IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

CENTER FOR FOOD SAFETY, et al., Appellants, **v.** **CALIFORNIA DEPARTMENT OF WATER RESOURCES,** Respondent, **ALAMEDA COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT, ZONE 7, et al.**, Real Parties in Interest.	Case No. C086215 Partially consolidated with Case Nos. C078249 and C080572

Sacramento County Superior Court, Case No. 34-2016-80002469
Timothy M. Frawley, Judge

RESPONDENT'S BRIEF

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COURT OF APPEAL THIRD APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER: C086215
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APPELLANT/ PETITIONER: CENTER FOR FOOD SAFETY, et al. RESPONDENT/ REAL PARTY IN INTEREST: California Department of Water Resources	

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GLOSSARY

2010 EIR	DWR's environmental impact report certified in 2010 on the Monterey Plus project
2014 Writ	The writ of mandamus issued by the trial court in *Rosedale* and *Central Delta* directing DWR to revise the 2010 EIR's (1) project description to include the KWB, and (2) further analysis of the potential impacts associated with the transfer, development, use and operation of the KWB as a groundwater banking and recovery project.
AOB	Appellants' Opening Brief
Appellants	Center for Food Safety, Center for Biological Diversity, California Sportfishing Protection Alliance, California Water Impact Network, Central Delta Water Agency, and South Delta Water Agency
Central Delta	Depending on the context, either the *Central Delta Water Agency v. Dept. of Water Resources*, Sacramento County Superior Court Case No. 34-2010-80000561 or Third District Court of Appeal, Case No. C078249
DWR	Department of Water Resources
KWB	Kern Water Bank
Monterey Plus	The CEQA project concerning the Monterey Amendment *plus* the additional project elements required by the *PCL v. DWR* Settlement Agreement
Revised EIR	The 2016 revised EIR on the Monterey Plus project, prepared by DWR to comply with the 2014 Writ
Rosedale	*Rosedale Rio Bravo Water Storage District v. Dept. of Water Resources*, Sacramento County Superior Court Case No. 34-2010-8000703
Section 916	Code of Civil Procedure section 916
SWP	State Water Project

INTRODUCTION

This appeal involves the California Department of Water Resources' (DWR) 2016 revised EIR on the Monterey Plus project (Revised EIR), which addressed the single error the trial court identified in DWR's 2010 EIR on the Monterey Plus project (2010 EIR). The Revised EIR addressed the potential impacts from the Kern Water Bank Authority's use and operation of the Kern Water Bank (KWB) as a groundwater banking facility. After extensive analysis, particularly of the local groundwater impacts, DWR concluded that with implementation of adopted mitigation measures KWB operations will have a less than significant impact on all resource categories except for potential growth-inducing impacts. Those impacts were outside of DWR's control to mitigate, and so DWR adopted a statement of overriding considerations.

Appellants Center for Food Safety, et al. (Appellants) raise four procedural and substantive challenges to the Revised EIR. Appellants first challenge the trial court's jurisdiction to have reviewed the adequacy of the Revised EIR at all because there is a pending appeal challenging the adequacy of parts of the 2010 EIR. That claim fails because CEQA specifically directs the trial court to retain jurisdiction to oversee compliance with its writ of mandate. Code of Civil Procedure section 916's general rule that certain post-judgment proceedings are automatically stayed pending appeal does not compel otherwise.

Appellants next assert that the Revised EIR did not fully address KWB's potential contribution to the statewide phenomenon of farmers increasingly choosing to convert their fields from lower-value row crops to higher-value tree crops, and did not describe the impact on Delta water resources from such crop conversion. The Revised EIR described how crop conversion was occurring in the relevant area and elsewhere throughout the state and also evaluated whether the KWB caused that crop conversion.

DWR concluded that the KWB did not cause crop conversion, but that it along with other groundwater banks in the San Joaquin Valley may have contributed to that phenomenon. DWR therefore analyzed crop conversion's potential impacts on the environment, including the potential for increased pumping of water from the Delta. DWR concluded that crop conversion would not cause a significant impact on the Delta because DWR already pumps as much water from the Delta as hydrological and regulatory conditions allow with or without the KWB, and that DWR already mitigates impacts to the Delta. The trial court previously ruled (in Appellants' prior CEQA challenge to the 2010 EIR) that DWR's conclusions with regard to crop conversion are supported by substantial evidence, and should therefore be affirmed.

Third, Appellants contend, as they did in their challenge to the 2010 EIR, that the Revised EIR should have included another version of the no project alternative that would have assumed little or no delivery of surplus water pursuant to Article 21 of the long-term water supply contracts between DWR and the 29 SWP contractors. Appellants already raised this argument during the 2010 EIR litigation, and the trial court rejected it by concluding that the 2010 EIR satisfied CEQA by disclosing the potential impacts of operating the SWP pursuant to Appellants' interpretation of former Article 21(g). Appellants' renewed challenge on this issue must be rejected, as there was no new information that required revising the 2010 EIR's discussion of Appellants' proposed no project alternative scenario.

Finally, Appellants contend that DWR's CEQA decision in 2016 regarding KWB operations violated CEQA as somehow having been made before DWR certified the Revised EIR. That claim fails because DWR made a decision regarding KWB's operations only after completing the Revised EIR, which is specifically what the 2014 Writ required and which is consistent with CEQA's remedy provisions.

The trial court's judgment upholding the Revised EIR should be affirmed.

STATEMENT OF FACTS

This is the fifth appeal in the past 20 years arising from DWR's amendment, known as the Monterey Amendment, to the long-term water supply contracts between DWR and 29 local public agencies governing the terms of the delivery of water from the State Water Project (SWP).[1] DWR does not here repeat the full history of the 1994 Monterey Agreement and the subsequent Monterey Amendments, the 2000 litigation challenging the original EIR, or the litigation challenging DWR's 2010 EIR on the Monterey Plus project. That history is fully set forth in DWR's Respondent's Brief filed in *Central Delta Water Agency v. DWR*, Third District Court of Appeal, Case No. C078249, which is partially consolidated with this appeal for purposes of oral argument and decision. But because the Revised EIR involves the operation of a groundwater bank in Kern County, DWR briefly reminds the court of some of the issues particularly germane to the Monterey Amendment's application to Kern County, including the transfer of land that ultimately became the Kern Water Bank. DWR then summarizes the key events of the prior litigation leading to the preparation of the Revised EIR, and the trial court proceedings challenging the Revised EIR.

I. AGRICULTURAL SWP CONTRACTORS' CONCERNS LEADING TO THE MONTEREY AGREEMENT AND MONTEREY AMENDMENT

The Monterey Amendment was the product of mediated negotiations in 1994 to resolve many issues confronting agricultural and urban

[1] Two SWP contractors—Plumas County Flood Control and Water Conservation District, and Empire West Side Irrigation District—have not executed the Monterey Amendments. (RAR 2718.)

contractors. (RAR 2717.)[2] One important motivation for SWP contractors, including agricultural contractors, for entering into the Monterey Amendment was to smooth out the peaks and valleys of SWP water deliveries to avoid having little or no water deliveries in dry years. (RAR 2716-2717.) To that end, the Monterey Amendment contained various provisions to help ensure that water deliveries would be regularized in both wet and dry years. These included the elimination of Article 18(b)'s ag-first shortage provisions which provided that agricultural contractors would have their deliveries curtailed before urban contractors in dry years, a new provision allowing contractors to store SWP water outside their service area during wet years without DWR's prior approval, a new provision allowing contractors to more flexibly use water and storage space in SWP reservoirs, and the transfer of 20,000 acres of land in Kern County to local interests for the potential development of a groundwater bank where water could be stored in wet years for extraction in dry years. (RAR 2727-2730.) Agricultural contractors believed that these and other provisions would help avoid the pre-Monterey Amendment's harsh consequences in dry years such as 1990, 1991, and 1992 when agricultural contractors received little or no SWP water, but still were obligated to repay tens of millions to DWR for the SWP. (RAR 2716.)[3]

After the original EIR on the Monterey Agreement was decertified by this court in *Planning and Conservation League v. DWR* (2000) 83 Cal.App.4th 892 (*PCL v. DWR*), the plaintiffs to that case, DWR, and SWP contractor representatives engaged in extensive mediation with Judge

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[2] RAR is the bates number prefix for documents in the Revised EIR's Administrative Record.

[3] Urban SWP contractors also gave up rights and obtained benefits from the Monterey Amendments, and the parties agreed that it was a package deal of negotiated concessions. (RAR 2723-2724, 4878.)

Weinstein which led to a comprehensive Settlement Agreement in 2003. (RAR 2718, 3991-4073.) Among other terms, the parties agreed that DWR could continue to operate the SWP pursuant to the Monterey Amendment while it prepared a new EIR analyzing the Monterey Amendment and the Settlement Agreement (the Monterey Plus Project). (RAR 4008, 4068.) Similarly, the parties agreed that the Kern Water Bank Authority "may continue to operate and administer the KWB Lands including the water bank… ." (RAR 4021.) The *PCL v. DWR* parties' Settlement Agreement was incorporated into and effectuated by a trial court order issued pursuant to CEQA's remedy provisions in Public Resources Code section 21168.9. (RAR 4066-4071.)

II. THE MONTEREY PLUS EIR AND CEQA LITIGATION CONCERNING ITS ADEQUACY

A. The 2007 Monterey Plus Draft EIR

The 2007 Monterey Plus draft EIR analyzed the environmental impacts of all aspects of the Monterey Plus project, including the transfer of land in Kern County for the development of a locally-operated groundwater banking facility. (RAR 2931-2933, 4077-4147.) Because the Monterey Amendment had been in effect since about 1995, DWR was able to use historical data (1996-2003) of the project's actual environmental impacts to inform its analysis of potential future impacts. (*Ibid*.) The 2007 draft Monterey Plus EIR concluded that project facilitated new groundwater banks in Kern County which historically had a net-positive effect on groundwater levels by facilitating the recharge of about 616,000 acre feet of additional water which raised groundwater levels by about 6 feet. (RAR 2931-2932.) DWR also concluded that groundwater bank operations in the future would continue to have a net positive impact on local groundwater for the same reasons. (RAR 2932-2933.)

