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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

NORTH COAST RIVERS ALLIANCE et al.,

Plaintiffs and Appellants,

v.

WESTLANDS WATER DISTRICT et al.,

Defendants and Respondents.

F062357

(Super. Ct. No. 10CECG00474)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Mark Wood Snauffer, Judge.

Law Offices of Stephan C. Volker, Stephan C. Volker, Joshua A.H. Harris and Daniel Garrett-Steinman for Plaintiffs and Appellants.

Pioneer Law Group, Andrea A. Matarazzo, Jeffrey K. Dorso; Thomas W. Birmingham and Harold Craig Manson for Defendants and Respondents.

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**SEE DISSENTING OPINION**

This appeal challenges the adequacy of respondents' compliance with the California Environmental Quality Act (CEQA)<sup>1</sup> with respect to 6 two-year interim renewal contracts concerning Central Valley Project (CVP) water that expired on February 29, 2012. As we will explain, the appeal is moot and the appropriate disposition is to reverse the judgment and remand the cause to the superior court with directions to dismiss the action as moot.<sup>2</sup>

## FACTS

Respondents Westlands Water District, Westlands Water District Distribution District No. 1, and Westlands Water District Distribution District No. 2 (collectively Water Districts) are three separate entities formed pursuant to Water Code section 36460 et seq.<sup>3</sup> Water Districts are part of the San Luis Unit of the West San Joaquin Division of

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<sup>1</sup> CEQA is codified at Public Resources Code section 21000 et seq. CEQA is implemented in the Guidelines for the Implementation of the California Environmental Quality Act, commonly referred to as the CEQA Guidelines, which are contained in title 14 of the California Code of Regulations section 15000 et. seq. “ ‘The CEQA Guidelines, promulgated by the state’s Resources Agency, are authorized by Public Resources Code section 21083. In interpreting CEQA, we accord the Guidelines great weight except where they are clearly unauthorized or erroneous.’ ” (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319, fn. 4.) Unless otherwise specified, all citations to the CEQA Guidelines are to title 14 of the Code of Regulations.

<sup>2</sup> “This reversal does not imply that the judgment was erroneous on the merits, but is solely for the purpose of returning jurisdiction over the case to the superior court by vacating the otherwise final judgment solely on the ground of mootness.” (*Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa* (2011) 198 Cal.App.4th 939, 947 (*Yucaipa*).

<sup>3</sup> In 1965, the California Legislature enacted the Westlands Water District Merger Law. (Wat. Code, §§ 37800-37856; see *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 689, fn. 4.) That law provided for the merger of the West Plains Water Storage District into the Westlands Water District, with the latter succeeding to all properties, rights, and contracts of the former. (Wat. Code, §§ 37820, 37826.) The West Plains Water Storage District comprised approximately 210,000 acres of land. The

the CVP. The San Luis Unit services various contractors, including Water Districts and the Cities of Avenal, Coalinga, Huron and Tracy.

The CVP is the country's largest water reclamation project and California's largest water supplier. (*In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1154.) It has a storage capacity of over 12 million acre-feet and operates 21 reservoirs, 11 power plants and 500 miles of major canals and aqueducts. (*Id.* at p. 1154, fn. 1.) The United States Bureau of Reclamation (Bureau of Reclamation) operates the CVP under water rights granted by the State Water Resources Control Board. (*Id.* at p. 1154.)

The San Luis Unit is part of the CVP and also is part of the State of California Water Plan. Consequently, some facilities of the San Luis Unit are jointly operated by the Bureau of Reclamation and the State of California, and some facilities are solely federally operated.

Water Districts cover almost 950 square miles of farmland located between the Coastal Range and the trough of the San Joaquin Valley in western Fresno and Kings Counties. Water Districts' permanent distribution system consists of 1,034 miles of closed, buried pipeline that conveys CVP water from the San Luis and Coalinga Canals and 7.4 miles of unlined canal that conveys CVP water from the Mendota Pool. Water Districts operate and maintain the 12-mile long, concrete-lined Coalinga Canal, the Pleasant Valley Pumping Station, and the laterals that supply CVP water to the Cities of Coalinga and Huron. All water is metered at the point of delivery through more than 3,200 agricultural and 250 municipal and industrial meter locations.

Water Districts entered into contracts with the Bureau of Reclamation concerning CVP water. The initial contracts were for a term of 40 years. In late 2009, Water

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record is not clear about how much CVP water, if any, was allocated to the land comprising the West Plains Water Storage District prior to the merger.

Districts and the Bureau of Reclamation renewed six of the contracts for a two-year period ending February 29, 2012 (the interim renewal contracts).<sup>4</sup> This was the second renewal for the largest of these contracts; the five other renewals were for the twelfth time. Water Districts and the Bureau of Reclamation subsequently adopted a successive set of interim renewal contracts that became effective on March 1, 2012.

The interim renewal contracts were adopted pursuant to authority granted by the Central Valley Project Improvement Act (Pub.L. No. 102-575 (Oct. 30, 1992) 106 Stat. 4706) (CVPIA). Under this federal legislation, the Bureau of Reclamation is authorized to renew existing water service contracts for a period of 25 years. Such 25-year contract renewals are not available, however, until (1) a programmatic environmental impact statement evaluating the impacts of implementing the CVPIA has been completed, and (2) appropriate environmental review under state law for the particular 25-year renewal contract in question also is complete. Pending the completion of these prerequisites, CVPIA authorizes interim renewals of not more than three years for the first interim period and not more than two years for any successive interim periods. The environmental review required by the CVPIA for the 25-year renewals has not been completed. Therefore, Water Districts and the Bureau of Reclamation adopted the interim renewals that are the subject of this litigation.

Some or all of the water service contracts have been referenced in federal decisions involving Westlands Water District. (*Westland Water Dist. v. U.S.* (E.D.Cal. 2001) 153 F.Supp.2d 1133, 1145; *Westlands Water Dist. v. U.S. Dept. of Interior* (E.D.Cal. 1992) 805 F.Supp. 1503, 1504, fn. 3; see also *O'Neill v. U.S.* (9th Cir. 1995) 50 F.3d 677, affg. *Barcellos and Wolfsen v. Westlands Water Dist.* (E.D.Cal. 1993) 849

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<sup>4</sup> The interim renewal contracts are identified by the following contract numbers: 14-06-200-495A-IR2; 14-06-200-3365A-IR12-B; 14-06-200-3365-IR12-C; 14-06-200-8018-IR12-B; 14-06-200-8092-IR12; and 7-07-20-W0055-IR12-B.

F.Supp. 717.) During oral argument, appellants' counsel informed this court that an action recently was filed in a federal court concerning the extent of the Bureau of Reclamation's discretion under the CVPIA with respect to interim contracts.

The Bureau of Reclamation, in connection with the 2010 through 2013 interim renewal of 11 water service contracts for the San Luis Unit and pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 et seq.), prepared a draft environmental assessment (EA) and a finding of no significant impact. The EA identifies alternatives considered but eliminated from further analysis—namely, the nonrenewal of the contracts and the reduction in water quantities delivered under the contracts. Citing the CVPIA, the EA states that the nonrenewal alternative was “eliminated from analysis in this EA because Reclamation has no discretion not to renew existing water service contracts.” The EA explicitly identifies issues related to CVP water use that are not included in its analysis. Those issues include (1) the effects of applying water to land within the Water Districts' service area, (2) changes in contract service areas, (3) water transfers and exchanges, (4) contract assignments, and (5) drainage.

In late December 2009 and early January 2010, Water Districts filed CEQA notices of exemption for interim renewal contract No. 14-06-200-495A-IR2 with the Fresno County Clerk, the Kings County Clerk and the State Clearing House. The notices state that the project is the execution of the interim renewal contract for the purpose of continuing delivery of CVP water within the Water District's service area and that the project is entirely administrative in scope. Similar notices of exemption were filed for the other five interim renewals.

In February 2010, plaintiffs and appellants North Coast Rivers Alliance, Friends of the River, Save the American River Association and the Winnemem Wintu Tribe (collectively appellants) filed a verified petition for writ of mandate and complaint for declaratory and injunctive relief and attorney fees. In March 2010, appellants filed a first

amended verified petition that, among other things, named the Bureau of Reclamation as a real party in interest (the amended petition). In their prayer for relief, appellants requested issuance of a writ of mandate setting aside the approval of the interim renewal contracts and directing Water Districts to suspend activity under those contracts.

In April 2010, appellants and the United States Attorney's Office stipulated to the dismissal with prejudice of the United States of America, sued as Bureau of Reclamation. The stipulation stated that the trial court lacked subject matter jurisdiction because of federal sovereign immunity.

In July 2010, Water Districts certified and lodged an administrative record. Water Districts also filed a joint motion for judgment on the peremptory writ and set it for hearing on September 22, 2010. On September 9, 2010, appellants filed an opposition to Water Districts' joint motion for judgment on the peremptory writ. Six days later, Water Districts filed a reply. On September 22, 2010, the day of the hearing on the motion for judgment on the peremptory writ, appellants filed a motion to augment the administrative record with five documents from federal agencies concerning environmental impacts related to CVP operations. In addition, appellants filed a motion for peremptory writ of mandate. At the September 22, 2010, hearing, the trial court continued all matters to October 20, 2010. The various motions were heard on October 20, 2010.

On January 19, 2011, the trial court filed a written order denying the amended petition. It determined that the statutory exemption for ongoing projects applied to the interim renewal contracts. (CEQA Guidelines, § 15261.) The trial court denied appellants' motion to augment the administrative record. It did not rule on any of the other issues that were raised by the parties. On February 2, 2011, the court filed a judgment in favor of Water Districts.

Appellants filed a timely notice of appeal. After appellate briefing was complete, this court requested supplemental letter briefs from the parties concerning eight points,

including the question of mootness if remittitur in this appeal could not be issued prior to expiration of the interim renewal contracts.

Water Districts filed supplemental letter briefs in December 2011 and January 2012. In relevant part, they urged this court to dismiss the appeal as moot. Water Districts also filed a request for judicial notice of 14 documents. We denied this request for judicial notice because it did not satisfy the requirements of California Rules of Court, rule 8.252(a).<sup>5</sup>

In January 2012, appellants filed their supplemental letter brief. In relevant part, they urged this court to exercise its discretion to decide this appeal. Appellants filed a request for judicial notice of two court records: (1) the verified petition for writ of mandate filed in Fresno Superior Court case No. 11CECG03022 challenging the set of interim renewal contracts that became operative on March 1, 2012, and (2) a stipulation and related order staying proceedings in that case pending the decision in this appeal. We granted appellants' request for judicial notice because reviewing courts are statutorily authorized to take judicial notice of state court records and these documents are relevant to the topic of mootness. (Evid. Code, §§ 452, subd. (d), 459.)

## DISCUSSION

### I. Applicable Legal Principles.

The appellate court may examine a suggestion of mootness on its own motion. (*City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 479.) Mootness has been characterized as “ ‘ ‘ ‘ ‘the doctrine of standing set in a time frame.’ ’ ’ ’ ” (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1574 (*Wilson*)). “Moot cases, ... are ‘[t]hose in which an actual controversy did exist but, by the passage

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<sup>5</sup> It is surprising that counsel for Westlands failed to follow the basic rules of appellate practice.

of time or a change in circumstances, ceased to exist.’ [Citation.]” (*Id.* at p. 1573.) In assessing mootness, “[t]he pivotal question ... is ... whether the court can grant the plaintiff any effectual relief. [Citations ....] If events have made such relief impracticable, the controversy has become ‘override’ and is therefore moot.” (*Id.* at p. 1574.) It is the duty of the courts “ ‘to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. [Citations.]’ [Citations.]” (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132 (*Milk Depots*).

