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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

CENTRAL DELTA WATER AGENCY, SOUTH DELTA WATER AGENCY, CALIFORNIA WATER IMPACT NETWORK, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE,
CENTER FOR BIOLOGICAL DIVERSITY, CAROLEE KRIEGER, and JAMES CRENSHAW

Petitioners / Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF WATER RESOURCES and DOES 1 – 20,

Respondents / Defendants;

KERN COUNTY WATER AGENCY,

Respondent;

ALAMEDA COUNTY FLOOD CONTROL & WATER CONSERVATION DISTRICT ZONE 7, et al.

Real Parties in Interest.

Case No. 34-2010-80000561

PLAINITFFS' OPPOSITION TO DEMURRERS AND MOTIONS TO DISMISS

[filed concurrently with PLAINTIFFS' OPPOSITION TO REQUESTS FOR JUDICIAL NOTICE]

Judge: Hon. Timothy M. Frawley
Dept: 29

Hearing Date: November 18, 2010
Hearing Time: 1:30 PM

Action Filed: June 3, 2010
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I. INTRODUCTION

Seeking to insulate from public challenge a major restructuring of the State Water Project (SWP) that did not become final until May 5, 2010, Defendant California Department of Water Resources ("DWR") Respondent Kern County Water Agency ("KCWA"), [1] and other real parties in interest bring "demurrers" that raise objections more appropriate to summary judgment. As detailed below, their pleadings misrepresent precursors to this action and rely upon superseded agreements and approvals. [2] The demurrers fail to disprove the contrary allegations thoroughly plead in Plaintiffs' complaint. At most, they raise factual disputes, which must be either resolved or stipulated to before related questions of law may be answered.

In a key part of the challenged 2010 project, DWR finalized a massive transfer of public property, first to KCWA and then to the private interests who control the Kern Water Bank Authority ("KWBA"). The Kern Water Bank[3] is the world's largest underground storage reservoir, and given its location and service area, undoubtedly the most expensive as well. The invalid and unconstitutional final disposition of the Kern Water Bank, effectively a gift to private interests, cost

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[1] Kern County Water Agency ("KCWA") filed a Demurrer and Motion to Dismiss joined by Real Parties Dudley Ridge Water District, Kern Water Bank Authority, Oak Flat Water District, Roll International, Paramount Farming, Semitropic Water Storage District, Tejon-Castac Water District, Tejon Ranch, Wheeler Ridge Water Storage District, and Westside Mutual Water Company. Other Real Parties in Interest filed separate demurrers but joined KCWA's Memorandum of Points and Authorities; these Real Parties are (grouped by demurrer): Solano County Water Agency, Tulare Lake Basin Water Storage District, County of Kings, Napa County Flood Control and Water Conservation District, City of Yuba City, San Gorgonio Pass Water Agency, Antelope Valley-East Kern Water Agency, Crestline-Lake Arrowhead Water Agency, Desert Water Agency, Ventura County Watershed Protection District, Palmdale Water District, Alameda County Flood Control and Water Conservation District (Zone 7), County of Butte, Santa Barbara County Flood Control and Water Conservation District, Central Coast Water Authority, Metropolitan District of Southern California, Coachella Valley Water Agency, Castaic Lake Water District, Littlerock Creek Irrigation District, and San Gabriel Valley Municipal Water District.

[2] Petitioners concurrently challenge the respondents' and real parties requests for judicial notice (RJN).

[3] The terms "Kern Fan Element" and "Kern Water Bank" are often used interchangeably, as they refer to essentially the same thing. This opposition brief uses the term "Kern Water Bank" except where the term "Kern Fan Element" is used in quoted text.

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the state millions and produced profound environmental consequences. Plaintiffs timely filed this action to right this wrong and return the Kern Water Bank to its rightful owner, the people of California. Plaintiffs clearly demonstrate here that they have pled sufficient facts and brought a timely action, so that a statute of limitations defense must fail at this early stage of the proceedings. For the foregoing reasons, the demurrers and motions to dismiss should be denied.

