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

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

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

RESPONDENT DEPARTMENT OF WATER RESOURCES' ANSWER TO PLANNING AND CONSERVATION LEAGUE'S AMICUS BRIEF

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GLOSSARY

AA	Appellants' Amended Appendix
AOB	Appellants' Amended Opening Brief
AR	Administrative Record
CDWA	Plaintiffs and Appellants Central Delta Water Agency, South Delta Water Agency, Center for Biological Diversity, California Water Impact Network, California Sportfishing Protection Alliance, Carolee Krieger and James Crenshaw
CEQA	California Environmental Quality Act, Pub. Resources Code, §§ 21000 *et seq.*
CEQA Guidelines	Cal. Code Regs., tit. 14, §§ 15000 et seq.
the Contracts	The 27 Monterey Amendments as executed between 1995 and 1999 (AA 13:3060 - 20:4803), and the Kern Fan Element Transfer Agreement executed on December 13, 1995 (AA 20:4804-4829)
DWR or Department	Department of Water Resources
KFE	Kern Fan Element
long-term contracts	The substantially identical long-term water supply contracts between DWR and the 29 SWP contractors first executed in 1960, as amended
Monterey Agreement	The 1994 agreement reached in the City of Monterey between DWR and SWP contractor representatives which was a global resolution of the Article 18 dispute and other long simmering issues. (AA 21: 5238-5249)

GLOSSARY
(continued)

PCL	Planning and Conservation League, the plaintiffs in the 1995 lawsuit challenging the Monterey Agreement EIR
PCL	*Planning and Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892
Project	The Monterey Amendment and the Settlement Agreement
Project Decision	DWR Director's May 4, 2010 decision to carry out the Project
RT	Reporter's Transcript
SWP	State Water Project
SWP contractors	The currently 29 local and regional water agencies that have long-term contracts with DWR for the delivery of SWP water
2003 Order	The CEQA order issued by the PCL trial court in 2003 following the Settlement Agreement. CDWA refers to this order as the "Interim Implementation Order." (AA 21:5015-5018)
2003 Writ	The writ of mandate issued by the PCL trial court in 2003 following the Settlement Agreement. (AA 21:5004-5005)

INTRODUCTION

Amicus curiae Planning and Conservation League (PCL)[1] states in its application that it takes no position on whether or not the court should uphold the Monterey Plus EIR or the Department of Water Resources' (DWR or Department) decision regarding same. (PCL Amicus Brief Application at p. 7.) PCL's Amicus Brief nonetheless argues that the parties to the *PCL* settlement agreement (Settlement Agreement) mutually intended that the Monterey Amendment would become void at the end of the Monterey Plus EIR process, and DWR would need to re-execute those contract amendments should it elect to proceed with that project. There is nothing in the plain language of the Settlement Agreement or 2003 Order which compels that result. Given the significant consequences if PCL's proposed interpretation were correct, one would expect that the Settlement Agreement would expressly provide for that result if the parties had mutually intended it to occur. Its absence from the Settlement Agreement is evidence that the parties did not intend that result. This is especially so given that the parties expressly provided for DWR to void a prior action (decertification of the Monterey Agreement EIR) when they intended that result to occur.

The PCL Amicus Brief is of little value because it sheds no light on what the parties mutually intended the Settlement Agreement to mean. In attempting to interpret the Settlement Agreement, PCL attempts to elevate the phrase "in the interim" as triggering a series of significant but unstated legal consequences. Those consequences are too heavy a result to hang on such a slender clause. The more natural reading of that portion of the Settlement Agreement is an affirmation that the *PCL* trial court was not

[1] For consistency, DWR uses the same acronyms and defined terms in this brief as it used in its Respondent's Brief.

issuing an order under Public Resources Code section 21168.9, subdivision (a)(1) to void the Monterey Amendment, but instead was allowing the project to remain in place. The Settlement Agreement was silent as to how DWR might exercise its discretion to implement the project following CEQA review, a decision CEQA leaves to an agency's discretion. (Pub. Resources Code, § 21168.9, subd. (c) ["Nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way"].)

PCL also ignores the flexibility that the Legislature provided trial courts to fashion CEQA remedies appropriate to the circumstances. PCL proceeds as if there is a one-size-fits-all remedy that trial courts must impose whenever an EIR is decertified. But that proposition is belied by the plain meaning of Public Resources Code section 21168.9, which gives trial courts discretion as to which remedies to impose. That includes the discretion to *not* void project approvals. (Pub. Resources Code, § 21168.9, subd. (a)(1).)

PCL's Amicus Brief also proceeds from the entirely mistaken presumption that DWR did not make a new CEQA decision in May 2010 at the conclusion of the Monterey Plus EIR process (Project Decision). It did, and all of PCL's arguments thereafter unravel.