The justiciability doctrine is implicated when mootness is considered. “It is a fundamental principle of appellate practice that an appeal will not be entertained unless it presents a justiciable issue.” (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1489; see also *Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 10 (*Finnie*)). In general terms, the justiciability doctrine “requires an appeal to concern a present, concrete, and genuine dispute as to which the court can grant effective relief ....’ Unnecessary decisions dissipate judicial energies better conserved for litigants who have a real need for official assistance. As to the parties themselves, courts should not undertake the role of helpful counselors .... [U]nnecessary lawmaking should be avoided, both as a matter of defining the proper role of the judiciary in society and as a matter of reducing the risk that premature litigation will lead to ill-advised adjudication.’ [Citation.]” (*In re I.A., supra*, 201 Cal.App.4th at pp. 1489-1490.) One of the important requirements for justiciability “is the availability of ‘effective’ relief—that is, the prospect of a remedy that can have a



prayer for relief, appellants sought issuance of a writ of mandate setting aside the approval of the interim renewal contracts and directing Water Districts to suspend activity under those contracts. This relief cannot be granted because the interim renewal contracts have expired and all activity under those contracts has ended.

*Hixon v. County of Los Angeles* (1974) 38 Cal.App.3d 370 (*Hixon*), is directly analogous. In *Hixon*, petitioners challenged the failure to prepare an environmental impact report for a street improvement project involving tree replacement. During the pendency of the action, the original trees were removed and could not be replaced. The appeal was dismissed as moot. The court explained, “The project is ended, the trees are cut down and the subject is now moot insofar as resort to a planning or informational document, which is what an EIR is.” (*Id.* at p. 378.) *Environmental Coalition of Orange County, Inc. v. Local Agency Formation Com.* (1980) 110 Cal.App.3d 164, is also on point. There, a challenge to EIR prepared for an annexation project was dismissed as moot because the annexation was completed during pendency of the action and it could not be ordered annulled because the annexing city was not a party to the action. (*Id.* at pp. 171-173.)

We are not persuaded by appellants’ contention that a ruling in this case could lead to modification of the project in order to reduce adverse impacts. Unlike *Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880 (*Woodward Park*), and *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227 (*California Oak*), which are cited by appellants, the interim renewal contracts did not involve construction of any building or facility. In contrast to *Woodward Park*, which involved construction and operation of a car wash, or *California Oak*, which involved construction and operation of a stadium, the interim renewal contracts only involved delivery of CVP water for a short period in the same amount on the same lands as the predecessor interim contracts. The water has been delivered and

used; there is no contractual activity or structure that can be modified based upon the results of environmental review. Thus, *Woodward Parks* and *Oak Foundation* are inapposite. For these reasons, we hold that effectual relief is no longer possible and, consequently, the appeal is moot.

### **III. We Decline to Exercise our Discretion in Favor of Deciding Moot Issues.**

“When events render a case moot, the court, whether trial or appellate, should generally dismiss it.” (*Wilson, supra*, 191 Cal.App.4th at p. 1574; see also, e.g., *Finnie, supra*, 199 Cal.App.3d at pp. 10-11; *Hixon, supra*, 38 Cal.App.3d at p. 378.) However, the general rule is tempered by the court’s discretionary authority to decide moot issues. Three discretionary exceptions to the rules regarding mootness have been recognized in CEQA cases: (1) when the case presents an issue of broad public interest that is likely to recur but evade review; (2) when there may be a recurrence of the controversy between the parties; and (3) when a material question remains for the court’s determination. (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479-480 (*Cucamongans*); *Californians for Alternatives to Toxics v. Department of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1069 (*Toxics*).

Appellants urge this court to exercise its discretion to decide the issue presented on appeal because they have filed a legal challenge to the interim renewal contracts that are currently in effect and that suit raises similar challenges to this appeal. Since the interim renewal contracts are of short duration, appellants also argue the issues in this appeal are capable of repetition and yet evade review. We are not persuaded.<sup>7</sup>

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<sup>7</sup> Appellants summarily assert this appeal presents important issues of broad public interest but they did not develop this issue. Points that are not supported by analysis of the facts and citation to legal authority are deemed forfeited. (*Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324)

It is well-established that appellate courts only exercise their inherent discretion to decide otherwise moot cases on the merits when “the record before us contains all the information necessary to review these claims” (*Toxics, supra*, 136 Cal.App.4th at p. 1070), and “the parties have fully litigated the issues.” (*Cucamongans, supra*, 82 Cal.App.4th at p. 480.) These requirements were not satisfied in this case.

For over 20 years, reviewing courts have expressed frustration with inadequate records in environmental cases. Appellants have been reminded that they bear “the burden of affirmatively demonstrating error by providing an adequate record.” (*Mountain Lion Coalition v. California Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1051, fn. 9.) Courts have pointed out to project proponents that they benefit from ensuring that the administrative record complies with Public Resources Code section 21167.6 and contains the requisite evidentiary support for factual findings and discretionary decisions. (*County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 6; *Protect our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 373.) No experienced attorney should fail to comprehend the lessons in elementary appellate practice that we offered in *Protect our Water v. County of Merced, supra*, 110 Cal.App.4th at page 364: “When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two.”

The parties in this case did not take heed of these lessons. Both Water Districts and appellants made untimely attempts to augment the record with documents that they informed this court were vitally important. *On the day of trial*, appellants sought to augment the administrative record with five federal documents that they claimed were necessary to show the increasingly severe environmental impacts resulting from water diversions. *After initial appellate briefing was complete*, Water Districts asked this court to take judicial notice of 14 documents they generally alleged were relevant to establish

their compliance with CEQA. Both of these efforts to augment the record properly failed. Thus, we have before us a record that both parties recognized was not complete in different respects.

Crafting a judicial opinion requires two essential components: (1) determining the relevant legal principles, and (2) applying these principles to the facts. Here, the administrative record contains numerous factual omissions so significant that, while we have no difficulty determining the relevant legal principles, we cannot apply these legal principles with a reasonable degree of certainty. The administrative record lacks essential factual information necessary to properly resolve the many complex CEQA issues presented in this appeal.

At the most fundamental level, the administrative record does not contain evidence from which this court can accurately determine the purpose and effect of the interim renewal contracts. Will CVP water be delivered to Water Districts in the absence of interim renewal contracts? Are the interim renewal contracts solely pricing agreements, as they are characterized by the Bureau of Reclamation in the EA? Or are the interim renewal contracts the primary vehicle through which the Water Districts gain a legal entitlement to CVP water? Can Water Districts decline to accept all the water to which they are entitled?

During oral argument, we attempted to elicit this crucial information. Counsel for appellants informed this court of an important new legal development by stating a lawsuit recently was filed in federal court challenging the legality of the Bureau of Reclamation's position that it is legally mandated under the CVPIA to provide CVP water to Water Districts regardless of the execution of interim renewal contracts. The court asked appellants' counsel about Water Districts' obligations to provide water to end users and counsel replied that those are matters not based on documents in this record. Counsel for Water Districts only stated that execution of the interim renewal contracts was a

discretionary project within the meaning of CEQA and there are agreements in place between the Bureau of Reclamation, Water Districts and end users that dictate the latitude and scope of this discretion. In response to this court's query if there are existing federal orders that would impact whether Water Districts could decline CVP water, Water Districts' counsel replied that she did not know the answer to this question.<sup>8</sup>

We cannot fully evaluate appellants' claim that the project will cause adverse environmental effects or Water Districts' assertion that the interim renewal contracts merely maintain the status quo without having complete information concerning the relationship between interim renewal contracts and water deliveries. This information is also fundamental to an accurate description of the existing environmental condition and to a determination if there are feasible mitigation measures or feasible project alternatives.

There are additional essential factual gaps in the administrative record. For example, there is no evidence showing when the various components of Water Districts' delivery system were approved. And the record lacks evidence showing when the right for water to be used in each area was first established. These are but some of the many areas where crucial information is not contained in the administrative record.

The trial court's failure to rule on any issue except the ongoing project exemption compounded this problem. We recognize that "[t]he appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427.) Yet, this does not render a trial court's decision superfluous in a CEQA action. If the trial court had considered each of the issues

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<sup>8</sup> In light of the magnitude and importance of the interim water contracts, we were dissatisfied by the manner Westlands' counsel responded to questions we posed in our issue letter and during oral argument.

presented in this matter, it would doubtless have recognized the inadequacies in the record and ensured that they were rectified.

The limited and incomplete record currently before us creates a substantial risk that an appellate decision in this cause would be based on inaccurate factual assumptions and therefore might mislead the parties or the trial court in Fresno Superior Court case No. 11CECG03022. A decision based on this inadequate record would amount to little more than an advisory opinion premised on uncertain facts. “ ‘The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court.’ [Citation.]” (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 860.)<sup>9</sup> “ ‘[C]ourts should not undertake the role of helpful counselors.’ ” (*In re I.A.*, *supra*, 201 Cal.App.4th at p. 1490.) Therefore, we decline to decide the moot issues presented in this appeal.

#### **IV. The Appropriate Disposition is Reversal and Remand for Dismissal.**

We turn to the question of the appropriate disposition. “Where an appeal is disposed of upon the ground of mootness and without reaching the merits, in order to avoid ambiguity, the preferable procedure is to reverse the judgment with directions to the trial court to dismiss the action for having become moot prior to its final determination on appeal.” (*Callie v. Board of Supervisors* (1969) 1 Cal.App.3d 13, 19; see also, e.g., *Milk Depots*, *supra*, 62 Cal.2d at pp. 134-135; *Yucaipa*, *supra*, 198 Cal.App.4th at pp. 942-948; *San Bernardino Valley Audubon Society v. Metropolitan*

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<sup>9</sup> “The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions. [Citation.] It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion. It is in part designed to regulate the workload of courts by preventing judicial consideration of lawsuits that seek only to obtain general guidance, rather than to resolve specific legal disputes. However, the ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy. [Citation.]” (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.)

*Water Dist.* (1999) 71 Cal.App.4th 382, 404.) A reversal with directions to the trial court to dismiss the action as moot “clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented by [subsequently occurring events].” (*United States v. Munsingwear, Inc.* (1950) 340 U.S. 36, 40.) This procedure preserves the rights of all parties and prejudices none. (*Ibid.*) Although this type of reversal avoids impliedly affirming the trial court’s order or judgment, it also “does not imply approval of a contrary judgment, but is merely a procedural step necessary to a proper disposition of this case.” (*Milk Depots, supra*, 62 Cal.2d at p. 135.)

We will follow this procedure here. The judgment denying the petition for writ of mandate shall be reversed and the cause remanded, for the purpose of restoring the matter to the jurisdiction of the superior court, with directions to dismiss the action as moot. In light of all the circumstances, the parties shall each bear their own costs on appeal pursuant to California Rules of Court, rule 8.278(a)(5). (*Milk Depots, supra*, 62 Cal.2d at p. 135; *Yucaipa, supra*, 198 Cal.App.4th at pp. 947-948; *Callie v. Board of Supervisors, supra*, 1 Cal.App.3d at p. 19.)