B. Litigation Over the 2010 Monterey Plus Final EIR

DWR certified the final 2010 EIR in May 2010. Two lawsuits were filed challenging it. One was filed by Rosedale Rio-Bravo Water Storage District, which operates a groundwater bank immediately to the north of the KWB, along with another water storage district to the west of the KWB (together, Rosedale). Rosedale claimed that DWR's analysis of the KWB's future impacts were potentially understated because the historical study period of 1995-2005 was a relatively wet period in which there was more groundwater recharge than extraction activity; Rosedale contended that if the study period had included drier periods, it might have revealed localized impacts associated with groundwater extraction activities. Rosedale also contended that while the KWB may have a net positive groundwater impact overall, it could lower groundwater levels in discrete areas for limited periods of time, which is a potential impact that should have been analyzed further. (CFS AA 10:1437-1454.)[4]

A second lawsuit was filed by Central Delta Water Agency and other petitioners (*Central Delta*), raising 25 different challenges to the 2010 EIR including a challenge to DWR's analysis of the KWB's potential future impacts which relied on extrapolating from data concerning KWB's historical operations during 1995-2005. (CFS AA 10:1395-1397.) This claim shared some similarities with *Rosedale's* claims. (See CFS AA 10:1309.)

The CEQA hearing on the 2010 EIR occurred in 2014. The trial court agreed with the *Rosedale* that DWR's project description should have included the KWB's operations as a reasonably foreseeable element of the project, and with both *Rosedale* and *Central Delta* that the analysis of the

[4] Citations to Appellants' Chronological Appendix are made in the following format: CFS AA [file]:[page].

KWB's potential future impacts was inadequate. (CFS AA 10:1309, 1448-1454.) The trial court otherwise rejected the *Central Delta* petitioners' 24 other claims of CEQA error. (CFS AA 10:1514 ¶ 1, 10:1283-1309.)

The trial court made findings and issued a writ of mandate on November 24, 2014 (the 2014 Writ). The 2014 Writ provided in part:

- Except for its discussion and analysis of KWB impacts, the 2010 EIR complied with CEQA;
- DWR's project decisions remain in place;
- The KWB activities can be and are severed from the remainder of the Project;
- DWR must revise the project description to include the KWB operations, and revise its analysis of the KWB's potential impacts, particularly as to groundwater hydrology and water quality;
- DWR need not revisit portions of the 2010 EIR that the court found satisfied CEQA;
- Kern Water Bank Authority may continue use and operation of the KWB while DWR prepares a new EIR, subject to certain conditions;
- Following certification of a Revised EIR, DWR is to "make a new determination regarding whether to continue the use and operation of the Kern Water Bank by KWBA;"
- DWR must complete the revised EIR and file a return to writ by December 31, 2015, about 13 months later;
- No subsequent challenges to the unrevised portions of the 2010 EIR can be raised in a challenge to the Revised EIR; and
- The trial court will retain jurisdiction until it determines that DWR complied with its writ of mandate.

(CFS AA 10:1513-1516.)[5] DWR elected to accept the trial court's conclusion and did not appeal the 2014 Writ.

The *Central Delta* petitioners appealed the judgment which reflected the trial court's denial of the bulk of their claims. (*Central Delta Water Agency v. DWR*, Third District Court of Appeal Case No. C078249.) Their appeal raised three claims of CEQA error: (1) Did the form of DWR's May 2010 CEQA decision regarding the Monterey Plus project violate CEQA?; (2) Did DWR prejudicially abuse its discretion when it failed to evaluate a fifth no project alternative scenario that would involve little or no delivery of Article 21 water?; and (3) Was the trial court required to void DWR's approvals of the Monterey Amendments? (CFS AA 10:1642-1643.) Notably, the *Central Delta* appellants do not seek this court's review of the portion of the 2014 Writ that required DWR to revise the 2010 EIR to further address the KWB's potential impacts. (*Ibid.*) Nor did the *Central Delta* appellants seek review of the trial court's conclusion that the 2010 EIR adequately addressed crop conversion. (*Ibid.*; CFS AA 10:1307.)

One of the *Central Delta* petitioners, Center for Biological Diversity, filed a motion for attorney's fees based on its asserted contribution to the trial court's issuance of the 2014 Writ requiring DWR to prepare the revised EIR, which the trial court denied. The Center for Biological Diversity appealed the trial court's denial of its attorney's fees motion. (*Center for Biological Diversity v. DWR*, Third District Court of Appeal Case No. C080572.) Those two appeals have been consolidated with this appeal for purposes of oral argument and decision. (See Order, May 4, 2018.)

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[5] The 2014 Writ is attached at the end of this brief for the court's convenience. (Cal. Rules of Court, rule 8.204(d).)

III. DWR COMPLIED WITH THE 2014 WRIT BY PREPARING THE REVISED EIR

Meanwhile, DWR was busily preparing the revised EIR in compliance with the 2014 Writ. A major component of the revised EIR was analysis of the KWB's potential impact to groundwater wells outside of the KWB, which was Rosedale's primary concern with the 2010 EIR. DWR engaged independent technical consultants and substantially revised an existing Kern County groundwater model. DWR used the revised model to help it evaluate potential groundwater impacts from past, existing and future KWB operations under different hydrological conditions (e.g., wet, average and dry years). The groundwater model included 39,300 cells of variable size, as well as 5 horizontal layers extending to more than 400 feet below ground surface and extending over a 476 square mile modeling domain. (RAR 532-534.) The model used 20 years of KWB historical operational data as inputs, and was calibrated by reference to historical observed groundwater levels in various monitoring wells. (*Ibid*.)

The draft Revised EIR also addressed the KWB's potential impact on all the other typical resource categories, such as water quality, air quality, terrestrial species, greenhouse gases, etc. The Revised EIR further examined the KWB's potential impacts on all these resources in conjunction with the operation of the many other groundwater banking projects in Kern County (i.e., cumulative impacts). The entire effort consumed more than 6,500 hours of DWR staff time, plus more than $3 million in outside consultant fees. (CFS AA 1:323.)

In April 2016 DWR released the draft Revised EIR. (RAR 409-1154.) DWR concluded that the KWB's historical operations (1996-2014) did not have a significant impact, but that without mitigation its future operations (2015-2035) may have significant impacts on surface water and groundwater hydrology; surface water and groundwater quality; terrestrial

biological resources; geology, soils, and mineral resources; hazards and hazardous materials; cultural and paleontological resources; energy; climate change; and cumulative impacts related to growth. (RAR 445-447.) The Revised EIR concluded that those impacts would be less than significant after mitigation. The only significant and unavoidable impacts were the KWB's facilitation of potential growth-inducing impacts. (RAR 446-447.)

The draft Revised EIR identified several measures to mitigate the potential impacts to neighboring groundwater wells due to KWB's groundwater extraction which the Kern Water Bank Authority adopted in a Long-Term Operations Plan. Under the Plan, Kern Water Bank Authority will monitor groundwater levels monthly, publicly report groundwater levels, update the model to project future groundwater conditions, use the model to avoid groundwater recovery activities that could adversely impact neighboring well owners, and mitigate defined impacts by adjusting neighboring groundwater wells, provide equivalent water to the affected well owner, or provide interim in-home water for domestic users. (RAR 579-584, 1896-1900, 1983-2012.)

Other potential future impacts will also be mitigated by the Kern Water Bank Authority's binding commitments. For example, the Kern Water Bank Authority adopted a first-of-its-kind groundwater pump management plan to increase the efficiency of its groundwater pumps to reduce its energy use and thereby reduce the greenhouse gas emissions associated with its electricity demand. (RAR 1051-1055, 2011-2012.) Notably, Appellants here do not challenge any aspect of the Revised EIR's evaluation of the KWB's potential groundwater or water quality impacts, nor do they challenge the mitigation measures adopted by DWR or the Kern Water Bank Authority.

DWR solicited written comments on the draft Revised EIR, and conducted two public meetings to receive oral comments. (RAR 2274-

2276.) Appellants submitted oral and written comments. (RAR 2343-2362; 2295-2296, 2392-2398.) None of those comments suggested that DWR should not be preparing the Revised EIR because of the *Central Delta* appeal. (*Ibid*.) The *Rosedale* petitioners did not submit written comments, and did not attend either public hearing. (RAR 2295-2297.) DWR then prepared a final Revised EIR which included "master responses" to certain categories of comments (2301-2332), as well as "specific responses" to each comment submitted, including Appellants' comments. (E.g., RAR 2363-2386, 2406-2409.)

On September 20, 2016, DWR's Director made various CEQA decisions regarding the project. (RAR 5-12 and 13-408.) He certified the Revised EIR (RAR 4, 10), made findings and determinations (RAR 328-367), adopted a mitigation monitoring and report program (RAR 379-404), and, as required by the 2014 Writ, directed "DWR to carry out the proposed project by continuing the use and operation of the KWB by KWBA." (RAR 11.) The Director also adopted a statement of overriding considerations detailing the overall Monterey Plus project's benefits. Among other benefits, the Director found that, "Water supply reliability and equitable allocation among SWP contractors would be facilitated in both wet and dry years, creating significant related statewide benefits for the economy, agriculture, environmental and citizens." (RAR 11, 376.) He also found that the restructuring of SWP allocations would provide benefits by "eliminating potentially economically devastating agricultural first shortage provisions" and that "Statewide water reliability would be improved by providing more flexible water storage capability" which "helps support the State economy and meets the public's need for agricultural and domestic water supplies." (RAR 376.) Finally, DWR's Director found that, "Agricultural water users would face a lower risk of receiving no water supplies in a dry year while still being required to pay

high water contract costs. The lowered risk could keep some lands in agricultural production even in dry years and consequently provide agricultural water users with a baseline of income and reduce their financial loss." (RAR 377.)

IV. JUDICIAL REVIEW OF THE REVISED EIR

On September 28, 2016, DWR filed its return to the 2014 Writ in *Rosedale* and *Central Delta*. (CFS AA 10:1518-1520.) The *Rosedale* petitioners stipulated that the Revised EIR satisfied all of their concerns with the KWB operations, that DWR complied with CEQA, and that the trial court could discharge the 2014 Writ. (CFS AA 10:1561-1565.) The *Central Delta* petitioners did not object to the trial court's discharge of the 2014 Writ, but filed a response indicating that some of them, along with a new entity, Center for Food Safety, intended to file a new CEQA lawsuit challenging the Revised EIR. (CFS AA 10:1549-1550.) That petition was filed by many of the same petitioners from *Central Delta* along with Center for Food Safety. (CFS AA 1:10-33.) For clarity, that petition and case (which is at issue in this appeal) is sometimes referred to as *Center for Food Safety* or *Central Delta III*.

