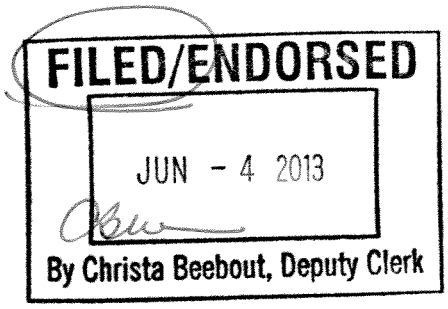

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

Coordination Proceeding Special Title (Rule 1550(b))	Department Number: 33 Case Number: JCCP 4353
QSA COORDINATED CIVIL CASES	RULING ON SUBMITTED MATTER

In this coordinated proceeding, Imperial Irrigation District ("IID") seeks, pursuant to Water Code section 22762 and Code of Civil Procedure section 860 et seq., validation of a Quantitative Settlement Agreement ("QSA") and eleven related agreements executed in October 2003 (collectively "QSA agreements"). These agreements provide for the conservation, transfer and exchange of Colorado River water diverted for beneficial consumptive use among Southern California water agencies, in particular IID, Coachella Valley Water District ("CVWD"), Metropolitan Water District of Southern California ("MWD"), and San Diego County Water Authority ("SDCWA") (collectively "Water Agencies"). The agreements were negotiated and executed to resolve longstanding disputes under the federal and state laws, court decisions and contracts comprising the Law of the River which

governs the diversion and use of Colorado River water by states through which the river runs, including California.

Validation of the QSA agreements is supported in the current proceedings on remand from the Court of Appeal (*Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758 ("*QSA Cases*")) by each of the Water Agencies, by Vista Irrigation District and the City of Escondido, parties to one of the QSA agreements, and by the State of California through the Department of Water Resources ("DWR") and the Department of Fish and Game ("DFG").[1]

Validation is opposed in the current proceedings on remand by the County of Imperial ("County"), the Imperial County Air Pollution Control District ("Air District"), an environmental organization named Protect Our Water and Environmental Rights ("POWER"), and Imperial Valley landowners Cuatro Del Mar ("Cuatro"), Morgan/Holtz parties, and Barioni/Krutzsch parties.[2] In IID's validation action, they challenge the procedural and substantive legality of the QSA agreements and the adequacy of the environmental documents prepared for the QSA agreements under the California Environmental Quality Act ("CEQA"). Additionally, in two separate actions which have been coordinated with IID's validation action, the County and POWER each challenge the environmental documents under CEQA. A main concern of the environmental challenges is the impact of IID's water conservation and transfers actions on the Salton Sea, an inland water body that has been sustained primarily by irrigation drainage from the IID and CVWD service areas.

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[1] DFG has recently been renamed the Department of Fish and Wildlife but will continue to be identified as DFG in this ruling, consistent with the references to the agency throughout the administrative and court records.

[2] All of the parties filing answers in IID's validation action are identified in the opinion of the Court of Appeal in *QSA Cases,* supra, 201 Cal.App.4th at p. 791. Only the parties named identified above have appeared in the current trial proceedings on remand from the Court of Appeal.

BACKGROUND[3]

The Water Agencies

The IID is a public agency organized in 1911 under the Irrigation District Act, Water Code section 20500 et seq. It holds state and federal rights to divert and distribute Colorado River water to approximately 500,000 acres of agricultural lands and nine cities within its service area, which includes Imperial County and parts of San Diego and Riverside Counties. IID diverts Colorado River water at Imperial Dam and conveys the water through the All American Canal ("AAC") for delivery to agricultural and residential customers through a 1,667-mile network of canals. IID also operates a drainage system for irrigation tailwater (surface runoff) and tile water (subsurface drainage) that discharges to the Salton Sea either directly or via the Alamo and New Rivers. Approximately 98 percent of the water delivered by IID is used for agricultural purposes; approximately 2 percent is used for municipal and residential purposes.

CVWD is a public agency organized in 1918 under the County Water District Act, Water Code section 30000 et seq. It serves approximately 640,000 acres in eastern Riverside County and in small parts of San Diego and northern Imperial Counties with various sources of water, including groundwater and imported water. It holds rights to Colorado River water which is diverted at Imperial Dam and conveyed through the AAC and the Coachella Canal, a branch of the AAC. More than 98 percent of the Colorado River water is used for agricultural purposes, and agricultural drainage empties to the Salton Sea either directly or through a storm water channel.

MWD is a public agency organized in 1928 under the Metropolitan Water District Act, Chapter 429 of the Statutes of 1927. It delivers water to its 26

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[3] Detailed background is provided in *QSA Cases* and the Statement of Decision ("SOD") issued by the trial court on January 13, 2010, in these coordinated cases.

members, cities and municipal water agencies providing drinking water to approximately 17 million people in Southern California coastal areas. The water delivered by MWD, which constitutes about 60 percent of the water used in MWD's service area, is supplied pursuant to MWD's contracts with the California Department of Water Resources for water from the State Water Project and MWD's contracts for Colorado River water with the United States Secretary of the Interior. MWD diverts Colorado River water at Lake Havasu and conveys the water to its service area in the Southern California coastal areas via the Colorado River Aqueduct ("CRA")

SDCWA is a public agency organized in 1944 under the County Water Authority Act, chapter 545 of the Statutes of 1943; it became one of MWD's 26 members in 1946. SDCWA provides wholesale water supplies to its members, public agencies delivering water to retail customers or other public agencies in San Diego County for municipal and agricultural uses. The majority of all water used in SDCWA's service area is imported, and SDCWA obtains all of the imported water through purchases from MWD. Most of the purchased water is diverted by MWD from the Colorado River.

California Rights to Colorado River Water

As described below, the QSA agreements quantify, by consent, the amount of Colorado River water that IID, CVWD and MWD may each divert annually for beneficial consumptive use during a 75-year period beginning in 2003; provide for the conservation of specified portions of IID's quantified amount; and authorize transfers and exchanges of the conserved amounts to and between CVWD, MWD, SDCWA and other parties. The historical circumstances leading up to these agreements begin in the 1920s with the apportionment of Colorado River water for the diversion and beneficial consumptive use of the seven states in the Colorado River Basin. In 1922, acting pursuant to congressional authorization, these states drafted a compact which (1) divided the basin into two parts -- the Upper Basin

states of Wyoming, Colorado, Utah and New Mexico and the Lower Basin states of Nevada, Arizona and California -- and (2) apportioned 7.5 million acre feet per year ("MAFY") to each part. (AR4/1A/1/1.)[4]

Building on the 1922 Colorado River Compact, Congress enacted the Boulder Canyon Project Act of 1928 ("BCPA"; AR 4/1A/1118). The BCPA authorized the United States Secretary of the Interior to construct facilities for the storage and transport of Colorado River water and to contract for the delivery of the river water for irrigation and domestic uses by entities and persons in the seven Colorado River Basin states. The BCPA conditioned the Secretary's activities on the ratification of the 1922 Colorado River Compact by at least six of the seven Colorado Basin states and on an agreement by the California Legislature to limit the state's consumptive use of Colorado River water to 4.4 MAFY plus one-half of any water exceeding the Lower Basin's 7.5 MAFY apportionment under the 1922 compact.

By 1929, the BCPA conditions were satisfied: six states had ratified the 1922 Compact, and the California Legislature had enacted the California Limitation Act of 1929. (Stats. 1929, ch. 16.) The BCPA became effective by presidential proclamation on June 25, 1929, and the Secretary commenced construction of facilities for the storage and transport of river water, including Hoover Dam and the AAC. The Secretary also entered into contracts for the delivery of Colorado River water pursuant to section 5 of the BCPA.

The United Supreme Court sustained California's BCPA apportionment in 1963, decreeing that California was entitled to 4.4 MAFY when Colorado River mainstream water was available to satisfy the Lower Basin apportionment of 7.5 MAFY and to 50 percent of any surplus over 7.5 MAFY declared by the Secretary. (*Arizona v. California* (1963) 373 U.S. 546, 565, 376 U.S. 340, 342.) The court

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[4] Citations to Administrative Record 1 and 3 are in the following form: AR#/CD#/Beginning page#/Pincite. Citations to Administrative Record 4 are in the following form: AR#/CD#/Tab#/Pincite.

also decreed that the Secretary was authorized to distribute any unused portion of Arizona's or Nevada's BCPA apportionment to the other Lower Basin states for consumptive use. (376 U.S. at p.343.) The court concluded that the Secretary was authorized to distribute California's apportionment through section 5 contracts pursuant to BCPA provisions, not state laws governing appropriative priorities. (373 U.S. at pp. 585-588.)

The section 5 contracts negotiated by the Secretary with California public agencies incorporated the provisions of the California Seven-Party Agreement of 1931 (AR3/15/501786), which prioritized the diversion of Colorado River water by the seven parties signing the agreement, including IID, CVWD and MWD. The priorities established by the agreement and incorporated into the section 5 contracts are set forth in the table at pages 22-23 of the Statement of Decision ("SOD") filed herein on January 13, 2010. (See also AR3/10/101804_0118.)

The Seven-Party agreement specified an aggregate quantity of water that could be diverted by agencies having Priorities 1, 2, 3a and 3b and an aggregate quantity of water that could be diverted by agencies having priorities 6a and 6b as follows:

- Agencies having Priorities 1 through 3 were allocated the right to divert an aggregate quantity of up to 3.85 MAFY: Palo Verde Irrigation District ("PVID") was assigned Priority 1 for the irrigation of 104,500 acres; Yuma Project Reservation Division was assigned Priority 2 for the irrigation of no more than 25,000 acres; IID and CVWD were assigned Priority 3a; and PVID was assigned Priority 3b for the irrigation of 16,000 acres of Palo Verde Mesa lands.
- Agencies having Priorities 6a and 6b were allocated the right to divert up an aggregate quantity of up to 0.3 MAFY: IID and CVWD were assigned Priority 6a for Imperial and Coachella Valley lands; PVID was assigned Priority 6B for 16,000 acres of mesa lands.

Because the Seven-Party agreement did not quantify the amounts that could be diverted by IID and CVWD within the aggregate quantity of 3.85 MAFY for Priorities 1 through 3 or within the aggregate amount of 0.3 MAFY for Priority 6, the agreement set the stage for disputes between IID and CVWD over the quantities of Colorado River water each was entitled to individually divert. The disputes continued despite a 1934 Compromise Agreement between IID and CWD subordinating CWD's diversion rights to those of IID. (AR3/5/53184.)

