NO. C086215

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

CENTER FOR FOOD SAFETY, et al.,
Petitioners and Appellants,

v.

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

On Appeal from the Superior Court of Sacramento
The Hon. Timothy M. Frawley, Presiding (Case No. 34-2016-80002469)

APPELLANTS' REPLY BRIEF

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*Adam Keats (SBN 191157)
Kellan Smith (SBN 318911)
CENTER FOR FOOD SAFETY
303 Sacramento St., 2nd Floor
San Francisco, CA 94111
Telephone: 415-826-2770
Facsimile: 415-826-0607
akeats@centerforfoodsafety.org
ksmith@centerforfoodsafety.org

*John Buse (SBN 163156)
Aruna Prabhala (SBN 278865)
CENTER FOR BIOLOGICAL DIVERSITY
1212 Broadway, Suite 800
Oakland, CA 94612
Telephone: 510-844-7100
Facsimile: 510-844-7150
jbuse@biologicaldiversity.org
aprabhala@biologicaldiversity.org

Attorneys for Appellants
Center for Food Safety, Center for Biological Diversity, California Water Information Network, California Sportfishing Protection Alliance, Central Delta Water Agency, and South Delta Water Agency

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

State Cases

State Statutes

INTRODUCTION

Neither the Department of Water Resources ("DWR") nor the Kern Water Bank Parties ("KWB Parties") effectively counter Appellants' arguments that: (1) the trial court should have stayed consideration of two of the issues raised by Appellants; (2) the Revised EIR fails to properly analyze the impacts to water supplies and reliability caused by the transfer of the Kern Water Bank ("KWB"); (3) the Revised EIR was required to revisit its earlier analysis of the deletion of Article 21(g)(1); and (4) DWR's project decision was not a proper project approval as required by CEQA. The general issues raised by these claims, in various forms, have been raised by members of the public and concerned public agencies since the very first challenge to the earliest attempt at environmental review for the Monterey Amendments, in 1995. Through each attempt, and despite twice having a court reject its efforts at CEQA compliance, DWR has stubbornly refused to properly address the heart of these complaints as it relates to this Appeal: that transferring the KWB while deleting Article 21(g)(1) (and its protections against the use of unreliable surplus water for permanent crops) from the State Water Project long-term contracts would result, and has in fact resulted, in

the tremendous and unsustainable expansion of permanent crops in the southern San Joaquin Valley, causing significant environmental effects that must be fully and honestly disclosed and analyzed.

These fundamental concerns about the transfer of the KWB have existed since the idea was first proposed back in the 1990s, and have lasted through three separate rounds of litigation. Perhaps this is a testament to the tenacity of the different public agencies and non-profit groups who have litigated these cases over all of these years, and perhaps it is a testament to the scale of the harms caused by this Project and the fundamental importance of the Kern Water Bank to California's future. But it is also a testament to DWR's repeated failure to comply with CEQA when analyzing the environmental impacts of the KWB transfer. Unfortunately, this effort—the agency's third—must be rejected as well.

ARGUMENT

I. Proceedings on Two of Appellants' Claims Should Have Been Stayed By the Trial Court As They Were Embraced in a Related Appeal

Appellants explain in their Opening Brief, pp. 21-34, that the trial court's ruling on two of their claims in *CFS* is void on its face. This is because California Code of Civil Procedure section 916 effects an automatic stay "over any matter embraced in or affected by the appeal *during the pendency* of the appeal." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196-97 [emphasis added].) Matters in a trial court proceeding which are embraced in or affected by an appeal are subject to section 916, and Appellants have properly identified two issues in *CFS* for which section 916 applies. The trial court in *CFS* was correct insofar that it held that "[w]hile the appeal does not prevent the court from determining DWR's compliance with the unappealed portions of the Judgment and Writ, the appeal prevents the court from reconsidering issues *embraced* by the appeal." (CFS AA 10:1942 [emphasis added].) Where the trial court erred, however, was in failing to stay proceedings on these two issues during the

pendency of the *Central Delta* Appeal.[1] The court's decision to deny the petition and discharge the 2014 Writ is therefore "void on its face[.]" (*Varian*, *supra*, 35 Cal.4th at p. 200 ["When, as here, there is an appeal from a void judgment, the reviewing court's jurisdiction is limited to reversing the trial court's void acts."].)

A. Issues in *CFS* Embraced in or Affected by the *Central Delta* Appeal Are Subject to Section 916's Automatic Stay

The Supreme Court in *Varian* found that a determination of "whether a proceeding is embraced in or affected by the appeal" within the meaning of section 916 requires a consideration of "whether postjudgment [or postorder] proceedings on the matter would have any effect on the effectiveness of the appeal." (*Varian*, *supra*, 35 Cal.4th at p. 189 [citations and quotations omitted].) *Varian* described four scenarios in which proceedings would have an effect on the effectiveness of an appeal, two of which are present here.

[1] KWB Parties are correct in their contention that "dismissal of a claim is the *normal* remedy where the court lacks jurisdiction." (KWB Parties' Br. at p. 34 [emphasis added].) When section 916 applies, however, dismissal is no longer an appropriate remedy. In fact, as the Supreme Court explained in *Varian*, there is only one possible outcome if section 916 applies: "the proceedings are stayed." (*Varian*, *supra*, 35 Cal.4th at 189.)

1. The Very Purpose of the *Central Delta* Appeal is to Avoid the Need for the *CFS* Proceedings

Section 916's automatic stay applies to two issues in *CFS* because the very purpose of the *Central Delta* Appeal is to avoid the need for the *CFS* proceedings on these issues. (*Varian*, *supra*, 35 Cal.4th at p.190 [When the very purpose of an appeal is to avoid the need for the trial court proceedings, those trial court proceedings *must* be stayed during the pendency of the appeal, since "the [trial court] proceeding itself is inherently inconsistent with a possible outcome on appeal[.]"].)

DWR argues in their brief that the types of cases which rely on the "very purpose" scenario to issue an automatic stay are very limited. (DWR Br. at pp. 29-30.) DWR has no support for this contention. Neither section 916 itself nor existing case law limits the "very purpose" scenario to any particular set of facts. Rather, the "very purpose" scenario is present whenever a trial court proceeding is inherently inconsistent with a possible outcome on appeal. (*Varian*, *supra*, 35 Cal.4th at p.190.) As discussed in Appellants' Opening Brief, pp. 23-25, the *CFS* trial court proceeding on the issues of (1) DWR's failure to make a project approval, and (2) DWR's failure to

address the deletion of Article 21(g)(1) in the no project alternative analysis, is inherently inconsistent with the relief sought in the *Central Delta* Appeal challenging the failure to void the project approvals (the same approvals for which DWR now relies on in *CFS*) and the failure to invalidate the no project alternatives analysis (the same flawed analysis on which the Revised EIR at issue in *CFS* relies).

DWR points to the two examples in *Varian* that demonstrate the "very purpose" scenario. First is when there is an appeal from a denial of a motion to compel arbitration. DWR agrees that in that instance the purpose of such an appeal "is to avoid having a trial in the superior court at all." (DWR Br. at p. 29.) Second is when there is an appeal from a denial of an anti-SLAPP motion. The Supreme Court in *Varian* found that "an appellate reversal of an order denying such a motion may [] result in a dismissal." (*Varian*, *supra,* 35 Cal.4th at p. 193.) DWR provides no justification or rational for why the *Central Delta* Appeal is any different. Appellants' success in the *Central Delta* Appeal would render the proceedings in *CFS* on these two issues unnecessary—just as success by the hypothetical appellants in the *Varian* examples would render further proceedings unnecessary.

