WHAT THE QSA MEANS FOR THE SALTON SEA: California's Big Blank Check

Timothy N. Forsman[†]

[A] drop of water cannot do two things at once, and every drop the residents of coastal Southern California want to drink is one that cannot be used to sustain the endangered Salton Sea—which is what brings us to where we are today

-Hon. Ronald Boyd Robie.1

The taming of the American West, and the utilization of its great rivers, led to an era of unparalleled prosperity and growth for the Nation. However, the era of the endless frontier has long since passed, and today, conflicts over vital water rights in the West continue to intensify. Because river systems cannot furnish an unlimited supply, demand will eventually outpace supply. The first casualties of a growing water shortage are already emerging, and the Salton Sea ("the Sea") is among the first to bear the brunt of this shortage.

Without further intervention, the Sea will become one of the largest ecological disasters in modern American history. Beginning in 2017 the Sea will lose up to 23% of its incoming water supply, resulting in a dramatic reduction in the Sea's size and depth, and a sharp increase in salinity and pollutant concentrations.² The ecological deterioration of the

[†] Timothy Forsman is a second year student at the Sandra Day O'Connor College of Law at Arizona State University. He has worked on complex litigation and environmental matters as a Summer Associate with Squire Sanders in Phoenix in addition to serving as a clerk at the Arizona Supreme Court Staff Attorney's Office.

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¹ In re Quantification Settlement Agreement Cases, 201 Cal. App. 4th 758, 773 (2011).

² HAZARD: The Future of the Salton Sea With No Restoration Project at 6. Table 1. Pacific Institute May, 2006.

Sea is on a trajectory which will create significant negative externalities. Likely impacts include increased health problems³ for California residents, destruction of critical habitat and wildlife, ongoing liabilities to the California government, and harmful impacts on the economy of California and the southwestern United States. Each of these potential impact areas will be examined in this paper.

I. Introduction

The reduction of Sea water is a deliberate result of an agreement known as the Quantitative Settlement Agreement ("QSA")⁴. The QSA requires California agencies to transfer water from the Imperial Irrigation District to urban areas, primarily to San Diego County.⁵ In addition to transferring water the QSA also imposes an "unconditional contractual obligation of the State of California" to pay for "environmental mitigation requirements" resulting from the water transfers called for under the QSA. The people of California, acting through their elected representatives, made it clear that they wished to ensure that negative environmental impacts to the Salton Sea resulting from the water transfer agreement would be

³ *Id.* at 33. (Health impacts of airborne particle emissions from the Sea include increased "risk of cardiac disease, heart attacks, and mortality in adults".).

⁴ The final version of the QSA was executed by the Imperial Irrigation District of California, the Metropolitan Water District of California, and the Coachella Valley Water District on October 10, 2003. *See* QUANTIFICATION SETTLEMENT AGREEMENT AND RELATED AGREEMENTS AND DOCUMENTS TO WHICH SOUTHERN CALIFORNIA AGENCIES ARE SIGNATORIES at 2, available at http://www.sdcwa.org/sites/default/files/files/QSA_final.pdf. The QSA references numerous related agreements, including "[t]he Acquisition Agreements, the Allocation Agreement, the Implementation Agreement, ... the QSA-JPA" along with many others. *See id. at* 6. The QSA frequently incorporates these other agreements by reference, for instance: "[t]he terms and conditions applicable to the acquisition of Conserved Water by CVWD from IID, as contemplated by this Agreement, shall be as set forth in the IID/CVWD Acquisition Agreement." *Id.* at 12. The term "QSA" is frequently used to refer to not only the QSA itself, but also to the agreements it incorporates by reference. *See County of Imperial v. Superior Court* 152 Cal. App. 4th 13 at 24 (2007) (discussing "the QSA and ... the QSA-related agreements.").

⁵ Over a period of 110 years, the QSA calls for a total transfer of 8.5 million acre-feet to San Diego County. *See* QUANTIFICATION SETTLEMENT AGREEMENT FOR THE COLORADO RIVER *available at* http://www.sdcwa.org/sites/default/files/files/publications/qsa-fs.pdf.

⁶ QUANTIFICATION SETTLEMENT AGREEMENT JOINT POWERS AUTHORITY CREATION AND FUNDING AGREEMENT at 1. (October 10, 2003).

⁷ *Id.* at 11.

mitigated, and that the Sea's ecosystem would be restored where harm occurred.8

California's obligation to restore the Sea has not yet been met. ⁹ The mitigation efforts currently in place are not sufficient to cope with the changes in water supply that the Sea will face beginning in 2017. In light of the ongoing fiscal crisis in California, it is unlikely that the State will be able to protect and restore the Sea from the effects of the QSA. 11 In December of 2011 a California Court of Appeals decided In re Quantification Settlement Agreement Cases, 12 holding that QSA water transfers may move forward despite the State's inability to comply with its mitigation obligations under the agreement. 13 The California Supreme Court declined to hear the case, in effect finalizing the judgment of the Court of Appeals.¹⁴ The U.S. Supreme Court also denied to review any issues in the matter, ostensibly foreclosing the possibility of any further judicial review of the QSA's validity.¹⁵

⁸ See Bill Analysis SB 654, Senate Agricultural & Water Resources Committee, 2003 ("The QSA commits the state to a restoration path for the environmentally sensitive Salton Sea as well as provides full mitigation for these water supply programs."), available at http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0651-0700/sb 654 cfa 20030910 120952 sen comm.html.

The California Legislature "has not yet acted on the preferred alternative" plan for restoration, nor have they "provided a viable funding plan" to restore the Sea. QUANTIFICATION SETTLEMENT AGREEMENT FOR THE COLORADO RIVER http://www.sdcwa.org/sites/default/files/files/publications/qsa-fs.pdf.

¹⁰ Some limited habitat restoration projects are underway, however, after "mitigation water" stops flowing in 2017, there will be "rapid changes" which will "cause the surface of the Sea to drop 20 feet" within 10 to 12 years, reducing the Sea's volume "by more than 60% and tripling it salinity." HAZARD, at ii, 6.

¹¹ There is currently only one bill, AB 939, being considered by the California Legislature which pertains to restoration of the Sea, and it does not provide for any restoration funding. Instead, the bill seeks to transfer authority over restoration efforts from the Salton Sea Restoration Council to the Salton Sea Authority. At the time this paper was published, AB 939 remains under consideration of the California State Senate. See ASSEMBLY BILL 939, CALIFORNIA LEGISLATURE 2011-2012 REGULAR SESSION. Available http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml.

² 201 Cal. App. 4th 758 (2011).

