No. F085535

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

FRIANT WATER SUPPLY PROTECTION ASSOCIATION
Petitioner and Appellant,

v.

DEL PUERTO WATER DISTRICT; BOARD OF DIRECTORS OF THE DEL PUERTO WATER DISTRICT; SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY; and BOARD OF DIRECTORS OF THE SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY
Respondents.

Appeal From a Judgment of the Superior Court, County of Stanislaus, Case No. CV-20-005164, the Honorable John R. Mayne, Judge Presiding.
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APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rules 8.208 and 8.488 of the California Rules of Court, the undersigned counsel of record for Petitioner and Appellant Friant Water Supply Protection Association certifies that there are no interested entities or persons that must be listed under Rule 8.208.

Dated: July 21, 2023

PRICE, POSTEL & PARMA LLP

By: _____

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INTRODUCTION

Petitioner and Appellant Friant Water Supply Protection Association ("FWSPA" or "Friant") brought this action to prevent Respondents Del Puerto Water District ("DPWD") and San Joaquin River Exchange Contractors Water Authority ("ECs") from adopting a defective Environmental Impact Report ("EIR") for the proposed Del Puerto Canyon Reservoir Project ("Project" or "Reservoir") that patently fails to provide the public with the information and analysis required by the California Environmental Quality Act ("CEQA").

Respondents seek to divert water from the Central Valley Project ("CVP"), which the ECs would otherwise receive from the United States Bureau of Reclamation ("Reclamation") in their service areas, at a new point of diversion outside their service areas, and to store that water in the Reservoir. Before proceeding with the Project, Respondents are required by CEQA to prepare an EIR identifying and evaluating "the significant effects of [the] project on the environment, the way those effects can be mitigated or avoided, and the alternatives to the project." Pub Res. Code § 21002.1(a).) The EIR is an informational document intended to "inform public decision-makers and the general public of the environmental effects of projects they propose to carry out or approve." (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 822.)

A fundamental issue that must be evaluated in any EIR for a California construction project is the source and continuing availability of water for the project. The EIR must also provide a careful analysis of the effect such use of water will have on the environment and other water users. *Santiago County Water Dist. v. County of Orange*, *supra*, 118 Cal.App.3d at p. 829.)

Respondents' EIR makes no effort to identify and evaluate these important public issues. On the critical subject of water supply for the Project, the EIR simply makes the assertion, without any supporting information or analysis, that Respondents already have the right to divert and store CVP water in the Reservoir:

> The Project Partners will not require a water right permit or other water right approval involving modification of Central Valley Project water rights. Both DPWD and the Exchange Contractors have existing contracts with Reclamation for water deliveries from the Central Valley Project. (4 AA 0517.)

Two state agencies, the California Department of Water Resources ("DWR") and the State Water Resources Control Board ("Water Board"), asked the project proponents to be more specific about the claimed water rights and warned that a new water rights permit or a modification of existing permits probably would be necessary for the project. Despite these warnings, the EIR does not attempt to explain why a new permit or modification of existing CVP permits is not required for the proposed new point of diversion and proposed new place of storage of CVP water. Such a water rights permit or modification must be considered and approved by the Water Board which,

when it received Respondents' Notice of Preparation ("NOP") of the EIR, specifically asked to be identified as a Responsible Agency in the EIR due to its role in approving such water rights permits and modification of permits. The Water Board further advised Respondents that it would need to rely on the EIR for the Project in determining whether to approve a water rights permit or modification, and therefore Respondents "should ensure that any EIR prepared for the project consider all potential direct, indirect, and cumulative impacts associated with the diversion and use of water; and a range of project alternatives that reduce or avoid flow-related impacts on terrestrial and aquatic species." (4 AA 0540.)

Respondents made no effort to comply with these requests. Their final EIR simply contains the conclusory (and incorrect) assertion that water rights permits will not be needed to divert or store the water for the Project. The EIR does not attempt to support this assertion, nor does it contain any analysis of the effect of the diversion and storage of 40,000 acre-feet a year of CVP water on the environment and other water users such as Friant.

In addition to the requests received from the Water Board, Respondents were also expressly advised by DWR to include a discussion in the EIR about the water rights necessary to divert and store the water in the Reservoir. After receiving Respondents' NOP, DWR informed Respondents that "the NOP does not specify any water rights information regarding the sources of water. Such water rights information is critical to evaluate

potential injury to other legal water users." DWR went on to state that "[g]iven the existing coordinated operations between DWR and Reclamation to convey water through the Delta for export and to meet regulatory requirements, the EIR should address potential effects of SWP operations and water supplies." (3 AA 0364-0365.)

DWR's statements to Respondents identify the central failing of the EIR. The operations of the CVP are carefully coordinated between DWR and Reclamation to accommodate the interests of many competing water users. Any environmental review of a proposed change in those operations, including Respondents' proposal to use CVP water for the Reservoir, must include an evaluation of how that change would affect other water users. Friant members are among the other water users who could be affected by the Project, and consequently they provided written comments similar to those from DWR and SWRCB prior to Respondents' certification of the EIR and approval of the Project.

Despite many opportunities to do so, Respondents obdurately refused to comply with the State Water Board's and DWR's requests concerning the content of the EIR. In both their Draft and Final EIR they continued to assert, without any supporting explanation, that they can divert and store CVP water in the Project under the ECs "existing contracts." They also refused to add any analysis of the effect of such diversions and storage on other water users.

Respondents' decision to ignore the State Water Board's and DWR's warnings and omit the requested information concerning water rights and the effect of the Project on other users is fatal to their EIR. Although the ECs have existing contracts for water supply from the CVP, those contracts specify the geographic locations and circumstances under which CVP water may be diverted for the ECs' use. The EIR does not identify any provisions in those contracts allowing CVP water to be diverted and stored at the new locations proposed in the Project. This is no mere oversight; Respondents omitted this information because their existing contracts do not and could not identify a point of diversion or place of storage that was not even contemplated many years ago when those contracts were made.

More importantly, however, even if the EC's existing contracts included the new point of diversion and place of storage, this would not establish that existing CVP water rights permits from the State Water Board include the proposed new point of diversion and place of storage. An existing contract is not an existing water right from the State Water Board; they are two different things. Respondents presented no evidence in the administrative record or in the lower court that a new permit will be unnecessary for the Project. Indeed, the State Water Board itself warned Respondents that the EIR needed to address and analyze the availability and effect of a new water rights permit for the Project. (4 AA 0540-0542; 4 AA 0535-0536.)

The EIR's failure to identify the State Water Board as a Responsible Agency is also a fatal defect. As Respondents acknowledged in the trial court, Reclamation operates the CVP pursuant to multiple water rights permits that have been approved and issued by the State Water Board. (9 AA 1216-1217.) Adding a new point of diversion or place of storage to these existing water rights requires application by Reclamation to the State Water Board, and consideration and approval of that action by that agency. Such consideration and approval constitute a discretionary action by a state agency, which under CEQA must be disclosed as an agency action in the EIR. Respondents admitted in the trial court that their EIR does not identify the application to modify the CVP water rights permits by the State Water Board as a project action, nor does the EIR identify the State Water Board as a Responsible Agency for this purpose. As a result, the EIR fails to make the analysis required by CEQA and which the State Water Board itself has stated is necessary in order to assess the impact of the Project on other CVP water users such as Friant.

As described more fully in this brief, the trial court failed to address this central issue, and instead based its decision on a non-relevant "harm" analysis. Rather than deciding the case on the basis of whether the information and analysis supplied by the EIR satisfies the requirements of CEQA, the trial court instead determined that the "critical issue" on which this case turns is whether Friant has demonstrated, based on the minimal

evidence presented by Respondents in the administrative record, that Friant will be harmed by the proposed Project.

The trial court's reasoning shows that it misapprehended its task in this case. This is a special proceeding brought solely to challenge the sufficiency of the EIR as an informational document. It is not a civil action against Respondents for which Friant must prove harm by a preponderance of the evidence. (If Friant had brought such an action, it would not be limited to the administrative record; it would have been entitled to present evidence of *all* years of water use, not just the years selectively presented by Respondents.) The limited evidence in the administrative record concerning water use, which concerned even the trial court, is not "critical" to Friant's case, nor is the trial court's finding based on that evidence "fatal to Friant's primary factual contention." Friant's primary factual contention is that the EIR *fails to provide the public with the information and analysis required by CEQA*. The only "critical" issues in this case are whether the EIR's failure to specify water rights information, failure to identify the State Water Board as a Responsible Agency, and failure to evaluate the effects of the Project on other water users satisfies the requirements of CEQA. As will be discussed, the law is clear that Respondents' EIR does *not* satisfy those requirements.

