

C064293

**CALIFORNIA COURT OF APPEAL  
FOR THE THIRD APPELLATE DISTRICT**

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**COORDINATED PROCEEDINGS SPECIAL TITLE  
(RULE 3.550)**

**QSA COORDINATED CIVIL CASES**

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Appeal From Judgment Entered February 11, 2010  
Sacramento Superior Court Case No. JCCP 4353  
Coordination Trial Judge The Honorable Roland L. Candee, Department 41

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**IMPERIAL COUNTY AIR POLLUTION CONTROL DISTRICT'S  
CROSS-APPELLANT'S REPLY BRIEF**

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## GLOSSARY OF DEFINED TERMS

- AB.** Assembly Bill.
- AOB.** Appellant's opening brief.
- Air District.** Imperial County Air Pollution Control District.
- af.** Acre-feet.
- afy.** Acre-feet per year.
- APA.** Federal Administrative Procedures Act.
- APCT.** Air Pollution Control Trading.
- AR.** Administrative Record.
- ARB.** Air Resources Board.
- BOR.** United States Bureau of Reclamation.
- Case 82.** *County of Imperial v. SWRCB*, Case No. 03CS00082.
- Case 83.** *SCAQMD and Air District v. SWRCB*, Case No. 03CS00083.
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- Case 1658.** *Morgan, et al. v. IID, et al.*, Case No. 04CS00879/ECU01658.
- CAA.** Federal Clean Air Act.
- CARB.** California Air Resources Board.
- CEQA.** California Environmental Quality Act.
- CESA.** California Endangered Species Act.
- County.** County of Imperial.
- County Agencies.** Air District and County.
- County Board.** County of Imperial Board of Supervisors.
- CVWD.** Coachella Valley Water District.
- CRWDA.** Colorado River Water Delivery Agreement.
- DFG.** California Department of Fish and Game.
- DOI.** United States Department of Interior.
- DWR.** California Department of Water Resources.
- DWR-MWD Agreement.** Agreement Between DWR and MWD for Transfer of Colorado River Water.
- ECSA.** Environmental Cost Sharing, Funding, and Habitat Conservation Plan Development Agreement.
- EIR/EIS.** Environmental Impact Report/Environmental Impact Statement for Water Transfer Project.
- ERCs.** Emission Reduction Credits.
- EMRs.** Environmental Mitigation Requirements.
- EPA.** Environmental Protection Agency.
- Escondido.** City of Escondido.
- FONSI.** Finding of No Significant Impact.

## GLOSSARY OF DEFINED TERMS

**FWS.** United States Fish and Wildlife Service.

**HCP IT.** Habitat Conservation Plan Implementation Team.

**IID.** Imperial Irrigation District.

**IID-DWR Agreement.** Agreement Between IID and DWR for Transfer of Colorado River Water

**IID-DWR-MWD Agreements.** IID-DWR Agreement and DWR-MWD Agreement.

**IOP.** Inadvertent Overrun and Payback Policy.

**ISG.** Interim Surplus Guidelines.

**mg/L.** milligrams per liter.

**MMRP.** Mitigation Monitoring and Reporting Program.

**msl.** mean sea level.

**MWD.** Metropolitan Water District of Southern California.

**NAAQS.** National Ambient Air Quality Standards.

**NOD.** Notice of Determination.

**NOP.** Notice of Preparation.

**PEIR.** Programmatic EIR for QSA.

**PM10.** particles with a diameter of 10 micrometers or less.

**POWER.** Protect Our Water and Environmental Rights.

**ppt.** parts per thousand.

**QSA.** Quantification Settlement Agreement and related agreements (35 total agreements).

**QSA-Contracts.** 13 QSA related agreements at issue in Case 1649.

**QSA-JPA.** Quantification Settlement Agreement Joint Powers Authority Creation and Funding Agreement among the State (through DFG), CVWD, IID, and SDCWA.

**ROD.** Record of decision.

**SCAQMD.** South Coast Air Quality Management District.

**SDCWA.** San Diego County Water Authority.

**Secretary.** Secretary of DOI.

**SIP.** State Implementation Plan.

**State-QSA.** Quantification Settlement Agreement by and among IID, MWD, and CVWD.

**SSHCS.** Salton Sea Habitat Conservation Strategy.

**SWRCB.** State Water Resources Control Board.

**t/y.** tons a year.

**µg/m<sup>3</sup>.** micrograms per cubic meter.

**Validation Action.** See Case 1649.

**VID.** Vista Irrigation District.

**Water Agencies.** IID, SDCWA, MWD, and CVWD.

**Water Order.** Final SWRCB Order WRO 2002-0013, as modified by Order WRO 2002-0016.

**XAOB.** Joint respondents/cross-appellants opening brief.

**XARB.** Cross-appellant reply brief.

**XRB.** Joint appellant reply/cross-respondents brief.

## I. INTRODUCTION.<sup>1</sup>

Time is running out. The amount of mitigation water that is being sent to the Salton Sea is wholly insufficient to make up for the Colorado River water that is redirected from Imperial Valley's agricultural lands to the urban coast. Because of this, the water transfers have undeniably thrust the Salton Sea into a downward spiral. New shoreline is being exposed at an alarming rate. Public health is threatened by toxic laden dust. Ecological systems are under severe distress.

Those responsible for this intolerable situation refuse to do anything more than implement the feeble mitigation included in their defective CEQA documents. Though these documents were timely challenged, they have managed to evade judicial review for *eight years*, allowing cross-respondents to avoid the imposition of additional mitigation requirements necessary to protect public health and the environment.

The State, now realizing its commitment in the record and on which it induced formation of the QSA is unconstitutional, attempts to interpret away its unconditional obligation to pay whatever it costs over \$133 million until the impacts from the QSA and water transfers its SWRCB approved for 75-years cease. The State's proposal to solve the constitutional infirmities by simply allowing the State to breach the terms of the QSA-JPA when it runs out of money to avoid violating section 7 of the Constitution cannot be tolerated. (State XRB, p. 12.) The State's obligation must be measured by its constitutionality today, so that the QSA does not proceed in its present form lacking the legally enforceable promises to fund and implement the mitigation.

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<sup>1</sup> All abbreviated terms are defined in the glossary of terms. Citation formats to the appendices, ARs, and reporter's transcript are identified in footnotes 4, 5, and 13 of the Air District's respondent's and cross-appellant's brief.

The County Agencies ask this Court, under its jurisdiction over the cross-appeal, to decide the merits of the CEQA and CAA claims in lieu of remanding them back to the trial court. The claims are briefed, and because cross-respondents refused to respond, the matter is deemed submitted on the County Agencies' briefs. Cross-respondents endeavor to delay the final judgment with a continued litigation morass of remands and the inevitable appeals in hopes the Salton Sea's decline will be irreversible. After eight long years, it is time that the several million people in Riverside and Imperial Counties, who live and breathe the consequences of the QSA and its water transfers, have their day in court.

This Court may void the EIR/EIS, PEIR, and project approvals on either or both of the following grounds:

- the invalidation of the QSA-JPA renders the mitigation inadequate because there is no assurance of funding and implementation; and/or,
- the EIR/EIS and PEIR violate the substantive and procedural requirements of CEQA with respect to the defective baseline, environmental analysis, mitigation measures, and failure to make findings.

Effective relief can be granted by this Court. The County Agencies have twice offered in their opposition to the writ of supersedeas petition and in the County's cross-appellant's opening brief, that if the Court voids the EIRs and project approvals, it could allow the water transfers to continue, subject to maintenance of sea level and salinity standards, while the Water Agencies conduct lawful environmental assessments and restructure the QSA to honor environmental statutory requirements and otherwise protect public health and the environment. Both times the County Agencies' proposal was met with resounding silence. Thus, the

only alternative they offer the Court is to enjoin the QSA and water transfers until satisfactory mitigation is in place.

The Air District responds to the issues raised by the cross-respondents' briefs that are within the scope of the County Agencies' cross-appeal, in the sections listed below. The Air District also joins in the County's cross-appellant's reply brief.

- Section II: response to arguments that errors and mistakes in IID's approval process do not affect substantial rights under Code of Civil Procedure section 866 relating to CEQA's requirements for public participation and informed decisionmaking, the Air District's ability to exhaust its administrative remedies, and the inadequacies of the administrative record and resulting prejudice to the parties.
- Section III: response to arguments the trial court properly exercised its discretion in denying the Air District's motions to intervene in CEQA cases 1653 and 1656.
- Section IV: response to arguments this Court cannot adjudicate the CEQA and CAA claims in the first instance because it cannot take original jurisdiction.
- Section V: response to arguments that the trial court properly deemed the CEQA and CAA claims moot and the inapplicability of the mootness exceptions.
- Section VI: response to arguments the trial court lacked jurisdiction to invalidate the CRWDA relating to the Air District's CAA claim.
- Section VII: response to arguments that this Court should remand the CEQA claims to the trial court.
- Section VIII: response to arguments this Court cannot decide CEQA because cross-respondents did not brief a response to the County Agencies' opening briefs.

- Section IX: response to arguments regarding the effect of invalidation of the QSA-JPA on the EIRs and QSA project approvals, and inadequacies of the QSA-JPA to ensure funding and implementation of the mitigation as required by CEQA.
- Section X: response to arguments that the 22 missing QSA contracts are validated-by-operation of law for the purpose of saving the invalidated QSA-Contracts.
- Section XI: response to arguments that the Air District did not sufficiently brief its request for attorneys' fees and costs.

**II. IID'S ERRORS AND MISTAKES AMPLIFY THE DISHONEST PROCESS USED TO APPROVE THE QSA, CERTIFY THE EIRS, AND VALIDATE THE QSA-CONTRACTS.**<sup>2</sup>

Cross-respondents argue Code of Civil Procedure section 866 protects the QSA-Contracts from the errors, irregularities, omissions, and mistakes made during the QSA approval process.<sup>3</sup> (IID XRB, pp. 8-11; SDCWA/CVWD/MWD XRB, pp. 70-73.) Here, the "process" underlying IID's approvals of the QSA-Contracts and CEQA documents raise serious due process problems that are far from harmless. IID's process precluded informed decisionmaking and public participation that CEQA demands, and played "hide the ball" with the trial court and parties with respect to critical evidence. Accordingly, IID's defenses that no "substantial right" has been affected is untenable.

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<sup>2</sup> This issue relates to the County Agencies' CEQA, Water Code, and CAA claims in their cross-appeal and cross-appellants' opening briefs.

<sup>3</sup> IID and SDCWA/CVWD/MWD raise this argument for the first time in their reply and cross-respondents' briefs. Generally, appellate courts will disregard arguments raised for the first time in a reply brief (*Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 322) and therefore, the County Agencies treat this argument as raised by the Water Agencies as cross-respondents resisting the CEQA, Water Code, and CAA claims.

1. **CODE OF CIVIL PROCEDURE SECTION 866 DOES NOT EXCUSE CEQA, WATER CODE AND CLEAN AIR ACT VIOLATIONS.**

IID concedes Code of Civil Procedure section 866 does not apply to constitutional violations. (IID XRB, p. 11.) SDCWA/CVWD/MWD do not claim otherwise. IID and SDCWA/CVWD/MWD do not contend Section 866 excuses CEQA, Water Code, and CAA violations. The Air District agrees that Section 866 cannot excuse violations of these statutes.

2. **IID'S DEFECTIVE PROCESS OBSTRUCTED PUBLIC DISCLOSURE, PARTICIPATION IN THE CEQA DECISIONMAKING PROCESS, AND THE PARTIES' ABILITY TO REDRESS THEIR GRIEVANCES IN COURT.**

Cross-respondents argue that IID's defective administrative process did not affect the public's substantial rights. (*See* IID XRB, pp. 114-126; SDCWA/CVWD/MWD XRB, pp. 71, 77-88.) They are wrong; this Court, like the trial court, should reject these arguments. Evidence wrongly withheld from the trial court has surfaced in this appellate proceeding and reveals even more troubling irregularities; IID's approval process was worse than the trial court described.

As discussed below, and in the Air District's cross-appellant's opening brief (pp. 9-14, 65-68), the lack of a transparent and informed public process deprived the public of: (1) an understanding of the elected officials' decisions *before* they were made; (2) an opportunity to comment on the terms of the executed contracts and certified CEQA documents; and, (3) the ability to fully participate in the process. The defective process infected the litigation, resulting in lawsuits being dismissed and critical evidence omitted.

The cases cited by cross-respondents do not excuse such a defective procedure. (*See* IID XRB, pp. 9-11; SDCWA/CVWD/MWD XRB, pp. 71-

72.) In *De Jong v. Pasadena Unified Sch. Dist.* (1968) 264 Cal.App.2d 877, 881-884, the court disregarded clerical errors that had not interfered with election results. In *Card v. Community Redevelopment Agency* (1976) 61 Cal.App.3d 570, 581, the court *upheld* the judgment of invalidity because the city's use of the wrong procedure deprived persons interested in the matter of constitutional due process of law. Section 866 only addresses harmless errors when there is no prejudice. (*Southern Pacific Pipe Lines, Inc. v. Bd. of Supervisors* (1992) 9 Cal.App.4th 451, 463.)

The Air District discusses the QSA-JPA below because it has an undeniable interest in assuring this contract fully funds the mitigation as required by CEQA.

A. **The Trial Court Properly Found Material Terms Were Still Being Negotiated After IID's Board Approved the QSA-JPA.**

The trial court found, based on evidence presented at trial, that the QSA-JPA's wording was not settled at the time IID's Board approved it on October 2, 2003, because substantive terms were yet to be negotiated as of October 6, 2003. (AA:47:292:12740.) This evidence included the October 6, 2003, email from DFG Director Hight to the Water Agencies showing material terms were still being negotiated after IID's Board approved the QSA at its October 2 meeting. (AA:47:292:12722-12723, 12740-12742.) The Hight email,<sup>4</sup> "mysteriously" omitted from the administrative record, was produced by the State only after Cuatro del Mar's persistent efforts and protracted battle with cross-respondents resulted in the trial court allowing limited discovery related to the constitutionality of the State's obligation in the QSA-JPA. (AA:9:67:2124-2127; AA:13:81:3159-3164.)

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<sup>4</sup> The Hight email was sent to cross-respondents' representatives, John Carter (IID), Jeff Kightlinger (MWD), Steve Robbins (CVWD), Scott Slater (SDCWA), and Maureen Stapleton (SDCWA). (AA:13:92:3288.)

The trial court's finding was also supported because there was no evidence in the administrative record showing any QSA-JPA draft agreement (complete or incomplete) was ever presented to IID's Board for consideration before the Board approved it on October 2, 2003. (AA:47:292:12722-12723, 12740-12742.) Thus, IID's Board and the public never had an opportunity to see or comment on all of the substantive and material provisions of the QSA-JPA. (AA:47:292:12723.) Without a draft QSA-JPA, IID's Board proceeded by improperly "rubber-stamping" approval of a QSA-JPA to be drafted by its staff at a later date. (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1127.)

IID defends this process by claiming the other Water Agencies' Boards had already approved the terms, and its General Manager and Chief Counsel confirmed to the IID Board the final agreements substantially complied with the prior drafts or outlines the Board had seen. (IID XRB, pp. 115.) But, the record does not show exactly if and, if so, what "QSA-JPA" IID's Board actually saw or approved on October 2, 2003, or that the public ever saw or knew what the Board ostensibly approved.

SDCWA/CVWD/MWD disagree, claiming any assumption that the version of the QSA-JPA SDCWA sent to Director Hight on October 3, 2003 (which by that time should have been the version approved by the SDCWA/CVWD/MWD Boards), was the same version the IID Board reviewed before its October 2, 2003, vote is "*unsupported and inaccurate.*" (SDCWA/CVWD/MWD XRB, p. 83, fn. 39 [emphasis added].) SDCWA/CVWD/MWD's claim leads to only one conclusion, assuming IID's Board approved a draft of the QSA-JPA: *the four Water Agencies approved different versions of the QSA-JPA.* On the record as it stands, the only verifiable "truth" is that cross-respondents have and continue to keep the public and courts in the dark on the events between October 2 and 10, 2003.

i. **The Hight Email Shows Material Terms Were Being Negotiated Even After the IID Board Approved the QSA-JPA.**

Curiously, it is IID,<sup>5</sup> not the State Attorney General's office representing DFG, that offers a new interpretation of Director Hight's email. (IID XRB, pp. 115-124.) IID now argues the email shows Director Hight was commenting on a "drafting error," and not that the parties were still negotiating the agreement after IID's Board approved it. IID's "interpretation" is inconsistent with the trial court's findings, and misleads the Court in that it suggests Director Hight's comments were about a version of the draft QSA-JPA presented to IID's Board on October 2, 2003. (See AA:47:292:12722.) The evidence shows otherwise.

IID's comparison of the draft QSA-JPA attached to the Carter declaration and the executed QSA-JPA to support its new interpretation of the Hight email is based, at best, on the false assumptions that the October 2, 2003, version of the QSA-JPA was the same version Director Hight was reviewing, and that the "deal" struck by the parties was the "deal" approved by IID's Board. According to the email, Director Hight was commenting on the QSA-JPA received from SDCWA late on October 3, 2003 – *a second version of the QSA-JPA that has not been produced.* (AA:38:236:10359.) There is no evidence that the SDCWA October 3, 2003, version is the one IID's Board approved; in fact, SDCWA/CVWD/MWD disclaim this assumption. (SWRCB/CVWD/ MWD XRB, p. 83, fn. 39.) Therefore, the trial court's finding must stand.

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<sup>5</sup> IID's "new interpretation" of the Hight email was not presented below and must be disregarded. (IID XRB, p. 122.) Arguments and points not raised in the trial court may not be raised for the first time on appeal. (*Schram Const., Inc. v. Regents of the University of California* (2010) 187 Cal.App.4th 1040, 1057, citing *Lyons v. Chinese Hospital Assn.* (2006) 136 Cal.App.4th 1331, 1336, fn.2.)

ii. **The Trial Court Correctly Found that the Administrative Record Did Not Contain a Draft QSA-JPA.**

The trial court correctly found, based on the record, that IID's Board was not presented with a draft QSA-JPA at the time it approved the contract on October 2, 2003. (AA:47:292:12722, 12740-12742.) It was only after trial when the Water Agencies petitioned this Court for a writ of supersedeas to allow the water transfers to continue during the pendency of their appeal that they, with the State Attorney General's concurrence, produced a draft QSA-JPA (attached to the Carter declaration) for the first time as alleged evidence of reversible error. (RJN1:10:155-157.<sup>6</sup>)

The Carter declaration claims the attached draft of the QSA-JPA was given to IID's Board on October 2, 2003. (RJN1:10:155.) But, as discussed in Morgan/Holtz respondent's brief (pp. 21, 26-27, 37-38), there is good reason to doubt whether the draft attached to the Carter declaration, or any draft version of the QSA-JPA for that matter, was presented to the Board on October 2, 2003. According to the Carter declaration, yet another revised draft was presented to the Board on October 6th or 7th. (RJN1:10:155.) *This alleged third version of the QSA-JPA has never been produced.*

The Water Agencies did not include this "evidence of error" in the record on appeal or request that this Court take judicial notice of this critical document in conjunction with their opening briefs. Therefore, the County Agencies requested this Court take judicial notice of the Carter declaration and draft QSA-JPA in their RJN1, primarily to avoid any later argument that remand would be warranted.

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<sup>6</sup> "RJN1" refers to the County Agencies' motion requesting judicial notice filed November 23, 2010. "RJN2" refers to the County Agencies' motion requesting judicial notice concurrently filed with their reply briefs. Citations to RJN2 are: RJN2:vol:no:page(s).

IID does not object to this Court taking notice of the Carter declaration or draft QSA-JPA, and has admitted it is “beyond dispute” that these documents “would have, and should have been part of the Administrative Record.” (IID XRB, pp. 119, 125.) SDCWA/CVWD/MWD did object, claiming in their RJN1 opposition (p. 17) that the Court cannot rely on the Carter declaration for the truth of the facts asserted therein.<sup>7</sup>

IID has been markedly vague about when it first discovered the “missing” October 2, 2003, draft QSA-JPA, other than Carter’s assertion in his declaration that he discovered the document “long after the record augmentation deadline set by the Superior Court” and *before* trial. (RJN1:10:156-157.) IID had an obligation to disclose to the trial court and parties the existence of the draft QSA-JPA as soon as it realized the record was incomplete. Instead, IID told the judge at trial that there was “just an outline” of the QSA-JPA, reinforcing the notion that an outline in the record (identified in the Carter declaration as Vol-8:Tab-155:AR3:CD2:20070) was the only draft QSA-JPA document given to IID’s Board. (RT-12/2/09:5:3308:1-4; AA:35:210:9537.)

IID cryptically inferred during trial that more was discussed with the Board than the record revealed. IID’s counsel told the trial court:

What did we talk about in closed session? It is privileged. ... Is the contract more detailed than

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<sup>7</sup> SDCWA/CVWD/MWD also objected in their opposition to RJN1 to this Court taking judicial notice of other declarations they submitted to this Court in support of their supersedeas petition, specifically, the declarations of Zehren-Thomas (pp. 13-14); Steve Robbins, CVWD General Manager (pp. 14-16); and Maureen Stapleton, SDCWA General Manager (pp. 14-16). They assert this Court cannot rely upon the substance and truthfulness of the facts in the declarations to adjudicate claims in this appeal. SDCWA/CVWD/MWD know if the declarants’ statements are truthful. If, as these water agencies assert, this Court cannot rely on the truth of the facts in the declarations in this appeal, then it should be equally true that the Court cannot rely on the truth of the facts in granting relief in supersedeas.

the outline that's in the public record? Sure. Is it more detailed than what went on in closed session? I can't respond.

(RT-12/2/09:5:3301:27-3302-2.) IID presented these arguments knowing (assuming Carter's declaration is accurate) that a draft of the QSA-JPA was given to IID's Board on October 2, 2003, *in open session*, and a revised draft of the QSA-JPA was given to IID's Board on either October 6 or 7, 2003, in closed session. (RJN1:10:155-156.) When respondents and cross-appellants alerted the Court to IID's misrepresentations, IID tried to justify its conduct by saying it had confined its comments to the administrative record. (IID XRB, p.125, fn. 48.)

California law is clear that attorneys must "never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Bus. & Prof. Code, § 6068(d).) An attorney's honesty in dealing with courts is of paramount importance, and misleading the judge is a serious offense, regardless of motives. (*Id.*; Prof. Conduct Rule 5-200(B); *Mendez v. Superior Court* (2008) 162 Cal.App.4th 827, 834.) Affirmatively mischaracterizing (or concealing) the record at oral argument may violate the statute prohibiting attorneys from misleading the judge or any judicial officer by an artifice or false statement of fact or law. (*Mammoth Mountain Ski Area v. Graham* (2006) 135 Cal.App.4th 1367, 1374-1375; *Sullins v. State Bar* (1975) 15 Cal.3d 609, 613.)

The charade continued after trial. IID failed to reveal the truth, despite its multiple opportunities to produce the draft QSA-JPA. Despite IID's vigorous objections to the trial court's tentative ruling, statement of decision, and judgment, it did not disclose the draft QSA-JPA or inform the trial court that IID's Board had been presented with a draft of the QSA-JPA (as claimed in the Carter declaration). (RJN1:10:155-156.)

iii. **The Administrative Record Shows Material Terms Were Not Settled at the Time IID's Board Approved the QSA-JPA**

There is no evidence in the administrative record of what document, if any, IID's Board approved as the "QSA-JPA" – best case scenario, it was the outline in the record. (Vol-10:Tab-228:AR3:CD2:20070-20076.) IID characterizes the QSA-JPA's changes between the IID Board's October 2, 2003, approval and the October 10, 2003, execution as merely "wordsmithing." (IID XRB, p. 133.) IID argues there is no document in the administrative record suggesting the QSA executed on October 10, 2003, is not substantially the same as approved by the Board on October 2, 2003. (IID XRB, p. 117.) The Air District urges the Court to compare the outline of the QSA (Vol-10:Tab-228:AR3:CD2:20070-20076) – which is the only document the trial court had, and which IID represented had all of the main deal points approved by the Board (AA:35:210:9537) – with the executed version of the QSA-JPA (Vol-10:Tab-231:AR3:CD3:10457-10535). The material differences are readily apparent even upon a cursory review.

The trial court determined language added in the second and third sentences of clause 9.2, the last sentence of clause 10.1, and in clause 14.2 in the executed version of the QSA-JPA demonstrated that substantive terms were yet to be negotiated as of October 6, 2003. (AA:47:292:12740.) As discussed below, this finding is consistent with the Hight email in which DFG's Director observed the State was concerned about entering into an agreement that would require it to write a "blank check." (AA:13:92:3288; AA:47:292:12741.)