¹³ See id. at 800, (holding that "the Joint Powers Agreement can be reasonably construed as lawful and consistent with" the California Constitution.).

⁴ See Quantification Settlement Agreement Cases, 2012 Cal. LEXIS 2522 (Cal. Mar. 14, 2012).

15 Del Mar v. Imperial Irrigation Dist., 133 S. Ct. 312 (2012).

This paper examines the state of the QSA in light of the *In re Quantification Settlement Agreement Cases* decision, and explores what partial enforcement of the QSA will mean for the Sea. Part II summarizes key facts about the Sea and how it was created. Historical background on the Sea is followed by a limited review of the QSA's development, adoption, and subsequent history. Part II also includes a short description of the Sea's current ecological status and a brief review of current restoration efforts. Part III undertakes an analysis of the *In re Quantification Settlement Agreement Cases* decision to determine what the agreement means for the Sea and the State in light of the Court's holding. Part IV concludes with a short section detailing the Sea's current trajectory and some likely outcomes for the State of California and its residents in terms of legal, health, environmental, and economic impacts.

II. BACKGROUND

The Salton Basin is a large geological depression in southern California located about 135 miles southeast of Los Angeles and about 90 miles to the northeast of San Diego. ¹⁶ The Basin sits below sea level and stretches over 8000 square miles. ¹⁷ Before 1905, the Basin intermittently filled when the Colorado River ("the River") changed course, ¹⁸ creating an inland body of water known as the Salton Lake. ¹⁹ Some scholars believe that the Basin was actually empty the majority of the time, ²⁰ although

¹⁷ A Brief Description of Its Current Conditions, and Potential Remediation Projects, Salton Sea Authority, October 3, 1997 available http://www.sci.sdsu.edu/salton/Salton%20Sea%20Description.html.

at

¹⁶ HAZARD at i.

Restoring Salton Legislative the Sea. Analyst's Office. http://www.lao.ca.gov/2008/rsrc/salton_sea/salton_sea_01-24-08.aspx (Jan. ("Periodically over the past several thousand years, a change in the course of the Colorado River would spill water for months or years into the area now occupied by the Sea. Eventually, a subsequent change in the river's course would leave the lake without a significant source of water. Over several years it would dry up, leaving a dry lake bed.") The River changed course as a result of sediment build-up, which allowed the River to flow outside its normal course. See Salton Sea Geography, Salton Sea Authority, 2003, http://saltonsea.ca.gov/about/geography.htm.

¹⁹ Geology of the Salton Trough, David L. Alles Western Washington University at 7. (2011).

²⁰ THE SALTON SEA: AN ASSESSMENT, Victor M. Ponce June 2005, http://saltonsea.sdsu.edu/ ("Any water reaching the depression, either from local runoff or from the Colorado river during major floods, eventually evaporated, leaving a dry lake bed most of the time.")

debate remains about how often the depression was filled.²¹ With the intervention of humans, the desert landscape of the Salton Basin was transformed into what is now California's largest lake.²²

A. THE SEA'S ORIGIN

In the 1890's, the city of Imperial, California, sat within the "middle of an enormous desert" known at the time as the Salton Sink or Colorado Desert. Observers noted, however, that the "desert does not consist of barren sand but, on the contrary, of very fertile clay which cannot be cultivated on account of a total lack of water." Indeed, the "area was a below-sealevel bed of an ancient lake" laden with "exceedingly rich silt deposited there by the Colorado River." Through the Homestead Act and the Desert Act of 1877, about 500,000 acres of fertile—but arid—government land was available to settlers in the Imperial Valley. Settlers could obtain title to the land for free if they cultivated the land under the Homestead act, or purchase it for as little as \$1.25 per acre under the Desert Act. On the Imperial Valley.

In 1896, a "shrewd and clever" engineer named Charles Rockwood formed the California Development Company ("the Company") in order to begin irrigation of what would become the Imperial Valley in Southern

²¹ See Laflin, P., 1995. The Salton Sea: California's Overlooked Treasure. The Periscope, Coachella Valley Historical Society, Indio, California. 61 pp. (Reprinted in 1999) available at http://www.sci.sdsu.edu/salton/PeriscopeSaltonSeaCh1-4.html ("No one knows for sure, but in all probability the Colorado alternately flowed into the Salton Sink every four or five hundred years.").

²² HAZARD at i.

²³ *The Imperial Valley In 1904*, Hugo de Vries, 22 Journal of San Diego History 1, (1976) available at http://www.sandiegohistory.org/journal/76winter/imperial.htm.

²⁴ Developing San Diego's Desert Empire, William O. Hendricks, 17 The Journal of San Diego History 3 (1971) *available at* http://www.sandiegohistory.org/journal/71summer/desert.htm.

²⁵ The Imperial Valley In 1904, Hugo de Vries, 22 Journal of San Diego History 1, (1976) available at http://www.sandiegohistory.org/journal/76winter/imperial.htm.

Developing San Diego's Desert Empire, William O. Hendricks, 17 The Journal of San Diego History 3 (1971) available at http://www.sandiegohistory.org/journal/71summer/desert.htm.

²⁷ The Imperial Valley In 1904, Hugo de Vries, 22 Journal of San Diego History 1, (1976) available at http://www.sandiegohistory.org/journal/76winter/imperial.htm.
²⁸ *Id.*

California.²⁹ Lacking capital, Rockwood partnered with George Chaffey, an experienced "civil engineer and irrigation expert" who provided 150,000 dollars in start-up capital in exchange for a position as president and chief engineer of the California Development Company. 30 The Company constructed a head gate to divert the Colorado at a point called Pilot Knob near Yuma, Arizona.³¹ From there, they built a canal:

southward across the Mexican boundary, in a course nearly parallel with the river, until they reached the dry overflow channel known as the Alamo. As this ancient watercourse meandered westward in the direction of the Salton Sink, they were able to clear it out, enlarge it, and utilize most of it as a part of their irrigation system. Then, at a point about forty miles west of the Colorado, they carried their canal northward, across the boundary line again, into California.³²

By 1902, the Company had succeeded in building the Imperial Canal, which diverted massive amounts of water to new farmlands in the Imperial Valley.³³ Between 1902 and 1904, the number of settlers in Imperial Valley skyrocketed from 2.000 to 10.000.³⁴ However, as the newcomers to the Valley continued to develop their farms, disaster loomed. During the winter of 1905, a series of unusually strong floods of the Colorado River put the fledgling canal system to the test.³⁵ The intakes joining the canal system to the River were inundated, and erosion widened the connection from 60 feet to 160 feet, as over 90,000 cubic feet of water per second flooded into the canal system.³⁶ The canal was quickly

²⁹ Laflin, P., 1995. The Salton Sea: California's Overlooked Treasure. The Periscope, Coachella Valley Historical Society, Indio, California. 61 pp. (Reprinted in 1999) available at http://www.sci.sdsu.edu/salton/PeriscopeSaltonSeaCh1-4.html.