Friant respectfully requests that this Court reverse the judgment due to the EIR's lack of ANY analysis of water rights for the Project, failure to fully identify all Responsible Agencies, and failure to identify or analyze the

effect of the Project on other CVP water users. Friant further requests that the trial court be directed to retain jurisdiction of this matter until Respondents certify a new EIR which complies with CEQA and properly analyzes the environmental impacts of their proposed Project. (See *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715, 724.)

STATEMENT OF THE CASE

I. Factual Background

A. The Central Valley Project and the Parties

The Central Valley Project ("CVP") is a federal water project operated by the United States Bureau of Reclamation ("Reclamation") in the Central Valley. (6 AA 0912.) Stretching from Redding to Bakersfield, the CVP is one of the largest water projects in the world, with 20 dams and reservoirs, 11 power plants and 500 miles of canals. (6 AA 0917.)

The CVP receives water from various sources, principally the Sacramento and San Joaquin Rivers, and delivers such water to users with whom it has contracts. (6 AA 0912.) Under federal law, Reclamation must comply with California law in acquiring water rights for diversion and storage of water by the CVP. (43 U.S.C. §383.) California law requires that the Water Board approve any permit for water appropriation from the CVP. (Cal. Water Code §179.) In the event water diverted under existing water rights permits is proposed to be diverted at a new location or stored at a new

location or at new times of storage, such changes must be reflected in applications to modify existing water rights, which also must be heard by the Water Board. (Cal. Water Code §§ 1701-1706.)

Friant is an unincorporated association of ten water supply contractors within the Friant Division of the CVP. Friant members receive their water supply from the Friant-Kern Canal, which receives its water supply from Millerton Lake, fed by the San Joaquin River. Friant members are responsible for providing a water supply for roughly 1 million acres of irrigated land in the east San Joaquin Valley. (6 AA 0943.)

DPWD is a California water district which serves agricultural interests in Stanislaus County. (5 AA 0710.) Del Puerto's principal source of water for its customers is a water service contract with Reclamation. (5 AA 0711.)

The ECs are the successors in interest to Miller & Lux, the farming and ranching company that owned much of the central San Joaquin Valley in the late 19th and early 20th centuries. Miller & Lux, followed by their successors in interest, owned significant water rights in the San Joaquin River. To obtain water for the CVP, in the 1930s Reclamation purchased a portion of the Miller & Lux water rights and entered into a written agreement with the ECs, commonly known as the "Exchange Contract," providing that the ECs would "exchange" the remainder of their water rights in the San Joaquin River for a specified flow of "Substitute Water" from CVP supplies that originate from the Sacramento River, delivered via the Delta-Mendota

Canal and San Luis Reservoir. The Exchange Contract provides for a total annual supply of up to 840,000 AFY (which can be decreased to 650,000 AFY in a "critical" year as defined in the Exchange Contract). (8 AA 1110-1116; 8 AA 1124-1125; 6 AA 0854-0880.)

Through the combination of the purchase of some of the Miller & Lux San Joaquin River rights, and the Exchange Contract providing the right to use the remainder of the Miller & Lux rights, Reclamation has secured the right to divert the entire flow of the San Joaquin River for the benefit of the Friant members. Friant members have contracted for a portion of this water, and have received water under those contracts via the Friant-Kern Canal and the Madera Canal, for more than 60 years. (6 AA 0916-0919; 6 AA 0921-0922, 6 AA 0936, 6 AA 0943; See also, *United States v. Gerlach Live Stock Co.* (1950) 339 U.S. 725.)

The Exchange Contract requires that the Substitute Water be delivered to specified delivery points for actual farming use, and goes so far as to include specific legal descriptions of parcels on which the Substitute Water may be used. (8 AA 1110-1115.) If the Exchange Contractors have no actual need for such supply on these described lands, the unused portion of the 840,000 AFY (or 650,000 AFY in a critical year) remains part of the CVP supply. (8 AA 1106-1107.) Delivery records for the past 20-30 years show that, when limited to meeting demands on the lands as spelled out in the Exchange Contract, there are many years in which deliveries to the ECs

account for far less than the 840,000 AFY maximum. (4 AA 0620.) Operationally, this unused portion of the Exchange Contract Substitute Water is generally stored in the CVP and available for use in later years to satisfy subsequent year water needs, including primarily the demands of the ECs in these subsequent years. (6 AA 0857-0858; 8 AA 1106-1107.)

If the CVP is unable to supply the ECs with the Substitute Water on the demand schedule identified in the Exchange Contract, the ECs are entitled to shift to diverting water under their reserved water rights from the San Joaquin River. (8 AA 1107-1108.) If this happens, as it did in 2014, 2015 and 2020, water which would ordinarily be available to Friant members is instead taken by the ECs. (1 AA 0104.)

In order to operate the CVP, Reclamation has applied for and obtained permits and licenses from the Water Board. Each of these permits and licenses (as with all permits and licenses issued by the Water Board) identify not only the quantities and timing of diversions that are permitted, but also the precise points of diversions, places of use and, in some cases, places and times of storage that are permitted, along with many other conditions. The record in this case does not contain any of the existing CVP water rights permits or licenses, and the EIR is devoid of any description of these permits or licenses in relation to the newly proposed point of diversion, place of storage or timing of storage that would be instituted with the Project.

B. The Del Puerto Canyon Reservoir Project

On June 26, 2019, Del Puerto issued a Notice of Intent to Prepare a Draft Environmental Impact Report ("Notice of Preparation") stating, among other things, that DPWD and the ECs, acting in partnership, proposed the construction of a reservoir on Del Puerto Creek in the foothills of the Coast Range Mountains west of Patterson, California ("Reservoir" or "Project"). The Reservoir would provide storage for 82,000 acre-feet (AF) of water, principally from the Delta-Mendota Canal. The Project includes the construction of a main dam, four (4) saddle dams, a spillway, inlet/outlet works, conveyance facilities (including a diversion facility on the DMC, a pumping plant, underground pipeline and energy dissipation facilities at the DMC outfall, along with related appurtenant components and electrical facilities, power supply lines and an electrical substation. (1 AA 0092-0095.)

DPWD has been working on its proposal for construction of the Reservoir since at least 2010. (4 AA 0553.) Friant members were generally aware of the Project, but until recently were unconcerned because its original iteration did not assume that any CVP water would be used in a manner that could impact Friant. (8 AA 1097.) The administrative record for this case indicates that the ECs did not become an active partner in the Project until April of 2019. (4 AA 0556; 4 AA 0543-0544.) The various members of Friant had no knowledge of the ECs' involvement in the Project at that time.

C. The Respondents' Understanding that the Project Would Require New or Modified Permits from the State Water Board and Reclamation

As of June 2019, when the ECs and DPWD were in the process of joining forces to build the Reservoir, the ECs recognized that new water permits would be necessary in order to implement the Project. In a June 7, 2019 staff report to the ECs board of directors, ECs staff reported that they had analyzed "the ability to re-store the Bureau's [Reclamation's] water under its water rights." (4 AA 0545.) This was stated as part of the ECs' goal to obtain 50,000 acre-feet of additional water storage. (*Ibid.*)

Shortly afterwards, in July 2019, DPWD and the ECs entered into a Joint Powers Agreement ("JPA") for the Reservoir. (5 AA 0738-0741.) The JPA recited the Respondents' understanding that water agency approvals were necessary to divert and store water in the Reservoir; it also memorialized their agreement to cooperate to obtain these approvals. These approvals included "authorizations required for storage and conveyance of Water to and from the project and the Delta-Mendota Canal" and "all other necessary federal, state, and local government agency permits and approvals related to the Project, including, but not limited to, approvals from the State Water Resources Control Board." (5 AA 0738.)

Respondents were also informed that permits would be needed for the proposed turnouts for the Reservoir because it is outside of the service areas described in the Exchange Contract. On April 17, 2020, Project consultant

Woodard & Curran wrote a memo to Reclamation which described a number of aspects of the proposed Reservoir. (7 AA 1003-1007; 7 AA 1008-1016.) Table 4-1 of that memo described all of the approvals necessary for the Project. (7 AA 1013.) Table 4-1 states that Reclamation would need to approve the "addition of turnout location to existing contracts for moving water in and out of DMC." (*Ibid.*) This statement refers to the fact that the Exchange Contract includes a discrete list of turnouts that are permitted in order for the ECs to take water from the CVP through the Delta-Mendota Canal, and that this list would need to be revised in order for the Reservoir to receive CVP water.