The trial court only had the benefit of the QSA outline. (Vol-10:Tab-228:AR3:CD2:20070-20076.) The outline provides "DFG will pay unanticipated costs beyond \$133 million." (Vol-10:Tab-228:AR3:CD2:20073.) The terms in the outline did not afford the State any control over

the mitigation costs, or identify whether an appropriation was necessary. IID's representation to the trial court that *all* QSA-JPA terms are material (RT-11/23/09:5:2674:16-22) presumably included these terms.

The State's asserted veto power over the costs and liabilities for the environmental mitigation requirements (section 9.2) and budget (section 10.1) appears for the first time in the final October 10, 2003, executed version of the QSA-JPA. (Vol-8:Tab-172:AR3:CD1:10467-10468.) The trial court viewed this contractual arrangement as an item of significant substantive legal effect that did not exist when IID formally voted to approve the QSA. (*See* Air District XAOB, p. 78.) Thus, it is clear that material terms that relate to the QSA-JPA's adequacy to ensure mitigation will be paid for and implemented as required by CEQA had not been fully negotiated or included in the QSA-JPA when IID's Board approved it.

**B. The Public Never Saw the Final QSA-Contracts or the CEQA-Required Documents Before EIR-Certification and Program/Project Approval.**

The public did not have any opportunity to see, review, or comment on all of the QSA-Contracts (draft or executed versions) or CEQA documents before IID's Board approved them.<sup>8</sup> (Air District XAOB, pp. 13-14, 65-68.) SDCWA/CVWD/MWD do not dispute this. IID's defense is that its approval process was "lengthy" and the Board voted on a list of the QSA agreements. (IID XRB, pp. 115, 117.)

Lengthiness and a vote are meaningless if the process lacks public disclosure and opportunity for meaningful input, or an understanding of what was approved. Even assuming IID's Board approved the outline (Vol-10:Tab-228:AR3:CD2: 20070-20076) instead of merely the list, the

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<sup>8</sup> According to the Carter Declaration, the draft QSA-JPA was only provided to the Board. (RJN1:10:155.)

outline's seven pages were clearly insufficient to convey the complex terms of 35 agreements totaling 1,501 pages.

The flawed process eviscerated CEQA's core principles because the public was deprived of its substantial right to be informed and involved in the approval process. "The purpose of CEQA is to require the 'public agency [to] explain the reasons for its actions to afford the public and other agencies a meaningful opportunity to participate in the environmental review process, and to hold it accountable for its actions.'" (*County of Amador v. City of Plymouth* (2007) 149 Cal.App.4th 1089, 1103, citing *City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392, 1426.) The absence of a clear process for reviewing and commenting on the CEQA documents was subsequently used to exclude parties from fully prosecuting their CEQA claims, as discussed in Section III.

C. **The Failure to Produce an Accurate Record of the Proceeding Disadvantaged and Prejudiced Parties Raising CEQA and CAA Claims That Are Decided on the Administrative Record.**

i. **The Submission to the Trial Court of An Incomplete Administrative Record is the Fault of IID.**

IID fails to take responsibility for the omission of the draft QSA-JPA from the administrative record. (IID XRB, pp. 119-122.) IID was responsible for preparing a complete and accurate record for the validation action and, as such, fault for the absence of this pivotal document from the record lies with IID. (AA:6:30:1442-01443; AA:6:37:1471-1472.)

When IID certified the record, it included a declaration by one of IID's custodians of record stating "[t]he documents contained in the attached administrative record are true and correct copies of the official records of IID that led up to, and including, the approval of the thirteen

agreements that IID is seeking to validate in Case ECU01649 [validation case].” (AA:7:43:1569.) As we now know, this certification is incorrect.

IID’s assertion that “[n]o other party noticed the omission, and therefore no party requested that the public copy of the draft be included in the Administrative Record” is wrong. (IID XRB, pp. 119-120.) The parties told cross-respondents long before trial that documents appeared to be missing from the record. Morgan/Holtz informed cross-respondents in June 2009 that review of the administrative record revealed “troubling irregularities,” for example: (1) there is no evidence in the record to show which QSA-Contracts were presented to IID’s Board on October 2, 2003; (2) the record includes documents that were in the possession of IID staff and consultants, but never shown to or seen by the public; and (3) *drafts of eight of the QSA-Contracts, including the QSA-JPA, were not in the record.* (M/H.RA:3:9:589-591.)

Morgan/Holtz endeavored to ensure the administrative record for the validation action was complete by filing a motion to augment the record, or alternatively, for discovery. (Supp.AA:119:1192:29512.) The motion detailed the record’s substantial omissions. (Supp.AA:119:1192:029514-29528; Supp.AA:118:1191:29464-29470; Supp.AA:124:1243:30903-30919.) IID opposed the motion (and request for discovery). (Supp.AA:123:1229:30700-30714.) In support of its opposition, IID’s custodian of records attested that IID attempted to include *all* of the items it considered in its approvals (less privileged items), and all items directly related to the approvals of the QSA and related agreements. (Supp.AA:123:1232:30731; Supp.AA:125:1254:31109.) The trial court denied most of Morgan/Holtz’s motion on relevancy grounds, but still acknowledged that IID had prevented Morgan/Holtz from identifying specific documents missing from the record by denying their discovery requests and requests to review IID’s files. (AA:9:68:2134-2136.)

The Carter declaration admits IID discovered the missing evidence *as trial approached* (i.e., before trial), and at a time that the QSA-JPA *was a focus in the trial proceedings*. IID's decision to continue to conceal this document from the trial court and parties after discovery is inexcusable and unlawful. As the Court has stated: "[T]he worst of the fatal errors counsel could commit would be to 'attempt to hide triable issues of material fact.'" (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 283.) The failure to promptly produce this evidence meant IID (and any other cross-respondents<sup>9</sup> that were privy to IID's withholding of material evidence from the trial court and parties) had an advantage at trial, whereas the Judge and other parties were purposely kept in the dark about the existence of the draft QSA-JPA.

Following IID's logic, if an agency "mistakenly" omits a relevant document from the administrative record, and enough time passes (or the time to move to augment the record expires), it should be allowed to benefit from its "mistake." The law does not see it this way. IID's counsel should have, *immediately* after discovering the omission of relevant documents from the record, requested that the trial court, either via a motion under California Code of Civil Procedure section 473<sup>10</sup> or by other means, to add the documents to the record or otherwise consider the evidence.

IID's assertion that the record was not required to be complete because the QSA-JPA was not challenged until later in the litigation is contrary to law. (IID XRB, pp. 119-122.) The party preparing the record is

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<sup>9</sup> Despite numerous opportunities to do so, the other cross-respondents have not offered to explain or deny their possible roles in this misconduct. Allen Matkins (IID's attorneys) and Dan Hentschke (SDCWA counsel), are identified as editors of the draft QSA-JPA. (RJN1:10:183-186.)

<sup>10</sup> Code of Civil Procedure section 473, subsection (a)(1), allows the court, in the furtherance of justice, and on any terms as may be proper, to allow a party to amend any proceeding by correcting a mistake *in any respect*.

required to make a diligent effort to ensure the administrative record contains all documents the agency considered. The scope of the record is not based upon the issues that the parties raise, and should not exclude critical documents just because the augmentation period has expired.

Likewise, IID's assertion that it did not add the draft QSA-JPA to the administrative record because its attorney, Mr. Carter, had possession of the document is, at best, disingenuous. (IID XRB, p. 125.) IID does not claim the document was attorney work product, or covered by the attorney-client privilege. In fact, according to the Carter declaration, the draft QSA-JPA *could not* have been privileged because it was purportedly given to IID's Board *in open session* – a public forum. (RJN1:10, 155.) IID cannot circumvent public disclosure by hiding relevant documents with its counsel or third parties.

Unfortunately, the omission of documents from the record extended beyond the draft QSA-JPA and Hight email. As detailed in RJN1, the County Agencies did not discover until October 2010, after five years of effort and two separate FOIA requests, that IID and SDCWA kept *two different sets of files regarding the EIR/EIS* – a private “project file,” and a public “administrative record file.” (RJN1:11(N):233-234<sup>11</sup>.)

Public Resources Code section 21167.6, subdivision (e), lists the materials that are required by law to be included in the administrative record in a CEQA proceeding. These materials include:

- all written comments received in response to, or in connection with, environmental documents prepared for the project (section 21167.6(e)(6));

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<sup>11</sup> A detailed summary of the County Agencies' efforts over the last five years to extract these public documents from DOI and BOR is described in the Casey declaration, ¶¶ 4-23 and attached documents, pp. 1-51, filed in support of RJN1.

- all written evidence or correspondence submitted to, or transferred from, the respondent public agency with respect to the project (section 21167.6(e)(7));
- any proposed decisions or findings submitted to the decisionmaking body (21167.6(e)(8));
- the documentation of the final public agency decision (section 21167.6(e)(9)); and,
- any other written materials relevant to the respondent public agency's compliance with CEQA or to its decision on the merits of the project (section 21167.6 (e)(10)).

The private "Project File" included "any and all documents related to the CEQA/NEPA environmental compliance process, including, but not limited to, correspondence, memoranda, resource materials, studies, notices, comments and requests for information received from third parties." (RJN1:11(N):234.) The description of documents to be included in the Project File is consistent with the scope of documents to be included in the administrative record under section 21167.6. As the Court in *County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 8, explained, "subdivision (e) [of section 21167.6] contemplates that the administrative record will include pretty much everything that ever came near a proposed development or to the agency's compliance with CEQA in responding to that development." But, not all of the documents in the private Project File were included in the public "Administrative Record File."

Instead, a "sanitizing process" was employed, apparently in an effort to limit the administrative record to favorable documents. All documents IID, BOR, and SDCWA sent to the Project File (attached to a "Project Transmittal Sheet"), were entered into a Microsoft Access database by IID – which was never disclosed or produced. (RJN1:11(N):233-234.) The person transmitting the document to the Project File made an initial

determination whether the document should also be included in the Administrative Record File and, if so, sent the document to a “staging file” until IID’s legal counsel approved the inclusion of the document into the Administrative Record File. (RJN1:11(N):233-234.)

It is impossible to know which documents did not qualify for inclusion in the Administrative Record File. The Administrative Record File simply became a “cherry-picked” version of the Project File, which included only a subset of the documents required by section 21167.6(e). By creating two files, IID and SDCWA deliberately kept from the administrative record documents revealing more defects in the environmental review process and analysis.

The following documents the County Agencies obtained from BOR through the FOIA process are good examples of documents not included in the administrative record, but were clearly within the scope of section 21167.6(e):

1. A “Pre-decisional Draft” plan for compliance under the EIR/EIS (RJN1:11(A):188);
2. Comments from Mr. Don Treasure, including “potentially fatal flaws” with the EIR/EIS (RJN1:11(B):190-197);
3. Comments from CVWD to IID’s counsel expressing concerns about the adequacy of the EIR/EIS (RJN1:11(C):199-202);
4. An email from Laura Harnish of CH2Mhill, consultant for the EIR/EIS, with tables showing ranges of environmental impacts from the project (RJN1:11(E):209-210); and,
5. An email from IID’s counsel to Laura Harnish describing BOR’s requested changes to the EIR/EIS (RJN1:11(G):214-215).

Cross-respondents did not deny in either their responses to the Air District’s cross-appellants’ opening brief or the County Agencies’ RJN1 that two separate files exist, or that the administrative record failed to

include all of the documents in the Project File. Instead, SDCWA/CVWD/MWD raised every conceivable objection in their opposition to the County Agencies' RJN1 (pp. 18-28), in an attempt to justify a system thwarting public disclosure and accountability. They ask this Court to disregard as the truth the statements made by: (1) IID's attorney; (2) BOR, the co-lead agency; and, (3), the preparers of the EIR/EIS who testified as experts at the SWRCB hearing, on the ground the documents are not relevant to the EIR/EIS because they concern NEPA. This is contrary to the representations in the EIR/EIS that it was prepared as a unified document to comply with both CEQA and NEPA. (Vol-10:Tab-220:AR3:CD10:101804\_0049.)

SDCWA/CVWD/MWD also assert in their RJN1 opposition (p. 24) that omitted documents they claim were never before the decisionmakers should nevertheless be protected from disclosure under the deliberative process privilege because the documents expose the agency's decisionmaking process. Notably, if SDCWA/CVWD/MWD concede the omitted documents (which include comments on the draft EIR/EIS) were not before the decisionmakers, then SDCWA/CVWD/MWD also admit they failed to *consider* and respond to comments in violation of CEQA. The Lead Agency *must evaluate comments* on a draft EIR and prepare written responses for inclusion in the final EIR. (Pub. Res. Code, § 21091, subd. (d); *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 353.)

The key purpose of CEQA's comment process is to alert the decisionmaker to deficiencies in the draft EIR. (Guidelines, §§ 15200, 15204.) CEQA does not permit comments to be disregarded without consideration – particularly not comments from the so-called *co-lead agency*, BOR. (*Id.*) When an expert suggests that the environmental document's assessment is flawed and further study is needed, a reviewing court may conclude that the EIR's analysis is fatally deficient, unless the final EIR responds with a further evaluation or a reasonable explanation,

supported by evidence, for not doing so. (*Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm'rs* (2001) 91 Cal.App.4th 1344, 1362.)

The omitted documents include comments made by Mr. Treasure whom, according to BOR, is an environmental “specialist” and “guru,” as to “potential fatal flaws” in the EIR/EIS. (RJN1:11(B):190-197.) If Mr. Treasure’s comments were not provided to the legislative bodies of the agencies approving the EIR/EIS, then the lead agenc(ies) could not have considered them, and the EIR/EIS is fatally deficient. (*Berkeley Keep Jets Over the Bay Comm.*, 91 Cal.App.4th at 1362.)

ii. **The Remedy for a Flawed Record is Reversal of the Project Approval.**

Cross-respondents’ egregious conduct in excluding documents from the record does not require remand. The proper remedy is for this Court to overturn all project approvals. (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 373; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82-83.) In *Protect Our Water*, the court stressed the importance of an adequate and complete record. (110 Cal.App.4th at 373.) Because responsibility for preparing the record falls squarely on the agency charged with certifying the accuracy of the record, the consequences of providing a record to the courts that does not evidence the agency’s compliance with CEQA is severe – *reversal of project approval*. (*Id.*) As discussed in this section and the Air District’s cross-appellant’s opening brief, IID’s process and CEQA documents failed to inform the public or the decisionmakers.

This Court should not reward IID’s misconduct by finding reversible error as a result of its incomplete record. The trial correctly found the record does not include a draft QSA-JPA. No party is claiming the trial court erred in finding the State made an unconstitutional commitment in the QSA-JPA because the draft QSA-JPA was belatedly disclosed. No party is

asking this Court to remand this case to the trial court to reconsider its decision in light of the draft QSA-JPA or other omitted documents. This Court can take judicial notice of this evidence.

The Hight Email and omission of a draft QSA-JPA are sufficient to show material terms were neither fully negotiated, nor fully incorporated into the QSA-JPA until *after* the IID Board's October 2, 2003 approval. Because of this, the public had no opportunity to review or comment on the final project or its environmental impacts. The existence of the draft QSA-JPA does not alter the trial court's findings regarding the shameful process that preceded the QSA approval and CEQA documents' certification. Reversal of the project approvals and EIR certifications, rather than remand, is the appropriate remedy here.

**III. THE TRIAL COURT ERRED IN DENYING THE AIR DISTRICT'S MOTIONS TO INTERVENE IN CEQA CASES 1653 AND 1656.**<sup>12</sup>

**1. THE AIR DISTRICT SOUGHT TO INTERVENE IN THE SAME CASES THE TRIAL COURT IDENTIFIED AS AVAILABLE FORUMS FOR ITS CEQA REMEDIES IN DISMISSED CASE 83.**

The Air District's motions to intervene in Cases 1653 and 1656 are, as SDCWA/CVWD/MWD acknowledge, rooted in the dismissal of Case 83. After the SWRCB adopted Final Water Order 2002-0013 on December 20, 2002, both the County (Case 82) and the Air District and SCAQMD (Case 83) filed writ petitions on January 21, 2003, challenging SWRCB's failure to require adequate measures to mitigate air quality impacts caused by the water transfers. (Vol-10:Tab-227:AR3:CD18:527013; Supp.AA:1:2:2-7; Supp.RA:1:1:1-7.) Cases 82 and 83 were stayed for nearly one

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<sup>12</sup> This issue is within the County Agencies' cross-appeal, issue number 2. (Supp.AA:219:2062:54613.) The Air District briefed this issue in its cross-appellant's brief at pages 61-65.

year because execution of the QSA (a condition of SWRCB's approval) had not yet occurred. (Vol-6:Tab-113:AR3:CD18:527005-527006; Supp. AA:1:4:9-17; Supp.RA:1:2:8-15.)

Case 82 was eventually dismissed because MWD and CVWD were not named as real parties under Public Resources Code section 21167.6.5. This Court affirmed the dismissal in *County of Imperial v. Superior Court* (2007) 152 Cal.App.4th 13, 41, based in part on the expectation that Case 83 would provide the County with an adequate remedy. (*Id.* at 39.)

After this Court's decision in Case 82, SWRCB and SDCWA demurred to the Air District's Case 83 on the same indispensable party grounds as Case 82, claiming the Air District would have an adequate remedy under Code of Civil Procedure section 389 because it could raise its CEQA claims in validation and CEQA cases 1653 and 1656. (Supp.RA:1:6:147-159; Supp.RA:1:7:160-172; Supp.RA:1:8:173-180; AA:7:47:1671-1676; Supp.RA:1:12:2091-2095; Supp.RA:1:13:2120-2122.)

In its decision sustaining the demurrers, the trial court confirmed the Air District could seek its CEQA remedies in validation (Case 1649), and in Cases 1653, 1656, and 1658. (AA:7:47:1673-1674.) The Air District's appeal of Case 83's dismissal is pending in this Court in Case C059264.

After sustaining the demurrers in Case 83, the trial court lifted its prior July 2004 order prohibiting the filing of motions to intervene. (AA:7:49:1681.) The Air District, in reliance on the trial court's decision dismissing Case 83, filed motions to intervene in Cases 1653 and 1656. (Supp.AA:126:1281:31428-31452; Supp.AA:126:1283:31469-31593.)

IID, SDCWA, CVWD, and MWD opposed the Air District's motions to intervene in Cases 1653 and 1656, arguing, among other things, that: the Air District should be limited to submitting an *amicus* brief on air quality issues only; the motions were untimely; the Air District lacked a direct interest in the litigation; and; the Air District failed to exhaust its

administrative remedies. (Supp.AA:131:1300; Supp.AA:131:1301; Supp.AA:131:1302; Supp.AA:131:1304; Supp.AA:131:1306; Supp.AA:131:1307; Supp.AA:131/132:1312; Supp.AA:132:1313.)

The trial court found the Air District's intervention motions were timely filed and that it had a direct interest in CEQA compliance, but it nevertheless denied both motions on the ground the Air District failed to exhaust its administrative remedies under Public Resources Code section 21177.<sup>13</sup> (AA:7:53:1740-1747, 1751-1752.) In light of the trial court's reliance on Cases 1653 and 1656 to provide the Air District with an adequate alternative remedy in lieu of the Case 83, its denial of the Air Districts' motions was inconsistent with section 387's purpose of promoting fairness by allowing all parties potentially affected by the judgment to participate in the litigation. (*Lincoln National Life Ins. Co. v. State Bd. of Equalization* (1994) 30 Cal.App.4th 1411, 1423.)

The Air District included the trial court's denial of its intervention motions in Cases 1653 and 1656 in its cross-appeal. (Supp.AA:219:2062:54613.) SDCWA/CVWD/MWD opposed (p. 174) the Air District's request for petitioner status in Cases 1653 and 1656, arguing the mere

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<sup>13</sup> Contrary to SDCWA/CVWD/MWD's assertion (XRB, pp. 164, 170-171), the trial court could not have concluded the reasons against the Air District's intervention outweighed the reasons in favor because the trial court incorporated this portion of its decision into its decision *granting* the County's motion to intervene in Case 1653. (AA:7:53:1747, 1750-1751.) Similarly unavailing is SDCWA/CVWD/ MWD's claim (XRB, pp. 164, 168-171) the trial court denied the motions because the Air District's petitions would enlarge the issues. The trial court declared the issue moot for the Air District's motions, including the discussion and analysis in Contested Matter 82 because of its relevancy to its decision on the County's motion to intervene in Case 1653. (AA:7:53:1746-1747.) Had the trial court found the Air District exhausted its remedies, it could have treated the Air District's petitions similar to the County's petition by only allowing those claims in the intervention petition that raised the same CEQA issues in existing Case 1653. (AA:7:53:1749-1750; AA:9:65:2091-2047.)

recognition of other available forums was enough of a remedy for the dismissal of Case 83 and that the Air District should be satisfied with an *amici* status in Cases 1653 and 1656.<sup>14</sup> (XRB, pp. 174.) This position disregards the trial court's decision dismissing Case 83: Cases 1653 and 1656 were supposed to provide the Air District with a forum for the *remedy* it sought in Case 83. (AA:7:47:1673-1674.)

*Amicus* status in another party's case does not provide a sufficient alternative forum or an opportunity to obtain the same relief as a party. *Amici* do not have a right to bring motions, to appeal the judgment, to be a part of settlements, to enforce their interests in the action, or to seek attorneys' fees as a prevailing party. Whether defendant status in validation alone provides a sufficient alternative forum, as SDCWA/CVWD/MWD allege, depends on whether the Air District can secure in validation the remedies it seeks: (1) project disapproval by the SWRCB, IID, SDCWA, CVWD, and MWD; (2) decertification of the EIR/EIS and PEIR; and, (3) participation as a party in any return on the writs.

SDCWA/CVWD/MWD rely on *County of San Joaquin v. State Water Resources Control Bd.* (1997) 54 Cal.App.4th 1144, 1157, fn. 8, to support their position. In *County of San Joaquin*, appellants argued they lacked an adequate remedy when the state asserted Eleventh Amendment immunity against complaints filed by appellants in federal court after the state trial court dismissed their case on indispensable party grounds. (*Id.*) This Court noted the trial judge could not be expected to monitor the various federal court actions and reevaluate indispensable party determinations to guarantee appellants a perfect alternative forum. (*Id.*)

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<sup>14</sup> In the Case 83 briefing before this Court, SDCWA and IID rejected as wholly insufficient the idea that CVWD and MWD (the two alleged indispensable parties not named in Case 83), could participate in Case 83 as *amici*. If the trial court's *amicus* briefing order was not sufficient for cross-respondents, then it is not sufficient for the Air District.

Importantly, in *County of San Joaquin*, the alternative forums were outside of the state trial judge's control in federal court.

Unlike *County of San Joaquin*, all of the QSA cases (including Cases 82 and 83), were part of a single coordinated proceeding before a single judge. In disregard of the purpose of coordination, the Water Agencies were permitted to serially launch *seven* rounds of pre-trial pleading battles over the course of 5 and a half years.<sup>15</sup> The Water Agencies manufactured an artificial divide between the forums by picking off the cases one-by-one in successive fashion. If the trial court had exercised its authority to coordinate all pre-trial motions, the viability of alternative forums would have been vetted before cases were dismissed to avoid the prejudice caused by inconsistent rulings, orders, or judgments. (*See* Code Civ. Proc., § 404.1.)

2. **THE TRIAL COURT ERRED IN FINDING THAT THE AIR DISTRICT DID NOT EXHAUST ITS ADMINISTRATIVE REMEDIES.**

The trial court abused its discretion in denying the Air District's intervention motions because it misinterpreted and, therefore, misapplied the law regarding exhaustion of administrative remedies. (AA:7:53:1742-1745, 1751.) The trial court's misinterpretation of the law is reviewed *de novo*. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799-801.)

Exhaustion is not required when there is no opportunity to do so; and, even if exhaustion applied, the Air District timely objected before IID

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<sup>15</sup> The seven rounds were: (1) demurrers and motions heard on November 5, 2004 (AA:5:17); (2) demurrers and motions heard on January 28, 2005 (AA:6:29); (3) demurrers heard on October 11, 2007 (AA:7:42); (4) demurrers heard on February 5, 2008 (AA:7:47); (5) demurrers and motions heard on May 1 and July 24, 2008 (AA:7:52; AA:9:65); (6) motions to preclude heard on January 22, 2009 (AA:9:77-78); and, (7) dispositive motions heard on July 2, August 20 and 27, 2009 (AA:23:130-134; AA:25:175-181).

approved a project in October 2003. (See Air District XAOB, pp. 61-68.) The later issue is addressed first.

