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16

17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
18 **COUNTY OF FRESNO, CENTRAL DIVISION**
19

20 WESTLANDS WATER DISTRICT, a
California Water District,
21
Plaintiff,
22
v.
23

24 ALL PERSONS INTERESTED IN THE
MATTER OF THE CONTRACT BETWEEN
25 THE UNITED STATES AND WESTLANDS
WATER DISTRICT PROVIDING FOR
PROJECT WATER SERVICE, SAN LUIS
26 UNIT AND DELTA DIVISION AND
FACILITIES REPAYMENT,
27
Defendants.
28

Case No. 19CECG03887

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR VALIDATION OF
CONTRACT**

Date: January 28, 2020
Time: 3:30 p.m.
Dept.: 502

Assigned for All Purposes to:
Hon. Alan Simpson, Dept. 502

Action Filed: October 25, 2019

TABLE OF CONTENTS

	<u>Page</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

I.	INTRODUCTION.....	6
II.	SUMMARY OF FACTS.....	7
III.	PROCEDURAL HISTORY	9
IV.	ARGUMENT	10
	A. This Proceeding Shall be Speedily Heard and Determined, and May be Decided by Motion.....	10
	B. The Court’s Task Is to Review the Record Before the Westlands’ Board.....	11
	C. This Proceeding Meets the Requirements of CCP Section 860	11
	D. Westlands Has Authority to Enter the Converted Contract	12
	E. Westlands’ Board Lawfully Approved the Converted Contract	12
	1. The Board Approved the Converted Contract at a Properly Noticed Public Meeting	12
	2. A Quorum of the Westlands’ Board Unanimously Approved the Converted Contract	13
	3. Westlands’ Board Properly Addressed CEQA by Adopting a Notice of Exemption	13
	4. Any CEQA Challenges to Approval of the Converted Contract Are Barred by Public Resources Code Sections 21167 and 21177.....	15
	5. The Converted Contract Is Not a “Covered Action,” and Thus the Westlands’ Board Need Not Make Any Consistency Determination Pursuant to the Delta Reform Act	16
	F. Three of the Answers Are Time Barred	17
	G. None of the Affirmative Defenses Raised by Defendants Support Denial of Validation	18
	1. Defendants Assert Defenses Far Outside the Scope of This Action	18
	2. This Action Will Not Decide Reclamation’s Compliance With Federal Law	19
	3. This Action Is Ripe	20
V.	CONCLUSION	20

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Cases

Citizens for East Shore Parks v. State Lands Com.
(2011) 202 Cal.App.4th 549.....17

City of San Diego v. San Diegans for Open Government
(2016) 3 Cal.App.5th 568.....18

Embarcadero Municipal Improvement District v. County of Santa Barbara
(2001) 88 Cal.App.4th 781.....10

Friedland v. City of Long Beach
(1998) 62 Cal.App.4th 835.....10

Meaney v. Sacramento Housing and Redevelopment Agency
(1993) 13 Cal.App.4th 566.....11

Mike Moore’s 24-Hour Towing v. City of San Diego
(1996) 45 Cal.App.4th 1294.....11

Morgan v. Community Redevelopment Agency
(1991) 231 Cal.App.3d 243.....11

North Coast Rivers Alliance v. Westlands Water District,
(2014) 227 Cal.App.4th 832.....14, 15, 19, 20

Poway Royal Mobilehome Owners Association v. City of Poway
(2007) 149 Cal.App.4th 1460.....10, 11

Protect Agricultural Land v. Stanislaus County Local Agency Formation Com.
(2014) 223 Cal.App.4th 550.....15

Quantification Settlement Agreement Cases
(2011) 201 Cal.App.4th 758.....18, 19

Walters v. County of Plumas
(1974) 61 Cal.App.3d 460.....15

1	California Regulations	
2	Cal. Code Regs. tit. 14	
3	§ 15060 et seq.....	13
4	§ 15061	13
5	§ 15261	13
6	§ 15261(a)	14
7	§ 15261(b)	14
8	§ 15301	13, 14
9	California Statutes	
10	Code Civ. Proc.	
11	§ 860	11
12	§ 860, et seq.....	10, 12
13	§ 862	17, 18
14	§ 864	12, 20
15	§ 867	6, 10, 11
16	Gov. Code	
17	§ 54950 et seq.....	12, 13
18	§ 54954.1	13
19	§ 54954.2	13
20	§ 54954.2(a)	13
21	Pub. Resources Code	
22	§ 21000 et seq.....	<i>passim</i>
23	§ 21065	16
24	§ 21167	15
25	§ 21167(d)	15
26	§ 21177	15
27	§ 21177(b)	16
28	Wat. Code	
	§ 34000 et seq.....	7
	§ 35851	12
	§ 35855	12
	§ 35875	12
	§ 35876	12
	§ 37823	12
	§ 37850	12
	§ 85000 et seq.....	16, 17
	§ 85057.5(a)	16
	§ 85057.5(a)(1)	17
	§ 85057.5(b)(2)	17