D. The Water Board's Warning That The Project Will Require A New or Modified Water Right Permit

The Water Board is an agency of the State of California with the statutorily assigned responsibility for permitting the use, diversion and storage of the state's water resources. On July 26, 2019, in response to the Notice of Preparation for the Project, the State Water Board wrote a letter to DPWD regarding the water rights approvals necessary to carry out the Project. (4 AA 0540-0542.) The letter stated as follows:

> State Water Resources Control Board (State Water Board), division of Water Rights (Division) staff has reviewed the Notice of Preparation (NOP) for the proposed Del Puerto Canyon Reservoir Project (SCH#2019060254). Based on information provided in the notice, it appears that the project may require one or more water right approvals. The Del Puerto Water District (District) should contact the Division to determine whether a water right permit and/or other water right approvals involving

modification of Central Valley Project water rights via petition are necessary to implement the project. (4 AA 0540.)

The letter went on to state that the Water Board would be the Responsible Agency within the meaning of CEQA for the issuance any water rights permits needed, and hence it was critical that the EIR for the Project, which the Water Board would rely on, fully evaluate the impact of the Project and alternatives to the Project:

> If water right approvals are required, the State Water Board will act as a Responsible Agency and may need to rely on the Environmental Impact Report (EIR) developed by the District when evaluating potential impacts on environmental resources within its purview. The District should therefore ensure that any EIR prepared for the project consider all potential direct, indirect, and cumulative impacts associated with the diversion and use of water; and a range of project alternatives that reduce or avoid flow-related impacts on terrestrial and aquatic species. (4 AA 0540.)

E. The Department of Water Resources' Warning That Respondents Must Fully Evaluate The Project's Impact on Other Water Users

Another State agency, the Department of Water Resources ("DWR"), also made it clear to Respondents that the identification of water rights for the Project and full evaluation of the potential impact to others would be necessary in order for the Project to proceed. On July 25, 2019, DWR sent a letter to DPWD responding to the Project NOP as follows:

> **Water Rights**
>
> The NOP indicates that the Project will provide additional south of the Delta storage, utilizing exported water from Delta through DMC to optimize use and benefit of existing water supplies. However, the NOP does not specify any water rights information regarding the sources of water. Such water rights information is critical to evaluate potential injury to other legal

water users. Presumably the water stored in the proposed reservoir will be CVP water supply, under the U.S. Bureau of Reclamation's (Reclamation) water rights permits, or other transfer water conveyed through CVP facilities. Given the existing coordinated operations between DWR and Reclamation to convey water through the Delta for export and to meet regulatory requirements, the EIR should address potential effects on SWP [State Water Project] operations and water supplies. (3 AA 0364-0365 [emphasis added].)

DWR's letter to Respondents reflects the fact that the operations of the CVP are carefully coordinated between DWR and Reclamation in order to accommodate the interests of many competing water users. DWR made it clear that any environmental review of any proposed changes in those operations, including Respondents' proposal to use CVP water for the Reservoir (a new place of storage and presumably at new times of storage), must include an evaluation of how those changes would affect others, including Friant.

F. The Draft EIR

The July 2019 comments made by the Water Board and DWR were ignored by Respondents in the December 2019 Project Draft EIR (DEIR). In the DEIR, the Respondents stated, for the first time, that they did not believe they needed any new water permits for the Project:

> Water to fill the proposed Del Puerto Canyon Reservoir would come from the existing contracts that DPWD and the Exchange Contractors have for water supply delivered through the Delta-Mendota Canal (DMC), which would be diverted and pumped from the DMC to the reservoir. Existing Reclamation water rights would be used for the Project Partners to receive their contracted water supply and store it in the reservoir. (DEIR, section 1.1.2, 1 AA 0105.)

This belief, however, was not consistently maintained within the DEIR itself. Elsewhere in the DEIR, it was stated that an approval would be needed from Reclamation for the "[a]ddition of a turnout location to existing contracts for moving water in and out of DMC [Delta Mendota Canal]." (1 AA 0106.) This references the Exchange Contract's strict requirement that water can only be delivered to the ECs at precisely defined turnout locations. The DEIR included Appendix F, a "Reservoir Operations Model," which describes how the Reservoir will be operated. (1 AA 0108.) The Operations Manual states that the ECs would supply the Reservoir with the yearly 40,000 AF of water during the months of October to February. (1 AA 0115.) The DEIR does not explain how this very considerable inflow to the Reservoir would fit within the monthly maximum supply limitations of the Exchange Contract, especially considering the ECs' agricultural water supply needs during those months. (4 AA 0579-0580.)

G. The Water Board's Objections to the DEIR

On January 27, 2020, the State Water Board sent a letter to DPWD stating that its comments in response to the NOP had been ignored in the Draft EIR:

> On June 27, 2019, a Notice of Preparation (NOP) for the proposed project was circulated by DPWD and began a 30-day public review period, which ended on July 29, 2019. On July 26, 2019, State Water Board, Division of Water Rights staff submitted comments on the NOP to DPWD (Attachment A). . . . The State Water Board Division of Water Rights staff comments on the NOP are not referenced in Section 1.6.2 or in Appendix A of the Draft EIR and no

> response is provided to the State Water Board, Division of Water Rights staff comments. Accordingly, State Water Board staff reiterate the July 26, 2019 State Water Board, Division of Water Rights staff comments on the NOP for the DPCR and provide the following additional comments on the DPCR EIR. (4 AA 0535-0536.)

The State Water Board's statement that the need for obtaining water rights permits for the Reservoir had been ignored by DPWD and the ECs in the DEIR was accurate.

H. Respondents' Awareness of the Need to Obtain Water Rights Permits for the Project

On January 23, 2020, only four days prior to the Water Board's January 27th letter, DPWD and the ECs filed an Application to Appropriate Water ("Application") for the Reservoir with the Water Board. (6 AA 953.) The Application stated that "CVP water would be diverted from the DMC and pumped into the reservoir. . . . Stored water would be released to the DMC for delivery to the District and the Exchange Contractors for agricultural purposes." (7 AA 0960.) Attachment 8 to the Application states that the Project proponents acknowledged that several approvals would be required from Reclamation, including a "Warren Act Contract or exchange agreement for moving water into and out of DMC," and a "License for construction of turnout on DMC." (7 AA 0982.) Although the Application appears to be limited to use of water from Del Puerto Creek, not the ECs' CVP water, it shows that the Respondents were aware of their obligation to obtain discretionary approvals from the Water Board.

In early 2020, Respondents internally acknowledged the need to obtain Water Board and Reclamation permits for the re-diversion and storage of CVP water for the Project. In February 2020, the DPWD prepared a chart listing all of the Project's risk factors, entitled "Preliminary Draft Risk Register." (7 AA 1000.) Included in the chart was Item 56, regarding "Water Rights." (*Ibid.*) Respondents' internal discussions about water rights included the following comments:

> Where do we stand on water rights? State water board staff meeting in the next couple weeks. We're taking water already arrived south of the delta, doesn't require a new permit. Is it a new point of re-diversion? From upstream reservoirs. We can articulate that process. (*Ibid.*)

This excerpt indicates that there was still debate among Respondents about the need to obtain new or modified water rights. Significantly, there is no discussion about the potential need for obtaining a new time or place of storage, which the Water Board had earlier suggested would be necessary. Respondents instead appeared interested in avoiding such a permit application.

Respondents also internally discussed their future strategy regarding water rights, which was to "[c]ontinue coordination with State Water Board. Understand exactly what approvals are needed, by what time, to ensure the process stays off the critical path." (*Ibid.*) This internal memorandum is inconsistent with the EIR's assertion that no water rights permits would be required. It instead shows that Respondents understood that permits would

be required, and that they needed to continue to work with the Water Board towards obtaining such permits. These considerations, however, never appeared in the EIR and were not made available to the public.

I. Friant's Objections to the DEIR

On October 20, 2020, Friant sent a letter to Respondents stating that the Project would result in changes to CVP operations which must be analyzed in the EIR. Those changes could have a negative impact on Friant members. By diverting water to the Reservoir, Respondents decrease the likelihood that there will be surplus water supply available for the subsequent year. If that subsequent year is a dry year, the lack of surplus supplies from the prior year increases the likelihood that there will be insufficient supplies to meet the ECs' demands for that year. Ultimately, this increases the risk that the ECs will call on water from the San Joaquin River, and therefore increase the likelihood that Friant members will lose a portion of their supply to the ECs. Friant's letter also noted that the EIR failed to acknowledge that modification of CVP water rights is an integral project action, and that the EIR fails to identify Reclamation and the Water Board as Responsible Agencies for that action. (5 AA 0756-0759.)

