

Third Civil Number C064293

**In the Court of Appeal
of the State of California**
THIRD APPELLATE DISTRICT

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

QSA COORDINATED CIVIL CASES

From the Superior Court of the State of California,
County of Sacramento, Judicial Counsel No. 4353
The Honorable Ronald L. Candee, Department 41
Telephone Number: 916.874.5661

**CUATRO DEL MAR'S COMBINED ANSWER TO AMICUS
CURIAE BRIEFS OF THE PLANNING AND CONSERVATION
LEAGUE, DEFENDERS OF WILDLIFE, AUDUBON
CALIFORNIA, AND PACIFIC INSTITUTE**

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**I.
INTRODUCTION**

Although Cuatro Del Mar (“Cuatro”) is not a party to any of the suits filed under the California Environmental Quality Act (“CEQA”)¹, it submits this answer in response to the amicus curiae briefs of the Planning and Conservation League, Environment Now, Defenders of Wildlife, Audubon California, and Pacific Institute (“CEQA Amici”) because the relief advocated by the CEQA Amici potentially delays a final judgment. Moreover, the analysis of CEQA documents that were prepared more than eight years ago may be unnecessary if the court strikes the CEQA approvals on their face.

¹ Case 1653 (*POWER v. IID et al.*, ECU01653); Case 1656 (*County of Imperial v. IID et al.*, ECU01656).

Cuatro's paramount concern is that this court expeditiously affirms the trial court's judgment that the Quantification Settlement Agreements ("QSA Agreements") are invalid. Only then should this court address the merits of the CEQA claims. If the court proceeds to do so, the concerns raised in the CEQA Amici can be quickly resolved by this court striking the dated CEQA approvals. In turn, this would mandate the Water Entities² to develop new and more current environmental assessments should they decide to proceed with another water transfer.

After invalidating the QSA as unconstitutional, the trial court refused to review the CEQA approvals, concluding that no action was needed. [AA:47:292:15752.] Cuatro appreciates the Amici's concerns that this failure to rule on the CEQA "approvals" creates uncertainty in the future, and the Amici's goal of ensuring that the Water Entities cannot rely on stale CEQA documents. To allay those concerns, however, this court need not delve into the tomes filed by the respective parties because it has inherent power to simply strike the CEQA approvals based upon IID's ultra vires signing of the QSA Agreements. As discussed below, the Administrative Record and findings of the trial court during Phase 1A (the primary validation action in ECU01649) provide more than a sufficient basis for this

² Cuatro refers collectively to the Imperial Irrigation District ("IID"), San Diego County Water Authority ("SDCWA"), Metropolitan Water District ("MWD"), and Coachella Valley Water District ("CVWD") as "Water Entities." The state of California shall be referred as to the "State".

court to strike the CEQA documents without needing to examine the technical and legal challenges to the voluminous environmental reports.³

Like the QSA Agreements, the CEQA approvals were premised on the understanding that the State's funding obligation, as set forth in the QSA Joint Powers Authority Creation and Funding Agreement ("JPA") ("State Obligation"), would mitigate and restore the Salton Sea. Even assuming the State intended to make good on these commitments (which is doubtful), the trial court found those contractual obligations to be unconstitutional. The State Funding Obligation was fundamental to implementing the mitigation measures in the CEQA approvals and to assessing the long-term environmental impacts on the surrounding communities. Without the State Funding Obligation, the CEQA approvals no longer have any validity and should be stricken as such.

³ Environmental Impact Report/Environmental Impact Statement ("EIR/EIS"), Program EIR ("PEIR"), approved in June 2002 [AR3:3:32097-32098; AR3:3:32099-32100]; Second Addendum to the EIR/EIS, PEIR, approved in September 2003 [AR4-07-515-30541/30444, 4-07-516-30614/30619]; Environmental Impact Report/Environmental Impact Statement ("EIR/EIS") for the IID/SDCWA Transfer, approved in June 2002 [AR3:18:526977]; Addendum to Environmental Impact Report/Environmental Impact Statement ("EIR/EIS") for the IID/SDCWA Transfer, approved in September 2003 [AR3:13:300415-300417; AR3:3:32108-32110.]

