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10.652.02

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

WESTLANDS WATER DISTRICT, a California Water District, Plaintiff, v. ALL PERSONS INTERESTED IN THE MATTER OF THE CONTRACT BETWEEN THE UNITED STATES AND WESTLANDS WATER DISTRICT PROVIDING FOR PROJECT WATER SERVICE, SAN LUIS UNIT AND DELTA DIVISION AND FACILITIES REPAYMENT	CASE NO. 19 CECG03887 **DEFENDANTS NORTH COAST RIVERS ALLIANCE, ET AL.'S MANDATORY SETTLEMENT CONFERENCE STATEMENT** Date: July 22, 2021 Time: 1:30 p.m. Dept.: 501 Assigned for All Purposes to: Hon. Tyler A. Tharpe, Dept. 501 Action Filed: October 25, 2019

Pursuant to this Court's Notice of Calendar Setting filed May 26, 2021 rescheduling the parties' Mandatory Settlement Conference to July 22, 2021 before the Honorable Tyler A. Tharpe of Department 501 of this Court, and in accordance with California Rules of Court 3.1380, subd. (c) and Fresno Local Rule 2.5.6.B, answering parties in this validation action North Coast Rivers Alliance, Winnemem Wintu Tribe, California Sportfishing Protection Alliance, Institute for Fisheries Resources, Pacific Coast Federation of Fishermen's Associations, and San Francisco Crab Boat Owners Association (collectively, "NCRA") hereby submit their Settlement Conference Statement. In summary, Plaintiff Westlands Water District ("Westlands") has no remaining viable claims and should dismiss its action as soon as possible to

avoid needless expense to the Court and the answering parties. The reasons for this are elucidated below.

I. GOOD FAITH SETTLEMENT OFFER

In accordance with Local Rule 3.1380, subd. (c)(2), NCRA will accept Westlands' prompt dismissal of this action with prejudice, subject to the answering parties' subsequent submission and adjudication of their timely filed memoranda of litigation costs pursuant to California Rule of Court 3.1700 and motions for recovery of their reasonable attorney's fees pursuant to Code of Civil Procedure section 1021.5.

II. DAMAGES

This matter is an in rem validation action and damages are not at issue.

III. PARTIES AND COUNSEL

Plaintiff: **Westlands Water District** represented by attorneys Daniel J. O'Hanlon, William T. Chisum, Jon D. Rubin, Douglas S. Brown, and Allison E. Burns**.**

Answering Parties: **(1) North Coast Rivers Alliance, Winnemem Wintu Tribe, California Sportfishing Protection Alliance, Institute for Fisheries Resources, Pacific Coast Federation of Fishermen's Associations,** and **San Francisco Crab Boat Owners Association,** represented by attorneys Stephan C. Volker, Alexis E. Krieg, Stephanie L. Clarke and Jamey M.B. Volker;

(2) County of San Joaquin, represented by attorneys Thomas H. Keeling, Roger B. Moore, J. Mark Myles and Kirin Virk; **County of Trinity**, represented by attorneys Thomas H. Keeling, Roger B. Moore, and Margaret Long;

(3) **Central Delta Water Agency** and **South Delta Water Agency**, represented by attorneys Dante J. Nomellini, Sr., Dante J. Nomellini, Jr. John Herrick and S. Dean Ruiz;

(4) **California Water Impact Network, California Indian Water Commission, AquAlliance, and Planning and Conservation League**, represented by attorney Adam Keats; **Center for Biological Diversity**, represented by attorney John Buse

IV. INSURANCE

Not applicable.

V. APPROVAL OF SETTLEMENT

The NCRA answering parties have authorized their undersigned counsel to negotiate, approve and execute settlement of this matter in accordance with the settlement position set forth above. Any settlement on materially different terms would require the approval of the respective boards of directors (and in the case of the Winnemem Wintu Tribe, its tribal leadership) of these answering parties.

VI. CONSENT OF NON-PARTIES TO SETTLEMENT

Not applicable.

VII. MEET AND CONFER PRIOR TO SETTLEMENT CONFERENCE

In accordance with Local Rule 2.5.2, NCRA has met and conferred with Westlands on July 5, 2021 via a Zoom telephonic meeting in a good faith attempt to settle all issues related to this matter.

VIII. PRIOR SETTLEMENT NEGOTIATIONS

The only settlement negotiations between NCRA and Westlands took place during their meet and confer Zoom telephonic meeting on July 5, 2021. Those discussions confirmed that settlement is highly unlikely at this time.

IX. C.C.P. § 998 DEMANDS

NCRA is not aware of any Code of Civil Procedure section 998 demands having been made by any party in this litigation. NCRA does not believe that such demands could be appropriately framed in this validation action.

X. DISCOVERY AND PREPARATION OF ADEQUATE EVIDENTIARY RECORD

NCRA does not anticipate any discovery, as this matter can and should be decided based on the existing pleadings and evidentiary record and the previous rulings of this Court and the Court of Appeal. If Westlands or any other party wishes to file any further dispositive motions, those motions can be decided without the need for discovery.

XI. STATEMENT OF FACTS AND LAW

A. WESTLANDS WANTS TO LOCK IN EXCESSIVE DIVERSIONS THAT WILL EXTIRPATE SALMON, STEELHEAD, STURGEON AND SMELT

Westlands, the largest Central Valley Project (CVP) water contractor, brought this action to validate "each and every provision" and "all of the proceedings" leading to approval of a highly controversial proposed agreement, the Converted Contract, on October 15, 2019. Westlands' Validation Complaint filed October 25, 2019 ("Validation Complaint"), Prayer, ¶ 4; Exh. A (Resolution 119-19), Exh. B (Contract). Relying on claimed authority available through December 16, 2021 under section 4011(a)(1) of the 2016 Water Infrastructure Improvements for the Nation Act ("WIIN Act")(Pub. L. 114-322, 130 Stat. 128), Westlands seeks to have its CVP water service contract, subject to two-year interim renewal periods (e.g., 2020-2022), convert to a permanent repayment contract that avoids earlier acreage

and pricing provisions. Westlands' Appendix of Exhibits (AOE), exh. 7, p. 20. Resolution 119-19 includes broad statements about water uses, and claims Westlands also met interim contract duties, whose federal agency review is among the subjects of past and present federal court challenges that have found, contrary to Westlands' claims, violations of federal environmental law.

Westlands has for decades received water from the CVP under long-term water service contracts with the United States Bureau of Reclamation ("Bureau"), including one entered into in 1963, with a term of 40 years. Validation Complaint at 3-4. In 1992 Congress enacted the Central Valley Project Improvement Act, Public Law No. 102-575, 108 Stat. 4600 ("CVPIA"), to reduce the adverse environmental impacts of CVP operations. CVPIA §§ 3402(a)-(b), 3406(b). The CVPIA limited the Bureau's authority to enter into new long-term contracts with existing water contractors. In order "[t]o address impacts of the Central Valley Project on fish, wildlife and associated habitat," the CVPIA requires the Bureau to undertake environmental review – including the preparation of an Environmental Impact Statement ("EIS") under the National Environmental Policy Act, 42 U.S.C. section 4321 *et seq*. ("NEPA") – before any long-term water service contract can be renewed by the Bureau. CVPIA §§ 3402(a), 3404(c)(1).

Despite the CVPIA's 1992 mandate, the Bureau never prepared the required EIS for its delivery of water to Westlands. Instead, upon expiration of the prior long-term contracts, the Bureau issued short-term interim contracts ("IRCs") to Westlands. Validation Complaint at 4; Westlands' Proposed Order re Ex Parte Application for Approval, Etc. of Summons filed October 30. 2019 ("Westlands' Ex Parte Order") at Exh. A, p. 6; NCRA's Opposition to Motion for Validation filed January 14, 2020 ("NCRA Validation Opposition") at 6 (citing Validation Complaint at Exh. 2, pp. 50 - 116). The Bureau relied upon a series of deficient environmental assessments ("EAs") and a perfunctory review by the United States Fish and Wildlife Service ("FWS"), which concluded that due to their short term nature, the IRCs' impacts on special status species would not cause jeopardy. NCRA Validation Opposition at 7 (quoting February 26, 2010 FWS Biological Opinion regarding Consultation on the Interim Renewal of Ten Water Service Contracts . . . for March 1, 2010 – February 29, 2012, at 78, 81).

The Bureau's deficient review ignored the increasingly severe *cumulative* impacts of its quarter-century of IRCs. *Id*. at 7. Neither Westlands nor the Bureau considered alternatives that would reduce

the quantity of water diverted to reduce these impacts. *Id*. Nor did the Bureau take into account that Westlands' need for water was declining. *Id*. Instead, the Bureau relied on Westlands' self-serving claims that it would beneficially apply all water delivered under the contracts to its lands, even as Westlands was retiring thousands of acres from farming. *Id*. For these reasons – because the IRCs had been used to *avoid* the scrutiny that Congress mandated – the Ninth Circuit declared them unlawful. *Pacific Coast Federation of Fishermen's Associations v. United States Department of the Interior*, 655 Fed.Appx. 595 (9th Cir. 2016); *id.*

Because the Bureau and Westlands had evaded compliance with NEPA and the CVPIA, downstream populations of salmon, steelhead and other imperiled fisheries in the Bay Delta have plummeted toward extinction. *Id*. Endangered winter-run Chinook salmon, threatened spring-run Chinook salmon, threatened Central Valley steelhead, threatened green sturgeon, and threatened delta smelt now all face an uphill battle for survival in the face of increased salinity, sedimentation, rising temperature, and other harmful reductions in water quality and flow.[1] *Id*. Fall-run and late fall-run Chinook salmon – the remaining commercially fished Chinook – have likewise declined due to the Bureau's and Westlands' decision to ignore the severe adverse effects of their water diversions. *Id* at 7-8. These fisheries collapsed because the Bureau ignored its duty to achieve the CVPIA's salmon-doubling goal by 2002. *Id*. at 8 (citing CVPIA § 3406(b)(1). Rather than double salmon as required, the Bureau has allowed salmon to accelerate their downward spiral toward extinction. *Id*.