**V. We Do Not Necessarily Agree with the Dissent’s Conclusions About the Proper Interpretation of CEQA or its Application of those Conclusions to the Facts.**

Having carefully considered the dissenting opinion, nothing therein convinces the majority that this appeal is not moot or that we should exercise our discretionary authority to decide moot issues. For the reasons expressed in the majority opinion, we decline to substantively comment upon the dissent’s analysis of the CEQA issues presented by the parties excepting only to state that we do not necessarily agree with the dissent’s conclusions about the proper interpretation of CEQA or its application of those conclusions to the facts of this case.

**DISPOSITION**

The judgment is reversed and the cause remanded to the superior court with directions to dismiss the underlying action as moot. Each party shall bear its own respective costs on appeal.

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LEVY, Acting P.J.

I CONCUR:

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GOMES, J.

DAWSON, J., Dissenting

I agree with the majority regarding the applicable rule of law for determining whether an appeal is moot. This court has stated the rule as follows: “An appeal is moot if it is impossible for an appellate court to grant an appellant any effectual relief.” (*Association for a Cleaner Environment v. Yosemite Community College* (2004) 116 Cal.App.4th 629, 641 [Cal. Environmental Quality Act appeal not moot].)

I also agree with the majority that the appropriate legal test for effective relief is whether there is a “prospect of a remedy that can have a practical, tangible impact on the parties’ conduct or legal status.” (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1490.)

I part company with the majority in how these legal standards apply to this case. I believe (1) mitigation measures qualify as effective relief because they could have a tangible impact on the physical environment and on the conduct of Westlands Water District, Westlands Water District Distribution District No. 1, and Westlands Water District Distribution District No. 2 (collectively, Water Districts) and (2) it is both legally and factually possible for mitigation measures to be adopted in this case.

Therefore, I believe this appeal presents a justiciable controversy and the substantive issues should be addressed.

## **I. Mootness and the Impossibility of Effective Relief**

### **A. Mitigation as Effective Relief**

This court has considered mootness in the context of appeals involving the California Environmental Quality Act (CEQA)<sup>1</sup> and concluded that the adoption of mitigation measures constitutes effective relief.

In *Association for a Cleaner Environment v. Yosemite Community College*, *supra*, 116 Cal.App.4th 629, an association sued a community college that decided to close and

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<sup>1</sup>Public Resources Code section 21000 et seq. Further statutory references are to the Public Resources Code unless otherwise indicated.

remove a campus shooting range without conducting an initial environmental study. The community college argued that the matter did not involve a project for purposes of CEQA or, alternatively, if a project existed, it was exempt from CEQA. (116 Cal.App.4th at pp. 632-633.) The community college also argued the matter was moot because it had implemented its decisions and there was no present controversy to be adjudicated. We concluded that the whole of the community college's action constituted a CEQA project that was not exempt. We also concluded that the appeal was not moot because "there is a possibility that directing the [agency] to conduct an initial study may result in a mitigated negative declaration or an environmental impact report containing mitigation measures." (*Association for a Cleaner Environment, supra*, at p. 641.) We did not go so far as to order the implementation of mitigation measures. We only ordered reversal of the judgment and remand of the case to the superior court with directions for it to issue a writ of mandate requiring the community college to undertake an initial environment study of the project. (*Id.* at p. 642.) Thus, the possibility that the initial environment study *might* have led to the adoption of mitigation measures was enough to conclude the appeal was not moot. (*Id.* at p. 641.)

Similarly, in *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, we concluded an appeal involving a CEQA challenge to the city's approval of two development projects was not moot even though portions of the shopping centers had been completed and retail businesses were operating on the sites. We concluded that full CEQA compliance would not be meaningless because, among other things, the city had the authority to "compel additional mitigation measures or require the projects to be modified, reconfigured or reduced. The City can require completed portions of the projects to be modified or removed and it can compel restoration of the project sites to their original condition. [Citations.]" (*Id.* at p. 1204.) The reference to restoration of the project site demonstrates that after-the-fact mitigation measures are (1)

types of mitigation that are available under CEQA and (2) relevant to determining mootness.

In *Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, we affirmed a trial court's order requiring the preparation of an environmental impact report (EIR) for a car wash project, even though the car wash had been completed and opened for business while the appeal was pending. (*Id.* at p. 882.) The real party in interest argued the appeal was moot, which we rejected based on the prospect that our ruling could afford effective relief. Specifically, we concluded effective relief was possible because "a decision upholding the [trial] court's order directing the preparation of an EIR could result in modification of the project to mitigate adverse impacts or even removal of the project altogether." (*Id.* at p. 888.)

The foregoing cases demonstrate that, for purposes of applying California's mootness doctrine to CEQA cases, "effective relief" includes a court order requiring further environmental review when that review *might* cause an agency to adopt mitigation measures. This view of California's mootness doctrine holds true even when the project has been completed. (*Woodward Park Homeowners Assn. v. Garreks, Inc., supra*, 77 Cal.App.4th at p. 888 [argument that further environmental review of completed car wash would serve no purpose contradicted public policies underlying CEQA and was absurd].)

Based on the foregoing, the proper—indeed, the required—inquiry into mootness here is whether it is possible that ordering further environmental review might lead to the adoption of mitigation measures. This broad inquiry into possibilities and impossibilities can be refined by separating legal impossibility from factual impossibility. While this approach has not been made explicit in existing published opinions, I have separated legal from factual impossibility here in an effort to clarify why I disagree with the majority regarding the availability of effective relief.

## **B. Mitigation and Legal Impossibility**

An analysis of whether mitigation is legally impossible involves considering (1) whether this court and the trial court have the legal authority to enter orders that might result in the adoption of mitigation measures<sup>2</sup> and (2) whether there are legal barriers to the implementation of mitigation measures in this case.

### **1. Legal authority of courts and agency**

CEQA grants this court the authority to remedy a violation by reversing the judgment denying plaintiffs' petition and remanding the matter to the trial court with directions to order Water Districts to (1) void their approval of the interim renewal contracts, void their approval of the notices of exemption, and void their related findings; (2) reconsider those decisions; and (3) undertake such further action as may be necessary to comply with CEQA. (§ 21168.9, subd. (a)(1), (3); see *Save Tara v. City of West Hollywood, supra*, 45 Cal.4th at pp. 127-128 [appellate court could direct superior court to order agency to void approvals and reconsider the project after completing an EIR]; *People v. County of Kern* (1976) 62 Cal.App.3d 761 [this court ordered writ of mandate issued requiring county to void approvals contained in board of supervisors' resolution].)

Because of the state of the administrative record and the complexities created by the absence of information, my orders on remand would not require specific actions, such as completing an initial study or preparing an EIR, but would instead simply require compliance with CEQA. This would avoid infringing upon the discretion of the agency and would allow it the flexibility to achieve CEQA compliance by different routes. (§ 21168.9, subd. (c).) For example, Water Districts might be able to cure the CEQA

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<sup>2</sup>This inquiry into the authority of the courts is consistent with the analysis adopted by the California Supreme Court in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116 when it examined the type of order it could enter to remedy the CEQA violation in that case. (*Id.* at pp. 127-128.)

violation by (1) creating an administrative record that justifies reliance on an exemption and adopting that exemption or (2) conducting further environmental review and adopting a mitigated negative declaration or an EIR containing mitigation measures.

The possibility that Water Districts might adopt mitigation measures is not mere conjecture. It is a reflection of what is required. CEQA Guidelines section 15040, subdivision (c)<sup>3</sup> provides that CEQA supplements an agency's discretionary authority by authorizing it "to use the discretionary powers to mitigate or avoid significant effects on the environment when it is feasible to do so ...." Guidelines section 15041, subdivision (a) provides that a lead agency has the authority to require feasible changes in any or all activities involved in the project to lessen or avoid substantial environmental effects. More generally, CEQA provides that an agency should not approve a project as proposed if feasible mitigation measures would substantially lessen the significant environmental effects of the project (§ 21002.) If Water Districts were to reach the point of preparing an EIR here, a detailed statement of mitigation measures proposed to minimize significant environmental effects would be required. (§ 21100, subd. (b)(3).)

The foregoing statutes and Guidelines demonstrate that (1) this court and the trial court have the authority to implement relief that results in Water Districts conducting further environmental review and (2) the further review conducted by Water Districts to comply with CEQA might result in the adoption of mitigation measures.

## **2. Legal barriers to mitigation**

Water Districts have identified, and I have located, no legal barriers to the possible implementation of mitigation measures in this case. Most of Water Districts' arguments concerning mootness fail even to address the possibility of mitigation.

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<sup>3</sup>California Code of Regulations, title 14, section 15000 et seq.; hereafter Guidelines.

For example, Water Districts argue that effective relief is not possible because the interim renewal contracts have expired. But while it is true that a wider range of relief might be available if the contracts had not expired, the fact that the contracts have been completed does not create a legal barrier to after-the-fact mitigation in the form of restoration or remediation of the environmental impacts caused by the 2010 and 2011 water deliveries. As discussed *ante*, decisions from this court readily demonstrate the legal availability of mitigation in CEQA cases where the project activities have been completed. Furthermore, CEQA's preference for adopting mitigation measures before the project is completed does not operate as a legal bar to requiring mitigation such as restoration or remediation after the project is completed.<sup>4</sup>

Water Districts also argue that effective relief is not possible because its approvals are no longer in effect and thus cannot be set aside. First, this argument regarding Water Districts' approvals does not negate the possibility that mitigation measures might be adopted in this matter. Second, I believe this court has the authority to direct Water Districts to void the approval of the notices of exemption and related findings—to alter both the public record and the records of the boards of directors of Water Districts—in effect, wiping the slate clean for the further environmental review I believe is required in this case. Once the earlier approvals and findings were voided, they could not operate as a legal barrier to further environmental review under CEQA and the possible implementation of mitigation measures.

Effective relief also is not possible, according to Water Districts, because the activities already conducted pursuant to the contracts cannot be modified. The fact that

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<sup>4</sup>Guidelines section 15126.4, subdivision (a)(1)(B) states that the formulation of mitigation measures should not be deferred until some future time, but the use of the term “should” means this regulation cannot be interpreted as prohibiting the adoption of mitigation after the project has been completed. (See Guidelines, § 15005, subd. (b) [“should” defined].)

activities already completed cannot be modified or undone does not preclude, *as a matter of law*, after-the-fact mitigation. This argument seems to be addressed more toward factual impossibility than legal impossibility. In short, the inability to modify the water deliveries or return the water does not create a legal barrier to the possible adoption of mitigation measures.

Water Districts argue that effective relief cannot be granted without the federal Bureau of Reclamation being a party to this lawsuit. Again, this argument appears to be directed at aspects of relief other than the legal availability of mitigation. Because Water District could adopt remedial measures that do not involve the Bureau of Reclamation, its absence from this lawsuit cannot be regarded as a legal barrier to all possible mitigation measures that Water Districts might adopt.

In summary, I believe mitigation measures are legally possible, not legally impossible, in this case.

### **C. Mitigation and Factual Impossibility**

The first step in addressing factual impossibility under California’s mootness doctrine is to define what factual impossibility means. In my view, factual impossibility must be determined by whether the legally possible relief is available “as a practical matter.”<sup>5</sup> (*Save Tara v. City of West Hollywood, supra*, 45 Cal.4th at p. 128; cf. *Seacall Development, Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 Cal.App.4th 201, 204-205, fn. 1 [idea of “virtual mootness” rejected where rent control controversy involving 11 condominium units had been reduced by appellant’s sale of eight of the units].) This interpretation is consistent with our Supreme Court’s statement that a case is moot when

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<sup>5</sup>This quote is taken from a sentence in which the court contrasted whether relief “[wa]s impossible as a practical matter” with whether the court lacked the power to order it. (*Save Tara v. City of West Hollywood, supra*, 45 Cal.4th at p. 128.) The former question seems addressed to factual impossibility and the question concerning the court’s power is addressed to legal impossibility.

events have made effective relief impracticable. (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 133.) Furthermore, defining factual impossibility as impracticability is similar to the way contract law treats impossibility. (14 Corbin on Contracts (rev. ed. 2001) § 74.1 , p. 2 [rule requiring absolute impossibility before contractual obligations were discharged developed into “an ‘impracticability’ standard that did not demand strict impossibility”].)

