SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

DATE/TIME	**: January 13, 2010**	**DEPT. NO**	**: 43**
JUDGE	**: ROLAND L. CANDEE**	**CLERK**	**: L.M. SWEEZER**
REPORTER	**: NONE**	**BAILIFF**	**: P. MCGEE, C.A.**
		PRESENT:	

Coordination Proceeding
Special Title (Rule 1550(b))
Plaintiff,

VS. **Case No.: JC4353**

QSA CASES,

Defendant.

Nature of Proceedings: **Statement of Decision Following Phase 1A Trial**

The Court scheduled Phase 1A for trial in regard to the QSA Judicial Council Coordination Proceeding No. JC4353 and conducted the trial on that Phase on certain dates between November 9 and December 2, 2009. Multiple parties filed Opening Trial Briefs and Response Trial Briefs for the Phase 1A trial, as shown in the Court's files. Various parties, as noted in the record, appeared and argued the issues before the Court in Phase 1A. The Court issued a tentative ruling following the Phase 1A trial, and invited the parties to provide written comments on the tentative ruling by December 17, 2009. The Court also invited the parties to present oral arguments at a hearing held on December 17, 2009 for that purpose. The State and SDCWA, joined by MWD, requested that the Court issue a Statement of Decision that addresses certain issues identified in their request. The Morgan/Holtz Parties, joined by the Barioni/Krutzsch Parties, also submitted proposed content for the Statement of Decision. The Court does not agree that all of the requested issues and proposed content need to be addressed in this decision. This decision includes those issues that the Court considered appropriate.

The Court, as a Coordination Trial Judge, does not view itself as strictly bound by all of the requirements and limitations included in California Rule of Court, Rule 3.1590. For instance, the Court is not desirous of calling this document a "proposed" statement of decision when the Court has already issued a "tentative" final ruling. One of the reasons for a proposed statement of decision would be to allow the parties to review and comment. That has already taken place with the issuance of a tentative final ruling and the Court's provision for written and oral comment on the tentative final ruling. When the reason for a rule

ceases, so should the rule itself. Civil Code Section 3510. The Court, accordingly, views this document as this Court's final statement of decision on the QSA coordinated proceedings. Additionally, complying with a strict reading of the time limits imposed would preclude this Court from having time to consider the Status Conference Statements that have been recently filed and considering any final oral comment input that might come from the set January 19 Status Conference in regard to how best to phrase the actual judgments that need to be entered in this matter. The Court set the date for Status Conference Statements and for a Status Conference before there were any formal requests for a statement of decision on file.

The Court had previously issued guidance (Court Guidance Regarding the Scope of the Validation Proceedings Heard on July 24, 2008 ("Guidance")) in regard to the scope of these validation proceedings, to provide needed direction in the absence of any pending motions or other discrete matters directly in issue at that time. The matter now being in front of the Court for trial, the Court addresses the validation law as part of this statement of decision following the Phase 1A trial, and oral and written comments of the parties regarding the Phase 1A trial tentative ruling.

Statement of Decision Issue One: What is appropriately included in this validation proceeding?

IID's Second Amended Complaint relies on Code of Civil Procedure section 860 et seq. (the "validation statutes"); Water Code sections 22670, 22762, 23225; Government Code section 53511; and 43 U.S.C. § 390uu as the statutory bases for IID bringing a validation proceeding to court.

The validation statutes. The validation statutes begin with the statement:

> "A public agency may upon the existence of any **matter** which under any other law is authorized to be determined pursuant to this chapter, … bring an action … to determine the validity of such matter." (Code Civ. Proc. § 860 (emphasis added).)

The validation statutes do not include a definition of "matter". The validation statutes prescribe the date of existence of "bonds, warrants, contracts, obligations, and evidences of indebtedness". (Code Civ. Proc. § 864.) Accordingly, the "matter" for which validation is sought consists of the thirteen contracts identified in IID's Second Amended Complaint filed on September 24, 2007.

Government Code section 53511. Government Code section 53511 provides:

"(a) A local agency may bring an action to determine the validity of its bonds, warrants, contracts, obligations or evidences of indebtedness pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure.

(b) A local agency that issues bonds, notes, or other obligations the proceeds of which are to be used to purchase, or to make loans evidenced or secured by, the bonds, warrants, contracts, obligations, or evidences of indebtedness of other local agencies, may bring a single action in the superior court of the county in which that local agency is located to determine the validity of the bonds, warrants, contracts, obligations, or evidences of indebtedness of the other local agencies, pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure."

Water Code provisions. Water Code sections 22670, 22762, and 23225 are part of the Irrigation District Law.

Water Code section 22670 provides:

"An action to determine the validity of any contract entered into for a period of more than three years or the levy of any assessment or of bonds, including whether or not the bonds when delivered to the person entitled to them under the terms of a contract will or do constitute valid obligations of the district as against all persons, may be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure."

Water Code section 22762 specifically addresses the QSA. It provides in its entirety:

"An action to determine the validity of the Quantification Settlement Agreement defined in subdivision (a) of Section 1 of Chapter 617 of the Statutes of 2002, or any action regarding a contract entered into that implements, or is referenced in, that Quantification Settlement Agreement, may be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure."

Water Code section 23225 is located within the chapter concerning cooperation with the United States, and the article titled "Approval of Federal Contracts". It provides:

> "An action to determine the validity of any contract and bonds may be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure."

Based on a literal reading of the statutes, this validation proceeding must determine the validity of the subject contracts. This is largely consistent with IID's Second Amended Complaint, which, among other things, requests:

- "That the Court examine and inquire into the adoption and the validity of the Contracts". (Second Amended Complaint, Prayer ¶ 4.)
- "That the Court find that all conditions, things and acts required by law to exist, happen or be performed precedent to and including the execution of the Contracts have existed, happened, and been performed in the time, form and manner required by law". (Second Amended Complaint, Prayer ¶ 5.)
- "That the Court hold that the Contracts, and each and every portion of such Contracts, are valid, legal and binding and are and will be in conformity with all applicable provisions of law and that any and all legal or factual objections and challenges to the validity of the Contracts are expressly denied". (Second Amended Complaint, Prayer ¶ 6.)

A validation proceeding may also address an agency action relevant to a contract, usually for the purpose of assessing validity of the contract (or other matter).

Case law is not uniform in identifying whether it is a public agency's decision or action, the subject of the decision or action (e.g., a contract), or perhaps both, that are the proper subject or subjects of a direct or reverse validation action.

The purpose of a validation proceeding has been described as follows:

> "A validation action implements important policy considerations. '[A] central theme in the validating procedures is speedy determination of the validity of the public agency's action.' (Millbrae School Dist. v. Superior Court (1989) 209 Cal.App.3d 1494, 1497 [261 Cal.Rptr. 409].) 'The text of section 870 and cases which have interpreted the validation statutes have placed great importance on the need for a single dispositive final judgment.' (Committee for Responsible Planning v. City of Indian Wells (1990) 225 Cal.App.3d 191, 197-198 [275 Cal.Rptr. 57].) The validating statutes should be construed so as to uphold their purpose, i.e.,

'the acting agency's need to settle promptly all questions about the validity of its action.' (Millbrae School Dist v. Superior Court, *supra*, 209 Cal.App.3d at p. 1499.)

'[I]n its most common and practical application, the validating proceeding is used to secure a judicial determination that proceedings by a local government entity, such as the issuance of municipal bonds and the resolution or ordinance authorizing the bonds, are valid, legal, and binding. Assurance as to the legality of the proceedings surrounding the issuance of municipal bonds is essential before underwriters will purchase bonds for resale to the public.' (Sen. Rules Com., Rep. on Sen. Bill No. 479 (1985-1986 Reg. Sess.).)" (Friedland vs. City of Long Beach (1998) 62 Cal.App.4th 835, 842.)

Certainly these coordinated validation proceedings have not met the theme of being a speedy determination. While a more expeditious process would have been preferable for all concerned, there are reasons for the timing. The unique and complex issues presented (more than 147 written rulings on contested matters), the number of parties and cases, the sheer volume of materials to be considered (in addition to the pleadings, six administrative records that, in electronic form, fill more than 350 CDs), the more than two years of having the proceedings stayed while certain rulings were on appeal, and other complicating factors, have all contributed to the time necessary to reach trial.

A validation action is a proceeding *in rem*. Pursuant to the primary validation statutes themselves, the matter, not simply the agency's action thereon, is in issue.[1] As noted above, this is consistent with IID's complaint in validation. As the Friedland court observed ("[I]n its most common and practical application …."), the action of the agency may be the only thing in issue, i.e., only it must be examined to determine the validity of the matter. The Court does not rule out the possibility that this may vary depending on what is sought to be validated and the circumstances. The Court is mindful that, in marked contrast to a local agency's issuance of bonds as described in the Friedland case, the QSA contracts, and hence these coordinated cases, are very complex and involve multiple public agencies. This differs significantly from the origins of the validation statutes, and much of the case law interpreting them.

A number of cases indicate that the determination of the validity of the contracts here must be done in the context of evaluating the decision-making process by which IID approved those contracts. This approach is consistent with case law discussions of the standard of review in validation proceedings. The standard has been articulated as follows:

"The scope of judicial review of a legislative type activity is limited to an examination of the record before the authorized decision makers to test for sufficiency with legal requirements. … A substantial evidence review is limited to the record before the CRA and the city council; it is an examination of the proceedings before the entities to determine if their actions were arbitrary, capricious, or entirely lacking in evidentiary support. The trial court reviews the decision-making process of the administrative agency and does not conduct its own evidentiary hearing; thus discovery is limited." (Morgan vs. Community Redevelopment Agency (1991) 231 Cal.App.3d 243, 258 (citation omitted); see also Poway Royal Mobilehome Owners Assn vs. City of Poway (2007) 149 Cal.App.4th 1460, 1479 (relied on the foregoing quotation from Morgan in discussing the applicable standard of review in a validation action).)

Case law recognizes validation by three methods: (1) a direct validation action filed under Code of Civil Procedure section 860 by the public agency seeking validation of its actions or the res of its actions, (2) a reverse validation action filed under Code of Civil Procedure section 863 by persons or entities other than the public agency regarding the validity of that public agency's actions or the res of its actions, and (3) the "do nothing" approach, where the matter is deemed validated by the passage of the sixty day limitations period provided in the validation statutes without the timely filing of a direct or reverse validation action. (Friedland, 62 Cal.App.4th 835, 850-851.) Under the "do nothing" method of validation (also called "validation by operation of law"), "the agency's action will become immune from attack whether it is legally valid or not." (Kaatz vs. City of Seaside (2006) 143 Cal.App.4th 13, 30.)

The "do nothing" approach is relevant to these proceedings because some of the parties sought to challenge agreements or approvals that were not one of the explicit subjects of the validation complaint in Case ECU01649. In particular, we are here concerned with matters, including those that are the subject of actions of agencies other than IID, as to which no validation action has been brought and the 60 day limitations period has run. As noted above, this consequence can apply only where an agency's action is eligible for validation under the validation statutes. Not all actions are so eligible. The scope of the authorizing statutes, including Water Code section 22762, must be applied to make such a determination.

For instance, Cuatro del Mar sought to challenge before trial the validity of the Agreement Between the Imperial Irrigation District and the Department of Water Resources for the Transfer of Colorado River Water ("IID-DWR Agreement"). Although IID is a party to the IID-DWR Agreement, which was signed on October 10, 2003, the same date as the QSA, and the IID-DWR Agreement is in the record (AR 3/1/10893), IID did not seek to validate that agreement in these proceedings.