Finally, PCL inappropriately asks this court to exclude evidence on grounds that were not raised at trial, and which none of the parties therefore briefed below or on appeal. An amicus curiae like PCL can not expand the issues on appeal, a rule especially applicable here considering that in the Settlement Agreement PCL waived its right to participate in the proceedings below. In any event, the document's admission or exclusion would not affect the trial court's judgment because it was based on numerous other pieces of extrinsic evidence, and that trial court held that it would have reached the same result without any extrinsic evidence.

BACKGROUND

I. THE *PCL v. DWR* SETTLEMENT AGREEMENT

Following this court's 2000 decision in *Planning and Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892 (*PCL*), PCL, DWR, the SWP contractors, and other parties engaged in mediated settlement discussions. In 2002, DWR and the SWP contractors submitted a memorandum to the mediator discussing their understanding of the principles underlying the terms of the settlement agreement which was reached and was ultimately executed in 2003. (AA 13:3003-3007; AR 199:101143-101147.) Their understanding was that the Settlement Agreement did not mandate that DWR re-execute the Monterey Amendment at the end of the Monterey Plus EIR process should DWR elect to proceed with the project. (AR 199:101145.) Further, the writ of mandate drafted by the parties and entered by the trial court in *PCL* (2003 Writ) did not in the end contain language proposed by PCL that suggested that DWR would need to re-execute the Monterey Amendments at the end of the CEQA process. (Compare AR 199:101149 [draft 2003 writ] with AR 115:58929-58930 [final 2003 Writ].)

Among the Settlement Agreement provisions, DWR agreed to establish the "EIR Committee," composed of representatives from PCL and the SWP contractors. (AR 25:12418.) The EIR Committee advised DWR on the development of the Monterey Plus EIR, and had unprecedented access to early drafts, among other benefits. (AR 25:12423.) DWR also agreed to provide PCL with unique administrative remedies, including the right to require DWR's Director to review and respond to any of PCL's concerns with the draft EIR or the terms and conditions of the Settlement Agreement. (AR 25:12419, 12427.) DWR also agreed that PCL could compel DWR to mediate any of PCL's disputes, and such mediation would

stay DWR's ability to certify the EIR. (*Id*.) In exchange for these additional procedural rights, PCL agreed that it could not challenge the Monterey Plus EIR in court unless it exhausted those special administrative remedies which it negotiated. (AR 25:12444-12445.) PCL also agreed to dismiss its reverse validation cause of action challenging the validity of the Monterey Amendment. (AR 25:12443.)

II. DWR AND THE EIR COMMITTEE DISCUSS WHETHER DWR MUST DETERMINE IN THE MONTEREY PLUS EIR WHETHER CARRYING OUT THE PROPOSED PROJECT WILL REQUIRE RE-EXECUTION OF THE MONTEREY AMENDMENT AND SETTLEMENT AGREEMENT

After the Settlement Agreement was executed in 2003, DWR began preparing the Monterey Plus EIR with continual input from the EIR Committee, which included PCL representatives. DWR provided the EIR Committee with administrative drafts of the EIR for their comment before the public draft EIR was released. DWR convened dozens of meetings over several years with the EIR Committee to discuss and develop the draft EIR. (E.g., AR 196:99957 to AR 199:101344.) Of relevance here, on November 15, 2006, DWR circulated to the EIR Committee an administrative draft of chapter 1.4 of the Monterey Plus EIR, entitled "Uses of the EIR." (AR 179:90311-90313.)

In December 2006, PCL sent DWR a letter commenting on this administrative draft chapter, again raising the issue—previously raised during the mediation—as to whether the EIR should specify whether DWR would carry out the project by re-executing the Monterey Amendment. (AR 179:90710-90712.) PCL quotes from this letter extensively in its Amicus Brief. (PCL Amicus Brief at pp. 17-18.) Following receipt of PCL's comment letter, DWR revised this draft chapter. (AR 200:101952-101953.) The SWP contractors submitted a response to PCL's letter on February 7, 2007, providing their comments on the draft chapter, arguing

that an EIR does not need to discuss how an agency will carry out a project. (AR 199:101137-101155, esp. 101138-101139.) Attached to that letter were several exhibits, including the SWP contractors' 2002 memorandum to the mediator prior to finalization of the Settlement Agreement outlining their contemporaneous understanding of the Settlement Agreement. (AR 199:101143-101147.)

The EIR Committee discussed this issue at its 26th meeting on March 2007. (AR 183:92587; AR 192:97458-97462.) DWR's consultant's summary report of that portion of the EIR Committee Meeting stated as follows:

> Plaintiffs maintained that the intended uses for the EIR as stated in the Draft EIR document are inconsistent with the provisions of the California Environmental Quality Act (CEQA). The law requires DWR, as the lead agency, to use the EIR document to make future decisions, including re-approval of the project, or only part of it.
>
> Plaintiffs clarified that their comments are not related to the adequacy of the EIR. Plaintiffs also clarified that their position on Attachment E transfers is that they are considered final and would not be challenged in court, as stated in the Settlement Agreement.
>
> Contractor representatives agreed that this is a fundamental disagreement. Contractors maintained that Plaintiffs' position is inconsistent with the Settlement Agreement and CEQA, and that DWR is not in a position to unilaterally re-execute contracts. Contractors disagree that Monterey would need to be re-executed after the Final EIR is certified.
>
> Katy Spanos from DWR clarified that since the issue is not related to the adequacy of the EIR document, DWR has not addressed it in the document even though it is an important issue that needs to be resolved. Peggy Bernady from DWR further clarified that the Department will make a decision on this issue after the EIR document is certified. Jerry confirmed that the Department will consider this issue based on the findings of impacts.