The second step in addressing factual impossibility—that is, impracticability—is to determine whether it is a question of fact or a question of law. Because impracticability is similar to the question whether a mitigation measure is feasible, I believe it is a question of fact.<sup>6</sup> (*Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 350 [feasibility treated as question of fact]; see *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 997 [agency’s infeasibility findings reviewed for substantial evidence].)

Generally, appellate courts do not decide questions of fact, except when the relevant evidence is undisputed and the question can be decided as a matter of law. (See *Duronslet v. Kamps* (2012) 203 Cal.App.4th 717, 731 [appellate court may decide existence of claimed privileged where it appears as a matter of law from the undisputed facts].)<sup>7</sup>

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<sup>6</sup>“Feasible” is defined as “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors.” (§ 21061.1; Guidelines, § 15364.)

<sup>7</sup>Code of Civil Procedure section 909 permits an appellate court to take evidence and make factual determinations but only in exceptional circumstances. (See Cal. Rules of Court, rule 8.252 [taking evidence and making findings on appeal].) This authority is rarely exercised. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 405 [authority should be exercised only in exceptional circumstances].) There are no exceptional circumstances in this case that would justify this court taking evidence and making a factual determination about impracticability.

Here, the undisputed facts available in the appellate record do not establish that mitigation measures are impracticable. For example, land affected by poor drainage of the irrigation water delivered in 2010 and 2011 could be fallowed in subsequent years. The Westlands Water District Annual Report of 2003/2004 describes the acquisition and retirement of land as a way to address impacts from poor drainage. Nothing I have found in the record suggests that all further land acquisitions and fallowing would be impracticable.

Water Districts challenge plaintiffs' assertion that mitigation is possible upon completion of environmental review by arguing that plaintiffs have not explained how mitigation might be accomplished. Water Districts' argument implies that plaintiffs have the burden of showing that a legally available type of relief is practicable, as though Water Districts were entitled to a presumption of mootness.<sup>8</sup> In my view, California's mootness doctrine should not be interpreted to impose such a burden on plaintiffs or to grant a presumption of impracticability to a party claiming the appeal is moot.

Because mitigation measures are a type of relief that is legally available, and because the record does not show that all possible mitigation measures are impracticable, I conclude that this appeal is not moot.

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<sup>8</sup>Water Districts have cited, and I have located, no California case that suggests a party claiming mootness is entitled to such a presumption. Indeed, such a presumption would be directly contrary to how federal environmental cases address mootness. Those cases explicitly require the party claiming mootness to meet a heavy burden in demonstrating that no effective relief for the alleged violations can be given. (E.g., *Feldman v. Bomar* (9th Cir. 2008) 518 F.3d 637, 640.) Furthermore, federal decisions that characterize mootness as a question of law (e.g., *Sierra Forest Legacy v. Sherman* (9th Cir. 2011) 646 F.3d 1161, 1176) are consistent with the position that the subissue of factual impossibility should be determined to exist only when the appellate court can make the finding as matter of law.

## II. Administrative Record

I agree with the majority that the administrative record plays an important role in the issues presented in this appeal. Therefore, before considering the exemptions relied upon by Water Districts, I will address Water Districts' request to expand the administrative record. I concur in the majority's denial of that request.

Water Districts' December 30, 2011, request for judicial notice was filed after initial briefing was complete. The request was almost two inches thick and contained 14 exhibits that Water Districts wanted added to the administrative record or considered as extra-record evidence. (See *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 62 [evidence in a CEQA matter is classified as part of administrative record or as extra-record evidence].)

Water Districts argued that the documents demonstrated their compliance with CEQA and "could have been properly part of the administrative record of proceedings lodged in the trial court." This argument contradicts the position taken by Water Districts in their brief on appeal, which asserted: "[Water Districts] ensured that the administrative records clearly identified and provided copies of all pertinent documents, including ...."

I would deny Water Districts' request for judicial notice pursuant to the discretionary authority granted by Evidence Code section 459. Their attempt to bolster the administrative record with documents presented for the first time on appeal is unsustainable. Judicial notice, for various reasons, is not a substitute for the certification and lodging of a complete administrative record. First, even if this court were to take judicial notice as requested, this would merely make the noticed documents a part of the appellate record and would not automatically made them part of the administrative record. (*Madera Oversight Coalition, Inc. v. County of Madera, supra*, 199 Cal.App.4th at p. 61, fn. 4 ["augmenting the record on appeal does not necessarily mean the document will be regarded as part of the administrative record or is otherwise admissible"].)

Second, I am not inclined to expand the administrative record at this stage of the proceedings because (1) Water Districts had the burden of presenting sufficient evidence to justify their reliance on the CEQA exemptions and that burden should have been met by the administrative record they prepared and lodged at the start of this litigation,<sup>9</sup> and (2) Water Districts opposed plaintiffs' attempt to augment the administrative record by assuring this court that the record was complete.

### **III. What Activities Constitute the Project**

#### **A. Basic Principles**

CEQA defines "project," as pertinent here, to mean an activity undertaken directly by a public agency that "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (§ 21065.) CEQA applies to discretionary projects proposed to be carried out or approved by a public agency. (§ 21080, subd. (a).) Acts and projects that are ministerial, not discretionary, are not subject to CEQA. (§ 21080, subd. (b)(1).)

The Guidelines refine the definition of a "project" as "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment ...." (Guidelines, § 15378, subd. (a); see also *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 272.) The statement that the project is the "whole of the action" has been interpreted to mean that a proposed activity cannot be segmented or treated as several discrete projects to avoid CEQA's requirements. (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1507 [proposed project cannot be

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<sup>9</sup>In *Magan v. County of Kings* (2002) 105 Cal.App.4th 468, we stated that the agency had the burden of demonstrating by substantial evidence that the project was exempt. (*Id.* at p. 474.)

chopped up into bite-size pieces; demolition was part of redevelopment project, not a separate project].)

The concept of agency approval also plays a role in the definition of “project.” Guidelines section 15378, subdivision (c) provides that the “term ‘project’ refers to the *activity which is being approved* and which may be subject to several discretionary approvals by governmental agencies.” (Italics added.) Thus, “[i]f the contemplated action would not require the agency’s ‘approval’ to go forward, then the agency need not comply with CEQA prior to taking the action.” (Remy et al., Guide to CEQA: Cal. Environmental Quality Act (11th ed. 2007) p. 69.)

### **B. Rules of Appellate Review**

The question whether an activity is a project often is less complex than the question regarding what activities should be considered together as constituting the potential project.

As to the first question, the California Supreme Court has stated: “Whether an activity is a project is an issue of law that can be decided on undisputed data in the record on appeal. [Citations.]” (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 382 [county airport land use commission’s adoption of land use compatibility plan for area surrounding Air Force base was CEQA project].)

As to the second question, this court has concluded that “which acts constitute the ‘whole of the action’ for purposes of Guidelines section 15378 is a question of law that appellate courts independently decide based on the undisputed facts in the record.” (*Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1224.) This principle, however, does not indicate how judicial review should proceed when factual disputes do exist. To date, it does not appear that a published decision has addressed how appellate courts should proceed when the record contains disputes of facts. As a result, there is uncertainty regarding the rules of appellate

review for cases in which (1) the record contains contradictory evidence regarding the facts material to deciding which acts constitute the whole of the action (i.e., the facts are disputed) or (2) the record does not contain all of the facts needed to decide what constitutes the whole of the action.

### **C. Analysis**

In this case, the parties do not dispute the existence of a discretionary CEQA project. Water Districts have acknowledged that they exercised discretion in negotiating the terms of the interim renewal contracts before they approved the contracts, particularly the terms related to the pricing of the water services and the administration of the contracts.

#### **1. Dispute regarding scope of the project**

The parties disagree, however, on which actions are included in the activity that constitutes the project and which actions are excluded. (See *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora*, *supra*, 155 Cal.App.4th at p. 1223 [courts must determine which acts to include in, and which to exclude from, the activity that constitutes the project].) The primary disagreement concerns whether Water Districts' receipt of Central Valley Project water and the delivery of that water to the landowners is an activity that is part of the project.

Plaintiffs contend that the water deliveries would not continue without the interim renewal contracts and, therefore, the water deliveries are among the activities that constitute the project. Water Districts disagree, asserting that the interim renewal "contracts do not determine whether Reclamation will deliver water, but only upon what terms."

The dispute about what activities constitute the project can be analyzed pursuant to subdivision (c) of Guidelines section 15378, which states that the "term 'project' refers to the activity which is being approved ...." (See Remy et al., Guide to CEQA: Cal.

Environmental Quality Act, *supra*, p. 70 [threshold question is whether agency is considering “approval” of a proposed action].) CEQA and the Guidelines do not define the term “approved,” but the Guidelines define “approval” as “the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person.... Legislative action in regard to a project often constitutes approval.” (Guidelines, § 15352, subd. (a).) Under this provision, if the water deliveries referenced in the interim renewal contracts would continue even if those contracts were not signed, Water Districts’ entry into the interim renewal contracts would not be the decision that definitely committed Water Districts to accepting the Central Valley Project water and distributing it to landowners. As a result, one could argue that those water deliveries would not be part of the activity being approved and, thus, would not be part of the project.<sup>10</sup>

## **2. What is being approved**

I will examine the question whether Water Districts’ decision to enter the interim renewal contracts was the decision that definitely committed Water Districts to accepting that water for two points of view. First, what does the evidence in the administrative record indicate about the decision to approve the interim renewal contracts? Second, does the administrative record contain evidence of another decision that committed Water Districts to accepting and delivering the Central Valley Project water?

The evidence in the administrative record that concerns the approval of the interim renewal contracts and whether that approval committed Water Districts to accepting and

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<sup>10</sup>This application of Guidelines section 15352, subdivision (a) leads to the question whether excluding the water deliveries from the activity constituting the CEQA project would violate the prohibition on segmenting projects. I do not believe it is necessary to reach the question whether excluding water deliveries from the project is improper segmenting or piece-mealing.

delivering the water to the landowners includes the original contracts, the interim renewal contracts, the resolutions of the boards of directors approving the interim renewal contracts, and the minutes of those meetings.

For example, the December 2009 board resolution for contract No. 14-06-200-495A-IR2 provides:

“WHEREAS, it is imperative to the District and its landowners that the District renew its rights under the 1963 Contract and the 1986 Contract to continue water service to lands within the District for beneficial use, and the District therefore proposes to enter into the Interim Renewal Contract.”

Another recital states that “under the Interim Renewal Contract, ongoing receipt and delivery of water will continue with no expansion of service and no new facilities constructed ....” Both of these recitals in the board resolution strongly support the inference that the water deliveries would not continue without the execution of the interim renewal contract.