³⁰ Laflin, P., 1995. The Salton Sea: California's Overlooked Treasure. The Periscope, Coachella Valley Historical Society, Indio, California. 61 pp. (Reprinted in 1999) available at http://www.sci.sdsu.edu/salton/PeriscopeSaltonSeaCh1-4.html. See also Developing San Diego's Desert Empire, William O. Hendricks, 17 The Journal of San Diego History 3 (1971) available at http://www.sandiegohistory.org/journal/71summer/desert.htm.

³¹ *Id*.

³² *Id*.

³³ *Id*.

³⁴ *Id. available at* http://www.sci.sdsu.edu/salton/PeriscopeSaltonSeaCh5-6.html.

³⁶ *Id*.

overloaded, and massive amounts of Colorado River water began pouring out onto the farmland and building up in the deepest part of the Salton Basin.³⁷

In December of 1906 the Colorado flooded again, destroying homes and farms in the Imperial Valley.³⁸ The River also washed away the Southern Pacific Railroad's main line from Los Angeles to Yuma.³⁹ For the next month, the Railroad struggled to get the Colorado under control. Eventually, after dumping over 2,000 train cars full of rock, gravel, and clay into the River's path, Southern Pacific workers succeeded in returning the Colorado to its normal course.⁴⁰ Although the Railroad eventually stopped the flood of River water, a vast quantity of remained behind, forming the basis of the modern Salton Sea.

B. THE MODERN SALTON SEA

After the Colorado had been returned to its original course, the Salton Sea continued to receive large amounts of the River's water through canals, fields, and drainage ditches which empty into the Sea.⁴¹ The incoming drainage water has sustained the Sea since its accidental creation over a century ago.⁴² Without incoming water, the Salton Sea would completely evaporate within "about a dozen years."⁴³

Over the past thirty years, increased demand for water in the Western United States has created "hot spots" where there is a "convergence of difficult hydrologic conditions, weather patterns,

³⁷ Id.

³⁸ See When The Imperial Valley Fought for Its Life, Robert L. Sperry, 21 Journal of San Diego History 1 (1975) ("On December 5, the men patrolling the river were surprised and shocked when a great flood came") available at http://www.sandiegohistory.org/journal/75winter/imperial.htm. See also Laflin, P., 1995. The Salton Sea: California's Overlooked Treasure,

³⁹ Id

⁴⁰ *Id.*, See also When The Imperial Valley Fought for Its Life, Robert L. Sperry, 21 Journal of San Diego History 1 (1975).

⁴¹ HAZARD at 3.

⁴² *Id*.

⁴³ *Id*.

endangered species locations and population growth."⁴⁴ The driving factors behind this change are "climate change and water allocation for ecosystems."⁴⁵ The Sea, along with much of the Imperial Valley and San Diego County, lie in an area which the U.S Army Corps of Engineers has classified as having a substantial potential for a water supply crisis by 2025.⁴⁶

California is the largest user of Colorado River water, and enjoys a base allotment of 4.4 million acre-feet ("maf") of water per year. ⁴⁷ However, "[b]etween 1983 and 1996, California used from 4.2 to 5.2 maf/yr, taking advantage of unused apportionments." ⁴⁸ As a result of increased population and water demand in Arizona and Nevada, California "was required to reduce its historic overuse of Colorado River water."

In 1997, Secretary of the Interior Bruce Babbit instructed California to develop a plan to reduce its usage of Colorado River water to the state's legal "4.4 million acre-foot entitlement or face an immediate reduction to that level." The Colorado River Board of California quickly set about

⁴⁴ Water Resources Outlook. U.S. Water Demand, Supply, and Allocation: *Trends and Outlook*. (2007). *available at* http://www.iwr.usace.army.mil/docs/iwrreports/2007-R-03.pdf.

⁴⁵ *Id.* at ix.

⁴⁶ *Id.*, Fig.2 at 9.

⁴⁷ The 4.4 maf allotment is based on the Boulder Canyon Project Act of 1928, as well as the related Colorado River Compact of 1922. *See* The Law of the River, U.S. Dept. of the Interior, Bureau of Reclamation, *available at* http://www.usbr.gov/lc/region/g1000/lawofrvr.html.

⁴⁸ Colorado River Basin Study, Report to the Western Water

Policy Review Advisory Commission at 27 (August 1997) *available at* http://repository.unm.edu/bitstream/handle/1928/2782/COLORADO.pdf?sequence=1.

Restoring the Salton Sea. Legislative Analyst's http://www.lao.ca.gov/2008/rsrc/salton sea/salton sea 01-24-08.aspx (Jan. 24, 2008). See also Options for Meeting Future Water Needs in Coastal Regions of California, The California Water Plan Update BULLETIN 160-98, California Department of Water Resources (1994) ("A major water management issue facing the South Coast Region is California's use of Colorado River water in excess of its basic annual apportionment of 4.4 maf. In the past, Arizona and Nevada were not using the full amount of their annual apportionments, and California was able to use the amount apportioned to, but not used by, Nevada and Arizona, and to use wet year surplus flows." available at http://www.waterplan.water.ca.gov/docs/previous/b160-98/v2ch7.pdf.

Restoring the Salton Sea, Legislative Analyst's Office. http://www.lao.ca.gov/2008/rsrc/salton_sea/salton_sea_01-24-08.aspx (Jan. 24, 2008) see also Colorado River: California's 4.4 Plan (March 7, 2000) ("In 1997, Secretary of the Interior, Bruce Babbit, forced the issue; thus the "4.4 Plan." At the 1999 Colorado River Water Users meeting held in Las Vegas, Babbit indicated that he wanted this matter resolved before the end

developing the "4.4 Plan" to reduce water usage in the state to the 4.4 maf/yr entitlement while acknowledging that "Californians long-standing use of Arizona and Nevada's apportioned, but unused apportionments, as authorized by the Secretary of the Interior, is nearing an end."⁵¹

As part of the first phase of the 4.4 Plan, internal water transfers between major users—namely large water and irrigation districts which supply entire communities—⁵² within the state California were planned, "which include core transfers and recovery of seepage from the All-American and Coachella canals that provide for about 400,000 acre-feet of water being transferred from the agricultural areas to the coastal plain of southern California."53 The All-American Canal is an 80 mile long manmade channel which carries water from the Colorado River near Yuma, Arizona, into the Imperial Valley.⁵⁴ The Coachella Canal carries water from the All-American Canal into Coachella Valley in southern California. 55 This internal transfer of 400,000 acre-feet per year was to come largely from Colorado River flows to the Imperial Valley, with a total reduction of about 360,000 fewer acre-feet of water reaching the Sea each year. 56

C. THE QUANTITATIVE SETTLEMENT AGREEMENT

By December of 2000, the major water users in southern California came together and agreed upon a draft agreement to re-distribute the reduced allocation of Colorado River water amongst themselves.⁵⁷ These users included the Imperial Irrigation District, The Metropolitan Water

his Secretary.") of term http://www.slcclassic.com/utilities/NewsEvents/news2000/news03072000.htm.