In June 2009, the National Marine Fisheries Service ("NMFS") issued a Biological Opinion

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[1] NCRA Validation Opposition at 7-8, citing the following facts: NFMFS formally designated Sacramento River winter-run Chinook as threatened in 1990 and reclassified them as endangered in 1994. 55 Fed.Reg. 46515 (Nov. 5, 1990); 59 Fed.Reg. 440 (Jan 4, 1994). NMFS designated their critical habitat in 1993. 58 Fed.Reg. 33212 (June 16, 1993). In 1999, NMFS designated Central Valley spring-run Chinook as threatened and designated their critical habitat in 2005. 64 Fed.Reg. 50394 (Sept. 16, 1999); 70 Fed.Reg. 52488 (Sept. 2, 2005). NMFS first listed Central Valley steelhead as threatened in 1998, and clarified that listing in 2006. 63 Fed.Reg. 13397 (March 19, 1998); 71 Fed.Reg. 834 (Jan. 5, 2006). NMFS designated critical habitat for Central Valley steelhead in 2005. 70 Fed.Reg. 52488 (Sept. 2, 2005). NMFS listed the Southern Distinct Population Segment ("DPS") of North American green sturgeon as threatened in 2006, and designated their critical habitat in 2009. 71 Fed.Reg. 17757 (April 7, 2006); 74 Fed.Reg. 52300 (Oct. 9, 2009). FWS determined that delta smelt were threatened in 1993, and designated critical habitat for delta smelt in 1994. 58 Fed.Reg. 12854 (March 5, 1993); 59 Fed.Reg. 65256 (Dec. 19, 1994). FWS has determined that delta smelt's reclassification as endangered "is warranted but precluded by other higher priority listing actions." 75 Fed.Reg. 17667 (April 7, 2010), *see also* 76 Fed.Reg. 66370 at 66428 (Oct. 26, 2011), 77 Fed.Reg. 69994 at 7048-7049 (Nov. 21, 2012).

("2009 NMFS BiOp") confirming the "precipitous decline" in Sacramento winter-run Chinook in 2007 "that continued in 2008, when less than 3,000 adult fish returned to the upper Sacramento River." *Id*. (quoting 2009 NMFS BiOp. at 81). It described how Central Valley steelhead have had "a pattern of negative growth rate since the late 1960s . . . [with] no indication that this trend has changed" since 1993. *Id*. (quoting 2009 NMFS BiOp at 109). It also described how the Southern DPS of North American green sturgeon had "very little production" in 2007 and 2008, and that it was "clear that the abundance of the Southern DPS of green sturgeon is declining." *Id.* (quoting 2009 NMFS BiOp at 120).

The 2009 NMFS BiOp warned the Bureau that:

> the long-term operations of the CVP and SWP are likely to jeopardize the continued existence of Sacramento River winter-run Chinook Salmon, Central Valley spring-run Chinook salmon, Central Valley steelhead, Southern DPS of North American green sturgeon, and Southern Resident Killer whales. The long-term operations of the CVP and SWP are likely to destroy or adversely modify critical habitat for Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, and Central Valley steelhead.

Id. (quoting 2009 NMFS BiOp at 575). Similarly, FWS's 2008 Biological Opinion ("2008 FWS BiOp") found that "the coordinated operations of the CVP and SWP, as proposed, are likely to jeopardize the continued existence of the delta smelt." *Id*. at 9 (quoting 2008 FWS BiOp at 276). Delta smelt in 2008 were "at the lowest level of abundance since monitoring began in 1967." *Id.*

The 2009 NMFS BiOp concludes that nearly 60 percent of the natural historical inflow to Central Valley watersheds and the Delta has been diverted for human uses. *Id*. Depleted flows have contributed to higher temperatures, lower dissolved oxygen . . . levels, and decreased recruitment of gravel and large woody debris." *Id*. (quoting 2009 NMFS BiOp at 135). NMFS has found that "[w]ater withdrawals, for agricultural and municipal purposes, have reduced river flows and increased temperatures during the critical summer months, and in some cases, have been of a sufficient magnitude to reverse flows in the lower San Joaquin River. . . . Direct relationships exist between water temperature, water flow, and juvenile salmonid survival." *Id*. (quoting 2009 NMFS BiOp at 136). Thus, both federal fisheries agencies have confirmed that the existing high volumes of CVP exports are causing these horrendous fish declines. *Id*.

In addition to harming fish by reducing Delta flows, using CVP water for irrigation on lands within Westlands' service district exacerbates the existing contamination of the soils, groundwater and

surface waters of the San Joaquin Valley with salts and other pollutants such as selenium, which is "highly bioaccumulative." *Id*. (quoting February 29, 2016 FWS Biological Opinion on Interim Renewal Water Service Contracts . . . for March 1, 2016 – February 28, 2018 ("2016 FWS IRC BiOp") at 18). "[T]here is a hydraulic connection of shallow groundwater contamination originating in Westlands to lands downslope of Westlands that do discharge to surface waters." *Id.* (quoting 2016 FWS IRC BiOp at 19). For this reason, "[d]rainage contamination from Westlands . . . likely contributes to . . . selenium contamination in the . . . San Joaquin River." *Id.* (quoting 2016 FWS IRC BiOp at 21). In fish, "excessive exposure can lead to selenium toxicity or selenosis and result in death or deformities of fish embryos, fry, or larvae." *Id*. (quoting 2016 Final Environmental Impact Statement for Coordinated Long-Term Operation o the Central Valley Project and State Water Project ("2016 LTO EIS") at 6-22). Green sturgeon are "highly sensitive to selenium levels." *Id*. (quoting 2009 NMFS BiOp at 115).

"There are longstanding concerns related to mercury and selenium levels in the watershed, Delta, and San Francisco Bay." *Id*. at 10 (quoting 2008 FWS BiOp at 186-187 and citing 2016 LTO EIS at 9-77). In salmonids, the increase in pollutants – like those from discharges of the shallow groundwater originating under Westlands' service area – "can lead to either acute toxicity, resulting in death . . . , or . . . when concentrations are lower, to chronic or sublethal effects that reduce the physical health of the organism and lessens its survival over an extended period of time." *Id*. (quoting 2009 NMFS BiOp at 142).

In 2016 the Bureau purported to issue a Record of Decision ("ROD") to implement the reasonable and prudent alternative ("RPA") mandated by the 2009 NMFS BiOp and 2008 FWS BiOp. *Id*. But the Bureau's subsequent actions have not implemented that alternative. *Id*. Instead, the Bureau's diversions continue to violate water quality standards and allow fish populations to plummet toward extinction. *Id*. Contrary to Congressional mandates to operate the CVP to protect and restore fish populations, the Bureau has prioritized water deliveries to contractors, and has never taken the hard look at the impacts on fisheries required by NEPA. *Id*.

In 2016, Congress adopted the Water Infrastructure Improvements of the Nation Act, Public Law 114-322 (2016) ("WIIN Act"). *Id*. It allows water agencies to convert their existing water service contracts to repayment contracts. WIIN Act § 4011(a). But the WIIN Act does not exempt the Bureau

from its duty to prepare an EIS. *Id.* In its briefing in *North Coast Rivers Alliance v. United States Department of the Interior* (E.D.Calif.) Case No. 16-cv-307-LJO-SKO, the Bureau has falsely claimed that the WIIN Act imposes a non-discretionary duty to enter into conversion contracts with Westlands. *Id*. at 11. To the contrary, the WIIN Act confirms that *the obligations of the CVPIA continue to apply to the Bureau's actions*, with the *sole* exception of the "savings provisions for the Stanislaus River predator management program." WIIN Act § 4012 (a)(2). The WIIN Act gives the Bureau ample discretion to negotiate "mutually agreeable terms and conditions" in converting existing contracts to repayment ones. WIIN Act § 4011(a)(1).

At its October 2019 Board Meeting, Westlands purported to approve the Converted Contract at issue by adopting Resolution 119-19. *Id*. at 11. But neither the Westlands Board nor the public was provided with the full or final terms of the Converted Contract at that time. None of the Converted Contract's Exhibits were provided with the Agenda or Staff Report, nor were they provided to this Court as part of Westlands' Validation Action. *Id*. (citing Westlands' Validation Complaint, Exh. 1 at 134 - 211, Exh. 6 at 12 - 16, and Exh. 7 at 19 - 108). And the draft Converted Contract presented for approval was clearly a "Working Draft" – not a final contract. *Id.* (citing Westlands' Validation Complaint, Exh. 7 at 22).

At the time Westlands' Board purported to approve the Converted Contract, its terms were not final. *Id.* Indeed, on January 8, 2020, Michael P. Jackson, the Bureau employee responsible for "overseeing and addressing Reclamation's interests . . . within the geographic scope of the [South-Central California Area]," submitted a sworn statement to the federal district court stating that "*Reclamation will* consider the public comments [on Westlands' proposed contract] . . . confer with Westlands, and *make changes to the contract (if any) as appropriate*" before "Reclamation will . . prepare the contract for execution." *Id.* (quoting the January 8, 2020 Declaration of Michael P. Jackson (Jackson Dec.) at ¶¶ 1, 4 (emphasis added). For that reason, the Bureau was prepared to enter into an additional IRC (and in fact, it subsequently did so) to continue water service to Westlands for the period 2020 to 2022. *Id*. (citing Jackson Dec. at ¶ 6).

NCRA is vitally concerned in the restoration of the Delta's fish and wildlife, particularly its salmon fisheries, by preventing Westlands from validating its purported Conversion Contract and its

excessive levels of diversion with Reclamation. Verified Answer of NCRA, et al. filed December17, 2019 ("NCRA Answer") at 3-6. Therefore NCRA has asked this Court to deny validation of Westlands' proposed Conversion Contract. *Id*. NCRA's Answer denies Westlands' allegations and raises eight Affirmative Defenses alleging Westlands' violation of numerous environmental laws and doctrines. *Id.* at 6-7.

B. PROCEDURAL HISTORY

Westlands filed its Validation Complaint in this Court on October 25, 2019. Summons was issued October 30, 2019. Westlands' Ex Parte Order. This Court's rules mandate electronic filing, and provide, pursuant to Code of Civil Procedure section 1010.6, subdivision (b)(3), that any document received electronically by 11:59:59 p.m. on a court day "shall be deemed filed on that Court day." Fresno County Superior Court Local Rule 4.1.13.A, D.

Like the two other answers found to be untimely by this Court, NCRA's Verified Answer was electronically received by the Court on December 16, 2019 – the last day for filing according to the Court's Summons – and served the same day. Declaration of Alexis E. Krieg in Opposition to Motion for Validation filed January 14, 2020 at 2 ¶¶ 3-7. Nonetheless, the Court did not deem these answers to have been filed on this date of electronic receipt. *Id*. On the morning of December 17, 2019, the Clerk notified NCRA that the electronic filing service provider utilized by NCRA's counsel, One Legal, did not provide the Court with the first appearance fee for each of the six jointly answering parties, as the Clerk requires. *Id*. Therefore at 9:54 a.m. on December 17, 2019, NCRA's counsel added individual appearance fees for each of the six NCRA answering parties to the same Verified Answer that had been submitted for filing on December 16, 2019, and resubmitted this document for filing via One Legal. *Id*.