The IID-DWR Agreement may have been a matter challenged in Case ECU01643, Morgan et al. vs. IID, et al. Among other things, that case sought to challenge the validity of the "QSA". The complaint defined the "QSA" as "a series of agreements, legislation, and contracts between and among the IID, SDCWA, MWD, CVWD and California, a portion of which provides that water from plaintiffs' land in the Imperial Valley will be transferred outside of the Imperial Valley. … ." (Case 1643 Complaint, ¶ 18.)

Case 1643 was filed shortly after Case 1649. Case 1643 is no longer pending, having been dismissed by the Imperial County Court in December 2003. According to the Imperial County Court order dismissing Case 1643, the case was dismissed because "(a) reverse validation action is barred by statute and case law when a public entity files its own validation action prior to the filing of the reverse validation action." Of course, Case 1649, IID's direct validation action, seeks validation of the QSA and only some of the QSA related agreements.

It does not appear to the Court that any of the parties appropriately assisted the Imperial County Court prior to the December 2003 order dismissing Case 1643. It appears that IID represented a limited if not somewhat misleading scope of the direct validations action to the Imperial County Court. IID stated in its opposition to the Case 1643 plaintiffs' ex parte application for permission to publish summons in their reverse validation action that it had "already brought a validation action … pertaining to the same subject matter." (IID Opposition to [Case ECU01643] Plaintiffs' Ex Parte Application for Permission to Publish Summons on Complaint Challenging Validity and For Declaratory Relief, p. 1:5-7.) In that same brief, IID stated:

> "Though Plaintiffs' Complaint is very vague, IID's validation lawsuit clearly pertains to the same matters challenged in the attempted action herein [fn omitted] – that is, the validity of the Quantification Settlement Agreement and related contracts to which IID is a party.").) (Ibid, pp. 1: 25-2:3.)

The Case 1649 complaint does not explicitly seek validation of the IID-DWR Agreement or any legislation related to the QSA. In contrast, Case 1643 sought to challenge the validity of the "QSA", which the Case 1643 complaint defined as "a series of agreements, legislation, and contracts between and among the IID, SDCWA, MWD, CVWD and California, a portion of which provides that water from plaintiffs' lands in the Imperial Valley will be transferred outside of the Imperial Valley. … ." (Case 1643 Complaint, p. 4:15-18.) The Case 1643 plaintiffs' response in support of their *ex parte* application did not highlight this distinction to the Imperial County Court.

The Imperial County Court denied the Case 1643 plaintiffs' *ex parte* application for an order for publication of summons without prejudice, pending supplemental briefing on IID's jurisdictional challenge (prior direct action (Case 1649) pending) to the action. In its supplemental briefing, IID noted that the Case 1643 complaint did not identify the particular agreements which the Case 1643 plaintiffs sought to challenge. IID argued, inter alia, that "By failing to identify which of these various contracts they are seeking to validate plaintiffs require the world to guess as to which contracts they are seeking to validate." (IID Supplemental Brief, p. 6:9-11.) The Case 1643 plaintiffs' supplemental brief failed to rebut or otherwise address this contention.

The failure of the Case 1643 parties to fairly focus the Imperial County Court on the difference in potential scope between the then pending reverse validation case (including all of the QSA related agreements) and the more limited scope of the direct validation action in Case 1649 is unfortunate. Nevertheless, the Imperial County Court order has long since been final.

Counsel have not identified any other case in which the IID-DWR Agreement is the subject of a direct or reverse validation proceeding. As far as the Court is aware, the IID-DWR Agreement is not the subject of a pending direct or reverse validation action, and the time to bring such an action has long passed.

Re-Opening. Does IID's direct validation proceeding put the validity of other related matters back into issue, even if they were otherwise duly deemed to be valid by operation of law (the "do nothing" approach), or became final by virtue of the running of other statutes of limitation? This "re-opening" effect was advocated, before trial, by Cuatro del Mar, Imperial County and the Imperial Air District. For example, Imperial County and the Imperial Air District sought to challenge a variety of actions, including the SWRCB approval of the water transfer. Some of these matters and actions may not be the proper subject of a validation action. Furthermore, revisiting prior determinations would not be consistent with the goal of speedy resolution, or with fundamental tenets of judicial efficiency. Case law does recognize that certain acts associated with the matters to be validated may come within the scope of the validation proceeding, regardless whether such acts occur more than sixty days before the filing of the validation action complaint. (Meaney v. Sacramento Housing and Redevelopment Agency (1993), 13 Cal.App.4th 566, 583.)

Meaney involved a reverse validation challenge to the validity of an October 1990 agreement between the County of Sacramento and the Sacramento Housing and Redevelopment Agency ("Agency") for the construction of a new courthouse (the Courthouse Agreement). The action was filed within sixty days of the adoption of the Courthouse Agreement, but more than sixty days after two July 17, 1990 resolutions of the Agency and the City of Sacramento City Council ("City Council") that made determinations under Health and Safety Code section 33445 relating to the benefit to the project area and the absence of other reasonable means of financing. In concluding that the trial court could consider the validity of the two July 17, 1990 resolutions, the appellate court stated:

> "No doubt, a validating proceeding may not be used as a springboard to delve into the history of a public agency, but we have no hesitation concluding that, where the proceeding pertaining directly to a challenged action extends beyond the 60-day period of limitations, the court may review the entire record of proceeding in adjudicating the validity of the action." (13 Cal.App.4th at 583.)

In Meaney, the validation action specifically named, among others, the Agency and the City Council, the two entities whose July 17, 1990 resolutions were at issue in that portion of the decision. The July 1990 resolutions were findings by those agencies which apparently supported or were prerequisites for the Courthouse Agreement. The resolutions themselves may not have been proper "matters" for validation, in which case they would not have been subject to the validation statutes' 60 day limitation period. The Meaney decision does not address this issue. The Court finds that the Meaney decision does not provide authority for "re-opening" other agencies' decisions, where those agencies undertook their own decision-making processes and those decisions have become final due to the expiration of limitation periods, litigation, or otherwise. The Court does not view the validation proceedings as "re-opening" decisions which have become final due to the expiration of limitations periods, litigation, or otherwise. This includes the SWRCB action on the water transfers.

The Court nonetheless has the authority to review the entire record or proceeding, as did the Meaney court, and the validity of the matters put in issue in these validation proceedings, to the extent those matters have not already been deemed validated.

Alleged Constitutional Violations and Matters Void Ab Initio. One of the issues identified in the Court's Final Orders Following the May 29, 2008 Status Conference regarding the scope of a validation

proceeding was whether a contract which is *void ab initio*, as contrasted to voidable, remains within the scope of one or more of the pending validation actions. For example, could a challenge that one or more of contracts sought to be validated, or a contract or action predicate[2] thereto, that is shown to be *void ab initio* be within the scope of these validation proceedings? A related question is whether constitutional challenges, which could be a basis upon which a matter would be *void ab initio*, survive. The law is clear that time does not confirm a void act. (Civ. Code § 3539.) A contract that is contrary to an express statute is void, not merely voidable. (Reno vs. American Ice Machine Co. (1925) 72 Cal.App. 409, 413.) "Such a contract has no legal existence for any purpose and neither action nor inaction of a party to it can validate it … ." (Ibid.) That is one of the distinctions between a void and a voidable contract. (Ibid.) Further, a contract that violates the constitutional debt limitation provisions in the California Constitution is generally void. (See, Dean vs. Kuchel (1950) 35 Cal.2d 444, 446-447, involving California Constitution Art. XVI, §1.)

The Court is concerned that at least the "do nothing" approach to validation (and possibly others) may have unintended consequences. It may shield, for example, a contract or other matter that has not been the subject of any constitutionally required due process. For example, the "do nothing" approach does not itself require any public notice. The Court would normally assume that notice would therefore be determined based upon other laws, such as constitutional due process and the laws applicable to a public agency's approval of a contract. Furthermore, such validation may shield a contract that would be abhorrent to public policy. During an oral argument at one point in these proceedings, the Court gave as an example a contract requiring slavery. While extreme, it is illustrative of the problem. Such validation appears to ignore the body of law regarding matters that cannot come into existence and, hence, cannot as a matter of law be validated.

However, the Court is bound to follow applicable precedent. The Friedland court held that:

> "We hold that as to matters which have been or which could have been adjudicated in a validation action, such matters – including constitutional challenges – must be raised within the statutory limitations period in section 860 et seq. or they are waived." (62 Cal.App.4th 835, 846- 847.)

The decision does not specifically discuss voidness. The constitutional issue in Friedland was whether a pledge of transit occupancy taxes and of amounts on deposit in the Tidelands Operating Fund were unconstitutional gifts of public funds in violation of Article XVI, section 6 of the California Constitution. While this is not the same constitutional claim as those raised here, the Court does not see any reason to distinguish based upon this difference.

The Friedland court's discussion of whether constitutional challenges are subject to the validation statutes' limitations period includes the following quote from Miller vs. Board of Medical Quality Assurance (1987) 193 Cal.App.3d 1371, 1377: "[T]he assertion of a constitutional right is subject to a reasonable statute of limitations unless a constitutional provision provides to the contrary." None of section 1, section 6, or

section 7 (which is also in issue in these cases) of Article XVI of the California Constitution contains any provision that bars application of an otherwise applicable statute of limitations.

Friedland is binding precedent. To the extent that the validation statutes apply to the IID-DWR Agreement, and as the 60 day limitations period under the validation statutes has expired and no direct or reverse validation action on that agreement was brought, or if brought, remains pending, the Court finds that that agreement, as with other similarly situated "matters", have been validated by operation of law.

This Court, accordingly, will not review the validity of a matter previously determined to be valid by a separate validation proceeding, or by inaction. However, this does not limit the Court's jurisdiction to review the thirteen contracts that are at issue in these validation proceedings. Validation is necessarily limited to the validity of the matter as approved at the time of the agency action which causes the matter – here the contracts – to come into existence. The determination of validity is limited to what was and could have been determined at that time. Subsequent occurrences or the failure thereof can alter the status of a matter, such as the failure of a condition subsequent in a contract, but such subsequent occurrences would not affect whether a contract under review was valid under a validation proceeding's analysis.

To the extent that the matters before the Court – i.e., the scope of these validation actions – are limited, so will be the Court's determinations of validity. The two must be consonant. The Court, however, will not look to some other contract, not one of the contracts for which validation is being sought, which may have been validated by operation of law as necessarily determinative of the validity of terms of the contracts for which validation is being sought.

Remaining Answers in this Validation Proceeding

As discussed above, IID's Second Amended Complaint is a source that shapes, for the Court, the determination of the scope of these validation proceedings. The scope of these proceedings is also shaped by the issues properly raised in the remaining answers in Case 1649.

Imperial County and the Imperial Air District argue that by timely answering and denying certain allegations in IID's Second Amended Validation Complaint, a defendant properly puts such matters at issue even if such matters are not specifically pled. A defendant is deemed to have admitted a material allegation by failing to deny it. (Code Civ. Proc. § 431.20.) The denial must be sufficient, e.g., must not contain a negative pregnant. (Loop Building Co. vs. De Coo (1929) 97 Cal.App. 354, 363.) The Court concludes from the foregoing that the material allegations in IID's Second Amended Complaint that have been properly denied by a defendant in this proceeding are matters properly within the scope of these proceedings.

Affirmative defenses are usually required to be pled by reference to specific facts, not mere conclusory statements. (FPI Development, Inc. vs. Nakashima (1991) 231 Cal.App.3d 367, 384.)

Affirmative defenses are the vehicle to allege new matters, not merely to deny an allegation in the complaint. (Code Civ. Proc. § 431.30, subs. (b)(1), (b)(2).) Based on the foregoing, affirmative defenses that consist of mere conclusory statements in a remaining answer are not sufficient to raise a new matter within the scope of these validation proceedings.