J. The Final EIR

In the Final EIR (FEIR) issued in October 2020, Respondents ignored the requests received from the Water Board, DWR and Friant for an explanation of the water rights supporting the Project. The EIR instead

simply asserts, without any supporting explanation, that a water right permit will not be needed because Respondents already have the right to store the water needed for the Project under their existing contracts. The FEIR also ignored the numerous request Respondents received for an evaluation regarding the impact of the Project on other CVP water users. In that regard, the FEIR stated:

> Response to Comment 4-9
> Comment Summary: The comment states that a water right permit and/or other water right approvals involving modification of the Central Valley Water Project water rights via petition may be necessary to implement the project, and if so, the EIR should consider all potential direct, indirect and cumulative impacts associated with diversion and use of water, as well as well as a range of alternatives that reduce or avoid flow-rated impacts on terrestrial and aquatic species.
>
> The Project Partners will not require a water right permit or other water right approval involving modification of Central Valley Project water rights. Both DPWD and the Exchange Contractors have existing contracts with Reclamation for water deliveries from the Central Valley Project. The DPCR Project would store water that is already entitled to the Project Partners under their existing Reclamation contracts. Reliable local water storage would allow the Project Partners to take delivery of their contracted water supply when it is available during wet periods and store it for use when there is demand for irrigation supply. However, the Project Partners will apply to the State Water Resources Control Board Division of Water Rights for the right to store a portion of Del Puerto Creek flows in the reservoir. The Project Partners are coordinating with Reclamation regarding Reclamation's water rights. (4 AA 0517.)

This response again focuses on existing "contracts," not water rights. There is no discussion in the DEIR or the FEIR as to the details of any provision of any water right permit for the CVP that allows for storing CVP water in the proposed Reservoir.

As in the DEIR, the FEIR was not consistent on the need for a new water permit. Elsewhere in the FEIR, DPWD discussed the operation of the proposed Reservoir and appears to admit that modification of Reclamation's existing CVP water rights would be necessary:

> The CVP water that would be stored in the Reservoir by the current Project Partners would be a portion of the annual allocation of deliveries to each of the Project Partners. In addition, in coordination with the Project Partners, Reclamation is proposing modification of its existing water rights to incorporate restorage of previously stored water in the Reservoir, i.e., water that has been previously stored in Shasta-Trinity and Folsom, and Friant Dams and which has been released for delivery to CVP contractors or for storage in San Luis Reservoir. (2 AA 0306 [emphasis added].)

Although appearing to admit that modification of water rights will indeed be required for this Project, as noted above, elsewhere the EIR summarily concluded the opposite. As a result, the EIR is devoid of any discussion or analysis whatsoever about the impact on others caused by a modification of the CVP water rights, despite the request for this analysis by two state agencies and ten Friant Division contractors.

II. Procedural Background

A. Friant's Petition to Decertify the FEIR

On November 19, 2020, Friant filed a petition for writ of mandate to decertify the EIR pursuant to Public Resources Code section 21167 in the Stanislaus Court Superior Court. Friant alleged three principal grounds for setting aside the EIR:

1. The EIR provides no analysis of one of the most fundamental aspects of the Project, namely, Respondents' legal ability to construct a new turnout from the CVP's Delta-Mendota Canal and use that turnout to annually divert 40,000 AF of CVP water and store it in the proposed Reservoir.

2. Had the EIR provided an analysis of whether new or modified water rights permits are required for the Project, it would have concluded that the ECs have no such existing permits, and that, instead, the Project would institute a new time and location of diversion, and new place of storage, none of which are authorized under any existing permit. Obtaining new diversion and storage rights is subject to the discretion of the Water Board and Reclamation.

3. As a result of this legal error, the EIR did not identify the requirement to obtain the required permits as a Project action, did not identify the Water Board as a Responsible Agency, and did evaluate the impact on other legal water users, including Friant members, that will be caused by the new storage at the Project, as specifically requested by the Water Board. As a Responsible Agency, the Water Board would have required that the Project proponent include in the EIR an evaluation of the environmental effects and impacts on existing users of water of granting the right to new storage of CVP water in the Project, including its potential effect on Friant water supply. The failure to identify a Responsible Agency, and to provide a

review of impacts associated with the Responsible Agency's approvals, is alone grounds for decertifying the EIR.

B. The Trial Court's Decision

The merits hearing on Friant's petition took place on August 5, 2022 before the Honorable John R. Mayne. On October 31, 2022, the trial court issued a written ruling denying the petition for writ of mandate. (10 AA 1468-1482.) This ruling was modified on December 27, 2022 without changing the outcome. (10 AA 1493-1505.) Judgment was entered in favor of Respondents on January 20, 2023. (10 AA 1513-1516.)

C. The Instant Appeal

Friant timely filed this appeal on February 1, 2023. (10 AA 1548-1558.)

STATEMENT OF APPEALABILITY

The judgment entered by the Superior Court on November 25, 2023 is appealable as a final judgment. (Code Civ. Proc. 904.1(a)(1).)

ARGUMENT

I. Standard of Review

Friant's Petition challenged the sufficiency of the EIR as an informative document. The courts have held that such challenges are reviewed on appeal under the same standard of review used by the trial court. "In determining whether the agency complied with the required procedures . . . the trial court and the appellate courts essentially perform identical roles.

We [the court of appeal] review the record de novo and are not bound by the trial court's conclusions." (*Environmental Protection Information Center v. Calif. Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 479.)

In this case, Friant asserts that the EIR fatally lacks any analysis of the legal right to divert water for storage at the Project and the impact of the Project on other water users such as Friant. Friant further claims that the EIR fails to analyze, or support with any evidence, the need to obtain water rights modifications from the Water Board and Reclamation and to identify the State Water Board as a Responsible Agency. Since Friant's challenge is based on the absence of analysis, rather than the method or outcome of the analysis, the standard of review is de novo, and this court should independently determine whether the EIR is sufficient under CEQA.

II. The FEIR Does Not Satisfy the Requirements of CEQA Because It Fails to Identify and Evaluate the Legal Availability of Water for the Project

A. The California Environmental Quality Act and its Purposes

The California Environmental Quality Act is designed to ensure that public agencies give "major consideration" to preventing damage to the environment while carrying out their functions. (Pub. Resources Code § 21000(g).) CEQA furthers this objective by requiring that an Environmental Impact Report be prepared before approving a project. (§§ 21100), 21151).)

"The EIR identifies significant effects of a project on the environment, the way those effects can be mitigated or avoided, and the alternatives to the project." (§ 21002.1(a) It is "an informational document which ... will inform public decision-makers and the general public of the environmental effects of projects they propose to carry out or approve." (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 822.)

The EIR has been referred to as "the heart of CEQA" and as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." (*County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.)

In reviewing the adequacy of an EIR, the trial court determines "whether there was a prejudicial abuse of discretion ... [which] is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (§ 21168.5.) The trial court does "not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 189.) The court must be satisfied, however, that the project proponent has fully complied with the procedural requirements of CEQA. Only by full compliance "can a subversion of the important public purposes of CEQA be avoided." (*People v. County of Kern* (1974) 39 Cal.App.3d 830, 842.)

B. CEQA Requires That Water Supplies for a Project Be Identified and Evaluated in an EIR

A fundamental environmental issue to be evaluated for construction projects in California, particularly water storage projects, is the source and continuing availability of water for the project, and the effect that such water use or storage will have on the environment and other water users. Numerous cases have addressed the importance of the consideration of a water supply in an EIR.

In *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, the County certified an EIR for a sand and gravel mining plant. The plant was expected to use approximately 35,000 gallons of water per day.[1] Although the EIR for the project assumed that this water would be available from a local water district, the district had previously told the County in writing that it was concerned about providing the required amount of water due to the absence of any engineering studies and the lack of pumping and other infrastructure necessary for such supply. (*Santiago County Water Dist. v. County of Orange, supra,* 118 Cal.App.3d at p. 825.)

Notwithstanding these objections, the County stated in the project EIR for the project that the Water District "has indicated that they will serve the proposed project." (*Ibid.*) The County Board of Supervisors certified the

[1] This equals a little more than 12 million gallons per year, in contrast to the proposed Reservoir, which is slated to receive more than 13 billion gallons of CVP water every year, more than ten times as much.