The Seven-Party Agreement also set the stage for disputes between IID, CVWD and MWD by prioritizing the diversion of 5.362 MAFY, 0.962 MAFY more than California's apportionment of 4.4 MAFY under the BCPA. The agreement authorized diversions of 4.4 MAFY by agencies having Priorities 1, 2, 3a, 3b, and a fourth priority entitling MWD to divert 0.55 MAFY. Priority 5, allocating a diversion of 0.662 MAFY by MWD, and Priorities 6a and 6b, allocating an aggregate diversion of 0.3 MAFY by IID, CVWD and PVID exceeded California's BCPA apportionment and could be satisfied pursuant to the BCPA and the decree in *Arizona v. California* only if sufficient water was made available by the Secretary from any BCPA apportionments unused by Nevada or Arizona, from water declared to be surplus by the Secretary and/or from any higher priority users who did not divert their full entitlement. In the absence of other Lower Basin States' unused apportionments, surplus water and/or unused higher priority entitlements, California would be limited to a total of 4.4 MAFY, and the quantity of Colorado River water available for diversion by MWD on a dependable basis would be restricted to 0.55 MAFY under Priority 4; it would be unable to divert any of its fifth priority allocation of 0.662 MAFY. In these circumstances, the availability of Colorado River water for delivery to MWD's members in the urban coastal areas of Southern California, including SDCWA, was uncertain and unreliable.

State Water Resource Control Board Decision 1600 and Order WR 88-20

In 1984, the State Water Resources Control Board ("SWRCB") adjudicated a complaint against IID, alleging that IID's water use was wasteful and unreasonable because agricultural runoff from IID was causing the level of the Salton Sea to rise and flood adjacent property. The SWRCB, cognizant of California's limited apportionment of 4.4 MAFY of Colorado River water and the availability of practical conservation measures that could be used to partially satisfy Southern California needs, issued Decision 1600, determining that IID's failure to implement sufficient water conservation measures to avoid wasteful runoff was unreasonable and constituted a misuse of water in violation of section 2 of article X of the California Constitution and Water Code section 100. (AR3/18/526917/526939. See AR3/15/501325.) The SWRCB ordered IID to develop a comprehensive water conservation plan. (*Ibid.*)

In subsequent hearings, the SWRCB reviewed IID's conservation efforts and issued Order WR 88-20, directing IID to submit a plan to implement conservation measures sufficient to conserve at least 100,000 acre feet per year. (AR3/15/501431.) The SWRCB identified conserved water transfers as a potential source of funding for the conservation measures identified by IID during the hearing and noted that a transfer of conserved water from IID's service area to urban areas of Southern California would be beneficial. (*Ibid.*)

In 1988, pursuant to Order WR 88-20, IID entered an agreement providing that MWD would fund certain conservation projects carried out by IID in its service area and, in return, would be entitled to divert an amount of Colorado River water equal to the amount of water conserved by the conservation projects, approximately 100,000 acre feet. (AR3/1/11426.) In a 1989 agreement between IID, CVWD, MWD and PVID, CVWD and PVID agreed, under specified conditions, to forebear taking the conserved water and to allow it to cascade through the priority system of the Seven Party Agreement to MWD. (AR3/1/11378.)

The Transfer Agreement between IID and SDCWA

In the early 1990s, SDCWA became concerned about the reliability of water supplies provided by MWD and undertook to diversify its supplies. (AR3/16/508212/508309, 508321, 508325, 508335.) To that end, SDCWA contacted IID, the largest single holder of high priority rights to divert Colorado River water in California. (AR3/12/206392/207020; AR3/16/508212/508334.)

By 1998, the two agencies had negotiated an agreement that provided for IID to transfer to SDCWA up to 300,000 AFY of water that was conserved by IID with on-farm and system improvements funded by SDCWA. (AR3/10/100009/100010.) The transfer agreement enabled SDCWA to obtain a reliable source of water for its service area and enabled IID to implement another long-term water conservation program pursuant to Decision 1600 and Order WR 88-22 of the SWRCB while retaining its priority among Colorado River water users.

IID and SDCWA jointly petitioned the SWRCB, seeking approval of the water transfer and changes in IID's water right permit, including a change in place of use, point of diversion and use from agricultural to municipal. (AR3/15/500001-87.)

MWD and CVWD, among others, challenged the petition, but in light of recent directives from the Secretary to California diverters of Colorado River water, became involved in negotiations to resolve disputes over their respective rights to divert Colorado River Water and to reduce California's use of Colorado River water to the state's apportionment of 4.4 MAFY under the Law of the River. (See *QSA Cases*, 201 Cal.App.4th at p. 788.) Ultimately, MWD and CVWD dismissed their protest and joined an amended petition during the SWRCB proceeding. (*Ibid.*)

Federal Enforcement of California's BCPA Apportionment Begins

In the years following *Arizona v. California*, entities and individuals with section 5 contract rights to use of Colorado River water in California diverted water in excess of the BCPA apportionment, generally relying on unused portions of the

BCPA apportionments of Nevada and Arizona. By the 1990s, however, both Arizona and Nevada were approaching full use of their apportionments, the demands of California users for Colorado River water were increasing, and surplus water made available by the Secretary was required to satisfy their demands. By 1996, the Secretary concluded that California's increasing use of Colorado River water for agricultural purposes was exceeding the beneficial consumptive use limits of the BCPA and was placing the apportionments of other Colorado River Basin states at risk. (AR4/2/55/8333; 4/2/65/9427; 4/2/71/10608; 4/3/116/11748; AR4/3/248/15493.)

To reduce California's dependency on surplus Colorado River water for its consumptive water needs and to protect other Colorado River Basin states from future shortages, the Secretary determined that California users would be required to reduce their use of Colorado River water to California's BCPA apportionment of 4.4 MAFY. (*Ibid.*) The Secretary specifically identified IID as a major user of Colorado River water which needed to reduce its diversions for agricultural purposes through various conservation efforts and transfers of conserved water to urban users similar to the IID's 1988 transfer agreement with MWD and pending transfer agreement with SDCWA. (*Ibid.*)

Key Terms

Negotiations in response to the Secretary's directives began between IID, CVWD and MWD, joined by the California Department of Water Resources and the United States Department of the Interior. The negotiations resulted in a document dated October 15, 1999, entitled "Key Terms For Quantification Settlement Among The State Of California, IID, CVWD, and MWD" ("Key Terms"). (AR4/2/103/11498-11542.) The Key Terms set forth proposed terms of a settlement of disputes among IID, CVWD and MWD relating to their use of Colorado River water as well as plans to reduce California's use of Colorado River water. Among the proposed terms of settlement were terms quantifying and capping IID's and CVWD's

unquantified Priority 3 and 6 water rights under the Seven Party Agreement of 1931 and terms providing for transfers of conserved water by IID to MWD, CVWD and SDCWA during a 75-year quantification period. The quantification period was set to commence upon a number of conditions precedent, including the completion of appropriate environmental review.

Thereafter, IID, CVWD, MWD, SDCWA, other Colorado River water rights holders, and state and federal officials began negotiations for agreements pursuant to the Key Terms, and environmental review was undertaken.

California's Colorado River Water Use Plan

In further response to the Secretary's directives, the California Legislature charged the Colorado River Water Board of California with the development of a plan to ensure that California can live within the state's apportionment of Colorado River water. (Stats. 1998, ch. 813.) A draft plan titled California's Colorado River Water Use Plan was published in 2000. (AR3/7/72184/72187.)

Reflecting the Key Terms, the plan sought to provide a framework for California to satisfy its annual water supply needs within its annual apportionment of Colorado River water. Its core components included cooperative water conservation/transfers from agricultural to urban uses and further quantification of the third priority of the Seven-Party Agreement through agreements among Colorado River water right holders based on the Key Terms.

In 2001, the Secretary adopted Interim Surplus Guidelines ("ISG") to recognize California's plan to reduce its reliance on surplus deliveries of Colorado River water and to assist California in moving towards its apportionment during a 15-year period. (AR3/22/710583). To that end, the ISG provided for the allocation of surplus water to California users of Colorado River water during the 15-year period as long as California was making progress in reducing its use of Colorado River water in accordance with benchmarks specified in the ISG. In addition, the

ISG would be suspended if the QSA and related agreements were not executed by IID, CVWD, MWD and SDCWA by December 31, 2002.

Environmental Review

While the QSA agreements were being negotiated and the petition for approval of the transfer agreement between IID and SDCWA was pending before the SWRCB, environmental review of the agreements was untaken.

- QSA Program Environmental Impact Report ("QSA PEIR")

The QSA PEIR evaluated the QSA project, a series of water transfers, water exchanges, water conservation measures and other actions identified in the QSA over a period of 75 years. The terms of these measures and actions were set forth in multiple agreements, including the 12 agreements which are the subject of IID's validation action. The QSA itself was the proposed agreement among CVWD, IID and MWD to budget their portion of California's apportionment of Colorado River water among themselves and to make available to CVWD, MWD, SDCWA and others water conserved in the IID service and by lining the All American Canal. (AR3/12/200746-47.)

The QSA PEIR addressed the aggregate impacts of implementing multiple individual program components (including major components of California's Colorado River Water Use Plan) and providing part of the mechanism for California to reduce its diversion of Colorado River water to the state's normal year apportionment of 4.4 MAFY via water exchanges, water transfers, and water conservation measures among other actions. (*Id.* at pp. 200746-48)

CVWD, IID, MWD and SDCWA served as co-lead agencies in the preparation of the PEIR. A draft PEIR was made available for public review and comment beginning in January 2002. Responses to the public comments were prepared, and a final PEIR was completed and certified by all co-lead agencies in June 2002 without approving the QSA project, which was still being negotiated. Subsequently, in December 2002, an addendum to the PEIR was prepared and

approved to address what were determined to be minor changes arising from the QSA negotiations. In 2003, a second addendum was prepared to address further changes to the PEIR which were also considered to be minor and certified the PEIR, as supplemented and modified by the addendum; each co-lead agency also adopted CEQA findings and a statement of overriding considerations and a mitigation monitoring and reporting report before approving the project.

- Water Conservation and Transfer Project Environmental Impact Report ("Transfer EIR")

The project evaluated in the Transfer EIR involved implementation by IID of a 75-year water conservation program to conserve up to 300,000 acre feet per year of Colorado River water and the transfer of the conserved water by IID to SDCWA, CVWD, and/or MWD; the terms of the conservation and transfer activities were set by the 1998 agreement between IID and SDCWA for the transfer of conserved water and in the QSA. The project also included a Habitat Conservation Plan ("HCP") addressing federal and state requirements for the protection of endangered species.

IID served as lead agency for the preparation of the Transfer EIR. An Environmental Impact Statement (EIS) was jointly prepared by the United States Bureau of Reclamation under the National Environmental Policy Act ("NEPA"). A draft EIR/EIS was circulated for public comment in January 2002. Responses to the public comments were prepared, and IID certified the Final EIR on June 28, 2002.