→ DWR will review the issue further and determine whether this issue needs to be resolved now or later.

(AR 192:97460.)

The administrative draft of chapter 1.4 was further revised before it was released in the public draft EIR in October 2007, renumbered as chapter 1.2, and retitled "Intended Uses of This EIR." (AR 23:11116-11117.) The draft EIR did not resolve what actions DWR would take following certification of the EIR. The draft stated, "Once the EIR is complete, the Department will consider all options available to it under the law. Upon completion and certification of this EIR, the Department will make written findings and decisions and file a Notice of Determination (NOD)." (AR 23:11116.)

In 2009, DWR provided PCL with an administrative draft of the Final EIR. PCL invoked its Settlement Agreement right to raise its concerns with this document directly to DWR's Director for his personal review, including PCL's argument that DWR would be required to re-execute the Monterey Amendments in order to implement the project. (AR 196:99484-99507, esp. 99486.) DWR's Director responded, reiterating that how the Department may implement the project is not an appropriate topic for an EIR, and that DWR will determine whether and how to carry out the project after certifying the final EIR. (AR 196:99691-99768, esp. 99703-99704.)[2]

PCL ultimately elected to not refer the Director's determinations to the mediator, thereby concluding the Settlement Agreement's unique administrative review processes. (AR 196:99943.) PCL therefore forfeited

[2] DWR also responded to similar comments in the final EIR. (AR 1:194-195; 2:585 ["Once the EIR is complete, the Department will consider all options available to it under the law, including the options of continuing to operate ***or not continuing to operate*** under the Monterey Amendment and the Settlement Agreement"], bold and italics added.)

its right to challenge the Monterey Plus EIR in court. (AR 25:12444-12445.)

III. THE MONTEREY PLUS EIR

The final Monterey Plus EIR constituted a new and comprehensive analysis of the potential environmental impacts of the Monterey Amendment and the Settlement Agreement. (E.g., AR 1:224-225.) The Monterey Plus EIR identified new potential impacts due to the Monterey Amendment not disclosed in the original Monterey Agreement EIR, and identified new mitigation measures to address those impacts. (*Id*.) None of those mitigation measures required revisions or amendments to the long-term contracts. (E.g., AR 22:10999-11001.) Through other long-term contract amendments required by the Settlement Agreement, DWR now negotiates all significant revisions to the long-term contracts in a public forum, prepares a bi-annual reliability report to disclose to the public and local planners the probability of how much water DWR may deliver to each SWP contractor in any given year, and amended other long-term contract terms to provide greater transparency. (E.g., AR 25:12466-12469, 12473.) PCL does not challenge here DWR's conclusions as to the proposed project's impacts or mitigation measures.

IV. DWR'S DECISION ON THE MONTEREY PLUS PROJECT

In February 2010, DWR certified the Monterey Plus EIR and in May 2010, DWR's Director made a new CEQA decision on the proposed project. (AR 22:10924-11007.) As reflected in the Director's Project Decision, DWR determined that it did not need to re-execute the Monterey Amendments in order to carry out the project. (AR 22:10986-10987.) The Director instructed the Department to "carry out the proposed project by continuing to operate under the existing Monterey Amendment . . . and the existing Settlement Agreement . . . in accordance with the terms of

those documents as previously executed by the Department and the other parties to those documents." (AR 22:10932.) Thus, after certifying the Monterey Plus EIR and deciding to proceed with the proposed project, the Department determined that it could and would carry out the project t, including adoption of all proposed mitigation measures, without re-executing the Monterey Amendments or Settlement Agreement.

DWR thereafter sought to discharge the 2003 Writ, and PCL filed a consent to the Writ's discharge. (AR 115:58950-58952.) The CDWA CEQA litigation ensued, without PCL's public participation.

ARGUMENT

I. DWR WAS NOT REQUIRED TO RE-EXECUTE THE MONTEREY AMENDMENT AND SETTLEMENT AGREEMENT IN ORDER TO CARRY OUT THE MONTEREY PLUS PROJECT

A. DWR Made a New CEQA Decision on the Monterey Plus Project in May 2010

PCL argues that the Settlement Agreement required DWR to make a new CEQA decision on the Monterey Plus project following certification of the Monterey Plus EIR. (PCL Amicus Brief at pp. 12-15.) DWR agrees. DWR defined the *proposed project* in the Monterey Plus EIR as "the Monterey Amendment and the Settlement Agreement" (AR 23:11116), whereas the *no project* was reversion to the SWP long-term contracts as they existed before the Monterey Amendment and not implementing the Settlement Agreement (AR 24:11832-11833).[3] DWR certified the

[3] DWR analyzed four versions of the no project alternative given that there was legitimate debate as to what a return to the pre-Monterey Amendment long-term contracts would entail. (AR 24:11832-11833.) Under no project alternative 1 (NPA1), "none of the elements of the proposed project (Monterey Amendment and Settlement Agreement) would be implemented." (AR 24:11832.) The trial court found this approach appropriate. (AA 33:8242-8243.)