Thus, the very purpose of the appeal is to avoid the need for the *CFS* proceedings on these issues. DWR provides no support to reach its contrary conclusion.[2]

2. The Outcomes of the *Central Delta* Appeal and the *CFS* Proceedings Are Potentially Irreconcilable

As explained in Appellant's Opening Brief, pp. 25-28, DWR's primary defense to the two issues discussed above is that the agency was merely complying with the 2014 Writ and judgment in *Central Delta*, the propriety of which—on these precise issues—is specifically challenged in the *Central Delta* Appeal. Thus, the fact that DWR relies on the 2014 Writ for its defense of its "project decision" at issue here makes the *possibility* of irreconcilability readily apparent, as DWR's defense goes to the merits of the *Central Delta* action.[3] (*Varian*, *supra*, 35 Cal.4th at p. 193 [irreconcilability is an issue of whether the proceedings "resolve[] the merits of a cause of action."].) Similarly, if this Court in *Central Delta* finds that the 2010 EIR's no project alternatives analysis failed to properly consider the implementation of Article 21(g)(1), the *CFS* trial court's rulings on Appellants' claim regarding the Revised EIR's no project alternatives

[2] KWB Parties do not address this argument.
[3] KWB Parties do not address this argument.

analysis (which relies on the earlier flawed 2010 EIR's analysis) could no longer stand. In both instances, the merits of these claims in *CFS* would be resolved, making the decision in *CFS* plainly irreconcilable with this potential outcome in the *Central Delta* Appeal.

DWR argues that Appellants do not explain "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." (DWR Br. at pp. 30-31.) DWR misstates Appellants' argument, which describes two different ways the proceedings are irreconcilable, one involving the project decision and the other involving the EIR's impacts analysis. As Appellants explain, it is the possibility that this Court, in the *Central Delta* Appeal, will void DWR's prior approvals of the Monterey Amendments that is irreconcilable with the *CFS* trial court's finding that DWR's reliance on these prior approvals was permissible under CEQA. (App. Br. at p. 27; CFS AA 10:1942-43, 1948 [trial court order denying the petition and discharging the writ].)

At the same time, in a separate way, an analysis of a project's impacts that is based on an invalidated no project alternatives analysis cannot stand, a fact that DWR argues is "excessively speculative."

(DWR Br. at p. 31.) What is excessively speculative is the idea that the Revised EIR's impacts analysis would not change even if the no project alternatives analysis were revised as a consequence of the *Central Delta* Appeal.

For the "irreconcilable" scenario described in *Varian*, a "trial court proceeding also affects the effectiveness of an appeal if the *possible* outcomes on appeal and the *actual or possible* results of the proceeding are irreconcilable." (*Varian, supra*, 35 Cal.4th at p. 190 [emphasis added].) It is enough that the appellate court decision could potentially impact the merits of issues in the trial court proceeding, rendering the outcome in the trial court irreconcilable with this possible result. DWR provides no support that potential irreconcilability can be too "speculative" to necessitate the automatic stay, and as Appellants demonstrate, the possible outcome on appeal and the actual results of the *CFS* proceeding are irreconcilable on the separate issues of (1) DWR's failure to make a project approval, and (2) DWR's failure to address the deletion of Article 21(g)(1) in the no project alternative analysis. Section 916 requires nothing more.

B. DWR's and KWB Parties' Arguments Attempting to Limit the Applicability of Section 916 Are Unavailing

Varian explains how and when section 916 applies to trial court proceedings by providing four non-exclusive examples of scenarios where proceedings are embraced in or affected by the appeal. (*Varian*, *supra*, 35 Cal.4th at p. 189-90.) Only one of these scenarios must be present to effect an automatic stay. After failing to provide any case law support or other legally relevant argument for why two of the four non-exclusive scenarios are present here, DWR and KWB Parties turn to a scattershot of unsupportable theories in order to argue that section 916 is somehow not applicable in this instance.

First, DWR and KWB Parties argue that section 21168.9's direction that trial courts "retain jurisdiction" over public agency proceedings by a way of a return to peremptory writ until the court has determined that the agency has complied with CEQA creates an exception to the automatic stay provisions of section 916. (DWR's Br. at pp. 26-27 [citing Pub. Resources Code, § 21168.9, subd. (b)]; KWB Parties' Br. at p. 35 [citing Pub. Resources Code, § 21168.9].) The two statutes are not in conflict, however, and section 21168.9 is not an exception to the rule of section 916. DWR argues that the

retained jurisdiction of section 21168.9 of CEQA must be applied over "Section 916's general withdrawal" of the trial court's jurisdiction. But nothing on the face of section 916 or in the Supreme Court's discussion in *Varian* indicates that it effects a "general withdrawal" of a trial court's jurisdiction when a judgment is appealed. Section 916 merely directs a trial court to stay proceedings under very particular circumstances—discussed above—"*during the pendency of that appeal*." (*Varian*, *supra*, 35 Cal.4th at p.196 [emphasis added].) Section 916 does not generally withdraw the trial court's jurisdiction; it merely clarifies that when an appellate court and a trial court are simultaneously adjudicating the merits of the same issues, the *appellate court speaks first*. The trial court is not permanently deprived of jurisdiction to hear these issues; the proceedings are stayed and then must continue in light of the appellate court's decision. DWR and KWB Parties fail to explain how this could be interpreted to amount to a "general withdrawal" of the trial court's jurisdiction. Only under KWB Parties' flawed argument that the proceedings must be dismissed rather than stayed would a general withdrawal of the trial court's jurisdiction occur. (KWB Parties' Br. at pp. 34-25; see CFS AA 10:1601-02 [KWB Parties' trial court

opposition brief].) Here, Appellants specifically appeal the *CFS* trial court's reliance on this misinterpretation of section 916 in its decision to entirely reject Appellants' petition and discharge the 2014 Writ. The trial court was required to stay proceedings on these two issues, preserving its jurisdiction to hear them subsequent to the ruling in the *Central Delta* Appeal. Thus, under the Supreme Court's interpretation of section 916, there is no conflict between the two statutes.

That a conflict exists between the *Central Delta* Appeal and the *CFS* trial court action is not evidence of a conflict between section 916 and CEQA. Rather, it is evidence of fundamental problems created by the recent trend of misapplication of section 21168.9(b) and the increased issuance of "limited writs." The trial court's issuance of the limited writ in *Central Delta*—that (1) permitted the prior project approvals to remain in place after finding flaws in and decertifying the EIR and (2) severed the 2010 EIR's analysis of the impacts of the KWB transfer from the 2010 EIR's no project alternatives analysis—created the high likelihood that section 916 would be implicated. This is because the 2010 limited writ spawned two separate (yet entirely predictable) litigation tracks—the *Central Delta* Appeal that challenged the trial court's decision and the *CFS*

trial court litigation that challenged the agency's subsequent reliance on that decision. Had the *Central Delta* trial court properly voided the Monterey Plus approvals, DWR would not have been able to rely on those approvals in its "project decision" that is a subject of *CFS*, and section 916 would not be implicated.[4]

This is not to say that the issuance of a limited writ pursuant to subsection (b) of section 21168.9 will never result in a stay being required pursuant to section 916. It is just that the proper application of subsection (b), with due consideration of that section's requirements regarding findings of severance, prejudice, and compliance with CEQA, should make limited writs rare, and thus section 916 stays in the context of CEQA litigation even rarer.

Second, DWR and KWB Parties argue in conclusory terms that the trial court proceedings in *CFS* are "ancillary or collateral" to the appealed judgment in *Central Delta*. (DWR's Br. at pp. 27-28; KWB Parties' Br. at p. 35.) *Varian* explains that proceedings are not implicated by section 916 when they "are collateral to the merits of an

[4] This is true even if DWR had appealed the trial court's decision to void the approvals; in that scenario it is exceedingly unlikely that the agency would move forward with preparation of the revised EIR and then issue new project approvals while litigating an appeal seeking to restore the project's earlier voided approvals. It would litigate the appeal first, as section 916 intends.

appeal." (*Varian*, *supra*, 35 Cal.4th at p.191.) As explained above, the fact that the very writ and judgment challenged in the *Central Delta* Appeal are the basis of DWR's defense goes to the merits of the action. Thus, it cannot be said that the proceedings are collateral to the merits on appeal; the proceedings in *CFS* are entirely dependent upon the outcome in the *Central Delta* Appeal in regards to these issues.