⁵¹ Colorado River Board 4.4 Plan, Californians Use of Its Colorado River Allocation (December 17, 1997) available at http://www.sci.sdsu.edu/salton/CoRiverBoard4.4plan.html.

⁵² The Imperial Irrigation District, the Metropolitan Water District of Southern California, and the Coachella Valley Water District are all parties to the QSA, and each is a major user of water within southern California. ⁵³ *Id*.

⁵⁴All-American Canal History, *available at* http://www.iid.com/index.aspx?page=177.

⁵⁵ Coachella Canal Rehabilitation and Betterment, U.S. Dept. of the Interior, available at http://www.usbr.gov/projects/Project.jsp?proj_Name=BCP+-

⁺Coachella+Canal+Rehabilitation+and+Betterment.

⁵⁶ HAZARD at 6, tbl. 1.

Quantification Settlement Agreement, Draft 12-12-00 at 1. available at http://www.cvwd.org/news/publicinfo/Quantification_Settlement_Agreement.pdf.

District of Southern California, and the Coachella Valley Water District.⁵⁸ A complicated series of negotiations took place to determine how the reallocation would took place:

[t]he quantification settlement agreement (OSA) negotiations involved high-level discussions among Colorado River water agencies, federal and state officials, and stakeholders to resolve long-standing disputes about quantification of Colorado River water rights. The disputes included reasonable and beneficial use of river water, transfers and exchanges between water users, federal delivery of surplus water to California, and various environmental and socioeconomic impacts to the County from implementation of the proposed QSAs.⁵⁹

The stated goal of the QSA was to "consensually settle longstanding disputes regarding the priority, use and transfer of Colorado River water, to establish by agreement the terms for the further distribution of Colorado River water among the Parties for up to seventy-five years."60 After protracted negotiations among the stakeholders, the water districts signed the OSA on October 10, 2003.⁶¹

On the same day, the State of California⁶² entered the Quantification Settlement Agreement Joint Powers Authority Creation and Funding Agreement, also known as "the Joint Powers Agreement" ("JPA").63 The

⁵⁸ *Id*.

⁵⁹ County of Imperial v. Superior Court, 152 Cal. App. 4th 13, 21 (2007).

Quantification Settlement Agreement, Draft 12-12-00 at 2. available at http://www.cvwd.org/news/publicinfo/Quantification_Settlement_Agreement.pdf.

⁶¹ See County of Imperial v. Superior Court, 152 Cal. App. 4th 13, 23(2007) ("On October 10, 2003, Imperial, Metropolitan, and Coachella signed the QSA and finalized the QSA-related agreements.")

⁶² The State of California entered the QSA-JPA "by and through" the California Department of Fish and Game and was "authorized by the Legislature to enter into [the QSA-JPA] on behalf of the State." See Quantification Settlement Agreement Joint Powers Authority Creation and Agreement (2003),http://www.sdcwa.org/sites/default/files/files/QSA_jpa-funding.pdf.

Quantification Settlement Agreement Joint Powers Authority Creation and Funding Agreement (2003), available at http://www.sdcwa.org/sites/default/files/files/QSA_jpafunding.pdf. See also In re Quantification Settlement Agreement Cases, 201 Cal. App. 4th 758, 774 (2011).

JPA was one of the agreements related to, and executed in conjunction with, the OSA. 64 The JPA was an agreement between the State of California and the Coachella Valley Water District, the Imperial Irrigation District and the San Diego County Water Authority. 65

The JPA included two key provisions about funding for environmental mitigation costs. In the first provision, the State of California assumed a responsibility to pay for environmental mitigation:

> [t]he State is solely responsible for the payment of the costs of and liability for Environmental Mitigation Requirements in excess of the Environmental Mitigation Cost Limitation.⁶⁶

Next, the State agreed to waive a defense in enforcement of the contract:

The State obligation is an unconditional contractual obligation of the State of California, and such obligation is not conditioned upon an appropriation by the Legislature, nor shall the event of non-appropriation be a defense. ⁶⁷

The JPA also affirmed the parties' understanding that the California legislature had already passed legislation committing the State to pay for environmental mitigation costs. 68 The JPA specifies California Senate Bill 654, commonly referred to as the "Machado" bill⁶⁹ as a "mechanism to implement and allocate environmental cost mitigation among" the parties as well as "the State". 70

⁶⁴ See In re Quantification Settlement Agreement Cases, 201 Cal. App. 4th 758, 774 (2011). (referring to "12 agreements related to the Quantification Settlement Agreement").

⁶⁵ Quantification Settlement Agreement Joint Powers Authority Creation and Funding Agreement, at 1., available at http://www.sdcwa.org/sites/default/files/files/QSA_jpafunding.pdf.

66 *Id.* at § 9.1.

⁶⁷ *Id.* at § 9.2.

 $^{^{68}}$ See id. at F.; ("SB 654 established a mechanism to implement and allocate environmental mitigation cost responsibility among IID, CVWD, SDCWA, and the State for the implementation of the 1998 IID/SDCWA Transfer Agreement and the IID/CVWD

Acquisition Agreement. Costs for environmental mitigation requirements up to and not to exceed a present value of \$133,000,000 shall be borne by IID, CVWD, and SDCWA, with the balance to be borne by the State.") (emphasis added).

Restoring the Analyst's Salton Sea, Legislative http://www.lao.ca.gov/2008/rsrc/salton_sea/salton_sea 01-24-08.aspx (Jan. 24, 2008) (referring to "SB 654: Chapter 613, Statutes of 2003 (Machado)").

⁷⁰ See California Senate Bill 654, § 3 (2003).