The *Center for Food Safety* petitioners then filed a motion to stay the case they had just filed, arguing that the filing of the *Central Delta* appeal automatically stayed further trial court proceedings pursuant to Code of Civil Procedure section 916. (CFS AA 1:146-156.)[6] Neither the *Central Delta* appellants nor *Rosedale* sought to stay the trial court's post-judgment proceedings in those cases to review DWR's return to the 2014 Writ. DWR and the Kern Water Bank Authority each opposed *Center for Food Safety's*

[6] Appellants also moved for a discretionary stay, which the trial court denied. (CFS AA 5:675.) Appellants do not appeal the trial court's denial of their motion for discretionary stay.

motion. (CFS AA 1:179-198, 276-295.) After a hearing on the motion, the trial court found that section 916 did not automatically stay its review of the Revised EIR. (CFS AA 5:665-675, RT 1-30.) The trial court held, among other things, that the potential reversal of the *Central Delta* judgment would not be irreconcilable with a decision discharging the 2014 Writ, and that it "flatly rejects Petitioners' argument that the purpose of the appeal was to avoid the need for this proceeding." (CFS AA 5:674-675.) Only then did the *Central Delta* appellants file a petition for supersedeas in this court to stay the trial court proceedings regarding the Revised EIR, which this court denied. (*Central Delta*, Third District Court of Appeal Case No. C078249, Order, Aug. 10, 2017.)

All parties in *Rosedale*, *Central Delta*, and *Center for Food Safety* stipulated that the trial court would conduct a single hearing on whether to discharge the 2014 Writ issued in *Rosedale* and *Central Delta* and on the *Center for Food Safety's* new challenge to the Revised EIR. (CFS AA 10:1534-1536.) The court conducted the joint merits hearing on August 18, 2017. (RT 31-101.) On October 2, 2017, the court issued a written decision discharging the 2014 Writ and denying the *Center for Food Safety's* petition challenge to the Revised EIR. (CFS AA 10:1932-1948.) Notice of entry of judgment against the *Center for Food Safety* petitioners was served on October 27, 2017 (CFS AA 11:1974-1979), and this appeal timely ensued (CFS AA 11:1985).

STANDARD OF REVIEW

Appellants' arguments are subject to different standards of review. Appellants' claim that as a matter of law Code of Civil Procedure section 916 automatically stayed the *Center for Food Safety* trial court proceedings is reviewed de novo. (See *Quiles v. Parent* (2017) 10 Cal.App.5th 130, 136 [de novo review of Section 916's application where facts are not in dispute].)

Appellants' challenges to the adequacy of the Revised EIR—including its challenge to the Revised EIR's conclusions regarding crop conversion and its challenge to the no project alternatives—are reviewed for substantial evidence. (Pub. Resources Code, § 21168.5; *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 898.) This is because, guided by the constitutional principle of separation of powers, courts defer to state agencies' substantive factual decisions. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426-427.) "The court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document." (*Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 392.) In reviewing an EIR, the court's focus is on the document's adequacy, completeness, and good faith effort at full disclosure. (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1390; Cal. Code Regs., tit. 14, § 15151 (Guidelines).)[7] A public agency's decision to certify an EIR is presumed correct, and the challenger has the burden of proving otherwise. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 530.)

A lead agency's assumptions underlying its description of the no project alternative are specifically reviewed for substantial evidence. (*North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 673; *Bay Area Citizens v. Assn. of Bay Area Governments* (2016) 248

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[7] The CEQA Guidelines (Guidelines) were promulgated by the California Natural Resources Agency and are found in title 14 of the California Code of Regulations, section 15000 et seq. Courts give the Guidelines great weight in interpreting CEQA, except where they are clearly unauthorized or erroneous. (*Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 241, fn. 4.)

Cal.App.4th 966, 1015.) "'Substantial evidence'" is 'enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.'" (*North Coast Rivers Alliance, supra*, at p. 673, quoting Guidelines, § 15384, subd. (a).) Evidence supporting different conclusions "is unavailing." (*Id.*)

Finally, DWR's compliance with a trial court's chosen CEQA remedy is reviewed for substantial evidence. (Cf. *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 287 [trial court's selection of CEQA remedy is reviewed for substantial evidence].) The trial court's interpretation of its authority under Public Resources Code section 21168.9 is reviewed de novo. (*Golden Gate Land Holdings LLC v. East Bay Regional Park Dist.* (2013) 215 Cal.App.4th 353, 371.)

ARGUMENT

I. THE *CENTRAL DELTA* APPEAL DID NOT AUTOMATICALLY STAY THIS CASE

Appellants' first argument is that Code of Civil Procedure section 916 (Section 916) automatically stayed the trial court's consideration of *Center for Food Safety's* challenge to the Revised EIR because *Central Delta* appealed some of the trial court's decision on the 2010 EIR. (Appellants' Opening Brief (AOB) at pp. 21-34.) That argument fails because appealing the partial *denial* of a CEQA petition for writ of mandate does not stay the trial court's expressly retained jurisdiction to oversee an agency's compliance with a partial *grant* of a CEQA petition for writ of mandate. CEQA provides that a trial court "shall retain jurisdiction" to oversee compliance with its writ of mandate. (Pub. Resources Code, § 21168.9, subd. (b).) Further, the trial court's post-judgment proceedings at issue here are not the type of proceedings that are stayed pursuant to Section 916.

A. The Trial Court Had Jurisdiction to Determine Whether DWR's Revised EIR Complied with the 2014 Writ and CEQA

Section 916 provides that "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby …." (Code Civ. Proc., § 916, subd. (a).) "The purpose of the automatic stay provision of section 916, subdivision (a), is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The [automatic stay] prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189, citations omitted.) Here, the status quo post-*Central Delta* judgment was that all of *Central Delta's* requested relief was denied, except for its request that DWR be ordered to further analyze KWB's potential impacts.

1. Return to writ of mandate proceedings in CEQA cases are not stayed because CEQA specifically grants trial courts retained jurisdiction to oversee compliance with writs of mandate they issue

CEQA provides, "The trial court *shall retain jurisdiction* over the public agency's proceedings by way of a return to the peremptory writ until the court has determined that the public agency has complied with this division [CEQA]." (Pub. Resources Code, § 21168.9, subd. (b), italics added.) The Legislature therefore expressly granted the trial court retained jurisdiction over a lead agency's compliance with a CEQA writ.

Section 916 and Public Resources Code section 21168.9 can be read to point towards different results. As in any statutory interpretation case, the court's first role is to harmonize two statutes when possible. (*Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 634.) Section 916 and Public Resources Code section 21168.9(b) can be harmonized because CEQA's

express grant of retained jurisdiction to the trial court falls within Section 916's exception for "ancillary or collateral matters." (*Varian, supra*, at p. 191, discussed further below.)

However, even if the two statutes cannot be harmonized, then Public Resources Code section 21168.9's express grant of retained jurisdiction controls because "'later enactments supersede earlier ones [citation], and more specific provisions take precedence over more general ones [citation].'" (*Lopez, supra*, 5 Cal.5th at p. 634, quoting *Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310.) Under that test, Public Resources Code section 21168.9's direct that trial courts "shall retain jurisdiction by way of return to the peremptory writ" to "determine[] that the public agency has complied with [CEQA]" must be applied over Section 916's general withdrawal of trial court jurisdiction when a judgment is appealed because it is both a later enactment[8] and more specific than Section 916.

2. Proceedings that are "ancillary or collateral" to the appealed judgment are not stayed

Section 916 does not stay all proceedings that occur after a judgment is entered. Proceedings which are "ancillary or collateral" to a judgment are not stayed. (*Varian, supra*, 35 Cal.4th at p. 191.) A CEQA trial court's consideration of an agency's compliance with a CEQA writ of mandate is just such a proceeding that is not stayed. By its express terms, CEQA

[8] Section 916's predecessor was first enacted in 1851 and its current form was added in 1968 (Stats. 1851, ch. 5, p. 107, § 353, and Stats. 1968, ch. 385, p. 816, § 2), whereas Public Resources Code section 21168.9, subdivision (b) was first enacted in 1984 (Stats. 1984, ch. 1213, § 1). While sections 916 and 21168.9 have both been amended after 1984, none of those amendments altered the potential conflict that existed in 1984. (See Stats. 1993, ch. 1131, § 9 [amending section 21168.9 to ….] and Stats. 1990, ch. 1305, § 8 [amending Section 916 to change statutory citations].)

provides that a trial court retains jurisdiction over return to writ proceedings. In a writ of mandamus proceeding in which some relief is granted and some is denied, a trial court's retained jurisdiction over the relief it granted is ancillary or collateral to an appeal of the relief that it denied.

3. Proceedings that could or would have occurred "regardless of the outcome of the appeal" are not stayed

Certain post-judgment proceedings are also not stayed if they "could or would have occurred regardless of the outcome of the appeal." (*Varian*, supra, at p. 191.) Here, the proceedings to determine if DWR complied with the 2014 Writ would occur regardless of the outcome of the *Central Delta* appeal. DWR chose to not appeal the 2014 Writ, meaning that it was required to comply with its terms and prepare a new analysis of the KWB's potential impacts. Whether or not *Central Delta* prevails in its appeal requiring DWR to perform other analyses or approve the Monterey Plus project differently, DWR would still be required to analyze the KWB's potential impacts. Thus, the trial court's proceedings reviewing the adequacy of the Revised EIR would have occurred regardless of the outcome of the *Central Delta* appeal.

B. Section 916 Did Not Automatically Stay the Trial Court's Consideration of the Revised EIR

The Supreme Court in *Varian* identified various circumstances which, if present, would trigger Section 916's automatic stay of a trial court's post-judgment proceedings. Appellants assert that two circumstances are present here which required the trial court to stay the *Center for Food*

Safety hearing.[9] Neither circumstance exists, for the reasons discussed below.

1. The "very purpose" of the *Central Delta* appeal was not to avoid the need for the *Center for Food Safety* case

Appellants claim that the "very purpose" of the *Central Delta* appeal was to avoid the need for the *Center for Food Safety* case. (AOB at pp. 23-25.) That argument rings hollow. One of the *Central Delta* petitioners' purported purposes in filing their CEQA petition in the first place was to obtain a writ of mandate requiring DWR to further analyze the KWB's potential future impacts in a revised EIR. (CFS AA 10:1395-1397 [*Central Delta* trial court brief], CFS AA 10:1309.) The only portion of the 2014 Writ and subsequent judgment that the *Central Delta* petitioners agree was correct was the trial court's order that DWR further analyze KWB operations. Stated another way, the *Central Delta* appellants did not appeal the judgment to prevent DWR from preparing the Revised EIR; that was some of the very relief they sought at trial.