Plaintiffs brought this challenge in 2010 because DWR did not certify the final EIR for and give final approval of the project "Monterey Amendment to the State Water Project Contracts (Including Kern Water Bank Transfer) and Associated Actions as Part of a Settlement Agreement (Monterey Plus)" project until May 5, 2010, making May, 2010 the earliest date when the approval of the Kern Water Bank transfer could be challenged. The Settlement Agreement referenced in that title, signed by DWR, KCWA, and many of the real parties, made abundantly clear that earlier implementation of parts of the project were only effective on an *interim* basis.

Plaintiffs allege sufficient facts to support their claim, and DWR and KCWA do not prove otherwise. Instead, the demurrers attempt to divert attention towards superseded approval documents executed in 1995 and 1996 that could not have conferred final authorization for the project which is subject to the present challenge. Those earlier contracts are either not at issue here, or expressly made the Monterey Plus Amendments the operative document for approval of the Kern Water Bank transfer, so that Plaintiffs' challenge to the approval of the 2010 transfer is timely under the validation statute. The demurrers, which ultimately rest upon the cynical theory that DWR's years of public review preceding the 2010 project approval were a charade directed at something already decided, deserve this Court's decisive rejection.

II. LEGAL STANDARD

A demurrer requires a high burden of proof, and will be denied if a complaint "alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose." (*Committee for Green Foothills v. Santa Clara County Bd. Supervisors* (2010) 48 Cal. 4th 32, 42.) A demurrer tests the sufficiency of a pleading by raising questions of law. (*White v. Lieberman* (2002) 103 Cal. App. 4th 210, 216), while admitting the truth of facts properly pleaded.

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(Cal. Code Civ. Proc. § 430.10; *Williams v. So. Cal. Gas* (2009) 176 Cal. App. 4th 591, 600, *citing Colm v. Francis* (1916) 30 Cal. App. 742, 752) ("a court ruling on a general demurrer is not empowered to "ascertain whether the facts stated [in the complaint] are true or untrue.") In ruling on a demurer, a court may consider matters which have been judicially noticed. (*Green Foothills,* 48 Cal. 4th at 42.) Therefore, if a complaint alleges sufficient facts (not disproven by judicially noticed documents) to support a particular cause of action, no demurrer lies.

III. ARGUMENT

A. PLAINTIFFS ALLEGE SUFFICIENT FACTS

1. Plaintiffs' Action Is Timely

Plaintiffs' Second Cause of Action challenges the validity of DWR's transfer of Kern Water Bank as a component of the "Monterey Amendment to the State Water Project Contracts (Including Kern Water Bank Transfer) and Associated Actions as Part of a Settlement Agreement (Monterey Plus)" (hereinafter referred to as "Monterey Plus Amendments"), a project not finally approved by DWR until May 5, 2010.[4] (Complaint ¶ 1.) The Monterey Plus Amendments are a series of fundamental changes to the long-term supply contracts for the State Water Project ("SWP"), and as is explicitly evidenced by the title, include the transfer of the Kern Water Bank. The "Monterey" refers to the inclusion of the original Monterey Amendment, while the "Plus" refers to the inclusion of specific additional requirements that resulted from the 2003 settlement agreement between the parties involved in *Planning and Conservation League v. Department of Water Resources* (2000) Cal. App. 4th 892 ("*PCL v. DWR*"). (Complaint ¶ 95.) The whole Monterey Plus Amendments are thus a combination of the original Monterey Amendment project (including the transfer of the Kern Water Bank) for which approval was overturned, and the

[4] KCWA observes that these massive contract changes are misleadingly termed the "Monterey Amendment" in the singular, even though this project encompasses multiple amendments to multiple State Water Project contracts. (KCWA Demurrer at 2 fn.3) For the sake of consistency with opposing counsel's terms, this Opposition refers to the earlier Monterey Amendment in the singular and the current Project being challenged in the plural: "Monterey Plus Amendments."

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additional provisions from the *PCL v. DWR* settlement agreement.

