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

KERN WATER BANK PARTIES' ANSWER AND OPPOSITION TO AMICUS CURIAE BRIEF OF PLANNING AND CONSERVATION LEAGUE

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AA	Appellants' Amended Appendix
AR	Administrative Record
Attachment A Amendments	Amendments to SWP contractors' long-term water supply contracts with DWR, including changes required by the Settlement Agreement
Authority	Kern Water Bank Authority
Central Delta Appellants	Plaintiffs and Appellants Central Delta Water Agency, South Delta Water Agency, Center for Biological Diversity, California Water Impact Network, California Sportfishing Protection Alliance, Carolee Krieger and James Crenshaw
CEQA	California Environmental Quality Act, Pub. Resources Code, §21000, *et seq.*
CEQA Guidelines	Cal. Code Regs., tit. 14, § 15000, *et seq.*
Contractors	The current 29 local and regional water agencies that have long-term water supply contracts with DWR for the delivery of State Water Project water
CSPA	California Sportfishing Protection Alliance
C-WIN	California Water Impact Network
DWR	Department of Water Resources

GLOSSARY

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

GLOSSARY

PCL v. DWR	*Planning and Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892
RA	Respondents' Appendix
Settlement Agreement	The 2003 Settlement Agreement entered into by the parties in *Planning & Conservation League v. Department of Water Resources*
SWP	State Water Project
1995 EIR	1995 Monterey Amendments Environmental Impact Report
2002 Memorandum	November 4, 2002 *PCL* Defendants' response to *PCL* Plaintiffs' proposed writ
2003 Act	Stats. 2003, ch. 295, § 8, Final Validating Act of 2003
2003 Order	The CEQA order issued by the *PCL v. DWR* trial court in 2003, following the Settlement Agreement
2003 Writ	The writ of mandate issued by the *PCL v. DWR* trial court in 2003, following the Settlement Agreement
2005 Letter	July 15, 2005 letter responding to PCL's counsel in response to statements made at June 15, 2005 EIR Committee Workshop

GLOSSARY

2006 PCL Letter	December 18, 2006 letter from PCL regarding DWR's administrative draft uses of the EIR discussion
2007 Memorandum	February 7, 2007 Memorandum of Defendants' Position on the "Uses of the EIR" Issue
2009 Letter	August 13, 2009 *PCL* Plaintiffs' letter to DWR listing issues referred to Director
2010 EIR	Final Environmental Impact Report encompassing both the Monterey Amendments and the Settlement Agreement

I. INTRODUCTION.

Amicus curiae Planning and Conservation League ("PCL") (1) dismissed its prior reverse validation challenge to the Monterey Amendments, and (2) waived any future challenge to the Monterey Amendments. Having lateraled the litigation football to the Central Delta Appellants, PCL now seeks to reenter the game under the guise of an *amicus* and obtain yet another bite at the apple.

It is particularly ironic that PCL trumpets its prior 14-year litigation against the Monterey Amendments. This only serves to demonstrate that the Superior Court properly dismissed Central Delta Appellants' reverse validation claims as time-barred by statutes of limitation and laches. It also demonstrates that PCL and the Central Delta Appellants are in privity, and that the Central Delta Appellants' CEQA claim is barred by res judicata.

The Court should reject PCL's arguments for the following reasons:

1. PCL ignores the substantial evidence supporting the trial court's judgment that Central Delta's reverse validation cause of action was barred on three independent grounds -- statutes of limitations, laches, and by the Final Validating Act of 2003. (AA30:7649-7665.)

2. PCL ignores the substantial evidence standard of review applicable to the trial court's judgment here. Under the substantial evidence standard, the Court "must . . . view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.) .

3. PCL relies on self-serving, non-contemporaneous communications years after the Settlement Agreement -- supposedly to demonstrate PCL's subjective intent in negotiating the Settlement

Agreement. California applies the ***objective*** theory of contracts. PCL's alleged subjective intent is irrelevant to this Court's review of the trial court's judgment. (*Founding Members of Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 956.)

4. PCL takes issue with two memoranda out of the 77 documents admitted into evidence at the time bar trial. PCL's argument is irrelevant because the trial court concluded that it would have reached the same decision in the absence of the two memoranda to which PCL objects. Moreover, no party raised the evidentiary issues on appeal. Indeed, the Central Delta Appellants cited the 2002 Memorandum as extrinsic evidence in support of its argument regarding the Settlement Agreement. An *amicus curiae* cannot expand an appeal beyond the issues briefed by the parties. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1047, fn. 12.)