D. QSA RELATED LEGISLATION

The QSA is integrated with four different bills passed by the California Legislature in 2003 and 2004.⁷¹ The four bills are SB 277 ("Ducheny"), SB 317 ("Kuehl I"), SB 1214 ("Kuehl II") and the Machado bill.⁷² The four bills were designed as a package to facilitate implementation of various aspects of the QSA.⁷³

The Kuel I bill required the Secretary of the California Resources Agency to develop a "preferred alternative" plan "for the restoration of the Salton Sea ecosystem and the protection of wildlife dependent on that ecosystem" and provided for implementation of various QSA water transfers. Provisions of the Ducheny bill outlined restoration objectives of the preferred alternative plan. Kuell II adds agricultural lands surrounding the Sea as well as portions of its tributaries to the restoration plan area, and provided that the Secretary could consider economic and recreational factors as secondary considerations to the ecological restoration goals. Kuel I was complemented by the Machado Bill, which, among other things, assigned costs of the Salton Sea Restoration to various parties.

The Machado Bill authorized the California Department of Fish and Game to "enter into a joint powers agreement for the purpose of providing for the payment of costs for environmental mitigation requirements." Machado also states how restoration costs will be allocated: "Costs for environmental mitigation requirements shall be allocated based on an agreement among Imperial Irrigation District, the Coachella Valley Water District, the San Diego County Water

⁷¹ See generally Salton Sea Restoration Program (referring to "State legislation enacted in 2003 and 2004 (SB 277, SB 317, SB 654 and SB 1214"). available at http://www.water.ca.gov/saltonsea/.

⁷² See Restoring the Salton Sea, Legislative Analyst's Office (discussing "Quantification Settlement Agreement Statutes"), http://www.lao.ca.gov/2008/rsrc/salton_sea/salton_sea_01-24-08.aspx

⁷³ See id.

⁷⁴ California Senate Bill 317, §1(e)(1) (2003), available at http://legix.info/us-ca/statutes;2003;chp0612.

⁷⁵ *Id.* at § 2081.7(c)(2) ("Imperial Irrigation District to transfer up to 800,000 additional acre-feet of conserved water...").

⁷⁶ See Ch, 13 SALTON SEA RESTORATION ACT § 2931(b) (2003) available at http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0251-0300/sb_277_bill_20030929_chaptered.html.

⁷⁷ See California Senate Bill 1214 § 3 (2003) available at http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1201-1250/sb_1214_bill_20040921_chaptered.pdf.

⁷⁸ California Senate Bill 654, § 3(a) (2003).

Authority and the Department of Fish and Game". 79

In effect, Machado not only allowed Fish and Game to enter into the JPA, but the agreement also designated the JPA as the instrument which would allocate payment of costs for restoration requirements. The QSA/QSA-JPA and their related legislation not only brought about large-scale internal water transfers in California, but also created some notable responsibilities and liabilities for the State.

C. MITIGATION AND RESTORATION EFFORTS

The Sea currently benefits from a substantial stop-gap measure, in place until 2017, in the form of water transfers to the Sea from the Imperial Irrigation District. This "mitigation water" was apportioned to the Sea to help offset the impacts to the Sea's ecology for until 2017, with the original rationale that by 2017 "other habitat and air pollution mitigation activities would be substituted."

The 2003 Kuell I bill requires the Secretary of the California Resources Agency to develop a "preferred alternative" plan for restoration of the Sea. Secondary 25, 2007, the Secretary submitted the Salton Sea Ecosystem Restoration Program's Final Programmatic Environmental Impact Report ("Preferred Alternative") to the California Legislature.

⁸⁰ Salton Sea Restoration Frequently Asked Questions, Imperial Irrigation District *available at* http://www.iid.com/Modules/ShowDocument.aspx?documentid=5155 (discussing current mitigation flows from IID to the Sea as well as IID's plan to substitute direct habitat and air quality mitigation in lieu of the mitigation transfer flows from 2014 through 2017.)

⁸¹Joint Petition for Modification of Revised Order WRO 2002-0013 By The Imperial Irrigation District and The San Diego County Water Authority at 1, (2011)

See California Senate Bill 317 §(e)(2) (2003) available at http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0301-0350/sb_317_bill_20030929_chaptered.html., ("The Secretary of the Resources Agency, in consultation with the department, the Department of Water Resources, the Salton Sea Authority, appropriate air quality districts, and the Salton Sea Advisory Committee, shall undertake a restoration study to determine a preferred alternative for the restoration of the Salton Sea ecosystem and the protection of wildlife dependent on that ecosystem.").

See Restoring the Salton Sea, available at http://www.lao.ca.gov/2008/rsrc/salton_sea/salton_sea_01-24-08.aspx. ("The Preferred Alternative was submitted by the Secretary to the Legislature in May 2007."). At the time, the Salton Sea Coalition, representing more than 1.3 million Californians, urged the California Legislature to make good on the Preferred Alternative: "Now it's up to the legislature to make good on the Secretary's efforts and not abandon the Sea, or the hopes and hard work of the

⁷⁹ California Senate Bill 654, § 3(b) (2003).

Preferred Alternative was expected to cost a total of approximately 9.2 billion dollars over several decades, with final operations and maintenance taking place until the year 2078. 84 Startup costs for the Preferred Alternative were to be approximately \$508 million by 2013, with a much more substantial cost of \$5.9 billion for construction to take place between 2014 and 2020.85

The main components of the Preferred Alternative were aimed at large scale ecosystem restoration and air quality mitigation efforts including:

> Saline Habitat Complex in the northern and southern Sea Bed, a Marine Sea that extends from San Felipe Creek to Bombay Beach (formed by barriers located at elevations from -260 to -270 feet msl), Air Quality Management facilities to reduce particulate emissions from the exposed playa, Brine Sink for discharge of salts, conveyance facilities, and Sedimentation/Distribution facilities. The Preferred Alternative also would include Early Start Habitat and an exclusion area for geothermal development.⁸⁶

The Preferred Alternative combined elements from a number of different restoration plans.⁸⁷ However, the sweeping scale and massive cost of the Preferred Alternative may have ultimately doomed it to failure in the legislature.

In 2008, the year following the presentation of the Preferred Alternative to the legislature, California was suffering from a \$14.4 billion budget deficit. 88 The Preferred Alternative's hefty price proved prohibitive in light of California's ongoing fiscal crisis, and the legislature has

⁸⁶ *Id.* at 3-10.

many people who have devoted so much time to designing a plan that meets that State's obligations to protect public health and wildlife." See Salton Sea Coalition Urges Immediate Action to Save Salton Sea, PACIFIC INSTITUTE, (May 25, 2007) available at http://www.pacinst.org/press_center/press_releases/20070525.html.