Plaintiffs' validation action challenges the Kern Water Bank transfer, and is focused on the first part of that two-step transfer. (Complaint ¶ 307.) The validation cause of action is brought under Code Civil Procedure § 860 et seq., which provides that an interested party may challenge the validity of certain agency actions within 60 days of the project's approval. (Complaint ¶¶ 304-306; Code Civ. Proc §§ 860 and 863.) Plaintiffs' action was brought on June 3, 2010, within 60 days of DWR's May 5, 2010, approval.

2. The Kern Water Bank Transfer Was Effectuated by the Approval of the Monterey Plus Amendments EIR

The 2010 approval of the Monterey Plus Amendment finalized the addition of Article 52 to each of the SWP delivery contracts, providing for the transfer of the "Kern Fan Element" (Kern Water Bank) from the state to Kern County Water Agency as part of a broad series of changes to the long-term contracts for delivery of water to the contractors of the State Water Project. (Complaint ¶¶ 82-83, 122, 123.) Article 52 expressly authorizes the transfer of the Kern Water Bank according to the terms originally set forth in the 1995 "Exchange Agreement for the Exchange of the Kern Fan Element of the Kern Water Bank" but not finalized until this year. (Complaint ¶¶ 123, 148.) Article 4.3 of the Exchange Agreement in turn explicitly conditions the transfer of Kern Water Bank upon completion of the CEQA review of the Monterey Amendment, and the statute of limitations expiring with no outstanding legal challenge. (Complaint ¶ 155.) CEQA review of the Monterey Amendment was not complete until the 2010 approval of the EIR for the Monterey Plus Amendments.

The Exchange Agreement is only one half of the contract for the transfer of the Kern Water Bank; the Monterey Plus Amendments—specifically Article 52—is the second half. Article 4.3 of the Exchange Agreement expressly relies on *later approval* of the Monterey Plus Amendments to effectuate the transfer: there is no agreement for the transfer of the Kern Water Bank unless and until the Monterey Plus Amendments are finally approved. (Complaint ¶ 155.) Therefore, approval of the Monterey Plus Amendments project is also the approval of the transfer of the Kern Water Bank, and the contract that is at issue came into existence in 2010, not 1995. (*See Smith v. Mt.*

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Diablo Unified School District (1976) 56 Cal. App. 3d 412, 416, and Code Civ. Proc. § 864.) Any other conclusion would necessarily suggest that DWR's 2010 decision--whose lengthy public review addressed the transfer, development and operation of the Kern Water Bank—was a merely a sham decision directed at a *fait accompli*.

The 2010 approval of the Monterey Plus Amendments also approved the addition of Article 53 to the SWP contracts, which provides for consideration (however illusory) to be paid to the state in exchange for the transfer of Kern Water Bank. (Complaint ¶127.) Taken together, Article 52 and Article 53 of the Monterey Amendment create an offer and consideration for that offer—in other words, a validate-able agreement or contract. The addition of Article 52 and 53 to the SWP contracts was necessarily executed and approved by DWR's issuance of an NOD in 2010, and not an NOD from 1995 which was overturned by *PCL v. DWR*.

The superseded, 1995 approval of the Monterey Amendment and the Kern Water Bank transfer, based entirely upon a long-decertified EIR, were timely challenged under both CEQA and validation causes of action. (Complaint ¶ 87.) The Monterey Amendment's underlying approval was unequivocally set aside by the Third Appellate District in *PCL v. DWR*, and later proceeded temporarily only on an interim basis. Because Article 52 of the Monterey Amendment provided the explicit authorization for the transfer of the Kern Water Bank, the *PCL v. DWR* decision invalidating the Amendment's approval necessarily invalidated the transfer as well. Similarly, the terms of Article 4.3 of the Exchange Agreement, which made the transfer dependent on the approval of the Monterey Amendments, were not met.[5] Therefore, as the facts stated in the Complaint clearly allege, the permanent transfer of the Kern Water Bank did not, and could not, take place until the environmental review was approved and survived judicial challenge, despite any separate resolutions or agreements undertaken by KCWA, and regardless of any organizational activities undertaken by the Kern Water Bank Authority.