In addition, *Varian* explains that a proceeding is likewise "ancillary or collateral" when "the proceeding could or would have occurred regardless of the outcome of the appeal." (*Varian*, *supra*, 35 Cal.4th at p.191.) One illustration of this is an appeal from an order denying a motion to disqualify counsel. (*Varian*, *supra*, 35 Cal.4th at p.191.) This would "not automatically stay further trial court proceedings on the merits because such proceedings would occur regardless of whether the reviewing court affirms or reverses the order." (*Varian*, *supra*, 35 Cal.4th at p.191.) Here, in stark contrast, one of the very purposes of the *Central Delta* Appeal is to avoid trial court proceedings resulting from the challenged 2014 Writ such as *CFS* because the *Central Delta* Appeal challenges the failure to void the project approvals (the same approvals for which DWR now relies

on in *CFS*) and the failure to invalidate the no project alternatives analysis (the same flawed analysis on which the Revised EIR at issue in *CFS* relies). Thus, it cannot be said that proceedings on these issues would occur regardless of the outcome in the *Central Delta* Appeal. Therefore, the trial court proceedings in *CFS* are not "ancillary or collateral" to the appealed judgment in *Central Delta*.

At best, DWR's and KWB Parties' attempts to limit the applicability of section 916 are creative yet unsupportable arguments to overrule binding Supreme Court precedent. Under any plain reading of section 916 and *Varian*, it is clear that the *Central Delta* Appeal effected an automatic stay on two of the issues in the trial court proceedings in *CFS*.

C. This Issue Is Not Moot

The entirety of Section III of the Supreme Court's decision in *Varian* is devoted to rejecting the contention—also raised here by DWR—that Appellants' claim surrounding section 916 is moot. (*Varian*, *supra*, 35 Cal.4th at pp. 196-201.) In its rationale, the Supreme Court explained that "[c]ommon fairness and a sense of justice readily suggests that while plaintiffs were in good faith prosecuting their appeals, they should be in some manner protected in

having the subject matter of the litigation preserved intact until the appellate court could settle the controversy." (*Varian*, *supra*, 35 Cal.4th at p. 198-99 [internal quotations and citations omitted].) Thus, in order to preserve the rights of the *Central Delta* appellants in their appeal of issues embraced in or affected by *CFS*, "section 916 necessarily renders any subsequent trial court proceedings [on those issues]…void—and not merely voidable." (*Varian*, *supra*, 35 Cal.4th at p. 198.) After all, under section 916, "the trial court is divested of subject matter jurisdiction over any matter embraced in or affected by the appeal *during the pendency of that appeal*." (*Varian*, *supra*, 35 Cal.4th at p.196 [internal quotations omitted] [emphasis added].) By failing to issue a stay and delay ruling on these issues pending the decision in the *Central Delta* Appeal, the trial court in *CFS* ignored the Supreme Court's instructions that the trial court has "no power 'to hear or determine [the] case'…[a]nd any judgment or order rendered by a court lacking in subject matter jurisdiction is 'void on its face.'" (*Varian*, *supra*, 35 Cal.4th at p.196.) Moreover, "[t]his is true even if the subsequent proceedings cure any purported defect in the judgement or order appealed from." (*Varian*, *supra*, 35 Cal.4th at p.197.) If one thing is clear from *Varian*, it does not matter if an

appellants' "theoretical concerns"—as DWR styles them—come to pass (or not), because if the two proceedings are consistent, "then the appeal is, in effect, futile because the trial court has already granted the relief that would have been granted on appeal," and if the two proceedings conflict, "then the appeal will likely be futile because the prevailing party, in most instances, will have no adequate remedy left." (*Varian*, *supra*, 35 Cal.4th at p.198.) Thus, "the only way to ensure that the appealing party has a remedy on appeal is to deprive the trial court of jurisdiction in its fundamental sense." (*Varian*, *supra*, 35 Cal.4th at p.199; see also fn.10 [rejecting the dissent's position that a harmless error analysis should apply]; *Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 339 ["A lack of fundamental jurisdiction is an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. Fundamental jurisdiction cannot be conferred by waiver, estoppel, or consent. Rather, an act beyond a court's fundamental jurisdiction may be raised for the first time on appeal."] [internal quotations, citations, and alterations omitted].)

Therefore, DWR's contentions that Appellants' concerns are "theoretical," that the "passage of time" is too great, that compliance

with section 916 "guarantees further cost and delay" and doesn't serve "judicial economy" (DWR's Br. at pp. 31-33), are of no consequence. *Varian* addressed these concerns at length. The Supreme Court noted that "[i]n light of our holding today, some…appeals will undoubtedly delay litigation even though the appeal is frivolous or insubstantial." (*Varian*, *supra*, 35 Cal.4th at p.195-96.) The court nevertheless found that "[s]uch an assessment is, however, a question for the Legislature, and the Legislature has already answered it." (*Varian*, *supra*, 35 Cal.4th at p.195-96.) If DWR thinks the implications of section 916 are unwise, it must bring these issues to the legislature not the courts. Appellants' claim is not moot, nor can it be.

In the exceedingly rare instances where a section 916 stay is required in the context of CEQA litigation, despite a trial court's close adherence to section 21168.9(b), section 916 provides clear instructions as to what must happen: the trial court proceedings must be stayed. Here, the trial court did not properly apply section 21168.9(b), in either its ruling regarding the Monterey Plus project approvals or regarding the 2010 EIR's no project alternatives analysis. As such, it is clear that the trial court proceedings should have been stayed. The trial court's ruling that these claims were dismissed

because it lacked jurisdiction was in error and should be reversed. In situations such as this where section 916 applies, there is only one possible outcome: "the proceedings are stayed." (*Varian*, *supra*, 35 Cal.4th at p. 189.) Thus, the trial court's ruling on these two matters as well as its order discharging the 2010 Writ is void. (*Varian*, *supra*, 35 Cal.4th at p. 200 ["When, as here, there is an appeal from a void judgment, the reviewing court's jurisdiction is limited to reversing the trial court's void acts."].)

II. The KWB Transfer Caused Massive Crop Conversion in the KWB Service Area Which Placed Pressure on Regional and Statewide Water Supplies that Was Not Sufficiently Analyzed in the Revised EIR

DWR and KWB Parties raise a variety of arguments regarding Appellants' crop-conversion claim, obfuscating what are two clear and simple allegations: (a) that the EIR's conclusion that the KWB transfer did not cause crop conversion in the KWB service area is not supported by substantial evidence, and (b) that the EIR's analysis of the impacts to regional and statewide water supplies caused by crop conversion in the KWB service area is not supported by substantial evidence. None of the arguments presented by DWR and KWB Parties effectively refute these claims.

A. The Revised EIR Improperly Denies that the Transfer of the KWB Caused Large-Scale Conversion of Crops to Permanent Tree Crops in the KWB Service Area

DWR and KWB Parties both concede that the Revised EIR concludes that the KWB transfer did not cause crop conversion in the KWB service area. (DWR Br. at p. 37 ["crop conversion in the [KWB] service area was caused by market forces independent of the KWB"]; KWB Parties Br. at pp. 42-43; RAR 2304 ["the project does not directly or indirectly cause conversion to permanent crops"].) The question is whether the Revised EIR supports this conclusion with substantial evidence. DWR and KWB Parties make similar arguments that it does. First they point to the EIR's *disclosure* of the reality of crop conversion in the area. (DWR Br. at pp. 34-35; KWB Parties Br. at p. 39.) Next they point to the Revised EIR's discussion of other possible causes of crop conversion. (DWR Br. at pp. 36-37; KWB Parties Br. at pp. 39-43.) Finally, DWR and KWB Parties attempt to refute Appellants' challenges to the scant evidence that was included in the Revised EIR. (DWR Br. at pp. 37-41; KWB Parties Br. at pp. 42-44.) Ultimately, DWR's and KWB Parties' efforts fail; the Revised EIR fails to support with substantial evidence its conclusion that the KWB transfer did not cause crop conversion in the KWB service area.

