leading to the certification of the 2010 EIR. Several of the Central Delta Appellants participated in the public comment process for the 1995 EIR, including the Central Delta Water Agency, the California Sportfishing Protection Alliance, and Carolee Krieger, and raised in their comments many of the same issues raised by the *PCL* Plaintiffs in the *PCL* lawsuit. (AR100:51093-51104.) On behalf of the Citizens Planning Association of Santa Barbara County, which was a named plaintiff in the *PCL* lawsuit, Carolee Krieger submitted comments on the 1995 EIR. (AR529:253963 [noting that Citizens Planning Assn. submitted comments on June 11, 1995 and July 10 & 11, 1995], AR529:254037 [responding to Ms. Krieger's June 11, 1995 letter].) Ms. Krieger now serves as President of C-WIN, another of the plaintiffs in ***this*** case. (AR28:13637-13638.)

Contrary to Central Delta's claim, the *PCL* Plaintiffs never abandoned their representation of the public interest. Instead, the *PCL* Plaintiffs succeeded in obtaining the Settlement Agreement, which bound DWR to the detailed and complex seven-year process of review and dispute resolution for preparation of the 2010 EIR. Only at the conclusion of this

lengthy process did the *PCL* Plaintiffs consent to DWR's return to the 2003 Writ.

The Superior Court subsequently ruled that the 2010 EIR satisfied the court's mandate to comply with CEQA. The painstaking procedure established by the Settlement Agreement produced the 2010 EIR, and eventually the 2010 Judgment concluding that DWR complied with CEQA.

Central Delta relies entirely on *Castaic Lake* to support its argument that the *PCL* Plaintiffs abandoned their representation of the public interest. No such procedure existed in *Castaic Lake*. The *PCL* Plaintiffs vigorously prosecuted in the public interest in enforcing CEQA for 14 years. Privity is thereby established, and res judicata bars the CEQA claims in this case. As the Court of Appeal recognized:

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

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

The Central Delta Appellants and the *PCL* Plaintiffs are in privity as a matter of law. The Kern Water Bank Parties nevertheless sought to take discovery on the privity issue through a request for production of documents concerning communications between the *PCL* Plaintiffs and the Central Delta Appellants in the *PCL* lawsuit, subsequent settlement, and discharge of the 2003 Writ. (RA12:2763-2765; RA13:2772-2898; RA15:3207-3223.) The requested documents were clearly relevant and

material to the privity issue. The Superior Court erred in its denial of the motion to compel. (*Associated Brewers Distributing Co. v. The Superior Court of Los Angeles County* (1967) 65 Cal.2d 583, 588 [holding trial court's denial of motion to compel was unsustainable as the plaintiff could show materiality of the documents to its case].)

Having opposed the Kern Water Bank Parties' discovery motion, it is more than a little ironic that Central Delta now argues that the Water Bank Parties failed to provide evidence of Central Delta's privity with the *PCL* Plaintiffs.

III. CENTRAL DELTA APPELLANTS FAILED TO CONTEST KERN WATER BANK PARTIES' STANDING ARGUMENT. CENTER FOR BIOLOGICAL RESOURCES DOES NOT HAVE STANDING.

In their Cross-Appellants' brief, the Kern Water Bank Parties, argued that the Center for Biological Diversity (the lead plaintiff in the CEQA cause of action) did not have standing to maintain the CEQA cause of action because it failed to timely object to the action of the Department of Water Resources ("DWR") on the Monterey Plus Project. (KWB Br., p. 121-124.) In their opposition brief, the Central Delta Appellants do not contest, or otherwise respond to, the Kern Water Bank Parties' argument that the Center for Biological Diversity ("CBD") lacks standing because CBD failed to exhaust its administrative remedies. The failure of the Central Delta Appellants to offer any contrary factual or legal argument speaks volumes.

CEQA provides,

> "[a] person shall not maintain an action or proceeding unless that person objected to the approval of the project orally or in writing

> during the public comment period provided by this division [CEQA] or prior to the close of the public hearing on the project before the filing of the notice of determination pursuant to Sections 21108 and 21152."

(Pub. Resources Code, § 21177, subd. (b).)

Without citing any case law, the trial court below concluded that CBD complied with Public Resources Code section 21177, subd. (b) by submitting a comment letter **nineteen months** after the comment period on the EIR had closed. (AA33:8234.) The trial court's ruling is contrary to established precedent that when, as here, no public hearing is held after the public comment period, CEQA requires the plaintiff to present any objections to the project "during the public comment period provided by [CEQA]." (*Center for Biological Diversity v. California Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204, 271; *Central Delta Water Agency v. State Water Resources Control Bd*. (2004) 124 Cal.App.4th 245, 273-274.) The Court should therefore dismiss CBD as a party in the CEQA cause of action.

IV. CONCLUSION.

The primary right here is DWR's compliance with CEQA concerning the Monterey Amendments. The 2010 Judgment finally adjudicated the primary right. The 2010 Judgment operates as res judicata to bar Central Delta's CEQA lawsuit.

Central Delta is in privity with the *PCL* Plaintiffs. The *PCL* Plaintiffs aggressively challenged the Monterey Amendments for 15 years. The Settlement Agreement achieved substantial public benefits. The *PCL* Plaintiffs' consent to the DWR return to the 2003 Writ did not the *PCL* Plaintiffs representation of the public. The Court should dismiss Central

Delta's CEQA lawsuit. If privity is severed when the plaintiffs in the first lawsuit litigate for 15 years and then agree to a settlement agreement, there will be no end to CEQA litigation. This result is entirely inconsistent with the text and structure of section 21168.9 and California res judicata jurisprudence.

Having failed to timely object to DWR's action on the 2010 EIR, Plaintiff Center for Biological Diversity does not have standing and should be dismissed as a party.

Dated: April 18, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to CRC Rule 8.204(c)(4), this brief contains 5,259 words, according to the word count feature of Microsoft Word 2010, and therefore complies with the 14,000 word limit for reply briefs.

Dated: April 18, 2016

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PROOF OF SERVICE

The undersigned declares:

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

On April 18, 2016, I caused to be served the **REPLY BRIEF OF KERN WATER BANK CROSS-APPELLANTS** on parties to the within action via the court's electronic filing system portal, TrueFiling, pursuant to LCvR 5(k), and by electronic mail.

Electronic service addresses of persons served are as follows:

SEE ATTACHED SERVICE LIST

A copy of the **REPLY BRIEF OF KERN WATER BANK CROSS-APPELLANTS** was served on the Clerk of the Sacramento County Superior Court, at 720 9th Street, Sacramento, CA 95814 via U.S. Postal Service, First Class mail.

A copy of the **REPLY BRIEF OF KERN WATER BANK CROSS-APPELLANTS** was also electronically uploaded to the California Supreme Court via the Court's web portal.

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

Executed on April 18, 2016

Amy R. Taylor

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