Monterey Plus EIR in February 2010 and then made a new CEQA decision on the Monterey Plus project in May 2010. (DWR's Respondent's Brief at pp. 33-34; AR 22:10928-11007, esp. 10931-10932.) DWR's Director concluded that the Department would carry out the proposed project. DWR's Director adopted other findings and determinations, a statement of overriding considerations, and a mitigation and monitoring program. The Director also provided direction as to *how* DWR would carry out the proposed project: by "continuing to operate" the SWP pursuant to the previously executed Monterey Amendment and Settlement Agreement, and would not re-execute those contracts. (AR 22:10932, 10986-10987.) DWR therefore made the requisite "new CEQA decision" on the Monterey Plus proposed project.

What PCL takes issue with is the DWR Director's Project Decision as to *how* DWR would carry out the project. PCL carries forward the same arguments it made in 2002, 2003, 2006, and 2009: that DWR's CEQA Project Decision to carry out the project was not effective unless it also re-executed the Monterey Amendments.[4] (PCL Amicus Brief at p. 12.) PCL ignores the fact that the Settlement Agreement did not provide for that result (see section I.B, below), and CEQA does not dictate how an agency must carry out a project. The CEQA Guidelines provide that "the lead agency may decide whether or how to approve or carry out the project." (Cal. Code Regs., tit. 14, § 15092, subd. (a).) The Department could carry out the project this way because the contracts had already been executed, and the PCL trial court did not set aside those contracts in the 2003 Writ.

[4] PCL does not contend that DWR is required to also re-execute the Settlement Agreement, and does not explain why this contract analyzed in the Monterey Plus EIR should be treated differently from the Monterey Amendments, which similarly are contracts analyzed in the Monterey Plus EIR.

"The fundamental goal of an EIR is to inform decision makers and the public of any significant adverse effects a project is likely to have on the physical environment." (*Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, 447.) Here, the Monterey Plus EIR fully served that fundamental goal. The Monterey Plus EIR identified the proposed project and the no project alternative and disclosed the proposed project's environmental impacts to the public and DWR's decision maker. Having been fully informed, DWR's Director ultimately made the policy decision to implement the proposed project, and not return the SWP to operation pursuant to the terms of the pre-Monterey Amendment long-term contracts. (AR 22:10932.) CEQA is not intended to dictate *how* a lead agency implements a project once a lead agency decides to implement it; that decision is left to the lead agency. (E.g., Cal. Code Regs., tit. 14, § 15092, subd. (a).)

PCL attacks a straw man when it argues that the Settlement Agreement did not leave the Monterey Amendments in place *regardless* of DWR's CEQA decision at the end of the CEQA process. DWR has never held that position. Throughout the Monterey Plus CEQA process, DWR consistently took the position that it would not predetermine what it would do following the completion of the CEQA process until it actually reached that point. (E.g., AR 23:11116 ["Once the EIR is complete, the Department will consider all options available to it under the law."]; AR 2:585; AR 192:97460.) It is wholly consistent with CEQA for DWR—at the conclusion of the EIR process—to ultimately make the policy decision that the SWP should be operated pursuant to the Monterey Amendment and Settlement Agreement, and the legal determination that this decision could be implemented without re-executing those contracts.

B. The Settlement Agreement Did Not Automatically Void the Monterey Amendment Expressly or by Operation of Law at the Conclusion of DWR's Monterey Plus EIR Process

PCL and CDWA implicitly concede that DWR did not need to re-execute the Monterey Amendments unless the Settlement Agreement or CEQA somehow automatically voided or set aside the previously executed Monterey Amendments upon DWR's May 2010 CEQA Project Decision on the Monterey Plus project. The trial court interpreted the plain terms of the Settlement Agreement, buttressed by extrinsic evidence, as not automatically setting aside or voiding those contracts.[5] The trial court was convinced that the plain language of the Settlement Agreement did not call for, and the parties did not mutually intend, this result. (AA 30:7657-7662.)

The Settlement Agreement does not contain an express statement that the Contracts will be voided at the completion of the Monterey Plus EIR process. (AR 25:12406-12487.) PCL and CDWA contend that the provisions in the Settlement Agreement and its attached proposed order (the 2003 Order)[6] which provide that DWR may operate the SWP pursuant to the Monterey Amendments "in the interim" or "on an interim basis" while DWR prepares the Monterey Plus EIR (AA 20:4936, 4955; 21:5015-5018) necessarily imply that the Contracts would be voided upon completion of

[5] The trial court also held that a reverse validation lawsuit challenging the Monterey Amendment would be barred by laches and the validating acts even if DWR were to have re-executed them in 2010. (AA 30:7663-7665.) PCL's amicus brief does not address these alternative bases on which judgment was entered against CDWA on the reverse validation causes of action. (37:9201-9204.)