⁸⁴ Salton Sea Ecosystem Restoration Final Programmatic Environmental Impact Report at (at 3-27) (2007)available http://www.water.ca.gov/saltonsea/docs/final_eir_05_chapter_3.pdf.

⁸⁷ Salton Sea Ecosystem Restoration Final Programmatic Environmental Impact Report at 3-2 (2007) available at http://www.water.ca.gov/saltonsea/docs/final_eir_05_chapter_3.pdf.

⁸⁸ Past and Future of the Salton Sea, Michael J. Cohen, The World's Water 2008-2009 at 137, available at http://www.worldwater.org/data20082009/WB02.pdf.

"demonstrated little interest in funding Salton Sea restoration." The Preferred Alternative was a non-starter in the legislature, and the State has yet to take any action to fund or otherwise implement the Preferred Alternative. 90

There is currently one bill in the California state senate, AB 939, dealing with restoration of the Sea. ⁹¹ If passed, AB 939 would assign responsibility for restoration of the Sea to the Salton Sea Authority, as opposed to the Salton Sea Restoration Council. ⁹² This would transfer restoration responsibility from a state agency to a more local political unit. ⁹³ The bill would also require that the Salton Sea Authority develop a new restoration plan. ⁹⁴ The bill does not appropriate any additional funding for restoration efforts. ⁹⁵ California asseblymember Manuel Pérez introduced the Bill in 2011, which has stalled in the Senate after failing to pass in the Appropriations Committee. ⁹⁶

Although the Preferred Alternative failed to gain support in the California legislature, there are currently a few small-scale restoration projects underway in and around the Sea. The most ambitious effort is the Species Conservation Habitat Project ("SCHP") by the California Department of Fish and Game, which has constructed about 100 acres of pond habitat near the south shore of the Sea. The SCHP is intended to

⁸⁹ Id

⁹⁰ See Joint Petition for Modification of Revised Order WRO 2002-0013 By The Imperial Irrigation District and The San Diego County Water Authority at 1, at 4 (2011) ("the California Legislature has taken no action to adopt a comprehensive restoration plan that includes a financing plan or that focuses on the mitigation of air impacts and the preservation of habitat. The federal government has been inactive as well.").

⁹¹ See AB-939 Salton Sea Restoration (2011), available at http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml.

⁹² Id. available at

⁹³ See Bill Analysis, AB 939 available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0901-0950/ab_939_cfa_20120805_144022_sen_comm.html. ("AB 939 would transfer authority to lead the restoration of the Salton Sea from the state to the Salton Sea Authority, a local joint powers authority.")

⁹⁴ See AB 939, Salton Sea restoration, § 2942 (b)(a) (2011) available at http://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml.

⁹⁵ See Id. at § 2944 (c)(1).

⁹⁶ See Votes and Bill history, http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml.

⁹⁷ In addition to efforts by California State agencies, the Torres-Martinez Indian Tribe is pursuing a small-scale habitat project. *See* http://www.torresmartinez.org/Departments/Wetlands.aspx.

Species Conservation Habitat Project, California Department of Water Resources, http://www.water.ca.gov/saltonsea/#, (2013) ("Ponds encompassing about 100 acres have been constructed as a pilot project near the southern shoreline of the sea to evaluate the feasibility of

serve as a "proof of concept" and its continued development is contingent upon funding from the State, which has appropriated only about 20% of the funding needed for the pilot program.⁹⁹

III. ANALYSIS

In In re Quantification Settlement Agreement Cases ("In re QSA"), a California appellate court upheld the validity of the QSA and its related agreements, reversing a trial court ruling that the QSA-JPA violated California's constitution. ¹⁰⁰ The *In re OSA* decision reviewed decisions stemming from three separate suits, which were coordinated for trial. ¹⁰¹ The first action was brought by the Imperial Irrigation District, seeking a judicial determination that the QSA and its related agreements were valid. 102 The second and third actions challenged the validity of the OSA, and were brought respectively by the County of Imperial and an environmental group, Protect Our Water and Environmental Rights. 103

The coordination trial judge found that the "unconditional contractual obligation" imposed by the QSA-JPA on the State of California to pay all mitigation costs for the Sea above a set threshold was unconstitutional because it violated the appropriation requirement of California's constitution. 104 Article XVI, section 7 of the California Constitution requires that "Money may be drawn from the Treasury only

developing shallow saline habitat to compensate for habitat that is becoming lost at the Salton

Sea.").

99 Salton Sea Species Conservation Habitat Project, Frequently Asked Questions, California

Accord (2011) available at Agency http://www.water.ca.gov/saltonsea/docs/faqs_schproject.pdf.

¹⁰⁰ See In re Quantification Settlement Agreement Cases, 201 Cal. App. 4th 758, 774 (2011) ("the ... trial judge found that one of the 12 agreements related to the Quantification Settlement Agreement—specifically, the Quantification Settlement Agreement Joint Powers Authority Creation and Funding Agreement (the Joint Powers Agreement)—was unconstitutional.").

¹⁰¹ *Id.* at 773–774.

Id. at II = II.

102 Id. ("the Irrigation District sought a court determination that the Quantification Settlement Agreement and 12 related agreements were valid").

¹⁰³ *Id*. ¹⁰⁴ *Id*. at 774.

through an appropriation made by law and upon a Controller's duly drawn warrant."105

The Appellate court found that the QSA-JPA did not violate the appropriation clause of the Constitution because the obligations created by the agreement were unenforceable:

[N]othing in the Joint Powers Agreement gives the Irrigation District, Coachella, or San Diego (or anyone else for that matter) the right to enforce that obligation by drawing money from the Treasury without an appropriation. ¹⁰⁶

The Court noted that "in the face of legislative intransigence, it is possible the water agencies could be left with an unenforceable judgment for the unpaid excess mitigation costs, despite the state's unconditional contractual obligation to pay those costs." Put differently, the Court found that the judiciary would not enforce the obligations spelled out in the contract, so the sole recourse of injured parties would be with the legislature. ¹⁰⁸

The QSA-JPA required that the State would "seek... to obtain Legislative appropriation of funds sufficient to satisfy the State obligation", 109 if the environmental mitigation costs exceeded the approximately \$30 million in mitigation costs that the water districts were required to pay. 110 The agreement also provided that California's duty to pay for excess mitigation costs "is an unconditional contractual obligation of the State of California, and such obligation is not conditioned upon an appropriation by the Legislature, nor shall the event of non-appropriation be

¹⁰⁵ **CALIFORNIA** CONSTITUTION. Art. XVI. § 7. available at http://www.leginfo.ca.gov/.const/.article_16.