1. Disclosure, By Itself, Is Not an Analysis of What Caused Crop Conversion

Appellants do not dispute that the Revised EIR discloses the reality of crop conversion in the KWB service area. In fact, much of this disclosure was made by Appellants themselves, in the form of their comment letter that discussed this phenomenon in detail and that is contained in the administrative record. (RAR 2348-53.) Rather than challenging the sufficiency of the Revised EIR's *disclosure* of crop conversion, however, Appellants challenge the Revised EIR's *conclusion* that the KWB transfer did not cause—or was not a cause of—that crop conversion. Appellants specifically allege that the Revised EIR's conclusion is not supported by substantial evidence. (App. Br. at pp. 36-40.) The mere fact that crop conversion occurred does not answer the question of what caused it.

2. That Other Factors Contribute to Crop Conversion Does Not Mean that the KWB Transfer Was Not Also a Factor

DWR and KWB Parties point to the Revised EIR's conclusion that factors other than the KWB transfer, including regional and state-wide trends, the relationship between commodity pricing and crop selection, more efficient irrigation techniques and requirements, and

the existence of alternate sources of water, caused crop conversion in the KWB service area. (DWR Br. at pp. 36-37; KWB Parties Br. at pp. 39-43.) Appellants acknowledged these arguments but did not challenge the first three, as they fail to address in any way whether the KWB transfer was a contributory cause of crop conversion. (App. Br. at pp. 37-38; 41.) Regional trends, world commodity prices, and efficiency developments obviously contribute to causing crop conversion. The question is whether the KWB transfer was *also* a cause. The causes listed in the Revised EIR are not mutually exclusive of the KWB transfer being a cause; their existence in no way speaks to whether the KWB transfer was a cause or not. Thus, the existence of these other causes is not substantial evidence, by itself, for the Revised EIR's emphatic conclusion that the KWB transfer "[did] not directly or indirectly cause conversion to permanent crops." (RAR 2304.)

3. The Revised EIR's Claim that Groundwater Could Be Used in the Absence of the KWB is Not Supported by Substantial Evidence

The Revised EIR points to only one piece of relevant evidence related to the KWB's responsibility for crop conversion in the KWB service area: the possibility that alternative sources of water are or

were available to KWB member agencies that could support those agencies' planting of permanent crops. (RAR 2302.) If other water supplies, like groundwater, were truly available to KWB member agencies, the Revised EIR's conclusion that crop conversion would have occurred regardless of the KWB transfer could be seen to be supported by substantial evidence. (See DWR Br. at p. 37 ["In dry years when surface water is relatively unavailable, there is a correlative increase in pumping groundwater. … This groundwater pumping is independent of the KWB's existence. Overall, DWR concluded that crop conversion would occur with or without the KWB."] (citing RAR 2309).) But if other water supplies did not exist, then none of the three other contributory causes of crop conversion advanced by DWR would matter, because without water the crops could not be planted in the first place. The presence or absence of alternative water supplies is thus the only factor identified in the Revised EIR that could qualify as substantial evidence for DWR's conclusion that the KWB transfer did not cause crop conversion.

The problem for DWR is that for several of the KWB member agencies, alternative water supplies ***do not exist*** independent of the KWB. Appellants establish this fact in two ways: (1) by providing

four different citations to evidence in the record that show how the west side of the San Joaquin Valley, which includes several of the KWB member agencies, lacks reliable groundwater resources and is essentially totally dependent on the State Water Project for its water supplies (and thus dependent on the KWB for storing SWP water for use in dry years when SWP deliveries are dramatically reduced) (App. Br. at pp. 38-39 [RAR 3560, 2465, 981, 2468]), and (2) by demonstrating that the only evidence in the record supporting DWR's claim that KWB member agencies could store water in other regional water banks was struck down by the *Central Delta* trial court as improperly limited in scope of time.

DWR is correct that the lead agency does not have to disprove a challengers' proffered evidence to satisfy the substantial evidence standard. (DWR Br. at p. 37.) But that is not what Appellants argue. Instead, Appellants contrast the clear evidence in the record that shows the absence of alternative water supplies to the insufficient evidentiary support for the Revised EIR's conclusion that such supplies exist. (App. Br. at p. 37-38.) In other words, Appellants' claim is that the Revised EIR does not contain substantial evidence supporting its conclusion.

Neither DWR nor KWB Parties address the evidence specifically cited by Appellants, instead citing to other pages in the record that they claim constitute substantial evidence. (DWR Br. at p. 39; KWB Parties Br. at p. 42-43.) DWR first cites to RAR 1126 for the notion that "many westside farmers" have contracts for SWP water (DWR Br. at p. 39), but this is exactly the point Appellants make: the west side's dependence on unreliable SWP water deliveries is what makes the planting of permanent crops so risky and thus what makes a water banking operation like the KWB so important. (App. Br. at p. 39.) As is stated on the page cited by DWR, "KCWA and Dudley Ridge WD can recharge SWP Table A and Article 21 water when they have SWP water in excess of their immediate in-district demands…." (RAR 1126.) It is the ability to bank the SWP water that allows the planting of permanent crops at the scale undertaken after the KWB transfer.

DWR next cites to RAR 4128 for the proposition that a majority of the water banked in Kern County between 1995 and 2000 "was unrelated to the Monterey Amendment." (DWR Br. at p. 39.) Aside from the fact that this page is from "Appendix E" of the

decertified 2010 EIR,[5] it is completely unhelpful to DWR, providing no evidence about the presence of groundwater on the west side or on the actual ability of west side water districts to bank water in non-KWB water banks. The possible use of alternative water banks is addressed below, but all we know from this page is that "more than half" of the 2.38 million acre feet of banked water was banked in non-Monterey Amendment water banks (and thus not the KWB).

DWR then cites to RAR 1093 and 1202-1204 for the notion that "westside districts have some access to local groundwater, as well as access to groundwater stored in other groundwater banking operations." Even if these pages show access to *some* groundwater resources or alternative groundwater banks, they in no way show that KWB member agencies could reliably access groundwater resources and alternative water banks to plant permanent crops. These pages are particularly deficient in showing how this could be done without KWB member agencies utilizing the KWB at all. RAR 1093 contains a description of other groundwater banks in the area, and generally states that some of these water banks allow participation by other

[5] Appendix E was specifically found by the Monterey Plus trial court to have limited its analysis to an improperly brief period of time. (See subsection 4, below.)

agencies, but no details beyond these general statements are included. RAR 1202 through RAR 1204, in turn, include a series of charts regarding well location data from Kern County. Although labeled "DWR Groundwater Levels Database," these charts, and the accompanying text, provide no data whatsoever regarding the groundwater levels in these sample wells, or the likely or even possible groundwater availability beyond the monitoring period. (RAR 1202-04.) For all the reader knows, any or all of these wells could be dry. The data certainly does not provide substantial evidence that groundwater was, is, or will be available to west side KWB member agencies.

Finally, DWR points to RAR 3113 for the observation that permanent crops were already planted in some west side water districts before the KWB transfer. (DWR Br. at p. 39.) KWB Parties cite this page, too. (KWB Parties Br. at p. 43.) The three water agencies highlighted by DWR—Belridge, Lost Hills, and Berrenda Mesa—are not KWB member agencies and therefore barely relevant to the question of the availability of groundwater by KWB member agencies. More importantly, RAR 3113 reveals that Wheeler Ridge-Maricopa WSD (a KWB member agency) greatly increased its

permanent crops acreage after the KWB transfer in 1995, and reveals large reductions in annual crop acreage in all four districts in 1990 and 1991, when SWP deliveries were 50 percent and 0 percent of what was requested. In other words, before the KWB transfer, during times of reduced SWP deliveries, the four agencies in this chart reduced their crop acreage due to a lack of water. This is not substantial evidence of the sufficient presence of groundwater in KWB member service areas or alternative groundwater banking options. KWB cites to the 2010 EIR's analysis of the topic (RAR 2303-08), but these pages just repeat the same arguments discussed above concerning world commodity prices and irrigation efficiency.