The Clerk then accepted NCRA's Verified Answer for filing. However, rather than identifying December 16, 2019 as the effective date of filing, the Clerk stamped the Verified Answer as having been filed a day later, on December 17, 2019, at 9:55 a.m.

In its otherwise unsuccessful Motion for Validation of Contract filed December 30, 2019, Westlands argued that NCRA's Verified Answer, along with two others, were not timely filed, stating that the three answers "were filed after the December 16, 2019, deadline set in the Summons, and thus, are time barred from consideration by this Court." Westlands' Memorandum in Support of Motion for

Validation filed December 30, 2019, at 17. Westlands further contended that the parties named in the three answers "have lost their opportunity to challenge Westlands' validation action, and should be dismissed from this case." *Id*. at 18.

This Court heard Westlands' Motion for Validation on February 27, 2020. At the hearing, the three groups of answering parties whose answers were rejected as untimely jointly argued that under Code of Civil Procedure section 1010.6, subdivision (b)(3) and the pertinent state and local court rules that the effective date of filing should have been deemed December 16, 2019, the date the Court electronically received the answers. Reporter's Transcript ("RT") 19:26 - 28:19 (citing Code Civ. Proc., § 1010.6 (b)(3); California Rules of Court, rule 2.253 (b)(6); Local Rule 4.1.13.D). The answering parties cited the judicial policy favoring the filing of documents and hearing of their merits where documents are submitted in a timely manner but are technically deficient in a way that does not prejudice their opponent. RT 21:11 - 26:12 (citing, *inter alia, Carlson v. Department of Fish and Game* (1998) 68 Cal.App.4th 1268, 1272 - 1276; *United Farm Workers of America v. Agricultural Labor Relations Board* (1985) 37 Cal.3d 912, 916 - 919; *Litzmann v. Workmen's Comp. App. Bd.* (1968) 266 Cal.App.2d 203, 205; and *Pacific Southwest Airlines v. Dowty-Rotol, Ltd.* (1983) 144 Cal.App.3d 491, 493).

On March 16, 2020 Judge Alan Simpson issued an Order denying the substance of Westlands' Motion for Validation but agreeing with Westlands that the three answers were untimely. This Order is attached as Exhibit 1. NCRA timely sought appellate review of the Order's finding that NCRA's Answer was untimely by e-filing and serving its Notice of Appeal on April 13, 2020, although for unknown reasons the Clerk did not file NCRA's notice until May 19, 2020.

On May 12, 2020, NCRA and the other answering parties whose Answers were ruled untimely filed a Joint Motion for Stay of Proceedings pending disposition of their appeals. On August 5, 2020 Westlands filed its Opposition, and on August 11, 2020, NCRA and the other answering parties filed their Joint Reply. On August 18, 2020, this Court issued a Tentative Ruling "[t]o grant and stay the entire action until determination of the pending appeals." On August 19, 2020 this Court adopted its Tentative Ruling without modification. Westlands did not seek appellate review of this Ruling.

On July 21, 2020, Westlands filed a Renewed Motion for Validation of Contract. On August 10, 2020 the Central Delta Water Agency filed its opposition to Westlands' renewed motion. On August 14,

2020, Westlands filed its Reply in Support of Renewed Motion for Validation Judgment. On August 19, 2020, as noted above this Court issued its Ruling staying this matter pending resolution of the parties' appeals.

On August 5, 2020, Westlands filed a Motion to Dismiss NCRA's Appeal. On August 19, 2020 NCRA filed its Opposition. On September 9, 2020 the Court of Appeal issued its Order stating that "[a] ruling upon the issues raised in respondent's August 5, 2020 'Motion to Dismiss Appeal' and appellants' August 20, 2020 opposition thereto are hereby deferred until the appeal is considered on its merits."

On September 16, 2020 NCRA filed its Appellants' Opening Brief and Appellants' Appendix. On October 14, 2020 Westlands filed its Respondent's Brief. On November 5, 2020 NCRA filed its Reply Brief. On February 24, 2021 the Court of Appeal heard argument. On March 9, 2021 the Court of Appeal issued its Opinion reversing this Court's March 16, 2020 Order finding that NCRA's Answer was untimely. The Opinion is attached as Exhibit 2. Remittitur issued May 11, restoring this Court's jurisdiction. On May 25, 2021, this Court issued its Minute Order setting July 23, 2021 for the parties' mandatory settlement conference, which was moved to July 22, 2021 by Minute Order filed May 26, 2021.

C WESTLANDS'ACTION DOES NOT SATISFY VALIDATION LAW

Westlands' Validation Action should be dismissed because the Board Resolution and proposed Conversion Contract for which Westlands seeks this Court's validation are materially deficient. This Court has already correctly rejected Westlands' Validation Complaint for five independent and compelling reasons. On March 16, 2020, Judge Simpson issued a thoroughly researched and carefully written ruling denying Westlands' Motion for Validation, which ruling as noted is attached as Exhibit 1. In summary, Judge Simpson rejected Westlands' Validation Action because it asks his Court to validate a draft, proposed, and facially incomplete contract that omits all four of its exhibits, lacks many of its material terms, and was never executed by the parties, as detailed below.

1. Westlands' Validation Action Does Not Qualify Under Water Code Section 35855.

Westlands alleges that "[t]he specific statute for validation proceeding on this type of contract is . . . Water Code section 35855." Exh. 1 hereto at 3. However, as Judge Simpson has already ruled, in 1961 the Legislature amended this statute to remove its reference to "proposed" contract. *Id*. Judge Simpson explained that "[i]t is a tenet of statutory construction that where the Legislature has chosen to

delete a provision, the Court cannot interpret the statute to put it back in." *Id.*, citing and quoting *Gikas v. Zolin* (1993) 6 Cal.4th 841, 861. Therefore, Judge Simpson correctly concluded that "[t]his contract does not qualify for validation under that statute." *Id.*

2. Westlands' Validation Action Does Not Qualify Under Government Code Section 53511.

Westlands' action seeks to validate a contract for the purchase of water from the Bureau's Central Valley Project. But Judge Simpson has already ruled that "[p]urchase contracts are not subject to validation under this statute," referring to Government Code section 53511. *Id.* at 4, citing *Santa Clarita Organization for Planning & Environment v. Castaic Lake Water Agency* (2016) 1 Cal.App.5th 1084, 1099.

3. Westlands' Validation Action Qualifies Under Civil Code Section 864 Only If Its Converted Contract Constitutes a Contract for Indebtedness.

Judge Simpson ruled further that Westlands' proposed contract "does not meet" Civil Code section 864's "requirements for [validation of] provisions unrelated to debt because it is a proposed contract, not an executed contract." *Id.* at 5. However, although it does contain some provisions related to debt, as explained below Judge Simpson ruled that those provisions lack material terms and thus cannot qualify for validation.

4. Westlands' Validation Action Fails Because Its Proposed Contract Lacks Material Terms

Westlands' proposed Converted Contract cannot qualify for validation under any applicable law because it lacks material terms. As Judge Simpson explained, "[i]n the Appendix of Evidence submitted by Westlands ('AOE') Vol. II, page 108, paragraph 8, the draft resolution states: 'The President of the District is hereby authorized to execute and deliver the Converted Contract in substantially the form attached hereto, with such additional changes and/or modifications as are approved by the President of the District, the General Manager, and its General Counsel.' The Resolution [of approval] itself has that language as well." *Id.* at 5, citing AOE at Vol. II, page 144. Moreover, as Judge Simpson further noted, "Exhibits A, B, C, and D to the Converted Contract are missing from all materials submitted to the Court." *Id.*, citing Exhibit D to the repayment page.

These omissions are material and preclude validation. As Judge Simpson pointed out, "[g]iven that the contract terms, including repayment terms, are not certain, and that the contract may be changed or modified, validation is not appropriate." *Id*. "It is not possible to make the determinations [of validation] sought where no final contract is presented for validation." *Id*. Because "the validation statutes do not encompass judicial approval of incomplete contracts," and the "estimate for the repayment amount is over $362,000,000," Judge Simpson properly concluded that "the absence of the actual final amount and payment schedule render the proposed contract lacking in material terms and incomplete." *Id.*

5. Westlands' Validation Action Fails to Establish Compliance With the Brown Act.

Finally, Judge Simpson ruled that Westlands' Validation Action must be rejected for the further reason that it fails to establish compliance with the Ralph M. Brown Act, Government Code section54950 et seq. *Id*. at 5-6. As Judge Simpson observed, "'[a]s a remedial statute, the Brown Act must be construed liberally in favor of openness so as to accomplish its purposes.'" *Id*. at 6, quoting from 9 Witkin, California Procedure (5th Ed. March 2019 Update), Administrative Procedure, section 18. However, the evidence submitted by Westlands to establish its compliance with all applicable laws, including the Brown Act, failed to do so. *Id*.

In particular, the evidence of the manner and date of posting of its meeting agenda that Westlands submitted to the Court was in conflict , and therefore "render[ed] the evidence of posting unreliable, and fail[ed] to prove posting was correctly done." *Id*. Furthermore, Judge Simpson ruled, "[n]o agenda packet [wa]s provided, so it is not possible to determine if the packet provided the information necessary to support the [Board] meeting." *Id*. For all of these reasons, Westlands failed to show compliance with the Brown Act as necessary for the Court to validate the proposed contract in issue.

Accordingly, Judge Simpson denied Westlands' Motion for Validation.

D. WESTLANDS' VALIDATION ACTION IS WITHOUT MERIT AND SHOULD BE DISMISSED

Westlands' Validation Action is without merit and should be dismissed. As explained, Judge Simpson has already ruled that the Converted Contract in issue cannot be validated. First, it is unexecuted, and expressly subject to revision. It leaves unresolved incomplete staff instructions, lacks payment information, and is missing all four exhibits referenced in the text: Exhibit A (Map of Contractors' Service Area), Exhibit B (Rates and Charges), Exhibit C (Central Valley Project Water

Needs Assessment Purpose and Methodology), and Exhibit D (Repayment Obligation). *See, e.g.*, Complaint Exh. B, pp. 32-33; AOE, Exh. 9, pp. 146, 148, 157, 156-162, 174. Westlands' staff report referred to a "draft converted contract," which still remained subject to the Bureau's pending review and public comment. AOE, exh. 7, p. 20; see also *id*. at p. 22 ("working draft" contract).

Without even waiting for the insertion of these missing contract details or completion of the Bureau's comment period and contract review, Westlands rushed ahead with this premature Validation Action on October 25, 2019. Central Delta Water Agency filed a timely answer on December 16, 2019 with 18 affirmative defenses, and the other three answering parties timely filed their answers likewise raising numerous affirmative defenses the following day. On December 30, 2019, Westlands filed a motion for validation of contract on the merits. At this Court's hearing on its motion, Westlands argued that the missing exhibits and provisions were immaterial to the contract's validity. The answering parties correctly pointed out that the missing information was material, and that its omission could not be lawfully cured by substituting a post-approval version for the October 2019 contract referenced in the approval Resolution, Complaint, and Summons. AOE, Exh. 14, pp. 11-14.