Plaintiff Imperial Irrigation District's Prima Facie Case

The Court has not been successful in finding any case authority clearly setting out what would amount, in a contract validation action, to the presentation of a sufficient prima facie case by the plaintiff. The one case the Court is aware of which uses the terminology of "prima facie case" in a validation action really isn't on point. That case, City of Sacramento vs. Drew, (1989) 207 Cal.App.3d 1287, was a case where a city brought an action to declare the validity of a special tax assessment district to be formed to raise the unfunded construction costs for three elementary schools. The trial court accepted one defendant's argument that the assessment was not authorized by the legislation the city was relying on yet refused to award attorney fees. The denial of attorney fees was appealed. The appellate court's discussion of "prima facie case" was not a recitation on the appellate court's part of what a prima facie case should. It was a quotation from the trial court's reasoning in denying fees. In this regard, the trial court stated, "presumably the court could not have entered a judgment in favor of the plaintiff even if no one appeared in this proceeding without the plaintiff presenting a prima facie case at some sort of default hearing forum satisfying the court that --- that --- that the City did have the statutory authority under the Street[s] and Highways Code to impose these assessments". (City of Sacramento, 207 Cal.App.3d at 1300.) Reviewing generally what the legal requirements are and what the judicial review standard would be, as set out in Morgan vs. Community Redevelopment Agency, supra, the Court is satisfied that IID as plaintiff in these contract validation proceedings would have to prove, as a minimum, that (1) the plaintiff is a public agency with authority to approve the contracts in question, (2) the contracts are validatable, (3) the public agency's approval complied with open meeting requirements, (4) the approval of the contracts was by the required vote (here, majority), and (5) the public agency acted in a manner that was not "arbitrary, capricious, or entirely lacking in evidentiary support".

Statement of Decision Issue Two: Is IID a public agency?

Addressing item (1) of IID's prima facie case, whether IID is a public agency is not in dispute. As set out in a statute reaffirming that irrigation districts are state agencies (California Water Code section 20570) and as acknowledged in a multitude of litigated cases such as Choudhry vs. Free, (1976) 17 Cal.3d 660, 662-663, IID is a local public agency, governed by a publicly elected Board of Directors. The administrative record supports that IID diverts, pursuant to IID's state rights and federal contract, Colorado River water equating to a consumptive use of about 3.1 million acre feet per year. (AR 3/30/113593/113595.) IID is facially a party to each and every one of the 13 separate agreements which IID seeks to have validated. Those contracts will be herein referred to as Contracts A through M, as they are attached as Exhibits to IID's Second Amended Validation Complaint, with titles and parties as set out in detail at IID's Phase 1A Opening Trial Brief, pages 22-24.

Statement of Decision Issue Three: Are the 13 contracts validatable matters?

Addressing item (2) of IID's prima facie case, Water Code section 22762 (set out above) was specifically enacted by the California legislature to allow parties to the Quantification Settlement Agreement (QSA) to seek court validation of any contract entered into that implements, or is referenced in, the QSA.

IID Second Amended Validation Complaint, at paragraph 23, asserts that all thirteen contracts "are interrelated and interdependent" and that they "are all part of the overall quantification, settlement and transfers agreed to by the many parties to the QSA and related agreements[3]".

The Court has reviewed all thirteen contracts.

- Contract A is the Colorado River Water Delivery Agreement: Federal Quantification Settlement Agreement" between the United States (by and through the Secretary of the Interior), IID, MWD, CVWD, and SDCWA, clearly an integral part of the QSA and listed as a QSA related agreement in Contract E.
- Contract B is the Allocation Agreement between the United States, MWD, CVWD, IID, SDCWA, the San Luis Rey Bands, the City of Escondido and others, facially references the QSA in multiple locations including having water delivered during the term of the QSA (paragraph 7.4), and is listed as a QSA related agreement in Contract E.
- Contract C is the Conservation Agreement among the Bureau of Reclamation, IID, CVWD, and SDCWA, mentions the QSA in various recitals, and is listed as a QSA related agreement in Contract E.
- Contract D is the IID-SDCWA Transfer Agreement's Revised Fourth Amendment between IID and SDCWA. That Fourth Amendment is facially tied to the QSA, including the QSA JPA Creation and Funding Agreement, and is listed as a QSA related agreement in Contract E.
- Contract E is the QSA between IID, MWD, and CVWD, facially calls itself the QSA (and is sometimes refered to herein as the "QSA"), contains an Exhibit A setting out QSA related agreements, and contains an Exhibit B listing related agreements that are executed but contingent on permits, approvals or consents, or to be signed after the QSA execution.
- Contract F is the MWD Acquisition Agreement between IID and MWD, facially recites that it is executed pursuant to the QSA, mentions the QSA JPA Agreement in multiple locations, and is listed as a QSA related agreement in Contract E.
- Contract G is the CVWD Acquisition Agreement between IID and CVWD, facially recites that it is executed pursuant to the QSA, mentions the QSA JPA Agreement in multiple locations, and is listed as a QSA related agreement in Contract E.
- Contract H is a Groundwater Storage Agreement between IID and CVWD, expressly subject to the CVWD Acquisition Agreement (Contract G) becoming valid (see Article X), and terminates concurrently with the QSA.
- Contract I is the QSA Joint Powers Authority Creation and Funding Agreement between the State of California (by and through the Department of Fish and Game), SDCWA, IID and CVWD, is listed in Contract E as a QSA related agreement, and facially recites that it is the QSA JPA Agreement referenced in the QSA and in the Environmental Cost Sharing Document, Contract J. The QSA JPA Agreement is not listed among the contracts in Contract E, Exhibit B that are contingent on further approvals or consent. It is included on the Contract E, Exhibit A list of related agreements.
- Contract J is the Environmental Cost Sharing Agreement between SDCWA, IID and CVWD, and is listed as a QSA related agreement in Contract E.
- Contract K is the Amendment to the 1988 IID/MWD Agreement, makes reference to the QSA in multiple locations, and specifically claims to be in furtherance of the QSA and related agreements.
- Contract L is an Approval Agreement Amendment between IID, MWD, Palo Verde Irrigation District, and CVWD that facially recites that the parties desire to amend the Approval Agreement as contemplated by the QSA and related agreements.
- Contract M is the Agreement to Resolve Salton Sea Flooding Damage Issues between IID and CVWD in which the Court could find no reference to the QSA. IID contended in its

Second Amended Complaint that Contract M is included in this proceeding because it is one of the agreements that make up the "QSA and related agreements". While the parties to Contract M are certainly parties to the QSA and the agreement was signed on the same day as the other QSA contracts, Contract M is not listed anywhere in Contract E. Contract M is not, in the Court's review, addressed in Contract E or Exhibits A and B thereto. Contract E, Appendix 5.1 is a list of matters that IID identified as actions, suits, legal or administrative proceedings or governmental investigations that were then pending or threatened (to the extent known by IID) against or affecting IID relating to the performance of Contract E. The claims that are the subject of Contract M are not included in Contract E, Appendix 5.1. Contract M does not appear to fit within the cited authority of Water Code section 22762 such as to allow for this Court to entertain an action to validate Contract M, even though it is mentioned in passing in Contract G (clause 9.1(3)).

After the Court issued the Phase 1A trial tentative ruling, IID changed its position. IID now contends that Contract M is not a QSA related agreement, but is nevertheless validatable on statutory grounds other than Water Code section 22762.

IID relies in part on Water Code section 22670 as a statutory basis for judicial validation of Contract M. The pertinent portion of Water Code section 22670 refers to a "contract entered into for a period of more than three years". Contract M has no explicit expiration date or termination provision. According to IID, the agreement contains continuing obligations and performance requirements that extend beyond three years.

Does Contract M come within Water Code section 22670? The Court is aware of one reported decision that discusses whether Water Code section 22670 should be read literally as applying to "any contract" that comes within the language thereof. It is ambiguous on this issue. In one portion of Kaatz v. City of Seaside (2006) 143 Cal.App.4th 13, 42, the court concluded that the term "contract" for purposes of Water Code section 22670 should be read literally. This statement was made in the context of distinguishing Government Code section 53511 (discussed below) from Water Code section 22670 and other statutes which authorize validation of "any contract". In another portion of the decision, Kaatz refers to Water Code section 22670 as one of the statutes which concerns "actions to test the validity of bonds or related matters". This latter language suggests that a narrower reading of the term "contract" may be warranted for purposes of Water Code section 22670.

The Court need not resolve this issue. Even if the Court were to conclude that Contract M is subject to Water Code section 22670, it does not appear to be validatable in this proceeding. IID acknowledges that its Board of Directors approved Contract M at its December 10, 2002 board meeting. (AR 3/3/31281/31286.) The record reflects that the motion on December 10, 2002 for the IID Board of Directors to approve and authorize execution of Contract M carried. The minutes of that board meeting do not include a roll call for that vote. (AR 3/3/31281/31286.) Although it appears that Contract M was executed on October 10, 2003, this is not necessarily the relevant date for determining when a validation action concerning Contract M should have been filed.

Under Code of Civil Procedure section 860, a timely validation action seeking to validate Contract M should have been brought within sixty days of the existence of Contract M. Under Code of Civil Procedure section 864, a contract is deemed to be in existence upon its authorization. A contract is deemed to be authorized "as of the date of adoption by the governing body of the public agency of a resolution or ordinance approving the contract and

authorizing its execution." (Ibid.) The Court has not found, and IID has not cited to, any evidence in the record that indicates that the IID board re-authorized Contract M at or around the time it approved the QSA and other related agreements on October 2, 2003. IID's validation action was not filed until November 5, 2003, which was significantly more than sixty days after the December 10, 2002 IID board meeting which approved Contract M.

IID also relies on Government Code section 53511 as a statutory basis for judicial validation of Contract M. As noted above, Government Code section 53511 authorizes validation of a local agency's "bonds, warrants, contracts, obligations, or other evidences of indebtedness".

Not all contracts that include a public entity financial obligation constitute a "contract" for purposes of Government Code section 53511. (Kaatz v. City of Seaside (2006) 143 Cal.App.4th 13, 42.) IID contends that because Contract M contains financial obligations such as apportionment of third party damages, settlement of past payments made to third parties in settlement of claims or litigation for damages allegedly caused by the Salton Sea, and apportionment of responsibility for future flood damage claims settlements and judgments, it comes within Government Code section 53511. However, the Kaatz court rejected the argument that "contracts" for purposes of Government Code section 53511 includes any contract constituting a financial obligation of a public agency. Instead, the Kaatz court concluded that "contracts" under Government Code section 53511 "are only those that are in the nature of, or directly relate to a public agency's bonds, warrants or other evidences of indebtedness." (143 Cal.App.4th at 42.) In Kaatz, the court concluded that an agreement calling for a public agency's purchase and immediate resale of real property to a private party where the source of funds for the agency's acquisition of the property is the third party purchaser bore no relationship to the issuance of bonds. No bonds were issued or contemplated in connection with these transactions. The agreement also did not relate to warrants. The Kaatz court concluded that the agreement did not constitute or relate to an evidence of indebtedness for purposes of Government Code section 53511.

Contract M has provisions concerning costs reimbursement and future cost sharing. It does not mention issuance of bonds or warrants. Contract M does not appear to be in the nature of a financing agreement. It therefore does not appear to be the kind of contract that is subject to Government Code section 53511. However, even if the Court were to conclude to the contrary, for the reasons discussed above concerning the timeliness of the validation action as it pertains to Contract M, Contract M does not appear to be validatable in this proceeding.

Accordingly, the Court hereby finds Contract M to not be properly subject to validation and declines plaintiff's request to declare Contract M valid.