1
2
3
4
5
6
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8
9
10
11
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14
15
16
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19
20
21
22
23
24
25
26
27
28

Federal Statutes

Act of August 4, 1939 § 9(d) (53 Stat. 1195).....6

WIIN Act

 § 40117, 8

 § 4011(a)(1).....8

Other Authorities

Delta Stewardship Council, Covered Actions Checklist [“DSC Checklist”] at Step
2, part 4, available at https://coveredactions.deltacouncil.ca.gov/Files/Covered-Actions-Checklist_July2019.pdf17

1 **I. INTRODUCTION**

2 Plaintiff Westlands Water District (“Westlands”) holds a water service contract with the
3 United States for vital water supplies from the Central Valley Project (“CVP”), water that since the
4 mid 1960’s has been used to irrigate lands in western Fresno and Kings counties. Westlands’
5 existing water service contract will expire on February 29, 2020. In this action, Westlands seeks to
6 validate its decision to convert its existing water service contract to a repayment contract
7 (“Converted Contract”). After conversion, Westlands’ contract will continue in effect so long as
8 Westlands pays applicable charges, consistent with section 9(d) of the Act of August 4, 1939 (53
9 Stat. 1195). Westlands seeks entry of a validation judgment in time to allow it to enter the Converted
10 Contract before its existing water service contract expires on February 29, 2020.

11 Code of Civil Procedure section 867 authorizes the Court to decide this action by motion
12 and directs that it be “speedily heard and determined.” As a matter of law, Westlands has the
13 authority to enter contracts for water supply, and to bring an action to validate such contracts. Only
14 a limited record, which is provided with this motion, is needed for the Court to determine that
15 Westlands’ Board of Directors (“Westlands’ Board” or “Board”) lawfully approved the Converted
16 Contract, and to enter a validation judgment. Westlands adopted the resolution approving the
17 Converted Contract in compliance with open meeting laws, by unanimous vote of its Board.
18 Westlands’ reliance on a Notice of Exemption from the California Environmental Quality Act
19 (“CEQA”), codified in Public Resources code section 21000, et seq., is well supported by prior
20 rulings of this Court and the Court of Appeal concerning a prior renewal of its existing water service
21 contract. Moreover, CEQA challenges are untimely. Finally, Westlands has provided notice of this
22 proceeding in the manner required by the Court’s orders, and consistent with the requirements of
23 the validating statutes. The Court therefore has jurisdiction to enter a validation judgment.

24 The answering defendants may be opposed to the delivery of CVP water to Fresno and Kings
25 counties, and to CVP operations in general. But the issues they seek to raise here are irrelevant to
26 the issues to be decided by the requested validation judgment. The judgment in this action will
27 determine the validity of Westlands’ Converted Contract. The various claims defendants seek to
28 raise, including those regarding environmental regulation affecting operations of the CVP and water

1 rights are not properly raised here. Given defendants’ apparent misunderstanding of the scope of
2 what will be decided in this action, Westlands has prepared and filed herewith a proposed form of
3 judgment intended to clarify those matters.

4 Westlands respectfully requests that following hearing of this motion the Court enter the
5 proposed validation judgment.

6 **II. SUMMARY OF FACTS**

7 Westlands is a California Water District established under California Water Code sections
8 34000 et seq. (Declaration of Jose Gutierrez [“Gutierrez Decl.”], ¶ 2.) Westlands’ principal office
9 is located in Fresno, California. (Gutierrez Decl. ¶ 3.) Westlands’ service area in western Fresno and
10 Kings counties encompasses some 614,000 acres, and includes some of the most highly productive
11 agricultural lands in the world. (*Ibid.*) Crop production in Westlands includes, but is not limited to,
12 almonds, pistachios, tomatoes, cotton, grapes, melons, wheat, lettuce, and onions. (*Ibid.*) Westlands
13 provides water primarily for irrigation of farms, but also provides water for municipal and industrial
14 uses. (*Ibid.*)

15 Westlands holds vested rights to receive water from the CVP under a water service contract
16 with the United States Bureau of Reclamation (“Reclamation”), for distribution and use within areas
17 of western Fresno and Kings Counties. (Gutierrez Decl. ¶ 4, Ex. 1 to the Appendix of Exhibits.)
18 Westlands’ total contractual entitlement to water from the CVP (“CVP Water”) is 1.15 million acre-
19 feet per year. (*Ibid.*)¹ Westlands first contracted for CVP water supply in 1963. (*Ibid.*) Before the
20 term of the original contract ended in 2007, Westlands entered the first in a series of interim renewal
21 contracts. (Gutierrez Decl. ¶ 5, Ex. 2 to the Appendix of Exhibits; see *North Coast Rivers Alliance*
22 *v. Westlands Water District*, [“NCRA ”] (2014) 227 Cal.App.4th 832, 844-845 [summarizing history
23 of Westlands’ contracting up through 2012 renewal].) Westlands’ existing water service contract
24 expires on February 29, 2020. (Gutierrez Decl. ¶ 6, Ex. 3 to the Appendix of Exhibits.)