The category of cases which involve the "very purpose" of an appeal is relatively limited. *Varian* cited one example—a denial of a motion to compel arbitration. (*Varian, supra,* 35 Cal.4th at p. 190.) Plainly, the very purpose of a motion to compel arbitration is to avoid having a trial in the superior court at all. Another example, which was at issue in *Varian*, was whether an appeal of the denial of an anti-SLAAP motion automatically stayed further proceedings. (*Id.* at pp. 186, 193 ["'The point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts

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[9] Appellants also argued below that a stay was required because the *Center for Food Safety* hearing on the Revised EIR would "enforce, modify or vacate" the *Central Delta* judgment. (CFS AA 149-150.) Appellants have abandoned that argument on appeal.

because you exercised your constitutional rights'", quoting *People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1317, italics in original].) DWR is unaware of reported California cases outside of the arbitration and anti-SLAAP context which relied on the "very purpose" prong to hold that a trial court's proceedings were stayed. The trial court "flatly reject[ed] Petitioner's argument that the purpose of the appeal was to avoid the need for" the trial court proceedings to consider the adequacy of the Revised EIR. (CFS AA 5:675.) This court should too.

2. The outcomes of the *Central Delta* appeal and the *Center for Food Safety* case were not potentially irreconcilable

Another instance in which a post-judgment proceeding is stayed is if "the possible outcomes on appeal and the actual or possible results of the [post-judgment] proceedings are irreconcilable." (*Varian, supra*, 35 Cal.4th at p. 190.) Appellants claim that this is true here, because if this court grants the *Central Delta* appellants relief, it is possible that such relief might necessitate further or different analysis of the KWB's impacts. (AOB at pp. 25-28.) The trial court rejected that argument (CFS AA 5:674), and it does not withstand scrutiny.

Appellants first argue that if the *Central Delta* appellate court voids the form of DWR's approval of the Monterey Plus project, that would somehow affect DWR's analysis of the KWB-portion of the project's impacts. (AOB at pp. 23-25.) Appellants do not articulate how a potential finding that the form of DWR's project decision was in error is potentially irreconcilable with a finding that DWR's analysis of the project's impacts was adequate. Should the Court of Appeal in *Central Delta* require DWR to make a CEQA decision in a different form, that direction would not affect or be affected by, and therefore could not be potentially irreconcilable with, DWR's analysis of the project's impacts.

Appellants next argue that if the *Central Delta* appellants prevail on their challenge to the adequacy of DWR's treatment of Article 21(g) as a no project alternative, this holding would be potentially irreconcilable with the *Center for Food Safety* trial court's holding that the Revised EIR complied with CEQA. It is excessively speculative to suggest that a potential change to the no project alternative's definition to include Appellants' interpretation of Article 21(g) would obviate the need for the *Center for Food Safety* appeal. The vast majority of the Revised EIR would remain unchanged even if the Revised EIR's no project alternative discussion had to be expanded to include an additional, fifth no project alternative incorporating Appellants' interpretation of Article 21(g).

C. Appellants' Attempt to Protect the *Central Delta* Appellate Court's Jurisdiction is Moot

Appellants' final argument is that if Section 916 stayed the *Center for Food Safety* trial court proceedings, then the *Center for Food Safety* trial court's judgment is void as to the issues embraced by the *Central Delta* judgment. (AOB at pp. 29-34.) Not so. The purpose of Section 916's automatic stay is to preserve the appellate court's jurisdiction over the subject matter of the appeal by preventing a trial court from taking an action that could infringe on the appellate court's jurisdiction. (*Varian, supra*, 35 Cal.4th at p. 189.) Here, we know that the *Center for Food Safety* trial court did not, in fact, take any action which limits this court's jurisdiction. Indeed, this court's jurisdiction is in fact enhanced, as it now has the project's entire environmental review—the 2010 EIR and the Revised EIR—before it in this partially consolidated proceeding. Appellants' theoretical concerns with preserving the *Central Delta* appellate court's jurisdiction have proven to be just that—theoretical. The court can look past Appellants' theoretical concerns that we now know did

not come to pass, and decline to rule on Appellants' Section 916 argument as moot given the passage of time.

Simply stated, Appellants' proposed path forward guarantees further cost and delay. After the trial court ordered DWR to prepare the Revised EIR in November 2014, Appellants sat on their hands while DWR spent millions of dollars and thousands of staff hours preparing it. (CFS AA 1:323.) Appellants never suggested during the administrative process that DWR should halt work until the *Central Delta* appeal was decided so that the Revised EIR could benefit from any further direction that DWR might receive from this court. Indeed, Appellants argued to the trial court that DWR should prepare it faster. (CFS AA 1:300-301 ¶ 7 [Appellants opposed DWR's request for additional time to prepare Revised EIR].) Appellants waited until January 2017, more than two years after the 2014 Writ was issued, before asking the trial court to stay further proceedings pending the outcome of the *Central Delta* appeal. (CFS AA 1:146.)

Despite their delay in seeking a stay, Appellants would have this court void the *Center for Food Safety* trial court's judgment on the Revised EIR, and hold the adequacy of the Revised EIR in suspension until all appeals as to the adequacy of the Monterey Plus EIR are resolved. Should this court affirm the adequacy of the Monterey Plus EIR, Appellants would have this court nonetheless order the parties to return to the trial court to reargue the adequacy of the Revised EIR. Judicial economy would not be well served by pretending that the *Center for Food Safety* hearing did not happen, nor would judicial economy be served by requiring this court to hear, in a later separate appeal, the adequacy of the Revised EIR. Indeed, the very reason DWR requested that the *Central Delta* and *Center for Food Safety* appeals be consolidated was to avoid a multiplicity of judicial proceeding on the same CEQA project. That the court granted DWR's motion, over Appellants' objections, does, in fact, avoid this multiplicity.

Further, while the *Center for Food Safety* petitioners moved the trial court to stay its consideration of their petition, the *Central Delta* and *Rosedale* petitioners did not similarly move the trial court to stay its consideration of the adequacy of DWR's return to the 2014 Writ. (E.g., CFS AA 1:148 [*Center for Food Safety* petitioners seeking stay "in the above entitled case"].) The trial court simultaneously considered whether to discharge the 2014 Writ issued in *Central Delta* and *Rosedale* and whether to grant the *Center for Food Safety's* petition. (CFS AA 1:166 ¶ 1.) Had the trial court granted *Center for Food Safety's* petition to stay that case, that order would not have also stayed the trial court's consideration of the return to writ proceedings in *Central Delta* and *Rosedale*. The trial court's ultimate decision to discharge the 2014 Writ because DWR complied with the 2014 Writ and CEQA would have been and was tantamount to a decision denying the petition for writ of mandamus in *Center for Food Safety*. Staying the *Center for Food Safety* petition would therefore have not stayed the trial court's return to writ proceedings in *Central Delta* and *Rosedale*, and the trial court's ruling in that proceeding would collaterally estop the *Center for Food Safety* petitioners from later raising the same challenges to the Revised EIR.

II. DWR FULLY ANALYZED KWB'S CONTRIBUTION TO CROP CONVERSION AND ITS POSSIBLE IMPACT ON DELTA WATER SUPPLIES

Appellants' second argument is that DWR failed to adequately address the KWB operation's potential facilitation of the conversion of annual crops to so-called permanent crops (also referred to as the conversion of row crops to tree crops), and the possible environmental impacts of that crop conversion on water resources in the Delta. (AOB at

pp. 34-43.)[10] DWR concluded in the Revised EIR that crop conversion occurs independently of the KWB's existence, but that the KWB may contribute to the phenomenon. DWR therefore analyzed the potential environmental impacts that crop conversion may have on various environmental resources individually and cumulatively with other local groundwater banks, and concluded that those impacts were less than significant. DWR also concluded that crop conversion will not have a significant impact in the Delta by driving increased demand for DWR to pump more water from the Delta because SWP contractors already request as much SWP water as DWR is able to pump, with or without the KWB. To the extent that the KWB does cause or contribute to additional pumping from the Delta, DWR already adopted mitigation measures in the 2010 EIR to address that potential impact, which the trial court found satisfied CEQA. The *Center for Food Safety* trial court held that there was no new information that was not disclosed in the Revised EIR. (CFS AA 10:1942-1944.) DWR's analysis and conclusions must be affirmed as they are supported by substantial evidence.

A. The Revised EIR's Discussion and Analysis of Crop Conversion is Supported by Substantial Evidence

1. The Revised EIR described the existence of crop conversion

The 2010 EIR analyzed and disclosed the Monterey Plus project's overall potential to contribute to the statewide phenomenon of farmers

[10] Calling tree crops "permanent" is somewhat of a misnomer, as those crops too can be removed as market forces dictate or water resources allow. For example, in 2016, a reported 10,000 acres of almond trees were removed from production in western Kern County due to "limited water resources and market factors." (RAR 2308, 34214 [describing 37 percent price drop in almonds, as well as drought impacts].) For ease of reading, DWR uses Appellants' nomenclature in this brief.

converting their fields from annual row crops like cotton or alfalfa to so-called permanent crops such as nut trees, vines, and citrus. The 2010 EIR noted that this phenomenon began no later than the 1980's, and continued into the 1990's and 2000's. (RAR 3107-3111.) DWR disclosed that "[b]ased on current trends, it is expected that more farmers in the SWP service area would choose to replace annual crops with permanent crops." (RAR 2598.)

The Revised EIR built on this analysis. In the draft Revised EIR chapter on Agricultural Resources, DWR disclosed that from 1996 to 2014 the total number of acres in crop production has grown by 1.2 percent in Kern County, and by 3.7 percent in the Kern Water Bank Authority members' service area. (RAR 747.) DWR also disclosed that the number of acres devoted to permanent crops in Kern County and in the Kern Water Bank Authority members' service area increased between 54 and 239 percent, and the number of acres devoted to annual crops decreased between 39 and 89 percent. (*Id*.) The Revised EIR reported that in the Kern Water Bank Authority members' service area, about 110,000 more acres of nuts, citrus and fruit trees were in cultivation in 2015 as compared to 1995. (*Id*.) Plainly, the Revised EIR disclosed that the total acreage on which trees were planted had increased substantially. The Revised EIR noted that these changes in agricultural practices within the Kern Water Bank Authority members' service area were consistent with changes seen in the rest of Kern County (which saw about 275,000 more acres of nuts, citrus and fruit in cultivation in 2014 as compared to 1996). (RAR 747, 753-754.) The trend in Kern County is seen statewide. (RAR 2304-2307 [graphs showing consistent increase in almond acreage in eight counties throughout San Joaquin Valley].) DWR concluded that it is possible that this trend of crop conversion may continue in the future. (*Id*.) DWR's Director made findings consistent with the above analysis. (RAR 333-334.)