An addendum to the Transfer EIR was prepared and approved in December 2002 to address a change in the transfer agreement, providing for the transfer of 100,000 acre feet of conserved water from IID to CVWD and/or MWD. The change was made pursuant to a decision by the SWRCB in December 2002, conditionally approving the petition for approval of the 1998 transfer agreement between IID and SDCWA, as amended to include CVWD and MWD.

A second addendum was prepared to make what were determined to be minor changes in the transfer schedule set forth in the transfer agreement and to refine mitigation measures for the Salton Sea imposed by the SWRCB in its decision conditionally approving the transfer agreement. In October 2003, IID approved the addendum; certified the Transfer EIR, as modified and supplemented by the addendum; and adopted findings and a statement of overriding considerations before approving the project.

ANALYSIS

In considering the validity of the 12 QSA Agreements submitted by IID for validation pursuant to Water Code section 22762 and Code of Civil Procedure section 860 et seq., the court reviews the record of proceedings before IID's Board of Directors when it approved the agreements and determines whether the Board's approvals were arbitrary, capricious or lacking in substantial evidentiary support. (See *Morgan v. Community Redevelopment Agency* (1991) 231 Cal.App3d 243, 258.) Pursuant to this limited and deferential review, the court must determine whether the 12 agreements are within IID's authority to enter and perform, whether the agreements are otherwise consistent with substantive legal requirements, and whether the Board complied with procedural requirements in approving the agreements. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 574, 577, citing *Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 212).) Should the parties opposing validation of the 12 agreements establish a substantive or procedural error with respect to any of the agreements, the court may invalidate the agreements if the extent that the error affects the parties' substantial rights. (Code Civ. Proc. § 866,)

IID's Authority

IID's authority to enter the 12 QSA agreements was adjudicated in the SOD issued January 13, 2010, and the judgment entered February 11, 2010, incorporating the SOD. At page 12 of the SOD, the court determined that IID is a

public irrigation district with rights under state land federal law and contracts to divert Colorado River water for consumptive use and that IID was a party to the QSA agreements submitted for validation. At page 47 of the SOD, the court found no basis for concluding that the IID Board lacked authority to proceed with an arrangement similar to the agreements, that IID had violated its trust obligations by entering the agreements, or that IID was required to allocate conserved water to landowners prior to proceeding with the agreements. These determinations and findings were not appealed and are now final and binding on this court. No parties have sought to challenge these findings in these proceedings on remand from the Court of Appeal.

Accordingly, the court finds that IID had authority to enter into and perform the 12 QSA agreements under the statutory and case authorities discussed in IID's Phase IA Opening and Response Briefs (AA:33:192:8806, 8867-8868; AA:35:210:9428, 9512-9527).

Ultra Vires Claims

When the IID Board of Directors approved the QSA agreements pursuant to Resolution No. 10-2003 on October 2, 2003, some of the agreements were in draft or outline form. Therefore, in adopting the Resolution, the Board "approve[d] the QSA, on the terms and conditions set forth in the agreements and documents set forth on Exhibit D [List of QSA Agreements] attached hereto." The Board further "authorizes[d] the President or Vice President and the Secretary to sign the QSA and all related agreements, upon determination by the General Manager and the Chief Counsel that said agreements are substantially in the same form and substance as those identified on Exhibit D [List of QSA Agreements] and submitted to the Board for review prior to approval of this Resolution." (AR 3/3/30110/30105, 30112, 30116-30118, 30130.) The President and Secretary executed the final versions of the QSA agreements, including the JPA, on October 10, 2003, after the General Manager and Chief Counsel determined that the agreements were

substantially in the same form and substance as those identified in Exhibit D attached to Resolution No. 10-2003. (30080.)

Cuatro and the Barioni/Krutzsch parties contend that the Board's delegation was ultra vires and rendered the QSA agreements void in two respects. First, they argue that the Board, in directing the General Manager and Chief Counsel to determine that the agreements were in substantially the same form and substance as those previously submitted to the Board, improperly delegated the Board's legal authority and responsibility to make a determination that involves an exercise of judgment and discretion rather than a ministerial function.

Second, Cuatro and the Barioni/Krutzsch parties argue that the QSA-JPA executed by the Board's officers on October 10, 2003, was materially different from the outline of the JPA approved by the Board in Resolution No. 10-2003. In particular, they claim that, in contrast to the outline provided to the Board prior to its approval, the JPA executed by IID's officers did not obligate the State of California to restore the Salton Sea and to provide funding for the restoration of the Sea and for mitigation of QSA impacts on the Sea in excess of specified amounts to be paid by IID, SDCWA and CVWD. In support of these arguments, Cuatro seeks to augment the administrative record with declarations by Bruce Kuhn and Rudy Maldonado, former members of the IID Board majority approving the QSA agreements and adopting Resolution No. 10-2003.

Cuatro raised its ultra vires arguments on appeal from the judgment entered February 11, 2010. (*QSA Cases*, 201 Cal.App.4th at pp. 811-812.) The Court of Appeal declined to consider Cuatro's arguments after finding that Cuatro had failed to raise them in the trial court by way of a properly pleaded affirmative defense and had abandoned the claims by failing to list them among the issues to be litigated in Phase 1A of the trial and by not including them in its trial brief. (*Id.*, at pp. 812-814.)

On remand from the Court of Appeal, Cuatro seeks leave to amend its answer to the validation complaint by adding:

- A Fourteenth Affirmative Defense, alleging that the JPA signed was substantially different from the agreement approved by the Board, and
- A Fifteenth Affirmative Defense, alleging that the Board lacked authority to delegate its duty to determine whether the JPA was substantially in the same form and substance as that presented to the Board on October 2, 2003, and thus execution of the JPA on the basis of that determination was ultra vires and invalid.

Cuatro's failure to properly plead and argue its ultra vires claims at trial prior to appeal, combined with the Court of Appeal's refusal to consider the claims, generally forecloses Cuatro from amending its answer to plead such an affirmative defense upon remand. The Barioni/Krutzsch parties are similarly foreclosed. Such failure to timely and properly raise the claims in pleadings and at trial generally has waived the claims.

However, as indicated in the court's minute order taking this matter out of submission and requesting further briefing, a possibility that the waiver could be excused was presented by a draft of the QSA-JPA dated October 2, 2003, appended to the declaration by John Carter, IID's former chief counsel, during the appellate proceedings. Mr. Carter's declaration, explaining that the October draft had been inadvertently omitted from the administrative record, prompted Cuatro to argue in the Court of Appeal that the QSA-JPA was ultra vires because material and significant changes were made to the agreement after IID's Board approved the draft outline of the agreement on October 2, 2003. (*QSA Cases*, 201 Cal.App.4th at p. 811.) Although the Court of Appeal declined to consider Cuatro's argument for the first time on appeal, (*Id.*, at pp. 813-914), later in its opinion it broadly indicated that further proceedings in the trial court on remand "may (or may not) include litigation over the significance of the draft Joint Powers Agreement." (*Id.*, at

p. 824.) Thus, to determine whether the October 2 draft of the QSA-JPA provided a basis for Cuatro's proposed Fourteenth Affirmative Defense -- a basis that was omitted from but should have been included in the administrative record before the trial court -- the court requested additional briefing specifying whether or not there were substantive material differences between the October 2 draft and the QSA-JPA signed by IID's officers on October 10, 2003.[5]

The additional briefs filed by the parties in response to the court's request provide comprehensive and detailed comparisons of the October 2 October 2 draft and October 10 executed QSA-JPA. The comparisons firmly establish that the two version of the agreement "are substantially in the same form and substance" and that IID's General Manager and Chief Counsel did not exceed the scope of the authority delegated by the Board to determine that the two versions "are substantially in the same form and substance."[6] Contrary to the contentions of

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[5] The court did not request additional briefing with respect to Cuatro's proposed Fifteenth Affirmative Defense because prior briefing had firmly established that the determination delegated by IID Board to its General Manager and Chief Counsel in Resolution 10-2003 was properly made pursuant to Water Code sections 7 and 22230. (See *Thomson v. City of Glendale* (1976) 61 Cal.App3d 378, 384.) Contrary to the contentions of Cuatro and the Barioni/Krutzsch parties, the Board did not delegate its quasi-legislative judgment to the General Manager and Chief Counsel. Instead, the Board exercised its quasi-legislative judgment in approving the QSA agreements on the basis of drafts and outlines of the agreements previously submitted to the Board. The Board's quasi-legislative approval circumscribed the determination delegated to the General Manager and Chief Counsel: in determining whether the final QSA agreements were substantially in the same form and substance as the drafts and outlines of the agreements that had been submitted to the Board for review, the General Manager and Chief Counsel were measuring the consistency of the final agreements with the Board's approval of the QSA agreements, as established by the form and substance of the drafts and outlines submitted prior to the Board's approval; they were filling in the details of the Board's quasi-legislative decision. (See *Kugler v. Yocum* (1968) 69 Cal.2d 371, 376.)

[6] Cuatro, the Barioni/Krutzsch parties and the Morgan/Holtz parties construe language at pages 17, 18, 35-36 and 42 of the SOD filed January 13, 2010, as findings that material changes were made in the QSA-JPA between October 2 and October 10, 2003. Upon review, the court finds that the language of the SOD does not support any such findings. Nor could such findings have been made in the absence of the October 2 draft QSA-JPA from the court record. The SOD finds at page 36 that "the lack of any draft QSA JPA Agreement in the administrative record at the time of the IID Board meeting . . . show that material portions of the QSA JPA Agreement were still being negotiated days after the October 2, 2003, approval by the IID Board."