Public Resources Code section 21177(b) prevents a person from maintaining an action or proceeding unless the person objected to the approval of the project orally or in writing during the public comment period *or* prior to the close of the public hearing on the project before the filing of the NOD. IID's Board did not approve the QSA until its October 2, 2003, meeting; it filed NODs for the EIR/EIS between October 8 and November 19, 2003, and for the PEIR between October 13 and 17, 2003.<sup>16</sup>

Cross-respondents do not dispute that the Air District submitted comments to IID in response to the NOP during the EIR/EIS scoping period and to the SWRCB during the Water Order approval process -- both of which occurred *before* IID issued an NOD. (AA:7:53:1743; SDCWA/CVWD/MWD XRB, pp. 166-167; Vol-2:Tab-37:AR3:CD10:101534-101535; Vol-6:Tab-93:AR3:CD18:526057-526062; Vol-6:Tab-94:AR3:CD18:524231-52466; Vol-6:Tab96:AR3:CD16:526590-529598.)

The trial court determined the Air District's letter responding to the EIR/EIS NOP was insufficient to constitute an objection to the project approval because the comment was made before the draft EIR/EIS was available. (AA:7:53:01743-01744.) The trial court's finding contradicts Public Resources Code section 21177(b).

In *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199-1200, the court held section 21177(b) allows objections to be raised anytime before the close of the public hearing

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<sup>16</sup> (Vol-8:Tab-159:AR3:CD14:400127-400128, 400128\_06/07, 400128\_11, 400138\_99, 400128\_102; Vol-8:Tab-160:AR3:CD14:400129-400130; Vol-10:Tab-230:AR3:CD14:400007; Vol-10:Tab-234:AR4-07-536-30989/30991; Vol-10:Tab-235:AR4-07-537-30992/30994; Vol-10:Tab-236:AR4-07-538-30995/30997; Vol-10:Tab-237:AR4-07-540-31001/31004; Vol-10:Tab-238:AR4-07-542-31007/31009.)

on the *project approval* (not EIR certification) prior to issuance of the NOD. Thus, if a party objects on any ground during the public comment period *or* before the close of the final public hearing on the project, the party can litigate any issues timely raised by others. (*Id.* at 1200.)

The court in *Woodward Park Homeowners Ass'n, Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 711-712, found comments submitted on the NOP were sufficient alone to satisfy the exhaustion requirement because “[t]he petitioner itself need only have raised some objection before the agency (Pub. Res. Code, § 21177, subd. (b)); if it has, it may then litigate any issue raised before the agency by anyone.” The Air District raised the same objections to the EIR/EIS in its scoping letter as it does now: the water transfers reduce inflows to the Salton Sea exposing playa and creating a serious air pollution problem that threatens public health. (Vol-2:Tab-37:AR3:CD10:101534-101535.)

Public input provided during the NOP and scoping process is not meaningless; it is intended to be used to determine the proper content for the draft EIR. (Pub. Res. Code, §§ 21104, 21153; *see also* EIR/EIS, which confirms the scoping comments affected the project description, impact analysis and alternatives analysis, Vol-3:Tab-51:AR3:CD10:101804\_0061-101804\_0063; Vol-10:Tab-220:AR3:CD10:101804\_0139-101804\_0141).)

The timing of the Air District’s comments was consistent with the State’s CEQA policy that “[c]omments from ... public agencies on the environmental effects of a project shall be made to lead agencies as soon as possible in the review of environmental documents, including, but not limited to, draft environmental impact reports and negative declarations, in order to allow the lead agencies to identify, at the earliest possible time in the environmental review process, potential significant effects of a project, alternatives, and mitigation measures which would substantially reduce the

effects.” (Pub. Res. Code, § 21003.1(a).) Thus, the Air District’s letter on the NOP was a timely objection under section 21177(b).

When lead agency IID certified the EIR/EIS and PEIR in June 2002, the project was not set because IID objected to the other Water Agencies’ and DOI’s insistence that the project include fallowing farmland to generate water for the transfers and QSA. (Vol-10:Tab-222:AR3:CD4:40496-40497; Vol-10:Tab-223:AR3:CD4:40493-40495.) As such, IID did not approve a project with the EIR/EIS and PEIR, or adopt findings, overriding considerations for the unmitigated significant impacts, an MMRP, or an NOD.<sup>17</sup> (Vol-5:Tab-86:AR3:CD3:32097-32098; Vol-5:Tab-87:AR3:CD3:32099-32100.)

Section 21177(b) did not require the Air District to file a separate and independent objection to the EIR/EIS and PEIR when IID certified them in June 2002 because there was no project approval or NOD. (*Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1119-1120.) Nevertheless, the County’s Board of Supervisors (the same elected body for the Air District) commented on the EIR/EIS and PEIR. (Air District XAOB, pp. 62-65.)

IID then submitted the draft and final EIR/EIS to the SWRCB for its use in approving the water transfers. The SWRCB was the first agency to rely on the EIR/EIS to approve the water transfer project. In that proceeding, the Air District filed written objections with the SWRCB, which were served on IID, testified at the SWRCB hearing, and filed a request for reconsideration of the Water Order. (Vol-6:Tab-93:AR3:CD18:526061; Vol-6:Tab-96:AR3:CD18:526597; Vol-6:Tab-94:

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<sup>17</sup> The court in *Bakersfield Citizens for Local Control* stated environmental review is not supposed to be segregated from project approval because public participation is an essential part of the CEQA process. (*Bakersfield Citizens for Local Control*, 124 Cal. App. 4th at 1200.)

AR3:CD18:524231-524266; Vol-6:Tab96:AR3:CD16:526590-529598.)

Cross-respondents' argue (consistent with the trial court's decision), that the Air District's comments and participation during the SWRCB proceeding did not satisfy section 21177(b) because these objections were not made during the *lead agency's* public comment period. (SDCWA/CVWD/MWD XRB, pp. 166-167; AA:7:53:1744; RA:7:53:1744.) Section 21177(b)'s language, however, does not specifically confine exhaustion to the lead agency's process. Exhaustion in the SWRCB proceeding<sup>18</sup> was proper because IID made the SWRCB testimony and CEQA evaluation a functional component of IID's CEQA review and, as the County pointed out there, the SWRCB was essentially acting as the lead agency by becoming first to act on the transfer project. (Vol-10:Tab-225:AR2:CD1:1882-1883; *Citizens Task Force On Sohio v. Bd. of Harbor Comrs.* (1979) 23 Cal.3d 812, 814.)

The SWRCB administrative proceeding was an inseparable part of the public review and comment process for the EIR/EIS. The draft and final EIR/EIS were introduced into evidence in the SWRCB proceeding, and the EIR/EIS preparers testified and were cross-examined about the sufficiency of the document (or lack thereof). (AA:47:292:12739; RT-5/1/08:918, 933; Vol-5:Tab-88:AR3:CD18:523809-523986; Vol-6:Tab-93:AR3:CD18:526057; Vol-5:Tab-76:AR2:CD3:08721-08723; Vol-5:Tab-81:AR3:CD11:200098-200101; Vol-5:Tab-82:AR3:CD11:200088-200090; Vol-5:Tab-77:AR2:CD6:27944.) IID as petitioner and presenter in the

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<sup>18</sup> In fact, on December 9, 2002 before the SWRCB's approval of the final Water Order, the IID Board rejected the transfer project, QSA, PEIR, and EIR/EIS. (Vol-6:Tab-101:AR3:CD3:31314-31315; Vol-6:Tab-102:AR3:CD3:31290-31292.) Contrary to IID's denial (XRB, p. 153) the transfer project, QSA, PEIR, and EIR/EIS were put before the Board for a vote of approval. A vote was taken and the motion to approve was voted down. At trial, IID admitted the QSA was voted down on December 9th. (RT-11/23/09:2694 [see lines 17-18].)

SWRCB proceeding of the non-finally-certified EIR/EIS was in the hearing room to hear, as well as read, the Air District's objections to the EIR/EIS. Perhaps that is why SDCWA/CVWD/MWD do not contest the Air District's assertion that its comments during the SWRCB proceeding are considered comments on the EIR/EIS. (*See* Air District XAOB, pp. 63-64.)

In Case 83, the Air District timely challenged the SWRCB's project approval and the EIR/EIS, naming IID and SDCWA as real parties in interest in the lawsuit. (Supp.RA:1:1:1-7.) Thus, IID had *nine months* from the time the Air District filed Case 83 until IID certified the EIR/EIS with a project approval, to respond to the Air District's comments. In fact, the stipulated stay for Case 83 anticipated changes would be made and the final project would be acceptable to the Air District. (Supp.RA:1:2:10.) Thus, the purpose of exhaustion – to give the agency an opportunity to respond to specific objections before those objections are subjected to judicial review – was satisfied here. (*Woodward Park Homeowners Ass'n, Inc.*, 150 Cal.App.4th at 712).

When IID finally approved a project on October 2, 2003, the public did not have an opportunity to review the final project because some of the QSA agreements were still in outline and draft form (or missing altogether), and material terms were still being negotiated after IID Board's October 2, 2003 approval. (*See* AA:47:292:12722-72723, 12740-12741; Air District XAOB, pp. 65-68.) There is no evidence in the record showing the public had copies of the EIR/EIS, PEIR, and Addendums before they were certified, or the draft QSA-Contracts under consideration. This glaring omission has been brought to cross-respondents' attention several times, but they have yet to identify evidence in the record showing otherwise.

Moreover, the October 2, 2003, public hearing was only for the QSA and not for the CEQA documents. (Vol-10:Tab-229:AR3:CD3: 30129.) Accordingly, the trial court concluded in Contested Matter 146, "the public

may not have been provided an opportunity to review, or sufficient time to meaningfully review and comment on the relevant documents.” (AA:25:180:6649). As discussed in Section II, this appellate proceeding has proven the trial court’s conclusion was an understatement.

The Air District could not be expected to meaningfully comment on the sufficiency of the EIR/EIS and PEIR (as amended by the Addendums) when it did not have the CEQA or final project documents, or adequate time to review them. (Vol-10:Tab-229:AR3:CD3:30129.) Exhaustion does not apply when there is no opportunity to do so. (Pub. Res. Code, § 21177(e); see e.g., *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1210-1211; *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 702.) SDCWA/CVWD/MWD did not contest these facts or otherwise respond to the Air District’s arguments that exhaustion was not required under these circumstances pursuant to section 21177(e). (Air District XAOB, pp. 65-68.) The trial court’s decision to deny the Air District petitioner status under these circumstances was unjust.

3. **THE COURT SHOULD REJECT THE EXTRANEOUS ARGUMENT ADVANCED BY SDCWA/CVWD/MWD THAT THE AIR DISTRICT’S MOTIONS TO INTERVENE WERE NOT TIMELY.**

SDCWA/CVWD/MWD object to the trial court’s finding that the Air District’s intervention motions were timely. (XRB, pp. 171-173; AA:7:53:1740-1742, 1751.) They argue the Air District should have filed its motions to intervene between the time Cases 1653 and 1656 were first filed (in November 10 and November 7, 2003), and the Imperial County Superior Court’s granted the motions to coordinate the cases and change venue (on January 27, 2004). (AA:7:53:1741, 1751.)

The trial court rejected this same argument, concluding a motion for change of venue stayed motions to intervene. (AA:7:53:1741-1742.)

SDCWA/CVWD/MWD do not dispute the law on this point, which has not changed since the trial court issued its ruling. (*Thompson v. Thames* (1997) 57 Cal.App.4th 1296, 1303-04 [the filing of a motion for change of venue operates as a supersedeas or stay of proceedings, and the court cannot rule on other substantive issues while the motion for change of venue is pending citing Code Civ. Proc., §§ 395, 396].)

The trial court also correctly observed that after the QSA cases were consolidated and moved to Sacramento, it notified the parties in its orders following the July 23, 2004, status conference that “motions for consolidation of actions or motions for leave to intervene will not be entertained until further order of the Court.” (AA:7:53:1741; AA:5:14:1178.) That stay order was not lifted until February 2008, when the trial court ordered motions to intervene be filed by April 3, 2008. (AA:7:49:1681.) The Air District filed its motions to intervene in compliance with those orders. (AA:7:49:1681; Supp.AA:126:1281:31428-31452; Supp.AA:126:1283:31469-31493.) Therefore, the trial court correctly concluded the Air District timely filed its intervention motions. (AA:7:53:1742, 1751.)

**IV. THIS COURT HAS JURISDICTION TO ADJUDICATE THE MERITS OF THE ENVIRONMENTAL CLAIMS UNDER THE CROSS-APPEAL.**

This Court has jurisdiction over the County Agencies’ cross-appeal, including the merits of the environmental claims. (*See Leone v. Medical Board of California* (2000) 22 Cal.4th 660, 666 [appellate court has jurisdiction over direct appeals].) Cross-respondents have not argued otherwise. Instead, they argue this Court must also have “original jurisdiction” (which, of course, they argue is unavailable) in order to adjudicate the merits of the environmental claims.

Cross-respondents’ argument mischaracterizes the County Agencies’ position on jurisdiction: while this Court could take “original jurisdiction”

of the claims if it so chooses, it is not necessary that it do so in order to adjudicate the merits because it already has jurisdiction by way of the cross-appeal. (Air District XAOB, pp. 83-89; County XAOB, pp. 90-91.) Because the Court already has jurisdiction, it can exercise its discretion to decide the environmental claims. But, no “extra jurisdiction” is required.

A. **THE COURT CAN GRANT THE COUNTY AGENCIES AFFIRMATIVE RELIEF ON CROSS-APPEAL.**

The Air District, as a cross-appellant, is entitled to seek affirmative relief from this Court, including requesting this Court adjudicate the merits of the environmental claims. (*Building Industry Assn. v. City of Oceanside* (1994) 27 Cal.App.4th 744, 758, fn. 9 [respondent that files a cross-appeal can obtain affirmative relief by way of appeal].)<sup>19</sup> The Court can grant such relief because this issue is within the scope of the County Agencies’ timely filed cross-appeal. (Supp.AA:219:2062:54610-54626; Supp.AA: 219:2063:54627-54643.)

The cross-respondents do not object, and the State actually concedes, that the County Agencies’ request to have this Court decide the CEQA merits is an issue raised in their cross-appeal. (State XRB, p. 25 [“respondent-appellants raised the matter as a cross-appeal”]; SDCWA/CVWD/MWD XRB, pp. 196 [“...request that the Court decline to consider the issues on these appeals”].) IID’s reliance on *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 259, and *Palermo v. Stockton Theaters, Inc.* (1948) 32 Cal.2d 53, 65, is therefore misplaced because resolution of the merits of the environmental claims is necessary to the disposition of the County Agencies’ cross-appeal.<sup>20</sup>

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<sup>19</sup> IID argues (pp. 144-145) respondents that did not cross-appeal cannot seek affirmative relief, conceding cross-appellants can seek such relief.

<sup>20</sup> The Court stated in those cases that it would not resolve issues that are not necessary to the Court’s appellate decision.

The County Agencies allege in their cross-appeal that the trial court erred in mooting the CEQA claims, not reaching the merits of CEQA and the CAA claims and defenses in Case 1649, and not issuing writs on the merits in CEQA Cases 1653 and 1656. (Supp.AA:219:2062:54613.) The County Agencies' intention to ask this Court to adjudicate the CEQA merits as part of their cross-appeal was never a secret.

After filing their cross-appeal, the County Agencies advised the Court (and cross-respondents, *without objection*) in April 2010 in their supersedeas opposition that they intended to ask the Court to adjudicate the CEQA merits. The County Agencies' application in October 2010 seeking permission to file briefs exceeding the word limit (*again, unopposed, and granted by this Court*) was also premised, in part, on briefing the CEQA and CAA claims.

For the first time in December 2010, cross-respondents questioned this Court's jurisdiction to hear CEQA by way of a motion to strike the County Agencies' and POWER's CEQA merits arguments, which this Court denied summarily. The arguments cross-respondents advanced in their motion to strike are the same ones advanced in their cross-respondent's briefs and, likewise, should be summarily rejected. This Court's denial of that motion is consistent with its jurisdiction to adjudicate the environmental claims on the merits.

**B. THE COURT CAN, BUT DOES NOT NEED TO, TAKE ORIGINAL JURISDICTION TO ADJUDICATE CEQA AND THE CAA CLAIMS.**

Cross-respondents argue the Court cannot adjudicate the merits of the environmental claims because: in order to do so, it would need original jurisdiction; and, the Court cannot take "original jurisdiction" because the County Agencies filed a cross-appeal instead of a writ petition. (IID XRB, pp. 148-153; State XRB, pp. 25-27.) As discussed above, the Court does

not need to take original jurisdiction because it already has jurisdiction over the County Agencies' cross-appeal. Moreover, this Court can take original jurisdiction of the CEQA and CAA claims if it so chooses. Either way, the Court can, and should, hear CEQA and the CAA.

The California Constitution, Article VI, sections 10 and 11, address jurisdiction of the California courts. Section 10 explains when the courts have original jurisdiction. Section 11 confirms this Court's appellate jurisdiction. Cross-respondents improperly attempt to use these sections to limit this Court's ability to adjudicate CEQA "in the first instance" to (1) when a party is before the Court on a writ petition instead of an appeal, or (2) where the underlying claims were brought as a writ. (State XRB, pp. 25-26; SDCWA/CVWD/MWD XRB, pp. 190-191.)

Cross-respondents' first argument begs the question: Why would a party be *required* to seek writ review of an issue that is already on appeal? A party can take an appeal in specified circumstances, like here, when a final judgment has been entered. (Cal. Code Civ. Proc., § 904.1.) Appeals, which are heard as a matter of right, differ from writ review, which is considered extraordinary, equitable and discretionary, and necessary when there is no appeal available. Thus, even where the trial court has erred, the appellate courts more often than not prefer to wait and review the issue on appeal rather than granting immediate writ review. (*See Brown, Winfield & Canzoneri, Inc. v. Superior Court (Great American Ins. Co.)* (2010) 47 Cal.4th 1233, 1241, fn. 3 [as of February 1, 2010, about 94% of writ petitions summarily denied].)

IID's reference to this Court's prior denial of the County Agencies' petition for writ of mandate filed in December 2008 to show that the County Agencies previously requested the "same extraordinary relief" highlights cross-respondents' misunderstanding of this Court's jurisdiction. (IID XRB, p. 148.) The County Agencies filed a petition for writ of

mandate in 2008 because the trial court had not entered judgment (or even set a briefing schedule or hearing); thus, appeal was not an available remedy and this Court would have had to take original jurisdiction to hear the merits of those claims. Since that time, the trial court entered judgment and the CEQA and CAA claims are now squarely before this Court by way of the County Agencies' cross-appeal. That the Court previously denied the County Agencies' 2008 writ petition does not bear on its jurisdiction to hear the merits of the environmental claims in the cross-appeal.

Cross-respondents' second argument is similarly unavailing. The Air District first notes that Cases 1653 and 1656 are in fact CEQA writ of mandate cases. The Court can adjudicate CEQA writ claims "in the first instance" when presented on cross-appeal. (*See, e.g., Californians for Alternatives to Toxics v. California Department of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1069 (*Toxics*).

The Court can grant the Air District petitioner status in Cases 1653 and 1656 because the denials of its intervention motions are part of the cross-appeal. Or, the Court can likewise treat the Air District's CEQA and CAA validation defenses as part of the County's writs. (Cal. Civ. Code, 3528 ["the law respects form less than substance"]; *see also, e.g., Sharpe v. Superior Court* (1983) 143 Cal.App.3d 469, 472 [appellate court disregarded form and reviewed the matter as the parties treated it because expeditious resolution of the merits of the claim would spare the parties time and expense]; *A.N., a Minor v. County of Los Angeles* (2009) 171 Cal.App.4th 1058, 1064 [the substance is what matters, not its label].)

Nevertheless, the Court can still decide the merits of an issue presented for the first time on appeal, *even where the issue was not brought as a writ*, if the issue is "capable of repetition, yet [would] evad[e] review" otherwise. (*Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122 [California Supreme Court held that appellate courts can resolve issues

not previously decided, or that were never presented].) The Air District discussed in its cross-appellant's opening brief how the cross-respondents could attempt to rely on the defective CEQA documents in the future if this Court does void the EIRs outright or adjudicate the merits. (Air District XAOB, pp. 82, 85.)

In *Thompson*, the appellate court dismissed an appeal regarding injunctive relief because it believed it lacked jurisdiction to hear the matter on the merits. The California Supreme Court superseded decision and found that although the inmate had since been executed (rendering the issue moot), the Court of Appeal should have heard the case and, thus, it decided the issue on the merits. (*Id.* at 121-122.) The Court stated: "Because Thompson has been executed, we could dismiss this proceeding as moot. But when, as here, an otherwise moot case presents important issues that are 'capable of repetition, yet evading review,' we may resolve the issues." (*Id.* [internal citations omitted].) As such, the Court has jurisdiction to hear non-writ claims on appeal.

Cross-respondents misconstrue the County Agencies' citations to the *Inyo v. Los Angeles* cases.<sup>21</sup> The County pointed out in its brief that the Court would be *justified* in taking original jurisdiction because the facts here are similar (and even more egregious) than those presented in *Inyo*. (County XAOB, pp. 90-91.) The Air District cited to *Inyo* to support the proposition that water transfers involve disputes of major public importance and present the types of issues that compel merits resolution. (Air District XAOB, pp. 83-84.)

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<sup>21</sup> *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795 (*Inyo I*); *County of Inyo v. City of Los Angeles* (1976) 61 Cal.App.3d 91 (*Inyo II*); *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185 (*Inyo III*); *County of Inyo v. City of Los Angeles* (1978) 78 Cal.App.3d 82 (*Inyo IV*); *County of Inyo v. City of Los Angeles* (1981) 124 Cal.App.3d 1 (*Inyo V*); and *County of Inyo v. City of Los Angeles* (1984) 160 Cal. App. 3d 1178 (*Inyo VI*).

As this Court observed in *Inyo VI*, “It is difficult to conceive litigants as sophisticated as the parties in this action could suppose this court” powerless to adjudicate CEQA claims on appeal from dismissal or in original jurisdiction. (160 Cal.App.3d 1178, 1185.) In fact, in *Inyo I*, the County filed a notice of appeal in addition to a writ of supersedeas to expedite resolution of the merits (which the Court treated as a petition for writ of mandate). The Court in this case has also expedited resolution of this appeal on the merits.

However, in addressing *Inyo* and other original jurisdiction cases, the County Agencies made clear that they “advance[d] these points not to urge this Court to assert original jurisdiction; the case is properly here on appeal and cross appeal from final judgment . . . .” (County XAOB, p. 91.) That cross-respondents attempt to rely on cases where the parties have filed writ petitions because the issue was not already on appeal as a limit on the Court’s jurisdiction or ability to adjudicate claims is disingenuous. This Court has jurisdiction to adjudicate the merits of the environmental claims irrespective of whether it can, or decides to, take original jurisdiction.

V. **THE ENVIRONMENTAL CLAIMS IN CASES 1649, 1653, AND 1656 ARE NOT MOOT.**<sup>22</sup>

1. **THE TRIAL COURT FAILED TO ADJUDICATE THE MERITS OF THE CEQA CLAIMS DESPITE THE COUNTY AGENCIES’ EXTRAORDINARY EFFORTS.**

Despite the County Agencies’ seven years of efforts, and even though answers were filed and records lodged, the trial court never decided CEQA. The County Agencies made numerous attempts over a year and a half to secure a briefing schedule and hearing on the CEQA claims, but the trial court refused (*see* Air District XAOB, pp. 19-21):

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<sup>22</sup> This issue is within the County Agencies’ cross-appeal, numbers 4 and 6. (Supp.AA:219:2062:54613.) The County Agencies briefed this issue. (Air District XAOB, pp. 79-89; County XAOB, pp. 91-131.)

- September 14, 2007. (RA:1:12:224-225).
- February 28, 2008. (RA:1:13:236-237; AA:7:49:1680-1682.)
- May 29, 2008. (RA:1:14:247-248; AA:8:58:1942-1946.)
- June 25, 2008. (RA:1:15:275.)
- August 14, 2008. (RA:2:26:513; Supp.AA:148:1484:36876.)
- October 23, 2008. (Supp.AA:153:1519:38121-38124.)
- November 13, 2008. (AR:2:29:552-552; AA:13:76:3082.)<sup>23</sup>
- January 15, 2009. (RA:4:49:897.)