2. The Revised EIR analyzed the multiple causes of crop conversion

DWR's 2010 EIR also analyzed the potential causes of crop conversion that has occurred over the past 40 years. The 2010 EIR discussed that the Monterey Plus project as a whole increased the reliability of agricultural contractors' SWP water supply, which potentially contributed to crop conversion. (E.g., RAR 2598.) Indeed, increasing the reliability of SWP water supplies was one of the Monterey Plus project's objectives. (RAR 2723.) Reliability for agricultural contractors was increased in a number of ways, including by deleting Article 18's urban-preference provision in times of temporary shortage. (RAR 2707-2708.)

The Revised EIR built on the 2010 EIR's conclusions regarding the causes of crop conversion. DWR reiterated its recognition that there has been a shift from annual crops to permanent crops in Kern County, throughout the San Joaquin Valley, and statewide. (RAR 2304.) DWR noted that two factors appeared primarily responsible for the shift. First, California's farmers respond to increases in world commodity prices for permanent crops. (RAR 2304-2307.) As nut prices spiked, so too did increased almond acreage. (RAR 2307, Figure 4-3.) This shows that farmers' cropping decisions correlate with market signals. Second, state policy has encouraged increased agricultural irrigation efficiency, which requires more capital investment to achieve. Efficiency is largely achieved by transitioning from less expensive (but also less water efficient) flood and furrow irrigation, to more expensive (and more water efficient) microdrip irrigation. The capital and operational costs of installing water-efficient microdrip irrigation systems create incentives for farmers to grow higher value crops so that they can recover their investment. (RAR 2307.)

DWR also discussed how this shift is not unique to farmland within Kern Water Bank Authority members' service area, but instead is

ubiquitous throughout California's agricultural communities, whether or not they have access to water supplied by the KWB or any other groundwater bank. (RAR 2308.) In dry years when surface water is relatively unavailable, there is a correlative increase in pumping groundwater. (RAR 2309.) This groundwater pumping is independent of the KWB's existence. Overall, DWR concluded that crop conversion would occur with or without the KWB.

The above discussion discloses the evidence which supports DWR's conclusion that crop conversion in the Kern Water Bank Authority members' service area was caused by market forces independent of the KWB. (RAR 333-334.) Such evidence is substantial because it is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, § 15384, subd. (a); *South County Citizens for Smart Growth v. County of Nevada* (2013) 221 Cal.App.4th 316, 325–326.)

3. Appellants' challenges to the substantial evidence supporting DWR's conclusions are unavailing

Appellants made three arguments challenging DWR's conclusion that crop conversion would occur with or without the KWB, none of which survive scrutiny.

a. Appellants are wrong in arguing that a lead agency must "disprove" a petitioner's contentions

First, Appellants assert that DWR "failed to disprove" Appellants' proffered evidence that the KWB caused crop conversion in its members' service area. (AOB at pp. 37-38.) Appellants misapprehend a lead agency's responsibilities under CEQA. A lead agency does not need to "disprove" a commenter's theory; all CEQA requires is that the lead

agency's conclusions be supported by substantial evidence. (E.g., *Residents Against Specific Plan 380 v. County of Riverside* (2017) 9 Cal.App.5th 941, 966–967 [affirming lead agency's conclusion which was contrary to petitioner's].) As outlined above, DWR's conclusions regarding the KWB's role in causing crop conversion are supported by substantial evidence. Appellants' evidence and argument to the contrary are of no moment.

b. Appellants waived their argument that westside farmers could not grow permanent crops without the KWB, but DWR's conclusion is nonetheless supported by substantial evidence

Second, Appellants claim that the record does not contain substantial evidence to support DWR's conclusion that sources of water other than from the KWB could support permanent crops in Kern Water Bank Authority members' service area, including on the westside of the Central Valley. (AOB at pp. 38-39.)[11] That argument fails procedurally and substantively. Procedurally, Appellants did not exhaust their administrative remedies with respect to that contention. Nowhere in Appellants' 20-page comment letter, or in any other comment letter, did anyone suggest that westside farmers could not grow permanent crops without the KWB. (See RAR 2343-2363.) Failure to raise the "exact issue" in a comment letter precludes a court from reviewing that issue. (*Hagopian v. State of California* (2014) 223 Cal.App.4th 349, 371 ["an interested party must present the exact issue to the administrative agency that is later asserted during litigation or on appeal. [citation] General objections, generalized references or unelaborated comments will not suffice"].) Appellants'

[11] The "westside" typically refers to land within the Lost Hills Water District, Berrenda Mesa Water District, and Belridge Water Storage District.

assertion that the record does not adequately rebut their argument—made for the first time to the trial court—must be rejected.

Regardless, Appellants' argument fails substantively because there is substantial evidence in the record to support DWR's determination that Kern Water Bank Authority members have access to water other than water stored in the KWB to support planting permanent crops. This includes the fact that many westside farmers are within the service area of SWP contractors who can supply them directly with SWP water or with water stored in other local groundwater banks. (RAR 1126 [Belridge, Berrenda Mesa and Lost Hills have contracts for 333,218 acre feet of Table A water]; 4120.) The majority of the 2.3 million acre feet of groundwater banked in Kern County from 1995-2000 was unrelated to the Monterey Amendment. (RAR 4128.) The record also demonstrates that westside districts have some access to local groundwater, as well as access to groundwater stored in other groundwater banking projects. (RAR 1093, 1202-1204; RT at pp. 74-78.) Finally, that westside farmers were not reliant on the existence of the KWB to decide to grow permanent crops is perhaps most plainly demonstrated by the fact that they had already converted to permanent crops long before the 1995 Monterey Amendment and development of the KWB. For example, in 1991, almost half of the acreage in Belridge, 80 percent of Lost Hills, and 100 percent of Berrenda Mesa were devoted to growing permanent crops. (RAR 3113.) This demonstrates that farmers within these westside areas already decided to grow permanent crops years before the KWB was ever developed.

c. DWR's conclusion that Kern County Water Agency members could store SWP water in other local groundwater banks is supported by substantial evidence

Third, Appellants claim that DWR's conclusion that there was capacity in other Kern County groundwater banks to absorb the amount of

water stored in the KWB if the KWB had not been built is not supported by substantial evidence. (AOB at pp. 39-40.) That claim fails. DWR's conclusion is documented in chapter VII of Appendix E of the 2010 EIR. There, DWR compared "the amount of SWP water recharged in KWB [] compared to the unused absorptive capacities available in other existing recharge projects in Kern County to which the KWBA had access." (RAR 4120.) The study specifically examined the monthly totals of SWP water recharged in the KWB from 1995-2004, and surveyed other local groundwater storage projects to determine if they had capacity in each of those months to take that quantity of water instead. (*Id*.) The study found that there was such additional capacity in every month. (RAR 4120-4124.) Thus, DWR concluded that if the KWB did not exist, those contractors would nonetheless have likely requested the same amount of SWP water and stored that water in other groundwater storage banks. As such, that same quantity of water would be available to Kern County farmers engaged in crop conversion, whether or not it came out of the KWB or another groundwater bank.

Appellants claim that this study is not substantial evidence because the *Central Delta* trial court found that *other* chapters of Appendix E did not support the *different* conclusion that the KWB would not adversely affect local groundwater levels. (AOB at p. 39.) That is an apples-and-oranges assertion. The reason the *Central Delta* trial court discounted DWR's 2010 conclusion that the KWB would not adversely affect local groundwater was that the study period (1996-2003) was a particularly wet period. The court reasoned that extrapolating increased recharge activities and higher groundwater levels in wet years might overstate the positive impacts to local groundwater conditions compared to a drier period. (CFS AA 10:1450.) But the opposite inference can be reached as to groundwater storage capacity during dry years. DWR reasonably concluded that other

Kern County groundwater banks would have capacity to store the water of the Kern Water Bank Authority's members. Simply put, people store groundwater in wet years; if 1995-2005 was particularly wet, that would mean that this is the most active period for use of other groundwater storage banks. If there was ample storage capacity during the comparatively wet years of 1995-2005, then the logical conclusion is that those groundwater storage banks would also have capacity in relatively dry years (when entities do not typically seek to store water because they use all available water to satisfy current demands).

In sum, there is, at best, disagreement as to what conclusions can be drawn from the record as to whether the KWB caused crop conversion or whether crop conversion in the Kern Water Bank Authority members' service area would occur without the KWB. But disagreements about the conclusions a lead agency reached from evidence in the record is not a basis for overturning that conclusion. "[I]f there are conflicts in the evidence, their resolution is for the agency." (*Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 350–351, quoting *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317; see also *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 195, quoting *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 531 ["In reviewing for substantial evidence, the reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,' for, on factual questions, our task 'is not to weigh conflicting evidence and determine who has the better argument'"].) Because there is substantial evidence to support DWR's conclusion that the crop conversion would occur in the Kern Water Bank Authority members' service area with or without the existence of the KWB, Appellants' challenge to it must be

rejected. In any event, as discussed below, the Revised EIR evaluated the potential impacts of crop conversion.

B. The Revised EIR's Discussion and Analysis of Crop Conversion's Potential Environmental Impacts is Supported by Substantial Evidence

1. The Revised EIR discussed the potential environmental impacts associated with crop conversion

Although DWR concluded that the KWB did not individually cause crop conversion in the Kern Water Bank Authority members' service area, DWR also concluded that the KWB in combination with other groundwater banking projects could contribute to crop conversion, and so analyzed the potential environmental impacts of crop conversion on various individual resources in the Revised EIR's Cumulative Impacts chapter. (See, e.g., RAR 993-994 [terrestrial biological resources], RAR 995-996 [visual resources], RAR 997-998 [agricultural resources], RAR 1000-1001 [air quality], RAR 1003 [soil erosion], RAR 1005 [land use patterns], RAR 1007 [noise], RAR 1009 [cultural and paleontological resources], and RAR 1010-1011 [traffic].)[12] In sum, DWR concluded that the cumulative environmental impacts from crop conversion on each of these

[12] DWR performed a similar analysis in the 2010 EIR. (See, e.g., RAR 3051-3052 (terrestrial biological impacts); 3081, 3089 (visual resources); 3107-3015 (agricultural resources); 3125-3126 (air quality); 3145-3146 (soil erosion); 3187-3188 (land use planning); 3210-3213 (noise); 3239 (cultural and paleontological resources); and 3269 (traffic). DWR concluded that each of these potential impacts was less than significant. (*Id*.) DWR also examined whether there were any cumulative impacts associated with crop conversion that the Monterey Plus project as a whole could cause for each of these resource categories. (E.g., RAR 3352-3353, 3359-3363, 3366, 3368-3370, 3375-3376.) As a general matter, DWR concluded that such potentially cumulative impacts were also less than significant. (*Id*.)

environmental resources would be less than significant. (*Id*.) And this conclusion was based on substantial evidence in the record.