5. PCL's convoluted CEQA argument is contradicted by (a) Public Resources Code section 21168.9 which, on its face, leaves broad discretion to the trial court to leave the project approvals in effect notwithstanding a CEQA violation, and (b) the terms of the Settlement Agreement, the 2003 Writ, and 2003 Order which, on their face, did ***not*** invalidate the Monterey Amendments, and required dismissal of PCL's reverse validation cause of action.

6. CEQA did not require DWR to re-execute the Monterey Amendments. DWR's 2010 decision to continue "to operate under the existing Monterey Amendment . . . and the existing Settlement Agreement" is expressly authorized by the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15092, subd. (a). [hereinafter "CEQA Guidelines"].) The Department could carry out the project this way because the Monterey Amendments

and the Settlement Agreement had already been executed, and the PCL trial court did not set aside those contracts in the 2003 Writ.

II. PCL IGNORES THE SUBSTANTIAL EVIDENCE SUPPORTING THE TRIAL COURT'S JUDGMENT.

A. PCL Ignores the Applicable Standard of Review.

PCL assiduously avoids any discussion of the applicable standard of review. The Court of Appeal is required to affirm the trial court decision if there was substantial evidence to support the trial court's ruling. (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.) The Court "must . . . view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor." (*Jessup Farms v. Baldwin*, *supra*, 33 Cal.3d at p. 660.) "[A] party 'raising a claim of insufficiency of the evidence assumes a 'daunting burden'" (*Wilson v. County of Orange*, *supra*, 169 Cal.App.4th at p. 1188, quoting, *Whiteley v. Philip Morris, Inc*. (2004) 117 Cal.App.4th 635, 678 [11 Cal. Rptr. 3d 807].) As set forth below, there is substantial evidence supporting the trial court's judgment on the reverse validation claims, and its decisions concerning the Settlement Agreement.

B. Substantial Evidence Supports the Trial Court's Judgment Concerning the Reverse Validation Claims.

(1) The Trial Court Held That the Reverse Validation Claims Were Time-Barred Based on Several Independent Grounds.

Here, the PCL brief addresses only one of several independent grounds supporting the trial court's judgment. The Court may affirm the trial court judgment if it is correct on any theory. (*In re Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 805.) The trial court concluded that the Central Delta Appellants' reverse validation claims

were time barred based on three separate and independent grounds – statutes of limitation, laches, and the Final Validating Act of 2003. There was substantial evidence presented at trial on each ground – and the judgment is supported by the evidence.

The evidence supporting the trial court's judgment is documented in the briefs filed by DWR and the Kern Water Bank Parties. (See Kern Water Bank Parties' Answering Br. and Cross-Appellants' Opening Br., pp. 48-53, 62-69; DWR's Br., pp. 36-38.)

The Central Delta Appellants submitted ***no evidence*** at trial challenging the proof of the elements of laches, and they cite to none in their Amended Opening Brief. For that reason alone, the judgment should be affirmed. PCL does not address the trial court's decision that the reverse validation claims are barred by laches.

After the Superior Court's approval of the 2003 Settlement Agreement and dismissal of the reverse validation causes of action, the Authority approved and sold $27 million in bonds and made additional investments to construct and operate the Kern Water Bank. (AA28:6838-6839.) The substantial reliance by the Authority and its members on the Settlement Agreement, are described in declarations admitted into evidence at trial (AA28:6798-6934 [Kern Water Bank Parties' declarations]), particularly in the Declaration of Jonathan Parker (AA28:6815-6841). (AA31:7726 [All Kern Water Bank Parties' exhibits and declarations admitted].)

At the time of the time-bar trial, the Authority had stored in the Kern Water Bank nearly one million acre feet of water that is owned by the Authority's members. (AA28:6823 [Parker Decl., ¶ 9].) The stored water is used to support agricultural production in dry years when other water

sources are not available. (AA28:6908-6910 [Taube Decl. ¶¶ 24-27], AA28:6823-6824 [Parker Decl., ¶ 10], AA28:6822, 6834 [Parker Decl., ¶¶ 7, 30].) Some of the water stored in the Kern Water Bank provides a municipal water supply for the City of Bakersfield and Kern County. (AA28:6803-6807 [Beard Decl., ¶¶ 5-16].)