The minutes for the December 2009 board meeting contain statements similar to the recitals in the board resolutions: “The District believes it is imperative that, for the benefit of the District, the water supply provided under the 1963 Contract and paragraph 5 of the *Barcellos* Judgment, and the first interim renewal contract, be continued. The Interim Renewal Contract will continue the water service in the same manner as the first interim renewal contract.” Again, these statements about the importance of continuing the water supply and that the water service will continue under the interim renewal contract strongly support the inference that, without the interim renewal contract, the Central Valley Project water would not continue to be delivered to Water Districts.

Similarly, the notice of exemption described the nature, purpose and beneficiaries of the project as follows:

“The project is the execution of the Interim Renewal Contract #14-06-200-495-A-IR2 water service contract *for the purpose of continuing delivery* of [Central Valley Project] water within the District’s service area boundary.

The beneficiaries of the project are the District, its landowners, and water users. The project is entirely administrative in scope.” (Italics added.)

The recitals in contract No. 14-06-200-495A-IR1<sup>11</sup> are consistent with the foregoing evidence. The third recital in the first interim renewal contract states that “the rights to Project Water were acquired by the United States pursuant to California law for operation of the Project.” Another recital states that the United States intends to execute interim renewal contracts in order to continue water service under Central Valley Project water service contracts that expire prior to the completion of the federal environmental review documents. As with the other statements about continuing water service, these recitals support the inference that water would not be delivered to Water Districts if the interim renewal contracts were not signed.

There is no dispute between the parties about what the resolutions, minutes, notices of exemption, and contracts say. The statements in those documents constitute undisputed evidence that strongly supports the conclusion that, contrary to Water Districts’ argument in this litigation, the delivery of Central Valley Project water would not continue unless Water Districts signed the interim renewal contracts.

In contrast, the administrative record contains no evidence that Water Districts made some other decision that committed them to request, accept, and deliver the Central Valley Project water. I acknowledge that it is possible that Water Districts did, in fact, make such a commitment long before entering the interim renewal contracts, but there is no evidence of it in the administrative record.

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<sup>11</sup>Contract No. 14-06-200-495-A concerns the largest volume of water of the six contracts involved in this case. The contract was entered into on June 5, 1963, and provided that it would remain in effect for 40 years beginning with the date of the initial delivery of water, which occurred in 1968. The initial 40-year term ran through 2007. The first interim renewal of the contract was executed in December 2007 and “IR1” (meaning interim renewal one) was added to the end of the contract number. This lawsuit concerns the second interim renewal of contract No. 14-06-200-495-A.

The last step in my analysis of the evidence in the administrative record is to consider the evidence cited by Water Districts to support their argument that the water deliveries would continue without the interim renewal contracts. Water Districts' appellate brief asserts: "If the renewal contracts had not been approved, then delivery of water, in the same amounts and for the same purposes, would continue under existing contracts." The citations to the administrative record that support this assertion are to (1) a federal draft environmental assessment for the interim renewal contracts dated January 2009<sup>12</sup> and (2) a final environmental assessment from 2007 concerning the prior set of interim renewal contracts. These federal documents are irrelevant to the question when Water Districts made the decision that committed themselves to request, accept, and deliver the Central Valley Project water. The federal environmental documents are concerned with the discretionary authority of the federal agency, the Bureau of Reclamation, and state that the Bureau does not have the discretion to deny renewal of the interim contracts if requested by the contractor (in this case, Water Districts).<sup>13</sup> The federal documents do not discuss Water Districts' authority or discretion and do not discuss when Water Districts committed themselves to requesting water.

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<sup>12</sup>This document states that the Bureau of "Reclamation has no discretion not to renew existing water service contracts." This statement is based on language from section 3404 of the Central Valley Project Improvement Act (Pub.L. No. 102-575 (Oct. 30, 1992) 106 Stat. 4706) which states that "the Secretary shall, upon request, renew any existing long-term repayment or water service contract for the delivery of water from the Central Valley Project for a period of twenty-five years ...." Neither the environmental assessment nor Water Districts provides an explanation for why this language regarding renewals for 25 years applies to interim renewals.

<sup>13</sup>Whether the Bureau of Reclamation has discretionary authority to enter the interim renewal contracts (as opposed to the long-term renewals) is a question of federal law that is disputed by the parties and need not be addressed in my analysis of what activities should be included in the CEQA project.

In summary, the evidence in this administrative record shows that the water deliveries would continue only if the interim renewal contracts were signed. Therefore, I conclude that water deliveries constitute part of the activity being approved by Water Districts when they approved the interim contracts and that activity is part of the “project” for purposes of CEQA. In addition, the project includes the operation and maintenance of Water Districts’ physical facilities, which are the means by which it receives water from the Central Valley Project and delivers that water to the persons who will use it. Lastly, I conclude that all six of the interim renewal contracts constitute a single project for purposes of CEQA. (See *Lincoln Place Tenants Assn. v. City of Los Angeles*, *supra*, 130 Cal.App.4th at p. 1507 [proposed project cannot be chopped up into bite-size pieces].)

#### **IV. Statutory Exemption for Ongoing Projects**

##### **A. Provisions of CEQA and Guidelines**

CEQA itself contains no statutory exemption expressly for “ongoing projects.”<sup>14</sup> (Remy et al., Guide to CEQA: Cal. Environmental Quality Act, *supra*, p. 121.) The Guidelines, however, include a section so denominated. It reads:

“(a) If a project being carried out by a public agency was approved prior to November 23, 1970, the project shall be exempt from CEQA unless either of the following conditions exists: [¶] (1) A substantial portion of the public funds allocated for the project have not been spent, and it is still

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<sup>14</sup>The California Supreme Court has referred to the exemption created by section 21171 as “the 1972 moratorium for ongoing projects.” (*Communities for A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 325, fn. 10.) Section 21171 states in part that CEQA shall not apply “to any project undertaken by a person which is supported in whole or in part through contracts with one or more public agencies until the 121st day after the effective date of this section.” A related statutory exemption set forth in section 21169 prevents CEQA from being applied to private projects that obtained agency approval prior to December 5, 1972. (See *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1216-1218 (*Azusa Land*) [history and scope of § 21169].)

feasible to modify the project to mitigate potentially adverse environmental effects, or to choose feasible alternatives to the project .... [¶] (2) A public agency proposes to modify the project in such a way that the project might have a new significant effect on the environment.” (Guidelines, § 15261; see *id.*, § 15260 [art. 18 describes several exemptions granted by Legislature].)

An agency considering this exemption must make three determinations before concluding the exemption applies: (1) the project being carried out was approved prior to November 23, 1970; (2) a substantial portion of the money allocated for the project has been spent and the project is too far developed to be modified so as to avoid significant impacts; and (3) there are no proposed modifications to the project that might produce a new significant environmental effect.

In considering the first determination, the agency as well as the court must identify the scope of the “project being carried out” at the present time and make sure it does not exceed the scope of the project approved prior to the enactment of CEQA. (Guidelines, § 15261, subd. (a).) In this case, I believe Water Districts have failed to present an administrative record that shows the scope of the project that was approved prior to the enactment of CEQA encompasses all of the activity of the present day project.

### **B. Case Law Addressing the Scope of an Ongoing Project**

The following case law involving the ongoing project exemption is instructive about identifying the scope of the present day activity and comparing it with what was approved prior to the enactment of CEQA.

In *Nacimiento Regional Water Management Advisory Com. v. Monterey County Water Resources Agency* (1993) 15 Cal.App.4th 200 (*Nacimiento*), the plaintiff filed a petition for writ of mandate, alleging the public agency operating a reservoir was required by CEQA to conduct an environmental review of its 1991 schedule for allocating water released from behind its dam. (*Nacimiento*, at pp. 201-202.) The trial court denied the petition, concluding the 1991 water release schedule was exempt from environmental

review under CEQA because it was part of an ongoing project. (*Nacimiento*, at pp. 203-204.)

The public agency in *Nacimiento* had obtained state approval, in 1955, of its application to build Nacimiento Dam to store and release water annually for irrigation and related domestic, municipal, industrial, and recreational uses. The agency's application at that time had stated that the water released from the reservoir would vary from year to year. (*Nacimiento, supra*, 15 Cal.App.4th at pp. 202-203.) In 1965, the public agency received a state license for the diversion and use of water from the reservoir. The public agency conducted no environmental review for the construction or operation of the reservoir or for annual release schedules either before or after CEQA became effective in 1970. (*Nacimiento*, at p. 203.) The agency's 1991 release schedule specified a 56-foot drop in the water level in the reservoir from 745 feet to a final elevation of 689 feet. The trial court found the release of water pursuant to the 1991 schedule would adversely affect the environment, including fish, wildlife, and recreation, but decided the 1991 release schedule was exempt from CEQA review because it was part of an ongoing project—namely, the operation of the reservoir. (*Nacimiento*, at pp. 203-204.) The proposed 1991 releases were consistent with pre-CEQA operations because three times prior to 1970 (1960, 1961 & 1969) the reservoir's water elevation fell to 689 feet or less. (*Ibid.*) As a result, the trial court concluded the agency properly relied on the exemption and denied the petition.

The appellate court affirmed. (*Nacimiento, supra*, 15 Cal.App.4th at pp. 204-205.) It concluded that the construction of the dam and its operation as a reservoir was an ongoing project under Guidelines section 15261 because the 1991 release schedule was “a normal, intrinsic part of the ongoing operation of the reservoir project” which did not “expand[] or enlarge[] project facilities ... [and] merely monitor[ed] and adjust[ed] the operation of existing facilities to meet fluctuating conditions. [Citations.]” (*Nacimiento, supra*, at pp. 205, 207; see also *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 806-

807 [construction of additional pumping facilities and wells for new groundwater extraction, which increased intensity and scope of actual and projected groundwater withdrawals, was not part of ongoing aqueduct/water transfer project]; *Sierra Club v. Morton* (N.D.Cal. 1975) 400 F.Supp. 610, 650 [federal court concludes EIR required for proposed additional pumping facilities].)

Other opinions demonstrate the idea that variations in the flow of water that are part of existing operations and occur without the construction of additional facilities do not require environmental review. (See, e.g., *County of Trinity v. Andrus* (E.D.Cal. 1977) 438 F.Supp. 1368, 1387 [planned drawdown of Clair Engle Lake, in response to drought, without modification of existing facilities did not require environmental review]; *Upper Snake River Chapter of Trout Unlimited v. Hodel* (9th Cir. 1990) 921 F.2d 232, 233 [National Environmental Policy Act of 1969 (42 U.S.C. § 4321 et seq.; NEPA) did not require Bureau of Reclamation to prepare environmental impact statement before periodically adjusting flow of water from Palisades Dam].)<sup>15</sup>

*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931 illustrates that a change in the use of existing facilities can preclude reliance on the ongoing project exemption. There, an irrigation district proposed buying a hydroelectric generation project from Pacific Gas and Electric Company, which operated the facilities for the sole purpose of generating electricity—a nonconsumptive use. (*Id.* at p. 943.) The irrigation district proposed changing the project to include consumptive uses. Both the trial and appellate courts rejected the irrigation district’s assertion that its acquisition

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<sup>15</sup>Although *County of Trinity v. Andrus* involved a federal district court applying NEPA, the court in *Nacimiento* stated the decision was particularly instructive. (*Nacimiento, supra*, 15 Cal.App.4th at p. 206.) California courts sometimes look to NEPA and federal decisions for guidance. (E.g., *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 260-261; *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 591 [CEQA patterned on NEPA; NEPA cases can be persuasive authority for interpreting CEQA].)

of the hydroelectric generation project was exempt from CEQA. (*County of Amador*, at pp. 966, 969.) As to the ongoing project exemption, the appellate court described the addition of consumptive uses as a “remarkable change in proposed operation . . .” (*Id.* at p. 968.) It referred to the test set forth in *Nacimiento*<sup>16</sup> and concluded that the irrigation district’s proposed expansion of the project to include consumptive water use significantly changed the focus of the project and thus could not be termed part of an “‘ongoing project.’ [Citation.]” (*County of Amador, supra*, at p. 969.)