Cuatro and the Barioni/Krutzsch parties (and similar contentions by the Air District and the Morgan/Holtz parties):

- The state was not relieved of a commitment to undertake restoration of the Salton Sea by a change in the definition of "restore" and "restoration" in section 1.1(c) of the agreement. The October 10 executed agreement replaced a generic definition of the terms with a definition referring to legislation coordinating the QSA agreements with the state's undertaking to restore the Salton Sea. The legislation delineated the scope of the state's responsibility for Salton Sea restoration and was consistent with the generic definitions in the October 2 draft. (See Stats. 2003, ch. 611 (S.B. 277, enacting Fish & Game Code § 2931, subds. (a) and (b) regarding state's undertaking to restore Salton Sea ecosystem and wildlife dependent on ecosystem); ch. 612 (A.B. 317, enacting Fish & Game Code § 2081.7, subd. (e), providing for study of restoration of Salton Sea ecosystem and protection of wildlife dependent on ecosystem); ch. 613 (S.B. 654, § 3(c) (restoration allocating future responsibility for Salton Sea restoration to the state).) The IID Board was well informed about that legislation prior to and during its October 2 meeting at which it adopted Resolution No. 10-2003. (AR3/3/30146; AR3/2/20165/20166, 20168; AR3/4/40003/40006; AR3/2/20070/20074.)
- The voting arrangement provided in sections 9.2, 10.1, and 3.1 of the October 10 executed QSA-JPA do not materially change provisions of the October 2 draft by providing the state with a power to veto any proposed funding in excess of the caps on the funding obligations of the Water Agencies for mitigation of Salton Sea impacts resulting from implementation of the QSA agreements. Sections 9.2, 10.1 and 3.1 of executed agreement relate to the approval and allocation of costs and debt incurred for environmental mitigation measures described in the Conservation and Transfer EIR/EIS, as specified in the QSA legislation. (See Stats. 2003, ch. 613 (S.B. 654, § 3(b)-3(d).) The three

sections provide for an affirmative vote of three of the four JPA commissioners (IID, CVWD, SDCWA, DFG), including the commissioner representing the state (DFG). This voting arrangement is consistent with the October 2 draft and does not provide the state with a veto because (1) section 10.1 of the October 2 draft required an equivalent arrangement, unanimous approval of the JPA budget by the four commissioners; (2) neither section 9.2 nor section 3.1 specified a voting arrangement, expressly or implicitly leaving the matter to be determined by the JPA, and (3) the sections either expressly or implicitly included language consistent with a covenant of good faith and fair dealing that inheres in every contract and either require the commissioners to make their determinations reasonably or prevent the commissioners from withholding approval unreasonably. (See *Pease v. Brown* (1960) 186 Cal.App.2d425, 431.) Thus, the October 10 executed QSA-JPA detailed and clarified voting provisions of the October 2 draft but did not make material substantively change any voting arrangements in the October 2 draft.

- The state's responsibility and liability for the environmental mitigation costs in excess of the caps on the costs payable by IID, CVWD and SDCWA is substantively the same in the October 10 executed agreement as it was in October 2 draft: Section 9.2 of the executed agreement provides that the "State is solely responsible for the payment of the costs of and liability for the 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." Section 9.2 of the October 2 draft agreement incorporated comparable language set forth in the draft Environmental Cost Sharing Agreement, which was attached as an exhibit to the October 2 draft. In addition, a sentence in section 9.2 of the October 2 draft -- providing for the

State to seek an appropriation with the support of IID, CVWD and SDCWA to satisfy any State obligation for environmental mitigation costs when the costs paid by IID, CVWD and SDCWA were within $5,000,000 of the cap on their payments -- was moved without substantive change to section 14.2 of the executed agreement.

Finding no material substantive differences between the draft and executed QSA-JPA, the court concludes that the draft QSA-JPA cannot provide a basis for relieving Cuatro of its waiver of an ultra vires defense before and during the Phase 1A trial. Finding no factual or legal basis to support Cuatro's proposed Fourteenth and Fifteenth Affirmative Defenses, the court denies Cuatro's request to amend its answer to the validation action by adding the proposed defenses.[7]

Brown Act Compliance

On remand, the court must determine whether the IID Board of Directors approved the QSA agreements on October 2, 2003, in compliance with the open meeting requirements of the Ralph M. Brown Act, Government Code section 54950 et seq. This issue was not decided by the trial court prior to appeal or by the Court of Appeal. (See SOD filed January 13, 2010, at p. 17; *QSA Cases*, 201 Cal.App.4th at pp. 815, fn. 29, 828.)

Evidence in the administrative record facially supports IID's claim that IID Board of Directors adopted Resolutions Nos. 9-2003 and 10-2003, approving the QSA agreements, in with compliance with relevant provisions of the Brown Act. Pursuant to Government Code sections 54956, the Board considered and acted on the QSA agreements at a special meeting noticed with an agenda describing the

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[7] Cuatro's request set forth in footnote 2 of its Opening Trial Brief filed September 11, 2012, to augment the administrative record to include the declarations of Bruce Kuhn and Rudy Maldonado, is denied. The court sustains the Water Agencies' joint objection, filed October 12, 2012, establishing that the declarations constitute inadmissible extra-record evidence. The court also sustains the Water Agencies' joint objection, filed October 12, 2012, to POWER's request for judicial notice of the same declarations by Bruce Kuhn and Rudy Maldonado on the grounds that the declarations constitute inadmissible extra-record evidence, lack relevance, and cannot establish the truth of the declarations' contents.

matters to be considered: approval and certification of the CEQA documents for the projects related to the QSA agreements, adoption of CEQA findings and mitigation and monitoring reports for the projects, approval of a settlement of IID's lawsuit against the United States on the terms set forth in the Colorado River Water Delivery Agreement, and approval of a stipulation and order for dismissal of the lawsuit. (AR3/3/30129-130.)

Pursuant to Government Code section 54954.3, members of the public were provided an opportunity to ask questions during presentations to the Board regarding the QSA agreements and projects and to comment before the Board considered and acted on the agreements and projects. (AR3/3/30101-103.) Thereafter, pursuant to Government Code section 54953, subdivision (c), the Board publicly considered and voted on the items described in the meeting agenda. (AR3/3/30104-30106, 30107-30109, 30110-30112.)

The Morgan/Holtz parties contend that the Board did not comply with the provision of the Brown Act requiring that documents distributed to Board members must be made available to members of the public attending the meeting. (See former Gov. Code § 54957.5, subdivision (a), in effect on October 2, 2003.) While acknowledging that they had received drafts of QSA agreements at the meeting (AR3/7/70025), the Morgan/Holtz parties assert that subdivision (a) required distribution of the final QSA agreements, a requirement that was not and could not be met because the final QSA agreements had not been completed at the time of the meeting. (See Morgan/Holtz Parties Closing Remand Brief, filed October 12, 2012, p. 33.)

The Morgan/Holtz parties also contend that the Board failed to comply with an open meeting requirement adopted under Government Code section 54953.7, a provision of the Brown Act authorizing a legislative body of a local agency like IID to impose requirements upon itself which allow greater access to its meetings than those prescribed by the Brown Act. According to the Morgan/Holtz

parties, the Board imposed such a requirement on itself when it delegated to IID's General Manager and Chief Counsel the task of determining that the final versions of the agreements to be executed had substantially the same form and substance as the drafts submitted to the Board prior to its approval of the agreements. That delegation, the Morgan/Holtz parties reason, limited the execution of final QSA agreements to those that the public were able to review at a subsequent public meeting for the Board's consideration of the final agreements.[8] (See Morgan/Holtz Parties Closing Remand Brief, filed October 12, 2012, pp. 29-31.)

Both of these contentions by the Morgan/Holtz parties appear to be premised on a view that the Board was required to review and approve, in a public meeting held prior to execution of the final QSA agreements, any changes to the QSA agreements made in the course of finalizing the drafts approved by the Board on October 2, 2003. According to this view, the delegation made by the Board in its approval of the QSA agreements violated the open meeting requirements of the Brown Act unless the Board held a public meeting where members of the public could comment on the changes to the QSA agreements before the Board considered whether to approve the changes.

The contentions of the Morgan/Holtz parties and the premise on which the contentions are based misapply the provisions of the Brown Act to the Board's delegation procedure for finalizing and executing the QSA agreements. The Brown Act provisions required IID to make available to the public only those documents distributed to the Board at a public meeting, i.e., the drafts and outlines of the QSA agreements. The Brown Act provisions did not govern whether the Board could properly delegate authority to its officers and staff to implement its public approval

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[8] This contention raises an issue not previously raised by the Morgan/Holtz parties in their pleadings, included in the list of issues for trial issued September 24, 2009, or in any of the parties' previous briefs. Therefore, the Morgan/Holtz parties have waived the contention and the issue on which it is based. Nonetheless, the court considers the merits of the contention because of its close relationship to the contention based on Government Code section 54957.5.

of the QSA agreements on October 2, 2003, or whether the Board was required to review the results of its delegation at meeting where members of the public could comment on the final agreements prior to their execution. The legality of the Board's delegation and its performance by its officers and staff raise issues of ultra vires, not open meeting requirements.[9]

The Air District contends that the IID Board violated requirements of the Brown Act for closed sessions in Government Code sections 54954.2, 54954.5, 54956 and 54957.7 by secretly discussing and making a determination regarding the QSA JPA in a closed sessions on October 6 or 7, 2003, after the Board had approved the QSA agreements at their special meeting on October 2, 2003. The Air District also contends that the IID Board failed to make available to the public at its October 2 meeting the October 2 draft of the QSA JPA that were distributed to the Board at the October 2 meeting, in violation of Brown Act requirements in Government Code section 54957.5. In support of these contentions, the Air District relies on the declaration of John Carter, IID's counsel, which was filed in the Court of Appeal in support of the Water Agencies' petition for a writ of supersedeas. Mr. Carter's declaration identified the October 2 draft QSA JPA omitted from the administrative record, as discussed above in this ruling, and also described the Board's acceptance of a revised QSA JPA at closed sessions of the Board on October 6 or 7, 2003.

Mr. Carter's declaration does not provide relevant evidentiary support for the Air District's contention. The declaration, composed on February 10, 2010, almost seven years after the Board's approval of the QSA agreements, fails to establish that the IID Board deliberated upon and took action with respect to the October 2 draft of the QSA JPA in a closed session of a regular meeting on October

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[9] As indicated in the previous section of this ruling, there is no basis for a claim that the Board's delegation of authority to its staff and officers to finalize and execute the QSA agreements or that the performance of the delegation by the Board's staff and officers was ultra vires.

6 or 7, 2003, such that the Board was required to agendize and report in the open session of meeting. When read in the context of the Board's Resolution Nos. 9-2003 and 10-2003 approving the QSA agreements on October 2, 2003, the statements in Mr. Carter's declaration reasonably support an inference that Mr. Carter was updating the Board on the revisions to the QSA JPA and securing the Board's agreement that the revised QSA JPA was consistent with the form and substance of the October 2 draft in accordance with the instructions accompanying the delegation of execution authority in the resolutions approving the QSA agreements. There is no reasonable inference that the Board secretly deliberated upon or undertook revisions of the draft QSA JPA or otherwise took action with respect to the agreement in a closed session on October 6 or 7, 2003. Absent any competent evidence of such Board action, the Board was not required to place the QSA JPA on the October 6 or 7 meeting agenda or report in the open session of the October 6 or 7 meeting any action taken on the QSA JPA during closed session.