The remaining twelve contracts (Contracts A through L) appear to be properly considered for validation by the Court under the authority of California Water Code section 22762. The Court notes that various parties who advocate the Court's validation of the contracts ("Category 1 parties" [4]) claim that this Court lacks jurisdiction to invalidate contracts that involve sovereign Indian tribes or the United States. If it were true that the Court lacked any jurisdiction to invalidate the contracts, then the Court would view itself as lacking any jurisdiction to validate those same contracts. The Court views these as *in rem* matters which the Court can reach despite the filing of a claim of sovereign immunity by some Indian tribes and the late attempted special appearance in this matter by the United States. The Court rejects any implication that a party to an otherwise validatable contract can file an action and obligate a Court to validate that contract simply because some other party to the contract appears to have sovereign immunity.

Statement of Decision Issue Four: Did IID's approval of the 12 remaining contracts comply with open meeting requirements?

Addressing item (3) of IID's prima facie case, there are claims by various parties that IID failed to comply with open meeting requirements (sometimes refered to as the "Brown Act"). While the Court does not in this decision reach the open meeting issue, the facts associated with the IID Board approval process are relevant. On October 2, 2003, the IID Board of Directors purported to approve the QSA agreements to which IID would be signatory, including Contract I (the QSA JPA Creation and Funding Agreement ("QSA JPA" or "QSA JPA Agreement")) and Contract J (the Environmental Cost Sharing, Funding, and Habitat Conservation Development Agreement ("ECSA")). The former requires signature on behalf of the State, and the latter does not.

At that time, the QSA JPA Agreement was still being negotiated and material substantive terms remained to be resolved (such as the second and the third sentences in clause 9.2, the last sentence of clause 10.1, and the obligations of the parties as set out in clause 14.2), as evidenced by the outline of some general concepts for this contract presented to the IID Board, the absence of any complete or incomplete drafts of Contract I in the administrative record (including the record of the October 2, 2003, IID Board meeting) and the October 6, 2003 e-mail from the Director of the State Department of Fish and Game to certain party representatives including IID (Exhibit 1 at trial, hereafter the "DFG Director E-Mail"). Contract I was ultimately completed and signed. There is no evidence in the record that either the IID Board or the public ever had any opportunity to see or comment on all of the substantive and material provisions of that contract. The Court notes that the subsequent legislative amendment of the Brown Act's open meeting law may help avoid such a factual scenario in the future.

Statement of Decision Issue Five: Did IID approve the contracts by the required vote?

Addressing item (4) of IID's prima facie case, the need for a majority vote approving the contracts, the Court notes that the administrative record shows a majority vote of the IID Board of Directors on October 2, 2003. (AR 3/3/30101/30105.)

Statement of Decision Issue Six: What are the relevant facts on the issue of whether IID's action was not arbitrary, capricious, or entirely lacking in evidentiary support?

Addressing item (5) of IID's prima facie case, whether there is substantial evidence in the record to show that the agency action was not arbitrary, capricious, or entirely lacking in evidentiary support, a review of what the record shows the facts to be is necessary. The Court finds the following facts supported by substantial evidence in the record.

IID. IID is located between the Colorado River/Arizona border on the east, Mexico on the south, Riverside County and the Salton Sea on the north, and San Diego County on the west. (AR 3/30/113593/113595.) IID is the source of fresh water for the Imperial Valley, and IID's sole source of fresh water is the Colorado River. (AR 3/30/113593/113595.) A $1+ billion agricultural-based economy dominates the Imperial Valley and is dependent on IID's Colorado River water rights and IID's delivery and drainage infrastructure. (AR 3/30/113593/113595.) Pursuant to its state rights and federal contract, IID diverts Colorado River water equating to a consumptive use of about 3.1 mafa.[5] (AR 3/30/113593/113595.)

IID requests water to be released from Lake Mead by submitting an order to the United States Bureau of Reclamation (the "BOR") pursuant to a federal contract, and then diverts the water at the Imperial Dam into the All American Canal ("AAC"). (AR 3/5/53219.) IID's distribution system is principally a gravity-flow system that includes the 82-mile AAC, almost 1,700 miles of other delivery canals going to about 6,300 headgates, numerous reservoirs, and over 1,400 miles of drainage ditches. (AR 3/30/113593/113596 to 113597.) An illustration showing the IID order and delivery process, timing, sequence and water flow path found at AR 3/15/502225/502276 is shown on the next page as Plate 1. Plate 1 is followed by Plate 2, which shows a diagram found at AR 3/10/101804/101804_0109 that illustrates in more detail how water flows from the Colorado River through IID's irrigation system, to and through farms and into the drainage system with a terminus at the Salton Sea. **[images not available]**

The Historical Water Supply Problems of California and Other QSA Parties. On August 18, 1931, a number of existing California Colorado River water users, including IID, and future users, including MWD, entered into the "Seven-Party Agreement" to resolve certain disputes over the use of California's share of Colorado River water. (AR 3/5/53275.) By this agreement, IID and the other applicable California agencies, as well as the State, agreed on how California's entitlement to Colorado River would be divided, and what priorities each party would receive. The signatories requested that California's Division of Water Resources (a predecessor to what is now known as the California Department of Water Resources) recognize the contractual apportionments and priorities in all matters relating to State authority, and to recommend the allocation and priority provisions to the Secretary of the Interior ("Secretary") for insertion in any and all contracts for water made pursuant to the terms of the Boulder Canyon Project Act. The California Division of Water Resources agreed to do so, as did the Secretary. The total volume of water divided among the seven California parties is 5.362 mafa.

The SWRCB's Revised Order WRO 2002-0013 (the "SWRCB Order") includes a chart which shows the priorities and related amounts of water associated with California water users under the Seven-Party Agreement. (AR 3/18/526917/526936.) The chart is reproduced below:

Priority	Description	Acre-feet-per year
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	
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
5(a)	MWD and/or the City of Los Angeles and/or others on the coastal plain	550,000
5(b)	City and/or County of San Diego	112,000

6(a)	IID and lands in Imperial and Coachella Valleys	300,000
6(b)	Palo Verde Irrigation District 16,000 of mesa lands	
7	Agricultural Use	All remaining water

For purposes of this decision, the only meaningful changes to the information in the chart are as follows. CVWD later subordinated its priority 3(a) and priority 6(a) rights to IID. (*See* AR 3/5/53184.) Also, San Diego assigned its priority 5(b) right to MWD when SDCWA joined MWD. (AR 3/11/200732/200812 to 200814.)

As with the QSA, some Imperial Valley landowners objected to IID's settlement of disputes over the division of California's share of the Colorado River through the Seven-Party Agreement and sued IID to enjoin IID's execution of the agreement. It is noteworthy that the settlement in the Seven-Party Agreement was judicially approved. (Greeson vs. Imperial Irrigation District (S.D. Cal. 1931) 55 F.2d 321, 325 and Greeson vs. Imperial Irrigation District (9th Cir. 1932) 59 F.2d 529, 532-533.)

IID's 1932 contract with the Secretary for delivery of Colorado River water incorporated the terms of the Seven-Party Agreement, and the United States obligated itself to permanently deliver to IID "so much water as may be necessary to supply the District a total quantity . . . in the amounts and with priorities in accordance with [those stated in the Seven-Party Agreement]." (AR 3/5/53219/53233.[6]) This contract was validated by an Imperial County Superior Court. (AR 3/30/114729.) That decision was appealed by CVWD. (AR 3/5/53184/53188; *see also* AR 3/30/114724.) In 1934, a Compromise Agreement subordinating CVWD's right to Colorado River water to IID's right was executed as part of a settlement of that appeal. (AR 3/5/53184.)

Colorado River water is divided between the Upper and Lower Colorado Basin States[7], and among the states within the two Basins, primarily by the 1922 Colorado River Compact and the Bounder Canyon Project Act. (AR 3/33/AUGP4-01A-001-00001 and 43 U.S.C. § 617 *et seq*.) Historically, the Upper and Lower Basin States had not been growing in population or Colorado River use at the same rate, and tensions developed among the states, especially with rapidly growing California. (Arizona v. California (1963) 373 U.S. 546, 555.) The Compact sought to resolve that dispute, but more Colorado River water was actually allocated than was reliably available, especially after the rights of Mexico and Indian Tribes were accommodated. (AR 3/22/710788/710788_0107 to _0112.)

In 1964, after interstate arguments had arisen over Colorado River water divisions and use, the U.S. Supreme Court decreed that California's basic apportionment, when there was no surplus water on the River, was limited to 4.4 mafa. (Arizona v. California (1964) 376 U.S. 340, 342.) This means that the nonsurplus apportionment for California (4.4 mafa) does not satisfy the allocation listed in the Seven-Party Agreement (5.362 mafa). It is far less.

The public agency with the largest potential shortfall when only 4.4 mafa is available is MWD. MWD brings Colorado River water to Southern California through the Colorado River Aqueduct ("CRA") which MWD owns and operates. (AR 3/12/204885/204978 to 204979.) The CRA has an approximate capacity of a little more than 1.2 million acre-feet per year. (Ibid.) Yet, when California receives 4.4 mafa, MWD's priority 4 right is only about 550,000 afa, leaving the CRA over half empty.[8] MWD's CRA was historically operated at full capacity because California historically used far more than 4.4 mafa. (Ibid.)

California's use of water above 4.4 mafa was enabled first by low Colorado River water use in Arizona and Nevada. As years passed, Nevada and Arizona began to use their limits, making it necessary for the Secretary to declare annual surpluses on the Colorado River so that California could exceed 4.4 mafa and MWD could keep the CRA full.

California's historical use of over 4.4 mafa concerned the other Basin States. (AR 3/15/505387/505390.) They complained about the surplus declarations to the Secretary, and began pressuring the Secretary and California to implement a plan to reduce California's water use to 4.4 mafa. (Ibid.) As stated by the SWRCB, "Growing demand in Arizona and Nevada, however, has placed pressure on California to reduce its use to its 4,400,000 afa apportionment during years when no surplus is available." (AR 3/18/526917/526936-526937. *See also* AR 3/22/710583; AR 3/22/710788/710788_0011.)

Negotiations among the Basin States led to the Secretary's issuance of the Interim Surplus Guidelines (the "ISG") to assist California in gradually reducing its Colorado River use. The ISG specified rules for the declaration of surpluses and how special surpluses could be used only by the urban users. (AR 3/22/710583.) California's Colorado River Board also adopted a draft Colorado River Water Use Plan (the "California Plan") to reduce California's use to 4.4 mafa. That Plan relied on agricultural water conservation and transfers to urban users and access to ISG water made available when agricultural transfers reached certain threshold levels. (AR 3/7/72184.)

Decision 1600 And Order 88-20. The SWRCB adopted SWRCB Decision 1600 (AR 3/30/114645) on June 21, 1984, in response to a complaint regarding IID water use practices and consequent flooding of farmland by the Salton Sea. The Department of Water Resources conducted an investigation, found misuse of water by IID, IID failed to take curative measures, and DWR referred the matter to the SWRCB. At the conclusion of a six-day evidentiary hearing, the SWRCB found impacts to the Salton Sea due to that misuse, and that under the waste and unreasonable use laws, "the Imperial Irrigation District must take several actions to improve its water conservation program, as specified in this decision." (AR 3/30/114645/114653.)

In 1988, four years after SWRCB Decision 1600, the SWRCB conducted further hearings. The SWRCB thereafter issued Order WR 88-20 (Imperial Irrigation District Order to Submit Plan and Implementation Schedule for Conservation Measures, AR 3/30/114567). Again, the SWRCB's focus was the unreasonable nature of IID water use practices and IID's failure to cure. In that context, and in furtherance of water conservation within IID, the SWRCB observed that California would benefit from a conserved water transfer by IID:

> "The evidence presented clearly establishes that California water users have a need for substantial additional water supplies and that additional water conservation in IID presents a feasible means of meeting a portion of that demand. . .." (AR 3/30/114567/114584.)