At the January 22, 2009, status conference, it became apparent that the trial court would not adjudicate the CEQA claims if the QSA-Contracts were invalidated on other grounds. (RT-1/22/09:6:1594-1595, 1597-1598.) The trial court's January 30, 2009, orders reiterated its belief that invalidation of the QSA-Contracts would "moot" CEQA. (AA:13:79:3131.) In February 2009, likely because the County Agencies' writ petition was pending in this Court,<sup>24</sup> the trial court finally set a schedule identifying three phases of trial, relegating CEQA to the later two phases: 1A (Case 1649), 1B (Case 1656), and 1C (Cases 1653 and 1658). (AA:13:79:3137.)

The CEQA and CAA merits were even briefed twice by the County Agencies and POWER in the proceeding below. The County Agencies and POWER first briefed the CEQA and CAA merits in motions for peremptory writs of mandate (Cases 1653 and 1656) and motions for summary judgment in Case 1649. (RA:5:56:1116-1125; RA:5:57:1126-

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<sup>23</sup> At that point, the County Agencies were extremely concerned about the trial court's resistance to adjudicating CEQA. Therefore, on December 29, 2008, after numerous unsuccessful attempts to secure a CEQA trial, the County Agencies filed a petition for writ of mandate in this Court asking it to take original jurisdiction over CEQA. (RJN1:3:55-59, 77-84.)

<sup>24</sup> This Court denied the County's writ petition after receiving a copy of the trial court's orders. (*County of Imperial v. Superior Court (Metropolitan Water Dist.)*, 3 Civil C060725 (Feb. 5, 2009).)

1177; Supp.RA:179:1721:44503-44548.) The County Agencies and POWER filed these motions in response to the trial court's January 30, 2009 orders that set a schedule for a seventh round of dispositive motions. (AA:13:79:3133.)

Other parties also filed motions on environmental claims and defenses.<sup>25</sup> The County Agencies' and POWER's motions were never considered. The trial court *sua sponte* issued an order in April 2009, denying the County Agencies' and POWER's motions as "premature." (AA:14:99:3593.) However, the trial court did not dismiss the Water Agencies' CEQA motions as "premature."

The County Agencies filed a motion to revise the orders. (RA:6:68:1458-1485; RT-5/27/09:6:1669.) IID opposed. (RA:6:70:1495-1514.) The trial court granted the motion, in part, to allow the Air District to re-file a motion in Case 1649 on its CAA defense only; the motion was denied as to the CEQA claims. (AA:15:101:3629.)

The County Agencies briefed the CEQA merits a second time in their trial briefs. Both the County Agencies and cross-respondent Water Agencies submitted opening trial briefs for phases 1B (PEIR CEQA compliance), and 1C (EIR/EIS CEQA, NEPA, and CAA compliance), in September 2009. All parties filed opposition briefing in October 2009.

During the month long trial in November 2009, the Air District showed that an invalid QSA-JPA necessitated the invalidation of the other QSA-Contracts and environmental documents (AA:40:242:10769-10875; AA:44:259:11829-11976; RT-11/19/09:9:2579-2651; RT-11/30/09:10/11:

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<sup>25</sup> *E.g.*, SDCWA/MWD motion to dismiss Case 1656 under CEQA (Supp. AA:180:1731:44970-45000); MWD/CVWD motion for partial judgment on the pleadings in Case 1649 as to NEPA and CAA denials and defenses (RA:5:60:1317-1346; RT-8/20/09:6:1751-1781); and CVWD/MWD MSJ in Case 1658, on CEQA grounds. (Supp.AA:172:1684:42928-42960; RT-8/20/09:6:1790-1795.)

2951-3038), and that invalidation of the QSA-Contracts would not “moot” the environmental claims (RT-11/30/09:10/11:2965-2968, 3035-3038). On December 10, 2009, the week before trial phase 1B, the trial court issued a tentative ruling invalidating 12 of the 13 QSA-Contracts, and vacating the remaining trial phases and environmental claims as moot. (AA:46:267:12339-12365.) The County Agencies contested the trial court’s mootness determination. (AA:46:270:12377-12384; RT-12/17/09:12:3337-3340.)

On January 13, 2010, the trial court issued a 52-page final statement of decision affirming its tentative ruling. (AA:47:292:12706-12757.) The County Agencies suggested phrasing for the judgment to void the environmental approvals and truly moot the environmental claims. (AA:47:294:12772-12774.) Specifically, the County Agencies requested the trial court set aside all of the Water Agencies’ resolutions and board actions certifying the EIR/EIS, PEIR, and Addendums. (AA:47:294:12772-12774.) Had the trial court honored this request, the environmental documents could not be relied upon or used in connection with any future project approval; but, by denying the County Agencies’ request, the trial court enables the existing EIRs to form the baseline from which new environmental assessments will be measured.

The trial court’s proposed judgment dismissed Cases 1653, 1656, 1558, and the environmental claims in 1649 without setting aside the approvals of the EIRs. (AA:47:298:12818-12819.) The County Agencies again contested the mootness determination in the proposed judgment, which did not void the EIRs, requesting the trial court set aside all of the Water Agencies’ resolutions and board actions certifying the EIR/EIS, PEIR, and Addenda. (AA:48:303:12878-12880; RT-2/11/10:12:3416-3417; AA:48:309:13029.) The trial court entered its final judgment on February 11, 2010, without making the County Agencies’ requested changes. (AA:48:312:13071-13072.) In doing so, the trial court stated it

did not intend to deprive any party of its opportunities to litigate its claims – but it has by failing to void the CEQA documents. (AA:47:292:12752.)

2. **THE JUDGMENT PREJUDICES THE PUBLIC AND CROSS-APPELLANTS BY ALLOWING THE TIMELY-CHALLENGED EIR/EIS AND PEIR TO REMAIN VALID.**

If the EIRs are not voided, the EIR/EIS, PEIR, and Addenda remain in effect – there is no middle (half void/half valid) ground. Cross-respondents do not cite to any cases that render the EIRs invalid once the CEQA writs are dismissed as moot. Instead of confronting this issue, cross-respondents make vague and unenforceable promises in an effort to convince this Court not to void the CEQA documents. (IID XRB, pp. 86-88; SDCWA/CVWD/ MWD XRB, pp. 186-187; State XRB, pp. 31-32.)

These Water Agencies’ “assurances” are not comforting and raise a logical question: Why are cross-respondents so adamant the EIR/EIS and PEIR should not be voided if the project is dead and the County Agencies will have other opportunities to fully challenge the EIR/EIS, PEIR, and Addenda in the future? The answer is simple. A *valid* EIR will grant cross-respondents a distinct advantage over the public. If the litigation is dismissed as moot, cross-respondents will be in the same position they were on June 28, 2002 – with an already certified EIR/EIS and PEIR. (Vol-5:Tab-86:AR3:CD3:32097-32098; Vol-5:Tab-87:AR3:CD3:32099-32100.) With still-certified EIRs, cross-respondents can avoid repeating the scoping process and comment period for the draft EIRs that preceded the certified CEQA documents.

The draft EIRs provided the only opportunities for public input and comment on the EIR/EIS and PEIR because the final project approvals were accompanied by addendums to the EIRs, which are not required to be, and were not, circulated for public review and comment. (Guidelines, § 15164(c).) (Vol-8:Tab-159:AR3:CD14:400127-400128, 400128\_06/

400128\_07, 400128\_11, 400128\_99, 400128\_102; Vol-8:Tab-160:AR3:CD14:400129-400130.) The certified status of the EIR/EIS and PEIR will allow cross-respondents to start the environmental analysis, not from scratch, but based on the flawed analysis in the EIR/EIS and PEIR. (See Air District, XAOB, pp. 90-136.)

Cross-respondents, without citing to authority, claim the existence of the still-certified CEQA documents will not prevent future objectors from re-challenging the environmental analysis in the certified EIRs when a new project is approved. Case law construing the statute of limitations provisions in Public Resources Code section 21167 indicates otherwise. (See e.g., *Committee For Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 56 [challenges to subsequent activities for which there is no new negative declaration or EIR may be limited to the legality of the agency's decision about whether to require a subsequent or supplemental EIR, or subsequent negative declaration].)

Cross-respondents' position is also disingenuous. In the proceeding below, CVWD and MWD challenged Morgan/Holtz's CEQA case 1658 (brought after the QSA was approved and the EIR/EIS Addendum was certified on October 2, 2003) as untimely because the petitioners did not challenge the original June 2002 certification of the EIR/EIS that occurred without project approval. While the trial court rejected CVWD's and MWD's contentions, it limited the scope of Case 1658 to only the EIR/EIS as amended by the Addendum. (AA:25:180:6652-6653.) The trial court concluded that recertification or re-adoption of an EIR in connection with a subsequent approval does not reopen the statutory limitations for the original EIR, citing *Chamberlin v. City of Palo Alto* (1986) 186 Cal.App.3d 181, 188 and *El Dorado Union High School District v. City of Placerville* (1983) 144 Cal.App.3d 123. (AA:25:180:06652-06653.)

A *void* EIR/EIS and PEIR is the only action that ensures a level playing field for both the public and cross-respondents. Allowing the EIR/EIS and PEIR to stand would disregard CEQA's primary purposes of informed decision making and meaningful public review.

3. **OTHER PROJECT APPROVALS REMAIN AFTER THE INVALIDATION OF THE QSA-CONTRACTS.**

Cross-respondents assert that if the QSA-Contracts are invalidated, there will be no remaining *project approvals* associated with the EIRs and, thus, the issues are moot, not ripe, and any further consideration of the CEQA disputes would result in only an advisory opinion. (IID XRB, pp. 84-88; SDCWA/CVWD/MWD XRB, pp. 181-185; State XRB, pp. 29-32.) In addition, that assertion addresses the wrong issue, because the prejudice to the cross-appellants stems from allowing the EIRs with remaining controversies over their adequacy to remain certified.

The EIR/EIS and PEIR covered more project approvals than just the invalidated QSA-Contracts. Cross-respondents were cautioned by the trial court that they were implementing the project, despite the pending litigation (including the CEQA writs), at their own risk. (AA:7:46:01655; Pub. Res. Code, § 21167.3(b); *Bakersfield Citizens*, 124 Cal.App.4th at 1203.)

The EIR/EIS project approvals described in the draft EIR/EIS, final EIR/EIS, and Addendum included the following:

- Water transfers to SDCWA and CVWD or MWD with *or without a QSA*;<sup>26</sup>

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<sup>26</sup> The project that was analyzed in the EIR/EIS and PEIR was not the same project that was selected. (Air District XAOB, pp. 108-121; *see also* County XAOB, pp. 123-130, discussing the changes from the project between the final EIR/EIS and PEIR.) There were changes to the project that were never analyzed between the draft and final and should have been the subject of a supplemental EIR instead of an addendum. (County XAOB, pp. 123-131.)

- Cap on the amount of Colorado River water IID would divert of 3.1 mafy;
- An HCP<sup>27</sup> under ESCA section 10(a)(1)(B) and CESA section 2081(b) and a biological opinion;
- IID water conservation activities for the water transfers *with or without the QSA*;
- IID's water conservation activities to generate water for the ISG backfill;
- SWRCB approval of the IID/SDCWA petition, Order 2002-0013; and,
- IID selling of the Salton Sea's mitigation water to DWR who in turn sells it to MWD (via IID-DWR-MWD Agreements).<sup>28</sup>

(Vol-3:Tab-51:AR3:CD10:101804\_0051/\_0053, 101804\_0093/\_0094; Vol-4:Tab-73:AR3:CD12:204903-204904; Vol-8:Tab-159:AR3:CD14:400126, 400128\_11-40012\_27; Vol-6:Tab-113:AR3:CD18:526917.)

Case 1653 challenges the EIR/EIS and Addendum. The project approvals listed above are within the scope of the County's and POWER's operative CEQA writ petitions in Case 1653.<sup>29</sup> (Supp.AA:67:744:016673-016678; Supp.AA:147:1468:036539-036544.) Thus, contrary to cross-respondents' representations, there are project approvals associated with the EIR/EIS that survive the invalidity of the QSA-Contracts.

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<sup>27</sup> The HCP has never been completed. It is still pending.

<sup>28</sup> Included in the project in the EIR/EIS Addendum, but the CEQA analysis was admittedly never performed. (Vol-7:Tab-136:AR3:CD14:400128\_23-400128\_24; *see also* IID AOB, pp. 20-21, admitting DWR had not conducted CEQA review.)

<sup>29</sup> The trial court rejected challenges to the QSA lawsuits based on uncertainty, ruling in at least four Contested Matters (Nos. 12, 18, 22 and 31) that because the parties structured a complex agreement the challengers could not be expected to know at the initial pleading stage the intricacies and significance of each component of the arrangement. (AA:6:17:1200-1201, 1204-1205, 1208.)

As shown in the table below, CVWD and IID relied on the PEIR and Addendum for their approval of project components that were not part of validation (Case 1649).

**Table-1: PEIR Project Components According to CVWD and IID Approvals.**

<b>Project Component Purported to Be Analyzed in the PEIR</b>	<b>Agency Utilizing PEIR for Project Approval</b>	<b>Challenged in 1649</b>
State QSA	CVWD, IID	X (Contract E)
CRWDA	CVWD, IID	X (Contract A)
Stipulation for dismissal by IID, CVWD, and United States (Part 417 lawsuit filed by IID)	CVWD	
Allocation Agreement	CVWD, IID	X (Contract B)
Amendment to the 1978 Canal Lining Contract	CVWD	
IID/CVWD Acquisition Agreement	CVWD	X (Contract G)
Salton Sea Flooding Agreement	CVWD	<sup>30</sup> (Contract M)
CVWD/IID Groundwater Storage Agreement	CVWD	
CVWD/MWD Acquisition Agreement	CVWD, IID	
CVWD/MWD 35,000 afy Transfer Agreement	CVWD	
100,000 afy Transfer Agreement	CVWD	
CVWD/DWR Agreement	CVWD	
Amendment to the 1989 Approval Agreement	CVWD, IID	X (Contract L)
Amendment to the MWD/CVWD 1989 Supplemental Agreement	CVWD	

<sup>30</sup> The trial court found this QSA-Contract was not within the scope of the validation statute, and did not validate or invalidate the contract. (AA:47: 292:12718-12721.)

<b>Project Component Purported to Be Analyzed in the PEIR</b>	<b>Agency Utilizing PEIR for Project Approval</b>	<b>Challenged in 1649</b>
Consent to Palo Verde Irrigation District Transfers	CVWD, IID	
QSA-JPA	CVWD, IID	X (Contract I)
ECSA	CVWD, IID	X (Contract J)
Section 7 Consultation Agreement	CVWD	
SDCWA/CVWD Backfill Memorandum of Understanding	CVWD	
IID-SDCWA water transfer agreement	IID	X (Contract D)
IID-MWD Acquisition Agreement	IID	X (Contract F)
Conservation Agreement	IID	X (Contract C)
IID-DWR Transfer Agreement	IID	

(Vol-8:Tab-160:AR3:CD14:400131, 400132; Vol-8:Tab-147:AR4-07-516-30616/30617.)

MWD is not identified in Table-1 because MWD did not adopt a resolution or make any findings in connection with the PEIR to show exactly what the MWD Board approved. (See Air District XAOB, p. 136.) Cross-respondents do not contest these facts. The Air District also raised this defect in the trial court, which was also un-refuted. (RA:10:113:2508; RA:10:114:2540; RA:10:115:2582; RA:10:116:2624-2625.)

SDCWA is not identified in Table-1 because its resolution refers to “attachment 1” for a listing of the projects approved (QSA agreements) based on the PEIR. (Vol-8:Tab-148:AR4-07-523-30850/30853.) Attachment 1 is not attached to the resolution and, thus, the record does not show what project approvals SDCWA executed in reliance upon the PEIR.

Case 1656 challenges the PEIR and Addendum. The above project approvals were within the scope of the County’s operative CEQA writ

petition filed on August 13, 2004. (Supp.AA:44:528:101794-10812.) SDCWA answered the County's petition on December 12, 2007. (Supp. AA:106:1132:26435-26450.) In April 2009, MWD and SDCWA (ironic as there is no evidence of their project approvals in the record) belatedly moved to dismiss<sup>31</sup> Case 1656 asserting the County failed to name the United States and Tribes. (Supp.AA:180:1731:44970-44997; Supp. AA:181:1732:45001-45006.) In response, the County was agreeable to limiting Case 1656 to the State-QSA. The trial court ruled in Contested Matter 135 that the United States and Tribes were not indispensable parties. This ruling is contested by SDCWA/CVWD/MWD. (Supp.AA:188:1855:46818-46829.)

4. **EVEN IF THE ISSUES WERE MOOT, WHICH THEY ARE NOT, THIS COURT SHOULD HEAR THE MERITS OF THE ENVIRONMENTAL CLAIMS.**

This Court has inherent discretion to adjudicate environmental compliance on the merits even if the Court finds the issue moot (which the Air District contests). (*Toxics*, 136 Cal.App.4th 1049.) This Court should exercise its discretion because this case presents an issue of broad public interest; there is likely to be a recurrence of the controversy between the parties; and, a material question remains for the Court's determination. (*Cucamongans United For Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479-480; see Air District XAOB, pp. 83-86, for discussion of why these factors apply in the present case.)

The *Toxics* case confirms this Court's inherent discretion. In *Toxics*, a non-profit group filed a mandamus petition challenging the Department of Pesticide Regulations' decision to renew pesticide registrations for 2002 in violation of CEQA, and complaint challenging the legality of the

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<sup>31</sup> The trial court incorrectly rejected the County's assertion that the motion to dismiss was barred by laches.

Department's procedure of reviewing pesticides registrations. (*Id.* at 1055.) The trial court sustained the Department's demurrers to the mandamus claims, finding them moot because the 2002 renewals were superseded by other renewals (the court also ruled in favor of the Department on the complaint). (*Id.* at 1056.)

Petitioners appealed the trial court's ruling on several grounds, including its mootness determination on the mandamus claims. The Court in *Toxics* determined that while the issue was moot, it "raises important issues of public policy that are likely to recur, yet will evade review ...." (*Id.* at 1069.) The Court acknowledged its authority to decide otherwise moot cases that present important issues that are capable of repetition. (*Id.* at 1070.) (*See* Air District Brief, pp. 83-86 for a discussion as to why this case presents an issue of broad public interest and there is likely to be a recurrence of the controversy between the parties.)<sup>32</sup>

Cross-respondents conveniently imply that the *Toxics* court only adjudicated the merits because the Department briefed the merits on appeal. (SDCWA/CVWD/MWD XRB, p. 193, fn. 75.) The Department in *Toxics* apparently believed that responding to the CEQA arguments on the merits was important to protect its interests. Cross-respondents here deliberately refused to do the same, and now attempt to distinguish *Toxics* on that basis. (*See* SDCWA/CVWD/ MWD XRB, pp. 192-193, fn. 75.)

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<sup>32</sup> Cross-respondents argue that *Toxics* is not instructive on the issue of whether the Court can decide the merits of the CEQA issues in the first instance because the jurisdictional issue was not raised by the parties or decided by the Court. (SDCWA/CVWD/MWD XRB, p. 193, fn. 75.) As stated in Section IV, the County Agencies did not cite *Toxics* to support their position on jurisdiction; rather, this case provides the Court with an example of a situation where the appellate court deemed it appropriate to exercise its inherent discretion to adjudicate CEQA on the merits. In any event, the *Toxics* court's decision to adjudicate the merits is proof enough that it had the jurisdiction to do so.

That the cross-respondents declined to provide this Court with a response does not limit this Court's inherent authority to determine CEQA compliance. Where a respondent fails (or refuses) to respond to contentions made in an appellant's brief, the contentions are deemed submitted. (*Cal. Ins. Guarantee Ass'n v. Workers' Compensation Appeals Board* (2005) 128 Cal.App.4th 307, 316, fn. 2; *see also* Section VIII.2, *infra*.) Any purported prejudice complained of by respondents is the result of their own litigation tactics; they must accept the consequences of their voluntary cowardice. This Court, like the *Toxics* court, has the discretion and all of the information necessary to issue a ruling on the merits of the environmental claims pursuant to the County Agencies' cross-appeal.

Cross-respondents also argue that the basis for the trial court's mootness determination can serve to limit the appellate court's ability to exercise its discretion to adjudicate the issues. (*See* State XRB, pp. 28-29; IID XRB, pp. 88-89; SDCWA/CVWD/MWD XRB, pp. 179-181.) They allege that courts will hear moot cases only where there is a "substantial change in facts in the underlying case external to the trial court's decision" or "occurrence of events pending appeal" that renders the immediate case moot, unlike here where the trial court's invalidation ruling itself purportedly made the CEQA matters moot.

However, neither the *Toxics* court nor the courts in the other cases cited by cross-respondents premised the exercise of discretion on this distinction, or otherwise implied that the court's inherent discretion could or would be limited by the basis of the trial court's mootness determination, so long as the mootness exceptions exist. (*See, e.g., Watershed Enforcers v. Department of Water Resources* (2010) 185 Cal.App.4th 969, 978, cited by State on p. 28 [court decided issue of statutory interpretation on the merits because of the importance of the issue].)

Cross-respondents also attempt to distinguish cases cited by the Air District to support this Court's exercise of discretion to hear the merits of the environmental claims. (State XRB, p. 29.) These cases, *Mountain Lion Coalition v. Cal. Fish and Game Commission* (1989) 214 Cal.App.3d 1043, 4145, fn. 2, and *Friends of Cuyamaca v. Lake Cuyamaca Recreation and Park Dist.* (1994) 28 Cal.App.4th 419, 425, provide this Court with examples of cases where the court has exercised its discretion to adjudicate moot issues because it believed the mootness exceptions applied to warrant adjudication of the issues.

Cross-respondents also argue that courts will not adjudicate moot issues when mootness turns on case-specific facts of a given situation, and where resolution would be unlikely to provide guidance for future disputes. (SDCWA/ CVWD/MWD XRB, pp. 179-181.) The case law cited by cross-respondents in support of this argument is either distinguishable, or supports the County Agencies' position that this Court should exercise its discretion to adjudicate the merits of the environmental claims.

Cross-respondents first rely, without applying the facts, on *MHC Operating, Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204. In *MHC Operating*, the City's actions rendered its own appeal moot. (*Id.* at 214.) The City argued the Court should exercise its discretion to hear the moot issues because they were of critical importance to future rent control disputes. (*Id.* at 215.) The Court declined to exercise its discretion because resolution of the issues would not likely provide guidance in future rent control disputes, which by nature are factual and determined on an as-applied basis. (*Id.*) *MHC Operating* is distinguishable from the present case because here it is likely that future litigation over the same or similar issues between the same parties will arise if the claims are not adjudicated. Without this determination, cross-respondents could attempt to rely on the same defective EIRs in crafting and approving new agreements.

Cross-respondents also argue that the present case is similar to *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* (2005) 127 Cal.App.4th 1544, 1631, because the County asked the Court to exercise its discretion to adjudicate a moot issue, but it declined because future controversies between the parties were likely to be factually distinct and do little to prevent a future dispute. (*Id.* at 1628.) In that same opinion, however, the Court did exercise its discretion to hear the County's CEQA claim with respect to a different contract:

County asserts the CEQA claim in its thirteenth cause of action is not moot because OCSD and Yakima could resume activities under the OCSD-Yakima Agreement if the heightened treatment standards were invalidated or modified. Even assuming the claim presently is moot, we will exercise our inherent discretion and consider County's CEQA claim regarding the OCSD-Yakima Agreement because of the potential it will be reinstated if the heightened treatment standards are modified. (See *In re William M.* (1970) 3 Cal.3d 16, 23, 89 Cal.Rptr. 33, 473 P.2d 737 [court has discretion to consider issue likely to recur].)

(*Id.* at 1631 [internal footnote omitted].)

Adjudication of the CEQA claims is necessary here because of the high likelihood some form of QSA and water transfer will emerge to replace invalid QSA-Contracts.<sup>33</sup>

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<sup>33</sup> Cross-respondents also rely on *Communities for a Better Environment*, 184 Cal.App.4th at 101-102, *PCL*, 83 Cal.App.4th at 920, and *Berkeley Jets Over the Bay Committee*, 91 Cal.App.4th at 1383, fn. 24, to support their argument that the Court should refrain from adjudicating CEQA when it is clear that the agency will have to redo its CEQA analysis. (SDCWA/CVWD/MWD Brief, p. 184.) However, if this Court upholds the invalidation judgment (which it should) and the parties have to redo the contracts, cross-respondents could still attempt to use these never-tested environmental documents as a launching pad for their subsequent or supplemental CEQA review.