As explained above, on March 16, 2020, Judge Simpson issued his Final Order denying Westlands' Validation Motion on five grounds, concluding that the Converted Contract "lacks material terms." *Id*. p. 4. Because "the contract terms, including repayment terms are not certain," the Court held that validation is "not appropriate." *Id.*

Thereafter Westlands attempted to have this Court reconsider Judge Simpson's ruling, but its motion was improper. Westlands based its July 27, 2020 Renewed Motion on a post-approval executed document (AOE exh. 12) materially different from the subject Contract referenced in its Resolution 119-19, Complaint and Summons. Moreover, as detailed below, Westlands' Motion was an improper attempt to seek reconsideration.

E. WESTLANDS' ATTEMPT TO SEEK RECONSIDERATION OF THIS COURT'S DENIAL OF ITS PREVIOUS MOTION FOR VALIDATION CANNOT SUCCEED.

1. Code of Civil Procedure Section 1008 Bars Westlands' Renewed Motion

This Court stayed this case before ruling on Westlands' Renewed Motion. However, should

Westlands refile that motion, this Court would have to deny it because it is plainly subject to, but completely fails to satisfy, Code of Civil Procedure section 1008's stringent requirements. Although styled a "Renewed Motion" for Validation, it is indisputably subject to section 1008's exacting standards, as that section applies to both motions for reconsideration and any "application for an order which was refused in whole or in part." *Id.*, subds. (a), (b). Westlands' Motion is an "application for an order" validating a proposed contract that was already rejected in Judge Simpson's March 16, 2020 Final Order denying Westlands' previous request for the same relief. It seeks a *different* ruling on exactly the *same matter* raised in Westlands' original Validation Motion: validation of Westlands' Board Resolution 119-19 adopted October 15, 2019 purporting to authorize Westlands' entry into and execution of its Converted Contract.

The fact that Westlands restyled its previous Validation Motion as a "Renewed Motion" rather than a "motion for reconsideration" is immaterial. "The requirements for a motion for reconsideration 'apply to any motion that asks the judge to decide the *same matter* previously ruled on.'" *R & B Auto Center, Inc. v. Farmers Group, Inc*. (2006) 140 Cal.App.4th 327, 373, quoting Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2005) ¶ 9:324.1, p. 9(1)-103) (emphasis in original). Because both motions raise the "same matter" and seek the same relief, the second, so-called "renewed," motion is subject to and governed by section 1008.

Courts require strict compliance with section 1008's stringent requirements because this statute is jurisdictional. The Legislature wrote that "[t]his section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions," and commanded that "[n]o application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section." C.C.P. § 1008(e). Consequently, "[t]he court exceeds its jurisdiction if it grants reconsideration of a motion that is not based on "new or different facts, circumstances or law" as required by section 1008. *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1498-1503; *Morite of Cal. v. Superior Court* (1993) 19 Cal.App.4th 485, 490-493. "No judge or court has jurisdiction to hear a motion to reconsider, or the renewal of a motion previously ruled on, that does not comply with CCP [section] 1008, [unless] on its own motion [the court] finds that a change of law warrants doing so. C.C.P. section 1008(c), (e)." California Civil Procedure Before Trial (C.E.B. 4th ed.,

June 2019) section 12.136. Far from suggesting otherwise, cases cited by Westlands (Motion, p. 10) reject efforts to avoid section 1008's strict requirements where, as here, the request to reconsider arose from a party's motion. *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107-1109; *New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 345.

a. Westlands' Motion Is Untimely Because It Did Not Seek Reconsideration within 10 Days.

Section 1008, subdiv.(a) directs that "any application for an order" under this section must be filed "within 10 days after service upon the party of written notice of entry of the order." *Id.* Westlands was served with written notice of entry of Judge Simpson's Final Order denying Westlands' Validation Motion by electronic transmission on April 10, 2020. Notice of Entry of Order filed April 10, 2020 by Defendants County of San Joaquin and County of Trinity. "The 10-day time limit runs from service of notice of entry of the order. *Forrest v. State of Calif. Dept. of Corps*. (2007) 150 Cal.App.4th 183, 203. Adding two days to the 10-day limit because this service was electronic per C.C.P. section 1010.6, subd. (a)(4)(B), yields a deadline of April 22, 2020. Westlands did not explain its failure to file by April 22, 2020, and its Motion is untimely by any measure. Because it was untimely, Westlands' Motion must be denied.

b. Westlands Failed to Seek Reconsideration from the Same Judge.

Section 1008, subd. (a) directs that an application under section 1008 must be "made to the same judge or court" that made the order. "The words 'or court' mean simply that if the original judge is *unavailable,* another judge of the same court can hear a motion for reconsideration." Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2005) ¶ 9:324.4, p. 9(1)-144 – 145) (emphasis in original). "There was no legislative intent to overrule earlier case law holding the motion *must be addressed to the same judge if available*:" "[O]ne trial court judge may not reconsider and overrule a ruling by another trial court judge." *Id.*, quoting from *Davcon, Inc. v. Roberts & Morgan* (2003) 110 Cal.App.4th 1355, 1361.

This rule is strictly enforced by the courts, for otherwise parties might simply refile their motions repeatedly until they received a favorable ruling. *Marriage of Oliverez* (2015) 238 Cal.App.4th 1242, 1247-1249 (where "there was nothing.to suggest that [the original judge] was unavailable at the time of the hearing" and "none of the recognized exceptions to the general rule that one trial judge cannot overrule

another trial judge are applicable," a second judge's vacation of the prior ruling was reversible error). Westlands failed to make the required showing that Judge Simpson was "unavailable" to decide its Motion. Westlands' failure to make this required showing is fatal to its Motion.

c. Westlands Fails to Show New Facts, Circumstances or Law as of the Operative Date of the Resolution It Seeks to Validate: October 15, 2019.

The core substantive restriction imposed by section 1008 is that a motion for reconsideration must be "based upon new or different facts, circumstances, or law." C.C.P. 1008, subd. (a). "The legislative intent was to *restrict* motions for reconsideration to circumstances where a party offers the court some fact or circumstance not previously considered, and some *valid* reason for not offering it earlier." Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2005) ¶ 9:328, p. 9(1)-147) (emphasis in original). As the Court explained in *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, "'Public policy requires that pressure be brought upon litigants to use great care in preparing cases for trial and in ascertaining all the facts. A rule which would permit the reopening of cases previously decided because of error or ignorance during the progress of the trial would in large measure vitiate the effects of the rules of res judicata.'" *Id*. at 1198, *quoting Blue Mountain Development Co. v. Carville* (1982) 132 Cal.App.3d 1005, 1012-1013.

Contrary to this settled law and clear legislative intent to require strict adherence to section 1008's requirements, Westlands creates a false narrative that largely ignores the first four substantive reasons why Judge Simpson denied Westlands' Validation Motion and invents the fiction that Westlands was unaware of the fifth substantive reason--its Brown Act violations--until Judge Simpson raised that violation "*sua sponte*" in his February 26, 2020 Tentative Ruling, precluding Westlands from briefing them prior to the February 27 hearing. Westlands' Validation Motion Memorandum filed July 27, 2020 ("Westlands MPA") at 10:9-13. Each of these points is addressed below.

In his Final Order denying validation, Judge Simpson ruled that Westlands' Converted Contract could not be validated under either California Water Code § 35855 (*id.* ¶ 3.a) (reason number one), or California Government Code § 53511 (*id*. ¶ 3.b) (reason number two). He further ruled that: (3) the repayment contract "does not meet [validation] requirements for provisions unrelated to debt because it is a proposed contract, not an executed contract" (*id*. ¶ 3.c); (4) the repayment contract could not be validated because the contract's "absence of the actual final amount and payment schedule render the

proposed contract lacking in material terms and incomplete," and the "validation statutes do not encompass judicial approval of incomplete contracts" (*id*. ¶ 4); and (5) validation was not possible because "the requested finding of compliance with the Brown Act [California Government Code §§ 54950 et seq.] cannot be made" (*id*. ¶ 5).

Westlands' Motion fails to present any *new* facts, circumstances or grounds as to the first three rulings; at most, it repeats a prior attempt to avoid the plain language of Water Code section 35855 (Westlands MPA 10:26-28), and ignores the next two. Consequently, it has forfeited any argument that Judge Simpson's first three rulings should be reconsidered under section 1008, let alone shown error.

As for Judge Simpson's crucial fourth ruling--that "The Converted Contract Lacks Material Terms"-- Westlands repeats Judge Simpson's stated grounds that the "contract terms, including repayment terms, are not certain, and that the contract may be changed or modified." But Westlands fails to dispute, much less advance any "new facts, circumstances or law" that would support reconsideration of, Judge Simpson's well-reasoned conclusion that an incomplete contract that lacks material terms and can be modified cannot be validated under any theory or validation statute. Westlands MPA 11:3-21. Instead, Westlands argues that this dispositive flaw in its Complaint for Validation is now cured because Westlands *subsequently* finalized the terms of, and executed, its contract. *Id*. at 11:22-23. It claims that "[f]inalization and execution of the Contract, since the Court took the original motion under submission, is a new fact and circumstance warranting this renewed motion." *Id.*

But Westlands completely misses the point of Judge Simpson's correct ruling. An *in rem* validation action must be decided based on the facts alleged in the agency's complaint, and on the notice of the agency's action *thereby given* to the public who will otherwise be bound by the "forever binding and conclusive" validation judgment. C.C.P. § 870(a). The public's understanding of the effect of the agency's action is necessarily limited to the facts alleged in the complaint and set forth in its attached documentation of the agency action sought to be validated, referenced in the published summons that secures the Court's jurisdiction and allows an answer date to be set. C.C.P. §§ 861, 861.1. Here, Westlands has not held the new Board meeting it recognized would be needed before materially changing the contract. AOE, exh. 14, p. 4. Allowing the belated substitution of a materially different document in this action would deprive the public of the information it critically needs to decide whether, and how, to

respond to the summons and participate in the validation action. *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 925 ("the procedure prescribed by the validating statute assures due process notice to all interested persons" and settles validity "once and for all by a single lawsuit").

Westlands ignores the fact that an action for validation of agency action is acutely time sensitive and necessarily limited to the facts and circumstances surrounding the agency's action as alleged in the validation complaint *at the moment of its authorization*. C.C.P. § 864. That filing triggers the short deadline set in the summons for the public to respond. C.C.P. § 862. If that filing fails to apprise the public of the material, final terms of the agency's action for which validation is sought, then the fundamental (indeed, entire) purpose of the validation process—to secure a "single, dispositive" ruling forever identifying and resolving all possible objections—cannot possibly be achieved. *Embarcadero Municipal Improvement District v. County of Santa Barbara* (2001) 88 Cal.App.4th 835, 842.