2. Appellants' claim that DWR failed to adequately address crop conversion's potential impacts on water resources fails

Appellants' comment letter suggested that crop conversion could have an adverse impact on water resources in the Sacramento-San Joaquin Delta by fueling a demand for the delivery of more SWP water than would otherwise be pumped from the Delta. (E.g., RAR 2343-2362, esp. 2352 ["the unfettered operation of the KWB hardens demand for Delta water pumping"].)[13] DWR responded to the comment by directing Appellants to DWR's Master Response 2: Delta Impacts. (RAR 2372-2373, 2308-2315, esp. 2312-2315.) In that master response, DWR described that the 2010 EIR concluded that agricultural SWP contractors were already "requesting their full Table A supplies prior to the Monterey Amendment" and that "[t]here is no reason to expect that [they] would have requested less than full Table A supplies after the Monterey Amendment, even if there was no KWB." (RAR 2312.) The SWP is generally supply-limited, meaning that SWP contractors' demand for SWP water usually outstrips DWR's ability to meet those requests, because of hydrological and regulatory constraints. (RAR 2312; see also RAR 5477-5480.) In sum, agricultural SWP

[13] Appellants do not challenge the major conclusion of the Revised EIR—and the main reason that the *Central Delta* and *Rosedale* court required it to be prepared in the first place—that the KWB's individual and cumulative potentially significant impact of depleting local groundwater supplies would be mitigated to a less-than-significant level. (RAR 334-336 [Impacts 7.1-2 and 10.1-24].) The entity with the most direct interest in local groundwater levels—the neighboring Rosedale Rio Bravo Water Storage District—concluded that the Revised EIR fully addressed its concerns with how KWB's operations might adversely impact local groundwater levels and the mitigation measures to address any such impacts. (CFS AA 10:1561-1565, esp. 1563 lines 14-19.)

contractors are likely to continue requesting all the SWP water that DWR can deliver, with or without the existence of the KWB. (RAR 2312-2313.)

Furthermore, even if the KWB's existence contributes to SWP contractors' demand for full deliveries of SWP water pumped from the Delta, the 2010 EIR fully disclosed the potential impacts on DWR's pumping from the Delta and imposed mitigation measures to address those impacts. The *Central Delta* trial court found that the analysis and mitigation measures satisfied CEQA. (CFA AA 10:1305; RAR 2314.) There was no new information presented during the Revised EIR process that required DWR to revisit that analysis or the previously adopted mitigation measures to mitigate the SWP's potential impacts in the Delta. Therefore, consistent with the 2014 Writ, DWR did not do so. (*Id.;* CFS AA 10:1514-1515 ¶ 5 [DWR may "recertify a revised Monterey Plus EIR without reopening the non-defective portions of the Monterey Plus EIR"].)

Because there was no new information about KWB operations that could cause new or different impacts to the Delta that were not already addressed and litigated in the *Central Delta* litigation over the 2010 EIR, Appellants' attempt to relitigate those issues here is barred. (*Federation of Hillside and Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1204; *Silverado Modjeska Recreation & Parks Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 298.) The 2014 Writ specifically prohibits Appellants from raising issues that already were or could have been raised in a challenge to the 2010 EIR. (CFS AA 10:1514-1515 ¶ 5 ["Upon recertification, only those portions of the Revised Monterey Plus EIR that are new or changed shall be subject to challenge under CEQA by petitioners or other interested parties"]; 10:1516 ¶ 8 ["Only those portions of the revised Monterey Plus EIR that are new or changed shall be subject to challenge under CEQA by petitioners or other interested parties. No other challenges that were raised or could have been raised with respect to

the Monterey Plus EIR may be raised in any challenge to the revised Monterey Plus EIR"].)

In sum, DWR's conclusion that the existence of the KWB would not have an adverse impact on Delta water supplies is supported by substantial evidence.

III. DWR WAS NOT REQUIRED TO ADD A FIFTH VARIANT OF THE NO PROJECT ALTERNATIVE TO REFLECT APPELLANTS' INTERPRETATION OF ARTICLE 21(g)(1)

Appellants' third argument is that when DWR prepared the Revised EIR to address the KWB's potential impacts, DWR was required to compare those impacts against a new, fifth variant of the no project alternative which incorporates Appellants' interpretation of Article 21(g) concerning the delivery of surplus water. (AOB at pp. 44-56.) Appellants' argument fails for at least two reasons.

First, Appellants do nothing more than to seek to relitigate the adequacy of the 2010 EIR, which CEQA and the *Central Delta* trial court expressly prohibited. Second, the *Central Delta* trial court was correct that the 2010 EIR describes and analyzes the potential environmental impacts of operating the SWP as Appellants' contend DWR might do if it operated the SWP pursuant to their interpretation of the former Article 21(g)—reducing or eliminating deliveries of surplus water to farmers who will use that water to support permanent crops. Even if Appellants were correct that there is additional evidence in 2016 that farmers in Kern Water Bank Authority's service area use SWP water to irrigate tree crops, that does not change the fact that the 2010 EIR already disclosed the impacts of operating the SWP pursuant to Appellants' interpretation of former Article 21(g).

A. The *Central Delta* Trial Court Found DWR Adequately Discussed Appellants' Proposed Interpretation of Article 21(g) as a Potential No Project Alternative

An EIR is required to include alternatives to a proposed project, as well as a "no project" alternative. (Guidelines, § 15126.6.) "The purpose of describing and analyzing a no project alternative is to allow decisionmakers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project." (*Id.*, § 15126.6, subd. (e)(1).) When a project is a revision of an ongoing operation, "the 'no project' alternative will be the continuation of the existing … operation into the future." (*Id.*, § 15126.6, subd. (e)(3)(A); *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 253 ["where the EIR is reviewing an existing operation or changes to that operation, the no project alternative is the existing operation"].)

In the 2007 Monterey Plus draft EIR, DWR determined that there was legitimate debate as to what it would mean for DWR to operate the SWP pursuant to the pre-Monterey Amendment version of the long-term water supply contracts. DWR therefore included four reasonably plausible variations of a no project alternative. (RAR 3397-3398.) At issue here is whether operating the SWP pursuant to the pre-Monterey Amendment Article 21(g) would result in DWR limiting or eliminating deliveries of surplus water to SWP contractors if such surplus water would "tend to encourage the development of an economy within the area served by such contractor which would be dependent upon the *sustained delivery* of water in excess of the contractor's maximum entitlement." (RAR 2708-2709, italics added.)[14] DWR did not include that interpretation of Article 21(g) in

[14] The Monterey Amendment eliminated that portion of Article 21(g) because it had become obsolete. (RAR 2727, 5448-5449; DWR's Respondent's Brief, *Central Delta* appeal, at pp. 40-43.)

one of its four no project alternative variants, finding that it was not an existing condition nor one reasonably expected to occur. (RAR 5300-5303.) DWR nonetheless performed an equivalent analysis of that operating scenario in the 2010 EIR for purposes of full disclosure to the public and decisionmakers. (RAR 5303-5308.)

In the 2010 EIR, DWR described how interpreting Article 21(g) to limit or preclude delivery of surplus water to SWP contractors who would deliver it to farmers to use as irrigation for permanent crops would lead to more water stored in Oroville and San Luis Reservoirs. This would likely increase DWR's ability to deliver water during times of drought, and reduce water quality impacts in San Luis Reservoir associated with low storage volumes. (RAR 5306-5307.) DWR would also pump less water from the Delta at the Banks Pumping Plant in most years, which would lead to lower fish mortality attributable to SWP-pumping. (*Id*.) DWR also described how any artificial decrease in pumping due to this interpretation of Article 21(g) would likely be offset by a corresponding increase in pumping from the Delta by the federal Central Valley Project, which would not be similarly constrained as it is also supply-limited. (RAR 5307-5308.) Any adverse impacts to the Delta avoided by DWR's reduced pumping for SWP purposes would be entirely offset by the Central Valley Project's corresponding increased pumping. Of most relevance here, the 2010 EIR disclosed that if DWR interpreted Article 21(g) as Appellants urge, DWR would deliver less water to agricultural SWP contractors, which could result in "crop idling" and the "abandonment of annual and permanent crops." (*Id*.)[15]

[15] Note that this analysis applies only to surplus water, which is water that was in excess of supplies needed for Table A deliveries, reservoir (continued…)

The *Central Delta* petitioners contended that this analysis did not substitute for DWR including it as a fifth variation on a no project alternative. (CFS AA 10:1303-1304.) The trial court concluded that DWR's inclusion of this analysis in a different part of the 2010 EIR was adequate and fulfilled CEQA's disclosure and informational purposes. (CFS AA 10:1304.) The trial court found that DWR's discussion "provides additional information to the public and to decisionmakers on the effect of not delivering water to SWP contractors that would otherwise be available under Article 21. … The EIR's analysis of this scenario is not perfect, but it is sufficient to make an informed decision on the Project, particularly where, as here, all of the parties to the SWP contracts believe such interpretation is not reasonable or enforceable." (*Id*.) Because the 2010 EIR provided sufficient information to the public and decisionmakers, any error in not labeling that analysis as a fifth no project alternative scenario was not prejudicial.[16] (Pub. Resources Code, § 21005, subd. (b); Guidelines, § 15151; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712.)

Because the trial court held that DWR's discussion of Article 21(g) in the 2010 EIR was adequate, Appellants cannot relitigate it here. "After considering the petitioner's challenges to an EIR or other agency action and rendering a final judgment and peremptory writ of mandate, a trial court evaluating a return to the writ may not consider any newly asserted challenges arising from the same material facts in existence at the time of the judgment. To do so would undermine the finality of the judgment."