VI. CAA COMPLIANCE IS PROPERLY BEFORE THIS COURT.<sup>34</sup>

1. THE CRWDA IS VALIDATABLE IN STATE COURT.

On one hand, IID concedes, as it must based on its validation complaint, that contracts with the federal government, like the CRWDA, are validatable in state court. (IID XRB, pp. 90-94, 98-103.) But, on the other hand, it negates the effect of invalidation by claiming a state court judgment only “sometimes” binds the United States. (IID XRB, pp. 90, 94-96.) SDCWA/CVWD/MWD (XRB, p. 89) disclaim jurisdiction, asserting the trial court cannot adjudicate the validity of the United States’ contracts because Congress has not waived sovereign immunity. Cross-respondents IID’s and SDCWA’s assertions propagate their misrepresentations to the United States District Court in *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States (Consejo)* (Case No. 2:05-cv-0870-PMP-LRL). In *Consejo*, IID and SDCWA opposed a motion for summary judgment on NEPA grounds, and argued that jurisdiction over the Allocation Agreement was only proper in the state validation action (Case 1649). (Supp.RA:2:18:315-330.)

Cross-respondents’ position ignores the fact that: (a) jurisdiction over *persons* is not required in an *in rem* proceeding; (b) IID brought its action under federal law (43 U.S.C. § 390uu); and, (c) validation judgments are supposed to be “binding on the world.”

A. In Personam Jurisdiction is Not Required in In Rem Proceedings.

Service of a validation summons is accomplished by publication. (Code Civ. Proc., § 861.) Once a validation action is commenced, the court

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<sup>34</sup> This issue is within the County Agencies’ cross-appeal, issue number 6. (Supp.AA:219:2062:054613.) The Air District briefed this issue in its cross-appellant’s opening brief at pages 136-142. The Air District responds to issues raised by cross-respondents that bear on the CAA claim.

issues a summons to be published, identifies where and when it must be published, and sets a deadline for any interested parties to appear. (Code Civ. Proc., § 861.1.) The summons for the first amended validation complaint was addressed to “all persons interested.” (AA:1:1:1.) The contracts sought to be validated included the three federal contracts. (AA:6:38:1488-1490.) The complaint was sent to the United States. (RA:1:2:14-18.) Therefore, the United States was named and served as “persons interested in the validation of the contracts.”

Any party failing to appear prior to the published summons deadline date is barred from asserting any challenge. (*Moorpark Unified School District v. Superior Court* (1990) 223 Cal.App.3d 954, 958-959; *United States v. Coachella Valley County Water District* (C.D. Cal. 1953) 111 F.Supp. 172, 176-180 (*CVCWD*); Code Civ. Proc., § 862.) Whether those interested in validation of the QSA-Contracts chose to appear was immaterial and did not deprive the state court of jurisdiction because jurisdiction is only required over the res in validation. (*Planning & Conservation League v. Dep't of Water Res. (PCL)* (2000) 83 Cal. App. 4th 892, 922.) Validation does not require extra *in personam* jurisdiction over all interested persons in an *in rem* proceeding.

The cases SDCWA/CVWD/MWD rely upon to support their position are distinguishable because *they are non-validation cases involving actions to recover property*. In *Hanson v. Denckla* (1958) 357 U.S. 235, 243, the Supreme Court considered whether Florida erred in holding it had jurisdiction over nonresident defendants in a distribution of trust dispute, and whether Delaware erred in refusing full faith and credit to the Florida decree. SDCWA/CVWD/MWD rely on the Court’s discussion about the location of the trust assets because the basis of jurisdiction was the presence of the subject property within the territorial jurisdiction of the forum State.

(*Id.* at 246-247.) Cross-respondents have never disputed that the res at issue is not located in California.

The other cases cited by cross-respondents are similarly unpersuasive. In *City of San Jose v. Superior Court* (1987) 195 Cal.App.3d 743, the court addressed whether the trial court had jurisdiction to grant defendants' motions for return of money seized in drug-related prosecutions that police had turned over to federal agents. The court in *Civiletti v. Municipal Court* (1981) 116 Cal.App.3d 105, addressed a murder prosecution involving subpoenas served to the United States Attorney General. Lastly, *St. Sava Mission Corp. v. Serbian E. Orthodox Diocese* (1990) 223 Cal.App.3d 1354, 1365, a quiet title action, supports the County Agencies' position that jurisdiction can be acquired in one of two ways – against the person by the service of process or by a procedure against the property – *and both are not required*. In *St. Sava Mission Corp.*, the lack of *in rem* jurisdiction was conceded. (*Id.* at 1366.)

**B. IID and SDCWA Have Made Compelling Arguments to Explain that Sovereign Immunity Does Not Bar the Invalidation of the CRWDA in Consejo that are Applicable Here.**

Sovereign immunity did not preclude the trial court from invalidating the CRWDA because jurisdiction over the parties is not required in an *in rem* proceeding, only over the res. (*PCL*, 83 Cal.App.4th at 922.) Again, the cases SDCWA/CVWD/MWD<sup>35</sup> rely on do not show otherwise. In *United States v. Shaw*, another probate case, the court considered whether the United States, by filing a claim against an estate in

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<sup>35</sup> SDCWA/CVWD/MWD's indispensable party claims are bound up in their sovereign immunity claims. The Air District and County have already adequately responded to the erroneous indispensable party assertions. (*See* Air District XAOB, pp. 37-38; County XAOB, pp. 47-55.)

a state court, subjects itself to a cross-claim against itself. (*United States v. Shaw* (1940) 309 U.S. 495, 499.)

Likewise, in *United States v. Nordic Village* (1992) 503 U.S. 30, the issue was whether the Bankruptcy Code or any other provision of law established a waiver of government's immunity from a bankruptcy trustee's claims for monetary relief. The Supreme Court rejected the argument that a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity; but, respondent did not invoke, and the Bankruptcy Court did not purport to exercise, *in rem* jurisdiction. (*Id.* at 38.) Further, the Court stated that there was no res to which the court's *in rem* jurisdiction could have attached. (*Id.*) The Court's statement that it never applied an *in rem* exception to the sovereign-immunity bar was in relationship to a monetary recovery. (*Id.*)

Even if sovereign immunity applies, it has been waived. (*See County XAOB*, pp. 36-45.) SDCWA's representations to this Court about the applicability of 43 U.S.C. § 390uu contradict the representations it and IID made to the United States District Court in *Consejo*, which involved the same Allocation Agreement at issue in this proceeding. In seeking to eliminate *Consejo*'s challenge to the Allocation Agreement, they claimed sovereign immunity was not a bar in Case 1649 as follows:

IID's state court validation proceeding [Case 1649] was brought pursuant to California's validation law and was also filed pursuant to 43 U.S.C. § 390uu...Section 390uu expressly provides a waiver of sovereign immunity for lawsuits against the United States in order to validate reclamation contracts. Exclusive federal court jurisdiction is not specified in section 390uu, and thus pursuant to extensive federal case law, the state courts have concurrent jurisdiction for such validation actions.

The United States, by and through the Secretary of the Interior, and pursuant to federal reclamation law . . . is a signatory to the Allocation Agreement and pursuant to Section 390uu, waived its sovereign immunity for

validation suits. IID filed a validation suit to validate in state court its reclamation contracts with the United States, including the Allocation Agreement, and named “All Persons Interested in [such contracts]” as defendants. Anyone that wanted to allege that noncompliance with NEPA made the Allocation Agreement invalid could and should have done so in the pending state court validation action.

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With respect to jurisdiction and venue, Section 390uu provides, as follows: “[a]ny suit pursuant to this section *may* be brought in any United States district court in the State in which the land involved is situated.” (Emphasis added.) This specific language has not been interpreted by courts to mean that such suits may *only* be heard in federal district court.

While there are no published decisions involving the jurisdictional locale for a Section 390uu claim, federal case law discussing Section 390uu recognizes that the waiver of sovereign immunity therein is “broad,” with “no conditions placed on the ability of a party to a reclamation contract to sue the government.” *See City of Tacoma v. Richardson*, 163 F.3d 1337 (Fed. Cir. 1998). Thus, one must look to how the courts have interpreted other federal statutes containing similar or analogous language regarding where a suit may be brought. There are three different types of statutory language that inform this discussion: (1) statutes that are silent as to forum; (2) statutes that, like Section 390uu, use a variation of the word “may” with respect to forum; and (3) statutes that use a variation of the word “shall” with respect to forum.

#### (i) “Silent” Statutes

When a statute is silent as to jurisdiction, the presumption of concurrent jurisdiction is conclusive. An example is found in 43 U.S.C. Section 666 (the McCarran Amendment), which involves a waiver of sovereign immunity for “any” suit against the United States “(1) for the adjudication of rights of the use of water of a river system or other source or (2) for the administration of such rights, where it appears that the United States is the owner

of or is in the process of acquiring water rights by appropriation under State law by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.”

There is no language within the statute as to what courts have jurisdiction, and thus the presumption of state court concurrent jurisdiction applies. *See, e.g., Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983) (McCarran Amendment provides state courts with jurisdiction to adjudicate Indian water rights and applies to all states); *National Audubon Soc. v. Dept. of Water & Power*, 496 F.Supp. 499 (E.D. Cal. 1980) (McCarran Amendment creates concurrent jurisdiction for adjudication of water rights); and *United States v. Bluewater-Toltec Irrigation Dist.*, 580 F.Supp. 1434 (1984), *aff'd* 806 F.2d 986 (1986).

#### (ii) “May” Statutes, Such As Section 390uu

When statutes say that one “may” bring an action in federal court, such as in Section 390uu, case law recognizes concurrent jurisdiction between state and federal courts.

In *Tafflin v. Levitt*, [493 U.S. 455 (1990)] the Supreme Court held that state courts have concurrent jurisdiction over civil RICO claims (Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961-1968 (“RICO”)). 493 U.S. at 455. Section 1964(c) of RICO states, in language very close to that in Section 390uu: “any person injured in his business or property by reason of a violation of section 1962 of this chapter *may* sue therefore in any appropriate United States district court.” (Emphasis added.) The Supreme Court ultimately concluded that the grant of federal jurisdiction quoted above was “plainly permissive, not mandatory, for the statute does not state nor even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described ‘may’ be brought in the federal district courts, not that they must be.” *Tafflin*, 493 U.S. at 460-461. “Indeed, it is black letter law ... that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action.” *Id.* at 461.

Similarly, in *Walker, et al. v. White, et al.*, 89 S.W.3d 573 (Tenn. Ct. App. 2002), plaintiff husband and wife sued defendant bank alleging violations of the Right to Financial Privacy Act, 12 U.S.C. Sections 3401 et seq., (“RFPA”) and a Tennessee privacy statute. The bank argued that the state court did not have jurisdiction over actions brought pursuant to the RFPA. The appellate court disagreed held that state courts do retain concurrent jurisdiction over RFPA actions, with a limited exception for federal exclusive jurisdiction over motions to quash federal subpoenas pursuant to 12 U.S.C. Section 3410. See *Walker, et al.*, 89 S.W.3d at 580.

The RFPA states: “An action to enforce any provision of this title may be brought in any appropriate United States district court without regard to the amount in controversy within three years from the date on which the violation occurs or the date of discovery of such violation, whichever is later.” 12 U.S.C. § 3416. Section 3410 also states that a motion to quash a subpoena “shall be filed in the appropriate United States district court.” The *Walker* court held, “the fact that Congress elected to use the permissive “may” in section 3416 while using the mandatory “shall” in section 3410 indicates ... that Congress intended to differentiate between the actions which must be taken by a customer to challenge a subpoena and the judicial remedies provided by the RFPA for alleged violations. The challenge to the federal subpoena must be brought in federal court. Such a challenge is distinct from a cause of action against a financial institution for alleged violations of the Act.”

*Walker et al.*, 89 S.W.3d at 580.

### (iii) “Shall” Statutes

A few months after *Tafflin*, the Supreme Court revisited the concurrent jurisdiction issue in *Yellow Freight System, Inc. v. Donnelley* 494 U.S. 820 (1990), this time addressing the text of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e et seq., (“Title VII”) and again holding that the presumption of concurrent jurisdiction was

not sufficiently overcome, sometimes even when the word “shall” is utilized.

The relevant portions of Title VII are as follows: “[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States *shall* have jurisdiction of actions brought under this subchapter.” 42 U.S.C. § 2000e-5(f)(3) (emphasis added). Despite the use of the word “shall” in the foregoing statute, the Supreme Court was not persuaded that the clause was sufficient to establish exclusive jurisdiction in federal court. The Supreme Court stated that, “[u]nlike a number of statutes in which Congress unequivocally stated that the jurisdiction of the federal courts is exclusive, Title VII contains no language that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction. The omission of any such provision is strong, and arguably sufficient, evidence that Congress had no such intent.” *Yellow Freight System*, 494 U.S. at 824. Moreover, the Supreme Court stated that even if there was evidence in the legislative history suggesting that there was an expectation that all Title VII cases would be tried in federal court, that would not be an “adequate substitute for a legislative decision to overcome the presumption of concurrent jurisdiction.” *Id.* at 824-825.

What, then, is sufficient statutory language to successfully rebut the presumption of concurrent jurisdiction in favor of exclusive jurisdiction? An example is the Employee Retirement Income Security Act of 1974 (“ERISA”). In footnote 3 in *Yellow Freight* (p. 823), the Supreme Court specifically pointed to ERISA as a statute that contained language sufficient to rebut the presumption of concurrent state court jurisdiction. The relevant statutory language is: “[e]xcept for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter.” 29 U.S.C. § 132(e)(1).

In the final analysis, it is clear that the language of section 390uu does not alter the presumption of concurrent state court jurisdiction.

(Supp.RA:2:18:331-335.)

The County advised the trial court of IID's and SDCWA's representations in *Consejo*. (Supp.RA:2:18:302-358; RA:7:88:1849-1850, 1856-1860). The Air District also brought these representations to this Court's attention in its cross-appellant's opening brief (p. 41). Yet, cross-respondents offer no compelling reason in their respondents' briefs as to why this Court should disregard the law as they represented it to the United States District Court. CVWD<sup>36</sup> also offers no compelling reason why its contracts with DOI and BOR can be validated in state court (*US v. CVCWD* 111 F.Supp. 172), but the QSA-Contracts with DOI and BOR cannot.

The jurisdiction games continue. After securing the dismissal of the challenges to the Allocation Agreement in the federal *Consejo* proceeding, cross-respondents now assert contrary jurisdictional arguments here to secure the same result for the three federal contracts<sup>37</sup> in this proceeding. The County Agencies were left with no choice but to bring a protective action in federal court, *People of the State of California Ex Rel Imperial County Air Pollution Control District et al. v. United States Department of Interior et al.*, USDC Southern Dist., Case No. 09 CV 2233 BTM PCL. Cross-respondents object to this Court taking judicial notice of their answers because, predictably, they claim the federal court does not have jurisdiction over the CRWDA. (RJN1:4:101-113.) The issue then, is not whether the State court lacks jurisdiction, but whether any court can assert jurisdiction over the claim.

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<sup>36</sup> CVWD's original name was the Coachella Valley County Water District ([www.cvwd.org/about/waterandcv.php](http://www.cvwd.org/about/waterandcv.php)).

<sup>37</sup> The 3 federal contracts are: CRWDA, Allocation Agreement, and the Conservation Agreement. (AA:6:38:1488-1490.)

C. **A Validation Judgment Cannot Be Binding On the World if All Persons Interested Are Not Bound to the Judgment.**

IID cannot have both a federal contract validated in state court and a judgment that does not include the “world.” A validation judgment “shall ... be forever binding and conclusive, as to all matters therein adjudicated or which at that time could have been adjudicated, against the agency, and against all other persons, and the judgment shall permanently enjoin the institution by any person of any action or proceeding raising any issues as to which the judgment is binding and conclusive.” (Code Civ. Proc., § 870; *Embarcadero Mun. Improvement Dist. v. County of Santa Barbara* (2001) 88 Cal.App.4th 781, 789; *PCL*, 83 Cal.App.4th at 921.) IID sought this judgment in its validation complaint, as did the other cross-respondents in their answers.<sup>38</sup> Validation judgments are ineffective if all persons are not bound to the judgment.

IID told the U.S. District Court in *Consejo*:

What good would it be for a public agency to validate a contract it signed with two other entities, only for persons to then later sue those other contracting entities to stop their performance under the agreement? This would not fulfill the purpose of validation, which is to have a “single dispositive final judgment.” *Committee For Responsible Planning v. City of Indian Wells* (Cal. Ct. App. 1990) 275 Cal.Rptr. 57, 61; 225 Cal.App.3d 191, 198.

(Supp.RA:2:18:357.)

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<sup>38</sup> AA:6:38:1477, 1493-1495; AA:6:21:1317; AA:6:22:1337; AA:6:24:1353; AA:6:25:1365; AA:6:26:1376; AA:5:3:8.

2. **CROSS-RESPONDENTS' ADMISSIONS IN THEIR ANSWERS AND CONDUCT PROHIBITS THEM FROM RAISING JURISDICTION AS A BAR TO THE COURT'S DETERMINATION OF THE CAA ISSUE.**

SDCWA/CVWD/MWD do not deny they:

- admitted and prayed for the trial court's jurisdiction over all of the QSA-Contracts;
- never demurred to the validation complaint on the ground state court's lack jurisdiction; and,
- represented to the Imperial County Superior Court that jurisdiction was proper in state courts in order to move the validation action from Imperial to Sacramento;

SDCWA/CVWD/MWD<sup>39</sup> solely rely on their argument that a jurisdictional defect can be raised at any time. (SDCWA/CVWD/MWD XRB, pp. 89, 134) This position entirely misses the point the Air District raised: the parties that admit jurisdiction cannot be the same parties to then raise jurisdiction defects because their admissions in an answer are binding. (*Fairbanks v. Woodhouse* (1856) 6 Cal. 433, 434; *Hibernia Sav. & Loan Soc. v. Boyd* (1909) 155 Cal. 193, 197; *Ingalls v. Bell* (1941) 43 Cal.App.2d 356, 368 [admissions in answer are binding on defendant]; *Lifton v. Harshman* (1947) 80 Cal.App.2d 422, 431-432, disapproved of on other grounds in *Pao Ch'en Lee v. Gregoriou* (1958) 50 Cal.2d 502, 505) and they are also estopped from asserting a contrary position (Evid. Code, § 623 [estoppel by own statement or conduct]; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489; *DRG/Beverly Hills v. Chopstix Dim Sum Café*

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<sup>39</sup> SDCWA/CVWD/MWD/VID/Escondido's tactic of denying jurisdiction because of the invalidation ruling will render last eight years of the judicial process pointless and an unnecessary waste of time and the millions of dollars parties have collectively spent in litigating this case in state court. The worst aspect is that the public will have to continue enduring the devastating effects of the inadequate mitigation at the Salton Sea.

(1994) 30 Cal.App.4th 54, 59 [equitable estoppel]; *Jogani v. Jogani* (2006) 141 Cal.App.4th 158,169 [judicial estoppel invoked when a party's inconsistent behavior will result in a miscarriage of justice]).

3. **FEDERAL LAW COMPLIANCE IS PROPERLY AT ISSUE.**

The matters sought to be validated by the public agency are the res -- here, the QSA-Contracts. (Code Civ. Proc., § 860; *PCL*, 83 Cal.App.4th at 922; *Citizens Against Forced Annexation v. Santa Clara* (1984) 153 Cal.App.3d 89, 100.) Validation is used to secure a judicial determination that contracts are valid, legal, and binding. (*Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 842.) The judgment is intended to be forever binding and conclusive as to all matters therein adjudicated or which at that time could have been adjudicated. (*Id.* at 846.) Any issue that bears on whether the res is valid or not is at issue in the validation proceeding. (*Id.* at 846-847.)

Thus, IID and SDCWA asserted in *Consejo*:

Plaintiffs allegations of NEPA noncompliance could have been asserted in the state court validation proceeding [Case 1649], even as against the United States, because of the waiver of sovereign immunity by the United States found in Section 390uu and the fact that the United States was a signatory to the Allocation Agreement. IID's validation case is thus the proper setting for NEPA challenges to the AAC lining project to have been timely raised. The California state court has exercised in rem jurisdiction over the Allocation Agreement, and all persons interested -- whatever their challenge (NEPA, water rights, or otherwise) -- need to have raised their challenge in that proceeding and not belatedly here.

(Supp.RA:2:18:336.)

SDCWA/CVWD/MWD concede that a determination of validity includes an inquiry into "whether the agency has the legal authority to enter

into the agreement and the agreement's provisions are prohibited by law.” (SDCWA/CVWD/MWD XRB, p. 70.) But, the validation inquiry cannot be limited to only the agency bringing the action because a contract must have at least two parties, and if either lacked authority to execute the contract, the contract is void. (*White v. Davis* (2002) 108 Cal.App.4th 197, 229.) Accordingly, under Code of Civil Procedure section 870, the judgment is intended to be “forever binding and conclusive” as to all matters which were or could have been adjudicated “against the agency and against all other persons....” (Emphasis added; *see also CVCWD*, 111 F.Supp at 177-179.)

The Air District's CAA claim goes to whether one of the contracting parties, the Secretary, lacked authority to execute the CRWDA. If the Secretary lacked legal authority to execute the CRWDA (*see* Air District XAOB, pp. 136-142), it is illegal and void. (*White*, 108 Cal.App.4th at 229; *ETSI Pipeline Project v. Missouri* (1988) 484 U.S. 495, 517.) An illegal contract is void. (Civ. Code, § 1608; *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 407.) An illegal contract cannot be validated. (*Fontana Redev. Agency v. Torres* (2007) 153 Cal.App.4th 902, 911-914.)

The authority SDCWA/CVWD/MWD rely upon, *Cory v. City of Stockton* (1928) 90 Cal.App. 634, in arguing the Secretary is required to be a party for CAA compliance to be adjudicated in validation, is inapposite. In *Cory*, a non-validation action, the plaintiff sought the abatement of a continuing public and private nuisance. The court found that the State and City of Stockton could not be held liable for money damages resulting from uses made of a right-of-way by the United States. (*Id.* at 638-639.)

Cross-respondents also assert the CAA violation had to be the subject of a reverse validation. (IID XRB, pp. 94-97; SDCWA/CVWD/MWD XRB, p. 129.) Case 1649 includes the CRWDA as one of the matters to be validated. (AA:6:38:1488-1490.) Therefore, a reverse

validation over the same CRWDA would not be allowed. Indeed, IID obtained its dismissal of Case 1643 by claiming that a reverse validation action cannot exist if a validation action on the same matter is already pending. (RA:2:16:299-300.) Likewise, the trial court in Contested Matter 10 found that reverse validation actions are prohibited unless the public agency has not initiated any proceeding. (AA:6:17:1198-1199.) The trial court relied on Code of Civil Procedure section 863 and *Community Redevelopment Agency of Los Angeles v. Superior Court* (1967) 248 Cal.App.2d 164, 168, fn. 2. (*Id.*)

4. **CROSS-RESPONDENTS DO NOT REFUTE THE AIR DISTRICT'S ASSERTION THAT AN APA LAWSUIT IS NOT REQUIRED TO ANSWER VALIDATION AND RAISE CAA NON-COMPLIANCE IN VALIDATION.**

Cross-respondents argued in their appellants' opening briefs that the Air District could only raise the Secretary's failure to comply with the CAA by an APA lawsuit. (SDCWA/CVWD/MWD AOB, pp. 118-121.) The Air District responded that the CAA provided for the Air District enforcement of the CAA and enforcement of its own rules (including Rule 925 addressing conformity), and that an APA lawsuit was not required to deny allegations and assert defenses in a validation proceeding. (Air District XAOB, pp. 38-41) SDCWA/CVWD/MWD do not refute the Air District on these points.

5. **THE FEDERAL CASE IS NOT A SUBSTITUTE FOR THE VALIDATION ACTION IN THIS COURT.**

Cross-respondents claim comity requires the state court to defer adjudication of the CAA claims while there is a concurrent case in federal court. (SDCWA/CVWD/MWD XRB, pp. 131-133). Comity is an issue of discretion, not right, and relates to whether the *second* lawsuit should wait for a decision in the *first* lawsuit. (*Clark's Fork Reclamation Dist. No.*

2069 v. Johns (1968) 259 Cal.App.2d 366, 369-370.) The cases SDCWA/CVWD/MWD rely upon do not support a stay of the state court proceeding or exclusion of the CAA violation from the validation action.

In *Clark's Fork Reclamation Dist. No. 2069 v. Johns*, a prior filing of a federal action raised questions of whether comity called for exercise of a circumspect discretion by the state court in which the *later* action was commenced. (*Id.* at 369.) Here, the County Agencies filed the federal case six years after the validation action was filed, and only then because of cross-respondents' belated assertions the state court lacked jurisdiction over the matters sought to be validated in state court.