[6] The parties have referred to this document by different names throughout the litigation: the Interim Implementation Order, the Section 21168.9 Order, and the 2003 Order. DWR uses the same nomenclature here as it used in its Respondent's Brief: 2003 Order.

the Monterey Plus EIR process. PCL's proposed construction of these provisions as requiring that legally significant result is not tenable.

First, the Settlement Agreement parties knew how to expressly specify that an agency action would be voided or set aside when they intended that result. The parties specifically intended for DWR to "set aside" its certification of the original Monterey Agreement EIR, and they drafted the 2003 Writ to specifically order DWR to take that action. (AA 21:5005.) The absence of similar direction to DWR to void or set aside the Monterey Amendment at the conclusion of the EIR process is evidence that the parties did not mutually intend that result to occur. (AA 30:7660.)

Second, the "interim" language used in the Settlement Agreement and the *PCL* trial court's Order Pursuant to Public Resources Code Section 21168.9 (2003 Order, or Interim Implementation Order, AR 115:58931-58934) has a more natural meaning: to avoid doubt, the PCL trial court was not issuing a Public Resources Code section 21168.9(a)(1) order to void or set aside the Contracts; DWR could operate the SWP pursuant to the Monterey Amendment and the Settlement Agreement notwithstanding the fact that original EIR underlying the Monterey Amendment had been decertified. The Settlement Agreement and 2003 Order were silent as to what would occur at the end of the Monterey Plus EIR process. This is entirely consistent with CEQA's Section 21168.9, which provides that "nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way." (Pub. Resources Code, § 21168.9, subd. (c); see also AA 21:5005 [2003 Writ, "Except as provided, this Writ of Mandate shall not limit or constrain the lawful jurisdiction and discretion of the Department of Water Resources"].) Because it was unknown and unknowable in 2003 what result DWR would reach at the conclusion of the forthcoming Monterey Plus EIR process, the Settlement Agreement and 2003 Order only addressed DWR's actions during the

"interim" period prior to the completion of the new EIR. It thus appropriately left to DWR's discretion to decide how to proceed after this interim period.

Third, CEQA does not require that all project approvals be automatically voided when an EIR is found to be inadequate. CEQA provides trial courts with flexibility to fashion an appropriate remedy for the given circumstances. (Pub. Resources Code, § 21168.9, subd. (a).) A trial court has the option, but not the obligation, to void or set aside project approvals upon finding CEQA error. (*Id.*) But since the trial court has discretion to *not* void or set aside project approvals, by definition that remedy it is not required in all circumstances. (*Id.*; *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 286-290.) And in 2000 this court in *PCL* refused to do what PCL is again asking it to do in 2016: require the automatic voiding of all project approvals upon decertification of an EIR as a matter of law. This court's 2000 slip opinion announcing the decertification of the original Monterey Amendment EIR did not dictate the remedy. (AA 20:4904.) PCL asked this court to modify its opinion to expressly direct the trial court to order DWR to void the Monterey Amendment, arguing that CEQA required that result. (AA 20:4910-4914.) This court declined PCL's request to modify its opinion in the way PCL requested, and instead modified it to expressly leave it to the trial court to fashion the appropriate remedy. (*PCL v. DWR* (2000) 83 Cal.App.4th 892, 926, fn. 16 ["The trial court, acting under the authority provided by Public Resources Code section 21168.9, is the more appropriate forum to consider and rule upon requests to enjoin all or portions of the project pending the completion of administrative and judicial proceedings necessitated by our opinion."].) Because CEQA does not mandate that project approvals be voided in all instances in which an EIR is decertified, it cannot be inferred that the parties to the Settlement Agreement omitted any express reference

to such a result based on a unstated mutual understanding that it would automatically occur by silent operation of law. In fact, DWR and the SWP contractors expressly communicated in the *PCL* settlement negotiations and thereafter during the Monterey Plus EIR preparation meetings that such a result was not intended.

In sum, PCL's Amicus Brief sheds no light on how to interpret the Settlement Agreement. The plain language does not support PCL's proposed interpretation. PCL's reliance on the "interim" clauses in the Settlement Agreement and 2003 Order are unpersuasive. At best, PCL's present-day assertions disclose that it may have had an undisclosed intent or understanding as to what it believed the Settlement Agreement required at the end of the Monterey Plus EIR CEQA process. But a party's "undisclosed intent or understanding is irrelevant to contract interpretation." (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 956.)[7] CEQA does not compel the court to rewrite the Settlement Agreement to insert provisions to which the parties did not agree.