¹⁰⁶ In re Quantification Settlement Agreement Cases, 201 Cal. App. 4th 758, 797 (2011), reh'g denied (Jan. 4, 2012), review denied (Mar. 14, 2012), cert. denied, 12-53, 2012 WL 2907086 (U.S. Oct. 1, 2012).

¹⁰⁷ *Id.*108 At the time the opinion was authored, the legislature had already been intransigent on the Preferred Alternative restoration plan was issue of funding mitigation costs for 5 years since a Preferred Alternative restoration plan was submitted to the legislature in 2006. See Final Programmatic Environmental Impact Report, Salton Sea Ecosystem Restoration Program.

¹⁰⁹ Quantification Settlement Agreement Joint Powers Authority Creation and Funding Agreement, § 14.2, available at http://www.sdcwa.org/sites/default/files/files/QSA jpafunding.pdf.

¹¹⁰ See id. at § 14.3.

a defense."¹¹¹ Given the holding in *In re QSA*, "the event of non-appropriation" need not be a defense to enforcement of the agreement, since no one has "the right to enforce" the agreement by drawing money from California's treasury. Thus, the parties to the QSA-JPA are bound by an effective contract which creates real obligations, the obligations however, will not be enforced by the judiciary.

According to the Restatement of Contracts 2d., "[a]n unenforceable contract is one for the breach of which neither the remedy of damages nor the remedy of specific performance is available." Unenforceable contracts are defined as "those which have some legal consequences but which may not be enforced in an action for damages or specific performance in the face of certain defenses..." Where "[a] contract is void, a contradiction in terms, when it produces no legal obligation [i]t would be more exact to say that no contract was created." Under *In re QSA*, the parties are found to have legal obligations, but there does not appear to be a remedy available to enforce the obligations. However, the water districts entered into the agreement "in reliance upon, and this Agreement is intended to implement, the provisions of SB 654 which allocates the costs and authorizes the State to accept responsibility for certain environmental mitigation costs." 115

In re QSA reached several important conclusions. The decision confirms that the QSA is constitutional because no one can force the state to spend money implementing mitigation or restoration efforts—and thus it does not run afoul of California's constitutional appropriations requirement. By affirming that the QSA is constitutional and valid, In re QSA also confirms the State's assumption of obligations and liabilities under the agreements. While no one can force the legislature's hand on the issue of mitigation, the rest of the agreement still carries the full force of law. The court's interpretation of the QSA-JPA was that the agreement by the state to

¹¹¹ *Id.* at § 9.2.

Restatement (Second) of Contracts § 8 (1981).

¹¹³ Calamari and Perillo on Contracts (6th ed.) §1.8(b). (p. 18 - 19).

¹¹⁴ *Id*.

Quantification Settlement Agreement Joint Powers Authority Creation and Funding Agreement, § 9.1 at 1. available at http://www.sdcwa.org/sites/default/files/files/QSA_jpafunding.pdf.

pay for mitigation and restoration was a real, non-illusory obligation, however, that obligation was not enforceable. Since the court has determined that the QSA is legally effective and binding in imposing nonillusory obligations on the State, the agreement's assignment of liability to the State must also be equally valid.

The QSA-JPA contains a provision stating that the "Agreement shall not waive, or be interpreted as waiving, the State of California's sovereign immunity under the Eleventh Amendment or any other provision of the U.S. Constitution in any present or future judicial or administrative proceeding."116 The Agreement also provides that the "State shall defend, indemnify and hold harmless the [water districts which are parties to the agreement], individually or collectively as the case may be, with respect to any liability, requirement, expense, cost or obligation for restoration of the Salton Sea the cost of which exceeds the Salton Sea Restoration Limit."117

It is not clear whether the State's assumption of liability would extend to a claim by a plaintiff who was injured as a result of any party's failure to adequately pursue prescribed mitigation measures. When the first plaintiff steps forward who is damaged by the dust and pollution which will begin emanating from the Sea en masse in 2017, the court will be forced to choose between undermining essential components of the Agreement or allowing suits to progress against water districts which the State has agreed to indemnify. The value of such claims could be enormous.

B. ENVIRONMENTAL IMPACTS

The Salton Sea is facing an environmental crisis which is likely to have serious consequences well beyond its receding shores. There are three major areas of concern: wildlife, air quality, water quality. These risks present serious hazards to both endangered species as well as to human

¹¹⁶ *Id.* at §15.15. ¹¹⁷ *Id.* at § 14.3.

health. Ongoing and potential ecological impacts to the Sea have been well documented.118

Wildlife have been the first casualties of the Sea's decline. By the time the OSA was signed, increased levels of salt in the Sea's water had already caused most fish within the Sea to die off. 119 Tilapia fish have proved more resilient than most other species due to their natural tolerance of very salty water. 120 Even though the tilapia's "greater adaptability has enabled them to dominate and outlast" the other fish species in the Sea, even they will succumb to the increasingly saline water soon after mitigation water stops flowing in 2017. 121

While fish populations in the Sea are already dwindling, the "Sea provides a critically important habitat to a tremendous diversity and abundance of birds", with over 407 species and millions of individual birds using the Sea, often as a critical stop in their migratory routes. 122 Since many of the birds which visit the Sea rely on fish as their primary food source, the declining numbers of fish will pose a serious threat to these bird's use of the Sea as a migratory stop. Within a few years after the mitigation water stops flowing, the Sea will no longer "provide a significant prey base for large-fish eating birds." Other species of birds which feed on small invertebrates will be able to continue using the Sea as long as the invertebrates continue to inhabit the Sea, however "most of the Sea's invertebrate production" will be eliminated within 30 to 40 years after mitigation water stops. 124

¹¹⁸See generally Selenium, arsenic, DDT and other contaminants in four fish species in the Salton Sea, California, their temporal trends, and their potential impact on human consumers and wildlife, Moreau et al., 23 Lake and Reservoir Management 536 (2007), Past and Future of the Salton Sea, Cohen, The World's Water 2008-2009 at 127 (2009), Hazard: The future of the Salton Sea with no restoration Project, Pacific Institute (2005).

¹¹⁹ See Selenium, arsenic, DDT and other contaminants in four fish species in the Salton Sea, California, their temporal trends, and their potential impact on human consumers and wildlife, Moreau et al., 23 Lake and Reservoir Management 536 at 537 (2007) (""Rising salinity caused all these fish species except for tilapia to become extinct in the lake by 2003.").