(…continued)
storage, regulatory requirements, and other needs; and that could be scheduled in advance of its delivery. (RAR 2673.)

[16] See DWR's Respondent's Brief filed in the *Central Delta* appeal, at pages 43-45.

(*Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 480.) Consistent with case law, the trial court's 2014 Writ expressly disavowed that its retained jurisdiction extended to reevaluating issues that were or could have been litigated in the 2010 EIR case. (CFS AA 10:1515.) The adequacy of DWR's discussion of Article 21(g) was already fully litigated, and was beyond the scope of the trial court's authority to litigate again.

B. No New Information in the Revised EIR Required Additional Discussion of This Potential No Project Alternative

In *Center for Food Safety*, Appellants argued that the Revised EIR disclosed additional evidence that farmers in the Kern Water Bank Authority members' service area relied on DWR's delivery of surplus water pursuant to Article 21(g) to support permanent crops. (CFS AA 9:1254-1258.) Appellants claim that it is even more likely that if DWR did not adopt the Monterey Amendment but instead operated the SWP pursuant to Appellants' proposed interpretation of Article 21(g), then DWR would likely deliver less or no surplus water to agricultural contractors for use in irrigating permanent crops.

DWR explained how it was not new information that farmers were using SWP supplied water to irrigate permanent crops. (CFS AA 10:1485-1486.) DWR already disclosed in the 2010 EIR that if it opted to operate the SWP pursuant to the pre-Monterey Amendment long-term water supply contracts and interpreted Article 21(g) as Appellants urge, this could lead to less acreage devoted to permanent crops. (RAR 5307-5308 [invocation of Article 21(g) in this manner could result in "crop idling" and the "abandonment of annual and permanent crops"].) The record also discloses that Kern Water Bank Authority members use water stored in the KWB as a "back-up source of water" in dry years. (RAR 32307.) There was no new

information to warrant further revising the disclosure DWR already made in the 2010 EIR regarding the potential impacts of delivering less or no surplus SWP water which is used to irrigate permanent crops.

IV. DWR'S CEQA PROJECT DECISION FOLLOWING THE REVISED EIR COMPLIED WITH CEQA AND THE 2014 WRIT

Appellants' final argument takes issue with the form of DWR's CEQA decision regarding KWB operations following certification of the Revised EIR, although the precise error is left unarticulated. (AOB at pp. 56-62.) Whatever Appellants' complaint, DWR fully complied with the 2014 Writ and with CEQA in making its project decision regarding the KWB in 2016.

A. DWR's Project Decision Following the Revised EIR

The *Central Delta* trial court ruled that the 2010 EIR complied with CEQA except with regard to the KWB impacts. (CFS AA 10:1514 ¶¶ 1-2.) The trial court severed the KWB portion of the Monterey Plus project from the rest of the project, finding that severance of the KWB portion of the project "will not prejudice complete and full compliance with CEQA." (*Id.* at ¶¶ 3-4.) As such, the trial court held that "[a]ll prior project approvals and decisions, including the Monterey Amendment, the Kern Fan Element Transfer Agreement, and the *PCL v. DWR* Settlement Agreement, as well as DWR's May 2010 decision to continue operating the State Water Project pursuant to the Monterey Amendment . . . shall remain in place and undisturbed by the Court's rulings and this writ." (*Id*. at ¶ 1.) The trial court directed DWR to prepare a revised EIR that addressed the potential impacts from the Kern Water Bank Authority's use and operation of the KWB as a groundwater banking facility, and then "make a new determination regarding whether to continue the use and operation of the Kern Water Bank by KWBA." (CFS AA 10:1515 ¶ 4.) In accordance with the 2014 Writ, DWR's Director executed a Decision Memorandum that

certified the Revised EIR and then recorded his new decision on the KWB portion of the overall Monterey Plus project. (RAR 10-11.) At trial below, Appellants challenged DWR's project decision regarding the Kern Water Bank Authority's use and operation of the KWB, but the trial court held that "DWR has done precisely what the 2014 Writ required" and that "DWR's project decision was made in conformance with the court's Writ." (CFS AA 10:1942.)

B. Appellants' Challenges to DWR's 2016 Project Decision are Unfounded

Appellants first assert that "DWR's decision memorandum did not record an approval of the project…." (AOB at pp. 56-57.) It is unclear what Appellants mean by this. The 2014 Writ expressly required DWR "to make a new determination regarding whether to continue use and operation of the Kern Water Bank by KWBA, after compliance with CEQA." (RAR 2367.) In conformance with the 2014 Writ's express direction, after DWR certified the Revised EIR, the Director executed a Decision Memorandum which provided that, "I direct DWR to carry out the proposed project by continuing the use and operation of the KWB by KWBA." (RAR 10-11; CFS AA 10:1514 ¶ 1.) This reflects DWR's Director's CEQA decision after certifying the Revised EIR. The form of a lead agency's decision on a project is not subject to any particular requirements. (*Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 506 ["No particular form of approval is required"].) Furthermore, the DWR Director's decision conforms with CEQA because it "commits the agency to a definite course of action in regard to a project intended to be carried out by any person." (Guidelines, § 15352, subd. (a).) The trial court held that "DWR has done precisely what the 2014 Writ required." (CFS AA 10:1942.) CEQA requires nothing more.

Appellants next claim that although DWR made a new decision in 2016 as required by the 2014 Writ, DWR somehow already made a commitment regarding KWB operations prior to preparing the Revised EIR. (AOB at p. 57.) There is nothing in the record to support Appellants' assertion. Appellants may be objecting that the project decision's phrasing as *continuing* the use and operation of the KWB by the Kern Water Bank Authority somehow suggests that DWR's decision preceded the environmental review. But the phrasing of the project decision merely reflected the actual state of affairs when DWR's Director made his decision regarding KWB operations on September 20, 2016. At that time, the Kern Water Bank Authority was in fact operating the KWB pursuant to certain trial court-imposed conditions while DWR prepared the Revised EIR. (CFS AA 10:1515-1516 ¶ 6.)[17] There is nothing wrong with DWR phrasing its project decision in a way that reflected this reality. Appellants' argument mirrors the *Central Delta* petitioners' challenge to the phrasing of DWR's 2010 project decision on the Monterey Plus as the continuation of the operation of the SWP pursuant to the Monterey Amendment, which DWR phrased that way because that was in fact how DWR was operating the SWP in 2010. (CFS AA 10:1294-1296.) The *Central Delta* trial court rejected petitioners' challenge to the phrasing of DWR's 2010 project decision (*id.*)[18] and the *Center for Food Safety* trial court rejected those petitioners' challenge to DWR's 2016 project decision as well (CFS AA 10:1942).

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[17] The Kern Water Bank Authority was not allowed to expand its operations, and was required to operate pursuant to an Interim Operations Plan negotiated with Rosedale. (CFS AA 10:1515-1516 ¶ 6.)

[18] The *Central Delta* petitioners at trial challenged the form of DWR's project *description* (CFS AA 10:1294-1296), and on appeal challenged the form of DWR's project *decision* (CFS AA 10:1664-1687).

Nor would Appellants' contention be valid if they are attacking the *Central Delta* trial court's orders allowing the Kern Water Bank Authority to continuing operating the KWB while DWR prepared the 2010 EIR and the Revised EIR. The Supreme Court found that it is appropriate for a trial court to exercise its discretion to allow a project to proceed while the lead agency conducts further CEQA review, so long as the lead agency does so in good faith and does not reject any alternative as infeasible on the basis that the project has already commenced. (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 425.) Appellants point to no evidence in the record which suggests that DWR did not conduct its evaluation of the KWB activities in good faith, or that DWR rejected any alternative as infeasible due to the ongoing nature of the KWB operation. Indeed, the record shows otherwise. DWR identified a host of measures, which the Kern Water Bank Authority either incorporated as elements of its project or as mitigation measures, to reduce the KWB's potential adverse environmental impacts. These included a Long-Term Operations Plan to govern the Kern Water Bank Authority's recharge and extraction activities to ensure that impacts to neighboring well owners be fully investigated and mitigated (RAR 579-584), as well as first-of-its-kind energy efficiency measures designed to ensure that greenhouse gas emissions associated with operating groundwater pumps are minimized (RAR 1053-1055).[19]

Appellants' recitation of hornbook CEQA case law holding that a project decision must come after appropriate CEQA review is

[19] Many other potential impacts from the KWB's operations were reduced or eliminated by incorporating them as project features or as mitigation measures. (See, e.g., RAR 379-404.)

uncontroversial,[20] but is inapt given that the Revised EIR was prepared pursuant to a trial court's equitable powers under CEQA's remedial statute, Public Resources Code section 21168.9. "Section 21168.9 was enacted in 1984 to give the trial courts some flexibility in tailoring a remedy to fit a specific CEQA violation." (*San Bernardino Valley Audubon Society v. Metropolitan Water Dist.* (2001) 89 Cal.App.4th 1097, 1103.) Under section 21168.9, a trial court has discretion to allow a project to proceed pending further environmental review. A trial court may void a lead agency's decision on a project "in whole or in part." (Pub. Resources Code, § 21168.9, subd. (a)(1).) The flip side of voiding only "part" of a lead agency's project decision is that the non-voided part of the project decision must remain effective. Otherwise, voiding a project decision "in part" has no meaning.

The cases Appellants cite are not to the contrary. None of them involve the scope of a trial court's authority to fashion a CEQA remedy pursuant to Public Resources Code section 21168.9, and the court's discretion to leave project approvals in place while the lead agency corrects CEQA errors. (*POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 756 ["In 1993, section 21168.9 was amended to expand the authority of courts to fashion a remedy that permits a part of the project to continue while the agency seeks to correct its CEQA violations"].) The building consensus of CEQA case law that addresses section 21168.9 holds

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[20] For example, in *Save Tara*, the Supreme Court held that the lead agency erred by entering into a development agreement before conducting any CEQA analysis of the development agreement's potential environmental impacts. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116.) That is wholly unlike the situation here, in which DWR certified the 2010 EIR and then made a decision to carry out the Monterey Plus project, and certified the Revised EIR and then made a decision as to the severed KWB portion of the project.

that the Legislature gave significant authority to trial courts to fashion limited remedies appropriate to the circumstances.