The foregoing cases demonstrate that in making a comparison between the scope of the present day activity and the activity approved prior to the enactment of CEQA, one must consider the construction and maintenance of the physical facilities as well as the day-to-day operation of those facilities.

Thus, I agree with the trial court’s conclusion that the “project” is not limited to the latest interim renewal contracts that expired on February 29, 2012. I also agree with that court’s assessment that the application of the ongoing projects exemption requires consideration of the chain of long-term contracts and interim renewal contracts between Water Districts and the Bureau of Reclamation over the Central Valley Project’s history.

### **C. Comparison of Scope of Pre-CEQA Approval with Current Activity**

The test set forth in *Nacimiento* helps identify the comparison that must be made to apply the ongoing project exemption. That test asks “[w]hether an activity requires environmental review depends upon whether it expands or enlarges project facilities or [instead] merely monitors and adjusts the operation of existing facilities to meet fluctuating conditions. [Citations.]” (*Nacimiento, supra*, 15 Cal.App.4th at p. 205.)

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<sup>16</sup>“Whether an activity requires environmental review depends upon whether it expands or enlarges project facilities or whether it merely monitors and adjusts the operation of existing facilities to meet fluctuating conditions. [Citations.]” (*Nacimiento, supra*, 15 Cal.App.4th at p. 205.)

## **1. Facilities**

The first half of this test requires an inquiry into whether the proposed activity will involve project facilities that were not approved prior to November 23, 1970—the date referenced in Guidelines section 15261, subdivision (a). If the proposed activity uses physical facilities that were not approved before that date, then that activity is not the continuation of pre-CEQA activity; it is the continuation of an expanded or enlarged version of the earlier project, and the “ongoing project” exemption does not apply.

At a hearing in the trial court, counsel for Water Districts repeatedly insisted that there has been no physical change to Water Districts’ facilities—“the infrastructure”—since 1968. Documents in the administrative record, however, reveal that this simply is not true. Westlands Water District’s Water Management Plan, dated March 3, 2008, indicates that Westlands Water District’s “distribution system was built between 1965 and 1979.” The administrative record also contains a table that provides information about various construction contracts involving Water Districts’ laterals and pumping plant. The table sets forth the “Spec No.,” the contractor’s name, a description of the work (e.g., “Laterals 1R, 3R, 4R”), completion date, and final cost. It shows that several construction contracts were completed from 1972 through 1979. Thus, the record demonstrates that the construction of Water Districts’ physical facilities continued after the November 23, 1970, date set forth in Guidelines section 15261. Had the construction been completed before that date, this court could have inferred that the construction had been “approved” prior to the cutoff date. Because construction continued until 1979, it is necessary to determine whether that construction was approved prior to November 23, 1970.

At oral argument, counsel for Water Districts argued that when she told the trial court that physical facilities were “in place” in 1968, she meant they had been approved by that date. Water Districts assert that because “Westlands Water District’s distribution

system was authorized in section 9(d) of the Reclamation Project Act of 1939,”<sup>17</sup> facilities built after November 23, 1970, were nonetheless “approved” prior to that date for purposes of Guidelines section 15261, subdivision (a). Citing to a copy of their 2002-2003 annual report and a copy of the original water service contract dated June 5, 1963, and designated contract No. 14-06-200-495-A, Water Districts also assert that their permanent distribution system, including the area of the former West Plains Water Storage District, was approved by 1965.

The Guidelines define “approval” as “the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person.... Legislative action in regard to a project often constitutes approval.” (Guidelines, § 15352, subd. (a).) The legislation cited by Water Districts, however, does not demonstrate when Water Districts were committed to the construction of the particular physical facilities that were completed after November 23, 1970. Similarly, the parts of the record of proceedings cited by Water Districts are insufficient to show when they made the decision that committed them to the construction of the physical facilities that were completed after November 23, 1970.

Water Districts attempt to bolster their argument regarding approval through a request that we take judicial notice of various documents. As discussed in part II., *ante*, I agree with the majority’s decision to deny that request. Furthermore, even were this court to take judicial notice as requested and consider the documents as part of the administrative record, they would not show what Water Districts intended. In fact, those documents are part of the difficulties about this case that cause the majority to avoid

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<sup>17</sup>This provision is codified as 43 United States Code section 485h(d) and states: “No water may be delivered for irrigation of lands in connection with any new project ... until an organization, satisfactory in form and powers to the Secretary, has entered into a repayment contract with the United States, in a form satisfactory to the Secretary,” which includes certain specified criteria.

addressing the issues. For example, a document entitled “Control Schedule” and appended to the program plans and estimates for the construction of Water Districts’ distribution system lists the lateral numbers covered by contracts Nos. 1 through 10. The lateral numbers are 1 through 32, inclusive. Elsewhere in the administrative record a table provides information about various construction contracts involving Water Districts’ laterals and pumping plant. The laterals listed in that table include laterals numbered 33, 34, 35, 36, 37, and 38. Because these laterals are not mentioned in the Control Schedule, I am not able to determine whether those additional six laterals were approved prior to CEQA’s enactment or after.<sup>18</sup>

For all of these reasons, I therefore conclude that the administrative record lacks substantial evidence to support a finding that those facilities that have been constructed after November 23, 1970, were “approved prior to” that date. (Guidelines, § 15261, subd. (a).) Thus, I must reject Water Districts’ claim of an “ongoing project” exemption for the interim renewal contracts at issue here.

## **2. Operations**

The second half of the test in *Nacimiento* concerns whether the current activity expands the operation of the physical facilities. (*Nacimiento, supra*, 15 Cal.App.4th at p. 205.) To examine this issue, I will compare the operations of Water Districts that were approved pre-CEQA with the operations undertaken to implement the interim renewal contracts. Part of that comparison can be expressed in terms of the volume of water handled by Water Districts.

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<sup>18</sup>Asked to address these inconsistencies at oral argument, counsel for Water Districts suggested that approval in concept—not of specific design or engineering details—is what CEQA requires. I will not consider this contention because it was raised late in these proceedings and has not been subject to the full rigors of the adversarial process.

For instance, the largest interim renewal contract authorizes 900,000 annual acre-feet of water for Priority Area I and 250,000 annual acre-feet for Priority Area II. There is no dispute that the original 1963 contract authorized at least 900,000 annual acre-feet for the original Westlands Water District (i.e., Priority Area I). Therefore, the approval of the largest interim contract does not expand the operations insofar as they relate to the delivery of 900,000 acre-feet of water per year to Priority Area I.

The administrative record, however, is less clear about the delivery of 250,000 acre-feet of water per year to Priority Area II. For example, the December 2009 board resolution approving contract No. 14-06-200-495A-IR2 refers to a 1986 contract that provides for the delivery of up to an additional 250,000 acre-feet of water, “the right to which was confirmed under paragraph 5 of the *Barcellos* Judgment and in other contracts between the District and the United States ....” The administrative record contains a copy of the *Barcellos* judgment (*Barcellos & Wolfson, Inc. v. Westlands Water Dist.* (E.D.Cal., No. CV 79-106-EDP)), which was entered in December 1986. In addition, the administrative record contains a stipulated agreement filed on September 18, 1981, in a federal lawsuit that Westlands Water District filed against the United States and the Bureau of Reclamation (*Westlands Water Dist. v. United States* (E.D.Cal., No. CV 81-245-EDP)). The stipulated agreement required the United States to deliver to Westlands Water District a firm annual supply of 1,150,000 acre-feet of water, a figure that corresponds with 900,000 acre-feet for Priority Area I and 250,000 acre-feet for Priority Area II. Nonetheless, the stipulation does not contain information allowing the allocation of 250,000 acre-feet of water (or more) for Priority Area II to be traced back to a time predating CEQA.

Because the 1981 stipulation and 1986 *Barcellos* judgment occurred after the 1970 enactment of CEQA, this court sent a letter requesting supplemental letter briefs that asked the parties whether the right of Westlands Water District (or its predecessor, West Plains Water District) to 250,000 acre-feet of water annually for use in Priority Area II

could be traced to before the 1981 stipulated agreement. Water Districts' response relied heavily on documents included in its simultaneously filed request for judicial notice. As discussed above, I concur in the denial of this request for judicial notice.<sup>19</sup>

As a result, the administrative record lacks sufficient evidence to support a finding that the allocation of 250,000 acre-feet of water per year to Priority Area II was "approved prior to November 23, 1970," for purposes of Guidelines section 15261, subdivision (a). Thus, the administrative record available in this case does support Water Districts' application of the "ongoing projects" exemption to the interim renewal contract designated contract No. 14-06-200-495A-IR2.

#### **V. Rate-setting Exemption**

The rate-setting exemption was added to CEQA after an appellate court decided an increase in bus fares was a "project" subject to environmental review under CEQA. (Stats. 1978, ch. 356, § 1; see *Shawn v. Golden Gate Bridge etc. Dist.* (1976) 60 Cal.App.3d 699.) Section 21080, subdivision (b)(8) provides an exemption from CEQA for:

"The establishment, modification, structuring, restructuring, or approval of rates, tolls, fares, or other charges by public agencies which the public agency finds are for the purpose of (A) meeting operating expenses, including employee wage rates and fringe benefits, (B) purchasing or leasing supplies, equipment, or materials, (C) meeting financial reserve needs and requirements, (D) obtaining funds for capital projects necessary to maintain service within existing service areas, or (E) obtaining funds

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<sup>19</sup>Even if this court granted Water Districts' request for judicial notice, it does not contain enough information to establish an allocation of up to 250,000 annual acre-feet of Central Valley Project water to Priority Area II prior to CEQA's enactment. Exhibit C to that request for judicial notice, contract No. 14-06-200-4152A, provides for the delivery of 1,400,000 acre-feet of Central Valley Project water over 10 years. There is nothing in the record to show that the activity under that contract has been ongoing and connected with the delivery of 250,000 annual acre-feet under the current interim renewal contract.

necessary to maintain those intracity transfers as are authorized by city charter.”

The statute also requires that the public agency

“shall incorporate written findings in the record of any proceeding in which an exemption under this paragraph is claimed setting forth with specificity the basis for the claim of exemption.” (§ 21080, subd. (b)(8).)<sup>20</sup>

The trial court here determined that Water Districts had failed to identify written findings setting forth the specific bases for their reliance on the rate-setting exemption and, thus, had violated the last sentence of subdivision (b)(8) of section 21080. Water Districts challenge the trial court’s conclusion by arguing: “The agencies in this case made proper findings that the renewals were exempt from CEQA, because they neither increased services nor expanded a system; instead, they approved rates and charges to maintain existing services. [Citations.]”

The documents cited by Water Districts include a December 15, 2009, resolution of the board of directors of Westlands Water District regarding interim renewal contract No. 14-06-200-495A-IR2. Paragraph No. 4 of the resolution states that the “Interim Renewal Contract requires changes in rates to be charged for water provided thereunder” and that such changes are statutorily exempt from CEQA.<sup>21</sup>

I, like the trial court, conclude that the December 15, 2009, resolution did not contain the written findings required by section 21080, subdivision (b)(8) and Guidelines section 15273, subdivision (c). The resolution does not mention any of the five purposes

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<sup>20</sup>The rate-setting exemption is reiterated in Guidelines section 15273. This last sentence of section 21080, concerning the written findings at issue in this appeal, is restated nearly verbatim in subdivision (c) of Guidelines section 15273.