*Gregg v. Superior Court* (1987) 194 Cal.App.3d 134, 137, cited by SDCWA/CVWD/MWD, supports the Air District's position that the first court's control over the res should not be disturbed. Here, the first and only control over the res in an *in rem* action is the state court proceeding, in which the Air District is a defendant. The federal case is an *in personam* action in which the Air District is a plaintiff. While both the CRWDA and CAA violation are one aspect of both lawsuits, the relief sought is different: in validation, the remedy is invalidation of the CRWDA; and, in the federal action, the remedy sought is voiding of the Secretary's execution of the CRWDA for lack of compliance with the CAA and Rule 925. (Supp.AA: 210:1970:052312;<sup>40</sup> Supp.AA:215:2002:53606-53607.) The authority cited by SDCWA/CVWD/MWD does not require comity under these circumstances.

Unlike *Clark's Fork Reclamation Dist. No. 2069*, the elements in this case do not strongly suggest restraint by California courts in adjudicating the CAA violation because it is primarily a local issue. The purpose of conformity is to protect the integrity of local air quality planning

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<sup>40</sup> The Air District asked DOI/BOR to stay the federal case. They would not agree until this proceeding was concluded.

by ensuring federal actions and approvals do not interfere or undermine efforts to achieve attainment of air quality standards in the region. (*Environmental Defense Fund, Inc. v. E.P.A* (D.C. Cir. 1996) 82 F.3d 451, 468.) The CAA establishes a joint state and federal program to address the nation's air pollution. (*Environmental Council of Sacramento v. Slater* (E.D. Cal. 2000) 184 F.Supp.2d 1016, 1018-1020.)

The Air District is statutorily responsible for carrying out the mandates of the federal and state Clean Air Acts in Imperial County, developing the local SIP, and achieving the NAAQS. (*See e.g.*, 42 U.S.C §§ 7407(a), 7410(a), 7410(d), 7412(d); Health & Saf. Code, §§ 40100 et seq.) The conformity decision turns on SIP approved Air District Rule 925 that governs the CAA conformity decision. (Supp.AA:204:1930:50953-50969; *see also* EPA's approval of the Air District's Rule 925, AA:5:59:1309-1312.) The local Air District is the exclusive local agency responsible for comprehensive air pollution control within Imperial County and is vested with independent authority to adopt and enforce the Rule 925. (Health & Saf. Code, §§ 39002 et seq., 40000 et seq., 40910 et seq, 41513.)

The validation action was intended to address all issues that go to the QSA-Contracts' validity. (AA:6:38:1477, 1493-1495; *see also* Air District XAOB, pp. 33-37.) There is no agreement in place reserving the federal issues to the federal litigation. The parties whose rights and interests are most at stake have chosen to participate in the validation action. Not all of the validation parties are parties in the federal case. DOI and BOR are not litigants in validation by choice.

Cross-respondents have also never identified evidence missing from the IID-prepared administrative record (with any particularity), evidence missing from the administrative record necessary for a conformity decision. Cross-respondents have had ample opportunity to augment the record or request judicial notice.

This Court's exercise of comity and exclusion of the CAA violation from Case 1649 will create a prejudicial and unfair result. For example, cross-respondents could attempt to use a dismissal of the CAA violation in validation to seek dismissal of the federal court proceeding because a validation judgment is intended to be binding and conclusive as to all matters therein adjudicated or which could have been adjudicated against the agency and all other persons, and permanently enjoin other actions that raise issues as to which the judgment is binding and conclusive. (Code Civ. Proc., § 870.) IID and SDCWA employed a similar tactic to save the Allocation Agreement. In *Consejo*, IID and SDCWA asserted comity "require[s] this Court [U.S. District Court] to decline jurisdiction, and defer to the pending *in rem* state court validation proceedings [Case 1649], in furtherance of comity and efficiency."

**VII. IT IS PROPER FOR THIS COURT TO RESOLVE THE ENVIRONMENTAL CLAIMS AND NOT REMAND BACK TO THE TRIAL COURT.**

As previously discussed, the County Agencies have made every effort, and expended significant time and resources, over the last *eight years* to have their CEQA claims heard on the merits. (Section V.1, *supra*.) Cross-respondents' request that this Court remand the CEQA merits to the trial court if it reverses the judgment is another ploy to delay resolution of the merits. (*See* IID XRB, pp. 88-89, 147-150; SDCWA/MWD/CVWD XRB, pp. 185-188; State XRB, pp. 24-32.) As further discussed below, there are compelling reasons for this Court to resolve the environmental claims, and the Court has all of the information it needs to do so.

1. **REMAND IS NOT THE CORRECT REMEDY GIVEN THE CONTINUING UNMITIGATED HARM TO THE ENVIRONMENT.**

The merits of the environmental claims must be resolved promptly to protect public health and the environment from ongoing harm. (Air District XAOB, pp. 87-88.) Remand will result in irreparable prejudice to the County Agencies and the people of the Imperial Valley and Riverside County that must daily live with and breathe the consequences of a dishonest CEQA process.

A. **The Record Reveals the Fate of the Salton Sea if Adequate Mitigation is Not Secured.**

Over the years, the steady drainage of Colorado River water into the Salton Sea, as intended by DOI in 1924 (Order of Withdrawal (Public Water Reserve No. 90, California, signed by President Coolidge on March 4, 1924, designating the Salton Sea as a reservoir for Colorado River water), has been put to beneficial uses by fostering an important ecological environment, and kept lands submerged that would otherwise cause severe air quality problems and negatively impact public health. (Vol-10:Tab-211:AR2:CD4:17488-17496.)

Flooding at the Salton Sea sparked controversy over IID's use of Colorado River water. (Supp.AA:203:1925:50671-50674.) In 1980, John Elmore, a farmer with property adjacent to the Salton Sea, alleged IID was wasting and misusing water, causing the Salton Sea's level to rise. (Vol-10:Tab-213:AR3:CD3:09306-09309.) The SWRCB considered the matter, and issued Decision 1600, finding that: (1) the Sea has risen gradually since the 1920s in response to increased irrigation drainage from the Imperial and Coachella Valleys and Mexico; and, (2) IID needed to employ water conservation measures to control the Salton Sea's rising levels. (Vol-10:Tab-213:AR3:CD3:09360.) IID and CVWD also faced damage claims

and lawsuits from Salton Sea flooding. (*Salton Bay Marina, Inc. v. Imperial Irrigation District* (1985) 172 Cal.App.3d 914; *United States v. Imperial Irrigation District* (S.D. Cal. 1992) 799 F.Supp. 1052; Vol-10:Tab-215:AR2:CD4:17468-17477; Vol-10:Tab-216:AR2:CD4:17478-17487.)

One of the contracts IID sought to validate, Contract M, relate to Salton Sea flooding. SWRCB determined that by conserving and transferring the water that would otherwise flow to the Salton Sea, it could be used by other California Colorado River water users to help California live within its allotment, or for beneficial uses, such as ground water recharge or enhancement of fish and wildlife resources. (Vol-10:Tab-213:AR3:CD3:09320-09323, 09328-09329; (Vol-10:Tab-217:AR2:CD3:07057; Vol-10:Tab-219:AR2:CD3:08018-08019.)

Instead of controlling elevation to prevent flooding, the QSA and transfer program are shrinking the Salton Sea, and are creating a human health danger. A depleted Salton Sea will expose significant playa and seabed sediment contaminated with toxic compounds creating toxic-laden dust storms harming public health, agricultural crops, and ecological systems including fish, birds and natural habitat. (AA:40:242:10875.)

Essentially, the QSA and water transfers are permanently altering the Salton Sea ecosystem, and if status quo continues, the Salton Sea (California's largest lake, with a surface area of about 364 square miles or over 233,000 acres) will transform into a toxic dustbowl, similar to the problems at Owens Lake, except at the Salton Sea the impacts will be worse. (Vol-3:Tab-51:AR3:CD10:101804\_0214, \_0290; Vol-4:Tab-73:AR3:CD12:205476-205477.) The potential exposed playa at the Salton Sea could be twice as large as the exposed Owens Lake shoreline. (Vol-4:Tab-73:AR3:CD12:205224-205225.) Also, according to cross-respondents, the public cannot rely on the implementation of a restoration plan to prevent the QSA's impacts because it is unfunded and no agency has committed to

undertake the necessary restoration activities. (IID XRB, pp. 16-22, 125-135; State XRB, pp. 9-10; SDCWA/CVWD/MWD XRB, p. 9-15.)

If the exposed shoreline at the Salton Sea results in only 1% of the emissions caused by the exposed Owens Lakebed, the emissions would be significant possibly resulting in 24-hour concentrations of PM10 between 300 to 4,000  $\mu\text{g}/\text{m}^3$ , far exceeding the federal health based standard of 150  $\mu\text{g}/\text{m}^3$ . (Vol-4:Tab-64:AR3:CD17:520450, 520455; Vol-4:Tab-70:AR3:CD18:522486-522487, 522489; Vol-4:Tab-73:AR3:CD12:205224-205225; 42 U.S.C. §§ 7408-7409; 40 C.F.R. Part 50.6.)

PM10 is a public health concern because it affects the respiratory system (including worsening asthma) and can cause lung tissue damage *and premature death*. (*Vigil v. Leavitt* (2004) 381 F.3d 826, 830; Vol-1:Tab-11:AR3:CD23:715982.) Imperial County was classified by EPA as a non-attainment area for PM10 and had the highest asthma hospital discharge rate in California before the QSA.<sup>41</sup> (Vol-3:Tab-60:AR2:CD6:27970; Vol-4:Tab-68:AR2:CD6:29117-29120; Vol-3:Tab-51:AR3:CD10:101804\_0680-101804\_0681; Vol-5:Tab-72:AR4-06-435-27481.)

**B. Mitigation Required by the Water Order is Not Sufficient to Fully Mitigate the Impacts.**

Cross-respondents ask this Court to believe the SWRCB's Water Order "fully mitigates" impacts of the QSA and water transfers until 2017 and beyond. (*See* IID XRB, p. 147.) Importantly, the Water Order relies on June-2002 EIR/EIS, the adequacy of which was challenged by the Air

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<sup>41</sup> The Imperial Valley is designated by the U.S. EPA as a serious non-attainment area, the worst possible classification possible. (*Sierra Club v. United States Env't'l Protection Agency* (9th Cir. 2003) 346 F.3d 955; 72 FR 70222 (December 11, 2007; 40 CFR Part 81.)

District and County in Cases 82 and 83, but not decided because these cases were dismissed (Case 83 is pending on appeal).<sup>42</sup>

Contrary to the State's efforts to reduce its obligation (XRB, p. 10), the Water Order requires compliance with the SSHCS for the duration of the transfers. One aspect of the SSHCS was the requirement for mitigation water to be sent to the Salton Sea, for another six years, until 2017. (Vol-6:Tab-113:AR3:CD18:526964-526968.)

As the Air District showed in its cross-appellant's opening brief (pp. 90-133), the environmental analysis was hardly a "worst case" as claimed, and the mitigation was wholly insufficient to fully mitigate the impacts of the QSA and water transfers.<sup>43</sup> The Air District further showed in its opening brief that the SSHCS touted by cross-respondents no longer exists, and the mitigation water for the Salton Sea is not assured, having been sold to DWR for MWD at the last minute without environmental analysis. (Air District XAOB, p. 123; Vol-7:Tab-136:AR3:CD14:400128\_22; Vol-7:Tab-

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<sup>42</sup> The SWRCB has not been receptive to the County Agencies' attempts to secure adequate mitigation under the Water Order. In addition to having Case 83 dismissed, it rejected its request to reconsider the draft water order and impose more strenuous air quality mitigation measures. (Vol-6:Tab-97:AR3:CD18:526539-526543; Vol-6:Tab-96:AR3:CD18:526590-526916; Vol-6:Tab-98:AR3:CD18:526801-526817.) This history undermines the Cross-respondents' suggestion that the Air District could simply ask the SWRCB to exercise its continuing authority and change the mitigation requirement. (See IID XRB, p. 147.) Hoping that SWRCB will exercise discretion to modify inadequate mitigation certainly does not ensure that adequate mitigation will ultimately be implemented. Moreover, SWRCB improperly delegated to the Division Chief the authority to determine at some unknown point in the future, by only consulting with the Air District, SCAQMD, and CARB, whether the air quality mitigation measures are feasible and necessary. (Vol-6:Tab-113:AR3:CD18:527008-527009.) (*Vedanta Society of Southern Cal. v. Cal. Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 526 [decision-making body must adopt required findings itself and may not delegate duty to another body].)

<sup>43</sup> IID did not send mitigation water to the Salton Sea in 2003, 2005, or 2006, as required by the Water Order. (RJN2:4:11:654, 744.)

137:AR3:CD14:400131\_16/\_17; IID AOB, pp. 20-21.) SDCWA/CVWD/MWD do not refute these claims.

In addition, there is no certainty that after the delivery of the mitigation water ceases in 2017, that a habitat and air mitigation plan will “full mitigate” the QSA and water transfer impacts. The State is disavowing its obligation to pay for mitigation after the first 15 years, and IID will not implement the mitigation without funding. (State XRB, pp. 10-11; Vol-8:Tab-172:AR3:CD1:10462; Vol-8:Tab-173:AR3:CD1:10547; Vol-8:Tab-167:AR3:CD1:11357.) As the Air District showed in its opening brief (pp. 124-133), the plan is a mere “wish list” and calls for, among other things, development of an undefined research and monitoring program as the Sea recedes to define the potential for future problems, and an air pollution credit trading program to generate PM10 ERCs that could be purchased in lieu of reducing emissions at the Salton Sea. (Vol-4:Tab-73:AR3:CD12:204968\_05-204968\_06; Vol-5:Tab-88: AR3:CD18:523895; Vol-7:Tab-136:AR3:CD14:400128\_56, 400128\_122-400128\_123, \_171; Vol-7:Tab-137:AR3:CD14:400131\_21, 400131\_62, 400131\_121, 400131\_185.). (See Air District XAOB, pp. 128-130.)

Moreover, a “rapidly dying Salton Sea” or termination of the QSA or water transfers will not reverse the environmental damage or terminate the need for mitigation. Once the shoreline and playa are exposed, these areas will be susceptible to wind erosion and an on-going source of PM10 emissions for potentially hundreds of years. (Vol-3:Tab-51:AR3:CD10:101804\_0701; Vol-4:Tab-73:AR3:CD17:520450-520451, 520455.) It will be necessary to continuously implement mitigation and maintain the mitigation once it is in place even after the transfers and QSA stop. (See Vol-3:Tab-59:AR2:CD7:32953-32967 [including maintenance costs for a portion of the 110 square mile Owens Lake].)

C. The Evidence Shows that Harm at the Sea is Already Occurring, and Will Continue to Occur.

Despite the facts in the record, as discussed above, IID argues that “repeated warnings of QSA-caused Salton Sea destruction are false,” apparently in an attempt to detour this Court from promptly adjudicating the merits of the environmental claims. (IID XRB, p. 146.) IID cites to the County Agencies’ opposition and evidence in the supersedeas proceeding in characterizing respondents’ position that the Salton Sea was suffering dramatic declines caused by the QSA and, thus, any stay was harmful.<sup>44</sup> IID then states, in conclusory fashion, that it “filed extensive evidence and argument showing that such claims were false, and that the QSA water transfers were being fully mitigated, as the SWRCB had ordered.”

Even if this evidence was part of the record on appeal, which it is not,<sup>45</sup> IID’s information is inaccurate and highly contested. The Air District has cited to extensive evidence in the record supporting its concerns that further delay will cause irreparable harm. Also, now that IID has “opened the door” to recent evidence, the County Agencies properly request this Court take judicial notice of the evidence they submitted in the supersedeas proceeding.<sup>46</sup> (RJN2:1-5:1-14:1-995.) This evidence shows the existing and continuing harm that is occurring at the Salton Sea as a result of the QSA and water transfers, and implications on public health. For example:

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<sup>44</sup> The County Agencies opposed an *unconditional* stay for the very same reasons discussed here.

<sup>45</sup> The evidence is also not the subject of a pending request for judicial notice. The Air District objects to IID’s citation to evidence not properly in the appellate record. IID has waived its opportunity to make such a request.

<sup>46</sup> IID notes on page 146, fn. 55 that some respondents made similar arguments in seeking an injunction that the trial court denied. The County Agencies did not seek an injunction in the trial court.

- The Salton Sea elevation has declined over four feet from the baseline analyzed in the environmental documents, and is declining at a faster rate than anticipated. (RJN2:4:11:639, 641-642; RJN2:3:6:423.)

- The Salton Sea bed is now exposed and Covered Species nesting on islets will be exposed to ground predators and those breeding areas eliminated from use earlier than anticipated. (RJN2:4:11:639, 643.)

- The receding Salton Sea shoreline exposes fine particulates that blow into the air, creating dust storms, damaging crops, and causing health problems. (RJN2:3:6:423-425, 438; RJN2:3:7:468-469.)

**D. Remand of the Environmental Claims is Not the Correct Remedy Given the Exigent Circumstances.**

The continuing harm to public health and the environment as a result of the QSA and water transfers, as discussed above, creates exigency in the adjudication of the CEQA and CAA claims. This exigency distinguishes this case from other cases, including those cited by cross-respondents, where remand (and the resulting delay) does not facilitate ongoing harm, and more akin to other cases where courts have decided that remand is not the appropriate remedy.

Cross-respondents rely on *California Statewide Communities Development Authority v. All Persons Interested et al.* (2007) 40 Cal.4th 788, 806-807, to support their position that “if the Court reverses the invalidation ruling, pursuant to Supreme Court authority, the correct remedy will *likely* be to remand the issues to the trial court for determination along with all the other issues the trial court did not reach.” (SDCWA/CVWD/MWD XRB, p. 185 [emphasis added].) *California Statewide Communities*, which involved validation of the issuance of

bonds, is distinguishable because there was not a pressing need to promptly adjudicate the issues that rendered remand an unviable option.<sup>47</sup>

The present case is more analogous to cases where the court has rejected remand and instead exercised discretion to hear the merits because an important issue was at stake. (See *Toxics*, 136 Cal.App.4th at 1069 [court exercised inherent discretion to hear CEQA]; see also *Faulder v. Mendocino County Board of Supervisors* (2006) 144 Cal.App.4th 1362, 1368-1369 [court took original jurisdiction to expeditiously interpret election laws governing deceased candidates]; *Inyo I*, 32 Cal.App.3d 795; *Inyo II*, 61 Cal.App.3d 9.) The “correct remedy” in this case is to not remand and instead adjudicate the claims now.

2. **ADJUDICATION OF THE ENVIRONMENTAL CLAIMS WOULD PROMOTE EFFICIENCY AND JUDICIAL ECONOMY.**

Cross-respondents argue remand of the entire action (if the judgment is reversed) is necessary to avoid issues being decided in two different judicial forums (State XRB, p. 32; SDCWA/CVWD/MWD Brief, p. 186), and inefficiently using judicial resources by providing this Court with the benefit of the trial court’s analysis in the first instance (State XRB, pp. 26-27; SDCWA/CVWD/MWD XRB, p. 186.) Cross-respondents’ arguments lack merit.

To “start over” ignores the eight-year history of this case and the additional time, costs, and judicial resources that would unnecessarily be

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<sup>47</sup> In *California Statewide Communities*, the Supreme Court found the issuance of government bonds would not violate the state Constitution if certain conditions were met; it remanded this portion of the case to the trial court to determine whether those conditions existed. The Court went on to adjudicate the issue of whether the issuance of the bonds violated the establishment clause of the First Amendment to the federal Constitution. (40 Cal.4th at 806-807.) This case did not involve any exigent threat to public health or the environment.

expended in another trial court proceeding for a case that will inevitably be appealed back to this Court. This Court has the discretion to decide when to hear and remand issues, and has the information it needs to decide the merits. There is no compelling reason to delay resolution of the issues with a further unnecessary trial court proceeding.

A. **Remand Will Unnecessarily Require The Parties And Court To Expend Further Fees Costs, And Judicial Resources.**

After seven years in the trial court and no merits resolution, the County Agencies are understandably reluctant to return to that forum. Unlike cross-respondents, who are financially benefiting from the QSA and water transfers, the County Agencies, with no financial upshot, could be left (in the dust, literally) to deal with the unmitigated aftermath. Despite the County Agencies' requests to be involved in the negotiating process in an effort to prevent potential conflicts, they were ousted. Now, ironically, they are compelled to participate in this litigation to protect the public health and environment of the Imperial and Coachella Valleys.

To date, the County Agencies have incurred nearly \$3 million in fees and costs trying to get their claims to resolution, to no avail. (RJN2:5:17:1004-1028; RJN2:5:18:1029-1049.) Public agencies' budgets are not unlimited. They should not be required on remand to unnecessarily incur additional fees and costs on a "do over" – particularly when the trial court has already refused to hear their claims.

At least one other party, the South Coast Air Quality Management District, withdrew from the validation action in part because of the "continued expense and delay." (RJN2:5:19:1052.) This agency is now relying on the County Agencies' efforts to secure adequate environmental review and mitigation of the QSA. (RJN2:5:19:1052.) "Starting over" in the trial court would be extremely prejudicial to the parties that have

already incurred fees and costs without an opportunity to have their day in court and the merits of their claims heard, potentially precluding some parties from pursuing their claims because to do so may be cost prohibitive.

Adjudicating the merits now will promote efficiency and judicial economy. Remand will require the expenditure of further significant and unnecessary fees and costs, and depletion of judicial resources.

**B. Deciding the Environmental Claims, Even if Other Claims are Remanded, Will Limit the Issues.**

Cross-respondents do not cite to authority preventing the Court from deciding some issues or cases on appeal, and remanding others. Cross-respondents' fear that more than one court will decide the same issues is unfounded. The Court has discretion to rule on certain issues, grounds, or even entire cases within the coordinated cases, while modifying or remanding others. Coordinated cases are not required to remain "bundled" for purposes of rulings, remand, or modifications of judgments.

In *State Water Resources Control Board Cases*, (2006) 136 Cal.App.4th 674, the Court of Appeal dealt with three appeals and eight cross-appeals regarding the trial court's (Judge Roland Candee) ruling in coordinated water rights proceedings involving water quality in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. (*Id.* at 687-689.) This Court of Appeal affirmed three of the coordinated cases, *modified the judgment* in one of the cases, and reversed the judgment in two of the cases. (*Id.* at 884-885.)

Also, in *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co., et al.*, (1996) 45 Cal.App.4th 1, the court heard appeals on coordinated proceedings involving determinations of insurance coverage under comprehensive general liability insurance policies for third parties' asbestos-related bodily injury and property damage claims. (*Id.* at 34-36.) In *Armstrong*, the Court of Appeal ruled that with regard to Phase V of the

coordinated proceedings, judgment was affirmed on certain grounds, but *remanded* on one issue (the issue of findings on the objectively reasonable expectations of the insured. (*Id.* at 87 and 116.)

Adjudicating the environmental claims now in lieu of remand would also promote judicial economy. The CEQA writs are separate from validation and seek different relief, even though they are coordinated. This Court's resolution of the CEQA and CAA issues now would not only bring final resolution to Cases 1653, 1656, and 1658 (three of the four cases included in the judgment on appeal), but it would limit the issues for the trial court in Case 1649 if the invalidation judgment is reversed.

C. **This Court Has All the Information it Needs to Decide the Merits.**

Cross-respondents also argue that adjudicating the merits of the environmental claims now in lieu of remand would deny the court the benefit of the trial court's analysis in the first instance. (IID XRB, p. 148-149; State XRB, pp. 26-27; SDCWA/CVWD/MWD XRB, pp. 185-188.) As the Air District pointed out on page 88 of its opening brief, this Court will apply the same standard of review as the trial court in reviewing CEQA and because the agency's action, not the trial court's decision, is reviewed and the review is *de novo*.<sup>48</sup> (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 80; *Sunnyvale West Neighborhood Ass'n v. City of Sunnyvale City Council*

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<sup>48</sup> The State agrees with the Air District that appellate review for CEQA issues is *de novo*. (State XRB, p. 27.) The cross-respondents do not contest the Air District's assertion that this Court's review of CEQA compliance is *de novo* or that the EIR/EIS and PEIR violate CEQA if the agencies did not comply with CEQA's legal requirements or did not adequately inform the public or decisionmakers. (Air District XAOB, pp. 88-89.) The cross-respondents also do not contest that a CAA and Air District Rule 925 violation is shown by the failure of the Secretary to make a conformity decision in the ROD. (Air District XAOB, pp. 136-142.)

(2010) 190 Cal.App.4th 1351, \*11<sup>49</sup>.) Thus, this Court does not need to review any decision by the trial court in order to reach its own conclusions.