Central Delta also failed to submit ***any evidence*** at trial in response to the Kern Water Bank Parties' defense that the reverse validation claim was barred by the Final Validating Act of 2003. The trial court specifically held that that "[r]epayment of the bonds was secured by the land transferred as part of the [Land] Transfer Agreement. Thus, the Court concludes, the [Final Validating Act of 2003] also validated any alleged defects or illegalities in the transfer of title to KWBA (through KCWA)." (AA30:7663.) PCL makes no effort to address the trial court's decision that the reverse validation claim was barred by laches and by the Final Validating Act of 2003.

(2) The Substantial Evidence Regarding the 2003 Settlement Agreement.

California recognizes the objective theory of contracts; thus "undisclosed intent or understanding is irrelevant to contract interpretation." (*Founding Members of Newport Beach Country Club v. Newport Beach Country Club, Inc., supra,* 109 Cal.App.4th at 956; see also Civ. Code, § 1636; *In re Quantification Settlement Agreement Cases, supra,* 201 Cal.App.4th 798.) The question is what the parties' ***objective*** expressions of intent would lead a reasonable person to believe. (*Winograd v. Am. Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.)

PCL's alleged subjective intent based on PCL's statements ***made years*** after the parties agreed on the Settlement Agreement and on the form

of the 2003 Writ, are not relevant to the trial court's conclusions regard the ***objective*** intent of the parties in the Settlement Agreement. The only question, therefore, is whether there is substantial evidence of the parties ***objective*** intent. There is.

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

After an exhaustive review of voluminous cotemporaneous evidence regarding the Settlement Agreement, the trial court concluded that "nowhere in the Settlement Agreement did the parties agree to invalidate the [Monterey Amendments or Land Transfer Agreement]." (AA30:7657-7660.) The trial court also concluded that "the [Monterey Amendments and Land Transfer Agreement] were not taken out of 'existence' as part of the PCL Litigation, the Settlement Agreement or its associated documents, or the certification of the new Monterey Plus EIR." (AA30:7657.) The trial court concluded, "In sum, the Monterey Amendment and [Land] Transfer Agreement came into 'existence' in the 1990s, never were invalidated or set

aside, and remain in existence today. Thus, the time for challenging the contracts has long since passed." (AA30:7662.) Substantial evidence supports this decision.

(3) The Record of the Settlement Agreement Negotiations Supports the Trial Court's Interpretation.

To support its argument that the Settlement Agreement invalidated the Monterey Amendments, PCL cites to its own statements ***made years*** after the parties agreed on the Settlement Agreement and on the form of the 2003 Writ. These one-sided, post-Settlement Agreement, post-2003 Writ, self-serving statements by PCL are not objective evidence of the intent of the parties in executing the Settlement Agreement. The record of the negotiations between the parties over the Settlement Agreement and the form of the 2003 Writ eviscerates PCL's argument.

The uncontested ***contemporaneous, objective*** evidence regarding the Settlement Agreement introduced at trial indicates the following:

1. The parties to the *PCL* litigation engaged in extensive settlement negotiations mediated by Judge Weinstein (Ret.). (AA20:4930.)

2. After reaching agreement on a Statement of Principles, the parties prepared drafts of the Settlement Agreement and the exhibits to the Settlement Agreement, including the form of the writ of mandate and order to be issued by the Superior Court. (See AA23:5668-5669.)

3. The *PCL* Plaintiffs' draft of the form of the writ of mandate stated the following:

> **Paragraph 3.** "Upon completion and certification of the new EIR, Respondent DWR shall make written findings and decisions and file a notice of determination **relating to its new project decision**, all in the manner

> prescribed by sections 15091 – 15094 of the CEQA Guidelines."
>
> * * *
>
> **Paragraph 4.** "Respondent DWR shall, upon filing of a [NOD], submit…**amendments to the State Water Contract and any other provisions that form the subject of its new project decision** to this Court by way of return to this writ of mandate."

(AA13:3008-3010; AR199:101148-101150, emphasis added.)

4. Defendants notified the *PCL* Plaintiffs that Defendants emphatically rejected the Plaintiffs' draft of the form of the writ of mandate:

> "Defendants ***never agreed, and would never have agreed***, to a provision in the Settlement Principles that converted the Monterey Amendments, as contractual documents, to an 'interim' status. ***No party ever proffered such an interpretation*** during the negotiations, and, in fact, all discussions were explicit to the contrary. ***We cannot count the number of times we stated that we did not intend to re-execute the Monterey Amendment.***"

(AA13:3005; AR199:101145, emphasis added.)