<sup>21</sup>This paragraph is identical to the fourth numbered paragraph in the board’s October 23, 2007, resolution relating to the first interim renewal, which may explain why it is inaccurate. The second interim renewal contract did not change the rates, but reinstated the rates established in the first renewal.

listed in clauses (A) through (E) of section 21080, subdivision (b)(8). (See Guidelines, § 15273, subd. (a)(1)-(5).)

Similarly, the notices of exemption cited by Water Districts do not contain any written findings that address one or more of the five purposes listed in section 21080, subdivision (b)(8). The notices cite Guidelines section 15273, subdivision (a)(1), but this mere citation cannot be regarded as a “written finding” that includes the specificity required by the statutory and regulatory text.

Therefore, I conclude that CEQA’s rate-setting exemption cannot be applied to the six interim contracts that constitute the CEQA project in this proceeding. Therefore, that exemption provides no basis for upholding the judgment in favor of Water Districts.

## **VI. Categorical Exemption for Existing Facilities**

The trial court relied on the ongoing project exemption to enter judgment in favor of Water Districts and chose not to address the applicability of the categorical exemption for existing facilities. (Guidelines, § 15301.) On appeal, the parties dispute whether the interim renewal contracts qualify for this categorical exemption. I address the existing facilities exemption here to determine if it provides a basis for upholding the judgment in favor of Water Districts.

### **A. Statutory and Regulatory Text**

Section 21084, subdivision (a) provides that the Guidelines “shall include a list of classes of projects that have been determined not to have a significant effect on the environment and that shall be exempt from [CEQA].”

Pursuant to this directive, article 19 of the Guidelines sets forth 33 classes of categorical exemptions. The “Class 1” categorical exemption concerns “the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead

agency’s determination.” (Guidelines, § 15301.) The Guideline provides 16 examples of the types of projects that fall within the Class 1 categorical exemption. (Guidelines, § 15301, subds. (a)-(p).) The second example concerns existing utility facilities used to provide electric power, natural gas, sewerage, or other public utility services. (Guidelines, § 15301, subd. (b).)

## **B. Standard of Review**

### **1. Categorical exemptions**

It is well-established that the substantial evidence test applies to an agency’s factual determination that a project is subject to a categorical exemption. (*Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1187.) Also, the agency has the burden of presenting substantial evidence demonstrating the project fell within the categorical exemption. (*Magan v. County of Kings, supra*, 105 Cal.App.4th at p. 474.)

### **2. Exceptions to categorical exemptions**

In contrast, the courts are divided on the question whether the fair argument standard or the substantial evidence test applies to the factual determinations that control whether an exception precludes reliance on a categorical exemption. (*Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles, supra*, 161 Cal.App.4th at p. 1187; see *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 796 [discussing split in authority and citing cases applying substantial evidence test to whether exception applies]; 1 Kostka & Zischke, Practice under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed. 2011) § 5:127, p. 297 [“unclear what standard applies”].)

This court, for practical purposes, has adopted the fair argument standard. In *Magan v. County of Kings, supra*, 105 Cal.App.4th 468, though we did not use the term “fair argument,” we did state the following principles:

“In categorical exemption cases, where the agency establishes that the project is within an exempt class, the burden shifts to the party challenging the exemption to show that the project is not exempt because it falls within one of the exceptions listed in Guidelines section 15300.2. The most commonly raised exception is subdivision (c) of [Guidelines] section 15300.2, which provides that an activity which would otherwise be categorically exempt is not exempt if there are “unusual circumstances” which create a “reasonable possibility” that the activity will have a significant effect on the environment. A challenger must therefore produce substantial evidence showing a reasonable possibility of adverse environmental impact sufficient to remove the project from the categorically exempt class.’ [Citations].” (*Magan v. County of Kings, supra*, 105 Cal.App.4th at p. 474, quoting *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115.)

The statement that a challenger must produce substantial evidence to remove the project from a categorical exemption is the equivalent of stating that the challenger must raise a “fair argument” that an exception to the categorical exemptions applies. (See *Nelson v. County of Kern, supra*, 190 Cal.App.4th 252 [fair argument test presents question of law regarding whether there is substantial evidence in support of fair argument that proposed project might have significant environmental impact].)<sup>22</sup>

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<sup>22</sup>Our opinion in *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039 addressed a different question—to wit, the scope of the environment. We framed that preliminary question narrowly: “whether City was required to employ the fair argument standard when considering whether [an apartment building] qualified as an historical resource.” (*Id.* at p. 1069.) Here the preliminary question of the scope of the environment is not presented. The question here is whether there is a reasonable possibility that the project will have a significant environmental impact effect due to “unusual circumstances.” (Guidelines, § 15300.2, subd. (c).) When this question is addressed, the scope of the environment already has been determined. Consequently, nothing in *Valley Advocates* conflicts with the proposition that the fair argument standard applies when a court is reviewing an agency’s findings concerning an exception

The position this court adopted in *Magan v. County of Kings* is consistent with the view “that the standard substantial evidence test does not apply and that any substantial evidence in the record that significant impacts *might* result triggers the significant effects exception to the categorical exemptions even though there is substantial evidence to the contrary.” (1 Kostka & Zischke, Practice under the Cal. Environmental Quality Act, *supra*, § 5:127, p. 297; see *Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249 (*Banker’s Hill*); *Azusa Land, supra*, 52 Cal.App.4th at pp. 1202-1204.)

In *Banker’s Hill*, the court concluded “that an agency must apply a fair argument approach in determining whether, under Guidelines section 15300.2(c), there is no reasonable possibility of a significant effect on the environment due to unusual circumstances.” (*Banker’s Hill, supra*, 139 Cal.App.4th at p. 264.) Similarly, in *Azusa Land*, the court applied the fair argument standard of review and concluded the record contained substantial evidence that, as a matter of law, precluded the agency from finding that the proposed activity (continued dumping in a landfill) did not create a reasonable possibility of a significant adverse environmental effect. (*Azusa Land, supra*, 52 Cal.App.4th at p. 1195.) As a result, the court determined the public agency abused its discretion by relying on a categorical exemption. (*Id.* at p. 1198.)

Accordingly, I would confirm the position adopted by this court in *Magan v. County of Kings, supra*, 105 Cal.App.4th at page 474, and join the courts in *Banker’s Hill* and *Azusa Land* in explicitly concluding that the fair argument standard applies when a court is reviewing an agency’s findings of fact relating to an exception set forth in subdivision (b) or (c) of Guidelines section 15300.2.

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contained in Guidelines section 15300.2, subdivisions (b) (cumulative impacts) and (c) (significant effects due to unusual circumstances).

### C. Application of Existing Facilities Exemption

Plaintiffs contend the existing facilities exemption of Guidelines section 15301 does not apply to the interim renewal contracts because the contracts *extend* Water Districts' use of water from the Central Valley Project by two years. This extension, they argue, is an "expansion of existing use" because the prior contracts authorized water diversion only through February 28, 2010. Plaintiffs have cited, and I have located, no authority for the proposition that the phrase "expansion of existing use" in Guidelines section 15301 should be interpreted to include approvals that *extend in time* the operation of a facility.

I disagree with plaintiffs' construction of the Guideline. The reference to "no expansion of use beyond that existing at the time of the lead agency's determination" appears to refer to a *physical* expansion of use of facilities and not to include temporal extensions or continuations of an existing use. The inclusion of the terms "permitting, leasing, [and] licensing" (Guidelines, § 15301) in the exemption demonstrates that the exemption can apply to acts that extend the time in which the facility is authorized to operate. The issuance of a permit or license for an existing facility necessarily includes the operation of that facility at a future time—a time during which operations would not be authorized without the permit or license. This interpretation is reinforced by the language that excludes uses "beyond that existing *at the time of the lead agency's determination.*" (*Ibid.*, italics added.) This language creates a comparison between the physical use of the facility before and after the agency's approval of the activity. (E.g., *Turlock Irrigation Dist. v. Zanker* (2006) 140 Cal.App.4th 1047, 1066 [water district's adoption of conservation rules exempt because rules (i) involved operation of existing water delivery system with only minor alterations to facilities—installation of water meters—and (ii) did not permit an expansion of previous use].)

For example, if a lead agency approved a permit for the continued operation of a pipeline at existing volumes, the approval would be exempt under Guidelines section

15301. If, however, the permit authorized a 20 percent increase in the volume delivered through the pipeline for a given period, an expansion of use might exist, which would preclude application of the exemption.

In this case, the adoption of the interim renewal contracts did not increase the volume of water deliveries “beyond that existing at the time of the lead agency’s determination” (Guidelines, § 15301)—that is, the deliveries authorized by the contracts in effect at the time the interim renewal contracts were approved. Also, the adoption of the interim renewal contracts did not modify the physical structures and facilities used in connection with that water delivery. I therefore conclude that substantial evidence supports Water Districts’ findings that the interim renewal contracts are within the categorical exemption for existing facilities. (See *Magan v. County of Kings*, *supra*, 105 Cal.App.4th at p. 474 [agency’s categorical exemption determination reviewed for substantial evidence to support finding that project fell within categorical exemption].)

I also disagree with plaintiffs’ additional argument that the list of examples contained in Guidelines section 15301 does not include any activity similar to the contract renewals in this case. The examples include the operation or permitting of existing facilities used to provide services such as electric power, natural gas, sewerage, or other public utility services. (Guidelines, § 15301, subd. (b).) The use of Water Districts’ canals, pumping stations, and laterals to provide water is similar to “other public utility services.” (*Ibid.*; see *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 272 [“[a] utility is an agency engaged in the business of supplying ... water”].)

#### **D. Exceptions to the Categorical Exemptions**

CEQA’s categorical exemptions are subject to exceptions. (Guidelines, § 15300.2.) The exceptions raised by plaintiffs concern activities where “the cumulative impact of successive projects of the same type in the same place, over time is significant”

or where “there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” (Guidelines, § 15300.2, subds. (b), (c).)

### **1. Cumulative impacts exception**

Water Districts assert that the interim renewal contracts effect no change in existing use and thus will have no incremental impacts. Because they will have no incremental impacts, Water Districts conclude, the contracts cannot have “cumulative impacts” under CEQA.

Water Districts’ theory of no change in existing use is based on the assertion that, even if the renewal contracts had not been approved, the delivery of water would have continued in the same amounts and for the same purposes. This theory is based on the contention that the Bureau of Reclamation is required by federal statute to renew water service contracts. Plaintiffs disagree, arguing that (1) the Bureau of Reclamation may, but is not required to, enter into interim renewals, (2) Water Districts’ entry into the renewal contracts is fully discretionary, and (3) water deliveries would not have occurred without a contract.

I addressed these arguments in my discussion of the activities that constitute the project. (See pt. III.C., *ante*.) The activity here includes Water Districts’ acceptance of Central Valley Project water from the Bureau of Reclamation and sending that water through Water Districts’ distribution system.

Water Districts have not argued that the use of Central Valley Project water by landowners will have no incremental adverse environmental impact. They have presented other arguments to avoid addressing this issue. A document in the administrative record acknowledged the fact that “[s]alinization, or salt build-up in the soil, is one of the oldest problems faced by irrigated agriculture.” “Salts from applied

water accumulate in alkaline soils and reduce crop yields unless the salts are leached, or flushed from the root zone.”