One of the potential sources of funding for IID conservation measures identified by the SWRCB was urban areas in need of water. (AR 3/30/114567/114591.) The SWRCB found that the "need for substantial additional water supplies in California and the prospects for substantial water conservation in the IID have been well established." (AR 3/30/114567/114614.) The SWRCB also found that "conservation of 367,900 acre-feet per annum . . . is a reasonable long-term goal which will assist in meeting future water demands." (Id.)

The SWRCB instructed IID to complete "an executed agreement with a separate entity willing to finance water conservation measures in Imperial Irrigation District," or take other measures which would achieve equally beneficial results. (AR 3/30/114567/114615.) The SWRCB retained "jurisdiction to review implementation of the intial plan and future water conservation measures." (AR 3/30/114567/114614.)

Pursuant to this mandate, IID entered into a 1988 conserved water transfer agreement with MWD for approximately 100,000 afa. (AR 3/1/11426.)

On January 25, 1999, MWD wrote a letter to the Secretary of the Interior asking for enforcement of reasonable and beneficial use restrictions, and to not deliver water without a "prior determination by the Department [of the Interior] that the water will be put to reasonable and beneficial use." (AR 3/7/72700.) In this letter MWD also asked the Secretary to revisit "whether the public interest warrants continuing the 1931 allocations of Colorado River water . . . . [i.e., water deliveries per the priorities from the Seven-Party Agreement.]" The targets of this communication were IID and the proposed IID-SDCWA Transfer Agreement.

The IID Board passed a resolution urging MWD to change its position and authorizing IID legal counsel to take necessary steps to protect IID's water rights and water supply. (AR 3/3/33561.)

MWD and CVWD then sued IID and SDCWA to stop the proposed conserved water transfer. This litigation (*see* AR3/5/52099 and AR 3/5/52165) claimed that IID was wasting water, and sought a determination that IID's "wasted" water should not be transferred to SDCWA, but rather be allowed to flow to them as junior appropriators. (AR 3/5/52099/52132 to 52135.)

Concurrently, IID, the Secretary, MWD and CVWD were trying to resolve their disputes. On October 15, 1999, IID, MWD, CVWD and the State of California issued "Key Terms" for a proposed Quantification Settlement Agreement. (AR 3/2/20611.) IID's Board adopted a resolution authorizing the use of those Key Terms to negotiate a definitive QSA arrangement. (AR 3/3/33248.) Based upon this preliminary agreement, MWD and CVWD dismissed their lawsuits. (AR 3/5/52093 and AR 3/5/52096.)

However, by the end of 2002, no QSA had been reached. The Secretary sent a letter to IID on December 27 that stated that if the QSA were signed by the end of the year, then IID's 2003 water order would be honored; but that if the QSA were not signed by then, IID's 2003 water order would be cut by 241,100 af. (AR 3/31/123915.)

No QSA was approved by all parties by December 31, 2002 (IID and SDCWA approved a different version than was approved by MWD and CVWD). (AR 3/2/20260; AR 3/6/60684; AR 3/6/60673.) The Secretary cut IID's water supply by the identified amount. IID sued the Secretary to stop the water reduction. The District Court granted IID a preliminary injunction. (AR 3/30/110591 and AR 3/30/110727.) The Secretary then reduced CVWD and MWD deliveries to offset the inability to reduce IID and keep California within 4.4 mafa. (AR 3/7/70555.)

Notwithstanding the injunction, the District Court allowed the Secretary a "do-over." The Secretary then commenced a Part 417 beneficial use review of IID's water order.[9] The District Court maintained the injunction and retained jurisdiction to eventually review the Part 417 conclusion. (AR 3/30/110137 and AR 3/30/110024.)

The Regional Director issued an initial Part 417 Determinations and Recommendations in July 2003. (AR 3/31/120693.) The Regional Director recommended reducing IID's water order, but increased the reduction by an additional 35,000 afa over the reduction that had been enjoined. (AR 3/31/120693/120739 to 120741.) IID objected, and submitted more evidence and argument. The Regional Director adhered to his position and issued his final decision in late August 2003. (AR 3/31/120019.)

The QSA and certain related agreements were approved and executed in October 2003.

Contracts A through L include several IID conserved water transfers. Conserved water transfers can, if done in a certain manner, enable a reduction in water use as a result of new conservation activities and structures, without reducing the amount of farming, by transferring only the newly conserved water. (AR 3/10/101804/101804_0053.) By increasing water use efficiency through conservation, the same farming could take place with less water diverted from the Colorado River. Two sources for efficiency improvements to create conserved water exist for IID: (a) delivery system conservation, by which delivery system improvements are made to reduce losses (such as lining canals to reduce seepage, or new structures to reduce spills), so that the same volume of water can be delivered, but with less water entering the delivery system; or (b) on-farm conservation, by which less water is used to irrigate crops by improving the irrigation method without reducing the crop yield, which occurs from improved irrigation methodology, such as drip irrigation (for certain crops), slower irrigation, and more level fields. (AR 3/10/101804/101804_0150 to _0160.) In addition to the above conservation methods where no loss of production occurs, the California Legislature amended Water Code section 1013 to allow IID to use fallowing for QSA-related transfers and have the fallowing be deemed efficiency conservation for purposes of any evaluation of IID's reasonable use of water. The diagrams on the following two pages, Plates 3 and 4, from the administrative record (AR 3/12/204885/205141 and 205143) regard how crop evapotransporation (water used by crops) is not reduced by transferring conserved water. **[images not available]**

A bar graph from the administrative record (AR 3/2/21362; Plate 5) which is duplicated on the next page purports to illustrate the recipients and volumes of conserved water transferred over time and the transfer ramp ups. This data is also reflected in table format (with additional information) in Exhibit "B" to the CRWDA (AR 3/1/10273/10285; Plate 6), a portion of which follows on the page thereafter. **[image not available]**

Dealing with the Salton Sea appears to the Court to have been the single most significant environmental issue faced in the QSA process. The Salton Sea is California's largest lake, located north of the Mexican border at the northern end of the IID service area and the southern end of CVWD's service area. (AR 3/17/518477.) It is in a large depression about 230 feet below sea level. The modern Salton Sea was accidently created when the Colorado River breached a headgate and flowed unimpeded into the Salton Sink for almost two years, starting in 1905. (AR 3/18/526917/526928.) The Salton Sea has no significant natural inflow, relying almost entirely on agricultural drain flow from IID and CVWD service areas for its continued existence. (AR 3/18/526917/526928-526929.) Changes in that inflow, whether increases or decreases, affect the condition of the Salton Sea. As evaporation over the years left behind the salt from the drain water, the Salton Sea became more and more salty, and increasingly toxic to wildlife.

The Audubon Society labeled the Salton Sea an "environmental Chernobyl" in 1999. (AR 3/16/513596/513597.) For example, in 1996 botulism at the Salton Sea killed about 10% of the population of western white pelicans. (AR 3/16/513596/513598.) The EIR/EIS prepared for the IID Transfer Project and other literature represented that the Salton Sea would continue to decline without a restoration project:

> "[With no restoration project] the salinity of the Salton Sea would exceed the level at which sargo, gulf croaker, and tilapia could complete their life cycles . . . in 2008, 2015, and 2023, respectively." (AR 3/10/101804/101804_0524 and incorporated in AR 3/12/204885/204900.)

> "[A]t current rates of salt loading of 4 million tons of salts per year, the Salton Sea will be unsuitable for fish and other wildlife in 15 years." (AR 3/16/513579/513580, written by Dr. Timothy Krantz in 1999 (*see* AR 3/18/522187/522362(14)-(22)).)

Restoration of the Salton Sea was studied for years prior to the approval of the QSA and related agreements. (AR 3/7/70729/70742.) Studies addressed the increasing salinity and lowering elevation in an effort to stabilize a habitat for fish and wildlife. (AR 3/7/70729-70742 and AR 3/7/70729/70742.)

Congress passed the Salton Sea Reclamation Act of 1998, which instructed the Secretary to perform certain "feasibility studies and cost analyses" for stabilizing the elevation and salinity of the Salton Sea. (AR 3/7/70729/70742.) The Secretary was to establish "options he deems economically feasible and cost effective," based on a set of operating assumptions. (AR 3/7/70729/70768.) Among those assumptions was to "account for transfers of water out of the Salton Sea Basin . . . which could be 800,000 acre-feet or less per year." (AR 3/7/70729/70768.)

In 2003, the California Legislature established the Salton Sea Restoration Fund (the "Restoration Fund") to be used for restoration purposes. (AR 3/14/400274/400277.) The primary transfer beneficiaries IID, SDCWA and CVWD provided an initial $30 million for the Restoration Fund. The State legislation insulated those agencies from any responsibility, obligation or liability for restoration, regardless of what the State ultimately decided to do. (AR 3/14/400286/400290.)

The impacts of the water transfers are clearly a subject of the QSA (see, e.g., Exhibit E, Recital K, the SWRCB Orders, and extensive environmentally related material and claims in these coordinated cases). The Court notes that "restoration" may differ from "mitigation", and that there are pending disputes regarding the QSA and QSA transfer impacts, and sufficiency of mitigation. The Court does not reach, nor make any finding, regarding these issues in this Statement of Decision.

Negotiations for an IID-SDCWA Conserved Water Transfer Agreement. Initially, SDCWA and IID entered into a Memorandum of Understanding for a conserved water transfer in 1995. (AR 3/17/514477/514480.) The purpose was to see if a negotiated agreement could be reached. The conditional agreement was approved in 1998. (AR 3/1/11127.) The IID Board approved that agreement on a 4-1 vote. (AR 3/3/34098/34106.)

SWRCB Water Rights Change Petition Process. In July 1998, IID and SDCWA jointly petitioned the SWRCB to approve the IID transfer to SDCWA. (AR 3/15/500001.) The Petition was later amended to seek approval of water transfers from IID to MWD and CVWD.

The SWRCB provided public notices of the hearings on the petition. On October 15, 1998, the SWRCB issued a Notice of Hearing. (See, e.g., AR 3/15/501107; AR 3/15/501137; AR 3/15/501147; AR 3/15/501169; AR 3/15/501195; AR 3/15/501205; AR 3/15/501210; AR 3/15/501217; AR 3/15/501218; AR 3/15/501219; AR 3/15/501221; and AR 3/15/501222.)

On April 22, 2002, the SWRCB held a public hearing in the Imperial Valley. In 2002, the SWRCB held 15 days of evidentiary hearings over a period of months, with witnesses and exhibits presented by many parties. (AR 3/18/526917/526932 to 526934.) Once the evidentiary proceeding was concluded, the SWRCB prepared a draft order and circulated it for review. (AR 3/18/526188.) Subsequent to post-evidentiary hearings, the SWRCB issued the SWRCB Order which approved the IID conserved water transfer to SDCWA, MWD and CVWD, subject to certain environmental mitigation conditions. (AR 3/18/526917.)

The IID Contract Approval Process. While the SWRCB proceedings were underway, attempts to reach a final agreement on the QSA and related agreements by the end of 2002 continued. The "Key Terms"

of a possible QSA had been agreed upon in 1999 (AR 3/2/20611); and IID, CVWD, and MWD had jointly issued proposed QSA documents for public review in 2000. (AR 3/3/32605.) Various draft agreements and public meetings and workshops occurred in 2000 and 2001,[10] but the majority of intense QSA activity took place in late 2002, from November through December. In December 2002, MWD and CVWD approved one version of the QSA and related agreements, while IID and SDCWA approved a different version. (AR 3/39/AUGP4-06-441-29042; AR 3/41/AUGP4-08-954-34620; AR 3/41/AUGP4-08-960-34676; AR 3/39/AUGP4-06-453-29553; AR 3/39/AUGP4-06-450-29429; AR 3/39/AUGP4-06-453-29442; AR 3/39/AUGP4-06-453-29436; (AR 3/3/30842); AR 3/3/30877; AR 3/3/32096/32105-32107; AR 3/3/32096/32108-32110; AR 3/3/32096/32111-32113; AR 3/6/60682; and AR 3/2/20260.) MWD and CVWD rejected the IID/SDCWA version of the QSA and related agreements. (AR 3/6/60684; AR 3/6/60673.)