In short, when comparing the evidence in the record cited by Appellants side-by-side with the evidence cited by the Revised EIR, DWR and KWB Parties, it is clear that the Revised EIR's conclusion that groundwater is or was available as an alternative water supply, and thus that the KWB was not a direct or indirect cause of crop conversion in the KWB service area, is not supported by substantial evidence. Crop conversion is a significant impact that should have been analyzed but was not due to this incorrect and unsupported conclusion in the Revised EIR.

4. The Revised EIR's Conclusion that KWB Members Could Store Water in Other Local Groundwater Banks is Not Supported by Substantial Evidence

DWR relies entirely on Appendix E from the 2010 EIR for support of its assertion that KWB member agencies could store SWP water in other groundwater banks if the KWB transfer had never taken place. (DWR Br. at pp. 39-41.) But as Appellants discussed in their Opening Brief, Appendix E was discredited by the *Central Delta* trial court for improperly limiting its scope to a period from 1995 to 2005. (App. Br. at p. 39.) For this reason alone the Revised EIR's conclusion is not supported by substantial evidence; despite being ordered by the trial court to update this specific analysis, DWR relied on it in the Revised EIR, unedited and not updated, for its conclusion that alternative water banking facilities were or are available for use by KWB member agencies.

DWR argues that "*other* chapters of Appendix E did not support the *different* conclusion that the KWB would not adversely affect local groundwater levels." (DWR Br. at p. 40 [emphasis in original].) DWR then presents a theory for why Appendix E is still useable (and qualifies as substantial evidence) in this instance: that the period was

unusually wet and therefore "the logical conclusion" is that if the alternative water banks had storage during those wet years, they would have storage during dry years, too. (DWR Br. at p. 40-41.) But DWR notably includes no citations to the record in this discussion. (*Id*.)

DWR's argument fails at the outset because it is wrong that the *Central Delta* trial court's ruling was limited to "other chapters" regarding a "different conclusion" regarding groundwater impacts. The argument made by the *Central Delta* petitioners that the court agreed with did not concern groundwater impacts; it was the *exact same argument* (regarding a different EIR) made here by Appellants:

> The EIR observes that between 1995 and 2004, all SWP water that was stored in the KWB could have been stored in other recharge facilities in Kern County (26:12531.), repeatedly citing to this conclusion to dismiss various possible environmental impacts caused by the transfer of the KWB (2:749-50 [no impacts to Delta because of available banking facilities]; 196:99725, 99722 ["no water has been exported out of the service area and no water was used for urban development"]; 2:746, 754-56 [KWB transfer did not cause increased water marketing]; 2:777 ["available increase in supply was not caused by the Monterey Amendments but by changes in hydrologic conditions."].) The problem with this analysis is that it uses a limited time period, 1995 through 2004, as evidence that such events will never occur in the future. This period of review does not demonstrate how much water was stored in Kern County prior to the Project, nor

how much storage was enabled through KWB expansion beyond 2004. The EIR's reliance on a single time period provides no proof that any of the alleged impacts will never occur and fails to analyze the KWB transfer in the proper context: as a permanent change in the operation of the SWP system that will have long-term impacts. The proper question is not what happened in one period, but what is likely to happen in the future. (Guidelines § 15144.)

The EIR fails to make any showing that the period of 1995 through 2004 is representative of future activities and impacts. What is revealed about this time period demonstrates the opposite: it is anomalous and not representative of likely future impacts. First, the EIR admits that it was a "very wet" period, with multiple years of surplus flows, increased pumping from the Delta, and 100% Table A deliveries in multiple years. (2:777.) Second, the EIR relies heavily on the calculation that there was abundant capacity for banked water outside of the KWB between 1995 and 2004 (26:12531) without recognizing that such extra capacity can and will be lost as other water banking facilities store more water or otherwise become unavailable in the future. (See 23:11260 [baseline analysis].) At that point, the presence or absence of a locally-controlled KWB will matter. Third, the experience between 1995 and 2004 provides no basis for concluding that banked water will never be sold to urban users or that banked water will never be sold out-of-district; documents in the record suggest exactly the opposite: sales of banked water for urban uses and out-of-district sales are not only anticipated, but already planned. (37:18522 [Paramount Farming Company reported to be in talks with L.A. Department of Water and Power about selling banked water]; 18243; 18532; 58264.) Considering that within the constrained period assessed in the EIR "fully seventy-five percent (75%) of banked water recovered from the project has been for water sales to third parties," significant future

> sales of banked water out of district and for urban uses must be considered likely, and the likely impacts of these sales, including promoting urban growth, must be analyzed in the EIR. (37:18617; 2:765.) The EIR is required under CEQA to analyze the whole of the action, not just a slice of time that has passed that conveniently provides support for a decision that has already been made. (Guidelines §§ 15126, 15151.)

(CFS AA 10:1395-97 [footnote omitted] [*Central Delta* trial court Opening Brief].)

The trial court in *Central Delta* agreed with the petitioners that "it was not reasonable for DWR to use this limited time period as evidence that impact will never occur in the future." (CFS AA 10:1309 [*Central Delta* Ruling on Submitted Matters].) Just as it was not reasonable in the 2010 EIR for DWR to rely on the analysis in Appendix E for the conclusion that the KWB transfer would have no significant impacts because water could be stored in other groundwater banks, it is not reasonable for DWR to do the same thing in the Revised EIR, especially after being specifically ordered by the *Central Delta* trial court to update that very same analysis. DWR's argument that the unusually wet period from 1995 to 2004 can lead to an "opposite inference" than that expressed by the trial court in the *Rosedale* ruling, concerning groundwater impacts, is both irrelevant

and untimely. (DWR Br. at p. 40.) The time and place for that analysis is in the Revised EIR, not DWR's appellate brief. Because the Revised EIR relies *entirely and exclusively* on Appendix E for this conclusion, it is not supported by substantial evidence.

5. Appellants Did Not Waive This Argument

Both DWR and KWB Parties again raise the desperate defense, soundly rejected by the trial court, that Appellants waived their argument concerning the lack of groundwater or alternative waterbanking resources by west side farmers by not raising it in their comments. (DWR Br. at p. 38; KWB Br. at pp. 45-46; see CFS AA 10:1945, fn. 8 [*CFS* Ruling on Submitted Matter].) But DWR and the KWB Parties fail to mention that this issue was raised by Appellants in response to the EIR's *response to comments*, where DWR first cited the four factors that supposedly disprove the KWB transfer's relationship to the massive crop conversion in the KWB members' service areas. (RAR 2302 [Final Revised EIR Response to Comments].) CEQA is clear that when "there is no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project," CEQA's exhaustion requirements do not apply. (Pub. Resources Code §

21177, subd. (e).) As there was no public hearing on the Final Revised EIR, Petitioners did not waive their ability to challenge the veracity of the assertions made by DWR in the Revised EIR's responses to comments. As the trial court ruled, "…this is a rebuttal argument to DWR's response to comments on the Revised EIR. Petitioners did not have an opportunity to raise the argument at the administrative level, so the exhaustion requirements do not apply." (CFS AA 10:1945, fn. 8.)