EIR for the project, and included a number of conditions in its approving resolution. The conditions included a requirement that "the operator shall establish an adequate water supply and appurtenant system to supply the water needs of the mining operation, processing plant and reclamation irrigation." The trial court concluded that the EIR had been properly done. (*Id. at p. 828.*)

The appellate court reversed, holding that the EIR did not meet the standards of CEQA "be use of its failure to give sufficient information concerning the delivery of water ca to the proposed sand and gravel mine." (*Id.,* at p. 829.) The appellate court stated as follows:

> Information about the water supply to the project is lacking in two significant areas. Nowhere in the EIR is there a description of the facilities that will have to be constructed to deliver water to the mining operation, or facts from which to evaluate the pros and cons of supplying the amount of water that the mine will need. (*Id.,* at p. 829.)

The critical need for the EIR to discuss the availability of water for a project was discussed in *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715. In that case, an EIR was certified for a large residential and commercial development. The Petitioner contended that the EIR lacked an adequate discussion of the water supply for the project. The EIR stated adequate water was available under an "entitlement" from the State Water Project (SWP) for additional water sources. However, that entitlement depended on the

completion of the SWP, which had not yet occurred. The trial court allowed the EIR to be certified, but this was reversed on appeal:

> The draft EIR makes no attempt to calculate or even discuss the differences between entitlement and actual supply. The final EIR contains a response to SCOPE's concern about the reliability of SWP water, but the response is inadequate. In calculating the wet year supply, the response included 100 percent of Castaic's SWP entitlement. But because the entitlement is based on a water system that is not completed, there is no justification for believing the SWP will be able to deliver 100 percent of all entitlements, even in wet years. As for periods of "extreme drought," the response used 50 percent of the entitlement in calculating the amount of water available. But there is nothing to suggest the SWP will be able to deliver 50 percent of all entitlements during periods of extreme drought.

The appellate court concluded by holding that water supplies for any significant project must be thoroughly analyzed in the EIR in order to meet the requirements of CEQA:

> Here the draft EIR gives no hint that SWP entitlements cannot be taken at face value. It is only in response to comments and submissions by project opponents such as SCOPE that the EIR obliquely acknowledges that the entitlements may not be all they seem. Instead of undertaking a serious and detailed analysis of SWP supplies, the EIR does little more than dismiss project opponents' concerns about water supply. Water is too important to receive such cursory treatment. (*Id.*, at p. 723; emphasis added.)

A similar analysis was made in *California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219. In that case, an EIR for a large industrial/business park relied on another "entitlement" of SWP water through a prior purchase of 41,000 AFY pursuant to the so-called "Monterey Agreement" entered into between the State and multiple water contractors. However, that purchase agreement had been decertified, leaving the water

supply in limbo. In response to comments to the EIR regarding the status of the 41,000 AFY water supply, the City stated that "it is likely that the 41,000 AFY will continue to be available" without any discussion or analysis supporting this statement. (*Id.,* at p. 1237.)

The court held that the City's statement that the supply would continue to be available was an impermissible assumption, "[which] is antithetical to the purpose of an EIR, which is to reveal to the public 'the basis on which its responsible officials either approve or reject environmentally significant action, so that the public, 'being duly informed, can respond accordingly to action with which it disagrees." (*Id.*, at p. 1237.) The court went on to stress:

> ["[T]o facilitate CEQA's informational role, the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions"].) This standard is not met in the absence of a forthright discussion of a significant factor that could affect water supplies. The EIR is devoid of any such discussion.

The court concluded as follows:

> While no other defects in the EIR are found, the section discussing water supplies is inadequate. Specifically, the EIR failed to present a reasoned analysis in response to SCOPE's comments pointing out the uncertainty attending the City's reliance on Castaic's entitlement to 41,000 AFY of imported water purchased under the Monterey Agreement. Without the 41,000 AFY entitlement, substantial evidence of sufficient water supplies does not exist. (*Id.,* at p. 1244.)

Moreover, in addition to identifying a source of water for a project, an EIR must identify the potential impacts of using that water supply at the

proposed project. In *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.App.4th 412, yet another project EIR was rejected because of inadequate analysis of water supplies. In addition to determining that the EIR failed to identify a reasonably certain water supply, the Supreme Court concluded its analysis rejecting the EIR by commenting how project proponents should approach the task of preparing a compliant EIR:

> The ultimate question under CEQA, moreover, is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable impacts of supplying water to the project. If the uncertainties inherent in long-term land use and water planning make it impossible to confidently identify the future water sources, an EIR may satisfy CEQA if it acknowledges the degree of uncertainty involved, discusses the reasonably foreseeable alternatives—including alternative water sources and the option of curtailing the development if sufficient water is not available for later phases—and discloses the significant foreseeable environmental effects of each alternative, as well as mitigation measures to minimize each adverse impact. (§ 21100, subd. (b).) In approving a project based on an EIR that takes this approach, however, the agency would also have to make, as appropriate to the circumstances, any findings CEQA requires regarding incorporated mitigation measures, infeasibility of mitigation, and overriding benefits of the project (§ 21081) as to each alternative prong of the analysis. (*Id.*, at p. 434. [emphasis added].)

The EIR in this case is devoid of any impacts analysis related to using existing CVP supplies for storage at a new location and storage at different times. The Respondents admit as much (as reflected in their response to comment) and refused to provide this analysis based on the sole (and inconsistent) justification that they have existing CVP water contracts. This

is no answer. As noted by the California Supreme Court, identifying a source of supply is not sufficient. An analysis of *the impacts of using that supply* at the proposed Project is required. Despite requests from DWR and the Water Board, and despite being presented with a feasible scenario from the ten Friant members that a negative impact is foreseeable, the Respondents plowed forward with certifying an EIR while simply refusing to provide the impacts analysis. For this reason alone, the EIR should be found to be defective.

C. The EIR Fails to State That the Project Requires A Modification of Existing Water Rights and that The Water Board is the Responsible Agency

1. The EIR Incorrectly States Without Explanation That the Respondents Have Existing Rights to Divert and Store Water in the Reservoir

The most fundamental basis for the construction of the proposed Reservoir is that it creates the perpetual new ability to store approximately 80,000 AFY of water. According to the EIR, one half of that annual amount, 40,000 AFY, will come from the CVP project via the Delta-Mendota Canal, provided by the ECs. Without any explanation or analysis, the EIR simply asserts that the ECs have existing rights to divert and store CVP water at this new location. (1 AA 0105; 4 AA 0517.) These unfounded and wholly unsupported assumptions are "antithetical to the purpose of an EIR, which is to reveal to the public 'the basis on which its responsible officials either

approve or reject environmentally significant action,' so that the public, 'being duly informed, can respond accordingly to action with which it disagrees.'" (*California Oak Foundation v. City of Santa Clarita*, *supra.*, 133 Cal.App.4th at p. 1237.)

The DEIR and FEIR contain no analysis of Respondents' allegation that the ECs already have an existing right to install a new turnout in the Delta-Mendota Canal and annually take 40,000 AF of CVP water to store in a new reservoir. The DEIR merely states that the water will come from "existing contracts" that the Respondents already have for water supply. (1 AA 0105.) Those "existing contracts" are never identified. The DEIR merely states that "[e]xisting USBR [Reclamation] water rights" will be used for a water supply. (*Ibid.*) Again, the source or identification of those water rights is not explained.

An existing contract is not an existing water right from the Water Board. Even if Respondents had existing contracts for a water supply from the CVP, they have not identified where in those existing contracts it is contemplated that they would take delivery of the CVP water at this new point of diversion and to store at this new place of storage. This is because those contracts do not do so, and could not possibly have identified a point of diversion or place of storage that was not even contemplated at the time of entering into those contracts. More importantly, however, even if the existing contracts included the new point of diversion and place of storage,

this would not establish that CVP water rights permits from the Water Board include the proposed new point of diversion and place of storage, and it is nonsensical to think that they would. Respondents did not include any of the CVP water rights permits or licenses with the Administrative Record, presumably because they are not helpful in supporting their assertion that existing water rights are sufficient to support the Project.

The DEIR completely ignores the letters previously provided by the Water Board and the DWR asking that the EIR identify and evaluate the water rights to be used to divert the water needed to supply the Reservoir. As the DWR stated in its July 25, 2019 letter to Respondents, "[s]uch water rights information is critical to evaluate potential injury to other legal water users." (3 AA 0364-0365.) In the FEIR, and after the Water Board filed its timely response to the DEIR in which it noted that Respondents had ignored its prior request for information about the need for new water rights permits, Respondents merely noted that the source of the water for the Reservoir "would be a portion of the annual allocation of deliveries to each of the Project Partners." (2 AA 0306.)