The *PCL* court had no trouble acknowledging that the action it was adjudicating

[5] In fact, this condition has still not been met, calling into question whether the transfer was *ever* effective.

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specifically covered "DWR's transfer of the Kern Fan Element and amendment of water supply contracts pursuant to the Monterey Agreement." (*PCL v. DWR,* 83 Cal.App.4th at 903, 920.) The court further found that a proper validation proceeding had been brought to "adjudicate DWR's contract to convey the Kern Fan Element and its amended contracts implementing the Monterey Agreement." (*Id*. at 922.) And although the court did not explicitly invalidate the 1996 exchange pursuant to the plaintiffs' reverse validation action, it did not have to because the validation action was mooted by the Court's finding that the approval of the Monterey Amendment, including the Kern Fan Element Transfer, violated CEQA, and required DWR to make an entirely new decision on approval of the Monterey Amendments, including the provision that transferred the Kern Fan Element to KCWA and then to KWBA. (*See Id.* at 920 ("we need not hypothesize on the remaining issues because DWR, with its expertise on the statewide impacts on water transfers, may choose to address those issues in a completely different and more comprehensive manner) and 926; Complaint ¶¶ 91, 92.) Since the 2010 approval provides the first legal basis for implementing the Monterey Amendment ("plus" the later additions pursuant to the settlement agreement), Plaintiffs' challenge to the 2010 approval is timely.

The demurring parties ultimately rest their argument on the holding of *Smith v. Mt. Diablo Unified School District* (1976) 56 Cal. App. 3d 412: that all contracts, no matter how invalid, must be challenged within 60 days of their coming into existence. This by itself is perfectly reasonable, as the inherent purpose of a validation challenge is to challenge the validity of a contract (and if no action is brought, the contract is legally and permanently "valid"). But the demurring parties twist the *Smith* court's logic one step too far: they define a contract's "coming into existence" incorrectly as the signing of the initial document, even if the transaction is made up of two separate approvals (Complaint ¶ 155), even if the first contract states on its face that it becomes final upon a later date *(id.),* and even if a court subsequently orders that the agency's decision to enter into that contract was not valid under the law (Complaint ¶ 90). Article 4.3 of the Exchange Agreement made the Monterey Amendment (later the Monterey Plus Amendments) the key and operative document requiring approval for the Kern Water Bank transfer to come into existence. (Complaint ¶ 155.) The demurring parties are attempting to use the *Smith* decision to carve out an exception to the

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validation statute that would completely destroy it, rendering it useless for challenging contracts as they are routinely created by public agencies: drafted in multiple parts, with approval of all parts required to effect the purpose of the agreement or contract. Quite simply, Plaintiffs have challenged the 2010 transfer of the Kern Water Bank that was effectuated by the 2010 approval of the Monterey Plus Amendments—a document that includes the "Kern Water Bank Transfer" *in its title*.

3. Plaintiffs' Action Was Brought Within the Statute of Limitations

As described in Plaintiffs' Complaint, Article 52 of the Monterey Plus Amendments provides that "the State shall convey to [KCWA] in accordance with the terms set forth in the agreement between [DWR] and [KCWA] entitled 'Agreement for the Exchange of the Kern Fan Element of the Kern Water Bank'…, the real and personal property described therein." (Complaint ¶ 123.) Article 4.3 of that Exchange Agreement specifies that "the exchange of Kern Water Bank is subject to several conditions, including *completion of environmental review* of the Monterey Amendments under CEQA and CESA and the *expiration of the CEQA statute of limitations* (with no challenge being filed or a final judgment being entered on such a challenge)." (Complaint ¶ 155. (emphasis added.) Finally, Article 13.7 of the Exchange Agreement explicitly acknowledges the Monterey Amendments as an integral component of the contract: "this Agreement and Monterey Amendments constitute the entire agreement between the parties with respect to the exchange of the Property." (Complaint ¶ 157.) The complaint thus properly alleges these salient facts: (1) the exchange of the Kern Water Bank is dependent on Article 52 of the Monterey Plus Amendments; (2) the Exchange Agreement required completion of environmental review under CEQA and the expiration of the CEQA statute of limitations with no challenge being filed; and (3) the exchange was based on *both* the Exchange Agreement and the Monterey Amendments.