Similarly, the Air District lacks evidentiary support for its contention that the October 2 QSA JPA draft distributed to the IID Board at the October 2 meeting, was not made available to the public attending the meeting. True, there were comments made by members of the public at the October 2 meeting that they had not received all of the QSA documents to review. But members of the Board had similar complaints. (AR 3/3/30102-103.) Another member of public attending the meeting acknowledged having received drafts of the QSA agreements at the October meeting while complaining no opportunity was provided for the public to review the final versions of the agreements prior to their execution. (AR3/7/70025.)

The court concludes that the Board's adoption of Resolution Nos. 9-2003 and 10-2003, approving the QSA agreements, substantially complied with the requirements of the Brown Act and did not impair the rights of the public under the Act to comment on matters considered by the Board at a public meeting and to

review documents distributed to the Board at the meeting. (See Code Civ. Proc. § 866. See also Gov. Code § 54960.1)

Validatability and Jurisdiction

The trial court's SOD filed January 13, 2010, found at page 17 that the 12 QSA agreements for which IID currently seeks validation were validatable pursuant to Water Code section 22762. This finding was not appealed and is now final and binding on the court.

The trial court's SOD at page 17 also found that its in rem jurisdiction under the validation statutes over three of the QSA agreements to which the United State and Indian tribes ("federal QSA agreements") were parties was not precluded by claims of sovereign immunity from the court's jurisdiction by the United States and the Indian tribes. The three agreements include the Colorado Water Delivery Agreement between the Secretary of the Interior and the four Water Agencies; the Allocation Agreement between the United States, five Indian bands, Vista Irrigation District, the City of Escondido and the four Water Agencies; and the Conservation Agreement between the United States Bureau of Reclamation, IID, CVWD and SDCWA.

The trial court's jurisdictional finding in the SOD was appealed but was not specifically decided by the Court of Appeal. (See *QSA Cases*, 201 Cal.App.4th at p. 827.) Accordingly, on remand, the court must resolve the contentions of MWD, CVWD, SDCWA, VID and the City of Escondido that the court lacks jurisdiction to determine the validity of the three federal agreements because the United States and the Indian tribes have not appeared in the validation action, have not waived their sovereign immunity from suit in state court, and are indispensable parties but cannot be joined.

Although the Court of Appeal did not specifically decide whether the validity of the three federal QSA agreements to which the United States and Indian tribes are parties, the Court of Appeal did decide a similar issue regarding the trial

court's jurisdiction to adjudicate claims that the agreements to which the federal agencies were parties were invalid because the federal agencies had approved and executed the agreements in violation of their responsibilities under the federal Clean Air Act ("CAA") and the National Environmental Policy Act ("NEPA"). The Court of Appeal determined that, because the alleged violations could only be litigated in federal court, the trial court lacked subject matter jurisdiction to adjudicate the CAA and NEPA claims in the validation action. (*QSA Cases*, 201 Cal.App.4th at pp.832-838.) This lack of jurisdiction, however, did not preclude the trial court from adjudicating the validity of IID's actions in entering the agreements to which the federal agencies were parties. (*Ibid.*)

As the Court of Appeal explained, a validation proceeding is a lawsuit filed and prosecuted by a public agency like IID for the purpose of promptly securing a judgment determining the validity of its decision or act. (Id. at p. 833.) There are no indispensable parties beyond the public agency bringing the lawsuit. (*Ibid.*) Thus, the validation lawsuit brought by IID focused on the validity of its actions in approving and executing the QSA agreements and did not encompass the validity of the United States' actions in entering three of those agreements. (*Id.* at pp. 833-834, 835-836.) The trial court had jurisdiction to adjudicate the validity of IID's actions with respect to the agreements but lacked jurisdiction to adjudicate the actions of an entity -- the United States -- that was not before the court and whose actions in compliance or noncompliance with federal law could only be adjudicated in federal court. (*Id.* at pp. 835-836.)

This reasoning by the Court of Appeal supports this court's jurisdiction to adjudicate the validity of IID's actions in entering and executing the three federal QSA agreements even though the federal agencies and Indian tribes who are parties to the three agreements have not waived their sovereign immunity and cannot be joined as parties. The court's jurisdiction to adjudicate the validity of the three agreements properly encompasses the validity of IID's actions in connection

with the agreements; the court's jurisdiction does not, and cannot, encompass the actions taken in connection with the agreements by the federal agencies and Indian tribes who have not waived their sovereign immunity and cannot be joined as parties. Any judgment issued in this action determining the validity of the three federal QSA agreements could not properly determine the validity of actions by the federal agencies and the Indian tribes with respect to the agreements and would not be binding on the agencies and tribes.[10] (Id. at pp. 338-339, citing Code Civ. Proc. § 870. subd. (a).)

The court concludes that it has jurisdiction to determine the validity of IID's actions in entering and executing the three federal QSA agreements.

CEQA[11]

In determining the adequacy of the CEQA documents certified for the Transfer Project and the QSA Program, the court's inquiry is limited to a determination of whether the certifying agency failed to proceed in the manner required by law in preparing the documents and whether the agency's findings and decision are supported by substantial evidence in light of the whole record. (Pub. Resources Code §§ 21168, 21168.5; Laurel *Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392-393.) The party challenging

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[10] This conclusion is consistent with the court's role in an action to validate an agreement approved by a public agency: to determine the facial validity of the approved agreement, not the rights of the parties to the agreement or how the agreement may be implemented. (See *Ivanhoe Irrigation Dist. v. All Parties* (1960) 53 Cal.2d 692, 7272-728.)

[11] The Water Agencies contend that all CEQA claims in these coordinated proceedings are time-barred pursuant to Public Resources Code section 21167, subdivision (a), because the claims were filed in court on November 8, 2003, more than 180 days after the certification of the Transfer EIR on December 31, 2002. The court rejects this contention for the reasons stated in Ruling on Contested Matter No. 146 (SA:203:1918:50525.) and set forth in County of Imperial's Reply Brief filed October 12, 2012, at pages 30-34.

The Water Agencies also contend that a majority of the CEQA claims challenging the adequacy of the environmental documents in this coordinated proceeding are procedurally barred pursuant to Public Resources Code section 21177 because the parties raising the claims had not presented any objection to the adequacy of the documents under CEQA prior to the approval of the Transfer and QSA projects and/or because the specific claims raised in this proceeding were not raised by someone prior to project approval. These matters will be addressed in connection with the specific claims to which they pertain.

the adequacy of the environmental documents must affirmatively show that there is no substantial evidence in the record to support the agency's decision by setting forth the evidence material to the agency's findings and identifying the evidence that supports the party's position. (*Laurel Heights Improvement Assn. v. Regents of University of California* 6 Cal.4th 1112, 1132-1133; *California Native Plant Soc. v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626.) If the administrative record contains substantial evidence that would support the agency's findings, the court must uphold the findings, even if the evidence would support different or opposite findings. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573-574.)

- *Salton Sea Baseline*

Under CEQA, the baseline environmental conditions against which the significance of a proposed project's environmental impacts are assessed are normally the actual environmental conditions or baseline existing in the vicinity of the project at the time environmental analysis is commenced, usually when a notice of preparation for an EIR is published. (*Communities for a Better Environment v. South Coast Air Quality Management Dist. (2010) 48 Cal.4th 310, 321* ("*CBE*"). See Guidelines §§ 15125(a), 15126.2(a).)[12] The impacts of a proposed project are ordinarily to be compared to the actual environmental conditions existing at the time of CEQA analysis rather than to hypothetical conditions that could or should exist. (*CBE, supra*, 48 Cal.4th at p. 322.)

The baseline used by the Transfer EIR and the QSA PEIR to analyze the impacts of the Transfer project and QSA Program on the Salton Sea departed from the baseline ordinarily used pursuant to the CEQA Guidelines. In addition to reflecting a snapshot of the existing conditions at the Sea at the time the EIR and PEIR were being prepared, the baseline reflected certain clear historical trends in

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[12] The CEQA Guidelines are set forth in the California Code of Regulations, title 14, § 15000 et seq.

the existing conditions -- increases in salinity and decreases in elevation and surface area -- which would adversely impact water quality, fish and wildlife and their habitat at the Sea without the conserved water transfers of the Transfer project and QSA Program. (AR3/12/204885/204940.) The baseline was developed with computer modeling to simulate the existing and evolving conditions at the Sea over the 75-year term of the QSA Program and to predict the effects of the conserved water transfers.

The Air District[13] and POWER[14] contend that the analyses of transfer and QSA project impacts on the Salton Sea significantly understate the impacts by improperly using baselines that assume the Sea would increase in salinity and lose surface area and elevation without implementation of the Transfer project and QSA Program. According to the Air District, the baselines are hypothetical and based on erroneous assumptions about the Sea's future decline. In the Air District's view, CEQA required the use of a baseline reflecting the actual conditions at the Salton Sea during the preparation of the EIR and PEIR so that the environmental impacts of the projects can be accurately disclosed and mitigated.

CEQA case law has not yet definitively addressed the validity of a predictive or future baseline like the baseline used in the Transfer EIR and QSA PEIR to evaluate the impacts of conserved water transfers on the Salton Sea.

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[13] The court considers the Air District's contentions in the coordinated validation and CEQA actions pursuant to the prior trial court's ruling in Contested Matter 121. (AA:1497:3464.)

[14] Power's standing to raise any CEQA challenge to the Transfer EIR herein is challenged by CVWD pursuant to Public Resources Code section 21177 on the ground that the organization did not object orally or in writing to the approval of the Transfer project prior to the close of the public hearing on the project before the filing of a notice of determination. POWER responds that it has standing pursuant to subdivision (c) of section 21177 as an organization formed after project approval with a member who objected to project approval orally or in writing prior to approval. POWER points to the comments in the record made by Steve Bilson, a member of POWER who objected to the project prior to project approval. (See e.g., AR1/4/301157, 30158.) Although the comments reflect a limited understanding of CEQA by Mr. Bilson, the comments do reflect an objection by Mr. Bilson's to the project. Accordingly, the court finds that POWER has standing to challenge the Transfer EIR in this proceeding.

Recent case law has recognized that a lead agency has a measure of discretion to establish a baseline at points in time other than the time when environmental review is undertaken or a project is approved. In *CBE*, *supra*, the California Supreme Court offered the following guideline: "[T]he date for establishing a baseline cannot be a rigid one. Environmental conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods." (Citation.) In some circumstances, peak impacts or recurring periods of resource scarcity may be as important environmentally as average conditions. Where environmental conditions are expected to change quickly during the period of environmental review for reasons other than the proposed project, project effects might reasonably be compared to predicted conditions at the expected date of approval, rather than to conditions at the time analysis is begun. (Citation.) . . . . "Neither CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence." (*CBE, supra, 48 Cal.4th at pp. 327-328*. See *Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 336-337.)