25 On December 16, 2016, Congress enacted the Water Infrastructure Improvements for the
26

27 ¹ Westlands holds additional vested rights to receive CVP water. Those rights are afforded by water
28 service contracts Westlands acquired through assignments from other water districts. Those
contracts are not the subject of this validation action. (Gutierrez Decl. ¶ 4.)

1 Nation Act (Pub. L. 114-322, 130 Stat. 1628) (the “WIIN Act”). Section 4011 of the WIIN Act
2 created an alternative to the renewal of water service contracts for agencies, such as Westlands, that
3 contract with the United States for the delivery of water developed by federal reclamation projects.
4 Section 4011 provides, in pertinent part, “[u]pon request of the contractor, the Secretary of the
5 Interior shall convert any water service contract in effect on the date of enactment of this subtitle
6 and between the United States and a water users’ association to allow for prepayment of the
7 repayment contract pursuant to paragraph (2) under mutually agreeable terms and conditions.”
8 (WIIN Act, P.L. No. 114-322, § 4011(a)(1) (Dec. 16, 2016) 130 Stat. 1878.) Pursuant to the WIIN
9 Act, in April 2018, Westlands requested that the Secretary of the Interior convert Westlands’
10 existing water service contract to a repayment contract. (Gutierrez Decl. ¶¶ 7-8.) Reclamation has
11 reported that CVP contractors have requested more than 75 conversions of water service contracts
12 to repayment contracts. (Gutierrez Decl. ¶ 7.) Reclamation, under the authority delegated to it, and
13 Westlands subsequently negotiated terms and conditions to convert Westlands’ existing water
14 service contract to a repayment contract. i.e., the Converted Contract. (Gutierrez Decl. ¶ 8.) A
15 significant amount of the negotiations occurred during CVP-wide negotiations that included
16 representatives of the other CVP contractors that requested conversion. (*Ibid.*)

17 On October 15, 2019, Westlands’ Board met at Westlands’ offices to consider adoption of a
18 resolution, Resolution 119-19, approving the Converted Contract and authorizing its execution.
19 (Gutierrez Decl. ¶¶ 12-14, Exs. 5-7 to the Appendix of Exhibits.) As is recorded in the minutes of
20 the October 15, 2019 meeting, upon motion duly made and seconded, the Board unanimously
21 adopted Resolution 119-19. (Gutierrez Decl. ¶¶ 15-16, Ex. 8 to the Appendix of Exhibits.)
22 Regarding CEQA, Resolution 119-19 found that execution of the Converted Contract was exempt
23 from CEQA, because, among other reasons, it is merely a continuation of a project approved, funded
24 and fully operated, prior to November 23, 1970, and the Converted Contract continues water service
25 to Westlands within established parameters, in the same scope and nature of the ongoing CVP and
26 its existing facilities; it involves no increase in existing service; and no new construction, expansion,
27 or any modification to the existing distribution system; nor any change in the source of water to be
28 delivered, or the uses to which such supplies will be put. (Gutierrez Decl. ¶ 20, Ex. 9 to the Appendix

1 of Exhibits.) Finally, on October 15, 2019, the Board authorized filing of this validation action.
2 (Gutierrez Decl. ¶ 25, Ex. 8 to the Appendix of Exhibits.) Article 46 of the Converted Contract
3 requires Westlands to bring a validation action “confirming the proceedings on the part of the
4 Contractor for the authorization of the execution of” the Converted Contract. (Gutierrez Decl. ¶ 24,
5 Ex. 4 to the Appendix of Exhibits.)

6 **III. PROCEDURAL HISTORY**

7 Westlands filed its Complaint for Validation Judgment (“Complaint”) on October 25, 2019.
8 Following an ex parte application, the Court authorized service by publication and other means in
9 an order dated October 30, 2019. (Order re Westlands Water District’s Ex Parte Application for
10 Approval, Issuance, Publication and Mailing/Emailing of Summons re Validation Action, filed
11 October 30, 2019, [“October 30, 2019, order”] at 2-3.) In that order, the Court approved service of
12 the Summons by publication in *The Business Journal* and *Hanford Sentinel*. (*Id.* at 2.) The Court
13 further ordered that Westlands mail or email its landowners and water users according to its
14 customary notification process. Finally, the Court directed Westlands to post the Summons,
15 Converted Contract, Resolution No. 119-19, and the proposed judgment on its website. (*Id.* at 2-3.)
16 Westlands complied with the Court’s October 30, 2019, order.²

17 The Summons required any appearances by December 16, 2019. Four Answers have been
18 filed in response to the Complaint, one on December 16 and three on December 17. They are: (1)
19 the “Answer of Interested Persons Central Delta Water Agency and South Delta Water Agency to
20 Complaint for Validation” filed on December 16, 2019, by the Central Delta Water Agency and
21 South Delta Water Agency [“CDWA et al.”]; (2) the “Verified Response and Answer of Counties
22 of San Joaquin and Trinity to Complaint for Validation” filed on December 17, 2019, by the
23 Counties of San Joaquin and Trinity; (3) the “Verified Answer of Public Interest Groups to
24

25 ² On December 11, 2019 the Court amended its Order re Westlands Water District’s Ex Parte
26 Application for Approval, Issuance, Publication and Mailing/Emailing fo[sic] Summons re
27 Validation Action, filed December 11, 2019. (See Order Amending Order re Westlands Water
28 District’s Ex Parte Application for Approval, Issuance, Publication and Mailing/Emailing fo[sic]
Summons re Validation Action, filed December 11, 2019.) Westlands complied with the amended
order.