5. Defendants countered with their own draft of the form of the writ of mandate. The Defendants' form of the writ (red-lined against the Plaintiffs' draft) stated:

> **Paragraph 3.** "Upon completion and certification of the new EIR, Respondent DWR shall make written findings and decisions and file a notice of determination ~~relating to its new project decision~~ identifying the components of the project analyzed in the new EIR, all in the manner prescribed by sections 15091 – 15094 of the CEQA Guidelines."

* * *

> **Paragraph 4: "**Respondent DWR shall, upon filing of a [NOD], submit the new EIR, the written findings, the [NOD], …~~**amendments to the State Water Contract and any other provisions that form the subject of its new project decision** to~~ and such additional documents as this Court may order by way of return to this writ of mandate."

(AA13:3009; AR199:101149.)

6. The *PCL* Plaintiffs withdrew their draft of the form of the writ of mandate and agreed with the Defendants' form of the writ of mandate. The form of the writ of mandate included as an exhibit to the Settlement Agreement is the form of the writ **as revised by Defendants and agreed to by the *PCL* Plaintiffs**:

> **Paragraph 3:** "Upon completion and certification of the new EIR, Respondent DWR shall make written findings and decisions and file a notice of determination identifying the components of the project analyzed in the new EIR, all in the manner prescribed by sections 15091 – 15094 of the CEQA Guidelines."
>
> **Paragraph 4: "**Respondent DWR shall, upon filing of a [NOD], submit…such additional documents as the Court may order by way of return to this writ of mandate."

(AA20:4998; AR115:58926.)

7. The Superior Court adopted the form of the writ of mandate as attached to the Settlement Agreement, ***without change***. (AA21:5004-5005 [Ex. 35].)

The above chronology ***objectively*** demonstrates that the parties agreed on a form of the writ that (1) did not invalidate DWR's approval of

the Monterey Amendments, and (2) did not require DWR to re-execute the Monterey Amendments. All that the writ required was for DWR to certify a new EIR and make written findings and decisions "in the manner prescribed by sections 15091 – 15094 of the CEQA Guidelines."

Nothing in the referenced sections of the CEQA Guidelines required DWR to re-approve or re-execute the Monterey Amendments. Section 15091 requires the agency make certain findings regarding mitigation of significant effects identified in the EIR. (CEQA Guidelines, § 15091.) Section 15092 provides that after considering the EIR and the findings, the agency "***may decide*** whether or ***how*** to approve ***or carry out*** the project." (CEQA Guidelines, § 15092, subd. (a), emphasis added.) In approving "or carrying out" the project, section 15092 requires the agency to determine either that the significant effects are "substantially lessened . . . where feasible", and that any remaining significant effects are unavoidable and justified by the statement of overriding considerations. (CEQA Guidelines, § 15092, subd. (b).)

Section 15093, in turn, describes the requirements for a statement of overriding considerations. (CEQA Guidelines, § 15093.) Finally, section 15094 requires the lead agency to file a notice of determination within five days "after deciding to carry out or approve the project." (CEQA Guidelines, § 15094.)

None of these sections of the CEQA Guidelines impose any requirement as to ***how*** an agency may "approve or carry out" a project. The sections simply provide that the lead agency shall (1) adopt the required findings and statement of overriding considerations for significant effects identified in the EIR, and (2) file a notice of determination to put the public on notice of the agency's decision and to trigger the start of the CEQA

statute of limitations. (CEQA Guidelines, § 15094, subd. (g).) It is uncontested that DWR adopted the findings as provided in section 15091, adopted the statement of overriding considerations as provided in section 15093, and filed the notice of determination as provided in section 15094.

(4) Other Substantial, Contemporaneous Evidence Supports the Trial Court's Decision.

Other contemporaneous documents related to the Settlement Agreement also evidence that the *PCL* Parties never intended to set aside the approval of the Monterey Amendments or to require DWR to re-execute the Monterey Amendments.