C. PCL's Proposed Interpretation of the 2003 Order, the 2003 Joint Motion, or the 2003 Joint Statement is Unsupportable

PCL claims that the 2003 Order authorized the Monterey Amendment, and that authorization expired once the 2003 Writ was discharged. (PCL Amicus Brief at pp. 14-15.) PCL then provides its "understanding" of what this means. (*Ibid*.) As discussed above, PCL's "undisclosed intent or understanding is irrelevant to contract

[7] The trial court noted in a footnote that it was fair to say that the *PCL* parties never agreed on what effect, if any, preparing a new EIR for a new project would have on the "validity" of the Monterey Amendment and the KFE Transfer Agreement. (AA 30:7661, fn. 15.)

interpretation." (*Founding Members of the Newport Beach Country Club, supra,* 109 Cal.App.4th at p. 956.)

As described in DWR's Respondent's Brief and as the trial court found, the fact that the 2003 Order did not state that DWR must re-execute the Monterey Amendment if it approved the project is evidence that the parties did not mutually intend for that result to occur. (DWR Respondent's Brief at p. 51; AA 30:7659-7661.) As the trial court found, "[n]othing in the [2003 Order] required DWR to aside its approval of the Monterey Amendment or the KFE Transfer Agreement." (AA 30:7660.) The 2003 Order does not support PCL's understanding of what would occur. CEQA provides that a writ cannot direct an agency's discretion, and there is nothing to suggest that the 2003 Order was intended to direct what would occur after DWR complied with the 2003 Writ or how DWR would carry out the project under review. (Pub. Resources Code, § 21168.9, subd. (c).)

The *PCL* parties also released a Joint Statement announcing the Settlement Agreement with a list of its "key components." (AA 23:5668-5669.) The automatic invalidation of the Monterey Amendment at the end of the CEQA process, the requirement for DWR to re-execute the Monterey Amendment if it chose to proceed with the proposed project, and the potential ability for third parties to mount new reverse validation challenges to the Monterey Amendment in the future, were ***not*** listed as "key components." (*Id*.) As the trial court held, "[i]f invalidation of the Monterey Amendment had been agreed to, one would reasonably expect it to be included as a 'key component' of the agreement. It was not." (AA 30:7660-7661.)

PCL's discussion of the 2003 joint motion by the *PCL* parties asking the *PCL* trial court to approve the Settlement Agreement and issue the 2003 Writ and 2003 Order (Joint Motion) is curious. (AA 23:5670-5699.) On

appeal, neither DWR, the SWP contractors or the KWBA parties relied on the Joint Motion as extrinsic evidence to help interpret the Settlement Agreement. DWR did rely on the Joint Motion at trial for the proposition that, like the Joint Statement, it set forth some of the "important provisions" of the Settlement Agreement, and the Joint Motion did not list invalidation of the Monterey Amendment or DWR being required to re-execute it at the end of the forthcoming EIR process. (AA 27:6722-6723; AA 23:5681-5683 [Joint Motion's "important provisions"].) As with the Joint Statement, had the parties mutually intended for DWR to be required to re-execute the Monterey Amendment following the EIR process, one would have expected it to be included as an "important provision" of the Settlement Agreement. Its absence is evidence that the parties did not mutually agree that this significant result must occur.

II. DWR APPROPRIATELY DEFINED THE PROPOSED PROJECT IN THE MONTEREY PLUS EIR

At the time DWR began preparing the Monterey Plus EIR, there is no dispute that DWR was operating the SWP pursuant to the Monterey Amendments as set forth in the Settlement Agreement and the 2003 Writ. Given that objective reality, the draft Monterey Plus EIR described the proposed project as "continuing to operate" the SWP under the Monterey Amendment (AR 23:11158), while describing the "no project" alternative as a return to the pre-Monterey Amendment long-term contracts. (AR 24:11832-11833; AR 22:10966.) At trial CDWA challenged the adequacy of this project description. (AA 31:7855-7862.)

The trial court found that "contrary to Petitioners' argument, the EIR adequately and appropriately described the Project under the unique circumstances of this case." (AA 33:8236.) The court recognized that because DWR was in fact lawfully operating the SWP under the Monterey Amendment while the new EIR was being prepared, "the EIR accurately

described the practical result of carrying out the proposed Project as 'continuing' to operate the SWP pursuant to the Monterey Amendment, and accurately described the 'no project' alternatives as returning to operation of the SWP in accordance with the pre-Monterey Amendment long-term water supply contracts." (*Ibid*.) CDWA did not appeal the trial court's finding that the project description was adequate under CEQA.

Section II of PCL's Amicus Brief nonetheless argues that DWR improperly defined the proposed project in the Monterey Plus EIR as the "continuing operation" of the SWP pursuant to the Monterey Plus Amendment. (PCL Amicus Brief at pp. 16-19.) Because CDWA did not argue on appeal that the project description was inadequate, and none of the parties briefed this issue, it is not appropriate for PCL to seek to expand the scope of this appeal to include the adequacy of the project description. (*Strong v. State Bd. of Equalization* (2007) 155 Cal.App.4th 1182, 1191, fn. 6.)