1 Complaint for Validation Judgment” filed on December 17, 2019, by California Water Impact
2 Network, AquAlliance, California Indian Water Commission, and Planning and Conservation
3 League [“CWIN et al.”]; and (4) the “Verified Answer of Defendants North Coast Rivers Alliance,
4 Winnemem Wintu Tribe, California Sportfishing Protection Alliance, Institute for Fisheries
5 Resources, Pacific Coast Federation of Fishermen’s Associations, and San Francisco Crab Boat
6 Owners Association to Complaint for Validation” filed on December 17, 2019, by the North Coast
7 Rivers Alliance, Winnemem Wintu Tribe, California Sportfishing Protection Alliance, Institute for
8 Fisheries Resources, Pacific Coast Federation of Fishermen’s Associations, and San Francisco Crab
9 Boat Owners Association [“NCRA et al.”].

10 Only the Answer filed by CDWA et al. was timely. The other three Answers – filed by
11 NRCA et al., CWIN et al., and the Counties of San Joaquin and Trinity – were filed on December
12 17, 2019, after the deadline passed.

13 **IV. ARGUMENT**

14 **A. This Proceeding Shall be Speedily Heard and Determined, and May be Decided**
15 **by Motion**

16 To decide a validation action, “[t]he validation statutes (Code Civ. Proc. § 860, et seq.)
17 require no particular procedure.” (*Poway Royal Mobilehome Owners Association v. City of Poway*
18 (2007) 149 Cal.App.4th 1460, 1479.) However, Code of Civil Procedure section 867 directs that:

19 [a]ctions brought pursuant to this chapter shall be given preference
20 over all other civil actions before the court in the matter of setting the
21 same for hearing or trial, and in hearing the same, to the end that such
actions shall be speedily heard and determined.

22 This is in accord with the overall policy of such actions in which:

23 [A] central theme in the validating procedures is speedy
24 determination of the validity of the public agency’s action.”
25 [Citation]. . . . The validating statutes should be construed so as to
uphold their purpose, i.e., “the acting agency’s need to settle promptly
all questions about the validity of its action.” [Citation].

26 (*Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 842; *see also Embarcadero Municipal*
27 *Improvement District v. County of Santa Barbara* (2001) 88 Cal.App.4th 781, 790-791 “[t]he
28 purpose of the validation statutes is to provide a simple and uniform method for testing the validity

1 of government action” and the statutes seek “to further the important policy of speedy determination
2 of the public agency’s action.”].) In furtherance of these principles, a court may decide a validation
3 action pursuant to standard law and motion procedures. (*See Poway Royal Mobilehome Owners*
4 *Association v. City of Poway, supra*, 149 Cal.App.4th at 1479 [upholding the use of standard law
5 and motion procedures to determine a validation proceeding].) Thus, in light of section 867, the
6 important policy considerations dictating a prompt resolution of validation actions and the court’s
7 holding in *Poway Mobilehome Owners Association*, a resolution of the present action under the
8 Court’s standard law and motion procedures is warranted. Westlands respectfully requests the
9 Court’s determination on the validity of the Converted Contract prior to February 29, 2020, when
10 its existing water service contract will expire.

11 **B. The Court’s Task Is to Review the Record Before the Westlands’ Board**

12 A hearing in a validation action occurs based upon “an examination of the record before the
13 authorized decision makers to test for sufficiency with legal requirements.” (*See Poway Royal*
14 *Mobilehome Owners Association v. City of Poway, supra*, 149 Cal.App.4th at 1479; *Meaney v.*
15 *Sacramento Housing and Redevelopment Agency* (1993) 13 Cal.App.4th 566, 582-583.) This case
16 involves a decision to enter a contract, which is a legislative action and which presents a question
17 of law. (*Mike Moore’s 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303.)
18 Judicial review of legislative activity is limited to an examination of the record. (*Morgan v.*
19 *Community Redevelopment Agency* (1991) 231 Cal.App.3d 243, 258.) As is explained below, that
20 record, which is provided in the Appendix of Exhibits, confirms that the Westlands’ Board lawfully
21 approved the Converted Contract.

22 **C. This Proceeding Meets the Requirements of CCP Section 860**

23 Code of Civil Procedure section 860 provides: “A public agency may upon the existence of
24 any matter which under any other law is authorized to be determined pursuant to this chapter, and
25 for 60 days thereafter, bring an action in the superior court of the county in which the principal
26 office of the public agency is located to determine the validity of the matter. The matter shall be in
27 the nature of a proceeding in rem.” This action meets the requirements of Code of Civil Procedure
28 section 860.