Moreover, the cases on which cross-respondents rely, *Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 44-45, and *Redevelopment Agency v. Superior Court* (1991) 228 Cal.App.3d 1487, actually support the Air District's argument that this Court has all of the information it needs to decide the merits now. In *Koster*, a CEQA petitioner appealed the trial court's finding that the case was not ripe for adjudication. (*Id.* at 31-32.) *Importantly, the parties did not provide the appellate court with the 41,000 page administrative record* to enable it to reach a decision on the merits. (*Id.* at 32, 45.) The court, after finding the controversy was ripe, remanded the case for the trial court's consideration on the merits. (*Id.* at 45.)

Likewise, in *Redevelopment Agency*, the appellate court was able to adjudicate and dispose of certain issues, but found the record before it precluded complete disposition of all of the objectors' contentions. (228 Cal.App.3d at 1491-1492.) On that basis, it issued the writs prayed for by the county, but directed the trial court to vacate its orders overruling the demurrers and reconsider them consistent with its decision. (*Id.*)

Here, as noted by IID (XRB, p. 150), and unlike *Koster*, where the court could not make a decision on the CEQA merits without the record, and *Redevelopment Agency*, where the record did not contain the information it needed to make a decision, *this Court has the administrative records* (comprising hundreds of thousands of pages); the appendices of pleadings and filings (comprising hundreds of volumes); and, the 12-

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<sup>49</sup> *Sunnyvale West Neighborhood Ass'n*, final as of January 16, 2011, also represents new authority supporting the County Agencies' claims that the CEQA baseline must represent existing conditions on the ground, and not a hypothetical circumstance.

volume reporter's transcript documenting hearings and trial that occurred over seven years in the trial court. The Court, however, does not need to search through the entire record (or conduct the 15 days of trial the trial court reserved), because cross-respondents have not opposed the County Agencies' arguments on the merits. The matter is deemed submitted on these briefs, and the County Agencies have provided the Court and parties with excerpts of the record for their convenience. (*See Cal. Ins. Guarantee Ass'n*, 128 Cal.App.4th at 316, fn. 2.)

Furthermore, the decisions in the *Koster* and *Redevelopment Agency* were issued early in the litigation. The parties in these cases did not undergo seven years of litigation only to be told in the end the court would not adjudicate the merits of their claims. Here, the trial court did not want to adjudicate the environmental claims, and instead deferred the matter to this Court. (RT-11/30/09:10:2966-2967.)

**D. The Environmental Claims Are Highly Likely to Return to this Court.**

Another reason to avoid remand is the likelihood that these issues would ultimately be back before this Court. Cross-respondents attempt to detour this Court from hearing the merits by outlining a plethora of scenarios about what could happen if this Court upholds the invalidity of the QSA-JPA and other QSA-Contracts, arguing that this Court's adjudication of potentially "speculative claims" would be an idle act.<sup>50</sup>

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<sup>50</sup> Specifically, cross-respondents state if the case is remanded they will decide whether to renegotiate or abandon the project and, therefore, it would be an idle act to consider the cross-appellants claims. (SDCWA/CVWD/MWD XRB, pp. 186-188.) This position is not persuasive; cross-respondents have made clear that the QSA "took years of negotiations;" is central to the peaceful sharing of the Colorado River and necessary for southern California to have a sufficient water supply; and is necessary to "protect the bay Delta from additional water supply demands." (RJN2: 5:16:999-1003; *see also* their oppositions to preliminary injunction motions

(SDCWA/CVWD/MWD XRB, pp. 186-188.) However, cross-respondents also reveal their expectation that regardless of what happens, and even if this Court remands the CEQA issues, these same issues will likely end up back before this Court on appellate review anyway. (*See, e.g.*, State XRB, p. 24 [this Court should “review the CEQA issues if and when they return to this Court via a subsequent appeal of the trial court’s ruling...”]; IID XRB, pp. 149-150 [discussing *Koster* case, and the court’s acknowledge possibility that “a new appeal would follow the hearing on remand and address some of the points briefed on appeal...”].)

**VIII. IN THE ABSENCE OF OPPOSITION, THIS COURT MAY FIND FOR THE COUNTY AGENCIES ON ALL CEQA AND CAA CLAIMS BASED ON THE COUNTY AGENCIES’ CROSS-APPELLANTS’ OPENING BRIEFS.**<sup>51</sup>

**1. CROSS-RESPONDENTS HAD SUFFICIENT NOTICE AND OPPORTUNITY TO BRIEF THE CEQA AND CAA CLAIMS.**

Cross-respondents had fair notice and opportunity to brief the merits of CEQA and the CAA, but consciously chose not to. This risky litigation tactic should not be a deciding factor in this Court’s decision to rule on the merits of the CEQA and CAA claims. For years, the County Agencies have served as a “canary in the coal mine” for the Salton Sea area with regard to these crucial environmental concerns, and cross-respondents’ failure to address the merits of the environmental claims is yet another example of their ongoing effort to avoid facing judgment day.

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filed in the trial court in 2007, Supp.AA:107:1138:26570-26583; Supp.AA:111: 1144:27618-27633; Supp.AA:111:1148:27713-27727; Supp.AA:112:1157: 27988-27992.) In light of the cross-respondents’ representations, it is hard to believe they will simply abandon the QSA if the EIRs are decertified.

<sup>51</sup> This issue is within the County Agencies’ cross-appeal, issue numbers 1, 3, and 6. (Supp.AA:219:2062:54613.) The Air District briefed this issue in its cross-appellant’s opening brief at pages 90-142.

Cross-respondents have known since the County Agencies filed their cross-appeal, which included as error the trial court's failure to decide the CEQA and CAA merits. (Supp.AA: 219:2062:54610-54626.) The County Agencies also advised the Court and parties in their supersedeas opposition that they intended to ask the Court to adjudicate the environmental claims on the merits. In the County Agencies' application on October 7, 2010, requesting permission to file briefs in excess of the word limit (unopposed, and in fact granted by this Court), they stated additional words were needed, in part, to brief the merits of CEQA and the CAA. On November 23, 2010, the County Agencies, consistent with their prior statements, filed their opening briefs including the merits of the CEQA and CAA claims.

In response, on December 6, 2010, SDCWA/CVWD/MWD filed a motion seeking to strike portions of the cross-appellants County Agencies' and POWER's briefs addressing the CEQA merits. The motion set forth the cross-respondents' position (virtually the same one presented in their most recent briefs) on why the Court cannot and should not consider the merits of CEQA and the CAA. This Court denied the motion outright, without waiting for the County Agencies' or POWER's opposition briefs. This denial was more than ample notice that this Court may consider and rule on the merits of the CEQA and CAA claims.

Despite the Court's ruling on their motion, cross-respondents have purposefully dodged these claims in an attempt to detour the Court from hearing the merits, while at the same time hedging their bets by trying to reserve additional opportunities to reply to these critical issues if their first strategy fails. (SDCWA/CVWD/MWD XRB, p. 195, fn 77.) They believe by refusing to respond to the merits of the CEQA and CAA claims they can prevent this Court from deciding the issues, but yet they cite to their trial briefing "just in case." (SDCWA/CVWD/MWD XRB, p. 190, fns. 73-74.) Cross-appellants' approach is undoubtedly improper and should be

summarily rejected by the Court. Their cross-respondents' brief was their opportunity to brief the CEQA and CAA issues,<sup>52</sup> and they chose not to take it, even though they had available space in their briefs, or could have requested more words. (*See* County XARB, p. 4.)

Moreover, it would not have been unduly burdensome for the cross-respondents to respond to cross-appellants' CEQA and CAA claims on the merits because, as cross-respondents readily admitted in their motion to strike the County Agencies' briefs (pp. 1-2, fn. 2) and in their responsive briefs (IID XRB, p. 150; SDCWA/CVWD/MWD XRB, p. 190, fn. 3), all parties already briefed the merits of the CEQA claims in the trial court. The CAA claims were also briefed in the trial court. (AA:33:194:8907-8935; Supp.AA:215:2004:53636-53646.) Thus, there is simply no compelling reason why cross-respondents chose in their opposition/reply briefs to not address the substantive merits of the CEQA and CAA claims.

2. **THE MERITS OF THE ENVIRONMENTAL CLAIMS ARE "DEEMED SUBMITTED" ON THE COUNTY AGENCIES' BRIEFS.**

The Air District demonstrated in its Opening brief the following CEQA violations:

- The QSA-JPA does not assure the mitigation measures identified in the EIR/EIS and PEIR will be implemented as required by CEQA (pp. 77-79);

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<sup>52</sup> Cross-respondents SDCWA/CVWD/MWD claim in footnote 77 on page 195 of their XRB that they have somehow been forced to "limit" their brief to the procedural issues regarding the trial court's decision. They provide no evidence, and the Air District can find no Court Order limiting their briefing solely to procedural issues given appellants' appealed the entire judgment are at issue in the appeals and cross-appeals.

- The EIR/EIS and PEIR utilized defective baselines that underestimated the environmental impacts in violation of CEQA (pp. 90-97);
- The EIR/EIS and PEIR failed to adequately analyze environmental impacts as required by CEQA (pp. 97-124);
- The EIR/EIS and PEIR failed to include adequate and feasible mitigation measures as required by CEQA (pp. 108-133); and,
- IID failed to make the requisite findings for the EIR/EIS, that IID, SDCWA, CVWD and MWD failed to make the requisite findings for the PEIR, and MWD failed to make the requisite findings for the PEIR Addendum (pp. 133-136).

The Air District showed the Secretary failed to ensure her approval of the CRWDA and State-QSA complied with the CAA and Air District Rule 925. (Air District XAOB, pp. 136-142.) As a result, the Secretary lacked authority to execute the CRWDA and approve the State-QSA.

The cross-respondents have not contested any of these matters. It was not an oversight; cross-respondents deliberately decided not to respond. The law is well established that where a respondent fails (or refuses) to respond to contentions made in an appellant's brief – the matter is deemed submitted on the appellant's brief. (*County of Butte v. Bach* (1985) 172 Cal.App.3d 848, 867 [contention raised in appellant's brief to which respondent makes no reply in its brief will be deemed submitted on appellant's brief]; *Cal. Ins. Guarantee Ass'n*, 128 Cal.App.4th at 316, fn. 2.) Thus, the question of CEQA and CAA compliance should be deemed submitted on the County Agencies' cross-appellants' opening briefs.

The Air District calls to the Court's attention a recent case, *Sunnyvale West Neighborhood Association v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, decided December 16, 2010, which

supports its position that the baselines used in the EIR/EIS and PEIR are improper. In *Sunnyvale West Neighborhood Association*, the court rejected a CEQA traffic analysis because the baseline utilized in the traffic model assumed future conditions not existing at the time of the analysis, and thus, “no direct comparison can be made to the existing conditions without the project.” The court concluded that the use of predicted conditions instead of actual conditions as the baseline was not endorsed by the California Supreme Court in *Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310 cited by the Air District in its cross-appellant’s opening brief.

3. **THE CEQA VIOLATIONS REQUIRE THE EIR/EIS, PEIR, ADDENDA, AND THE PROJECT APPROVALS BE VOIDED.**

The Air District showed, with more than ample citation to the record, that cross-respondents (IID as lead agency for the EIR/EIS, and IID/SDCWA/CVWD/MWD as co-lead agencies for the PEIR) prejudicially abused their discretion by failing to proceed in the manner required by CEQA and by their omissions of information essential to informed decisionmaking and informed public participation. (See Air District XAOB, pp. 88-89.) Cross respondents’ have not contested these CEQA violations in their briefs.

The proper remedy is to void the EIR/EIS, PEIR, Addenda, and project approvals. Because cross-respondents have twice rejected the conditions offered by the County Agencies that would allow the transfers to continue while the environmental violations are cured, the transfers should be enjoined. For the Court’s convenience, the applicable resolutions certifying the CEQA documents and approving the QSA projects are located in the administrative record as follows:

- IID Resolution No. 8-2002 Certifying EIR/EIS, June 28, 2002 (Vol-5:-Tab-87:AR3:CD3:32099-32100).
- IID Resolution No. 9-2003 Approving EIR/EIS, as Modified and Supplemented by EIR Addendum for the Transfer Project, and Approving the Transfer Project, October 2, 2003 (Vol-8:Tab-159:AR3:CD14:400126-400128).
- CVWD Resolution No. 2002-119 Certifying the QSA PEIR, June 25, 2002 (Vol-5:Tab-80:AR4-05-380-25302/25303).
- SDCWA Resolution No. 2002-08 Certifying the Final PEIR for the implementation of the Colorado River QSA, June 27, 2002 (Vol-5:Tab-83:AR4-05-381-25304/25305).
- IID Resolution No. 7-2002 Certifying the PEIR for the QSA, June 28, 2002 (Vol-5:Tab-86:AR3:CD3:32097-32098).
- CVWD Resolution No. 2003-223 Approving Addendum No. 2 to the QSA Final PEIR, September 24, 2003 (Vol-8:Tab-146:AR4-07-515-30541/30544).
- CVWD Resolution No. 2003-227 Approving Environmental Findings, Statement of Overriding Considerations and MMRP pursuant to CEQA and Approving the QSA, September 24, 2003 (Vol-8:Tab-147:AR4-07-516-30614/30619).
- SDCWA Resolution No. 2003-30 Certifying the Addendum to the Final PEIR for QSA, Adopting Environmental Findings of Fact, Adopting a Statement of Overriding Considerations, Adopting a MMRP, and Approving the Project, September 25, 2003 (Vol-8:Tab-148:AR4-07-523-30850/30852).
- IID Resolution No. 10-2003 Certifying the Addendum to the Final PEIR for the QSA and Approving the Project, October 2, 2003 (Vol-8:Tab-160:AR3:CD14:400129-400132).

The Air District does not believe MWD executed lawful approvals of the QSA PEIR and Addendum. (See Air District XAOB, pp. 134-136). However, in an abundance of caution, the Air District also requests the following recommended Board actions also be rescinded:

- MWD Board Action Requesting Certification of QSA PEIR, June 24, 2002 (Vol-5:Tab-179:AR4-05-379-25300/ 25301).
- MWD Board Action Requesting Approval of Addendum to QSA PEIR, Adoption of Findings of Fact, Statement of Overriding Considerations, and MMRP, and Approval of QSA and related agreements, September 23, 2003 (Vol-7:Tab-143:AR4-07-513-30473/30475).

4. **THE SECRETARY'S FAILURE TO COMPLY WITH THE CAA AND RULE 925 REQUIRES INVALIDATION OF THE CRWDA, STATE-QSA, AND REMAINING QSA-CONTRACTS.**

The Secretary's failure to make conformity findings in violation of the CAA requires invalidation of the CRWDA. (Vol-9:Tab-178:AR3:CD1:10042-10061.) The CRWDA approved the State-QSA and was necessary to implement the QSA and water transfers. (Vol-8:Tab-164:AR3:CD1:10274-10279, 10283-10285; Supp.AA:46:564:11374.)

The Secretary delivers to California water contractors California's basic apportionment of Colorado River water of 4.4 mafy plus one-half of any surplus water.<sup>53</sup> (*Arizona v. California* (1963) 373 U.S. 546, 555-562, 564-586; California Limitation Act, Stats. 1929, ch. 16, § 1.) California's historic use of Colorado River water ranged from 4.5 to 5.2 mafy, a situation made possible by surplus water conditions on the Colorado River combined with water apportioned to, but unused by, Arizona and Nevada.

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<sup>53</sup> See also AA:47:292:12723-12737; AA:6:38:1477-1493.

Surpluses will not likely reappear in the foreseeable future, and Arizona and Nevada are claiming their apportioned shares of the Colorado River.

**Table 2: Seven Party Agreement**

<b>Priority</b>	<b>Description</b>	<b>Acre-feet-per year</b>
1	Palo Verde Irrigation District gross area of 104,500 acres	3,850,000
2	Yuma Project not exceeding a gross area of 25,000 acres	
3(a)	IID and lands in Imperial and Coachella Valleys to be served by the All-American Canal IID (Senior) CVWD (Junior)	
3(b)	Palo Verde Irrigation District 16,000 acres of mesa lands	
4	MWD and/or City of Los Angeles and/or others on the coastal plain	550,000
	<b>SUBTOTAL</b>	<b>4.4 mafy</b>
5(a)	MWD and/or the City of Los Angeles and/or others on the coastal plain	550,000
5(b)	MWD (Prior-City and/or County of San Diego)	112,000
6(a)	IID and lands in Imperial and Coachella Valleys IID (Senior) CVWD (Junior)	300,000
6(b)	Palo Verde Irrigation District 16,000 of mesa lands	
7	Agricultural Use	All remaining water
	<b>TOTAL</b>	<b>5,362,000</b>

(Vol-10:Tab-212:AR2:CD4:15329-15333; AA:47:292:12727-12728.)

In their 1931 Seven Party Agreement, the California water contractors apportioned California's Colorado River water share as if California would always receive more than its 4.4 mafy. (Vol-10:Tab-212:AR2:CD4:15329-15333.) The Secretary required this agreement before executing contracts with individual Colorado River water users, and each of the California water users' contracts incorporates the Seven Party Agreement into the contracts' terms. (Vol-10:Tab-212:AR2:CD4:15330.)

Under the Seven Party Agreement, the Palo Verde Irrigation District, the Yuma Project, IID, and CVWD are the agricultural entities holding the first three priorities to the use of no more than 3.85 mafy of Colorado River water, although IID holds the lion's share of California's water rights. (Vol-10:Tab-212:AR2:CD4:15330-15331.) MWD was allotted 550,000 afy under a fourth priority right and 662,000 afy under a fifth priority right. (Vol-10:Tab-212:AR2:CD4:15331.) But only the first four priorities (down to MWD's first 550,000 afy) in the Seven Party Agreement lie within California's 4.4 mafy limit, as shown in the table above.

When California is limited to 4.4 mafy of water, IID's Priority 3(a) water allocation is unaffected. (Vol-10:Tab-220:AR3:CD10:101804\_0115-101804\_0120.) However, MWD loses 662,000 afy of Colorado River water, potentially leaving its Colorado River Aqueduct half empty. (The Colorado River Aqueduct, completed in 1941, was sized in the expectation of receiving annually both the basic apportionment and surplus water.) (Vol-10:Tab-220:AR3:CD10:101804\_0111-101804\_0113; Vol-10:Tab-218:AR3:CD16:507417-507418.) SDCWA, receiving virtually all of its imported water supply from MWD, is left to compete with more than twenty other MWD member agencies for a share of a half-full Colorado River Aqueduct and MWD's supplies from the State Water Project and elsewhere. (Vol-10:Tab-220:AR3:CD10:101804\_0111.)

**Table 3: Post-QSA Priority 3(a) Colorado River Water  
Distribution by the Secretary for IID**

	Changes in Quantified Amount (in thousands/acre feet)		Recipient(s) of Water	Key QSA Contracts Approving the Change (* denotes contracts in validation action)
	2017	2026		
<b>IID</b>	-110	-110	MWD	CRWDA* State-QSA* 1988 MWD-IID transfer (changes)*
<b>Priority</b>	-100	-200	SDCWA	CRWDA* State-QSA* IID-SDCWA transfer*
<b>3a</b>	-67.7	-67.7	56.2 - SDCWA 11.5 - SLR parties	CRWDA* State-QSA* Allocation Agreement*
	-150	0	Salton Sea mitigation water	CRWDA* State-QSA* IID-SDCWA transfer*
	-45	-103	CVWD or MWD if CVWD declines	CRWDA* State-QSA* IID-CVWD transfer* IID-MWD transfer*
	-91 (Salton Sea Mitigation Water)	0	MWD	CRWDA* State-QSA* IID-DWR contract DWR-MWD contract
	-11.5	-11.5	Misc PRs	CRWDA* State-QSA*
<b>Priority 3a total quantified amount</b>	<b>3,100</b>	<b>3,100</b>	<b>CRWDA* State-QSA*</b>	
<b>Total Change</b>	<b>-575.2</b>	<b>-492.2</b>	<b>QSA Contracts noted above</b>	
<b>IID Net Priority 3a</b>	<b>2,524.8</b>	<b>2,607.8</b>	<b>Amount the Secretary can deliver to IID for its use under the QSA</b>	

**Table 4: Post-QSA Priority 3(a) Colorado River Water Distribution by the Secretary for CVWD**

	Changes in Quantified Amount (in thousands/acre feet)		Recipient(s) of water	Key QSA Contracts Approving the Change (* denotes contracts in validation action)
	2017	2026		
<b>CVWD</b>	-26	-26	4.5 - SDCWA 21.5 - SLR parties	CRWDA* State-QSA* Allocation Agreement*
<b>Priority</b>	-3	-3	Misc PRs	CRWDA* State-QSA*
<b>3a</b>	+45	+103	CVWD (from IID)	CRWDA* State-QSA* IID-CVWD transfer*
	+20	+20	CVWD (from MWD)	CRWDA* State-QSA* MWD-CVWD Supplemental Agreement IID/MWD/PVID/CVWD Approval Agreement* 1988 MWD-IID transfer (changes)*
Priority 3a total quantified amount	330	330	CRWDA* State-QSA*	
Total Change	+33	+94	QSA Contracts noted above	
CVWD Net Priority 3a	363	424	Amount the Secretary can deliver to CVWD for its use under the QSA	

When the Secretary executed the ROD and CRWDA (among other actions) on October 10, 2003, she restricted and delivered Colorado River water to the Water Agencies according to the QSA's terms. By doing this, the Secretary causes a reduction in the amount of water that would have otherwise flowed to the Salton Sea. (Vol-8:Tab-164:AR3:CD1:10274-

10279, 10283-10285.) After the QSA, the Priority 3(a) water distribution (shown in yellow in Table-2), is no longer an undefined portion of 3.85 mafy. The table<sup>54</sup> below shows the water distribution resulting from the Secretary's approval of the QSA.<sup>55</sup>

IID concedes that “[a] number of the QSA-Related Agreements have their efficacy tied to the existence of the QSA.<sup>15</sup> They state they are not effective until the QSA is effective, clearly showing the parties’ intent that they only come into being if there is in fact a QSA.” (IID XRB, p. 51.) MWD agrees the water transfers are expressly conditioned upon the CRWDA. (Supp.AA:57:667:014018.) Regardless of whether it is the QSA-JPA, CRWDA, or State-QSA that is individually invalidated, the result will be the same: *if one falls, they all fall*. (See Air District XAOB, pp. 49-61, and the trial court’s analysis of the contract terms and its decision, AA:47:292:12718-12719, 12749-12751.)

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<sup>54</sup> This table is not meant to imply that the QSA only resulted in changes to IID’s and CVWD’s Priority 3a water. The year 2017 was selected because this is the last year that mitigation water is sent to the Salton Sea. The year 2026 was selected because this shows the effect of the QSA through 2077. The San Luis Rey (“SLR”) parties are: Tribes, Escondido, and VID. (Vol-5:Tab-74:AR4:06-435-27325.) The Misc PRs are federal reserved rights and decreed rights. (Vol-8:Tab-164:AR3:CD1:10285.)

<sup>55</sup> The sources for the two tables are: Vol-8:Tab-164:AR3:CD:1:10275-10278, 10285; Vol-5:Tab-74:AR4-06-435-27229/4-06-435-27231, 27295, 27317-27330; Vol-7:Tab-136:AR3:CD:14:400128\_28-400128\_32; Vol-7:Tab-137:AR3:CD:14:400131\_10-400131\_14; Vol-7:Tab-168:AR3:CD:1:10299-10302; Vol-7:Tab-169:AR3:CD:1:10349-10352; Vol-7:Tab-170:AR3:CD:1:10380-10381; Vol-8:Tab-165:AR3:CD:1:10210-10213, 10217-10220, 10230-10231; Vol-1:Tab-14:AR3:CD:1:11151-11152, 11342-11345, 11349-11350; Vol-8:Tab-168:AR3:CD:1:10300, 10322; Vol-9:Tab-174:AR3:CD:1:10336; Vol-9:Tab-175:AR3:CD:1:10926, 10931; Vol-10:Tab-232:AR3:CD:1:10935-10936; Vol-9:Tab-176:AR3:CD:1:10080-10086; Vol-9:Tab-177:AR3:CD:1:10893-10900; Vol-3:Tab-51:AR3:CD:10:101804\_0147-101804\_0148.)