Cases decided subsequent to this guiding language in *CBE* vary in the extent to which they have approved the use of a predicted or future baseline rather than a baseline providing a snapshot of existing conditions at the time environmental review is undertaken, the time set forth as the norm in Guidelines § 15125. (See *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale* (2010) 190 Cal.App.4th 1351 1379-1380 (rejecting predicted or future baseline); *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 98 (following *Sunnyvale*).) Another case has recognized a lead agency's discretion to choose a predicted or future baseline where the environmental conditions that would be in

effect at the time of project implementation vary from the conditions existing at the time of environmental review. (*Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1571.)[15] The issue in the latter case is factual, whether the lead agency's choice of a predicted or future baseline is supported by substantial evidence in the administrative record. (*Ibid.* See *CBE, supra, 48 Cal.4th at pp. 327-328.*)

As SDCWA points out in its opening brief on remand, the flexible approach to the selection and review of a project baseline discussed in *CBE* and used in *Pfeiffer* is consistent with CEQA's requirement that an EIR "must present information in such a manner that the foreseeable impacts of pursuing the project can actually be understood and weighed." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449-450.) Where the surrounding physical conditions existing at the time of environmental review may vary independent of the project over the course of project implementation, the project's significant impacts on the environment can be accurately determined and disclosed in accordance with CEQA requirements only if the baseline is defined to include both the conditions existing at the time of environmental review and the changes predicted to occur in the environment during project implementation. Thus, to accurately assess the significance of the Transfer project's impacts on the Salton Sea, it was necessary and appropriate for the EIR to use a baseline which took into account both existing conditions and existing trends in the Sea's hydrology during the term of the project and use a baseline that included existing conditions and predicted future conditions at the Salton Sea.

[15] The California Supreme Court granted review in Case No. S0202828 on August 8, 2012, on the issue of whether, under CEQA, a public agency is required to evaluate a project's potential traffic impacts using a baseline consisting of existing physical conditions in the project area during the period of environmental review or may evaluate the project impacts only against predicted future conditions.

Accepting the appropriateness of using a baseline consisting of existing and predicted future conditions at the Salton Sea to measure the impacts of the Transfer project, the court turns to the issue of whether the baseline used is supported by substantial evidence. The court's review of the administrative record, aided by the comprehensive and exhaustive discussion in the briefs filed by IID and SDCWA, has identified detailed explanations in the EIR and PEIR and related documents about the development and use of the baseline to predict Salton Sea salinity, elevation and surface area and to measure project impacts to those hydrologic conditions over the course of the 75-year project term. The record contains detailed information about the combined use of four hydrologic computer programs, previously developed and validated by the Bureau of Reclamation and other agencies, to model and analyze both existing conditions of the Salton Sea and project impacts over the 75-year term. The specific assumptions used in developing the modeled baseline are identified and reasonably explained.

On the basis of the court's review, the predicted baseline for Salton Sea hydrologic conditions and the measurement of project impacts on those conditions are shown to be based on substantial evidence in the record. The Air District and POWER, contending that the baseline is hypothetical and based on erroneous assumptions about the Salton Sea's increasing salinity and decreasing elevation and surface area, have not identified evidence of specific deficiencies in the methodology or particular errors in the assumptions used in developing the baseline. Although they bear the burden of demonstrating the inadequacies and lack of substantial evidentiary support for the baseline they have challenged herein, they have failed to do so, and their challenge must fail. (See *State Water Resources Control Board Cases* (20006) 136 Cal.App.4th 674, 795-796.)

- *Alternatives*

CEQA requires an EIR to consider a reasonable range of alternatives to a proposed project that would feasibly attain most of the project objectives while

substantially lessening or avoiding significant environmental impacts of the project. (Pub. Resources. Code § 21002; Guidelines § 15126.6(a).) The lead agency is responsible for selecting those alternatives that reasonably satisfy these parameters and evaluating the comparative merits of the selected alternatives in the EIR. (*Ibid*. *See Citizens of Goleta Valley v. Bd. Of Supervisors* (1990) 52 Cal.3d 553, 565-566; *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 917-918.)

POWER argues that the range of alternatives in the Transfer EIR is flawed because it fails to include an alternative based on demand reduction measures to be undertaken by SDCWA through its own water conservation methods as an alternative. In POWER's view, an alternative based on such conservation measures without a transfer component would be feasible and would satisfy most of the objectives of the Transfer project, to provide SDCWA with an independent, alternative, long-term reliable water supply at a stabilized, competitive rate. POWER observes that the transfer objective unduly narrows the range of alternatives analyzed in the EIR by requiring transfer.

As SDCWA explains, POWER's all-conservation alternative did not warrant detailed analysis as a project alternative because, upon screening, it was determined to be infeasible and incapable of meeting most project objectives. Substantial evidence in the record establishes that SDCWA's existing and planned conservation measures would not produce a sufficient amount of reliable water to meet SDCWA's overall needs, had little potential for sizeable expansion beyond that already planned, and would not diversify SDCWA's sources of supply. (AR3/16/509812; AR3/12/204885/204987, 204990; AR3/16/508212/509783; AR3/17/514001.) In addition, POWER's all-conservation alternative disregarded IID's critical project objectives and the fundamental purpose of the project, to develop and implement a program for the transfer of conserved water in accordance with the SWRCB directive to IID. (AR3/16/508212/509783;

AR3/23/716440/716501.) As a critical project objective and fundamental purpose, the transfer of conserved water did not unduly narrow the range of project alternatives; instead it changed the basic nature of the project and could not reasonably be considered as a project alternative.[16]

The Morgan/Holtz parties contend that no alternatives were identified and analyzed for a project objective and component newly added by the 2003 Addendum to the Transfer EIR. According to these parties, the newly added project component and objective involved IID's sale of two increments of 800,000 acre feet of water to DWR and DWR's resale of the water to create funds for Salton Sea mitigation and restoration. To provide an alternative to this new project component and objective, the Morgan/Holtz parties propose a sale of IID's power assets to fund Salton Sea restoration.

The court's consideration of this contention by the Morgan/Holtz parties is barred by a lack of issue exhaustion. No one raised this issue in comments to the IID Board of Directors before the Board approved the Transfer project. Further, the parties' answer to IID's validation complaint failed to allege any particularized factual allegations about their proposed alternative in support of their affirmative defense alleging noncompliance with environmental regulatory requirements. (AA:6:28:1403.) (See *QSA Cases*, 201 Cal.App.4th at p. 813.

Nonetheless, the court notes that the contention of the Morgan/Holtz parties lacks merit. The two increments of 800,000 acre feet discussed in the 2003 Addendum did not establish a new project component or objective. Rather, the two increments were part of legislation providing a mechanism to implement a measure that had already been adopted for the project to mitigate project impacts on the Salton Sea and to coordinate the project with Salton Sea restoration efforts by the

[16] The joint objection of SDCWA, CVWD and MWD, filed October 12, 2012, to the documents in Exhibits A through E to POWER's request for judicial notice is sustained on the ground that the documents inadmissible extra-record evidence.

State which were not part of the Transfer project. (AR3/3/30109_22 to 30109_23. See Stats. 2003 (SB 317).) In addition, even if the two increments constituted a new project component, the sale of IID's power assets proposed by the Morgan/Holtz parties as an alternative would be unwarranted because CEQA requires consideration of alternatives to the project, not a component or facet of the project. (See *Big Rock Mesas Property Owners Assn. v. Bd. of Supervisors* (1977) 73 Cal.App.3d 218, 227; Guidelines § 15126.6.)

- *No-Project Alternative*

CEQA requires that the discussion of alternatives in an EIR include a "no project" alternative which allows decision-makers to compare the impacts of approving a proposed project with the impacts of not approving it. (Guidelines § 15126.6(e).) A no project alternative describes "what would reasonably be expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services." (*Ibid.*) "It is a factually based forecast of the environmental impacts of preserving the status quo." (*Planning and Conservation League v. Department of Water Resources*, supra, 83 Cal.App.4th at p. 917.) Thus, although the no project alternative analysis is not the baseline for determining whether a proposed project's environmental impacts may be significant, the no project alternative analysis may be identical to the existing environmental setting analysis which does establish the baseline. (Guidelines § 15126.6(e).) Thus, because the no project alternative does involve reasonable forecasting, it may be identical to the baseline where the existing environmental setting analysis does not assure the preservation of the existing setting and must reasonably forecast the setting.

The County contends that the Transfer EIR and QSA PEIR inaccurately describe the no project alternative and conceal the project's growth inducing effects by failing to clearly disclose the reduction in MWD's Colorado River water use by half if the Transfer and QSA projects are not approved, by conflating the no project

alternative with the pre-project baseline of MWD's existing Colorado River water use, and by concealing the growth inducing effects of the project. The County claims that the EIR and PEIR rely on speculative assumptions and generalities about the availability of alternative sources of water to replace the reduction in Colorado River water in the MWD and SDCWA service areas and do not provide the detail and estimates necessary to assess the reliability of the alternative sources, as required by CEQA case law, in particular *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 432. The County indicates that the assumptions and generalities on which the Transfer EIR and PEIR rely are contradicted and undercut by the claims of MWD and SDCWA in support of a petition for writ of supersedeas in the Court of Appeal, that they would not have alternative supplies available immediately or likely into the future to make up for the shortfall resulting from the invalidation of the QSA agreements by the trial court's judgment entered February 11, 2010. The County indicates that the assumptions and generalities are also contradicted and undercut by statements in the Transfer EIS prepared by the Bureau of Reclamation under NEPA, that new agency-specific projects responding to the reduced water supply and reliability resulting from the non-implementation of the Transfer and QSA projects were speculative and not part of the no action alternative in the EIS.

Contrary to the County's claims, the Transfer EIR accurately describes the no project alternative by openly disclosing the reduction in Colorado River water to California's 4.4 apportionment, the non-implementation of various water conservation measures and transfers pursuant to the QSA agreements, the possibility of water rationing in the MWD service area during dry years, unimproved reliability of water supplies and a need to develop other water supply sources, SDCWA's continued dependence on MWD to meet its long-term water supply objectives, and increased costs to SDCWA's water users to support development of new MWD water supplies. (AR3/10/101804/101804_0194 through 101804_0196.)