B. The EIR's Analysis of the Impacts to Regional and Statewide Water Supplies Caused by Crop Conversion in the KWB Service Area Is Not Supported by Substantial Evidence

DWR and KWB Parties fail to directly address the substance of Appellants' argument that the Revised EIR fails to adequately analyze a major consequence of crop conversion in the KWB service area: increased pressure, year after year, on regional water supplies, i.e., a hardening of demand for SWP water. (App. Br. at p. 40-42; see DWR Br. at pp. 42-45; KWB Parties Br. at pp. 44-45.) And neither party addresses the core of Appellants' argument: that the Revised EIR instead obfuscates the incredible absolute growth in the number of

acres of permanent crops in the KWB service area by focusing on the *comparable growth rate*. (App. Br. at p. 42-43.)

Instead, DWR focuses on the analysis in the 2010 EIR, arguing that there was no new information that required the Revised EIR to revisit the earlier analysis. (DWR Br. at p. 44.) But there was new information: the evidence presented by Appellants that the KWB transfer caused massive conversion of crops to permanent crops in the KWB service area, as discussed at length above. KWB Parties, in turn, argue that the Revised EIR did analyze water supply reliability for KWB members (KWB Parties Br. at p. 44-45), but this misses Appellants' point about *regional and statewide* water supplies. Appellants do not dispute that the KWB transfer increased water supply reliability for KWB members (that is, in fact, exactly why KWB members have been able to convert so many of their acres to permanent crops). The issue is what pressure and impacts this increased reliability for these specific users has had on the rest of the system.

III. DWR Was Required to Revise the 2010 EIR's No Project Alternatives Analysis

The briefs by DWR and KWB Parties unnecessarily confuse and complicate Appellants' claim regarding Article 21(g)(1) and the Revised EIR's no project alternatives analysis. Contrary to both DWR's and Real Parties' arguments, Appellants do not seek, and have never sought, "a new, fifth variant of the no project alternative…." (DWR Br. at p. 45.) Nor do Appellants seek to relitigate the adequacy of the 2010 EIR. (*Id*.) What Appellants do seek is an adequate analysis of the KWB transfer, as ordered by the *Central Delta* trial court.[6] Pursuant to CEQA that analysis must be based on a valid comparison to a legitimate no project alternative. (Guidelines § 15126.6, subd. (e).)

A. Procedural Background

The Revised EIR did not revise or revisit in any way the 2010 EIR's no project alternatives analysis. (RAR 2317 ["The elimination of Article 21(g)(1) was addressed in the [2010 EIR]. No changes or revisions were made to Article 21 in the [Revised EIR]."].) DWR

[6] As discussed in Section I, above, this claim should not have been decided by the trial court. The court instead should have stayed this claim pending the resolution of the *Central Delta* Appeal because the issues raised here are embraced in or affected by the *Central Delta* Appeal. (Code Civ. Proc. § 916, subd. (a).)

claims that it was not required to revisit that analysis, because the *Central Delta* trial court had found that analysis to satisfy CEQA. (*Id*.; DWR Br. at pp. 48-49.) Appellants argue, however, that because the Revised EIR contains new facts and evidence regarding the use of surplus water to support the permanent economies of nut trees in the KWB service area, and because this evidence directly contradicts a major assumption on which the 2010 EIR's no project alternatives analysis is based, the Revised EIR was obligated to reassess and revise the 2010 EIR's no project alternatives analysis in order to properly analyze the impacts of the KWB transfer. (App. Br. at pp. 50-51.)

Article 21 of the SWP long-term contracts governs the use of surplus water. (RAR 2315-16.) Subsection (g)(1) of Article 21 was deleted from the SWP long-term contracts by the Monterey Plus project. (RAR 2317.) Members of the public reviewing the Monterey Plus Draft EIR, including some of the *Central Delta* petitioners, commented on the document's failure to analyze the significant impacts of the Monterey Plus project in light of the deletion of Article 21(g)(1). They argued that, like the invocation of Article 18(b) from the long-term contracts (that this Court ordered should be considered

as part of the 2010 EIR's no project alternatives), the invocation of Article 21(g)(1) should also be considered in the EIR's no project alternatives analysis. (CFS AA 10:1302 [*Central Delta* Ruling on Submitted Matters]; see *Planning and Conservation League v. Dep't of Water Resources* (2000) 83 Cal.App.4th 892, 916-17.)

DWR rejected this request and did not include the invocation of Article 21(g)(1) in any of the 2010 EIR's four no project alternatives. (RAR 5304 [2010 Final EIR: "The invocation of Article 18(b) without Article 21 deliveries was not considered in detail in the DEIR…"]; RAR 3397-98 [Monterey Plus Draft EIR].) The 2010 EIR did include, as part of its responses to comments, an "Analysis of Article 18(b) Invocation with Limited or no Article 21 Water." (RAR 5303.) But the 2010 EIR was clear that this analysis was "not presented as an alternative or a modification of any alternatives discussed in the DEIR, but as clarification of why the Department rejected the approach as an alternative." (RAR 5304.)

The *Central Delta* petitioners raised this issue as one of their claims in their petition. Despite agreeing with the petitioners that their "'plausible' construction [of Article 21(g)(1)] should have been included in the variants of the 'no project' alternative," the *Central*

Delta trial court found that the discussion provided in the 2010 EIR's responses to comments, while "not perfect, … is sufficient to make an informed decision on the Project," and thus satisfied CEQA. (CFS AA 1303-04 [*Central Delta* Ruling on Submitted Matters].) The *Central Delta* petitioners appealed that ruling and the issue is before this Court in the *Central Delta* Appeal. (*Central Delta* Appellants' Op. Br. at pp. 54-64.)

B. The 2010 EIR's Analysis Is Based on the Flawed Assumption that the Sustained Delivery of Surplus Water Does Not Support the Development of Any Permanent Economies

Underpinning the analysis provided in the 2010 EIR's responses to comments is the assumption that "it is unlikely that anyone thought that intermittent Article 21 water would be used to support development of an economy in agricultural or M&I areas." (RAR 5288 [2010 EIR]; RAR 5301 [same language]; RAR 5302 ["Some of the comments express concern that local government today is relying on Article 21 water to support permanent development. The DEIR provides information that shows that this concern is unlikely to occur."].)[7]

[7] On Page 51 of their Opening Brief, Appellants confuse the *Central Delta* administrative record with the *CFS* administrative record in this appeal. The

The 2010 EIR's response to comments admitted that "Article 21 water can be stored for later use and that stored water can constitute a source of water that can be relied upon in local water supply planning." (RAR 5302.) But the 2010 EIR contextualized that possibility within its own interpretation of Article 21(g)(1), that the contract provision applied only to "scheduled" surplus water and not to "interruptible" Article 21 water. (RAR 5303.) The terms "scheduled" and "interruptible" do not appear in the text of Article 21(g)(1).[8] (RAR 5303.) DWR reads these terms into Article 21(g)(1) through its interpretation of the article: "Article 21(g)(1) was designed to prevent agencies from relying on *scheduled* surplus water (therefore the reason for the term 'sustained delivery'), not from using or storing *interruptible* Article 21 water when it was available." (RAR 5303 [emphasis added].) The 2010 EIR then concluded that:

> In the absence of storage, interruptible Article 21 water is not likely to contribute to local water supply reliability because of its intermittent and unpredictable nature. With storage, agencies could provide a drought buffer

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citation to "*Central Delta* AR 11:5301" should thus be "RAR 5301" and the citation to "*Central Delta* AR 2:747" should thus be "RAR 747."

[8] Article 21(g)(1) states as follows: "In providing for the delivery of surplus water pursuant to this article, the State shall refuse to deliver such surplus water to any contractor or non-contractor to the extent that the State determines that such delivery would tend to encourage the development of an economy within the area served by such contractor or non-contractor which would be dependent on the sustained delivery of surplus water." (RAR 5303.)

> that would support some added economic activity, but not within the context of Article 21(g)(1)…. Although the Department is aware of storage of Table A and Article 21 water which may lead to additional local development due to the drought "buffer" from additional stored supplies, the Department is not aware of any local water supplier of local governmental agency that relies upon 'the sustained delivery of surplus water' to support the development of a local economy.

(RAR 5303.)