The Exchange Contract specifically defines each turnout location from the DMC; no other delivery points are authorized. (4 AA 0572-0574.) The proposed turnout location for the new Reservoir is not included. The addition of a new turnout would require an amendment of the Exchange Contract, but that amendment has not been secured. No evaluation of the

impact of the new proposed turnout has been performed. No member of the public reviewing the EIR would be aware that a new turnout would require amendment of the Exchange Contract; indeed, the Exchange Contract is not even mentioned in the EIR.

Equally important, the EIR fails to address the fact that the Project will divert and store 40,000 AFY of CVP water in a new Reservoir for use in areas not authorized by the Exchange Contract. The ECs assert that water for the proposed Reservoir will be delivered directly from the Delta-Mendota Canal, at a new turnout to be supposedly approved by Reclamation, and at locations and times not currently authorized in the Exchange Contract. (1 AA 0105.) Neither the Exchange Contract nor any water program authorizes CVP water to be permanently and annually used for storage at a new reservoir via a new turnout not authorized by the Exchange Contract.

The EIR also fails to address the fact that the Exchange Contract requires CVP water to be put to actual use, not stored for later use. (4 AA 0577.) Nothing in the Exchange Contract provides that CVP water may be stored for future use in later years. Finally, the water must be used in the service areas designated in the Exchange Contract. (4 AA 0577.) The Exchange Contract does not allow the delivered water to be stored in a remote location, for future use anywhere the ECs desire. (4 AA 0577.) None of these critical issues affecting the supply of water for the Project are addressed in the EIR.

2. Respondents' Assertion That The EIR Need Not Discuss the Impacts of Their Proposed Water Use Because It Is Not Their Water Rights That Underlie the Delivery of Water to The Project is Meritless

Hoping to deflect attention from the central issue in this case, Respondents will likely assert, as they did in the trial court, that they have no obligation to discuss in the EIR whether Reclamation will need to obtain new water rights from the Water Board. (9 AA 1244 *et seq.*) Respondents will contend that since it is not Respondents' water rights that need to be modified, there is no need to consider the impacts of revising those rights. But this completely ignores that CEQA requires the identification of impacts of *any* agency with discretionary decision-making powers related in any way to the project, not solely the actions of the proponent agencies, a fact that the Water Board made abundantly clear in its comment letter. It also ignores the fact that Respondents have no contractual right under the Exchange Contract to install a new diversion point in the CVP, nor do they have the right to take annually 40,000 acre feet of CVP water and store it in a reservoir outside any contractually permitted service area. It is also an attempt to completely sidestep whether the Water Board needed to be involved as a Responsible Agency in the preparation of the EIR, as the Water Board in fact formally requested. In order for the Reservoir to receive the water supply proposed by Respondents, new water rights would have to be obtained, and the

Exchange Contract would need to be modified. The environmental impacts of those actions must be discussed and evaluated in the EIR.

D. The Trial Court Incorrectly Believed That Friant Sought An Adjudication of Respondents' Contractual Rights

The trial court concluded that it was improper for Friant to ask the court to "determine the contractual rights of the parties," and consequently declined to consider whether the Exchange Contract already gave Respondents the water rights they needed to fill the reservoir with water. (10 AA 1528-1529.) The trial court misperceived its role, which was to review the record, including the Exchange Contract, to determine whether there was substantial evidence supporting the Respondents' assertion in the EIR that they had existing CVP water rights. Carrying the trial court's position to its logical conclusion would mean that Respondents could have completely misrepresented whether they in fact had any water rights, and the trial court would have been incapable of determining whether any evidence supported that conclusion. This is not a breach of contract case; but the trial court's duty to determine whether substantial evidence supported the EIR's conclusions does not mean that the trial court need not read the Exchange Contract and determine whether Respondents in fact possessed the required CVP water rights.

In *North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, the Westlands Water District entered into two-year, interim

renewal contracts with the USBR for the continued performance of previously existing supply agreements. Westlands did not undertake any environmental review in connection with the preparation and execution of the interim contracts, on the assumption that the action taken was exempt from CEQA. The petitioners contended that the contracts were not exempt from CEQA. The court disagreed. In so concluding, the court acknowledged that the petitioners had claimed that the water rights at issue "would involve the diversion . . . of a substantial volume of water from the Delta," affecting water flows and purity. (*Id.*, at p. 847.) The court carefully described the contracts which existed prior to the renewal contracts, and concluded that they provided for the same quantities of water that Westlands was then entitled to receive. (*Id.*, at p. 862.) The particular water rights were described by the court in detail, including the volume of water and the place of use. (*Id.*, at p. 862.) The court thereby concluded that substantial evidence supported Westlands' contention that it already had the water rights which were included in the renewal contracts.

The trial court should have gone through the same analysis in this matter. Having not done so, the trial court's decision should be reversed, and the matter sent back for consideration of this issue.

III. The FEIR Does Not Satisfy the Requirements of CEQA Because It Fails To Identify The State Water Board as a Responsible Agency for the Purpose of Approving the Reservoir as a New Place of Storage Under the CVP Water Rights

A. Respondents Admit that the EIR Fails to Disclose the State Water Board as a Responsible Agency and the Approval of a New Place of Storage

Respondents admitted in the trial court that the Water Board was not listed as a Responsible Agency in Table 1-1 of the EIR, and that the action by the Water Board to consider and approve a modification of Reclamation's CVP water rights was also omitted. In the trial court, Respondents claimed this was a "minor CEQA sin," and incorrectly asserted that this omission did not affect the EIR review process. (9 AA 1247.) Respondents further asserted that omitting the Water Board from the list of Responsible Agencies was a harmless error because the Water Board was provided an opportunity to "participate fully" in the EIR process. (9 AA 1250.)

Respondents ignore the fact that, when the Water Board attempted to "participate" by requesting the Respondents to identify the Water Board as a Responsible Agency and to include specific water supply impacts analyses in the EIR so that the Water Board could later rely on this analysis in considering the water rights modifications, the Respondents simply refused to do so, and also refused to perform any of that requested analysis. If a party is invited to participate and then is expressly ignored when they do, this cannot be considered "full participation."

The Water Board wrote a very detailed comment letter in response to the initial NOP circulated by the Respondents in mid-2019, and strongly suggested that a water right permit would be required. It went on to very clearly delineate what role the Water Board would play in such circumstances and requested certain analysis in order to allow the Water Board to rely on the project EIR:

> Based on information provided in the notice, it appears that the project may require one or more water right approvals. The Del Puerto Water District (District) should contact the Division to determine whether a water right permit and/or other water right approvals involving modification of Central Valley Project water rights via petition are necessary to implement the project.
>
> If water right approvals are required, the State Water Board will act as a Responsible Agency and may need to rely on the Environmental Impact Report (EIR) developed by the District when evaluating potential impacts on environmental resources within its purview. The District should therefore ensure that any EIR prepared for the project consider all potential direct, indirect, and cumulative impacts associated with the diversion and use of water; and a range of project alternatives that reduce or avoid flow related impacts on terrestrial and aquatic species. (4 AA 0540.)

The Water Board's letter clearly requests advance determination of the nature of the water rights approval before preparation of the project EIR, so that the necessary analysis may be included.

Respondents ignored this request and failed to recognize this comment at all in the initial Draft EIR. This prompted a second letter from the Water Board:

> As discussed in the State Water Board, Division of Water Rights staff comments on the NOP for the DPCR, the EIR should

> evaluate the effects the proposed project would have on diversions from the Delta and any associated impacts to fish and wildlife species in the Delta and propose appropriate mitigation for any impacts, including cumulative impacts. The Draft EIR acknowledges the potential for the DPCR to affect Delta exports but the modeling of the proposed project does not evaluate these effects."... "Such changes to Delta export operations would be contingent upon the operation of the DPCR and should be modeled and evaluated accordingly in the DPCR EIR. For example, if CVP deliveries are stored in DPCR instead of San Luis Reservoir during the winter through late spring, Reclamation may export additional water at times when lack of storage space and real time demand would limit exports in the absence of the project. The magnitude of export modifications cannot be assessed without a model study that approximates likely operational scenarios. This effort should also analyze whether any changes to Delta exports due to the proposed project would alter Delta hydrodynamic processes such as Delta outflow, salinity conditions, reverse flows, and entrainment, and whether there could be impacts on water quality and biological resources upstream in the Delta. (4 AA 0535-0536; Emphasis added.)

The EIR's only response to these important comments is that such analysis is not being provided because modification to CVP water rights will not be necessary. (4 AA 0517.) This is not true, or at best had not yet been determined, by Respondents' own admissions.