Plaintiffs brought this action on June 3, 2010, challenging the transfer of the Kern Water Bank that was made final with the certification and approval of the Monterey Plus Amendments' Notice of Determination ("NOD") on May 5, 2010. (Complaint ¶ 101.) This 2010 certification, "authorizing the execution" of the Monterey Plus Amendments, which includes authorization of the original Monterey Amendment, is the operative date for the purposes of Plaintiffs' validation action

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because it is the approval of these amendments that are being challenged. Therefore, Plaintiffs' validation action is timely because it was brought within the 60 day period required by the validation statute to challenge the approval of the Monterey Plus Amendments.

Plaintiffs should not be precluded from challenging the Kern Water Bank transfer because DWR has taken over 15 years to certify an EIR (challenged in the First Cause of Action) and give final approval to the transfer. Both KCWA and DWR have known that their earlier transfer of the Kern Water Bank was temporary, entirely dependent on DWR's necessary environmental review, its final approval, and the project's survival of any legal challenges (like this one). If KCWA and DWR persist in using a statute of limitations defense, this defense "must establish, *on the trial,* the facts showing the cause of action is barred." (Code Civ. Proc. § 458) (emphasis supplied.) At this juncture, a demurrer based on the statute of limitations defense must fail.

B. THE DEMURRERS' ARGUMENTS ARE WITHOUT MERIT

1. The Demurrers Raise Factual Disputes

Plaintiffs allege abundant facts to support their validation challenge to the 2010 approval date of the transfer of Kern Water Bank. The demurrers chiefly respond by claiming that different contracts and/or approvals carry the "real" approval date, and not the 2010 Project alleged by Plaintiffs. To this end, the demurring parties seek judicial notice of multiple contracts and agreements which purport to transfer the Kern Water Bank. At best, the demurrers' insistence on different contractual dates creates a factual dispute which requires review of record and/or discovery evidence to resolve, and cannot be determined at this early stage of litigation.[6]

[6] With limited exceptions, these other documents relied on in the demurrers are also inappropriate for judicial notice, as discussed in Plaintiffs' concurrently-filed Opposition to Judicial Notice. Nonetheless, assuming *arguendo* that judicial notice were appropriate at the demurrer stage, the Settlement Agreement (RJN, ex. 5) overwhelmingly confirms Plaintiffs' position that (1) the Project whose final approval occurred in 2010 included both the "Monterey" and "Plus" components of the project; (2) the Monterey Amendments and Kern Water Bank transfer were only effective on an interim basis prior to that final approval; (3) the Settlement Agreement anticipated the possibility of a future validation challenge; and (4) outsiders are not bound by the agreement's restrictions. (*See, e.g.,* RJN, ex. 5, ¶¶ II, III.A-C, V.F, VII, X.O.) The 2003 Interim Implementation Order (RJN, ex. 6) also confirms the temporary status of previous implementation.

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2. Competing "Approval" Dates Cannot Sustain a Statute of Limitations Defense

A demurrer may be brought on the basis that the statute of limitations has run, but "a demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred." (*Guardian North Bay, Inc. v. Superior Court* (2001) 94 Cal.App.4th 963, 972.) The running of the statute must appear "clearly and affirmatively from the dates alleged. It is not sufficient that the complaint *might* be barred." (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal. App. 4th 1397, 1403; *citing Mangini v. Aerojet-General Corp*. (1991) 230 Cal. App. 3d 1125, 1155.) (emphasis added.)