The specific analyses that are the subject of the *Central Delta* Appeal (and that DWR relies entirely on for its analysis in the Revised EIR) then follows, based on the assumptions that Article 21(g)(1) applied only to "scheduled" surplus water and that no local economies are or were dependent on the sustained delivery of such scheduled surplus water. This analysis constitutes two very brief scenarios, one assuming the invocation of Article 18(b) with no Article 21 deliveries at all, and the other reducing Article 21 deliveries by two-thirds. (RAR 5303-08.)

C. The Revised EIR Was Required to Revise the No Project Alternative Analysis in Light of New Evidence that Disproves the Assumption upon Which that Analysis Is Based

As stated above, the trial court should not have addressed the merits of this argument while the *Central Delta* Appeal is pending,

because if the 2010 EIR's no project alternatives analysis is found to be in violation of CEQA, the Revised EIR's dependence on that analysis cannot stand independently. The argument raised here by Appellants assumes, therefore, that the *Central Delta* Appeal does not exist, and thus the only question raised here is whether the Revised EIR was required to update the 2010 EIR's no project alternatives analysis in light of evidence that contradicts the assumptions upon which it is based.

In their Opening Brief, Appellants cite to evidence contained in the record—that was necessarily not available for inclusion in the 2010 EIR because it post-dates that document—that demonstrates the development of an economy within the KWB members' service area that is dependent on the sustained delivery of surplus water. (App. Br. at pp. 52-53; see RAR 2353-54 [Appellants' Comments on Draft EIR]; see RAR 747 [Chart in Revised EIR showing massive increase in permanent crop plantings in KWB member service areas after KWB transfer].) This new data, showing the *actual* use of surplus water to enable the planting and growing of permanent crops in the KWB member service area, contradicts the 2010 EIR's repeated assumption that "this concern is unlikely to occur." (RAR 5302.)

Neither DWR nor KWB Parties address this core assumption from the 2010 EIR—that forms the basis for Appellants' claim—at all. DWR claims that the 2010 EIR addressed the issue all along, but fails to explain or discuss this specific language, repeated throughout the 2010 EIR's responses to comments, that so clearly has been the focus of Appellants throughout this litigation. (See DWR Br. at pp. 49-50.) Instead, DWR cites to the 2010 EIR's response to comments mini-analysis discussed above for the notion that "invocation of Article 21(g) in this manner could result in 'crop idling' and the 'abandonment of annual and permanent crops."[9] (DWR Br. at p. 49, citing RAR 5307-08.) But nowhere on those two pages, or in the rest of the mini-analysis, does the 2010 EIR discuss, let alone contradict or interpret, the assumptions repeatedly stated just pages earlier in the 2010 EIR: that "the Department is not aware of any local water supplier or local governmental agency that relies upon the 'sustained delivery of surplus water' to support the development of a local economy." (RAR 5307; 5303.) It is the data contained in the 2016 Revised EIR that directly contradicts this assumption, at least

[9] DWR also cites to RAR 32307, which is a single page from a consultant's air quality analysis, for the non-controversial notion that KWB member agencies store water in the KWB as back-up water for use in dry years. (DWR Br. at p. 49.)

regarding the KWB member service areas, and thus it is the Revised EIR that must address this issue.

Moreover, the pages cited by DWR (RAR 5307-08) provide insufficient detail regarding the subject of this lawsuit: the KWB transfer and the impact it has had on KWB member service areas. The mini-analysis makes the alarming declaration that the scenario (as it defines it) "would result from a 40 percent reduction in SWP water deliveries to the 29 SWP contractors that supply water to 23 million California residents," triggering "potentially significant adverse impacts affecting up to 23 million people, and affecting over 600,000 acres of irrigated agricultural lands." (RAR 5307.) The 2010 EIR then admits, however, that the "actual percentage reduction in supply experienced by these people would vary locally according to the water supply mix used by each water agency." (*Id*.) Even if this general statement of the (hyperbolically dire) scope of possible significant impacts could in any way qualify as a sufficient support for the 2010 EIR's conclusions, it does not qualify as sufficiently detailed to provide information regarding the impacts focused on the KWB members' service areas, which is supposed to be the focus of the

Revised EIR and is the focus of this litigation. As Appellants stated in their comment letter on the Draft Revised EIR:

> What the Revised EIR does not analyze is how much surplus water—water that was formerly subject to Article 21(g)(1)'s restrictions—has been used to recharge the KWB, and thus how much surplus water has been used to irrigate permanent crops. There can be no question that, if Article 21(g)(1)'s restrictions applied to any amount of recharged water stored in the KWB, growers using KWB water may have made different crop selection decisions. The Revised EIR needs to include this data and then disclose and analyze the significant impacts that resulted and will result from the removal of Article 21(g)(1) restrictions.

(AR 2354.)

The KWB Parties similarly fail to address the specific substance of Appellants' claim, instead focusing their energy on the argument that Appellants' claim is barred and that the 2010 EIR sufficiently addressed the issue. (KWB Parties Br. at pp. 48-50.) The 2010 EIR's analysis is addressed above, and Appellants addressed at length the argument that the claim is barred in their Opening Brief. (App. Br. at pp. 45-50.) The KWB Parties devote the remainder of their brief to a policy argument against "[p]rohibiting the banking of water in wet years for beneficial use in drought years," an argument never made by Appellants or the petitioners in the *Central Delta*

action. (KWB Parties Br. at p. 45.) The KWB Parties state that the "practical implications of Central Delta's contractual interpretation of Article 21(g) are breathtaking," but then fail to cite to anywhere in the record a discussion of what those implications might be to the KWB member service areas and to the regional and statewide water supplies on which the KWB members rely. (*Id*.)

What are the implications of transferring the KWB in light of the invocation of Article 21(g)(1), especially considering the evidence that demonstrates how thousands and thousands of acres of permanent crops were planted and watered in the KWB member service areas with surplus water that flowed through the KWB? The Revised EIR doesn't identify these implications, and neither does the 2010 EIR, in sufficient detail. A reader—the public and/or decisionmakers—cannot answer that question based on the Revised EIR or the evidence in the record upon which it is based. As the *Central Delta* trial court specifically ordered DWR to revise its analysis of the transfer, operation, and use of the KWB as a water banking operation, this fundamental question should be answerable.

IV. DWR's Project Decision Reveals that the Revised EIR Improperly Followed Project Approval

The legal issues regarding section 21168.9 have been extensively briefed in Appellants' Opening Brief and the response briefs filed by DWR and KWB Parties, as well as the briefs filed in the *Central Delta* Appeal. Appellants therefore limit this response to a few specific issues raised in DWR and KWB Parties' briefs.

A. DWR's Approval of the Project Preceded Its Environmental Review

DWR repeatedly expresses confusion or ignorance as to the substance of Appellants' claim. (DWR Br. at p. 50 ["the precise error is left unarticulated"]; p. 51 ["It is unclear what Appellants mean by this"]; p. 52 ["Appellants may be objecting that the project decision's phrasing as continuing the use and operation of the KWB by Kern Water Bank Authority somehow suggests that DWR's decision preceded the environmental review."].) DWR's confusion rings hollow, as this precise issue has been discussed at length in roughly a dozen briefs in two different trial court proceedings and now two different appellate court proceedings. To be clear, Appellants object to DWR's project decision because the agency has "decided" to

merely continue the use and operation of the KWB pursuant to a prior approval:

> DWR's 'decision' to carry out the project by continuing the use and operation of the Kern Water Bank, expressed in both its decision memorandum and in the Revised EIR, violated CEQA, as it impermissibly defined the project approval in a way that made DWR's commitment to the Project precede its environmental review.

(App. Br. at p. 57.)