1 Westlands is a public agency, specifically a California water district. (Gutierrez Decl. ¶ 2;
2 Wat. Code §§ 37823, 37850.) For purposes of validation, the Converted Contract came into
3 existence on October 15, 2019, when Westlands’ Board adopted Resolution No. 119-19 approving
4 it. (Code Civ. Proc. § 864 [“contracts shall be deemed authorized as of the date of adoption by the
5 governing body of the public agency of a resolution or ordinance approving the contract and
6 authorizing its execution.”].) Water Code section 35855 authorizes Westlands to bring “an action to
7 determine the validity of any contract” pursuant to Code of Civil Procedure section 860 et seq. This
8 action was filed on October 25, 2019, ten days after the Converted Contract came into existence.
9 Finally, it is properly brought in this Court, because Westlands has its principal office in Fresno.
10 (Gutierrez Decl. ¶ 3.)

11 **D. Westlands Has Authority to Enter the Converted Contract**

12 Westlands has express statutory authority to enter contracts, including the Converted
13 Contract. Water Code section 35851 provides in relevant part that a “district may for a valuable
14 consideration enter into any contract with the United States . . . as the board deems proper, advisable,
15 or in the interest of the district for . . . the storage, regulation, control, development and distribution
16 of water for the irrigation of land.” Water Code section 35875 authorizes Westlands to cooperate
17 and contract with the United States under federal reclamation law. Water Code section 35876
18 provides that contract and cooperation may be for, among other things, a “water supply.” The
19 Converted Contract falls squarely within the authority granted Westlands by these statutes.

20 **E. Westlands’ Board Lawfully Approved the Converted Contract**

21 **1. The Board Approved the Converted Contract at a Properly Noticed**
22 **Public Meeting**

23 Westlands’ Board approved the Converted Contract in compliance with public notice and
24 meeting requirements. The Ralph M. Brown Act (the “Brown Act”), codified in Government Code
25 section 54950 et seq., provides legal standards for local governmental transparency in decision
26 making. In accordance with the Brown Act, Westlands timely posted the agenda for the October 15,
27 2019 regular meeting of Westlands’ Board at its Fresno and Five Points offices and on its website,
28 making the agenda freely available for public inspection. (Declaration of Balbina (“Bobbie”))

1 Ormonde [“Ormonde Decl.”], ¶¶ 3-7; Exs. 5-6 to the Appendix of Exhibits; Gov. Code § 54954.2.)
2 The agenda was posted by October 10, 2019, more than 72 hours prior to the noticed meeting. (*Ibid.*)
3 The agenda noted the time and place of the meeting and provided for public comment on any matter
4 on the agenda before or during consideration of that matter. (Ex. 6 to the Appendix of Exhibits;
5 Gov. Code § 54954.2.) The agenda provided a brief general description of the action to take place.
6 (Ex. 6 to the Appendix of Exhibits at Item 4; Gov. Code § 54954.2(a).) On the date the agenda
7 packet was sent to all Directors, it was also emailed to all persons who made a written request for
8 the packet, consistent with the mandate of Government Code section 54954.1. (Ormonde Decl. ¶ 8;
9 Gov. Code § 54954.1.) The agenda packet was also available for public inspection at Westlands’
10 offices. (*Ibid.*) Accordingly, Westlands provided timely and proper notice for its October 15, 2019
11 meeting and its consideration of Resolution No. 119-19.

12 **2. A Quorum of the Westlands’ Board Unanimously Approved the**
13 **Converted Contract**

14 As reflected in the minutes for the October 15, 2019 meeting, eight of the nine directors for
15 Westlands’ Board were present at the meeting. (Ex. 8 to the Appendix of Exhibits.) All eight of the
16 directors present at the meeting voted in favor of adopting Resolution No. 119-19. (Ex. 8 to the
17 Appendix of Exhibits.)

18 **3. Westlands’ Board Properly Addressed CEQA by Adopting a Notice of**
19 **Exemption**

20 CEQA generally requires a public agency to conduct an environmental assessment regarding
21 the potential environmental effects of projects subject to the act. (Pub. Res. Code § 21000 et seq.;
22 Cal. Code Regs. tit. 14, § 15060 et seq.) In determining whether an activity is a project subject to
23 CEQA, an agency may review for potential exemptions. (Cal. Code Regs. tit. 14, § 15061.) Here,
24 Westlands’ Board resolved that its approval of the Converted Contract was exempt from CEQA,
25 and directed staff to file a Notice of Exemption (“NOE”) with the Clerks of Fresno and King
26 Counties and the Office of Planning and Research (State Clearinghouse), noting the categorical
27 exemption for existing facilities (Cal. Code Regs. tit. 14, § 15301) and statutory exemption for
28 ongoing projects (Cal. Code Regs. tit. 14, § 15261). (See NOE at Ex. 11 to the Appendix of

1 Exhibits.)

2 The CEQA exemption for ongoing projects is a statutory exemption, which provides that
3 “[i]f a project being carried out by a public agency was approved prior to November 23, 1970, the
4 project shall be exempt from CEQA . . .” (Cal. Code Regs. tit. 14, § 15261(a).) The exceptions to
5 this exemption are when “[a] substantial portion of public funds allocated for the project have not
6 been spent, and it is still feasible to modify the project to mitigate potentially adverse environmental
7 effects” or the “agency proposes to modify the project in such a way that the project might have a
8 new significant effect on the environment.” (Cal. Code Regs. tit. 14, § 15261(b).) Neither of these
9 exceptions applies here, and the Board properly determined approval of the Converted Contract to
10 be exempt from CEQA. (*NRCA, supra*, 227 Cal.App.4th at 866-867 [special exceptions to statutory
11 exemption for ongoing projects not applicable to continuation of Westlands’ existing water service
12 contracts].)