This is especially so here because PCL could have invoked its rights under the Settlement Agreement to bring this issue to a mediator before DWR certified the Monterey Plus EIR, but expressly chose not to do so. The Settlement Agreement provided that PCL could not litigate the adequacy of the Monterey Plus EIR, including the adequacy of the project description, unless it first participated in the contracted-for mediation process. (AR 25:12419, 12427, 12444-12445.) PCL knew in 2007 that it disagreed with the Monterey Plus EIR's project description, as it submitted a comment letter on that issue (PCL Amicus Brief at p. 18, citing AR 196:99486 ["Defining the project decision in terms of 'continued operation' is blatantly inappropriate"]), yet it chose to not challenge DWR's decision. It would be blatantly unfair and inconsistent with the Settlement Agreement for PCL to not only submit its views on the issues that *CDWA* raised on

appeal, but to expand the issues on appeal here to include the adequacy of the project description.

Should the court nonetheless consider PCL's new argument, this court should reject it for the same reason as the trial court rejected it. (AA 33:8236.) The project description was simply a common sense expression of the practical result of proceeding with the proposed project given that DWR was in fact operating the SWP pursuant to the Monterey Amendment at the time the EIR was prepared and at the time the Director made a decision on the proposed project. (*Id*.)

III. PCL'S EVIDENTIARY OBJECTIONS ARE UNFOUNDED AND AN IMPROPER ATTEMPT TO RAISE AN ISSUE NOT RAISED BY THE PARTIES

PCL finally claims that this court should not consider two documents—a 2007 memorandum and a 2002 memorandum—that the trial court received into evidence during both the validation and CEQA trials. (PCL Amicus Brief at pp. 19-20; AA 30:7648 [admitting these documents during the validation trial]; RT 250:7-12 [admitting CEQA administrative record into evidence].)[8] PCL claims that these were inadmissible pursuant to the mediation confidentiality provision found in Evidence Code section 1119. (PCL Amicus Brief at pp. 19-20.) The 2007 memorandum was not submitted to the mediator, but was submitted to DWR during preparation of the Monterey Plus EIR; Evidence Code section 1119 has no application. The court should decline PCL's request to consider whether the 2002 memorandum is subject to mediation confidentiality because no party raised this issue below or on appeal, and its exclusion would not have

[8] It is unclear from the PCL Amicus Brief whether PCL is claiming that the trial court erred in submitting these two documents the SWP Contractors submitted during the validation trial, or whether CDWA erred in including these documents in its petitioner-prepared CEQA administrative record, or both.

changed the trial court's conclusion because it rested on numerous other grounds.

A. The 2007 Memorandum Was Submitted By the SWP Contractors to DWR, Not the Mediator

DWR did not rely on the 2007 memorandum at trial or on appeal as extrinsic evidence in support of its interpretation of the 2003 Settlement Agreement. Nonetheless, PCL finds it important to discuss this particular piece of extrinsic evidence submitted by the SWP contractors during the validation trial (AA 13:2997-3000) and included by CDWA in its petitioner-prepared administrative record (AR 199:101137-101140). PCL's evidentiary concerns are unfounded.[9]

PCL incorrectly asserts that the 2007 memorandum was submitted to the mediator. It was not. The 2007 memorandum was in fact submitted by the SWP contractors to DWR in the course of the EIR Committee process. (AR 199:101137-101140.) While PCL may have been confused given that the 2007 memorandum contains a header indicating it is "privileged and confidential," DWR did not treat this or any document it received from third parties, such as the SWP contractors, during the course of the EIR Committee process as a privileged communication. The CEQA administrative record contains all the communications to and from PCL, and to and from the SWP contractors, regarding the Monterey Plus EIR, as well as EIR Committee summary reports, agendas presentations and handouts. (AR 166:83118 to 199:101344.) The 2007 memorandum is no different from any of the other documents submitted to DWR by PCL or the SWP contractors in the course of preparing the Monterey Plus EIR.

[9] It is ironic that PCL relies on a letter it submitted to DWR explaining *its* position on the Uses of the EIR issue, but now seeks to preclude the court from considering a letter the SWP Contractors submitted to DWR explaining *their* position on the same issue.

B. This Court Need Not Consider Whether the 2002 Memorandum is Subject to Mediation Confidentiality Because CDWA Did Not Object on That Basis at Trial, and Does Not Seek Review of Its Admissibility on Appeal

CDWA included the 2002 memorandum and exhibit in the CEQA administrative record it prepared and requested that DWR certify. (AR 199:101143-101150.) The SWP contractors submitted the same document into evidence during the validation trial as Exhibit 2007 as extrinsic evidence to help the court interpret the Settlement Agreement. (AA 13:2916, 2996, 3003-3010.) CDWA submitted various written objections to this portion of Exhibit 2007 at trial, but CDWA did *not* object on the basis of mediation confidentiality. (AA 29:7069-7070.) CDWA also argued during the validation trial why these documents, if admitted, supported their interpretation of the Settlement Agreement. (AA 28:7044-7048.)