At the end of 2002, there was no mutual agreement upon the proposed QSA contracts. Different views on cost issues, environmental mitigation funding, and termination events continued to separate the parties. (AR 3/6/60673/60674 to 60675; AR 3/6/60684/60684 to 60685; AR 3/6/60682/60682 to 60683.)

Tremendous pressure existed to get this QSA deal done by October 12, 2003. This is reflected above and in the state legislative history of which the Court has taken judicial notice (RJN:000358) as requested by SDCWA, documenting that:

> "The history of the QSA has been that periodically, the affected parties announce that they had reached agreement on terms, the Legislature takes action to make the necessary changes in law, and then for one reason or another, the agreement falls apart at the last minute. While by all appearances, the outcome will be different this time, there are no guarantees. Consequently, the three QSA bills are contingent upon enactment of each of the others, so that none of the bills will become operative unless both the other bills become operative by January 1, 2004. More important, the principle benefits to the QSA parties of these three bills are contingent on execution of the QSA by October 12, 2003. October 12, 2003 is also the constitutional deadline for the Governor to sign or veto bills passed this year."
>
> The legislation itself contains this October 12, 2003 deadline.

The wording of the QSA JPA Agreement (Contract I) was not settled on at the time of the IID Board's formal approval on October 2, 2003. The addition of the language found in the second and third sentences of clause 9.2, the last sentence of clause 10.1, and clause 14.2 of the QSA JPA Agreement, show that the QSA JPA Agreement -- and because of their interrelationship and the critical nature of the QSA JPA Agreement, the entire QSA -- still had substantive terms remaining to be negotiated as of October 6, 2003. The Court additionally finds that the lack of any draft QSA JPA Agreement in the administrative record at the time of the IID Board meeting and the timing of the DFG Director E-Mail (Exhibit 1) show that material portions of the QSA JPA Agreement were still being negotiated days after the October 2, 2003, approval by the IID Board.

The DFG Director E-Mail shows that the State was concerned on October 6, 2003, about entering into an agreement that would amount to writing a "blank check" on behalf of the State.

The ECSA, Contract J, has an attached exhibit that shows that the parties were aware of, and included in their contract, an estimate of the environmental mitigation costs in 2003 of $178,000,000. No one reasonably would have taken this as other than an estimate, but given the magnitude of the potential cost and the explicit ceilings on the non-State agency funding parties' contributions, the parties would have reasonably understood the importance of what funding the State would contribute for mitigation obligations

of the QSA agreements and projects. The normal rules, as observed by the State's counsel in this litigation, is that the State cannot sign a blank check. Given the additional language described below, those negotiating the QSA understood that since the State was not required to sign the ECSA, inclusion of any modification of the legislative language regarding the State's funding commitment had to be in an agreement executed by the State, such as the QSA JPA Agreement.

In the days between October 2, 2003, and before the October 12, 2003 deadline, in an apparent attempt to make the State's commitment to pick up any environmental mitigation cost shortfall more certain than had been provided by the California legislature in Senate Bill 654, the QSA JPA Agreement language was successfully negotiated by the non-State parties to expressly provide that the "State obligation is an unconditional contractual obligation of the State of California, and such obligation is not conditioned upon an appropriation by the Legislature, nor shall the event of non-appropriation be a defense". (Contract I, clause 9.2, third sentence.) Everyone negotiating the QSA JPA Agreement would have reasonably understood that now the State itself was purporting to unconditionally commit to pick up the entire tab for mitigation costs exceeding the capped contribution of the other QSA parties, notwithstanding the amount of those costs -- even if they ultimately amounted to millions or billions of dollars – and notwithstanding the State's budget, appropriations, or other controls over expenditures.

Similar language appears in the ECSA, Contract J, item 1.2(23) stating that the parties (IID, CVWD, SDCWA) "understand the State Obligation to be an unconditional contractual obligation of the State of California not dependent on any further State action, and are relying on the State Obligation in order to comply with the extensive state and federal requirements that mandate Environmental Mitigation Requirements. In addition, the Parties are relying on the State Obligation in making contracts with third parties, including without limitation, landowners and farmers in the Imperial Valley who will be entering contracts to produce conserved water." Even though the State is not a party to Contact J and is therefore not bound thereby, Contract J reiterates the importance of this element of the contractual scheme to the contracting parties.

Statement of Decision Issue Seven: Is the QSA JPA Agreement constitutionally valid?

California Constitution, Article XVI, Sections 1 and 7. The Court sees the issue as whether the State can make a commitment that, while it may be contingent, is expressly projected by the primary non-State QSA parties in one of the QSA contracts to cost well in excess of the constitutional debt limit, under express contract terms that call such a commitment "an unconditional contractual obligation of the State" which is "not conditioned upon an appropriation by the Legislature" and which forfeits "the event of non-appropriation" as a defense. The Court does not believe that it would be legitimate to read these provisions as consistent with the constitutional requirements. To validate the QSA agreements when the QSA JPA Agreement contains such express language would nullify the language of the California Constitution, Article XVI, Section 7, in a fashion that would:

> "undermine the … state Constitution…In view of the fundamental nature of this requirement, we conclude that the state cannot undertake obligations protected by the contract clause that directly contravene …[Article XVI, section 7 of the California Constitution]. To hold otherwise would gut the requirement." (White vs. Davis, (2002) 108 Cal.App.4th 197, 230.)

This Court has no ability to sanction a way to contract around the Constitution. It is clear to this Court that if this contract language is validated, executive agencies of the state can contract for amounts well over the constitutional debt limit where some amount is contingent but everyone knows there is a very real

possibility that the debt limit amount will be exceeded by simply adding language saying the obligation is an unconditional contractual obligation of the State not conditioned upon an appropriation by the Legislature, contractually binding future legislators' hands in contravention of our Constitution. Which State agency would be the first to follow the logical import of judicial validation of such language and commit to a significant expenditure for which there is no available funding by simply adding the magic language that this commitment is an unconditional contractual obligation of the State not conditioned upon an appropriation by the Legislature? Informed contracting parties might add some uncertainty as to the exact amount of the expenditure, to bolster the "contingency" defense. And thus, by formula established in the actual wording of the QSA documents and validated here, the Constititutional limits would be easily gutted.

Some have urged the Court to look to the fact that the QSA JPA Agreement has a severability and waiver clause (Contract I, Clause 15.2) to save the agreement from the identified defects herein noted. The Court does not agree, because the logical result of such reasoning would be a requirement for the Court to validate every contract as long as a severability and waiver clause was included. In a similar vein, the Court will not attempt to reform a contract in a validation proceeding. As counsel for CVWD, Mr. Abbot, candidly stated at trial (Transcript, Page 2446), the "parties, with all due respect, were not going to leave it to a court to rewrite the agreement for them if there was a provision invalid" (Trial Transcript, Page 2446.) Nor does the Court, in a validation action, attempt to explain away facial language in a fashion that takes unequivocal language (like the word "unconditional"), call it ambiguous, and impose a reading that creates conditions for the unconditional obligation to become effective.

The Court concurs that it must read the word "unconditional" in context. But what is the context here? The Court is not in the dark in determining what the non-State contracting parties thought "unconditional" meant. The non-State contracting parties stated that their understanding of "unconditional" certainly included "not dependent on any further State action" (ECSA, Contract J, clause 1.2(23)). There is some evidence as well as to what the State thought "unconditional" meant. The State, through its pleadings responsive to a summary judgment motion, took the position that the State's only contractual obligation was to "seek an appropriation" if the mitigation funding shortfall comes to pass, that the challenged language was simply "an incorrect assertion about the state of the world", and that the language in question "imposes no contractual obligation but is merely a representation, albeit an incorrect one". The Court, at trial, did hear the State's attorney answer "yes" in response to the Court's stated understanding that if the contracts are validated then "the State is contractually committed to step forward and pay all of the (excess) Environmental Mitigation Costs, no matter how high they may go, even if it's billions of dollars". (Trial Transcript, Page 2422.) That same attorney, however, declined to commit to the State's representative on the QSA JPA Agreement being precluded from voting against mitigation, and thereby preventing the expenditure, if mitigation is necessary but there isn't any "money in the checkbook for the State" (Trial Transcript, Page 2423).

Statement of Decision Issue Eight: Is the State's QSA JPA Agreement obligation illusory?

The Court has additionally been urged to invalidate the QSA because of a claim that the wording in the second sentence of Clause 9.2 of Contract I, the QSA JPA Agreement, gives the Commissioner representing the State as a voting member of the created "Quantification Settlement Agreement Joint Powers Authority" a veto power over any excess mitigation expenditures, i.e., mitigation expenditures that would exceed the amounts funded by the non-State contracting parties. The argument goes that requiring three affirmative votes for any expenditure in excess of the Environmental Mitigation Cost Limitation, "including (the vote of) the Commissioner representing the State", gives the State the power not to perform, leaving the contract promise to pay such excess costs illusory. The existence of such an illusory promise, the argument

goes, would require the Court to invalidate the contracts because there was no meeting of the minds. The Court's analysis of this claimed invalidity in Contract I proceeds along standard contract law lines. The actual wording of the sentence being questioned is as follows: "The amount of such costs and liabilities shall be determined by the affirmative vote of three Commissioners, including the Commissioner representing the State, which determination shall be reasonably made." The applicable law, as stated in Pease vs. Brown (1960), 186 Cal.App.2nd 425, 431, is "if one of the promises leaves a party free to perform or to withdraw from the agreement at his own unrestricted pleasure, the promise is deemed illusory…". Is the State here, acting through the Commissioner representing the State, able to not perform at the State's own unrestricted pleasure? No. In the very same paragraph, the Pease case notes that if there is a "good faith" standard applicable to the performance, that standard "applies with equal vigor to this type of condition and prevents it from nullifying the consideration otherwise present in the promises exchanged." Under the facts present in this case, the express requirement for the determination to be reasonably made and the implied covenant of good faith and fair dealing which exists in all contract situations prevents this Court from calling the State's obligation in regard to excess mitigation requirement expenditures illusory and invalidating the contracts on this claimed ground. The Court's conclusion that the voting arrangement is not illusory does not preclude the Court from viewing, as the Court does, this contractual voting arrangement as an item of significant substantive legal effect that did not exist when the IID board formally voted to approve the contracts on October 2, 2003.

Statement of Decision Issue Nine: Does the Court have to validate or invalidate the QSA legislation?

The Court's analysis does not look to the analytical framework provided for the Court for analyzing whether a statute is unconstitutional, as found in Taxpayers for Improving Public Safety vs. Schwarzenegger (2009), 172 Cal. App.4th 749. If it did, the Court's examination of the contractual language would focus solely on looking at whether the contract being challenged "can be implemented in such a way as to avoid a constitutional infirmity", 172 Cal.App.4th 749, at 780.