The demurrers repeatedly attempt to raise competing approval dates for the Monterey Amendment and the Kern Water Bank transfer. (*See, e.g.,* DWR Demurrer at 11 (citing 1995 and 1996 approval dates).) However, the mere existence of other alleged dates is insufficient. (*Id; Pike v. Zadig* (1915) 171 Cal. 273, 277) ("A demurrer on ground of bar of statute of limitations does not lie where complaint merely shows that action may have been barred, but it must appear affirmatively that, upon facts stated, right of action is necessarily barred.") Because Plaintiffs have asserted sufficient facts regarding the transfer of the Kern Water Bank being approved in 2010, the existence of other dates which *could* have effected the transfer is insufficient to sustain the demurrer in this action. Plaintiffs seek to invalidate the transfer of the Kern Water Bank that was authorized and effectuated by the 2010 approval of the Monterey Plus Amendments. (Complaint ¶3.) This is not a legal conclusion; it is a fact properly alleged by Plaintiffs and must be taken as true by this Court in deciding the demurrers. Again, the introduction of competing dates and/or agreements can, at best, raise a factual dispute which cannot be resolved at the demurrer stage.

3. The Kern Water Bank Was Transferred on an Interim Basis Only

After the final 2000 *PCL v. DWR* appellate decision was issued, the parties to the action negotiated a settlement agreement, authorizing only on an *interim basis* the administration and operation of the SWP *and Kern Water Bank.* (Complaint ¶¶ 94 and 96.) The 2003 settlement

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agreement allowed the Monterey Amendment to be in effect on a temporary basis, pending new environmental review as part of a full review and decision of the Monterey Plus Amendments, including the Monterey Amendment and the transfer of the Kern Water Bank. (Complaint ¶¶ 71-72.) Inherent in this *interim* operation is that the *permanent* operation awaited the approval of DWR. It is this *interim* operation that the "numerous government agencies and others have relied extensively on for over 14 years," and not the *permanent* operation that required DWR's 2010 approval of the Monterey Plus Amendments.

Although the *PCL v. DWR* decision overturned the approval of the Monterey Amendment, KCWA argues that language in the Monterey Plus Amendments EIR and accompanying Notice of Decision ("NOD") demonstrate that DWR was not making a new decision to transfer Kern Water Bank. (KCWA Demurrer at 5 and 6 fn.8.) But as explained in Petitioners' First Cause of Action, the Monterey Plus Amendments' project description and NOD are legally flawed under CEQA, (Complaint ¶¶ 179-180.) Contrary to the Settlement Agreement, the Monterey Plus Amendments NOD implausibly describes DWR's decision as "whether to *continue* operating under the proposed project." (*Id.*) However, the point of the *new* decision on the Monterey Plus Amendments is whether to approve the entire set of contract amendments *at all*—including Articles 52 and 53 effecting the transfer of the Kern Water Bank. (Complaint ¶ 180.) DWR could not decide to "continue" operation of the project, because the project was operating only on an interim basis in the first place until DWR issued a final decision whether to approve the project. DWR and KCWA insist that the 15 years it took DWR to prepare a new EIR insulates the transfer of Kern Water Bank from attack, but this delay in preparing the EIR and the stunted project description cannot shield DWR from its statutory obligation to evaluate the entire project, including the transfer of Kern Water Bank.

4. The Earlier Validation Action Was Directed at the Earlier Approval

The demurring parties claim to be "perplexed" as to why Plaintiffs challenge the validity of the 2010 approval of the Monterey Plus Amendments and the transfer of Kern Water Bank when an earlier validation challenge to the original Monterey Amendment was dismissed in 2003. (KCWA Demurrer at 12.) DWR's demurrer goes still further, and claims that all interested persons are