13 The exemption for existing facilities exempts from CEQA review projects that consist “of
14 the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing
15 public or private structures, facilities, mechanical equipment, or topographical features, involving
16 negligible or no expansion of existing or former use.” (Cal. Code Regs. tit. 14, § 15301.) Westlands’
17 Board also properly determined that this categorical exemption applied to approval of the Converted
18 Contract.

19 In *NRCA, supra*, 227 Cal.App.4th at 867, the Fifth District Court of Appeal found that
20 Westlands’ approval of prior “interim renewal contracts came within the statutory exemption for
21 ongoing projects as set forth in Guidelines section 15261(a).” Accordingly, it held Westlands’
22 findings that the renewals were exempt from CEQA were proper. (*Ibid.*) Regarding the exemption
23 for ongoing projects, the court explained:

24 The applicability of the ongoing projects exemption depends on
25 whether the challenged action is “a normal, intrinsic part of the
26 ongoing operation” of a project approved prior to CEQA, rather than
 an expansion or modification thereof.

27 (*Id.* at 864.) The court further explained that, “the original pre-CEQA project included the
28 construction and operation of Westlands Water District’s existing facilities to receive CVP water

1 and to deliver that water to customers within Westlands Water District’s boundaries. Moreover, the
2 original pre-CEQA project included the entirety of the 1.15 million acre-feet of water to which
3 Westlands Water District is presently entitled to receive by contract.” (*Ibid.*)

4 The holding in *NCRA* continues to apply here. In Resolution No. 119-19, the Board resolved
5 that “the Converted Contract is statutorily exempt . . . because it is merely a continuation of a project
6 approved, funded fully and operated prior to November 23, 1970, and no modification or alteration
7 in the Central Valley Project or the amount of water delivered is proposed.” (Ex. 9 to the Appendix
8 of Exhibits, Resolution No. 119-19 at p. 4.) The resolution continues:

9 Execution of the Converted Contract is exempt . . . based on its record
10 of proceedings showing that the Converted Contract continues water
11 service to the District within established parameters, in the same
12 scope and nature of the ongoing Central Valley Project and its
13 existing facilities; it involves no increase in existing service; and no
14 new construction, expansion, or any modification to the existing
15 distribution system; nor any change in the source of water to be
16 delivered, or the uses to which such supplies will be put.

14 (*Ibid.*) Like the interim renewal contracts reviewed in *NCRA*, the Converted Contract makes
15 available the same 1.15 million acre-feet of water for the same irrigation and M&I purposes,
16 consistent with all applicable State water rights permits, and licenses, federal law and other contract
17 terms. (See Ex. 4 to the Appendix of Exhibits, Converted Contract at Art. 3.) Thus, approval of the
18 Converted Contract here, like approval of the interim renewal contracts reviewed in *NCRA*, is
19 statutorily and categorically exempt from CEQA. Hence, the Board made proper determinations and
20 was justified in directing staff to file the NOE.

21 **4. Any CEQA Challenges to Approval of the Converted Contract Are**
22 **Barred by Public Resources Code Sections 21167 and 21177**

23 The statute of limitations for challenging an agency’s CEQA exemption determination is 35
24 days. (Pub. Res. Code § 21167(d).) The CEQA limitations period takes precedence over the
25 validation statute of limitations for purposes of any CEQA claim. (*Walters v. County of Plumas*
26 (1974) 61 Cal.App.3d 460, 468-469; *Protect Agricultural Land v. Stanislaus County Local Agency*
27 *Formation Com.* (2014) 223 Cal.App.4th 550.) The statutory period for any CEQA claim
28 challenging the Board’s CEQA exemption determinations ran on November 21, 2019. (Ex. 11 to

1 the Appendix of Exhibits.)

2 Moreover, one who seeks to challenge an agency's actions under CEQA must have
3 participated in the agency's administrative proceedings. (Pub. Res. Code § 21177(b).) The statute
4 requires not only that the issues to be challenged be presented to the agency, but also that the identity
5 of the potential challengers be presented prior to litigation. No defendant here meets this standard
6 because none objected prior to or during the Board's hearing on the approval of the Converted
7 Contract. (Ex. 8 to the Appendix of Exhibits.)

8 For these reasons, challenges based on assertions Westlands failed to comply with CEQA
9 are barred by the statute of limitations, as well as defendants' failure to exhaust administrative
10 remedies.