The standard of review for judicial evaluation of a challenge to a statute differs from that applicable to contracts. These proceedings seek validation of contractual, not statutory, language. The Court is being asked to validate Contracts A through L, not the related statutory authorizations. The Court is therefore guided by case law which states that a contract "'must receive such an interpretation as will make it lawful ... **if it can be done without violating the intention of the parties**.' (Civ. Code, § 1643.)" (City of San Diego vs. Rider (1996) 47 Cal.App.4th 1473, 1490 (emphasis added).) As noted above, Contracts I and J describe the State's obligation as "unconditional", "not conditioned upon an appropriation by the Legislature" nor subject to "the event of non-appropriation as a defense".

The focus under the facts of these coordinated proceedings is on whether "the Contracts, and each and every portion of such Contracts, are valid, legal and binding and are … in conformity with all applicable provisions of law…" (Second Amended Validation Complaint, page 19, item 6 (Prayer)). The question is, accordingly, whether the State obligation as phrased in Contract I, Clause 9.2 and Contract J, item 1.2 withstands judicial scrutiny under a contract validation action standard. And the Court asks itself whether, in light of the potential contingency over which the parties themselves admit the State may need to seek an appropriation (Contract I, Clause 14.2) for excess mitigation costs well in excess of the constitutional debt limit amount, any such State obligation in a contract could ever be, under Article XVI, Section 7, called an "unconditional contractual obligation of the State" which is "not conditioned upon an appropriation by the Legislature" nor subject to "the event of non-appropriation as a defense". The answer again must be "no". To hold otherwise would point out, for all to see, a way to contract around the constitutional debt prohibition and the constitutional requirement for an appropriation before expenditure found in our Constitution. Both

constitutional provisions would be contravened by the simple inclusion of such language in any contract that had the express language (and thus the inferred intention of the parties) being the creation of a debt in excess of the constitutional debt limit.

IID contends that Contract I, Clause 14.2 is evidence that the parties were providing for the circumstance in which appropriations from the Fish and Game Preservation Fund may not be sufficient to meet the State's contractual obligation and that this somehow trumps or moots the objectionable language in Clause 9.2. The Court does not agree. In fact, at trial, IID's counsel, in an attempt to explain away the import of Clause 14.2, suggested that the Court should read that clause and the contracting parties' intent as addressing a situation where excess mitigation expenses need to be paid, the State has the ability to write the check on the Fish and Game fund account (ignoring the reality that the account no longer exists), but the State really would rather write the check on some other account so the parties go back to the Legislature to ask for another appropriation. (Transcript, pages 2851/2852). That, from the Court's perspective, is pure fantasy: as much fantasy as speculating that "by capping the liability of the Water Agencies, the Legislature must have intended to modify all laws that would require mitigation above that amount, subject to the State appropriating money for additional mitigation. No other interpretation can honor both the Water Agency cap and the argued constitutional limit." (IID's Opposition to Cuatro Del Mar Motion for Summary Judgment, page 37).

IID's counsel additionally argued at trial (Transcipt, pages 2814/2815) that the Court should find the QSA JPA Agreement valid here as against a facial constitutional challenge if there is compliance with either section 1 or section 7 of Article XVI of the California Constitution, citing to the language in Walsh vs. Board of Administration (1992), 4 Cal.App.4th 682, at 699. That case does have language that states "(u)nder our Constitution the creation of an enforceable contract with the state requires compliance with the constitutional debt limitation provisions of article XVI, section 1, or a valid appropriation in support of the contract under article XVI, section 7."

The Court does not ignore or disregard this guidance, it is the law. But Walsh is readily distinguishable from the instant case in regard to the "or" language cited in the paragraph above. Walsh involved a former legislator's administrative appeal of the denial of early retirement benefits, after which Walsh brought a writ of mandate to compel the board of the Public Employees' Retirement System to award him early retirement benefits. In analyzing whether the claim was valid under our Constitution, the appellate court looked to find authority under section 1 "or" section 7 of Article XVI.

After listing the four ways that the State can incur a valid contractual obligation under the California Constitution, the Walsh court found that the Legislators' Retirement Law "was not even arguably enacted in compliance with the first three of these means." (4 Cal.App.4th at 699.) According to the Walsh court, the Legislators' Retirement Law did not provide for a continuing appropriation. For that reason, "sums required for state contributions shall be appropriated in each State Budget Act, or otherwise." (4 Cal.App.4th at 698.)

According to the decision, the PERS Board argued that since the Legislators' Retirement Law was not supported by a continuing appropriation during the period of Walsh's service, he could not have acquired a contractual right to the payment of specific benefits. This argument relied on two depublished cases. The Walsh court considered the PERS Board's argument as a request to consider and reiterate the reasoning expressed in those depublished cases. The Walsh court declined, stating that it was not necessary to resolve this issue. According to the Walsh court, "Throughout the period of Walsh's service our Constitution contained an express reservation of power to the Legislature to limit the retirement benefits of members of the Legislature before their retirement." (4 Cal.App.4th at 700.) According to the court:

> "The modification of a retirement plan pursuant to a reservation of the power to do so is consistent with the terms of any contract extended by the plan and does not violate the contract clause of the federal constitution." (4 Cal.App.4th at 700.)

Walsh is therefore distinguishable because it did not apply the rule it articulated in denying Walsh's claimed contract right to specific retirement benefits. The Court has found no case that would be precedent for the position that, in a contract validation proceeding, facial compliance with part of a Constitutional provision would excuse compliance with some other Constitutional requirement. Accordingly, the Court concludes that it cannot validate these contracts unless both section 1 and 7 are appropriately complied with.

The express language found in Contract I, Clause 9.2, states as follows:

> "The State is solely responsible for the payment of the costs and liability for Environmental Mitigation Requirements in excess of the Environmental Mitigation Cost Limitation. … The State obligation is an unconditional contractual obligation of the State of California, and such obligation is not conditioned upon an appropriation by the Legislature, nor shall the event of non-appropriation be a defense."

As actually phrased, the QSA JPA Agreement can only stand if the Court finds that contractual language complies with both sections 1 and 7. In this regard, IID's counsel is correct in understanding that the Court was concerned that "had we said less (i.e., not put in the third sentence in Clause 9.2), we might be better." (Trial Transcript, page 2856.) But less was not said. The parties signed the documents. The language reads as it reads. The Court is being asked to validate the actual language used. It is simply unreasonable to, as IID counsel attempted at trial, say that the parties would have understood the contractual State obligation being talked about throughout Clause 9.2 was something other than the key contribution by the State to getting this QSA deal done – i.e., the State stepping up to take on all of any excess mitigation costs even if that amounts to billions of dollars (See, also, Contract C, Recitals F and G, and Contract I, Recitals H, J and K.) It is simply not a reasonable reading of the Section 9.2 language to say the parties thought the existence of a continuing appropriation in the Fish and Game Fund, the contingent nature of the obligation, or the existence of a Salton Sea Restoration Fund, was the unconditional contractual obligation of the State being talked about in Clause 9.2. The only reasonable reading of the language in Clause 9.2 that actually made it into the contract is that the parties were bargaining for the excess mitigation costs (even if that amounted to billions of dollars) to be an unconditional contractual obligation of the State that is not conditioned upon appropriation nor subject to the defense of non-appropriation. That is what the contract expressly says. As IID's counsel acknowledged at trial, "(i)f Your Honor says, okay, I have read this and the only way to make the third sentence make sense is that because of the time pressure they wrote something that can only be interpreted as an express contractual waiver of Section 7, which we know you can't do, then you've got a constitutional infirmity, okay." (Trial Transcript, Page 2862.)

The State relies on City and County of San Francisco vs. Boyd (1941) 17 Cal.2d 606, where the California Supreme Court held that the contract there must be validated as long as there is no showing that "under no possibility would funds be available for the future years." The State also cites to language in Boyd where the California Supreme Court stated, "Because the scheme might fail of execution for want of appropriation is immaterial."

Boyd is distinguishable because there the parties entered into a stipulation of fact to the effect that there were sufficient funds available in the treasury at that time in excess of the amounts due on the obligation. There is no such similar stipulation here. More importantly, Boyd did not involve any waiver by the City and County of San Francisco of any defenses based on non-appropriation or lack of available funds.

The State also contends that the Phase 1A trial decision should address White vs. Davis (2003) 30 Cal.4th 528. In that 2003 decision, the the California Supreme Court reviewed, among other things, that portion of the 2002 White vs. Davis Court of Appeal decision that discussed the *payment* of wages and overtime under federal law (the Fair Labor Standards Act). The Court concluded that during a budget impasse, where a non-exempt employee did not work overtime, the FLSA requires that the State timely pay the employee at least the minimum wage rate for all straight hours worked by that employee. The Court also concluded based on FLSA regulations that where the non-exempt worked overtime, the State must timely pay the non-exempt employee his/her full salary for all straight time worked plus one and one-half times their regular rate of pay for overtime.

The 2003 White vs. Davis decision is distinguishable because the obligation to pay federal minimum wages and overtime was not based on compliance with "either" section 1 or section 7 of Article XVI of the State Constitution, but instead on federal law. In addition, the existence of an employment relationship was based on Government Code section 1231, not compliance with either section 1 or 7 of Article XVI of the California Constitution.

The Court is not called upon nor does it address whether the QSA legislation is unconstitutional. The Court does conclude, however, that the above-cited language puts a more extensive obligation on the State than imposed by the QSA legislation. This, coupled with the non-State parties express confirmation of their intent and understanding that the State obligation was an unconditional contractual obligation of the State of California not dependent on any further State action, compels the Court to declare the QSA JPA Agreement invalid.

Statement of Decision Issue Ten: Does the validation by operation of law of the IID-DWR Agreement preclude this Court from invalidating the QSA JPA Agreement?

According to IID, the prior validation by operation of law of the IID-DWR Agreement precludes invalidation of the QSA JPA Agreement upon which the IID-DWR Agreement is dependent. (IID Objections to Phase 1A Trial Tentative Ruling, pp. 6-8.) In IID's Phase 1A Response Trial Brief, IID states that "The QSA-related contracts already validated as a matter of law depend on the validity of the Validation Contracts[11]." According to IID's Phase 1A Response Trial Brief, if the Court invalidates the contracts which IID seeks to validate in Case 1649, the Court would also invalidate the "already-validated QSA-related contracts, a result prohibited by law."

IID's own complaint seeks judicial validation of the QSA JPA Agreement and other agreements. It necessarily follows that IID's position, and its position throughout this lengthy and costly litigation, is that the Court has the authority to determine the validity of these agreements. If, as IID now argues, the Court is required to validate the agreement, all that is requested is a rubber stamp. The Court finds that this argument is not credible.

The IID-DWR Agreement supports this Court's conclusion that the Court isn't precluded from invalidating the QSA JPA Agreement. Article 3.6 of the IID-DWR Agreement provides that "This Agreement shall remain in effect only so long as the Department's agreement with Metropolitan, referred to in Recital 7, and the QSA, referred to in Recital 1, remain in effect." Thus the IID-DWR Agreement

expressly provides that if the contracts relied upon cease to remain in effect, then it too will cease to remain in effect. This provision was validated by operation of law. This provision explicitly contemplates invalidation (or other termination) of the QSA.

IID also contends that the Article XVI, section 7 issue "was never raised in any way by any Category 2 Party". This is not an accurate statement. The Morgan/Holtz Parties identified as Issue V-2 that "The agreements purport to bind the State to spend money even without any appropriation by the legislature under article XVI." In addition, because this is a validation proceeding, it is within the Court's authority to consider the issue regardless of whether it appeared in the remaining list of issues or in the parties' pleadings.

For the foregoing reasons, the Court concludes that QSA JPA Agreement (Contract I) violates Article XVI, section 7 of the California Constitution. Based on this conclusion, the Court does not find it necessary to resolve whether any other provision of the QSA JPA Agreement violates the California Constitution.

Statement of Decision Issue 11:
How does invalidating Contract I impact the remaining 11 contracts?