The 2003 Joint Motion requesting the Superior Court to approve the Settlement Agreement and issue the 2003 Writ and 2003 Order provides additional substantial evidence that the *PCL* Parties did not intend to vacate the Monterey Amendments. PCL cites selected snippets of the 2003 Joint Motion. (See Amicus Br., pp. 14-15.) Other provision of the 2003 Joint Motion, not addressed in the PCL *amicus* brief, refute PCL's argument. The 2003 Joint Motion noted that the Settlement Agreement required *PCL* Plaintiffs to dismiss the reverse validation action. (AA13:2989-2990.) The trial court cited this dismissal provision in the Settlement Agreement, also referenced in the 2003 Joint Motion as an "important provision" of the Settlement Agreement (AA13:2988), as "clear evidence the parties intended to 'validate' those Contracts as part of the Settlement Agreement." (AA30:7658.)

With respect to the 2003 Order, PCL repeats Central Delta's misleading interpretation of one word ("interim") in the 2003 Order (Amicus Br., p. 15.) The term "interim" applied ***only*** to "the administration

and operation of the State Water Project and Kern Water Bank Lands," not to the continued existence of the Monterey Amendments. (AA21:5017.) Nothing in the 2003 Writ or the 2003 Order required DWR to set aside its approval of the Monterey Amendments or Land Transfer Agreement. (AA30:7660.) As the trial court below concluded, had the *PCL* court intended to vacate these approvals, it knew how to do so. (See AA30:7659-7660.)

Finally, PCL claims that the 2003 Joint Statement provides "no support for any assumed agreement that approvals based on the decertified EIR remained permanently operative . . . ." (Amicus Br., p. 15.) But, the 2003 Joint Statement listed the "key components" of the Settlement Agreement. (AA30:7660.) As the trial court found, if the *PCL* Parties intended to invalidate the Monterey Amendments or Land Transfer Agreement, "one would reasonably expect it to be included as a 'key component' of the [Settlement Agreement]." (AA30:7660-7661.) ***But it was not***. The trial court contrasted the complete absence of any mention of invalidation of Land Transfer Agreement with the 2003 Joint Statement's explicit statement that the Kern Water Bank would "remain in local ownership" and continue to be operated "as it has" as evidence to support the trial court's ruling. (AA30:7661.)

In addition to these contemporaneous documents, the trial court cited two other pieces of evidence that PCL wholly ignores. First, *PCL* Plaintiffs requested that the *PCL* Court of Appeal modify its opinion to set aside the Monterey Amendments and Land Transfer Agreement; the Court of Appeal refused to include this language. (AA30:7657.) The *PCL* Court of Appeal concluded that the trial court was the "more appropriate forum" to consider or rule upon such request. (*Ibid.*) The trial court stated that the *PCL* Court

of Appeal's decision "did not invalidate the contract approvals or cause the contracts to go out of 'existence[,]'" and that "[t]he Court of Appeal ***plainly*** did not agree that the contract approvals were legally required to be set aside." (*Ibid.*, emphasis added.)

PCL also ignores the 2003 Writ's complete omission of the approvals from its required actions. Indeed, "the [2003 W]rit required DWR to set aside its certification of the Monterey Amendment EIR and prepare and certify a new Notice of Determination . . . ." (AA30:7660; see AA20:4997-4998.) Critically, however, the trial court noted that "nothing in the [2003 W]rit required DWR to vacate or set aside its approval of the Monterey Amendment, the [Land] Transfer Agreement, or any other contract." (*Ibid.*) Indeed, "[i]f the [2003 W]rit were intended to vacate all project approvals, the PCL Plaintiffs and the trial court certainly knew how to include such language in the writ. Because they did not, the [trial court was] bound to conclude that there was no intent to vacate the project approvals." (AA30:7661.)

The above substantial evidence, in addition to the Settlement Agreement and the history of the negotiation of the form of the 2003 Writ, clearly supports the trial court's decision holding that the *PCL* Parties did not intend to set aside Monterey Amendments or the Land Transfer Agreement.

Notably, the trial court specifically stated that it "would reach the same conclusion ***in the absence of the extrinsic evidence***" that it relied upon in reaching its determination that the parties did not intend to vacate the Monterey Amendments and Land Transfer Agreement. (AA30:7662, emphasis added.) Nevertheless, the trial court found that "the extrinsic evidence supports the [trial court]'s interpretation." (*Ibid.*) Accordingly,

because there is substantial evidence to support the trial court's interpretation, this Court must affirm the trial court judgment.

C. PCL Cannot Challenge the Trial Court's Admission of the 2002 Memorandum or the 2007 Memorandum.

PCL takes issue with the trial court's admission into evidence of the 2002 Memorandum and the 2007 Memorandum during the time bar portion of the trial. (Amicus Br., p. 19.) There are two fatal problems with PCL's argument: (1) PCL cannot raise the argument because Central Delta Appellants did not raise the issue of admission of the two exhibits on appeal; and (2) the trial court concluded that it would have reached the same decision independent of the extrinsic evidence.