II.
**THIS COURT HAS INHERENT POWER TO STRIKE THE
CEQA APPROVALS WITHOUT A LENGTHY REVIEW ON
THE MERITS**

As background, Cuatro owns a citrus and palm tree ranch directly on the south shore of the Salton Sea. Its property will be one of the first investments impacted as the shoreline continues to recede and contaminated dust blows onto its crops. At trial, Cuatro focused solely, and prevailed on, the issue of whether the State's "unlimited obligation" to fund mitigation and restoration of the Salton Sea was an unconstitutional commitment of public funds in violation of the state constitution. Though Cuatro would have preferred that the State's Funding Obligation be enforceable so that restoration would now be long underway, it feared from the outset (as the trial court ultimately found) that the State's funding commitment was a hollow promise intended to dupe IID into signing away significant amounts of its most precious resource.

The environmental community's concerns over Salton Sea degradation have been documented for decades, and those concerns have now been realized beyond question given the adverse impacts on the Salton Sea already occurring as a result of the QSA. The Sea is all but teetering on extinction and, if proper restoration is not commenced soon, it will be irreversibly damaged.

After years of dismissing these concerns as unfounded, the Water Entities have finally acknowledged the importance of the State

Obligation and the State's current failure to fund its contractual commitments. Just last week, the SDCWA's Board of Directors adopted a resolution condemning the State for its failure to properly fund Salton Sea restoration and thereby placing the QSA in jeopardy:

The Legislature is responsible for adopting and funding this [restoration plan], or some version of it, but has not yet done so. Because of the state's obligation to control airborne dust from a declining sea and other mitigation requirements, even the "no-project" alternative has a significant cost, estimated to be about \$1 billion.

(See Cuatro's Motion Requesting Judicial Notice, filed concurrently herewith, Exh. 1 at p. 60 of 324.)

Hypothesizing a host of unknown contingencies, the Water Entities have downplayed the importance of the State Obligation as a fundamental prerequisite to the QSA by disingenuously arguing that this Obligation may never be triggered. (IID's Opening Brief ("OB") at pp. 38-39; SDCWA/MWD/CVWD OB at p. 53.) Apparently faced with an ever growing environmental disaster, the Water Entities are now admitting the importance of the State's role.⁴

⁴ Cuatro has steadfastly resisted referencing any post-October 2003 evidence during its briefing given the standard that was evoked by the trial court regarding extra-record evidence. The Water Entities, on the other hand, have made a mockery of those rules by introducing post-appellate extra record testimony with impunity.

Cuatro, however, submits the SDCWA's most recent "Board Packet," provided at the March 24, 2011 Board Meeting, as it contains information that is highly relevant to the issues raised on appeal and

Clearly, the State's Obligation is not some "contingent" event that may or may not be triggered. The real life consequences to the Salton Sea resulting from the State's failure to fund even the least expensive restoration alternative are now apparent to the very parties who have claimed in the past that Cuatro and the environmental communities concerns were far-fetched.

Had IID's Board of Directors ("Board") understood that the State never intended to nor could it legally fund the environmental mitigation and restoration obligations, it would not have voted for the QSA. The circumstances surrounding the October 3, 2003 CEQA "approvals" and the subsequent material changes in the QSA-JPA render the CEQA documents *per se* defective. The underlying assumption in the CEQA approvals – like the QSA Agreements – was that the State would mitigate and restore the Sea.

blatant contradictions as to the Appellants' ongoing representations to this Court. The materials included in the Board Packet provide, as follows:

Because of its complexity and impacts, restoration of the Salton Sea is controversial and will be difficult to implement. As noted in a 2008 report by the state's Legislative Analyst's Office ("Restoring the Salton Sea"), the state of California "has legal and contractual obligations to restore the Sea."

(See Cuatro's Motion Requesting Judicial Notice, filed concurrently herewith, Exh. "1" at p. 60 of 324, SDCWA Board Packet, Mar. 24, 2011.)

The QSA passed by the IID Board on a 3:2 vote. Two of the board members who voted “yes” have submitted declarations to this Court of Appeal confirming precisely what the trial court inferred. According to Former IID Director Kuhn:

I would not have voted to approve the QSA if the restoration of the Salton Sea as envisioned in this language was not assured. Nor would I have voted to approve the QSA were it not for the State's commitment to fund restoration amounts in excess of the \$30 million amount provided by IID, CVWD, and SDCWA.