With express language being found in Contract I requiring that contract to be invalidated, what does the Court do, under these factual circumstances, with the remaining 11 contracts (A, B, C, D, E, F, G, H, J, K and L)? What, if anything, in the record would cause the Court to view the contracts as independent contractual obligations that can stand on their own without a QSA JPA Agreement? Or is there something in the record that shows the Court that the agreements are interdependent such that all be invalidated if the QSA JPA Agreement falls? A review of the contracts provides the answer for the Court. Contract C, the Conservation Agreement, contains in Recital G, the language: "CVWD, SDCWA and IID have agreed to substantial commitments of water, money and other valuable resources to implement the QSA, including but not limited to, this Agreement and other commitments of funds to mitigate environmental impacts of the QSA, including the water transfers and other activities. CVWD, SDCWA and IID, individually and collectively, would not have made these commitments but for the commitments of the State in the QSA JPA". Contract I itself, in Recital paragraph H, states that "(n)either the QSA or these conserved water transfers could be implemented without compliance with extensive state and federal environmental laws, and this Agreement including the State Obligation is the principal mechanism for ensuring that required mitigation under those laws for these transfers will be fully paid for." (See also Contract D, Recital B.) With the QSA JPA Agreement being the principal mitigation funding mechanism for the QSA, and with IID expressly stating that the other contractual QSA commitments would not have been made but for the commitments of the State in the QSA JPA Agreement, the Court finds the remaining 11 contracts to be interdependent with the QSA JPA Agreement. The Court's finding here is consistent with IID's pleading in the Second Amended Validation Complaint, paragraph 23, that all of the contracts in question are "interrelated and interdependent".

The City of Escondido and Vista Irrigation District argue that the Allocation Agreement (Contract B) is sufficiently different from the other QSA related agreements such that it should remain in effect even if the QSA and/or the QSA JPA Agreement are found to be invalid. They point to Article 28 of the Allocation Agreement, which provides:

"ARTICLE 28

Interrelationship with Existing Agreements

> Existing contracts and agreements entered into by the Secretary for the delivery of Colorado River water shall remain in full force and effect in accordance with their terms and, with this Allocation Agreement, shall govern the delivery and use of Colorado River water allocated as a result of the Projects. Neither the Secretary nor the San Luis Rey Settlement Parties are parties to the Quantification Settlement Agreement, and the rights and responsibilities of the Secretary and the San Luis Rey Settlement Parties with respect to the allocation of water conserved by the All American Canal Lining Project and the Coachella Canal Lining Project are as set forth in this Allocation Agreement and are not affected by the Quantification Settlement Agreement[12]." (Article 28 of the Allocation Agreement.)

The City of Escondido and Vista Irrigation District also contend that this Court lacks jurisdiction to invalidate the Allocation Agreement, relying on Public Law 109-432, 120 Stat. 2922 (2006) ("2006 Act") and Consejo De Desarrollo Economico De Mexicali etc v. United States, 482 F.3d 1157 (9th Cir. 2007).

The 2006 Act requires that the Secretary of the Interior carry out the All American Canal Lining Project "Notwithstanding any other provision of law" and "without delay". In Consejo, the Ninth Circuit concluded that the 2006 Act rendered challenges to the All American Canal Lining Project based on NEPA, the Endangered Species Act, the Migratory Bird Treaty Act, and the Settlement Act moot. However, the Ninth Circuit did not hold that the 2006 Act mooted any challenge to the Allocation Agreement[13]. The Ninth Circuit concluded that the 2006 Act exempted the All American Canal Lining Project from the identified federal statutory environmental claims. It refused to adjudicate a federal Constitution Tenth Amendment challenge to the 2006 Act, stating:

> "Here, the Plaintiffs argue that if the 2006 Act goes into effect, it will require the commandeering of California's financial resources. However, California has already agreed to appropriate its financial resources to the Lining Project. *See* The Allocation Agreement. Therefore, the controversy the Plaintiffs seek to litigate by this challenge – whether the United States may appropriate California's resources – no longer exists. Accordingly, we hold that this claim is moot and we therefore lack jurisdiction to reach its merits." (482 F.3d at 1170.)

The Tenth Amendment provides in its entirety, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Ninth Circuit's ruling as to compliance with federal environmental laws did not render this challenge moot or invalid.

Category 1 parties also contend that the Court lacks jurisdiction to invalidate any of the contracts to which either the United States and/or Indian Tribes are parties, on the grounds of sovereign immunity. The Category 1 parties cannot have it both ways. In essence, the Category 1 parties again contend that the Court only has the authority to validate, but not to invalidate, such contracts. If this Court does not have the authority to invalidate any contract to which the United States and/or the Indian Tribes are a party, then such a contract cannot be a proper contract for the Court to validate in this proceeding. The Court believes that it does have the authority to determine the validity of those contracts.

Based on the foregoing, the Court finds that all remaining eleven contracts must also be invalidated.

Other challenges to the validity of the contracts. The Court does not find that the contracts must be invalidated because of some claimed violation of Government Code section 1090 because of actions by IID's retained outside counsel, David Osias, IID's retained outside consultant, Dr. Rodney Smith, or IID's former Chief Counsel, John Carter. The law in question states, in relevant part:

> "Members of the Legislature, …district…(and) officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall … officer or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity."

The record supports that John Carter was, as IID Chief Counsel, a public official within the meaning of Government Code section 1090. The Court has not seen any evidence that would lead the Court to conclude, however, that Mr. Carter had a "financial interest" in the QSA contracts as the required to establish a section 1090 violation. The Court has reviewed the citations provided by the Morgan/Holtz Parties to the administrative record and does not find any evidence that David Osias or Dr. Rodney Smith were public officials within the meaning of Government Code section 1090.

The Court does not find that the contracts must be invalidated because of some claimed lack of authority on the part of the IID Board to proceed with an arrangement similar to the QSA nor does the Court find that IID violated trust obligations or somehow had to allocate the conserved water to landowners as a required part of proceeding with the QSA.

In their written comments to the Phase 1A trial tentative ruling, the State and SDCWA expressed a desire to obtain an advisory opinion on the constitutionality of the QSA legislation. The Court declines to issue such an advisory opinion. The validity of the QSA legislation is beyond the scope of Case ECU01649. IID's validation complaint seeks a judicial determination of validation of Contracts A through M, not the QSA legislation.

The Court is not reaching the CEQA, NEPA and Clean Air Act claims and defenses in cases 875 (ECU01649), 877 (ECU01653), 878 (ECU01656) and 879 (ECU01658) because of its findings of invalidity as set forth herein. Category 2 parties have expressed concern that this could allow reliance on the challenged CEQA, NEPA and/or Clean Air Act documents and processes if, for example, the QSA contracts are revised in ways that do not trigger further environmental review, yet the timely environmental challenges could be foreclosed.

The Court does not intend to deprive any party of its opportunities to litigate its claims. The Court simply cannot justify trying claims predicated upon contracts the Court has found invalid.

Stay of judgment. SDCWA requests that the judgment contain a specific provision staying the effectiveness of the judgment until expiration of the deadline to file a notice of appeal and during the pendency of the appeal. The Court grants SDCWA's request as to a stay of the effectiveness of the judgment until expiration of the deadline to file a notice of appeal. The Court denies SDCWA's request to stay the effectiveness of the judgment during the pendency of the appeal.

The judgment shall include a provision staying the effectiveness of the judgment until expiration of the deadline to file a notice of appeal.

January 13, 2010

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Roland L. Candee

Coordination Trial Judge

Certificate of Service by Mailing attached.

CERTIFICATE OF SERVICE BY MAILING

C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above entitled Statement of Decision Following Phase 1A Trial in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

Chair, Judicial Council of California Administrative Office of the Courts Attn: Judicial Assignments Unit (Civil Case Coordination) State Building, 455 Golden Gate Avenue San Francisco, CA 94102-3660	Horton, Knox, Carter & Foote John P. Carter 509 S. Eighth Street El Centro, CA 92243
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Dated: January 15, 2010

Superior Court of California,

County of Sacramento

By:
L.M. SWEEZER
Deputy Clerk

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[1] The Court notes that reliance on Planning and Conservation League vs. Department of Water Resources ((2000) 83 Cal.App.4th 892, hereafter "PCL") on this point would be, to some extent, misplaced. PCL primarily addressed indispensible parties and requisite service, not the scope of validation or what was being validated.

[2] The Court uses this term to indicate something that is a prerequisite, a form of condition precedent. It arose as a result of the argument that but for the unconditional State funding commitment, one or more other QSA agreements would not have been agreed to by all parties.

[3] According to IID, "The QSA and Related Agreements consist of 35 contracts among a large number of local, state and national public agencies. (See Exhibit A and B to the QSA at AR 3/1/10287/10318 to 10321 and the exhibits thereto, which are also implementing contracts.')". (IID Phase 1A Opening Trial Brief, p. 1:2-7.)

Citations to the administrative record are in the following format: "AR X/A/B/C", where "AR" refers to Administrative Record, "X" refers to the Administrative Record number, "A" refers to the CD number, "B" refers to the document Bates number, and "C" refers to the pin cite Bates page number.

[4] "Category 1" parties are those parties who align themselves with proponents of one or more of the contracts or project approvals at issue in these coordinated cases, their environmental documentation, or both. "Category 2" parties are those parties who align themselves with opponents of one or more of the contracts or project approvals at issue in these coordinated cases, their environmental documentation, or both.

[5] In this ruling, the term "af" is used to refer to acre-feet, "afa" means acre-feet per year, and "maf" means acre-feet in millions. An acre-foot of water is generally considered sufficient to satisfy one rural family of four for a year, or two urban families of four.

[6] Between 1933 and 1936, after its contract with the Secretary was signed, IID filed eight California appropriative water rights applications with the State. (AR 3/15/504813.) Permits were granted to IID by the State. (AR 3/15/504813.) IID also obtained assignments of pre-1914 California appropriative water rights. Thus, IID's water rights are both federal and state-based.

[7] From north to south: Wyoming, Colorado, Utah, New Mexico (Upper Basin States); California, Nevada and Arizona (Lower Basin States).

[8] Even after adding IID's later 1988 agreement with MWD to transfer conserved water of about 100,000 afa, MWD would still be about 450,000 afa short of filling its CRA.

[9] Part 417 is a federal regulation, found at 43 C.F.R. Part 417, by which the Department of the Interior grants to the BOR the right to make reasonable and beneficial use determinations as to recipients of water under Colorado River water delivery contracts.

[10] *See*, for example, AR 3/15/504391//504392 to 504496 and AR 3/3/32182.

[11] IID refers to Contracts A through M as the "Validation Contracts". IID's Phase 1A Opening Trial Brief characterizes these thirteen contracts as being "part of the Quantification Settlement Agreement ('QSA') and related agreements (the 'QSA and Related Agreements.'). For the reasons discussed above, it does not appear that Contract M is properly characterized as a "Validation Contract".

[12] The Secretary and the San Luis Rey Settlement Parties are not the only parties to the Allocation Agreement. MWD, CVWD, IID, SDCWA, the City of Escondido and Vista Irrigation District are also parties to the Allocation Agreement.

[13] The Ninth Circuit defined "the Allocation Agreement" as "a series of agreements in 2003 between the United States, the MWD, Coachella Valley Water District, IID, San Diego County Water Authority ('SDCWA'), the La Jolla, Pala, Pauma, Rincon & San Pasqual Bands of Mission Indians, the San Luis Rey River Indian Authority, and the City of Escondido & Vista Irrigation District". This Court is aware of only one 2003 agreement amongst those named parties that has been referred to as the Allocation Agreement. The State is not a party to that agreement. It is not clear whether the Ninth Circuit may have intended to refer to the entire suite of contracts that have been sometimes referred to as the QSA.