¹²⁰ Hazard at 26.

121 Id. ("Tilapia will disappear from the Salton Sea within 12 years.").

¹²² Id. at 26. (Citing Shuford et. al., The Salton Sea as critical habitat to migratory and resident waterbirds, Hydrobiologia 473 at 255-274.).

¹²³ Hazard at 29. ¹²⁴ *Id.* at 30.

As the Salton Sea receives less water, it will shrink dramatically in size. After mitigation water stops flowing in 2017, the Sea's surface will drop by approximately 20 feet within a decade. 125 The Sea will recede enough to expose approximately 134 square miles of land that is currently underwater. 126 The QSA will directly cause about half of this reduction, with the remaining reduction due to ongoing hydrological patterns which have reduced naturally occurring inflows to the Sea. 127 As more land is exposed, increasing amounts of airborne particulate matter (PM) will be produced. Some estimates have shown that the Sea could begin producing 43 tons per day of "fugitive windblown dust", with as many as 215 tons per day being produced by 2036. 128 According to the EPA, PM can "get deep into the lungs and cause serious health problems" including "premature death in people with heart or lung disease, nonfatal heart attacks, irregular heartbeat, aggravated asthma, decreased lung function" and "coughing or difficulty breathing." The lands which are likely to be exposed belong predominately to the Imperial Irrigation District as well as the Federal government. 130

C. POTENTIAL LIABILITY

Under the QSA-JPA, "the State is solely responsible for the payment of the costs and liability for Environmental Mitigation Requirements" in excess of the amounts payable by the water districts. ¹³¹ The mitigation requirements were to be finalized in the final Environmental Impact Report/Environmental Impact Statement. ¹³² The liabilities assumed by the

¹²⁵ *Id.* at 8.

¹²⁶ *Id.* at 33.

¹²⁷ *Id*.

¹²⁸ *Id.* at 34.

¹²⁹ United States Environmental Protection Agency, Particulate Matter (PM) Health Effects (2013) *available at* http://www.epa.gov/pm/health.html.

¹³⁰ Hazard at 36.

¹³¹ Quantification Settlement Agreement Joint Powers Authority Creation and Funding Agreement, § 14.2, available at http://www.sdcwa.org/sites/default/files/files/QSA_jpafunding.pdf.

¹³² Specifically, "environmental mitigation requirements' means any measures required as a result of any environmental review process for activities which are part of the project described in the final Environmental Impact Report/Environmental Impact Statement for the Imperial Irrigation District Water Conservation and transfer project

State "in the context of the Environmental Cost Limitation" include "any responsibility or obligation arising out of or related to any claim, demand, cause of action, cost, expense, condition or restriction, and shall include, without limitation, damages, fees, fines, penalties, assessments, permit conditions, litigation cost, attorneys' fees, administrative requirements, inkind contributions, adaptive management requirements, and cost-sharing requirements." The QSA-JPA also provided that "[t]he State shall have the power to sue and be sued in any court of competent jurisdiction." Additionally, the State's obligation "is an unconditional contractual obligation of the State of California, and such obligation is not conditioned upon an appropriation by the Legislature, nor shall the event of nonappropriation be a defense." ¹³⁴

Despite its apparent consent to be sued under the QSA-JPA, the "Agreement shall not waive, or be interpreted as waiving, the State of California's sovereign immunity under the Eleventh Amendment or any other provision of the U.S. Constitution in any present or future judicial or administrative proceeding." ¹³⁵ The QSA and its related agreements purport to impose obligations on the State of California, however, in light of *In re* QSA, it is unclear that the State has any obligations which it must actually fulfill. The QSA-JPA assigns liabilities to the State and indicates that the State may be sued under the Agreement, and yet also preserve's the State's sovereign immunity. Given the conflicting language of the Agreement, and the ambiguous and complex nature of the State's obligations, it seems unlikely, but not impossible, that a hypothetical plaintiff who was injured as

certified by the Imperial Irrigation District on June 28, 2002, as modified and supplemented by the addendum thereto prepared to assess subsequent revisions to the Quantification Settlement Agreement, but excluding measures required to address environmental impacts:

⁽¹⁾ Within the service areas of the Coachella Valley Water District, other than impacts related to the Salton Sea, the San Diego County Water Authority, and the Metropolitan Water District of Southern California.

⁽²⁾ Associated with the All American Canal and the Coachella Canal

Lining Projects, and measures to address socioeconomic impacts." California Senate Bill 654 "Machado" at 91.

133 Id. at § 1.1.

134 Id. at § 9.2.

¹³⁵ *Id. at* § 15.15.

a result of the State's failure to fulfill its mitigation obligations would be able to recover from the State.

IV. CONCLUSION

The QSA was designed as a balanced agreement. It imposed both affirmative obligations as well as ongoing liabilities on the State. The QSA, intentionally or not, was balanced such that restoration and mitigation efforts would minimize the ongoing liability of the State, by dealing with environmental impacts of the water re-allocation in a proactive, forward-looking mitigation plan. The State, however, has been unable or unwilling to act on the expensive Preferred Alternative. *In re QSA* presented the court with two undesirable alternatives. It could have declared the act unconstitutional or otherwise invalid, or it could uphold an imperfect and partially implemented agreement. The court made the only reasonable decision under the circumstances, however, that decision does little to alleviate the dilemma with which California and the Sea now face.

The QSA was drafted to both transfer water within California, and also to protect the various interests that would be affected by that transfer. The agreement was, in essence, a legislative compromise which accounted for various interest groups, which included the interests of large cities like San Diego and Los Angeles, along with farmers and other residents of Imperial Valley. The QSA was also designed to account for the environmental consequences that result from the water transfers, specifically with regard to the Salton Sea.

By holding that key portions of the QSA are valid, and non-illusory, and yet also unenforceable, California's judiciary has allowed its legislature to take the easy way out. The California Supreme Court should have granted review to the *In re Quantification Settlement Agreement Cases*, and held that the QSA was either enforceable or unconstitutional. Instead, the water-transfer provisions of the QSA have been implemented, while the environmental mitigation requirements remain unfulfilled. The Court allowed the legislature and the State to evade their duties to restore and mitigate environmental impacts of water transfers on the Salton Sea.

The agreements and legislation which constitute the QSA represent compromises, or manifestations of consensus amongst competing interests within society. By allowing part of that compromised bargain to go unfulfilled, the judiciary assisted the legislature in abrogating its responsibilities to follow through on their commitments to their constituencies. Without extraordinary human intervention, the Salton Sea will likely become a serious ecological catastrophe.