An appellate court will consider only those questions properly raised by the parties; an *amicus curiae* cannot expand the issues beyond those issues. (*Professional Engineers in California Government v. Kempton, supra,* 40 Cal.4th at 1047, fn. 12; *City of Los Angeles v. Standard Oil* (1968) 262 Cal.App.2d 118, 127 [*amicus curiae* who filed brief in appellate court declaratory relief action to determine constitutionality of a statute was not allowed to seek relief based on hypothetical construction of statute not asserted by parties].) This Court should, therefore, ignore PCL's arguments with respect to the 2002 Memorandum and the 2007 Memorandum. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn. 14 [court may ignore improper material in *amicus curiae* brief].)

Importantly, the trial court concluded that "[u]ltimately . . . the PCL writ did ***exactly as the PCL defendants described***: it required decertification of the prior EIR and preparation of a new EIR by DWR as the lead agency." (*Ibid,* emphasis added.) It did not vacate the project approvals. (*Ibid.*) Indeed, the trial court concluded that it "would reach the

same conclusion in the absence of extrinsic evidence . . . ." (AA30:7662.) (*Romine v. Johnson Controls, Inc.* (2014) 244 Cal.App.4th 990, 1014 [affirming trial court's award of damages notwithstanding trial court's error in admitting evidence of the full amount billed for the plaintiff's medical care]; *Pacific Factors v. St. Paul Hotel* (1931) 113 Cal.App. 657, 660 ["[H]ence, if there were error in the ruling of the trial court admitting the document in evidence and in denying defendants' motion for a nonsuit, those rulings were cured [by subsequent evidence] and are now not available as grounds for the reversal of the judgment."], (citing *Levey v. Henderson* (1917) 177 Cal. 21, 22.)

D. The Court Should Disregard PCL's Reliance on Non-Contemporaneous Evidence.

PCL relies on the 2006 PCL Letter as "evidence" that the neither the Settlement Agreement, 2003 Writ, nor 2003 Order established the finality of the Monterey Amendments and Land Transfer Agreement. (See Amicus Br., p. 16.) But this self-serving communication drafted ***three years*** after the Settlement Agreement cannot provide ***objective*** evidence of the *PCL* Parties' ***mutual*** intent in the ***2003*** Settlement Agreement. The trial court properly relied only on the contemporaneous evidence of the parties' intent.

The 2006 PCL Letter does nothing more than illustrate that ***three years after the Settlement Agreement***, PCL sought, *post hoc*, to renegotiate the Settlement Agreement. Moreover, PCL neglects to acknowledge that the *PCL* Defendants vehemently disagreed with the contentions in the 2006 PCL Letter. *PCL* Defendants responded to the 2006 PCL Letter with the 2007 Memorandum. (AA13:2996-3029 [Ex. 2007]; AR10:1137-1169.) The 2007 Memorandum noted that PCL's position was inconsistent with (a) CEQA; (b) the parties' prior understanding with regard to the

requirements of the 2003 Writ, referring to the 2002 Memorandum; and (c) the Settlement Agreement provisions regarding the Kern Water Bank, referring to the 2005 Letter. (AA13:2997-3000; AR199:101137-101140.) PCL did not provide any written response to the *PCL* Defendants' 2007 Memorandum.

The 2009 PCL Letter similarly provides nothing more than a lawyer's *post hoc* argument. It is not evidence of the parties' mutual intent documented in the 2003 Settlement Agreement, the 2003 Writ and the 2003 Order. The 2009 Letter merely listed issues for the Director's decision on the final administrative Draft EIR. (AR196:99484-99508.) In the 2009 Letter, PCL contended that DWR erroneously described the proposed Project decision and that, when the Interim Implementation Order expired, the contract would revert to pre-Monterey Amendment status unless reapproved. (AR196:99486.) DWR's Director and other *PCL* Defendants provided responses disagreeing with PCL's contentions. (AR196:99691-99768, 99649-99671.) The 2009 Letter does not evidence that it was the *PCL* Parties' mutual intent to require re-approval of the Monterey Amendments and Land Transfer Agreement. Accordingly, neither the 2006 nor the 2009 Letter have any evidentiary value and cannot be used to challenge the trial court's well-founded decision.