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precluded from challenging the approval of the Monterey Plus Amendments. (DWR Demurrer at 12.) Once again, the demurrers confuse the prior action against the Monterey Amendment, and its subsequent post-judgment settlement agreement, with the new decision required to be made under *PCL v. DWR*. The *PCL v. DWR* decision overturned the environmental approval of the Monterey Amendment, and did not alter the Exchange Agreement's requirement that the Monterey Amendment undergo valid environmental review and withstand legal challenge prior to being final. Plaintiffs in the earlier legal challenge also brought a validation action, which the *PCL* court upheld as a valid challenge to the transfer. (*PCL,* 83 Cal.App.4th at 926.) After *PCL v. DWR,* the validation challenge to the original amendment remained active until the parties agreed to dismiss the claim as part of the 2003 settlement agreement.[7] The *PCL* validation claim was necessarily limited to the 1995-1996 approval, which was in turn contingent on the Monterey Amendment—but the 1995 approval of the Monterey Amendment was overturned and has been superseded. In contrast, the present validation claim is against the 2010 approval of the Kern Water Bank transfer, and not the 1995 approval. As explained above, the 1995 Exchange Agreement makes the approval of these contract changes as part of Monterey (and now Monterey Plus) the operative approval act. Indeed, 2010 marks the second time that an agency attempted to authorize the transfer of Kern Water Bank, and Plaintiffs' validation claim challenges that second authorization, not the first. Contrary to the demurrers' claims, the major component of the 2010 project remains the Monterey Amendment, and is most definitely not "validated and immune from attack" when challenged within 60 days of its 2010 approval, as Plaintiffs have done.

5. The 2003 Settlement Does Not Alter the *PCL v. DWR* Decision

The simple, irrefutable holding of *PCL v. DWR* is that there was inadequate environmental review of the Monterey Amendment, including the transfer of Kern Water Bank, and that the "approval" of the project—including the Kern Water Bank transfer—by the Central Coast Water

[7] The settlement agreement also appears to limit the ability of the original *PCL* plaintiffs to bring a validation claim, but should it need to be reviewed here, by its express terms it cannot limit the ability of other, non-signing parties to bring their own actions. (See fn. 6, *supra* and RJN, ex. 5, ¶ X.O.)

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Agency was no approval at all. (*PCL,* 83 Cal. App. 4th at 920.) This basic holding is frequently distorted by DWR and KCWA, who insist that either the 2000 case did not overturn the Monterey Amendment and KWB transfer approval, and/or that the private 2003 post-judgment settlement with the *PCL* plaintiffs somehow invalidated or negated this published appellate decision. For example, KCWA argues that the court-approved settlement agreement did not invalidate the Monterey Amendment. (KCWA Demurrer at 4.) Yet the court in *PCL v. DWR* had already invalidated the approval of Monterey and the KWB transfer. (*PCL,* 83 Cal. App. 4th at 920) The 2003 settlement agreement bound only those parties who signed it; any interested member of the public that was not a signatory can thus challenge the 2010 approval of the Monterey Plus Amendments, including the transfer of Kern Water Bank.

In a similar manner, the demurrers claim that the Monterey Plus Amendments do not include the Monterey Amendment itself, possibly because the Amendment is not set forth in the settlement agreement. (KCWA Demurrer at 6 fn.8.) This absurd proposition ignores the obvious: that the "Monterey" in the "Monterey Plus Amendments" *is* the Monterey Amendment, and the "Plus" are additional terms required by the 2003 settlement agreement. DWR was required to review and approve or disapprove *both* the Monterey Amendment (required by *PCL v. DWR*) *and* the "Plus" components (required by the settlement) in its 2010 decision. The 2003 settlement cannot narrow the scope of the project to exclude DWR's mandatory decision to approve the Monterey Amendment, in its enhanced 2010 "Plus" variant, which is the subject of Plaintiffs' action.

C. KCWA IS PROPERLY NOT NAMED AS A DEFENDANT

KCWA argues that the Court lacks jurisdiction because KCWA was not named as a defendant, but only if Plaintiffs' Complaint seeks to invalidate both parts of the two-part transfer of the Kern Water Bank. (KCWA Demurrer at 14.) As the above discussion makes clear, however, the Complaint only seeks to invalidate the first part of the two-part transfer, that between DWR and KCWA, so DWR is the only valid defendant to this action.