Consequently, the fact that Westlands took subsequent action in an attempt to "cure" the original Validation Complaint's fatal lack of material and certain terms does nothing to remedy the public's lack of notice as to those terms. Therefore it is irrelevant to the sound legal and policy reasons that animated Judge Simpson's Final Order. Accordingly, Westlands' Motion provides no basis under section 1008 for reconsideration of the fourth ground for Judge Simpson's Final Order.

As for Judge Simpson's fifth ruling--that Westlands failed to show compliance with the Brown Act--Westlands claims that it had no opportunity to brief its compliance with that Act because no party raised that issue. It states: "[t]he issues of Westlands' Brown Act compliance relating to posting of its notice and agenda, website information, and the availability of the agenda packet were first raised, *sua sponte*, in the Court's tentative ruling, the day before the hearing on Westlands' motion." Westlands' MPA 10: 9-12. At best, this is misleading.

In fact, and contrary to Westlands' representation to this Court, Westlands affirmatively asserted Brown Act compliance in its own Complaint (¶ 18), where it played an important role in the proceedings "leading up to" approval sought for validation (Prayer, ¶ 4). Moreover, failure to comply with the Brown Act was raised by NCRA in its Answer and opposition to Westlands' Validation Motion. For example, in its Verified Answer NCRA alleged:

> WWD's approval of Resolution No. 119-19 and the Converted Contract violates the Ralph M. Brown Act, Government Code section 54950, *et seq.*, in that, *inter alia*, *WWD failed to provide adequate public notice of this Resolution and the Converted Contract* before purporting to approve the same because *WWD failed to make publicly available the Exhibits to this Resolution and the Converted Contract whose contents are essential to public understanding* of the substance and impact of said Resolution and Converted Contract.

Id. at 6:12-17, Second Affirmative Defense (emphasis added). NCRA elaborated on this allegation in its Opposition to Westlands' Motion for Validation filed January 14, 2020. *Id.* at 14:7-15:5 (noting that Westlands "precluded the informed public decisionmaking required under the Brown Act," and applying Brown Act case law to Westlands ; see *Epstein v. Hollywood Entertainment Dist. II Business Improvement Dist.* (2001) 87 Cal.App.4th 862, 869 (Act is to be construed "liberally"). Westlands *did* respond to NCRA's Brown Act claims in its Reply filed January 21, 2020. Judge Simpson was not persuaded by Westlands' Reply, and found that Westlands had failed to show compliance with the Brown Act. Westlands had a further opportunity to persuade Judge Simpson during the February 27, 2020 hearing, but failed to do so. Westlands' claim that it had no opportunity to address its Brown Act violations before the hearing fails, and Westlands has failed to show "new facts, circumstances or law" as required by section 1008 to support its Motion.

d. Westlands Fails to Show Reasonable Diligence.

Despite a clear duty to demonstrate reasonable diligence to excuse its failure to present the Court with a final, certain and executed contract in its original Validation Motion, Westlands provides no reasonable explanation for this fatal error. Section 1008 was always understood to require such a showing, and in 1992 this requirement was reinforced when the Legislature "tightened, not loosened, the requirements of the statute." *Baldwin*, *supra*, 59 Cal.App.4th at 1199, quoting *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 688 (emphasis added by *Baldwin*). "[T]he legislative history of the 1992 amendments to section 1008 shows that the measure was 'designed "to reduce the number of motions to reconsider and renewals of previous motions heard by judges in this state."'" *Id., quoting Hejmadi* at 688. "Without a diligence requirement the number of times a court could be required to reconsider its prior orders would be limited only by the ability of counsel who belatedly conjure a legal theory different from those previously rejected, which is not much of a limitation." *Baldwin*, 59 Cal.App.4th at 1199. Applying this rule, *Hejmadi* reversed an order granting reconsideration where the order was based on knowledge

that the plaintiff had from the outset of the litigation. 58 Cal.App.4th at 689-690.

Hejmadi is on all fours with this case. From the outset of this proceeding, Westlands knew full well that its failure to include in its Validation Motion critical, material exhibits to its Board Resolution rendered that resolution, and of course the Proposed Contract itself, fatally uncertain and thus incapable of validation. Judge Simpson properly, and unavoidably, deemed this omission to be a complete bar to validation. As he explained in his Final Order, "the converted contract lacks material terms." Exhibit 1 at p. 5, ¶ 4 (capitalization altered). "Given that the contract terms, including repayment terms, are not certain, and that the contract may be changed or modified, validation is not appropriate. It is not possible to make the [validation] determinations sought where no final contract is presented for validation." *Id*.

Judge Simpson's reasoning, and denial of validation, remain as unassailably correct today as they were when he ruled on March 16, 2020. Rather than admit this obvious fact, concede its error, return the matter to its Board to adopt a new resolution, file a new validation complaint, and publish a new summons that fully apprised the public of the material terms of that contract, Westlands stubbornly retreats into full denial mode. But its refusal to admit error and proceed responsibly as the law requires is plain for all to see. This Court must reject Westland's improvident gambit. The reasonable diligence standard cannot be met here, and that is the end of the matter.

e. Westlands' Failure to Comply with Section 1008 Bars Its Motion.

The *exclusive* means by which Westlands may overturn Judge Simpson's Final Order—short of an appeal whose filing deadline has long passed—is through a reconsideration motion pursuant to section 1008. *Baldwin, supra*, 59 Cal.App.4th at 1199, citing *Hejmadi*, *supra*, 58 Cal.App.4th at 688. When the Legislature amended section 1008 in 1992, it clarified "section 1008's application to all orders, final or interim, *and made its provisions exclusive and jurisdictional*." *Id*; see *New York Times Co.,* 135 Cal.App.4th at 213 (applying *Baldwin*). Since as shown Westlands cannot possibly satisfy section 1008's stringent requirements, should it refile its Renewed Motion, that Motion must be denied, and its Validation Complaint accordingly dismissed.

2. The Validation Summons and Record Cannot Support Validation.

Even if Judge Simpson had not already provided such clear grounds for rejecting the Validation Motion, Westlands' attempt to substitute its February 2020 executed contract for the October 2019 version

actually approved in Resolution 119-19 would create two further dispositive problems preventing the Court from granting the motion to validate. First, it would undermine reliance on the previously published validation Summons, which provides the basis for the Court's jurisdiction over interested parties as well as the December 16, 2019 answer date. C.C.P. §§ 861, 861.1. The Summons in this action refers only to the October 2019 Contract authorized on October 15, 2019 and referenced in Resolution 119-19, and the Court has determined that the February 2020 contract is materially different. Here, relying on the Summons for the October contract to validate the February contract would undermine the "due process notice to all interested persons" required under validation law. *Planning and Conservation League*, 83 Cal.App.4th at 925.

Second, replacing the October contract framing this validation action with a post-approval contract document executed more than four months after Resolution 119-19 would further ensure that the already-problematic evidentiary record could not support validation, and would leave unresolved discrepancies. Notably, no "record" has ever been introduced or certified in this action. Although Westlands concedes having requested its contract conversion in April 2018 , the meager "appendix" is not certified for completeness, and conspicuously lacks documents before October 2019 except for the contracts themselves. The "Renewed Motion" adds the further problem of relying on unwarranted post-approval documents not considered or disclosed to the public in Westlands' approval Resolution. *See, e.g.*, AOE, Exhs. 12, 16.

F. NCRA IS ENTITLED TO RECOVER ITS REASONABLE ATTORNEY FEES AND COSTS IF IT PREVAILS.

NCRA qualifies for recovery of its attorney fees and litigation costs under Code of Civil Procedure section 1021.5 if it prevails in this matter. It defended against Westlands' Validation Action to enforce important rights affecting the public interest and if it prevails, it will have conferred a significant benefit on the public. The fact that multiple parties including public agencies have answered the Validation Action does not preclude any of them from recovering their fees under section 1021.5 should they prevail in this proceeding. *State Water Resources Control Board Cases II* (2008) 161 Cal.App.4th 304, 312-320.

G. SETTLEMENT OFFER.

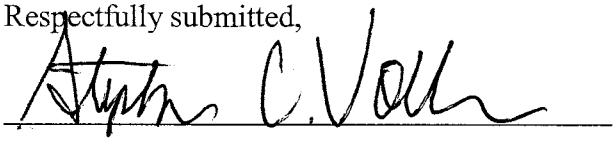
For the foregoing reasons, Westlands' Validation Action should be voluntarily dismissed with

prejudice, Westlands should rescind its approval of Resolution No. 119-19, and NCRA should be compensated for its successful defense of this action under Code of Civil Procedure section 1021.5. This Court correctly denied Westlands' previous Motion for Validation, and for the reasons outlined above should deny any subsequent attempt, by "renewed motion" or otherwise, to relitigate that ruling. As noted, Westlands' Renewed Motion for Validation was untimely, directed to the wrong judge, refuted by the evidence and record before this Court, and contrary to the governing statutory and case law.

Accordingly, NCRA respectfully requests that Westlands consider, and approve, a settlement pursuant to which it would voluntarily rescind its approval of Resolution No. 119-19, dismiss its Validation Action with prejudice, and pay NCRA's reasonable fees and costs incurred in successfully defending this action. Doing so would avoid the needless expenditure of the parties', and this Court's, scarce and valuable resources on a matter in which Westlands has no viable remaining claims.

Dated: July 12, 2021,

Respectfully submitted,



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PROOF OF SERVICE

On July 12, 2021, I served a true copy of the following document:

DEFENDANTS' NORTH COAST RIVERS ALLIANCE, ET AL'S SETTLEMENT CONFERENCE STATEMENT

in the above-captioned matter on the persons listed below by electronic transmission, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on July 12, 2021 at Berkeley, California.

Yuri Miyagawa

EXHIBIT 1

SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Unlimited Department, Central Division	Entered by:
TITLE OF CASE: **Westlands Water District vs All Persons Interested**	
MINUTE ORDER	Case Number: **19CECG03887**

Date: March 16, 2020 **Re: Decision**

Department: **502** Judge/Temporary Judge: **Alan Simpson**

Court Clerk: **N. Capalare** Reporter/Tape: **N/A** ☐ Contested

Appearing Parties:

Plaintiff: ☐ appearing on behalf of Plaintiff

Defendant: ☐ appearing on behalf of Defendant

☐ Off Calendar

☐ Set for at Dept for

The Court having taken the February 27, 2020 motion for Validation of "Converted Contract" under submission, now takes the matter out from under submission and adopts the 2/27/20 tentative ruling as the final order. (see attached tentative ruling)

(19) **Tentative Ruling**

Re: ***Westlands Water District v. All Persons Interested***
Superior Court Case No. 19CECG03887

Hearing Date: February 27, 2020 (Department 502)

Motion: by Westlands Water District for Validation of "Converted Contract"

Tentative Ruling:

To deny.