11 **5. The Converted Contract Is Not a "Covered Action," and Thus the**
12 **Westlands' Board Need Not Make Any Consistency Determination**
Pursuant to the Delta Reform Act

13 The Delta Reform Act, codified in Water Code section 85000 et seq.³ is inapplicable here
14 because the Converted Contract is not a "covered action" under the Act. The Delta Reform Act
15 requires a state or local agency to prepare certification of consistency prior to initiating
16 implementation of any "covered action," which is defined by the Act to mean:

17 [A] plan, program, or project as defined pursuant to Section 21065 of
18 the Public Resources Code that meets *all of the following conditions*:

19 (1) Will occur, in whole or in part, within the boundaries of the
20 Delta or Suisun Marsh.

21 (2) Will be carried out, approved, or funded by the state or a local
22 public agency.

23 (3) Is covered by one or more provisions of the Delta Plan.

24 (4) Will have a significant impact on achievement of one or both of
25 the coequal goals or the implementation of government-sponsored
26 flood control programs to reduce risks to people, property, and state
27 interests in the Delta.

28 (Wat. Code § 85057.5(a) (emphasis added).)

In this case, the activities undertaken by Westlands to perform its obligations and to receive

³ At least one defendant has alleged an affirmative defense asserting violation of the Delta Reform Act for failure to make a consistency determination.

1 benefits under the Converted Contract will not occur, in whole or in part, within the boundaries of
2 the Delta or Suisun Marsh. Rather, those activities will occur in Fresno and Kings Counties, and
3 therefore approval of the Converted Contract is not a “covered action.” Defendants may assert that
4 Reclamation’s activities to perform the United States’ obligations under the Converted Contract will
5 occur in the Delta, but those activities are expressly excluded from the definition of a “covered
6 action.” (See Wat. Code § 85057.5(b)(2) [“Covered action” does not include routine operation of
7 the federal Central Valley Project].)

8 In addition, one criterion for determining whether a project is a “covered action” is whether
9 the activity will have a significant impact (positive or negative) on the achievement of one or both
10 of the “coequal goals” or a flood control program. (Wat. Code § 85057.5(a)(1); see also Delta
11 Stewardship Council, Covered Actions Checklist [“DSC Checklist”] at Step 2, part 4, available at
12 https://coveredactions.deltacouncil.ca.gov/Files/Covered-Actions-Checklist_July2019.pdf.)
13 Categories of projects that will not have a significant impact for this purpose include projects that
14 are exempt from CEQA, unless there are unusual circumstances indicating a reasonable possibility
15 that the project will have a significant impact. (DSC Checklist.)

16 Here, the finding that the Converted Contract is exempt from CEQA equally supports a
17 finding that it will not have significant impacts because it makes no cognizable change to existing
18 physical conditions; it merely continues existing activities within established parameters. (*Citizens
19 for East Shore Parks v. State Lands Com.* (2011) 202 Cal.App.4th 549, 558-559, 565-566.) Hence,
20 the Converted Contract is not a covered action pursuant to the Delta Reform Act. Westlands’ Board
21 was not required to prepare any certification of consistency or take any other action under the Delta
22 Reform Act.

23 **F. Three of the Answers Are Time Barred**

24 Three of the Answers challenging Westlands’ approval of the Converted Contract were filed
25 after the December 16, 2019, deadline set in the Summons, and thus, are time barred from
26 consideration by this Court.

27 The validating statutes provide that any interested party may appear and contest a validation
28 action as long as the appearance is made “not later than the date specified in the summons.” (Code

1 Civ. Proc. § 862; see *City of San Diego v. San Diegans for Open Government* (2016) 3 Cal.App.5th
2 568, 579.) “If the interested party does not appear during the prescribed time, he or she loses the
3 opportunity to challenge the government’s action.” (See *City of San Diego, supra*, 3 Cal.App.5th at
4 579.) Here, the Answers filed by NRCA et al., CWIN et al., and the Counties of San Joaquin and
5 Trinity were filed after the date specified in the Summons. Accordingly, those parties have failed to
6 satisfy the timing requirement as set out in Code of Civil Procedure section 862. (See Code Civ.
7 Proc. § 862; *City of San Diego, supra*, 3 Cal.App.5th at 579.) They have lost their opportunity to
8 challenge Westlands’ validation action, and should be dismissed from this case. (See *ibid.*)

9 **G. None of the Affirmative Defenses Raised by Defendants Support Denial of**
10 **Validation**

11 In addition to denying that a validation proceeding is available to Westlands, that Westlands
12 has taken the procedural steps necessary to lawfully approve the Converted Contract, and that
13 Westlands has met the requirements for service of the Summons, defendants allege a host of
14 supposed affirmative defenses. None support denial of a validation judgment. Most of these defenses
15 are based on a misapprehension of the scope of this case and the issues resolved by a judgment in a
16 validation action. Some defenses are simply conclusory statements with no supporting factual
17 allegations, or are too vague and uncertain to reasonably address in these moving papers. Westlands
18 will address those defenses as necessary in reply if defendants elaborate upon the defenses in their
19 opposition.