In a reverse validation action, only the lead public agency must be named and served with the summons and complaint. As set forth in Code Civ. Proc. § 863, "*[t]he* public agency shall be a

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defendant and shall be served with the summons and complaint . . . In any such action the summons shall be . . . directed to *the* public agency." (emphasis added). (*See also PCL v. DWR*, 83 Cal.App.4th at 925) ("there are no indispensable parties beyond *the* public agency whose action is challenged") (emphasis added) and 922, n. 9 ("the validation statutes explicitly refer only to the singular form, '*the* public agency'") (emphasis added).)

In this case, which pertains specifically to the transaction from DWR to KCWA, DWR was the sole "action agency" for this transfer. Therefore, Plaintiffs were only required, and indeed only permitted, to sue DWR. As the court of appeals has held: "as long as service is effective on *the target public agency, other interested persons, by definition under the validation statutes, cannot be indispensable*. Hence, it is incongruous to conclude . . . that the voluntary absence of interested persons, with both constructive and actual notice of the proceedings, would compel dismissal of the proceedings." (*PCL v. DWR*, *supra,* 83 Cal.App.4th at 925 (emphasis added).) Because DWR is the action agency at issue in this case and has been properly served, KCWA cannot, therefore, even be deemed an indispensable party to the validation cause of action.

D. PLAINTIFFS' THIRD CAUSE OF ACTION IS NOT TIME BARRED

DWR and KCWA also demurrer to Plaintiffs' Third Cause of Action, a mandate action challenging DWR's 2010 approval of the Monterey Plus Amendment based on violations of the California Constitution. (KCWA Demurrer at 11; Complaint ¶¶ 349-361). DWR and KCWA erroneously assume that the Third Cause of Action is limited to the transfer of Kern Water Bank, and therefore the cause of action is simply as re-stating of the second cause of action. (*See, e.g.,* KCWA demurrer at 11.) However, Plaintiffs' mandate action independently challenges the May 2010 decision by DWR to approve the Monterey Plus Amendments, of which the Kern Water Bank transfer is but one part. The mandate action was timely filed within 30 days of DWR's 2010 approval, and challenges both the Kern Water Bank transfer *and* DWR's abrogation of its constitutional mandate to maintain contractual fidelity and uniformity. (Complaint ¶¶ 359-361). Therefore, the Third Cause of Action presents timely claims against DWR regardless of the statue of limitations defense asserted against Plaintiffs' Second Cause of Action.

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III. CONCLUSION

For the foregoing reasons, the demurrers and motions to dismiss should be denied.

Dated: November 4, 2010

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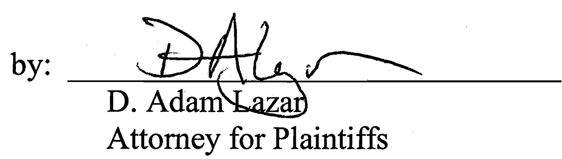
by:



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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I, Adam Lazar, declare: I am and was at the times of the service hereunder mentioned, over the age of (18) eighteen years, and not a party to the within cause. My business address is: Center for Biological Diversity, 351 California Street., Suite 600, San Francisco, California 94104.

On November 4, 2010, I caused to be served the below listed document(s) entitled:

Plaintiffs' Opposition to Demurrers and Motions to Dismiss

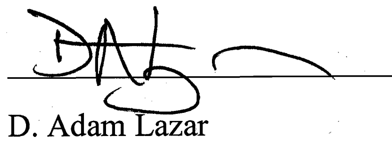
on the interested parties in this action, as listed below:

SEE ATTACHED SERVICE LIST

_X_ BY MAIL on November 4, 2010, at San Francisco, California, pursuant to California Code of Civil Procedure § 1013(a), by placing __ an original or _X_ a true copy thereof enclosed in a sealed envelope and placing that envelope in a U.S. delivery mail box. I am readily familiar with the organization's practice of collection and processing of documents for mailing. Under that practice I would deposit the envelope in a mail box maintained by the Untied States Postal Service on that same day with postage thereon fully pre-paid in San Francisco, California in the ordinary course of business.

Executed on November 4, 2010, at San Francsico, California.

I declare that I am employed as a member of the bar at whose direction the service was made. I declare under penalty of perjury that the foregoing is true and correct.



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