E. Nothing in CEQA Required the *PCL* Court to Void the Monterey Amendments or Land Transfer Agreement.

PCL's convoluted CEQA argument is addressed at length in DWR's and Kern Water Bank Parties' Answering and Reply briefs in the appeal. PCL's argument is flatly contrary to the text of Public Resources Code section 21168.9 which vests considerable discretion in trial courts to determine whether to vacate a project approval if the court identifies a

CEQA violation. (See Kern Water Bank Parties' Answering Br., pp. 70-80; DWR's Answering Br., pp. 58-62.)

The court may "mandate that the determination, finding, or decision be voided by a public agency, in whole ***or in part***." (Pub. Resources Code, § 21168.9, subd. (a)(1), emphasis added.) Where a specific project activity will prejudice consideration or implementation of particular alternatives or mitigation measures to the project, the court may mandate that the public agency and real parties in interest suspend ***any or all*** specific activities until the public agency has complied with CEQA. (*Id.*, subd. (a)(2).) A final option is to simply mandate that the lead agency take specific action to bring its decision into compliance with CEQA. (*Id.*, subd. (a)(3).)

Repeating Central Delta's argument, PCL seizes upon a single word ("interim") in the 2003 Order to argue that it means, contrary to all the other events and language just noted, that the Monterey Amendments were invalidated. PCL does not explain how this could possibly be the case in the face of (i) the undisputed fact that the title remained vested in the Kern Water Bank Authority, (ii) that the Superior Court dismissed the reverse validation cause of action in the *PCL* litigation, and (iii) the Settlement Agreement prohibited refiling of the reverse validation action.

The word "interim" in context did not vacate any approvals of the Monterey Amendments. The 2003 Order merely said: "***In the interim***, until DWR files its return in compliance with the Peremptory Writ of Mandate and this Court orders discharge of the Writ of Mandate, the ***administration and operation*** of the State Water Project and [transferred land] shall be conducted pursuant to the Monterey Amendments . . ., as supplemented by the Attachment A Amendments . . . and the other terms and conditions of the Settlement Agreement." (AA21:5017-5018 [Ex. 37],

emphasis added.) PCL jumps to the unsupported conclusion that the single word "interim" means that the parties intended to render the contracts subject to the reverse validation action temporary.

The *PCL* trial court elected to exercise its broad discretion under Public Resources Code section 21168.9 by mandating specific action for DWR: decertification of the 1995 EIR and preparation of a new EIR. As the trial court concluded, neither the Settlement Agreement, the 2003 Writ, nor the 2003 Order mandated that DWR vacate the approval of the Monterey Amendments or the deed conveying the Kern Water Bank Lands. In fact, they did the exact opposite!

CEQA's remedy provision and the controlling case law directly contradict a fundamental premise of PCL's argument. The statute states on its face that courts retain the discretion to keep project approvals in effect where the court finds a CEQA error. (Pub. Resources Code, § 21168.9, subds. (a)(1)-(3).) The controlling case law confirms a trial court's broad equitable discretion to leave project approvals in place. (See, e.g., *Golden Gate Land Holdings LLC v. East Bay Regional Park Dist.* (2013) 215 Cal.App.4th 353, 375-376 [stating that "reasonable, commonsense" reading of section 21168.9 forecloses assertion that trial court must mandate public agency void all approvals because it "directly conflicts" with "in part" language of subdivision (a)(1)]; *POET LLC v. Cal. Air Resources Bd.* (2013) 218 Cal.App.4th 681, 760-762; *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 288.)

III. THE PCL AMICUS BRIEF DEMONSTRATES THAT THE CENTRAL DELTA LAWSUIT IS BARRED BY RES JUDICATA.

If PCL's amicus brief demonstrates anything, it is that PCL vigorously litigated DWR's compliance with CEQA regarding the Monterey Amendments for fourteen years, that the Central Delta Plaintiffs are in privity with the *PCL* Plaintiffs, and that res judicata bars Central Delta Appellants' current CEQA challenge. Res judicata applies to the parties in the *PCL* lawsuit and to other parties that are in privity with them. PCL's argument underscores that the "privity" requirement is easily satisfied due to its previous participation in the *PCL* lawsuit, settlement, preparation of the new EIR, and apparent continued participation in the background of the subject lawsuit although only formally appearing in this phase of the litigation for the first time under the guise of an *amicus*. [1]