DWR argues that its decision "conforms with CEQA because it 'commits the agency to a definite course of action'" and that "[t]here is nothing in the record to support Appellants' assertion" that DWR made its commitment to the Project before preparing the Revised EIR. (DWR Br. at pp. 51-52.) In fact, the record says otherwise. The 2010 EIR stated that no approval was required for the project to go forward. (RAR002734 ["No permits or approvals are required for the proposed project."].) That language was not revised in the Revised EIR. (RAR000511 ["All other text in DEIR Chapter 4 remains unchanged…"].) In addition, DWR's 2010 Findings stated that DWR "concludes that its decision to carry out the proposed project by continuing to operate under the existing Monterey Amendment and the existing Settlement Agreement does not require re-approval or re-

execution of the Monterey Amendment or the Settlement Agreement." (CFS AA 1930 [also found at *Central Delta* AR 57].) The 2016 Findings incorporate and adopt this earlier finding:

> REIR findings for the KWB activities do not supersede the findings of the Monterey Plus EIR but supplement the findings of the Monterey Plus EIR. …the findings for the Monterey Plus EIR that were set aside when DWR vacated its February 1, 2010 certification of the Monterey Plus EIR remain valid as written. …The unchanged findings for the Monterey Plus EIR (Documents Band C of the [Revised EIR]) and these new supplemental findings for the 2016 REIR, covering KWB development and continued use and operation, together constitute the complete findings for the [Revised EIR].

(RAR00330.)

In short, the Revised EIR and DWR's 2016 Findings together explicitly state that the prior approvals of the KWB transfer—a fundamental component of the Project and the very subject of the Revised EIR's analysis—were untouched, unchanged, and left in place, and that DWR's 2016 Findings were merely supplementary to the earlier findings.[10] DWR simply cannot claim that its environmental review of the KWB transfer predated its approval of the transfer. Nor can it claim that its project "decision" at issue in this

[10] One of the five elements of the Monterey Plus project considered in the 2010 EIR was the "Transfer of property known as the 'Kern Fan Element property' in Kern County." (RAR 511.)

appeal satisfied CEQA's definition of a project approval, because its commitment to the KWB transfer took place, under its own terms, before the preparation of the Revised EIR. (Guidelines § 15352, subd. (a).)

B. DWR Cannot Rely on the 2014 Writ for Its Failure to Comply With CEQA

DWR and KWB Parties rely primarily on the 2014 Writ in defense of DWR's project decision.[11] (DWR Br. at p. 51 ["The trial court held that 'DWR has done precisely what the 2014 Writ required… CEQA requires nothing more."]; KWB Parties' Br. at pp. 51-53.] Both DWR and KWB Parties argue that CEQA confers broad discretion on the trial court to fashion a remedy, like this one, that permits an agency to decide to continue to operate a project pursuant to a project approval that predated the environmental review. (DWR Br. at pp. 54-56; KWB Parties' Br. at pp. 53-55.) The propriety of the 2014 Writ is not an issue in this action; that is properly a claim in the *Central Delta* Appeal. But even assuming the 2014 Writ was properly drafted, DWR did not comply with it, because it explicitly required

[11] As discussed in Section I, above, DWR's reliance on the 2014 Writ that is challenged in the *Central Delta* Appeal for its primary defense is further evidence that this claim is embraced in and affected by the *Central Delta* Appeal and as such should have been stayed by the trial court.

DWR to comply with CEQA and CEQA does not permit post hoc environmental review. (CFS AA 10:1327; App. Br. at pp. 58-61.)

The KWB Parties point to their belief that DWR maintained some amount of discretion in its project decision for proof that the project approval did not improperly precede its environmental review, while DWR points to the lack of evidence in the record "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." (KWB Parties Br. at p. 55; DWR Br. at p. 53.) Both arguments noticeably avoid a critical question in that analysis: did DWR believe that it had the discretion to reject the Project, whether in whole or in part? More specifically, did DWR believe that at the conclusion of the Revised EIR process it could decide to not transfer the KWB and instead retain ownership of it?

DWR's argument indicates that it did not believe that it had such discretion, as it describes its project decision as "merely reflect[ing] the actual state of affairs when DWR's Director made his decision regarding KWB operations on September 20, 2016." (DWR Br. at p. 52.) This is in line with the statements in the record, discussed above, that make clear that DWR's earlier commitment to

the KWB transfer was not in any way on the table and that nothing about the Revised EIR process changed that earlier commitment. In this light, DWR's and KWB Parties' arguments that DWR supposedly retained discretion to implement mitigation measures are irrelevant. A project approval involves more than just the power to mitigate; a commitment to a definite course of action requires the power to reject the project as well.

CONCLUSION

The trial court correctly recognized that two of Appellants' claims—regarding the Revised EIR's no project alternatives section and regarding DWR's project decision—were embraced in or affected by the *Central Delta* Appeal, but incorrectly dismissed those claims (and discharged the 2014 Writ they were challenging) rather than staying the proceeding, as it was required to do. Pursuant to clear Supreme Court precedent, the trial court's ruling on these claims, as well as its action discharging the 2014 Writ, is void.

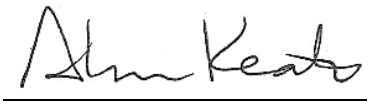
This Court should thus not reach the merits of these two claims. If it does, however, it should find that the Revised EIR improperly failed to revise the 2010 EIR's no project alternatives analysis to include the invocation of Article 21(g)(1), an as-yet-unenforced

provision of the SWP long-term contracts that was deleted as part of the Monterey Plus project, an issue that is strikingly similar, in almost every way, to the one concerning Article 18(b) that was the subject of this Court's ruling in *PCL v. DWR* 18 years ago. This Court should also find that DWR's project decision, crafted in such a way to leave the original approval of the KWB transfer in place, revealed in no uncertain terms that the Revised EIR was an improper post hoc environmental review.

Finally, regardless of how this Court decides the other issues, it should find that the Revised EIR fails to properly and sufficiently review the significant environmental impacts of the KWB transfer, particularly regarding the explosive growth of permanent crops in the KWB members' service areas and the impacts and pressures on regional and statewide water supplies that have resulted from this massive shift. This Court should find that the Revised EIR's conclusions about the cause of crop conversion, as well as the impacts of the crop conversion, are not supported by substantial evidence.

For these reasons, the reasons expressed above, and the reasons expressed in Appellants' Opening Brief, Appellants respectfully request that this Court find in their favor.

RESPECTFULLY SUBMITTED,

DATED: October 31, 2018 BY: 

Adam Keats
Kellan Smith
John Buse
Aruna Prabhala
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to CRC Rule 8.204(c)(1), this combined reply brief contains 11,373 words, according to the word count feature of Microsoft Word 2010, and therefore complies with the 14,000 word limit.

/s/ Adam Keats
Adam Keats

PROOF OF SERVICE

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

CASE NO.: **C0860215**

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO.

I, Russell Howze, declare: I am employed in San Francisco, California. I am over the age of 18 and not a party to the foregoing action. My business address is Center for Food Safety, 303 Sacramento Street, 2nd Floor, San Francisco, California, 94111. My email is rhowze@centerforfoodsafety.org.

On October 31, 2018, I served a true and correct copy of the following document(s):

APPELLANTS' REPLY BRIEF

on all parties in this action via the TrueFiling system. Participants who are registered with the TrueFiling will be served electronically.

IN ADDITION, on October 31, 2018, I served a true and correct copy of the following document(s):

APPELLANTS' REPLY BRIEF

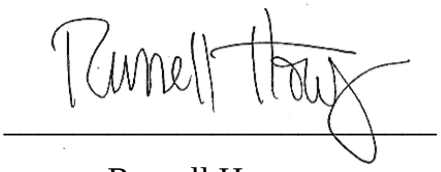
By First Class Mail, placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United

States Postal Service in a sealed envelope with postage fully prepaid, addressed to:

Honorable Timothy M. Frawley
Superior Court of Sacramento County
Gordon D. Schaber County Courthouse, Dept. 29
720 9th Street
Sacramento, CA 95814

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

Executed on October 31, 2018 at San Francisco, California.



Russell Howze