(See Declaration of Former IID Director Bruce Kuhn submitted in Support of POWER’s Opp’n to Writ of Supersedeas, filed Mar. 25, 2010 at p. 3, para. 5.)

Former IID Director Maldonado has testified similarly:

I never understood, and none of the Dream Team, ever told me, that some other agreement had been reached that the State would be responsible for something less than full mitigation of the Sea. Had any “Dream Team” member ever advised that the QSA did not mandate the State to "restore, improve the condition of, or to minimize or mitigate the projected decline of biological, recreational or environmental resources of the Salton Sea" I would have voted against the QSA.

(Declaration of Rodolfo J. Maldonado in Support of Barioni/Krutzsch Parties’ Opp’n to Writ of Supersedeas, filed Mar. 29, 2010 at p. 2, para. 10, emphasis in original.)

Implicit in the trial court's findings that post-October 3, 2003 changes were material is the conclusion that the IID Board understood the deal to be something different than what was executed. Cuatro

has argued on appeal that the record and these findings support an alternative grounds for reversal: namely that the contracts were ultra vires. Given the above declarations, its clear that the IID Board thought it was committing to agreements wherein environmental mitigation would be funded. The CEQA approvals were similarly premised on those understandings which have been proven false. Ordinarily, CEQA documents are judicially reviewed long before the ultimate judgment. The unusual posture here justifies the court taking a practical view of what has transpired and, with the benefit of hindsight, striking them in their entirety.

III. CONCLUSION

Cuatro does not take issue with the substantive positions of CEQA Amici as to the underlying defects in the environmental review process and the environmental harm that will ensue if the water transfers continue. Cuatro, however, respectfully urges this court to avoid a full analysis on the merits of the CEQA actions, particularly since contesting extremely stale environmental documents serves no purpose.

With each passing day, the health of the Salton Sea continues to diminish as a result of the transfer of hundreds of thousands of acre feet of water away from the Imperial Valley. Time is not a luxury that this region can afford. So long as these judicial proceedings drag on, the Water Entities will not take the necessary steps to readjust their expectations regarding their respective Colorado River water

allocations. Delay rewards the Water Entities' cynical hope that the maturity of the QSA and the demise of the Sea will deter any court from "un-ringing" the bell. Already, this strategy has been effective for eight years.

If the QSA Agreements are invalidated – as Cuatro submits they are – then this court should require the Water Entities to start anew and address the realities of the State and federal budget today, as well as the environmental conditions on the ground. No longer is runoff from Imperial farmlands considered an unreasonable use of water; instead, it is the lifeblood of the Salton Sea. And no longer can the government underwrite an unnecessary water transfer to San Diego, whose water needs could be addressed in far more economic and environmentally sensitive ways. This court need not, and should not waste, the resources necessary to evaluate CEQA documents that no longer have any grounding in reality.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE WITH RULE 8.204

I, the undersigned, Lisa Willhelm Cooney, declare that:

1. I am a partner in the firm of Lewis, Brisbois Bisgaard & Smith LLP, counsel of record for Attorneys for Defendant and Respondent Cuatro Del Mar.

2. This certificate of compliance is submitted in accordance with rule 8.204 of the California Rules of Court.

3. This brief was produced with a computer. It is proportionately spaced in 14-point Times New Roman typeface. The brief contains 3,458 words, including footnotes (excluding the caption page, table of contents, table of authorities, certification of word count, and proof of service.)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Diego, California on April 1, 2011.

Lisa W. Cooney

PROOF OF SERVICE

Imperial Irrigation District, et al. v. Cuatro Del Mar, et al.

I, Jonna Wilkinson, state:

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 701 B Street, Suite 1900, San Diego, California 92101.

On April 1, 2011, I served the following document described as **CUATRO DEL MAR'S COMBINED ANSWER TO AMICUS CURIAE BRIEFS OF THE PLANNING AND CONSERVATION LEAGUE, DEFENDERS OF WILDLIFE, AUDUBON CALIFORNIA, AND PACIFIC INSTITUTE** on all interested parties in this action by placing a true copy enclosed in sealed envelopes addressed as stated on the attached service list. I deposited such envelope in the mail at San Diego, California. The envelope was mailed with postage thereon fully prepaid.

I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, this document will be deposited with the U.S. Postal Service on this date with postage thereon fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

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

Executed on April 1, 2011, at San Diego, California.

Jonna Wilkinson

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