Similarly, the QSA PEIR discloses the reduction in the amounts of Colorado River water that would be available for diversion by water users in California. (AR4/6/435/27600, 27607.) Rather than equating the project conditions with the no project conditions, the QSA PEIR indicates that deliveries of Colorado River water to the CRA would be reduced and that MWD would increase its water supplies through conservation, recycling, storage and other programs while continuing to rely on its SWP supplies. (*Ibid.*)

The assumptions in the Transfer EIR and QSA PEIR that MWD and SDCWA would develop and obtain alternative water supplies to replace the reductions in Colorado River water under the no project alternative are supported by substantial evidence and are not speculative. Pursuant to the Urban Planning Water Management Planning Act (Wat. Code § 10610 et seq.), water providers like MWD and SDCWA must prepare a plan every five years that describes and evaluates the water supplies necessary to meet projected demands over at least a 20-year period. In accord with their responsibilities to provide their service areas with adequate and reliable water supplies, MWD and SDCWA continually identify and develop available sources of water and establish reserves to meet projected demands in the event of reductions in their supplies of Colorado River water or shortages in other existing water sources. (AR3/10/101804/101804_955, 101804_956; 3/11/200158/200162; AR4/6/435/27600, 27607, 27628, 27629, 27779; AR4/6/468/29949.) These measures are undertaken independent of the Transfer and QSA projects and do not constitute additional new projects considered to be too speculative to include in the no-action alternative in the Transfer EIS prepared by the Bureau of Reclamation under NEPA. (See AR3/11/203054/203161.)

Such contingency plans made to meet water shortages are an integral component of the no-project alternative under Guidelines § 15126.6(e). The plans were appropriately included in the description of the no-project alternative forecasted in the Transfer EIR and QSA PEIR. Greater specificity in the forecast

regarding the amount and reliability of the water supplies available pursuant to the plans was not required. Unlike the degree of detail required in an analysis of the reliability of possible long-term water supplies for a development project was not required (see *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*, *supra*, 40 Cal.4th at pp. 427-447), a no project alternative need only describe existing conditions supplemented by a reasonable forecast. (*Planning and Conservation League v. Department of Water Resources*, supra, 83 Cal.App.4th at pp. 911, 919.)

- *Growth-inducing impacts*

Under CEQA, an EIR must describe any growth-inducing impacts of a proposed project, including the ways in which the project could directly or indirectly foster economic or population growth or the construction of additional housing in the surrounding environment. (Guidelines § 15126.2(d).) Only a general analysis of projected growth impacts is required. (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 369.) The sufficiency of the analysis is judged pursuant to the substantial evidence standard.

The County and POWER dispute the conclusion of the QSA PEIR and the Transfer EIR, that the QSA and Transfer projects would not foster economic or population growth or remove obstacles to population growth. They contend that the PEIR and the EIR failed to disclose the growth-inducing impacts of IID's transfer of up to 200,000 acre feet per year of conserved Colorado River water to SDCWA. In their view, the transferred water provided SDCWA with a reliable supply of higher priority water that was in addition to the firm supply of 300,000 acre feet of water SDCWA received from MWD each year and which would accommodate and foster urban population growth and housing in SDCWA's service area.

The County and POWER misconstrue the evidence and law underpinning the conclusion in the PEIR and EIR that IID's transfer of conserved water to SDCWA

would not induce growth. They ignore the substantial evidence and reasonable inferences from that evidence supporting the conclusion.

The County and POWER do not recognize that the transfer would replace, not add to, the quantity of water previously provided by MWD from Colorado River surpluses declared by the Secretary with the same quantity of conserved Colorado River water having IID's high priority. (AR4/4/334-20470; 4/5/368/21874-75, 21879, AR4/5/369/22661-63, 22668; AR3/12/204885/204978-86, 20498; AR3/3/30001/300007_54.) By thus replacing the surplus water with high priority conserved water, the transfer would provide SDCWA with a reliable supply of water in the same amount and help to implement the goals and objectives of the QSA Program, to optimize the use of Colorado River water within California while reducing California's historical diversions of Colorado River water of up to 5.2 MAFY to the state's 4.4 MAFY apportionment under the Law of the River. (*Ibid.*)

The County and POWER also do not recognize that the transferred water would be conveyed via existing facilities, MWD's California River Aqueduct, which is near or at full capacity and would not be able to convey a larger quantity of water to SDCWA. Because no new delivery or conveyance facilities are planned, no infrastructure would be available to convey an increased amount of water to SDCWA. (AR4/5/368/21811-12, 21684-87, 21875-80; AR4/5/369/22665, 22667; AR3/12/204885/204981; AR3/12/206392/207123; AR3/18/521628/521815.)

Lastly, the County and POWER fail to recognize that IID's transfer of conserved water would be used to meet existing water supply demand that had been planned and approved pursuant to general plan and CEQA procedures by municipal land planning agencies within SDCWA's service area. (AR3/12/204885/204979-80; AR3/12/206392/207121-22, 207134-37, 207272-75, 207181 207193; AR3/17/514841/514842-45.) SDCWA is responsible for providing a reliable supply of water to meet this existing demand and projected demand arising from planned and approved development, but it has no land use planning

responsibility or authority that could create demand and facilitate new development and growth. (*Ibid.*) Thus, in using the transferred water to meet existing and projected demand, SDCWA would not and could induce growth.

- *Air Quality*

Analysis in the EIR and PEIR indicated that the reduced runoff of irrigation water from farms in the IID and CVWD service areas to the Salton Sea as a result of conserved water transfers under the Transfer and QSA projects would accelerate the reduction of the Sea's level and surface area, creating the potential for emissions of windswept dust with the pollutant PM10 (particulate matter with a diameter of less than 10 micrometers) from the exposure of previously submerged Sea lands. The Air District contends that the air quality analysis in the Transfer EIR and the QSA PEIR related to such project impacts on air quality at the Salton Sea and the mitigation of those impacts violated CEQA in a number of ways.

First, the Air District claims that the Transfer EIR and QSA PEIR failed to adequately disclose the air quality impacts of the project at the Salton Sea because the air quality analysis in these environmental documents was qualitative rather than quantitative. According to the Air District, a comprehensive quantitative analysis was necessary to adequate disclosure of the air quality impacts and was feasible to perform. The Air District disputes the conclusion in the environmental documents that there were insufficient data to conduct a reliable quantitative analysis of potential dust emissions from newly exposed shoreline. The Air District argues that lack of a feasible quantitative analysis fails to disclose the information about the projects' impacts that is necessary to the informed decision-and required by CEQA.

Under CEQA, a lead agency need not conduct an analysis which is not feasible and may properly conduct a less exacting analysis. (*Association of Irritated Residents v. Count of Madera* (2003) 107 Cal.App.4th 1383, 1397; *Citizens To Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 432.) An

analysis is not feasible if it is not "capable of being accomplished in a successful manner within a reasonable period of time, taking into account technological among other factors. (See Guidelines §15364.) Whether a particular analysis, such as the quantitative analysis of PM10 emissions from newly exposed shoreline of the Salton Sea, is feasible presents an issue of fact, and the court is required to sustain a lead agency's finding regarding the feasibility of the particular analysis if the lead agency's finding is supported by substantial evidence. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573-574.)

Here, the Final Transfer EIR explained in response to comments on the Draft EIR that the quantification of emissions from newly exposed Salton Sea shoreline was not feasible because of a lack of sufficient data. (See (AR3/10/101804/101804_701; AR3/12/204968_1 et seq.) The Transfer EIR pointed to a lack of data regarding sediment characteristics and the relationship of the characteristics to surface stability and actual emissions rates, special variations in sediment characteristics, temporal variations in wind conditions, and temporal variation in factors influencing the tendency of land surfaces to emit dust in high winds. The EIR also explained that the air quality methodology to model dust emissions used at Owens Lake, where the Los Angeles Department of Water and Power operated a dust mitigation program, was inappropriate to use for the quantification of emissions at the Salton Sea because of distinct differences between the wind, sand and temperature at Owens Lake and at the Salton Sea. (*Ibid.*; AR 3/10/101804/10804_701-703.) In the absence of pertinent data or methodology to develop the data, the EIR concluded that it was currently impossible to predict the extent and intensity of potential increases in dust emissions or associated increases in ambient concentrations of PM10 in excess of air quality standards. (AR3/12/204968_4.)

Conflicting expert opinion in the administrative record indicated sufficient data could be developed to model and predict the behavior of exposed seabed in

wind conditions at the Salton Sea with the use of a wind tunnel. (AR 3/18/552561-62; 522494.) However, none of the expert opinion in the record adequately explained how reliable and accurate data could be developed currently regarding future emissions from yet-to-be exposed shoreline with undetermined soil characteristics. (AR3/18/522466/522524, 522551; AR 3/552961/523094, 523096-98; AR3/18/523471/523755-523759). The SWRCB, having heard considerable testimony concerning the possibility that emissive sediments would be exposed as inflows to the Salton Sea were reduced as a result of conserved water transfers during the hearing on the petition for approval of IID's transfer of conserved water to SDCWA, found the testimony inconclusive and concluded that the air quality impacts of exposed shoreline associated with the proposed project were difficult to predict using existing studies and technology. (AR 3/18/526917/526992.)

The court concludes that substantial evidence support the EIR's conclusion that the quantification of dust emissions with PM10 was not feasible given the lack of relevant data and methodology.

Second, the Air District claims that the EIR and the PEIR failed to analyze the potential human health impacts of toxic chemicals that exist in Salton Sea sediment and that could become airborne should the sediment become exposed shoreline as a result of the Transfer project. This claim ignores the discussion in the EIR acknowledging the potential of the toxic compounds in the Salton seabed to become airborne toxic contaminants in windblown dust generated from exposed seabed and to result in health effects. (AR3/12/204968_18-20.)

The EIR acknowledged the potential health effects while reviewing studies evaluating the sediments underlying the Salton Sea and finding concentrations of cadmium, copper, molybdenum, nickel, zinc and selenium at levels exceeding the maximum baseline concentrations for soil in the western United States. (*Ibid.*) The EIR also explained that up to 16,000 acres of shoreline would be gradually exposed beginning in the year 2035 under the project and that, at the current time,

sufficient data did not exist to predict the locations and extent of elevated metals concentrations in the shoreline sediment that would be exposed at that time, thereby precluding a health risk assessment at the present time. (*Ibid.*)

The EIR, recognizing that potential incremental health risks existed under the project, provided measures in the project's mitigation and monitoring plan steps to suppress the potential risks, including a four-step plan used to manage potential but unquantified air quality impacts of the project. (*Ibid.* See (AR3/12/204968_4-6.)

Third, the Air District claims a number of deficiencies in the cumulative impacts analysis for the Transfer and QSA projects. The claims are inaccurate.

The EIR comprehensively analyzed the incremental effects of the project with the impact of over 30 other projects. (AR3/10/101804/101804_917 to _950.) This cumulative impact analysis was not conclusory as the Air District claims.

Contrary to the Air District's claim, the EIR did not contradictorily conclude that the project's incremental effect was not substantial while concluding that the project's individual impacts were significant. The EIR's cumulative impacts summary recognized the potentially significant impact of the project on air quality while finding that other projects would have no air quality impacts or a positive impact at the Salton Sea. (AR3/10/101804/101804_670, _950.)