The trial court employed the typical two-step process to determine whether to admit extrinsic evidence, including the 2002 memorandum. (AA 27:6721-6722.) First, a trial court may provisionally receive an exhibit to determine whether the language is reasonably susceptible to the interpretation urged by the parties. (*Id*. citing *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165-1166.) Here, the trial court provisionally received Exhibit 2007 (and other extrinsic evidence proffered) for that purpose. (AA 30:7648.) Second, if a trial court agrees that the underlying document (here, the Settlement Agreement) is susceptible to different interpretations, the trial court may admit extrinsic evidence to aid in its interpretation. (*Winet, supra*, at pp. 1165-1166.) Here, the trial court so concluded, and admitted Exhibit 2007 (and other extrinsic evidence) over CDWA's hearsay and other objections. (AA 30:7648.)

CDWA did not appeal this evidentiary ruling. Indeed, it extensively argued on appeal in its Opening and Reply Briefs that the 2002 memorandum was extrinsic evidence that supported its interpretation of the Settlement Agreement. (AOB at pp. 48-50; Appellants' Reply Brief at pp. 53-57.)

The court should not consider PCL's newly asserted evidentiary objection to the 2002 memorandum. CDWA did not object to the exhibit on that basis at trial. Moreover, CDWA affirmatively relied on that document at trial and on appeal. "It is a general rule that an amicus curiae accepts a case as he or she finds it. Amicus curiae may not launch out upon a juridical expedition of its own unrelated to the actual appellate record." (*California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1474 [internal citations omitted]; see also *Rand v. Bd. of Psychology* (2012) 206 Cal.App.4th 565, 593, fn. 10 [court refused to consider arguments not presented by the parties in the appeal which were raised only in an amicus brief].)

The reasons for the rule are plain. Aside from the fact that this would be a new issue for the court to address in an appeal that has already consumed more than 95,000 words of briefing, the trial court record is not developed on this issue because the CDWA petitioners did not raise it below.

C. The Trial Court's Judgment Should Be Affirmed Whether or Not the 2002 Memorandum Should Have Been Admitted

This court should not send the parties down PCL's proposed new evidentiary rabbit hole, undeveloped by the parties below or on appeal, because as a practical matter it would have no impact on the trial court's judgment. To explore this issue would require the parties to submit new briefing, for the first time, on the issue of whether the document is subject

to mediation confidentiality, whether any exception applies, and whether any objection was waived. Such an exercise is unnecessary because the 2002 memorandum was just one of many pieces of extrinsic evidence accepted by the trial court. The trial court also considered the 2003 Order, the 2003 Writ, and the *PCL* parties' Joint Statement announcing the Settlement Agreement in reaching its conclusion that the Settlement Agreement did not void the Monterey Amendment and require DWR to re-execute the Monterey Amendment to carry out the project.[10] (AA 30:7659-7661.) Most crucially, the trial court found that it would have interpreted the Settlement Agreement in the same way without any extrinsic evidence, including the 2002 memorandum, although the extrinsic evidence it did consider supported the court's conclusion. (AA 30:7662.) While the existence of the 2002 memorandum supports the trial court's conclusion that the Settlement Agreement did not void the Monterey Amendment or require DWR to re-execute Monterey Amendment at the end of the Monterey Plus EIR process, there is ample other evidence to support the trial court's judgment.

CONCLUSION

PCL's Amicus Brief adds little or nothing to this court's consideration of the merits of CDWA's appeal: whether CEQA dictates how a public agency must implement a proposed project, and whether CDWA's validation causes of action were time-barred. PCL itself concedes that its brief does not suggest how the court should decide this case. The PCL Amicus Brief does not alter or diminish the force of any of DWR's

[10] The trial court also accepted the 2007 memorandum and PCL's consent to discharge of the 2003 Writ into evidence, but gave those documents "little weight." (AA 30:7661.)

arguments in its Respondent's Brief, which demonstrate why the trial court's judgment should be affirmed.

Dated: July 20, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT DEPARTMENT OF WATER RESOURCES' ANSWER TO PLANNING AND CONSERVATION LEAGUE'S AMICUS BRIEF** uses a 13 point Times New Roman font and contains 6,576 words.

Dated: July 20, 2016

KAMALA D. HARRIS
Attorney General of California

/S/ ERIC M. KATZ

ERIC M. KATZ
Supervising Deputy Attorney General
Attorneys for Defendant and Respondent Department of Water Resources

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

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

Case No.: **C078249**

I declare:

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

On July 20, 2016, I electronically submitted the attached **RESPONDENT DEPARTMENT OF WATER RESOURCES' ANSWER TO PLANNING AND CONSERVATION LEAGUE'S AMICUS BRIEF** through the TrueFiling system pursuant to the Court's Local Rule 5, which then electronically served all parties registered with TrueFiling.

In addition, on July 20, 2016, I served a paper copy on:

Sacramento County Superior Court
720 9th Street
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 20, 2016, at Los Angeles, California.

Beatriz Davalos	/s/ Beatriz Davalos
Declarant	Signature

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