The leading case interpreting section 21168.9, *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, involved a residential and commercial development project. The court found the EIR complied with CEQA in all respects except for its mitigation measures for the Quino butterfly and its water supply analysis. (*Id*. at pp. 280-286.) The court concluded that a trial court has discretion under Public Resources Code section 21168.9 to not require a lead agency to void all project approvals upon findings that an EIR violates CEQA in part. (*Id*. at p. 288.) That is because the Legislature gave trial courts discretion to use their equitable powers to fashion remedies appropriate to the circumstance. (*Id.* at pp. 287-288.) The court held,

> [A] reasonable, commonsense reading of section 21168.9 plainly forecloses plaintiffs' assertion that a trial court must mandate a public agency decertify the EIR and void all related project approvals in every instance where the court finds an EIR violates CEQA. Such a rigid requirement directly conflicts with the 'in part' language in section 21168.9, subdivision (a)(1), which specifically allows a court to direct its mandates to parts of determinations, parts of findings, or parts of decisions. Such a rigid requirement also conflicts with the language in section 21168.9, subdivision (b), limiting the court's mandates to only those necessary to achieve CEQA compliance and, if the court makes specified findings, to only 'that portion of a determination, finding, or decision' violating CEQA.

(*Id*. at p. 288.) Other courts following *Preserve Wild Santee* uniformly support the position that trial courts have discretion to leave certain project approvals in place following a determination that an EIR was deficient in part. (E.g., *Golden Gate Land Holdings LLC v. East Bay Regional Park Dist.* (2013) 215 Cal.App.4th 353, 371.)

In another CEQA remedies case, *Center for Biological Diversity v. Department of Fish & Wildlife* (2017) 17 Cal.App.5th 1245, the appellant

made the same argument advanced here, namely, that a trial court does not have discretion to leave an agency's project approvals in place after decertifying an EIR because doing so "makes the environmental analysis 'nothing more than a post hoc rationalization of its existing approvals,'… ." (*Center for Biological Diversity, supra*, 17 Cal.App.5th at p. 1255.) The court flatly rejected that claim, affirming a trial court's flexibility to fashion appropriate remedies including to leave some or all project approvals in place. (*Id*. at pp. 1255-1256.) It cited the Supreme Court's direction that the trial court has discretion to decide "the parameters of the writ of mandate to be issued." (*Id*., citing *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 240.)

CEQA specifically granted the trial court the discretion to fashion a remedy appropriate to the circumstances. Here, the trial court exercised that discretion to allow the Kern Water Bank Authority to continue operating the KWB subject to conditions while DWR prepared the Revised EIR. The trial court did not abuse its discretion in doing so, and Appellants do not argue otherwise. Against that factual backdrop, DWR's project decision was worded appropriately, given the express direction in the 2014 Writ and within CEQA, which allowed the trial court to limit DWR's project decision to just this severed portion of the overall Monterey Plus project.

CONCLUSION

DWR satisfied CEQA by fully disclosing the KWB's potential environmental impacts due to crop conversion, and the consequences of operating the SWP if it did so pursuant to Appellants' interpretation of Article 21(g). DWR appropriately made a CEQA decision regarding KWB operations after certifying the Revised EIR as the trial court required in the 2014 Writ. The existence of the *Central Delta* appeal did not deprive the trial court of its retained jurisdiction to determine whether the Revised EIR complied with the 2014 Writ and CEQA.

For all these reasons, DWR respectfully requests that the judgment be affirmed.

Dated: September 21, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 13,755 words according to the word count of the computer program used to generate this brief.

Dated: September 21, 2018

XAVIER BECERRA
Attorney General of California

/s/ Eric M. Katz

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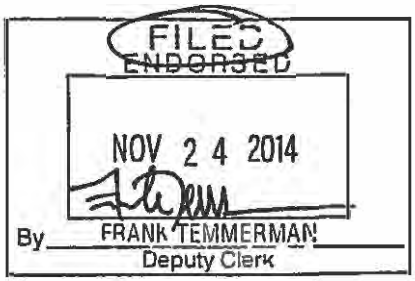
California Department of Water Resources



SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

CENTRAL DELTA WATER AGENCY, et al.,

Petitioners,

v.

CALIFORNIA DEPARTMENT OF WATER RESOURCES,

Respondent,

ALAMEDA COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT ZONE 7, et al.,

Real Parties in Interest

ROSEDALE-RIO BRAVO WATER STORAGE DISTRICT, et al.,

Petitioners,

v.

CALIFORNIA DEPARTMENT OF WATER RESOURCES,

Respondent,

KERN WATER BANK AUTHORITY, et al.,

Real Parties in Interest.

Case No. 34-2010-80000561
Case No. 34-2010-80000703
[consolidated for CEQA Trial]

[PROPOSED] FINDINGS AND PEREMPTORY WRIT OF MANDATE (Public Resources Code § 21168.9)

Trial Date: January 31, 2014 [CEQA only]

In accordance with the Court's Rulings on Submitted Matter (March 5, 2014) and the Court's Joint Ruling on Submitted Matter (October 2, 2014) in the above-entitled actions, the Court hereby finds and orders with respect to the "Monterey Amendments to the State Water Project Contracts (Including Kern Water Bank Transfer) and Associated Actions as Part of the Settlement Agreement" (the Monterey Plus EIR) and the Monterey Plus Project, as follows:

FINDINGS

1. Except as provided below, the Department of Water Resources (DWR) complied with the California Environmental Quality Act (CEQA) with respect to the Monterey Plus EIR and the Monterey Plus Project. All prior project approvals and decisions, including the Monterey Amendment, the Kern Fan Element Transfer Agreement, and the *PCL v. DWR* Settlement Agreement, as well as DWR's May 2010 decision to continue operating the State Water Project pursuant to the Monterey Amendment and *PCL v. DWR* Settlement Agreement at issue in this case, shall remain in place and undisturbed by the Court's rulings and this writ.

2. The Monterey Plus EIR is deficient (i) because it fails to adequately describe the development, use and operation of the Kern Water Bank lands as a water banking and recovery project, and (ii) in its discussion, analysis, and (if appropriate) mitigation of the potential impacts – particularly to groundwater hydrology and water quality – associated with the Kern Water Bank Authority's (KWBA) anticipated use and operation of the Kern Water Bank lands as a water banking and recovery project.

3. The use and operation of the Kern Water Bank lands as a water banking and recovery project is severable from the other portions of the Monterey Plus Project.

4. Severance of the use and operation of the Kern Water Bank lands as a water banking and recovery project from the other portions of the Monterey Plus Project will not prejudice complete and full compliance with CEQA.

5. DWR shall be allowed to correct the deficiencies identified in the Court's Rulings on Submitted Matter (March 5, 2014) and Joint Ruling on Submitted Matter (October 2, 2014) and recertify a revised Monterey Plus EIR without reopening the non-defective portions of the

Monterey Plus EIR. Upon recertification, only those portions of the revised Monterey Plus EIR that are new or changed shall be subject to challenge under CEQA by petitioners or other interested parties.

PEREMPTORY WRIT OF MANDATE

Pursuant to Public Resources Code section 21168.9, the Court commands as follows:

1. The use and operation of the Kern Water Bank is severed from the remainder of the Monterey Plus Project.

2. DWR shall vacate its February 1, 2010 certification of the Monterey Plus EIR.

3. DWR shall revise the Monterey Plus EIR's project description to include the development, use and operation of the Kern Water Bank as a water banking and recovery project, and revise the Monterey Plus EIR as necessary to correct the CEQA error with respect to the analysis of the potential impacts associated with the transfer, development, use and operation of the Kern Water Bank as a water banking and recovery project as identified in the Court's Rulings on Submitted Matter (March 5, 2014). DWR's preparation of the revised Monterey Plus EIR shall be in accordance with the Court's rulings in the *Rosedale* and *Central Delta* matters.

4. DWR's May 2010 Monterey Plus Project decision as it related to the Kern Water Bank's use and operation will remain in place on an interim basis pending preparation of an adequate EIR. At the conclusion of the revised Monterey Plus EIR process, DWR (as lead agency) and KWBA (as responsible agency) shall make a new determination regarding whether to continue the use and operation of the Kern Water Bank by KWBA.

5. Except as otherwise provided herein, DWR may continue to implement the Monterey Plus Project and operate the State Water Project pursuant to the Monterey Amendment and the *PCL v. DWR* Settlement Agreement without limitation.

6. Until this writ is discharged, KWBA may continue to use and operate the Kern Water Bank lands as a water banking and recovery project subject to the following conditions: (i) existing Kern Water Bank operations shall be maintained, but not expanded; and (ii) the Kern Water Bank shall be subject to and operated in compliance with the "Interim Operations Plan" (a

copy of which is attached hereto as Exhibit A and, by this reference, incorporated herein) and the existing Kern Environmental Permits (as defined in the *PCL v. DWR* Settlement Agreement).

7. On or before December 31, 2014, DWR shall file an initial return reporting to the Court the steps and schedule it proposes to comply with this writ. Unless the Court orders otherwise for good cause shown, DWR must correct the deficiencies in the Monterey Plus EIR and recertify a revised Monterey Plus EIR by December 31, 2015.

8. DWR shall, by way of final return to this peremptory writ of mandate, lodge with this Court: (i) the revised Monterey Plus EIR, (ii) DWR's certification of and findings regarding same, and (iii) the record of proceedings for that administrative action. The Court will conduct a substantive review of the same for compliance with this peremptory writ of mandate. Only those portions of the revised Monterey Plus EIR that are new or changed shall be subject to challenge under CEQA by petitioners or other interested parties. No other challenges that were raised or could have been raised with respect to the Monterey Plus EIR may be raised in any challenge to the revised Monterey Plus EIR.

9. Except as provided herein, this peremptory writ of mandate shall not limit or constrain DWR's lawful jurisdiction and discretion.

10. The Court shall retain jurisdiction over this proceeding ~~until DWR files a final return~~ as necessary demonstrating compliance with this peremptory writ of mandate and CEQA, and this Court issues an order discharging this peremptory writ of mandate.

Dated: November 24, 2014

Timothy M. Frawley
JUDGE OF THE SUPERIOR COURT

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **Center for Food Safety, et al. v. California Department of Water Resources, et al.**

Case No.: **C086215**

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 collecting and processing electronic and physical correspondence. 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. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On September 21, 2018, I electronically served the attached **RESPONDENT'S BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on September 21, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Honorable Timothy M. Frawley
Sacramento County Superior Court
Gordon D. Schaber County Courthouse, Dept. 29
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 September 21, 2018, at Los Angeles, California.

Beatriz Davalos
Declarant

Beatriz Davalos
Signature