Fourth, the Air District challenges the adequacy of each step of a four-step mitigation strategy developed by IID to address future possible PM10 emissions from exposed shoreline at the Salton Sea. Designed to detect, locate, assess, and mitigate the potentially significant air quality impact, the plan would (1) restrict public access to shoreline areas to minimize soil disturbances, (2) implement a research and monitoring program as the Sea receded to develop information about potential for air quality problems, including PM10 and toxic air contaminants such as arsenic and selenium, (3) create or purchase offsetting emission reduction credits with local air pollution control districts to offset emissions

caused by the project, as determined by monitoring pursuant to step 2, and (4) implement direct emission reductions at the Sea using feasible dust mitigation measures and, if feasible, water to re-wet emissive areas identified pursuant to step 2 when toxic air contaminants are determined to pose a significant risk or when sufficient offsetting emission reduction credits are not available. (AR3/12/204968_4-6.)

The Air District argues that the first step lacks analysis. The Air District fails to recognize that fencing and signage restricting access to environmentally sensitive areas are common forms of mitigation and that the value of limiting access to exposed seabed to reduce dust and PM10 emissions had been the subject of expert testimony at the proceedings on the petition to transfer before the SWRCB. (AR 3/18/523471/523659, 523758.)

The Air District argues that the second step does not constitute mitigation. The Air District fails to recognize that mitigation measures may have a research and monitoring component. (See *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 412.)

The Air District argues that the third step is inappropriate because it requires the cooperation of air districts to develop the proposed air pollution credit trading program. The Air District disregards cases upholding mitigation measures that require consultations with regulatory agencies which may or may not be helpful. (See *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 945-946.)

The Air District argues that the fourth step fails to describe specific mitigation measures to reduce dust emissions. However, re-wetting an emissive area is a specific measure, and postponing the identification of specific dust mitigation measures is permissible because specific identification depends on further research and monitoring pursuant to the second step and there is a commitment to comply with the results, as evidenced by the inclusion of the four-

step mitigation measure in the Mitigation and Monitoring Program Report for the Transfer project. (See *Sacramento Old City Assn. v. Sacramento City Council* (1991) 229 Cal.App.4th 1011, 1029.)

- *Use of Addenda*

The County and the Air District each claim that changes were made in the Transfer project or the QSA Program subsequent to certification of the Transfer EIR or the QSA PEIR were not minor and should not have been included in an addendum. Instead, according to the County and the Air District, these changes should have been analyzed in a supplemental or subsequent EIR because the changes resulted in new or substantially more severe impacts than those previously identified in the EIR or PEIR under CEQA.

As established by the discussion in CVWD's Response Trial Brief at pages 24 through 54 and the discussion in IID's Response Trial Brief at pages As established Upon examination, however, the claims of the County and Air District fail, either because their claim of a change is incorrect, or they have been unable to demonstrate that the change resulted in a new impact or a substantially more severe impact, or they have overlooked the measures undertaken to mitigate any impacts.

- *Responsible Agencies*

Under CEQA, a "responsible agency" is an agency, other than the lead agency, which has responsibility for carrying out or approving a project. (Pub. Resources Code § 21069; Guidelines 15381.) The responsible agency has discretionary approval power over all or part of the project and relies on the lead agency's environmental document in acting on whatever aspect of the project requires its approval. (See *Riverwatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1201; *Lexington Hills Assn. v. State of California* (1988) 200 Cal.App.3d 415, 433.)

The Air District contends that the Transfer EIR and the QSA PEIR violated CEQA because they did not designate the District as a responsible agency for the Transfer and QSA projects. The Air District argues that it should have been designated as a responsible agency for the Transfer and QSA projects because it is the exclusive local agency responsible for air pollution control within Imperial County pursuant to Health and Safety Code section 40000 and, as such, has authority to issue permits for the implementation of mitigation measures adopted for the Transfer project.

The Air District did not seek status as a responsible agency through the CEQA consultation process. (Pub. Resources Code § 21080.3, 21080; Guidelines § 15082.) Moreover, the Air District's permitting authority does not constitute discretionary approval power over the proposed project itself. In exercising its permitting power for the implementation of project mitigation measures, the Air District does not exercise any discretionary authority to approve a component or activity integral to the project. (*Lexington Hills Assn. v. State of California, supra,* 200 Cal.App.3d at p. 433.) Thus, even if the Air District had pursued status as a responsible agency through the CEQA consultation process, it could not have qualified under CEQA as a responsible party for either the Transfer or QSA projects.

- *Co-Lead Agencies for the QSA PEIR*

The County contends that the designation of IID, SDCWA, CVWD and MWD as co-lead agencies for the preparation of the QSA PEIR violates a requirement of CEQA statutes, Guidelines and case law, that only the agency having principal responsibility for carrying out or approving a project may serve as lead agency. Relying on *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 907, the County observes that a lead agency is the one agency in the best position to fulfill the underlying purpose of an EIR, to analyze and inform regarding adverse effects to the environment as a whole.

In the County's view, the agency best positioned to serve as lead agency for the preparation of the QSA PEIR was MWD, the primary beneficiary of the transfers and exchanges of conserved Colorado River water and the water agency serving the largest area of the QSA Program which included San Diego. From that position, the County argues, MWD had the greatest ability to assess and mitigate the impacts of the QSA Program but, as a co-lead agency, was able to avoid that principal responsibility, to allow the performance of defective assessments of the no-project alternative and growth-inducing impacts, and to evade financial responsibility for the costs of Salton Sea mitigation. Thus, the County concludes, the failure to designate a single lead agency led to prejudicial error requiring the decertification of the QSA PEIR.

The applicable CEQA statutes, Guidelines and case law provide minimal guidance as to whether co-lead agencies are permissible. Public Resources Code section 21067 defines a lead agency as "the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment," -- a definition that neither allows nor prohibits two or more agencies from sharing principal responsibility for a project and serving as co-lead agencies in the preparation of environmental documents for the project.

The language of section 15050(a) of the CEQA Guidelines appears to strictly construe section 21067 and limit lead agency status to one lead agency: "Where a project is to be carried out or approved by more than one public agency, one public agency shall be responsible for preparing an EIR or negative declaration for the project. This agency shall be called the lead agency." However, section 15051(d) of the Guidelines appears to construe section 21067 more broadly and leave room for more than one agency to serve in the capacity of lead agency: "Where the provisions of subsections (a), (b) and (c) leave two or more public agencies with a substantial claim to be the lead agency, the public agencies may by agreement designate an agency as the lead agency. An agreement may also

provide for cooperative efforts by two or more agencies by contract, joint exercise of powers or similar devices."

An agreement entered pursuant to the first sentence of section 15051(d) establishes the typical relationship between a lead agency and one or more responsible agencies, as defined by statute and Guidelines. (See Pub. Resources Code § 21069; Guidelines §§ 15050, 15052.) But an agreement entered pursuant to the second sentence of section 15051(d) establishes as an alternative to the typical lead agency/responsible agency relationship a cooperative lead agency relationship between two or more agencies with a substantial claim to be the lead agency based on contract or joint powers agreement.

The case law involving lead agency issues under CEQA does not appear to have addressed the validity of co-lead agencies. Instead, reported cases have focused on the issue of whether an agency designated as the lead agency for a project qualified for the designation as the agency with principal responsibility for carrying out the project. (See, e.g., *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 907; *City of Sacramento v. State Water Resources Control Bd.* (1992) 2 Cal.App.4th 960, 973.)

In these proceedings, the designation of IID, SDCWA, CVWD and MWD as co-lead agencies for preparation of the QSA PEIR is well supported factually. Underpinning the co-lead relationship of the four agencies and giving rise to the QSA Program was "a document entitled 'Key Terms For Quantification Settlement Among The State Of California,' dated October 15, 1999, which sets forth proposed terms of a settlement of certain disputes among them relating to their use of Colorado River water as well as proposed plans to reduce California's use of Colorado River water." (AR4/3/158/12722; AR4/2/11498.) The Key Terms became the basis of legal agreements, including the Quantification Settlement Agreement, prepared by IID, SDCWA, CVWD and MWD to facilitate the transfer of conserved water from Imperial to SDCWA. (*Ibid.*) The approval, funding and implementation

of the Quantification Settlement by the agencies were conditioned upon, among other things, completion of an environmental review process pursuant to CEQA.

When IID, SDCWA, CVWD and MWD agreed to serve as co-lead agencies for the preparation of the QSA Program each had a direct and substantial interest in achieving the goals and objectives of the Program. (AR4/435/27214-27215.) Each had principal responsibility for implementation of various components of the QSA agreements comprising the QSA Program within, between, and sometimes even outside their respective service areas as in the case of Salton Sea mitigation costs. (AR4/435/27214-27217-27220.) No one of the agencies had overall responsibility for implementing the components; thus, by serving as co-lead agencies, they were in the best position to coordinate assessment of the environmental impacts of the QSA Program components. The County's claim that MWD was in the best position to serve as lead agency for preparation of the QSA PEIR does not appear to be correct.

The court concludes that the Water Agencies properly served as co-lead agencies for the preparation of the QSA PEIR.[17]

CONCLUSION

The court concludes and declares that the evidence in the administrative record and the legal argument herein supports and demonstrates the validity of IID's actions in entering and executing the 12 QSA agreements brought before the court for validation in Imperial County Superior Court No. ECU01649 (Sacramento Superior Court Case No. 04 CS00979.)

The petition in Imperial County Superior Court Case No. ECU01653 (Sacramento Superior Court Case No. 04CS00877) is denied.

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[17] Even if the Water Agencies' co-lead status were determined to be improper under CEQA, the QSA PEIR would not be automatically invalidated. Such invalidation would occur only upon a showing that the Water Agencies' co-lead status was prejudicial, i.e., had led to a significant inadequacy in the PEIR. (See *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 907.)

The petition in Imperial County Superior Court Case No. ECU01656 (Sacramento Superior Court Case No. 04CS00878) is denied.

Dated: June 4, 2013

LLOYD G. CONNELLY
JUDGE OF THE SUPERIOR COURT

CERTIFICATE OF SERVICE BY MAILING (C.C.P. Sec. 1013a(4))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the **RULING ON SUBMITTED MATTER** by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at 720 9th Street, Sacramento, California, each of which envelopes was addressed respectively to the persons and addresses shown on the attached service list.

I, the undersigned Deputy Clerk, declare under penalty of perjury that the foregoing is true and correct.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

Dated: June 5, 2013

By: C. BEEBOUT,
Deputy Clerk

Coordination Proceeding Special Title (Rule 1550(b))
QSA COORDINATION CIVIL CASES
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