Explanation:

1. Untimely Answers

> "We view the time limit established by section 862 like a statute of limitations. Put differently, if any interested party appears in a validation action after the time period permitted by the applicable summons, the government would have a valid defense, preventing that interested party from further challenging the government's proposed action."
>
> *San Diego v. San Diegans for Open Government* (2016) 3 Cal. App. 5th 568, 579.

"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." *McLeod v. Vista USD* (2008) 158 Cal. App. 4th 1156, 1166 (*rev. denied*). In construction of Code of Civil Procedure section 862, "[o]ur primary goal is to implement the legislative purpose." *Lateef v. City of Madera* (2020) 2020 WL 746176, *4, Case No. F076227. Interpreting the statute to bar late filing honors the plain language of the statute as well as its purpose.

The answers of all but Central Delta Water Agency and South Delta Water Agency were filed after the December 16, 2019 deadline set forth in the Summons, and are therefore untimely.

2. Validation Actions Generally

> "Validation proceedings are a procedural vehicle for obtaining an expedited but definitive ruling regarding the validity or invalidity of certain actions taken by public agencies. (Code Civ. Proc., § 860 et seq.) They are expedited because they require validation proceedings to be filed within 60 days of the public agency's action (Code Civ. Proc., §§ 860 & 863); they are

> given preference over all other civil actions (*id.*, § 867) . . . They are definitive because they are in rem proceedings that, once proper constructive notice is given (*id.*, §§ 861, 862), result in a judgment that is binding ... against the world, and cannot be collaterally attacked, even on constitutional grounds. By providing a protocol for obtaining a prompt settlement of all questions about the validity of its action . . . validation proceedings provide much-needed certainty to the agency itself as well as to all third parties who would be hesitant to contract with or provide financing to the agency absent that certainty."

Santa Clarita Organization for Planning & Environment v. Castaic Lake Water Agency (2016) 1 Cal. App. 4th 1684, 1096 (internal quotes and case citations omitted).

"Of course, not all actions of a public agency are subject to validation. The statutes defining validation proceedings do not specify the types of public agency action to which they apply; instead, they establish a uniform system that other statutory schemes must activate by reference." (*Id.* at 1097, internal quotes and citations omitted.)

3. Availability of Validation Proceeding for the Converted Contract

a. Not Under Water Code Section 35855

The specific statute for validation proceeding on this type of contract is stated by Westlands to be Water Code section 35855. The comments to the 1961 amendment of Water Code section 35855 noted the prior version expressly allowed a validation action for a "proposed contract." The amendment took out "proposed." It is a tenet of statutory construction that where the Legislature has chosen to delete a provision, the Court cannot interpret the statute to put it back in. "The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision." *Gikas v. Zolin* (1993) 6 Cal. 4th 841, 861. The Legislature did not intend that Courts make such advisory opinions on proposed contracts after 1961. This contract does not qualify for validation under that statute. But it is not the only one cited.

b. General Validation Statutes for Debt Obligations

> "Government Code section 53511 makes validation proceedings available 'to determine the validity of [a local agency's] bonds, warrants, *contracts*, obligations or evidences of indebtedness.' (Government Code section 53511(a)), italics added.) Although 'contracts' could be read to reach *all* contracts, the courts have defined it by reference to the clause in which it has been used, and thus to reach only those contracts 'that are in the nature of, or directly relate to a public agency's bonds, warrants or other evidences of indebtedness.' (*Kaatz , supra,* 143 Cal. App. 4th at pp.

40, 42 . . . *Friedland, supra,* 62 Cal. App. 4th at p. 843 . . . 'contracts' in this statute do not refer generally to all public agency contracts, but rather to contracts involving financing and financial obligations."

Purchase contracts are not subject to validation under this statute. See *Santa Clarita Organization for Planning & Environment v. Castaic Lake Water Agency, supra,* 1 Cal. App. 5th at 1099. There, the plaintiff sought invalidation of a contract to purchase stock by a water agency from a retail water purveyor. The Court found such action was not properly subject to validation. See also *San Diego County Water Authority v. Metropolitan Water Dist. Of Southern California* (2017) 12 Cal. App. 5th 1124, finding an agency's action challenging rates was not a proper validation action. In *Phillips v. Seely* (1974) 43 Cal. App. 3d 104, the Court found that a contract obligation the County to pay $12,500 a month for legal services to indigent defendants was not the type of contract subject to validation proceedings. In *Smith v. Mt. Diablo USD* (1976) 56 Cal. App. 3d 412, the Court found that a purchase contract by a school district did not fall under Code of Civil Procedure section 864.

Code of Civil Procedure section 864 does permit validation of proposed contracts: "For purposes of this chapter, bonds, warrants, contracts, obligations, and evidences of indebtedness shall be deemed authorized as of the date of adoption by the governing body of the public agency of a resolution or ordinance approving the contract and authorizing its execution." *City of Ontario v. Superior Court* (1970) 2 Cal. 3d 335, 343-344, confirmed general validation was available for contracts of indebtedness.

Unless the Converted Contract can be considered a contract for indebtedness, it does not yet qualify for a validation action.

c. The Converted Contract Has Some Provisions Subject to Validation

Para. 1.(i)(1) defines "Existing Capital Obligation" as the "remaining amount of construction costs or other capitalized costs allocable to the Contractor . . ." "Repayment Obligation" is defined in para. 1.(x) as that "for water delivered as irrigation water shall mean the Existing Capital Obligation discounted by ½ of the treasury rate, which shall be the amount due and payable to the United States . . ." under the WIIN Act.

"Water Infrastructure Improvements for the Nation (WIIN) Act: Bureau of Reclamation and California Water Provisions," updated December 14, 2018,[1] discusses numerous provisions of the WIIN Act, but of particular interest for this case is Section 4011: "Accelerated Repayment and Surface Water Storage Account," starting on page 22. These publications are cited by California appellate courts. See, e.g., *In re A.A.* (2016) 243 Cal. App. 4th 765, 773; *Legal Services for Prisoners with Children v. Bowen*

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1 See https://crsreports.congress.gov/product/pdf/R/R44986

(2009) 170 Cal. App. 4th 447, 456-457, *People* v. *Salcido* (2019) 42 Cal. App. 5th 529, 539, fnt. 3.

This shows that the contract at issue in this case is, in part, one for faster repayment of debts incurred to the Bureau of Reclamation for infrastructure used to store and move water around California. Thus the contract at issue meets the requirements, at least in part, for a validation action under Government Code section 53511 and Code of Civil Procedure section 864.

The Converted Contract does not meet such requirements for provisions unrelated to debt because it is a proposed contract, not an executed contract.

4. The Converted Contract Lacks Material Terms.

In the Appendix of Evidence submitted by Westlands ("AOE") Vol. II, page 108, paragraph 8, the draft resolution states: "The President of the District is hereby authorized to execute and deliver the Converted Contract in substantially the form attached hereto, with such additional changes and/or modifications as are approved by the President of the District, its General Manager, and its General Counsel." The resolution itself has that language as well. AOE, Vol. II, page 144. Exhibits A, B, C, and D to the Converted Contract are missing from all materials submitted to the Court. Exhibit D is the repayment page.

The proposed judgment seeks a ruling that "the Converted Contract is in all respects valid under applicable California Law and binding upon Westlands." Given that the contract terms, including repayment terms, are not certain, and that the contract may be changed or modified, validation is not appropriate. It is not possible to make the determinations sought where no final contract is presented for validation.

Westlands' Declarant Gutierrez states he does not anticipate any major changes, but the validation statutes do not encompass judicial approval of incomplete contracts. Given the estimate for the repayment amount is over $362,000,000 (Ex. 12 to Westlands' Exhibits), the absence of the actual final amount and payment schedule render the proposed contract lacking in material terms and incomplete.

5. Brown Act Issues

> "In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on

remaining informed so that they may retain control over the instruments they have created."

Government Code section 54950.

"As a remedial statute, the Brown Act must be construed liberally in favor of openness so as to accomplish its purpose." 9 Witkin, California Procedure (5th Ed. March 2019 Update), "Administrative Procedure, section 18.

Brown Act issues are raised by Westlands' request for a judgment that "all of the proceedings related to the Westlands' approval of the Converted Contract were in all responses legal and valid . . ." (Prop. Judgment, para. 4.) Government Code sections 54954.1 and 54954.2 set forth certain requirements for public meetings and public notice of such meetings.

The Declaration of Ms. Ormone states that the Agenda was posted on the District's Website on October 10, 2019 for the October 15, 2019 meeting. But the document itself, which states it is a copy, lists October 9, 2019 as the posting date (See AOE 11 at the bottom). She also states that a revised Agenda was posted on October 10, 2019. But Exhibit 6 states that the revised agenda was posted earlier, on October 8, 2019. (AOE 17.) Each document states it is a copy only, and that the original is signed by the secretary, but the original is not provided for either one. The conflicts render the evidence of posting unreliable, and fail to prove posting was correctly done.

For meetings occurring after January 1, 2019, Government Code section 54954.2(a)(2) also requires that such agenda be posted "on the primary Internet Web site homepage . . . through a prominent, direct link . . ." The declaration offered says only that the agenda was posted on the website, but not the specific weblink, and provides no copies of the webpage where it was posted.

No agenda packet is provided, so it is not possible to determine if the packet provided the information necessary to support the meeting. Agenda packets must be available to the public. Government Code sections 54954.1 and 54957.5(a). As the particular packet is not provided to the Court, the requested finding of compliance with the Brown Act cannot be made.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: _____ (Judge's initials) **on** 2/26/20 (Date).

SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO
Civil Department, Central Division
1130 "O" Street
Fresno, California 93724-0002
(559) 457-2000

FOR COURT USE ONLY

TITLE OF CASE:
Westlands Water District, a California Water District vs. All Persons Interested in the Matter of the Contract Between the United States and Westlands Water Disctrict Providing for Project Water Service, San Luis Unit and Delta Division and Facilities Repayment

CASE NUMBER:
19CECG03887

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that a true copy of the:

Minutes/Order

was placed in a sealed envelope and placed for collection and mailing on the date and at the place shown below following our ordinary business practice. I am readily familiar with this court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

Place of mailing: **Fresno, California 93724-0002**
On Date: **03/16/2020** Clerk, by _____, Deputy
N. Capalare

David C. Palmer
Stradling Yocca Carlson & Rauth, P.C.
660 Newport Center Drive, Suite 1600
Newport Beach, CA 92660

S. Dean Ruiz
3439 Brookside Road
Suite 208
Stockton, CA 95219

Stephan C. Volker
Law Offices of Stephan C. Volker
1633 University Avenue
Berkeley, CA 94703

Roger B. Moore
Law Office of Roger B. Moore
337 17th Street
Suite 211
Oakland, CA 94612

Adam Keats
Center For Food Safety
303 Sacramento Street
2nd floor
San Francisco, CA 94111

☐ Clerk's Certificate of Mailing Additional Address Page Attached

EXHIBIT
2

Filed 3/9/21 Westlands Water Dist. v. North Coast Rivers Alliance CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

WESTLANDS WATER DISTRICT, Plaintiff and Respondent, v. NORTH COAST RIVERS ALLIANCE et al., Defendants and Appellants.	F081174 (Super. Ct. No. 19CECG03887) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Alan M. Simpson, Judge.

Law Offices of Stephan C. Volker, Stephan C. Volker, Alexis E. Krieg, Stephanie L. Clark and Jamey M.B. Volker for Defendants and Appellants.

Kronick, Moskovitz, Tiedemann & Girard, Daniel J. O'Hanlon, William T. Chisum, and Carissa M. Beecham for Plaintiff and Respondent.

-ooOoo-

A validation action is a unique proceeding for declaratory relief governed by Code of Civil Procedure sections 860 through 870.5.[1] Respondent Westlands Water District initiated such an action to obtain judicial approval of a contract between it and the federal

[1]Unless otherwise specified, all further statutory references are to the Code of Civil Procedure.

government. The deadline for interested parties to appear in the case and contest the validity of the contract was December 16, 2019.

On December 16, 2019, appellants[2] attempted to electronically file a joint answer to the validation complaint. The next morning, appellants were informed the filing had been rejected due to nonpayment of a first appearance fee for five of the six answering parties. Appellants' counsel promptly resubmitted the pleading with the required fees. The document was accepted and electronically file stamped at 9:55 a.m., December 17, 2019.

A dispute arose over the filing date of the answer. The pleading was found to be untimely, which effectively barred appellants from participating in the lawsuit. Appellants claim this ruling was erroneous as a matter of law.

Subject to conditions set forth in section 1010.6, trial courts may permit or require electronic filing of documents in civil actions. One condition is "[a]ny document received electronically by the court between 12:00 a.m. and 11:59:59 p.m. on a court day shall be deemed filed on that court day." (*Id.*, subd. (b)(3).) Respondent does not dispute that appellants' pleading was received by the Fresno Superior Court on December 16, 2019. However, it contends all required fees must accompany the initial submission of an electronically filed document in order for the filing date to relate back to the date of receipt. We disagree with respondent's interpretation of the law and will reverse the trial court's finding of untimeliness.

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[2]Appellants consist of an unincorporated nonprofit association (North Coast Rivers Alliance), an unincorporated nonprofit organization (Institute For Fisheries Resources), two nonprofit corporations (California Sportfishing Protection Alliance; Pacific Coast Federation of Fishermen's Associations), a Native American tribe (Winnemem Wintu Tribe), and an association whose legal status is not otherwise specified in the record (San Francisco Crab Boat Owners Association).

FACTUAL AND PROCEDURAL BACKGROUND

On October 25, 2019, respondent filed a validation complaint in the Fresno Superior Court. The complaint named as defendants "All Persons Interested in the Matter of the Contract Between the United States and Westlands Water District Providing for Project Water Service, San Luis Unit and Delta Division and Facilities Repayment." (Some capitalization omitted.) Pursuant to sections 861 and 861.1, service was accomplished by publication of a summons in two newspapers. The summons stated, in relevant part: "All persons interested in this matter may contest the legality or validity of the matter by appearing and filing a written answer to the complaint not later than December 16, 2019."

Subject to an exception for self-represented parties, the Fresno Superior Court requires electronic filing in civil cases. (Super. Ct. Fresno County, Local Rules, rule 4.1.2(A).)[3] "The electronic filing of documents must be effected using the Court's electronic service providers." (*Id.*, local rule 4.1.2(D)(1); former local rule 4.1.13(D).) On December 16, 2019, appellants attempted to file an answer to the complaint using an electronic service provider called One Legal.

During the electronic filing process, appellants' counsel "made sure the type of document [she] was submitting included the first appearance fee, and confirmed that the credit card information on file was accurate."[4] The attorney "saw a warning that [she] might need to adjust the fee amount if the document was filed on behalf of multiple parties," but she had seen this "generic warning" before when filing complaints in other

---

[3]All further references to local rules are to those of the Fresno Superior Court.

Prior to January 1, 2021, provisions concerning electronic filing were set forth in former local rule 4.1.13. On our own motion, we take judicial notice of local rule 4.1.2 and former local rule 4.1.13. (Evid. Code, §§ 452, subd. (e), 459, subd. (a).)

[4]The quotations in this paragraph are from a sworn declaration of the associate attorney who uploaded and transmitted the pleading to One Legal for electronic filing.

cases. The attorney had "never needed to adjust the fee amount when filing a complaint on behalf of multiple parties," so she ignored the warning and paid only one first appearance fee instead of six. One Legal provided a written confirmation showing the pleading was submitted at 4:57 p.m.

On December 17, 2019, appellants' counsel was notified regarding the requirement of a first appearance fee for each answering party. Counsel resubmitted appellants' answer with the correct fee payment. The pleading was accepted and electronically file stamped with this notation: "E-FILED [¶] 12/17/2019 9:55 AM."

On December 30, 2019, respondent filed a motion for entry of a judgment in its favor (similar in substance to a motion for summary judgment). The moving papers focused on the merits of the validation complaint, but respondent also claimed appellants' answer to the complaint was "time barred." The argument was factually based on appellants' alleged failure to meet the filing deadline provided in the summons. The legal basis for the argument was section 862, which states: "Jurisdiction shall be complete after the date specified in the summons. Any party interested may, not later than the date specified in the summons, appear and contest the legality or validity of the matter sought to be determined."

Appellants filed an opposition to respondent's motion. In a short discussion regarding the timeliness of their answer, appellants argued the pleading was submitted to the court on the deadline specified in the summons. The written opposition contained no legal argument on this issue. Appellants' factual argument was supported by a declaration from the attorney who had electronically submitted the answer, along with the documents confirming dates and times of the filing activity.

The trial court issued a tentative ruling indicating respondent's motion would be denied. However, the trial court also tentatively found appellants' answer was "filed after the December 16, 2019 deadline." No analysis was provided in support of this conclusion. The pleading was deemed "untimely" based on section 862 and the

following language in *City of San Diego v. San Diegans for Open Government* (2016) 3 Cal.App.5th 568 at page 579:

> "We view the time limit established by section 862 like a statute of limitations. Put differently, if any interested party appears in a validation action after the time period permitted by the applicable summons, the government would have a valid defense, preventing that interested party from further challenging the government's proposed action."

When the motion was heard, appellants argued section 1010.6, subdivision (b)(3) (section 1010.6(b)(3)) "governs the effective date of the filing." In other words, they claimed the answer should be deemed filed as of the date it was first received by the superior court. The hearing concluded with the matter being taken under submission.

On March 16, 2020, the trial court issued a minute order summarily adopting its tentative ruling. Appellants filed a notice of entry of order on April 10, 2020. A notice of appeal followed.

In May 2020, appellants and two groups of similarly situated defendants filed a motion in the trial court to stay the action pending the outcomes of their respective appeals. The other moving parties had also filed answers that were found to be untimely. In July 2020, respondent filed a "renewed" motion for entry of judgment in its favor, which has yet to be ruled upon. In August 2020, the trial court granted appellants' motion to stay the proceedings.[5]

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[5]Respondent's motion to augment the record on appeal with material concerning the information in this paragraph is hereby granted. Appellants' opposition to the motion is based on the principle "that, when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered." (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813.) We acknowledge the subject matter of respondent's motion to augment only to provide a more complete procedural summary, not for any purpose regarding the correctness of the challenged ruling. The California Rules of Court permit augmentation of the record to include "[a]ny document filed or lodged in the case in superior court." (*Id.*, rule 8.155(a)(1).) Furthermore, the filing of appellants' motion to stay the trial court proceedings and respondent's renewed motion for judgment in its favor are facts reflected in the register of actions included in appellants' own appendix.

DISCUSSION

I. Appealability

Respondent has moved to dismiss the appeal, arguing the challenged ruling was made in a nonappealable order. "Section 904.1, which codifies the general list of appealable judgments and orders, also effectively codifies the common law one-final-judgment rule. Under this rule, an appeal lies only from a final judgment that terminates the trial court proceedings by completely disposing of the matter in controversy." (*Walton v. Mueller* (2009) 180 Cal.App.4th 161, 172, fn. 9.)

Respondent claims the minute order is not a "judgment" for purposes of section 904.1, subdivision (a)(1). Appellants rely on the principle that "'[i]t is not the form of the decree but the substance and effect of the adjudication which is determinative.'" (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 698.) Appellants argue the trial court's finding of untimeliness was a dispositive ruling and is therefore appealable. In the alternative, appellants ask us to treat the appeal as a petition for writ relief. (See *H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1366 ["An appellate court has discretion to treat a purported appeal from a nonappealable order as a petition for writ of mandate"].) We agree with appellants' first argument and need not treat the appeal as a writ petition.

"A judgment is the final determination of the rights of the parties in an action or proceeding." (§ 577.) "'As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final.'" (*Griset v. Fair Political Practices Com.*, *supra*, 25 Cal.4th at p. 698.) Accordingly, "it has long been the settled rule that in a case involving multiple parties, a judgment is final and appealable when it leaves no issues to be

determined as to one party." (*Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 506.)

"A validation action 'is a lawsuit filed and prosecuted for the purpose of securing a judgment determining the validity of a particular … governmental decision or act.'" (*Davis v. Fresno Unified School Dist*. (2020) 57 Cal.App.5th 911, 927.) As discussed, respondent's lawsuit seeks to establish the validity of a contract between it and the federal government. Appellants are not specifically named in the complaint, but section 861 "grants jurisdiction of 'all' interested parties by publication of summons." (*Green v. Community Redevelopment Agency* (1979) 96 Cal.App.3d 491, 500.) "Section 862 states that any interested party *may not later than the date specified in the summons* appear and contest the legality and validity of the matter sought to be determined." (*Ibid*.) The deadline established by the summons is the functional equivalent of a statute of limitations. (*City of San Diego v. San Diegans for Open Government*, *supra,* 3 Cal.App.5th at p. 579.)