20 **1. Defendants Assert Defenses Far Outside the Scope of This Action**

21 Many of the defenses raised by defendants are irrelevant, because they relate to matters that
22 will not be determined by a validation judgment in this action. ““A validation proceeding ... is a
23 lawsuit filed and prosecuted for the purpose of securing a judgment determining the validity of a
24 *particular local governmental decision or act.*” (*Quantification Settlement Agreement Cases*
25 (2011) 201 Cal.App.4th 758, 833.) “[B]y its very nature a validation action is focused on the validity
26 of the actions taken by the agency that is seeking the determination of validity.” (*Ibid.*) Here, that
27 agency is Westlands, and it is seeking a determination of the validity of its approval of the Converted
28 Contract.

1 A validation judgment in this action will not decide, or foreclose defendants from raising
2 elsewhere, issues such as how much water the Bureau may lawfully appropriate and deliver to CVP
3 contractors, water rights priorities, or the level of protection to be afforded Delta water users or the
4 environment.⁴ That the Converted Contract is for a quantity of up to 1.15 million acre-feet per year
5 does not assure, let alone mandate, that Westlands will actually receive that quantity from the Bureau
6 each year. As the court in *NCRA* explained, “in addition to considering the amount of water available
7 from rainfall, expected snowpack runoff from the Sierra and reservoir storage, the Bureau also takes
8 into account its obligations under environmental laws, which often significantly impact its
9 determination of the amount of CVP water available to contractors. . . . In practice, CVP water is
10 made available [by the Bureau] to [Westlands] only after the Bureau’s obligations under
11 environmental laws are satisfied and the rights of holders of senior water rights are met.” (*NCRA*,
12 *supra*, 227 Cal.App.4th at 843-844.) In its operation of the CVP, Reclamation will have to comply
13 with all applicable laws and water rights priorities. That will be so regardless of the Court’s
14 validation of Westlands’ approval of the Converted Contract.

15 **2. This Action Will Not Decide Reclamation’s Compliance With Federal**
16 **Law**

17 Given the scope of this validation action is limited to Westlands’ decision to enter into the
18 Converted Contract, this action does not encompass the validity of actions by the United States in
19 connection with the Converted Contract. That is so even though the United States is a party to the
20 Converted Contract. (*Quantification Settlement Agreement Cases, supra*, 201 Cal.App.4th at 833.)
21 Hence, the various defenses asserting that the Converted Contract is contrary to Reclamation’s
22 obligations under federal law, including the National Environmental Policy Act (“NEPA”), are
23 irrelevant.⁵ Indeed, as the *Quantification Settlement Agreement Cases* court explained, claims for
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25 ⁴ See e.g., CDWA Sixth, Seventh, Eighth, Ninth and Tenth Affirmative Defenses; Counties’ Third
26 Affirmative Defense; NCRA Third and Fifth Affirmative Defenses; CWIN First and Second
Affirmative Defenses.

27 ⁵ See e.g., CDWA Twelfth, Thirteenth, Fifteenth and Eighteenth Affirmative Defenses; Counties’
28 Fourth Affirmative Defense; NCRA Seventh and Eighth Affirmative Defenses; and CWIN Third,
Fourth, Fifth and Seventh Affirmative Defenses.

1 noncompliance with NEPA must be brought in federal court, and hence a state court has no
2 jurisdiction to decide such issues in a validation action. (*Id.* at 834-836.)

3 **3. This Action Is Ripe**

4 All defendants allege that this action is premature because at the time of filing Reclamation
5 had not yet completed its environmental review under NEPA, and Reclamation has not yet executed
6 the Converted Contract.⁶ But as discussed above, the Converted Contract became a “matter in
7 existence” for purposes of validation on October 15, 2019, when Westlands’ Board approved it.
8 (Code Civ. Proc. § 864.) Indeed, parties such as Westlands and the United States may want to await
9 validation before executing a contract, something the validation statutes expressly contemplate and
10 allow for by deeming a contract to be “in existence” for validation purposes upon governing board
11 approval, rather than upon execution. The validation procedures permit Westlands and the United
12 States to have confirmation that Westlands’ approval is valid before they each execute the Converted
13 Contract.

14 **V. CONCLUSION**

15 Based on the foregoing Westlands respectfully requests that this Court grant its motion and
16 enter the proposed validation judgment submitted with this motion, and do so in time for Westlands
17 to enter the Converted Contract prior to the expiration of its existing contract on February 29, 2020.

18
19 DATED: December 30, 2019

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation

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21 

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23 By: _____

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28 ⁶ See e.g., CDWA Second Affirmative Defense; Counties’ Second Affirmative Defense; NCRA
Eighth Affirmative Defense; and CWIN Fourth Affirmative Defense.

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PROOF OF SERVICE

Case No. 19CECG03887

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814.

On December 30, 2019, I served true copies of the following document(s) described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR VALIDATION OF CONTRACT** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address twhitman@kmtg.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

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

Executed on December 30, 2019, at Sacramento, California.

Terri Whitman

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