Respondents' failure to appropriately identify the Water Board as a Responsible Agency has significant consequences because of the legal obligations to be assumed by a Responsible Agency in the CEQA process. "The responsible agency must . . . issue its own findings regarding the feasibility of relevant mitigation measures or project alternatives that can substantially lessen or avoid significant environmental effects. Furthermore, where necessary, a responsible agency must issue its own statement of

overriding considerations." (*River Watch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1202.) The prejudicial result of the failure to properly identify a Responsible Agency was discussed in *River Watch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186:

> Before reaching a decision on the project, the decision-making body of the responsible agency must consider the environmental effects of the project as shown in the EIR or negative declaration and feasible mitigation measures or alternatives within the agency's powers. [Citation.] If the responsible agency finds that any alternatives or mitigation measures within its powers are feasible and would substantially lessen or avoid a significant effect of the project, the responsible agency may not approve the project as proposed, but must adopt the feasible mitigation measures or alternatives. [Citation.] Each responsible agency must certify that its decision-making body reviewed and considered the information in the EIR or negative declaration on the project. [Citation.] (*Id. at pp.* 1201-1202.)

None of the important tasks described above were pursued by the Water Board because Respondents' improper claim that no water rights approvals were necessary and to omit from the EIR any internal analysis of that issue. Prior to finalizing the EIR, Respondents knew that the Water Board, in its July 26, 2019 letter, had concluded that "it appears that the project may require one or more water right approvals." (4 AA 0540.) DPWD was directed to contact the Water Board "to determine whether a water right permit and/or other water right approvals involving modification of Central Valley Project water rights via petition are necessary to implement the project." (*Ibid.*) The letter concluded by stating that if such water rights approvals were necessary, the Water Board "will act as a Responsible

Agency . . .." Importantly, the letter stated that DPWD must "ensure that any EIR prepared for the project consider all potential direct, indirect, and cumulative impacts associated with the diversion and use of water . . .." (*Ibid.*)

The Water Board's July 26, 2019 letter was completely ignored by Respondents. The follow-up January 27, 2020 response to the DEIR noted that fact. (4 AA 0535-0536.) At the same time, Respondents filed their water rights application with the Water Board, asking for approval to divert Del Puerto Creek water into the Reservoir ("Application"). In the Application, Respondents stated that a new "exchange agreement" from Reclamation would be needed for the Project. The Water Board denied the Application, later stating that insufficient information was provided about that subject. Reclamation also wrote to Respondents in January 2020, indicating that a full EIS for the Project would be required due to "controversy over use of the resource, including considerations of the long-term use of these resources." (6 AA 0946.) Yet despite this written communication, nothing was changed in the FEIR relative to this issue, with Respondents unilaterally concluding that no new water rights agreement was necessary.

B. Respondents' Failure to Disclose the State Water Board as a Responsible Agency Resulted in Omitting Impacts Analyses and Mandates Decertification of the EIR

Failure to identify all project impacts, including impacts of a Responsible Agency's decisions, is grounds for decertification of an EIR.

(*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal. 5th 918, 942 [failure to discuss a responsible agency's requirements and associated impacts resulted in inadequate evaluation of project alternatives and mitigation measures because information highly relevant to that responsible agency's permitting function was suppressed, thereby depriving the public of a full understanding of the environmental issues raised by the project proposal].)

This Court should conclude that a water rights modification is required, that it was omitted as significant agency action, that the State Water Board was omitted as a Responsible Agency for the purpose of considering changes to the CVP water rights permits and licenses, and that such an omission is grounds for decertification of the EIR.

IV. The FEIR Does Not Satisfy the Requirements of CEQA Because It Fails to Evaluate Impacts of the Project or to Recommend Mitigation Measures

A. CEQA Requires That an EIR Evaluate Potential Impacts of a Project and Recommend Mitigation Measures

One of the key purposes of an EIR is to identify "significant effects of a project on the environment, the way those effects can be mitigated or avoided, and the alternatives to the project." (Pub. Resources Code § 21002.1(a).) This enables public decision-makers and the general public to be informed of the environmental effects of projects they propose to carry

out or approve. (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 822.)

B. The FEIR Fails to Evaluate Potential Impacts of a New Water Right Condition, or to Recommend Mitigation Measures for that Approval

As reflected in the Water Board's January 27, 2020 letter, Respondents were instructed to ensure that the EIR "evaluate the effects the proposed project would have on diversions from the Delta . . ., including cumulative impacts." (4 AA 0537.) In addition, the Water Board stated that "changes to Delta export operations would be contingent upon the operation of the DPCR and should be modeled and evaluated accordingly in the DPCR EIR." The Water Board even gave an example of such changes which was directly related to the proposed use of the Reservoir and the concern expressed by FRIANT about the Project, as follows:

> For example, if CVP deliveries are stored in DPCR instead of San Luis Reservoir during the winter through late spring, Reclamation may export additional water at times when lack of storage space and real time demand would limit exports in the absence of the project. (4 AA 0537.)

Finally, the Water Board instructed Respondents to "analyze whether any changes to Delta exports due to the proposed project would alter Delta hydrodynamic processes such as Delta outflow, salinity conditions, reverse flows, and entrainment, and whether there could be impacts on water quality and biological resources upstream in the Delta." (*Ibid.*)

These specific instructions from the Water Board were expressly rejected by Respondents. In the FEIR, Respondents stated that "[a]s noted in Section 2.3.1, the proposed project operations are subject to the Coordinated Operation Agreement and annual allocations and entitlements, and therefore would have no material effect on existing CVP (or SWP) Delta pumping operations, and therefore would have no material effect on existing CVP (or SWP) Delta pumping operations." (4 AA 0513.) Yet, the FEIR provides no analysis to support this assertion, while simply ignoring the Water Board's request for such analysis.

This is another example of Respondents' meritless claim that they already had existing contracts to supply the Reservoir, and that nothing about the CVP operations would be changed as a result of the Project. This alleged "analysis" of CVP and SWP operations did not include any description of a change in timing of diversion, or the effect of maximization of use under the Exchange Contract. Both of these aspects would have been required if the Water Board's requested analyses were provided. Respondents did not do so because they incorrectly asserted that no new water right is needed.

As the Supreme Court held in the *Vineyard* case:

> The ultimate question under CEQA, moreover, is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable impacts of supplying water to the project. *(Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.App.4th at 434).

In order to comply with CEQA, the EIR must address the reasonably foreseeable impacts to FWSPA and others of supplying water to the proposed Reservoir.

C. Consideration of the Environmental Impact of an Amended Water Right at a Later Time Would Violate the Rule Against "Piecemealing"

Another argument made by Respondents is that even if modification of CVP water rights held by Reclamation is needed any necessary environmental analysis can be performed at that time. Respondents further argued in the trial court that if no water right is available to them after the Reservoir is constructed, the Reservoir will simply be empty until such time a new water right is obtained, at which point the required analyses can be provided. Both assertions ignore the fact that having water available to store at the project is a central component of the Project, not a tangential piece of it, and it must be evaluated for its environmental impacts. This analysis has not been performed. Deferral of the environmental analysis of a central aspect of a project, just because that approval will occur at a later date by a different agency, is not allowed under CEQA.

A project applicant is not allowed to certify an EIR which divides a large project into separate components, when the cumulative project could have other adverse consequences not contemplated in the first EIR. (*Arviv Enterprises, Inc. v. South Valley Area Planning Com.* (2002) 101 Cal.App.4th 1333, 1346.) This tactic, commonly known as "piecemealing,"

is barred by CEQA. (*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 165 [county abused its discretion in adopting negative declarations for each portion of the project because it failed to consider the cumulative impacts of the project as a whole]; *Burbank–Glendale–Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592 ["A narrow view of a project could result in the fallacy of division, that is, overlooking its cumulative impact by separately focusing on isolated parts of the whole."]; *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1358 ("There is no dispute that CEQA forbids 'piecemeal' review of the significant environmental impacts of a project.").)

Respondents propose to store a massive amount of CVP water in the Reservoir, more than 13 billion gallons of water every year. As currently constituted, the EIR completely overlooks the environmental impact of that substantial diversion and storage of CVP water. CEQA does not permit Respondents to ignore the consequences of that diversion and storage by not evaluating it in the EIR. As a result, the EIR must be decertified.

D. The Trial Court Incorrectly Believed That Its Task Was To Determine the Project's Potential For Harm Rather Than to Determine Whether the EIR Adequately Discussed the Potential For Harm

Respondents asserted, and the trial court accepted, that their proposed use of the Reservoir will have no effect on Friant because the ECs use all of

their allotted supply every year. (9 AA 1231 *et seq.*) The trial court went so far as to claim that the critical issue in the case is whether Friant has proved the Project will harm them. (10 AA 1528.)