PCL's pursuit of its CEQA claims on behalf of the public is sufficient to show a "common interest" in enforcing CEQA. (*Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 230; *Consumer Advocacy Group v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675, 690.) Where a CEQA plaintiff group represents the public interest to enforce the primary right of CEQA compliance, a second set of CEQA plaintiffs is in privity, and are barred from re-litigating CEQA compliance. (See *Citizens for Open Access to*

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[1] For example, just one day after *PCL* Plaintiffs filed their August 13, 2009 referral to DWR's Director under the Settlement Agreement (AR196:99484-99493), on August 14, 2009, Central Delta Appellant CBD submitted a comment letter criticizing the draft EIR partially based on *PCL's* and C-WIN's prior comments, which were incorporated by reference (AR113:58264-58265), and Appellants C-WIN and CSPA submitted a letter requesting a public comment period on the final EIR (AR113:58266-58267).

Sand and Tide, Inc. v. Seadrift Assn. (1998) 60 Cal.App.4th 1053, 1072-1073.)

As a result of the *PCL* Plaintiffs' prosecution of their CEQA lawsuit, they 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 a new EIR. By PCL's own admission, "[b]etween 2003 and 2010, PCL participated in all phases of DWR's administrative review of the Monterey Plus project, from scoping and public comment through final review, certification and decision. PCL representatives participated in meetings of the EIR Committee . . . in addition to preparing detailed letters and comments." (Amicus Br., p. 10.) Only at the conclusion of this lengthy process did *PCL* Plaintiffs consent to DWR's return to the 2003 Writ.

PCL claims that it expressly "abandoned" its role representing the public interest because its consent to the return on the 2003 Writ included some magic words to that effect. But mere utterance of a simple phrase cannot negate that they actively participated in the painstaking process established by the Settlement Agreement that resulted in the 2010 EIR, and the judgment entered thereon. This Court cannot reward PCL's tactics to seek a second (or third) bite at the apple by allowing them to actively represent the public interest through the entirety of the process PCL was ***instrumental in establishing*** only to claim they "abandoned" their role because they were not 100% satisfied with the results of that process.

PCL cannot demonstrate that they abandoned their role as representatives of the public interest. They are in privity with the Central Delta Appellants, and, therefore, Central Delta Appellants' lawsuit is barred by res judicata. Accordingly, the Court should reverse the trial court's

ruling on the res judicata issue and order it to dismiss Central Delta Appellants' CEQA lawsuit.

IV. CONCLUSION.

The Court should affirm the trial court's decision that Central Delta's reverse validation action is time barred because substantial evidence supports the trial court's judgment.

Because the Amicus Brief establishes that PCL did not abandon its representation in the prior litigation and related CEQA evaluation, the Court should reverse the trial court's decision on the res judicata issue and dismiss Central Delta Appellants' CEQA lawsuit because res judicata bars re-litigation of this action.

Dated: July 20, 2016

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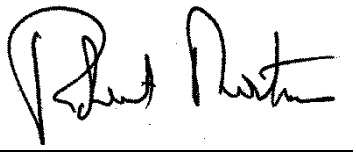
BY: 

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CERTIFICATE OF COMPLIANCE

Pursuant to CRC Rule 8.204(c)(4), this brief contains 5,497 words, according to the word count feature of Microsoft Word 2010, and therefore complies with the 14,000 word limit for responding briefs.

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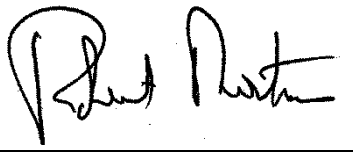
BY: 

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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 July 20, 2016, I caused to be served the KERN WATER BANK PARTIES' ANSWER AND OPPOSITION TO AMICUS CURIAE BRIEF OF PLANNING AND CONSERVATION LEAGUE on parties to the within action via the court's electronic filing system, TrueFiling portal, 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 KERN WATER BANK PARTIES' ANSWER AND OPPOSITION TO AMICUS CURIAE BRIEF OF PLANNING AND CONSERVATION LEAGUE was served on the Clerk of the Sacramento County Superior Court, at 720 9th Street, Sacramento, CA 95814 via USPS First Class mail.

A copy of the KERN WATER BANK PARTIES' ANSWER AND OPPOSITION TO AMICUS CURIAE BRIEF OF PLANNING AND CONSERVATION LEAGUE was electronically uploaded to the California Supreme Court via the Court's web portal.

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

Executed on July 20, 2016

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