5. **THE AIR DISTRICT DID NOT BRIEF “NEW ISSUES” AS CLAIMED BY IID AND SDCWA/CVWD/MWD.**

Cross-respondents erroneously argue that the Air District raised “new issues” that were not briefed before the trial court or included in issue statements purportedly required by Public Resources Code section 21167.8, subdivision (f) (“Section 21167.8”) and, as a result, this Court cannot consider these claims.<sup>56</sup> (IID XRB, p. 149, fn. 149; SDCWA/CVWD/MWD XRB, pp. 195-198, fn. 78.) Not only does Section 21167.8 not apply to the Air District (or County) in these proceedings, but all of the issues the Air District briefed fall within the scope of its pleadings and issue statement. Moreover, the trial court did not consider or rule on the merits of any of the Air District’s CEQA issues. Thus, if the Court exercises its inherent discretion to adjudicate the CEQA merits, it would be considering all of the CEQA issues for the first time, and is not limited to specific issues the trial court never considered. Accordingly, the Court may adjudicate all of the County Agencies’ CEQA issues because they are properly at issue and within the scope of their cross-appeal.

A. **Section 21167.8 Does Not Apply.**

Section 21167.8 requires CEQA petitioners to file and serve with the trial court a statement of issues which the petitioner intends to raise in any brief or at any hearing or trial. (*Id.* at 196.) SDCWA/CVWD/MWD expend two pages addressing Section 21167.8 and request the Court take judicial notice of its legislative history, even though the statute was entirely inapplicable to the QSA proceeding.<sup>57</sup>

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<sup>56</sup> Cross-respondents’ argument that the Court should not consider these issues is remarkable considering they did not respond to any of the County Agencies’ CEQA arguments on the merits.

<sup>57</sup> The Air District concurrently filed the County Agencies’ opposition to the request for judicial notice submitted by SDCWA/CVWD/MWD.

As a preliminary matter, the Air District is not a petitioner (or a respondent) in any of the remaining CEQA cases at issue and, thus, Section 21167.8 does not apply to any of its issues.<sup>58</sup> The Air District is a defendant in the validation action. In its answer to the validation complaint, the Air District denied IID's general allegations that the QSA-Contracts' comply with all applicable state and federal environmental laws, and raised non-compliance with CEQA as affirmative defenses. (AA:7:40:1541-1543.)

Section 21167.8 also does not apply to the petitioners' (including the County's) claims in the CEQA cases.<sup>59</sup> In 2004, the trial court stayed application of CEQA's procedural provisions, including Section 21167.8, shortly after the QSA cases were coordinated. (AA:5:14:1177 ["The Court orders all of the coordinated cases stayed from all CEQA statutory deadlines until further order of the Court, including but not limited to any deadlines set forth in sections 21167.4, 21167.6 and 21167.8 of the California Public Resources Code."].) The trial court never lifted this stay.

Later, in 2008, the trial court required every party to each of the QSA coordinated cases (not just petitioners in the CEQA cases) to align itself as either a "validation opponent" or "validation proponent" and to file either a "statement of issues" or "responsive statement of issues" that each validation opponent or validation proponent, respectively, intended to pursue at trial. (AA:9:71:2245-2246.) The trial court stated the "volume of

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<sup>58</sup> SDCWA/CVWD/MWD's attempt to apply Section 21167.8 to the Air District is ironic given their roles in securing dismissal of Case 83 and vehement opposition to the Air District's motions to intervene as a petitioner in CEQA cases 1653 and 1656 in the trial court and in this appellate proceeding. (See SDCWA/CVWD/MWD XRB, pp. 161-176.)

<sup>59</sup> The County, like the Air District, raised non-compliance with CEQA as an affirmative defense in validation, and generally denied IID's allegations that the QSA contracts comply with all applicable state and federal environmental laws. (AA:7:39:1527-1529.)

pleadings and multiplicity of rulings over the years preclude this Court from readily listing all the issues that the Court will need to address to have these proceedings resolved.” (*Id.*) While the “issue statement” exercise was mirrored after CEQA’s procedure, the purpose of the statements was not intended for Section 21167.8 compliance but, rather, to assist the trial court in “determin[ing] how best to proceed.” (AA:9:71:2245.)

After the parties filed revised statements of issues, the trial court allowed the validation proponents to file motions to preclude validation opponents from pursuing claims at trial on the ground that the issue was blocked by a prior ruling of the court. (AA:13:75:3074-3075.) The trial court then issued rulings on motions to preclude filed by IID and SDCWA. (AA:13:77:3083-3102; AA:13:78:3103-3129.) After the motion process IID then prepared a comprehensive list of issues, to which certain parties objected to, and then the trial court ruled on those objections and issued a final list of remaining issues. (AA:13:82:3165; AA:14:97:3462-3585.)

Later, in 2009, after the trial court issued rulings on dispositive motions filed by the parties to further limit issues for trial, the court issued the “final list of remaining issues.” (AA:26:184:6777-6786.) The trial court’s process of vetting down the issues for trial did not resemble or intend to serve as compliance with Section 21167.8. That statute simply did not apply in the trial court, and does not apply here to limit the issues the County Agencies can raise and brief on cross-appeal.

**B. The Air District Properly Raised All Issues.**

Even if this Court were to find the Air District was required to comply with Section 21167.8, each of the issues raised in its cross-appellant’s opening brief falls within the scope of the County Agencies’ issue statement. The Air District was not required to identify every specific CEQA deficiency at the time it filed its validation answer or submitted its issue statement. (*See, e.g., Okun v. Superior Court* (1981) 29 Cal.3d 442,

458 [policy is to construe pleadings liberally; less particularity is required when it appears that defendant has superior knowledge of the facts, so long as the pleading gives notice of the issues sufficient to enable preparation of a defense].) In fact, the County Agencies stated in their issue statement:

In this revised statement, the opposing public agencies identify the issues that they know at this time will be pursued at trial. However, it is possible as the administrative records are more thoroughly examined during the preparation of briefs that refined issues within the scope of this proceeding and the operative pleadings may emerge. The opposing public agencies should not be prevented from raising refined issues in the future, and therefore, express their intent to proceed accordingly.

(Supp.AA:38314-38315.)

The County Agencies “also expressly reserve[d] their right to raise issues not identified in [the] statement in response to any other parties’ responsive statement of issues.” (Supp.AA:38315-38316.) That the Air District has been able to further define its issues based on documents improperly omitted from the record, does not preclude the Air District from briefing these issues, or this Court from considering them.

Below is a chart of the alleged “new issues”<sup>60</sup> and the corresponding reference to the County Agencies’ issue statement.<sup>61</sup> The Air District also provides additional references to their trial briefs and, in some cases, explains how the issue was refined based on documents improperly excluded from the record.<sup>62</sup>

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<sup>60</sup> SDCWA/CVWD/MWD allege on page 197 of their XRB that the County Agencies raised 12 “new issues,” however, in fn. 78 on page 195, they only identify 4 “new issues.” They try to correct this error in their notice of errata served on February 7, 2011.

<sup>61</sup> The County Agencies’ issue statement includes corresponding references to their answers to the validation complaint.

<sup>62</sup> The Air District should not be prejudiced as a result of IID’s omission of critical documents from the administrative record.

Alleged “New Issue”	Reference to Issue Statement
Components were omitted from the air quality analysis, Air District’s Brief, pp. 102-103. (IID XRB, p. 149, fn. 58.)	Issue 2-3 [shifting project], and Issue 2-6 [impacts]. (Supp.AA:38335, 38350.)
Discussion of different projects, Air District’s Brief, pp. 108-117. (IID XRB, p. 149, fn. 58.)	Issue 2-3 [shifting project]. (Supp.AA:38328; <i>see also</i> RA:10:118:2735 [Air District Phase 1C Trial Brief].)
Salton Sea restoration was feasible but omitted mitigation, Air District’s Brief, pp. 131-132. (IID XRB, p. 149, fn. 58.)	Issue 2-12 [mitigation]. (Supp.AA:38350.) IID’s post-judgment production of the draft QSA-JPA revealed that Salton Sea restoration was included as mitigation, but later rejected.
No mitigation monitoring program was adopted, Air District’s Brief, pp. 132-133. (IID XRB, p. 149, fn. 58.)	Issue 2-12 [mitigation]. (Supp.AA:38350; <i>see also</i> RA:9:112:2479-2480 and RA:12:126:3085-3087 [Air District Phase 1B Trial Briefs].)
No findings for impacts or mitigation, Air District’s Brief, pp. 133-136. (IID XRB, p. 149, fn. 58.)	Issue 2-12 [mitigation]. (Supp.AA:38350; <i>see also</i> RA:9:112:2481 and RA:12:126:3085-3087 [Air District Phase 1B Trial Briefs].)
After the EIR/EIS was certified, the Water Agencies privately evaluated other alternatives, Air District’s Brief, pp. 125-127; <i>see also</i> County Agencies 11/23/10 RJN:11(E):209-210. (SDCWA/MWD/ CVWD XRB, p. 195, fn. 78.)	Issue 2-11 [alternatives]. (Supp.AA:38347.) The Air District’s review of BOR’s FOIA documents produced in 2010 (that IID improperly omitted from the administrative record) revealed this specific issue.
The EIRs did not include Salton Sea restoration as a feasible mitigation measure, Air District’s Brief, pp. 131-132. (SDCWA/MWD/CVWD XRB, p. 195, fn. 78.)	Issue 2-12 [mitigation]. (Supp.AA:38350.) As stated above, IID’s post-judgment production of the draft QSA-JPA revealed this specific issue.

Alleged “New Issue”	Reference to Issue Statement
IID relinquished its responsibilities to the State Board in violation of CEQA, Air District’s Brief, p. 134 (SDCWA/MWD/CVWD XRB, p. 195, fn. 78.)	Issue 5-5 [SWRCB mitigation]. (Supp.AA:38360.)

**IX. THE QSA-JPA’S ENFORCEABILITY RELATES TO CEQA COMPLIANCE.**

The Air District does not address the constitutional arguments, as they are part of the appeal. The Air District’s concern in the cross-appeal is the adequacy of the QSA-JPA to fund and implement CEQA mitigation.

**1. INVALIDATION OF THE QSA-JPA ALSO REQUIRES VOIDING OF THE EIR/EIS AND PEIR.**<sup>63</sup>

The Air District has a strong interest in this Court’s decision of whether the State’s unconditional obligation in the QSA-JPA is legally enforceable because of the QSA-JPA’s critical role in funding and implementing the CEQA mitigation measures necessary to protect public health and the environment. The QSA-JPA was intended to be the funding mechanism required by CEQA to ensure implementation of the mitigation measures identified in the EIR/EIS and PEIR. (See Air District XAOB, pp. 68-69, 76-77.) As the Air District explained in its opening brief, if the QSA-JPA is invalid, the EIR/EIS, PEIR and QSA certifications and project approvals must likewise be voided and set aside because the mitigation will not satisfy CEQA’s enforceability requirements without the QSA-JPA. Cross-respondents IID and the State did not respond to or otherwise oppose these significant matters.

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<sup>63</sup> This issue is number six in the County Agencies’ cross-appeal. (Supp. AA:219:2062:54613.) The Air District briefed this issue in its cross-appellant’s opening brief at pages 68-79.

SDCWA/CVWD/MWD's only response is that the CEQA documents are not automatically invalidated when the underlying approvals are struck down. (XRB, pp. 188-190.) However, they misunderstand the Air District's contention: the EIRs were not void simply because the project was void; rather, *because the project – in particular, the QSA-JPA – is void, the EIRs no longer comply with CEQA.*

IID is responsible for implementing the mitigation, but will not perform without the QSA-JPA's funding. (RJN2:5:15:997 [Wilcox Declaration, ¶7: "Termination of the QSA agreements would disrupt ongoing environmental mitigation programs and cause them to stop because mitigation is paid for by the QSA JPA"]; Vol-8-Tab-167:AR3:CD1:11357.) Absent a legally enforceable assurance of adequate funding and implementation of the measures as necessary to avoid project impacts as set forth in the EIRs, the mitigation is unenforceable in violation of CEQA. (Pub. Res. Code, §§ 21081(a)(1), 21081.6; CEQA Guidelines, §§ 15091, 15126.4(a)(2); *Federation of Hillside and Canyon Ass'n v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1255-1256, 1260-1261.) Thus, the QSA project cannot proceed without a valid and enforceable QSA-JPA.

2. **THE DEFENSE OF THE QSA-JPA HAS REVEALED IT TO BE, IF IT STILL STANDS, AN INEFFECTIVE CONTRACT TO ENSURE MITIGATION IS FUNDED AND IMPLEMENTED.**

The adequacy of an agreement is a determination that can be reached in a validation proceeding. (*Clark's Fork Reclamation Dist. No. 2069*, 259 Cal.App.2d at 369.) Here, the pivotal role of the QSA-JPA in funding the mitigation means its adequacy *must* be reached in this proceeding less the water transfers continue and when the money is needed there is no one that can or will pay for the environmental damage the transfers caused.

Cross-respondents' briefs, as discussed below, again highlight the parties' irreconcilable differing interpretations of the QSA-JPA's critical

material terms.<sup>64</sup> These conflicting interpretations reveal there was, and is, no mutual intent of the parties as to the material terms. The public cannot be assured the funding necessary to mitigate the QSA's impacts will be available *when the contracting parties cannot agree on what the QSA-JPA's material terms mean and require.*

There is no agreement between the QSA-JPA parties as how the State was and is to fund its unconditional obligation. According to IID, there was a continuing appropriation in the former Fish and Game Code section 13220 at the time of contracting to pay for the State's obligation in the QSA-JPA. (IID XRB, p. 34.) The State Attorney General, who has never endorsed IID's position or the Preservation Fund as the source of its funding when its obligation comes due, disagrees and, instead, insists that its obligation under the QSA-JPA is to merely seek an appropriation. (State XRB, pp. 1, 5, 11-14). According to SDCWA/CVWD/MWD, no appropriation was required. They argue that an "appropriation clearly was

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<sup>64</sup> Instead of offering a unified explanation of the QSA-JPA's terms, some cross-respondents urge the Court to ignore the Attorney General Office's arguments. (*See, e.g.*, IID XRB, pp. 139-141; State XRB, p. 6, fn. 5). The Court can consider counsels' arguments. In fact, counsel has a duty to argue and cite authority to show why the rulings complained of are erroneous. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836; *In re Randall's Estate* (1924) 194 Cal. 725; *Bradley v. Butchart* (1933) 217 Cal. 731; *Hom v. Clark* (1963) 221 Cal.App.2d 622; *Mecchi v. Picchi* (1966) 245 Cal.App.2d 470; *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012.) Otherwise, the Court may treat as waived any contentions that are not supported by cogent legal argument or citation. (Cal. Rules of Court, Rule 8.204(a)(1); *In re Marriage of Falcone* (2008) 164 Cal.App.4th 814.) The Court may also consider counsel's statements as admissions against the party. (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1152, citing *DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1019, fn. 3, superseded on other ground ["while briefs and arguments are outside the record, they are reliable indications of a party's position on the facts as well as the law, and a reviewing court may make use of statements therein as admissions against the party."].)

not possible at the time of contracting because whether the State would be required to pay mitigation costs and the amount of such costs were ‘indefinite and uncertain.’” (SDCWA/CVWD/ MWD XRB, p. 20.)

There is no agreement between the QSA-JPA parties as to whether the State’s unconditional obligation can be enforced when it comes due. IID claims that “to date, the State has not contended it will not make the required payments when due, should that contingency ever arise.” (IID XRB, p. 141.) The State disagrees, asserting it will breach the QSA-JPA if it were to someday need, but fail to obtain, an appropriation, in order to avoid violating section 7 of the Constitution. (State XRB, p. 12.)

There is no agreement between the QSA-JPA parties as to whether the State is obligated to pay for mitigation after the first fifteen years of the water transfers. The State, in a misguided effort to avoid the obligation it agreed to in the QSA-JPA now that it realizes the potential enormous liability, belatedly asserts it is not responsible for mitigation extending beyond the 15-year requirement for mitigation water imposed by the SWRCB. (State XRB, pp. 10-11.) According to the State, its obligation only arises if the \$133 million is exceeded in the first 15 years. (*Id.*) SDCWA/CVWD/MWD assert the contrary that the 15-year duration for mitigation refers exclusively to the mitigation water for the Salton Sea and that mitigation will last for the life of the project and possibly beyond. (XRB, pp. 13-14, fn 11.)

According to the State, the other QSA-JPA signatories are responsible for the long-term, continuing commitments for mitigation and that they will have pick up the bill, not the State. (State XRB, p. 11.) IID and SDCWA/CVWD/MWD point the finger back at the State. IID claims the State’s obligation was the financial “backstop” for the QSA mitigation during the actual years of the transfers and any residual mitigation caused by the transfers. (IID XRB, pp. 15, 21-26.) Likewise, SDCWA/CVWD/

MWD assert the QSA-JPA makes the State responsible for all costs above \$133 million, and that the State must fully indemnify SDCWA, CVWD and IID for mitigation requirements or costs above \$133 million. (SDCWA/CVWD/MWD XRB, pp. 7-8, 28-29.)

Under any of these interpretations – waiting until, or if ever, a broke State appropriates funds or relies on money from a non-existent fund – it is clear the QSA-JPA is not sufficient under CEQA to ensure the mitigation promised in the CEQA documents will actually occur. Without secured mitigation, public health and the environment will undoubtedly suffer.

**X. THE TRIAL COURT CANNOT DECLARE THAT ANY OF THE 22 MISSING QSA CONTRACTS ARE VALIDATED-BY-OPERATION-OF-LAW.**<sup>65</sup>

IID relies on the trial court's observation that *if* the validation statutes applied to the IID-DWR agreement *and* the 60-day limitations period under the validation statutes has expired *and* no direct or reverse validation action was brought, then that agreement and others similarly situated would be validated-by-operation-of-law, in an attempt to create a conclusive finding that all QSA-related agreements not in Case 1649 have been validated-by-operation-of-law. (IID XRB, pp. 47-48.) The trial court stated that an analysis needed to be conducted to determine whether any of the missing 22 contracts were within the scope of the validation statute. (AA:47:292:12711.) As IID concedes, only certain matters specifically identify by the Legislature are entitled to be validated. (IID XRB, p. 8) The scope analysis was not conducted by the trial court, and cannot be conducted by cross-respondents now.

The trial court was not convinced validation-by-operation-of-law was the proper course for contracts when there is no validation lawsuit, the

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<sup>65</sup> This issue is number 7 in the County Agencies' cross-appeal. (Supp.AA: 219:2062:54613.) The Air District briefed this issue as a unified appeal/cross-appeal issue at pages 44-49.

contracts have not been the subject of a constitutionally required due process, and the contracts may be void or abhorrent to public policy. (AA:47:292:12714-12715.) The trial court expressed its distain over the tactics IID used to convince the Imperial County Superior Court to dismiss Case 1643 (with its timely challenge to the broader set of QSA-related contracts) and create the situation whereby less than the entire QSA was before the court. (AA:47:292:12711-12712.)

IID asserts that because the interrelatedness of the QSA-Contracts caused them to be invalidated when the QSA-JPA was invalidated, the interrelatedness of the 22 missing QSA contracts should prevent the 12 QSA-Contracts from being invalidated. (IID, XRB, p. 48.) According to IID, invalidation of the State-QSA eliminated any State-QSA terms the trial court used to void the IID-DWR Agreement. (IID XRB, pp. 50-51.) Since the IID-DWR Agreement was not voided, IID asserts it could be used to “save” the QSA-Contracts from invalidity. IID’s analysis is wrong.

The trial court reviewed the terms of each QSA-Contract and found the QSA-Contracts to be void if the QSA-JPA was void. (AA:47:292:12718-12719, 12749-12751.) A void contract does not legally exist; it is as if it never existed. (*R.M. Sherman Co. v. W.R. Thomason, Inc.* (1987) 191 Cal.App.3d 559, 563.) The trial court reviewed the *terms of the IID-DWR Agreement*, one of the 22 QSA contracts missing from the validation proceeding. In doing so, the trial court determined it was the *terms of the IID-DWR Agreement* (not the terms of the State-QSA) that explicitly contemplated that invalidation of the State-QSA would also cause the IID-DWR Agreement to fall. (AA:47:292:12749.)

In addition, the IID-DWR Agreement relied upon certain preconditions that could never occur because the QSA-Contracts were invalidated. (Vol-9:Tab-177:AR3:CD1:10893-10899; *see also* Air District XAOB, pp. 45-47.) The IID-DWR Agreement does not become operative

until the pre-conditional terms occur. (Civil Code, §§ 1436, 1439.) According to IID, it did not include this contract in the validation action because of these unfulfilled preconditions (and the lack of a CEQA analysis). (IID AOB, pp. 20-21.) As such, the IID-DWR Agreement never came into existence because the invalidation of the State-QSA prevents its preconditions from ever being satisfied. Validation whether by judicial decree or by law cannot protect contracts from being voided in the future by their own terms. IID cannot use a contract that terminates when the State-QSA terminates or that never came into existence to “save” the QSA-Contracts from invalidation. IID cites no case to the contrary.

*California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406 and *Hollywood Park Land Company, LLC v. Golden State Transportation Financing Corporation* (2009) 178 Cal.App.4th 924 do not support IID’s assertion the missing 22 QSA contracts purposefully omitted from case 1649 have been validated-by-operation-of-law and so require a predetermined validation only result for the QSA-Contracts. These cases addressed a situation whereby the statute of limitations barred the plaintiffs’ attack of the subsequent ratification of compacts long after the original compacts were approved. (See Air District XAOB, pp. 47-49; County XARB, pp. 33-38; and, Cuatro del Mar’s opposition to IID’s request for judicial notice of the *Commerce Casino* compacts.)

**XI. A REQUEST THAT THIS COURT AWARD ATTORNEYS’ FEES AND COSTS IS APPROPRIATE.**

IID argues that the respondents and cross-appellants: (1) have not shown they are entitled to attorneys’ fees and costs; and, (2) that they are not entitled to attorneys fees as a matter-of-law. (IID XRB, pp. 154-156.) IID cites to *Banning v. Newdow* (2004) 119 Cal.App.4th 438, 458-459, arguing that conclusory requests for attorneys’ fees without detailed

analyses are routinely denied. In *Banning*, however, the court denied the request without prejudice to seek the fees in the trial court. (*Id.* at 459.)

The Air District's request in its brief for attorneys' fees and costs is a preservation of its rights to seek the same consistent with the Court's decision on the appeal and cross-appeal. The Air District was not required to exhaustively brief this issue; it anticipated the Court may decide the parties' entitlement to fees and costs and give direction to the trial court in determining reasonable fees and costs consistent with its opinion.

Nevertheless, in response to IID's arguments, the County Agencies are concurrently requesting this Court to take judicial notice of their motions for attorneys fees and costs that are pending (but currently stayed) in the trial court on the basis that they are prevailing parties under the trial court's judgment and, as such, they are entitled to reasonable attorneys' fees and costs pursuant to Code of Civil Procedure section 1021.5. (RJN2:5:17:1004-1028; RJN2:5:18:1029-1049.) Should the County Agencies prevail on appeal and/or cross-appeal, they would seek additional attorneys' fees and costs on the same statutory basis, and would also be prepared to submit actual documentation supporting the reasonableness of their supplemental fee and cost requests.

## **XII. CONCLUSION.**

The QSA and water transfers have had a free pass for the last eight years. This Court can adjudicate the merits of the environmental claims under the cross-appeal and, upon finding the CEQA and CAA violations as set forth in the County Agencies' briefs, promptly order effective relief – project disapproval and decertification of the EIR/EIS, PEIR and their Addendums. It is essential for public health and to protect the wildlife and habitat of the Salton Sea that all of the issues presented by the appeals and cross-appeals, including whether the State's unconditional obligation to pay millions, or perhaps even billions, of dollars irrespective of a legislative

appropriation is constitutional, be resolved now. The public should not find out after the environmental damage is irreversible that the State's unconditional obligation is really an empty promise.

Dated: February 9, 2011

Respectfully submitted,

IMPERIAL COUNTY APCD

Michael L. Rood, County Counsel

Katherine Turner, Deputy County  
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JACKSON DEMARCO TIDUS

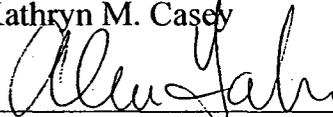
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**CERTIFICATION OF WORD COUNT**

Under California Rule of Court 8.204(c)(1), the undersigned appellate counsel hereby certifies that, according to the word count of the computer program used to prepare the Imperial County Air Pollution Control District's Cross-Appellant's Reply Brief, the Brief contains 31,271 words (excluding the caption page, table of contents, table of authorities, glossary of defined terms, and certification of word count). On January 12, 2011, the Court issued an order granting the County Agencies' application to each file a reply brief exceeding the authorized word limit, permitting the Air District to file a reply brief up to a maximum of 32,000 words.

Dated: February 9, 2011

Respectfully submitted,

IMPERIAL COUNTY APCD

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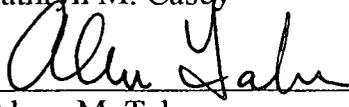
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