This is the wrong standard to apply in a case challenging the sufficiency of an EIR. A party challenging the sufficiency of an EIR is not required to establish harm, as it would in a tort or breach of contract case. The challenging party must merely present conflicting data or opinions about the impact of a proposed project.

Instead of Friant being held to a standard of proving harm to its members, it is the Respondent who had a legal obligation to meet a standard with its response to comments. When comments to an EIR (such as the Water Board's letters and Mr. Peltzer's letter on the same issue about water rights) reveal conflicting data or opinions about the impact of a proposed project, the project proponent is not allowed to simply ignore those comments without explanation. Instead, the project proponent must provide a "*good faith, reasoned analysis in response.*" (*Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 357; emphasis in original.) See also, Cal. Admin. Code, tit. 14, §§ 15027, 15085, (d), 15088, 15143; and *People v. County of Kern* (1974) 39 Cal.App.3d 830, 841-842, which stated in pertinent part as follows:

> The policy of citizen input which underlies the act (*Environmental Defense Fund, Inc. v. Coastside County Water Dist.*, 27 Cal.App.3d 695) supports the requirement that the responsible

> public officials set forth in detail the reasons why the economic and social value of the project, in their opinion, overcomes the significant environmental objections raised by the public. In *Silva v. Lynn* (1st Cir. 1973) 482 F.2d 1282, 1285, a case decided under the analogous National Environmental Policy Act [Citations] the court explained the policy thusly: "Finally, and perhaps most substantively, the requirement of a detailed statement helps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug. A conclusory statement 'unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind' not only fails to crystallize issues [citation] but 'affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.' [Citation.] Moreover, where comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. *There must be good faith, reasoned analysis in response.*" [Citations] Only by requiring the County to fully comply with the letter of the law can a subversion of the important public purposes of CEQA be avoided, and only by this process will the public be able to determine the environmental and economic values of their elected and appointed officials, thus allowing for appropriate action come election day should a majority of the voters disagree. We conclude that the County's failure to respond with specificity in the final EIR to the comments and objections to the draft EIR renders the final EIR fatally defective. (*Id.* at pp. 704–705 [emphasis added.])

Respondents have not met this standard. In *Berkeley Keep Jets Over the Bay Committee, supra,* 91 Cal.App.4th 1344, the Oakland Board of Port Commissioners proposed a major expansion of the Oakland Airport. Project opponents contended that the EIR had not properly analyzed the potential dangerous airborne toxic emissions from jet airplanes, as published by the California Air Resources Board (CARB). In response, the Port created a "misleading impression" that a CARB official had discouraged the Port from using current standards for measuring toxic emissions from airplanes.

According to the court, "the Port chose simply to ignore and then to mischaracterize the view of CARB . . .." (*Id.,* at p. 1366, fn. 13.) The court concluded that the Port had used scientifically outdated information, and concluded that "the EIR was not a reasoned and good faith effort to inform decisionmakers and the public about the increase in [toxic air] emissions" from the airport expansion. (*Id.,* at p. 1367.) The court further found that the Port had improperly analyzed the risk of public health risks in response to other comments on the EIR. Rather than responding in detail to those comments, the Port concluded that "the significance of the [public health] impact is thus considered unknown." (*Id.,* at p. 1368.) The court ruled that this response was inadequate:

> The Port has not cited to us any reasonably conscientious effort it took either to collect additional data or to make further inquiries of environmental or regulatory agencies having expertise in the matter. These failures flout the requirement that the lead agency consult with all responsible agencies and with any other public agency which has jurisdiction by law over natural resources affected by the project. (*Id.*, at p. 1370.)

Similarly to *People v. County of Kern* and *Berkeley Keep Jets Over the Bay Committee,* the Water Board's and Mr. Peltzer's letters clearly identified their opinion that a water rights modification would be necessary, and that modification could result in certain impacts – the only standard those comments needed to meet in order to trigger an obligation to substantively respond. (4 AA 0535-0536.) These impacts were identified before the DEIR was prepared, and again after the DEIR was prepared but

before the FEIR was completed, and a third time before the FEIR was certified by the Respondents. DPWD's and the EC's response to the Water Board's letters, and Mr. Peltzer's letter, was to ignore the requests for this analysis.

Even though Friant should not have been required to provide evidence of harm to its members, it in fact did so, in order to demonstrate the kind of potential impact that should have been analyzed in the EIR. Friant pointed out in comments and in the trial below that the Reservoir project has the potential to detrimentally impact Friant members because it will maximize the probability that the ECs would always fully use their yearly maximum of 840,000 AF (or 650,000 AF in a Critical Year), rather than allowing some portion of that allotment to be used in the CVP system or saved for later years. In a subsequent year in which Reclamation is unable to provide the full 840,000 AF allotment, the ECs would be allowed to capture San Joaquin River flows, thereby reducing Friant's supply while, at the same time, having the benefit of being able to use 40,000 AF of water that had been stored in the proposed Reservoir the year before. (8 AA 1097-1135.)

The record shows that the ECs do not always use their entire maximums under the Exchange Contract, particularly in those years in which exchanges or transfers were not allowed by Reclamation.[2] (4 AA 0620.) For

[2]Respondents have only disclosed their usage records since 2010.

instance, they used approximately 833,000 AF in 2010, 817,000 AF in 2005, 835,000 AF in 2001, 832,000 AF in 2000, 812,000 AF in 1995 and 1996, 786,000 AF in 1990, 829,000 AF in 1989, and 783,000 AF in 1986. (4 AA 0620.) The remainder portions of the total maximum commitment in those years are significant amounts of water; the remainder of the CVP, including its members, benefit when there is an unused portion of the maximums under the Contract. Allowing the Exchange Contractors to take that unused portion and store it in a new reservoir potentially harms the other CVP users.

The Respondents' own evidence supports the conclusion that in the current (pre-Project) condition, the Respondents do not use all of the water identified as the maximums under their contracts. The ECs did not start transferring large amounts of water until around 1999. (4 AA 0622.) The EC's admit this, by noting that prior to commencement of the transfers, it was quite common that the ECs did not use up their total allotment of 840,000 AF. (*Ibid.*) Far from disproving any impact, Respondents' proffered evidence actually proves the validity of Friant's concern about the impact potentially caused by the Project. To the extent the Reservoir would facilitate the ECs' full use of its yearly maximums, the proposed yearly storage of 40,000 AF would maximize the likelihood that CVP water would be inadequate to meet the ECs' needs in later years, thereby maximizing the likelihood that the ECs could call on the San Joaquin River for its water

needs; the proposed Reservoir would undoubtedly tend to increase the probability of that use.

CONCLUSION

Friant respectfully requests that this Court reverse the judgment and direct the trial court to decertify the EIR. Friant further requests that the trial court be directed to retain jurisdiction of this matter until Respondents certify a new EIR which complies with CEQA and properly analyzes the environmental impacts of their proposed Project.

Dated: July 21, 2023

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1).)

I, the undersigned appellate counsel, certify that this brief consists of 13,899 words exclusive of those portions of the brief specified in California Rules of Court, rule 8.204(c)(3), relying on the word count of the Microsoft Word computer program used to prepare the brief.

Dated: July 21, 2023 PRICE, POSTEL & PARMA LLP

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PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF SANTA BARBARA

I am employed in the County of Santa Barbara, State of California. I am over the age of eighteen (18) and not a party to the within action. My business address is 200 East Carrillo Street, Fourth Floor, Santa Barbara, California 93101.

On July 24, 2023, I served the foregoing document described as **APPELLANT'S OPENING BRIEF** on all interested parties in this action as follows:

BY TRUEFILING (EFS): I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling portal operated by ImageSoft, Inc. Participants in the case who are registered EFS users will be served by the TrueFiling EFS system. Participants in the case who are not registered TrueFiling EFS users will be served by mail or by other means permitted by the court rules.

SEE ATTACHED SERVICE LIST

BY MAIL: I placed the original and/or true copy in a sealed envelope addressed as indicate above. I am readily familiar with the firm's practice of collection and processing documents for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

Clerk of the Court
Stanislaus Superior Court
City Towers Courthouse – Civil
801 10th Street
Modesto, CA 95354

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

Executed on July 24, 2023, at Santa Barbara, California.

Elizabeth Wright

Elizabeth Wright

SERVICE LIST

Sierra Club, et al. v. Del Puerto Water District
Stanislaus County Superior Court
Case Nos. CV-20-005193 and CV-20-005164 (Partially Consolidated)

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