Water Districts have not escaped the age-old problem of soil salinization. A 2004 draft environmental assessment for contract No. 14-06-200-3365A states that “[w]ater delivered into [Water Districts] from the San Luis Canal is generally very good quality, although the water does contain salts.” Another environmental assessment states: “Complicating the salinity problems in [Westlands Water District] is the soil structure in some areas where dense clay layers of varying depth and thickness restrict natural downward drainage. This causes the irrigation water that moves past the crop root zone to accumulate above the clay layers, resulting in a near-surface saline water table in some areas of [Water Districts], primarily on the eastern side of [Water Districts].” Water Districts’ drainage problem can be eased, but not fully eliminated, with intensive irrigation management. Nonetheless, “salts must ultimately be exported from the area to achieve salt balance and maintain land productivity.” In addition, the draft environmental assessment dated January 2009 for the interim contract renewals for the San Luis Unit indicates that (1) the application of irrigation water to land increases the salt and selenium concentrations in the groundwater and (2) portions of the groundwater within the area covered by Water Districts contain significant quantities of sodium, chlorides, selenium, and other elements.

The foregoing evidence in the administrative record supports a fair argument that the delivery of Central Valley Project water pursuant to the interim renewal contracts will have incremental adverse impacts on the environment.<sup>23</sup> The water deliveries and the

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<sup>23</sup>The factual components of a fair argument must be supported by substantial evidence. Substantial evidence consists of fact, reasonable inference drawn from facts, and expert opinions based on facts. (§ 21080, subd. (e); *Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, 285.)

water's use for irrigation will contribute, incrementally, to a significant cumulative environmental impact—the level of salts and selenium in the area's groundwater. Water Districts' reliance on the finding in the draft environmental assessment that these interim renewal contracts would have no cumulative impact is unpersuasive because that environmental assessment does not analyze the impacts from the delivery of water over the two-year period covered by the contracts.

Based on the foregoing, I conclude that the record supports a fair argument that the exception for cumulative impacts (Guidelines, § 15300.2, subd. (b)) applies in this case and bars Water Districts from relying on the categorical exemption for existing facilities.

## **2. Significant impact due to unusual circumstances**

The application of the exception set forth in subdivision (c) of Guidelines section 15300.2 “involves two distinct inquiries: (1) whether the project presents unusual circumstances and (2) whether there is a reasonable possibility of a significant environmental impact resulting from those unusual circumstances.” (1 Kostka & Zischke, Practice under the Cal. Environmental Quality Act, *supra*, § 5:72, p. 247.) Each of these inquiries presents a question of fact. (*Centinela Hospital Assn. v. City of Inglewood* (1990) 225 Cal.App.3d 1586, 1601 [notice of exemption included implied finding that proposed psychiatric facility would not cause significant environmental effects]; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1260 [plaintiff made no showing of “unusual circumstances”].)

The Guidelines do not define the term “unusual circumstances.” One court has stated that unusual circumstances exist “where the circumstances of a particular project (i) differ from the general circumstances of the projects covered by a particular categorical exemption, and (ii) those circumstances create an environmental risk that does not exist for the general class of exempt projects.” (*Azusa Land, supra*, 52 Cal.App.4th at

p. 1207.) In another case, the appellate court indicated that an unusual circumstance is “some feature of the project that distinguishes it” from others in the exempt class.

*(Fairbank v. City of Mill Valley, supra, 75 Cal.App.4th at p. 1260.)*

Plaintiffs argue that unusual circumstances exist here because of (1) the sheer volume of water diverted, used, and discharged, (2) the impact of the diversions, uses, and discharges on water quantity and quality and on wildlife, and (3) the fact that water deliveries are being made to selenium-contaminated land. In response, Water Districts contend, rather circuitously, that as a matter of law, unusual circumstances do not exist because “any existing project impacts associated with continued operation of existing facilities are common, not ‘unusual.’”

I conclude there is no question that plaintiffs have presented a fair argument that unusual circumstances are present in this case based on the volume of the authorized delivery of Central Valley Project water (over 1.1 million acre-feet) and the characteristics of the area to which that water is delivered. Those characteristics include, among other things, the area’s drainage problems and the high concentrations of total dissolved solids in its groundwater.

The evidence of the area’s drainage problems exists throughout the administrative record. For example, Water Districts’ annual report for 2003/2004 stated that it had purchased approximately 50,000 acres of land, much of it fallow or severely impacted by poor drainage. The report also stated that a majority of the purchased land could be returned to irrigated farming if water supplies and drainage service were to become available.

Evidence of the area’s groundwater issues includes the federal draft environmental assessment dated January 2009, which states:

“Significant portions of the groundwater in the San Luis Unit exceed the California Regional Water Quality Control Board’s recommended [total dissolved solids] concentration. Calcium, magnesium, sodium,

bicarbonates, selenium, sulfates, and chlorides are all present in significant quantities as well (Reclamation 2005a).”

Based on the foregoing evidence, it is reasonable to infer that (1) the circumstances of this project differ from the general circumstances of projects covered by the existing facilities exemption and (2) those circumstances create environmental risks that are atypical for projects falling within the Class 1 exemption. (*Azusa Land, supra*, 52 Cal.App.4th at p. 1207.) In short, the delivery of up to 1.1 million acre-feet of water to an area with salinity and drainage problems is atypical, not a run-of-the-mill situation so common—that is, usual—that it can avoid CEQA review pursuant to a categorical exemption. Therefore, a fair argument exists that unusual circumstances are present in this case.

With respect to the second inquiry—whether there is a reasonable possibility of a significant environmental impact resulting from the unusual circumstances—a fair argument can be made that the delivery of water under the interim renewal contracts creates a reasonable possibility of a significant impact on the environment. The information in the administrative record concerning groundwater quality and drainage issues is sufficient to show a reasonable possibility of significant environmental impacts from the delivery of Central Valley Project water during the two years covered by the interim renewal contracts.

It is well-established that the fair argument standard provides a low threshold (*Valley Advocates v. City of Fresno, supra*, 160 Cal.App.4th at p. 1067), and the range of plausible inferences drawn from evidence in the record may be enlarged when the lead agency has not studied an area of possible environmental impact (*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1597). Also, Water Districts’ argument regarding existing conditions and the proper baseline is not persuasive. The fact that many environmental problems associated with irrigation existed before this set

of interim renewal contracts was approved does not negate the possibility that the impact of two additional years of irrigation may be significant for purposes of CEQA.

## **VII. Indispensable Party**

Water Districts contend this proceeding is not properly before the court because plaintiffs failed to timely join an indispensable party—the Bureau of Reclamation. (Code Civ. Proc., § 389; Pub. Resources Code, § 21167.6.5, subds. (a), (d).) Water Districts first asserted the Bureau of Reclamation was an indispensable party by way of a demurrer filed in the trial court before the administrative record had been filed.

Plaintiffs respond that, in accordance with section 21167.6.5, they named the Bureau of Reclamation as a real party in interest and timely served it with their petition. The administrative record reveals that, before the demurrer of Water Districts, plaintiffs and the United States Attorney's Office stipulated to the dismissal with prejudice of the United States of America, sued as United States Bureau of Reclamation. The stipulation stated that the trial court lacked subject matter jurisdiction because of federal sovereign immunity. The administrative record does not reveal, and this court has not been informed, whether Water Districts had any opportunity to object to the stipulation. Plaintiffs, however, do not assert that such was the case.

The trial court overruled Water Districts' demurrer, concluding that a review of the administrative record at trial was necessary to evaluate the propriety of their arguments. Because the court eventually ruled in favor of Water Districts on another ground, the court never decided whether the Bureau of Reclamation was an indispensable party or whether it was timely joined. Nothing in the record indicates that Water Districts asked for a ruling on the issue.

Plaintiffs assert also that the Bureau of Reclamation is not an indispensable party under the four-factor inquiry used to decide whether to dismiss an action.<sup>24</sup> Ordinarily, appellate courts review a trial court's determination regarding indispensability for an abuse of discretion, and the burden to establish such an abuse is on the party challenging the trial court's ruling. (*Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 855.) Here, because there was no ruling by the trial court, there is nothing for this court to review. Were I acting with a majority, I would remand this matter to the trial court to give it the opportunity to exercise its discretion and determine whether this issue justifies denying plaintiffs' petition.

### **VIII. Exhaustion**

Water Districts contend that plaintiffs' claims are barred for failure to exhaust administrative remedies. Plaintiffs respond by arguing that the exhaustion requirement does not apply in this case and cite as support *Azusa Land, supra*, 52 Cal.App.4th 1165, a case involving a categorical exemption. The trial court also did not rule on this subject. Because exhaustion presents solely a question of law, however, we could and should make the ruling here.

The exhaustion doctrine, which is set forth in section 21177, is interpreted "as not requiring would-be petitioners to exhaust their administrative remedies on CEQA issues where the public agency has not conducted formal public review prior to taking its action." (Remy et al., *Guide to CEQA: Cal. Environmental Quality Act, supra*, p. 806.)

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<sup>24</sup>Code of Civil Procedure section 389, subdivision (b) provides: "The factors to be considered by the court [in making the determination regarding indispensability] include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder."

“[T]he exhaustion requirement applies where (1) CEQA provides a public comment period, or (2) there is a public hearing before a notice of determination is issued.” (*Azusa Land, supra*, 52 Cal.App.4th at p. 1210.) In *Azusa Land*, the public agency declared the project was exempt from CEQA and, as a result, there was no public comment period or public hearing. Therefore, the court determined that the exhaustion requirement contained in section 21177 had no application. (*Azusa Land, supra*, at p. 1210.)

Similarly, Water Districts did not (1) provide a public comment period or (2) hold a public hearing prior to issuing a notice of determination. Therefore, applying the principle set forth in *Azusa Land*, I conclude that CEQA’s exhaustion requirement does not apply here and does not provide a ground for upholding the trial court’s denial of plaintiffs’ petition.

#### **IX. Plaintiffs’ Request to Augment the Administrative Record**

One of the points plaintiffs raise in this appeal is whether the trial court should have granted their motion to augment the administrative record. The documents in that request concern the environmental impacts resulting from the use of the Central Valley Project water by the landowners. Because I have concluded that the administrative record contains substantial evidence supporting a fair argument regarding the existence of such impacts, it is unnecessary for me to decide whether the motion should have been granted.

#### **X. Relief**

I, like the majority, would reverse the judgment in this case. Rather than directing the trial court to dismiss the petition as moot, I would direct the trial court to undertake further proceedings and, depending on the outcome of those proceedings, direct the trial court to order Water Districts to (1) void their approval of the interim renewal contracts, void their approval of the notices of exemption, and void their related findings; (2) reconsider those decisions; and (3) undertake such further action as may be necessary to

comply with CEQA. (§ 21168.9, subd. (a)(1), (3).) In those further proceedings, the trial court should decide the issues involving Water Districts' claim that an indispensable party was not timely joined and any other matters that might operate as a bar to relief. For example, it is possible that Water Districts might argue the factual impossibility of mitigation measures and request that the trial court hold an evidentiary hearing on that factual question. (See 2 Kostka & Zischke, Practice under the Cal. Environmental Quality Act, *supra*, § 23.58, pp. 1198-1199 [trial court may take new evidence on procedural issues or affirmative defenses unrelated to validity of agency's CEQA determinations].)

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DAWSON, J.