The trial court's ruling includes both a finding of untimeliness and statements regarding the preclusive effect of its finding. The order effectively bars appellants "'from further challenging the government's proposed action.'" (Quoting *City of San Diego v. San Diegans for Open Government*, *supra*, 3 Cal.App.5th at p. 579.) Unlike a defaulted defendant in an ordinary civil case, appellants have no recourse under section 473 because "the statute does not offer relief from mandatory deadlines deemed jurisdictional in nature." (*Maynard v. Brandon* (2005) 36 Cal.4th 364, 372.) As between respondent and appellants, the challenged ruling leaves no issues for future consideration and constitutes a final determination of appellants' rights in this lawsuit. For those reasons, the ruling qualifies as a judgment under section 577 and may be treated as such for purposes of section 904.1. Respondent's motion to dismiss is therefore denied.

II. Law and Analysis

The question presented is whether, for purposes of meeting a filing deadline, the date of a trial court's receipt of an electronically submitted pleading constitutes the filing date of the pleading. This question presumes the pleading is actually filed. "Because this issue involves the application of law to undisputed facts, we review the matter de novo." (*Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, 1018.) Our analysis involves the interpretation of statutes and rules, which are questions of law subject to our independent review. (*Lopez v. Sony Electronics, Inc*. (2018) 5 Cal.5th 627, 633.)

"Our fundamental task in interpreting a statute is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning … in the context of the statutory framework as a whole …." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) "If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend." (*Ibid*.) If the language is ambiguous, we "may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Ibid*.) The same principles apply to our interpretation of the California Rules of Court. (*Life v. County of Los Angeles* (1990) 218 Cal.App.3d 1287, 1296.)

Section 1010.6 governs the electronic service and filing of documents. The statute imposes conditions upon a trial court's adoption of local rules for electronic filing, and those conditions are supplemented by the California Rules of Court. (§ 1010.6, subds. (b), (f), (g); see *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1351 ["A trial court is without authority to adopt local rules or procedures that conflict with statutes or with rules of court adopted by the Judicial Council"].) As stated in the current and former versions of section 1010.6(b)(3), "Any document received electronically by the court between 12:00 a.m. and 11:59:59 p.m. on a court day shall be deemed filed on that court day."

The word "shall" ordinarily connotes a mandatory or directory duty. (*Woodbury v. Brown-Dempsey* (2003) 108 Cal.App.4th 421, 433.) Recent changes in the law add context and limitations to section 1010.6(b)(3). (See further discussion, *post*.) But at the time appellants filed their answer, section 1010.6(b)(3) was self-explanatory and required no further statutory construction. (See *Voices of the Wetlands v. State Water Resources Control Bd*. (2011) 52 Cal.4th 499, 519 ["If the language is unambiguous, the plain meaning controls"].)

Rule 1.20 of the California Rules of Court (rule 1.20) is entitled, "Effective Date of Filing." (Boldface omitted.) It states, "Unless otherwise provided, a document is deemed filed on the date it is received by the court clerk." Rule 2.253(b)(6) provides: "The effective date of filing any document received electronically is prescribed by Code of Civil Procedure section 1010.6. *This provision concerns only the effective date of filing. Any document that is received electronically must be processed and satisfy all other legal filing requirements to be filed as an official court record*." (Italics added.)

Current and former versions of the trial court's local rules incorporate the language of section 1010.6(b)(3) and portions of California Rules of Court, rule 2.253(b)(6). The local rules state, in relevant part: "For purposes of electronic filing of documents, pursuant to Code of Civil Procedure § 1010.6(b)(3), any document received electronically by the Court between 12:00 a.m. and 11:59:59 p.m. on a court day shall be deemed filed on that court day. … *This provision concerns only the method and effective date of filing; any document that is electronically filed must satisfy all other legal filing deadlines and requirements*." (Local rule 4.1.2(D)(4); *id*., former local rule 4.1.13(D), italics added.)

Respondent argues the italicized language quoted above means a document will not be deemed filed on the day it is received unless all required fees are tendered at the time of submission/receipt. We are not persuaded. By providing for the submission and receipt of documents up until 11:59:59 p.m., the rules contemplate that some documents

will not be processed and filed by the clerk's office on the day they are received. No distinction is made between the receipt of documents submitted with payment of the correct filing fee and documents submitted with payment of an insufficient sum. Furthermore, the California Rules of Court "must be liberally construed" to ensure a just determination of the proceedings they govern. (*Id*., rule 1.5(a).)

The italicized language warns that mere receipt of a document does not mean it will be filed. (Cal. Rules of Court, rule 2.253(b)(6).) The document may be rejected if the required filing fees are not paid. (*Ibid*.) However, the clerk of the court must provide confirmation of *receipt* of all electronically submitted documents regardless of whether the documents are in proper form and/or accompanied by the required fees. (*Id.*, rule 2.259(a)(1).) "A document is considered received at the date and time the confirmation of receipt is created." (*Ibid*.) "If the document … complies with filing requirements and all required filing fees have been paid, the court must promptly send the electronic filer confirmation that the document has been filed. The filing confirmation must indicate the date and time of filing and is proof that the document was filed on the date and at the time specified." (*Id*., subd. (a)(2).) Whenever a document is filed, the "effective date" of the filing is the date of receipt. (Cal. Rules of Court, rule 2.253(b)(6); Super. Ct., Fresno County, Local Rules, rule 4.1.2(D)(4); *id*., former local rule 4.1.13(D).)

As of January 1, 2021, section 1010.6 has been amended to address this very issue. Assembly Bill No. 2165 (2019–2020 Reg. Sess.) (Assembly Bill 2165) revised the language of section 1010.6, subdivision (b)(4)(A) and added subdivision (b)(4)(B)–(E). (Stats. 2020, ch. 215, § 1.5.) Section 1010.6, subdivision (b)(4)(E) provides:

> "If the clerk of the court does not file a complaint or cross complaint because the complaint or cross complaint does not comply with applicable filing requirements or the required filing fee has not been paid, any statute of limitations applicable to the causes of action alleged in the complaint or cross complaint shall be tolled for the period beginning on the date on which the court received the document and as shown on the confirmation of receipt described in subparagraph (A), through the later of either the date on

> which the clerk of the court sent the notice of rejection described in subparagraph (C) or the date on which the electronic filing service provider or electronic filing manager sent the notice of rejection as described in subparagraph (D), plus one additional day if the complaint or cross complaint is subsequently submitted in a form that corrects the errors which caused the document to be rejected. The party filing the complaint or cross complaint shall not make any change to the complaint or cross complaint other than those required to correct the errors which caused the document to be rejected."

The legislative history of Assembly Bill 2165 indicates the amendments were partially in response to concerns about statutes of limitations expiring because of "delayed notice of rejected electronically-filed documents." (Concurrence in Sen. Amends. to Assem. Bill No. 2165 (2019–2020 Reg. Sess.) Aug. 31, 2020, p. 3.) "The bill formally tolls any applicable statute of limitations during the interval between the date of the [notice of receipt] and the date of the [notice of rejection], while providing an additional day to correct the error that led the filing to be rejected. Filers can also use these notices as a basis to seek relief from the court if they miss a deadline other than a limitations period." (*Ibid.*; see § 1010.6, subd. (b)(4)(C)–(D) [new provisions regarding notices of rejection].)

The recent amendment to section 1010.6 does not change our analysis of the law in effect when appellants filed their answer. Section 1010.6(b)(3), California Rules of Court, rules 1.20 and 2.253(b)(6), and the trial court's local rules all said the effective date of a filed document is the date it was received by the court. Unlike the new version of section 1010.6, there was no qualifying language regarding the effective date of a properly filed document that was initially rejected for insufficient payment of fees. "We may not, under the guise of interpretation, insert qualifying provisions not included in the statute." (*Estate of Griswold* (2001) 25 Cal.4th 904, 917; see *Poppers v. Tamalpais Union High School Dist*. (1986) 184 Cal.App.3d 399, 404 [reasoning if "the Legislature had intended to limit the application of [a particular statute] as respondent suggests, qualifying language could have easily been used to effectuate this result"].) We are also

mindful of "the legislative and judicial policy of this state to prefer disposition of litigation on the merits rather than on procedural grounds." (*Carlson v. Department of Fish & Game* (1998) 68 Cal.App.4th 1268, 1278; see *Hernandez v. Temple* (1983) 142 Cal.App.3d 286, 290 ["The law abhors forfeitures and requires strict construction of statutes imposing them"].)

Respondent attempts to frame the issue in terms of whether "the governing rules empowered the clerk to decline to file the answer absent the required filing fee." Respondent relies on Government Code section 6100 and the holding of *Duran v. St. Luke's Hospital* (2003) 114 Cal.App.4th 457. The statute provides, in relevant part, "Officers of the state, or of a county or judicial district, shall not perform any official services unless upon the payment of the fees prescribed by law for the performance of the services …." (Gov. Code, § 6100.)

In *Duran*, a plaintiff's attorney used an overnight carrier to deliver a medical malpractice complaint to a superior court for filing. The package included a check for the filing fee. The check "was $3 short of the amount required to file [the] complaint." (*Duran v. St. Luke's Hospital*, *supra*, 114 Cal.App.4th at p. 458.) The clerk of the court received the pleading one day prior to the deadline of the applicable statute of limitations but refused to file it because of the insufficient funds. (*Id*. at p. 459.) "By the time plaintiffs' attorney learned of the situation and tendered the correct filing fee, the statute of limitations had expired." (*Ibid*.) The court of appeal upheld a judgment of dismissal based on the statute of limitations.

The *Duran* court relied on Government Code section 6100 and "[a]n unbroken line of decisions by our Supreme Court hold[ing] that it is mandatory for court clerks to demand and receive the fee required by statute before documents or pleadings are filed." (*Duran v. St. Luke's Hospital*, *supra*, 114 Cal.App.4th at p. 459.) However, the facts of *Duran* do not involve electronic filing. The opinion also predates rule 1.20 ["Unless

otherwise provided, a document is deemed filed on the date it is received by the court clerk"].

We agree the clerk of the court was authorized to reject appellants' pleading for lack of payment of all required fees. This does not change the fact it was timely *received*. The pleading was subsequently filed once appellants' counsel rectified the problem. Pursuant to section 1010.6 and the applicable rules of court, the effective date of the answer was the date it was received, i.e., December 16, 2019. We interpret this to mean the filing date related back to the date of receipt. Therefore, appellants' appearance in the validation action was timely for purposes of section 862.

DISPOSITION

The trial court's finding as to the timeliness of appellants' appearance in this action, as made in the minute order dated March 16, 2020, is reversed. Appellants shall recover their costs on appeal.

PEÑA, Acting P.J.

WE CONCUR:

SMITH, J.

SNAUFFER, J.