3rd Civ. No. C064293

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

COORDINATED PROCEEDINGS SPECIAL TITLE (RULE 3.550)

QSA COORDINATED CIVIL CASES

Appeal From Judgment Entered February 11, 2010
Sacramento Superior Court Case No. JCCP 4353
Coordination Trial Judge: The Hon. Roland L. Candee, Dept. 41
(916) 874-5661

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF SAN LUIS REY INDIAN WATER AUTHORITY IN SUPPORT OF APPELLANTS AND AMICUS CURIAE BRIEF OF SAN LUIS REY INDIAN WATER AUTHORITY IN SUPPORT OF APPELLANTS

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February 24, 2011

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, THIRD APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: C064293
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Robert S. Pelcyger, 1335 Marshall Street, Boulder, CO 80302 CA Bar No. 43614	Superior Court Case Number: JCCP 4353
TELEPHONE NO.: 303-449-3263 FAX NO. (Optional): 303-440-0389 E-MAIL ADDRESS (Optional): bob@rspelcyger.com ATTORNEY FOR (Name): San Luis Rey Indian Water Authority	FOR COURT USE ONLY
APPELLANT/PETITIONER: RESPONDENT/REAL PARTY IN INTEREST:	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): San Luis Rey Indian Water Authority

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: February 24, 2011

Robert S. Pelcyger
(TYPE OR PRINT NAME)

▶ Robert S. Pelcyger
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
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APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE VANCE W. RAYE, PRESIDING JUSTICE

INTRODUCTION

Pursuant to Rule 8.200(c) of the California Rules of Court, the San Luis Rey Indian Water Authority ("Indian Water Authority") respectfully requests leave to file the accompanying brief as amicus curiae in this proceeding in support of the Appellants. By Order dated January 12, 2011, the "last appellant's reply brief" was due February 11, 2011. Pursuant to Rule 8.200(c)(1), this Application is timely filed within 14 days of that date.

THE AMICUS CURIAE

I. Amicus Curiae and Its Interest.

Amicus Indian Water Authority is a permanent governmental intertribal entity established pursuant to duly adopted ordinances of the La Jolla, Pala, Pauma, Rincon and San Pasqual Bands of Mission Indians ("Bands"). The establishment of the Indian Water Authority by the Bands was recognized and approved by the United States Congress in Section 107 of the San Luis Rey Indian Water Rights Settlement Act, Title I of Public Law 100-675, 102 Stat. 4000, 4003, enacted on November 17, 1988 (the "Settlement Act") to act of the agent of the Bands in carrying out the terms

of the Settlement Act and in negotiating the settlement agreement required by the Settlement Act.

The Indian Water Authority and the Bands have an interest in this litigation because they are parties to one of the agreements invalidated by the Trial Court – the "Allocation Agreement Among the United States of America, The Metropolitan Water District of Southern California, Coachella Valley Water District, Imperial Irrigation District, San Diego County Water Authority, the La Jolla, Pala, Pauma, Rincon and San Pasqual Bands of Mission Indians, the San Luis Rey River Indian Water Authority, the City of Escondido and Vista Irrigation District" (the "Allocation Agreement"). The Trial Court's invalidation of the Allocation Agreement may significantly burden the implementation of a near-final settlement of over forty years of water rights and related litigation among the Bands, the United States, and Vista Irrigation District ("Vista") and the City of Escondido ("Escondido"), over the limited flows of the San Luis Rey River in northern San Diego County.

II. Statement of How Amicus Curiae's Proposed Brief Will Assist the Court.

The Indian Water Authority and the Bands are parties to the Allocation Agreement, one of the agreements invalidated by the decision of the Superior Court. Owing to their tribal sovereign immunity, however, the Indian Water Authority and the Bands are not parties to the QSA litigation.

The proposed Amicus Brief sets forth the reasons why the Trial Court's decision invaliding the Allocation Agreement should be reversed.

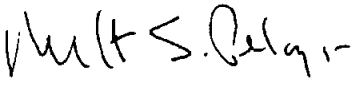
Pursuant to Rule 8.200(c)(3), the undersigned certifies that no party or counsel for a party authored the proposed Amicus Curiae Brief in whole or in part or made a monetary contribution to fund the preparation or submission of the Brief, and that the only such monetary contributions came from the Indian Water Authority.

CONCLUSION

For the foregoing reasons, the Indian Water Authority believes that the proposed Amicus Curiae Brief will assist the Court of Appeals in deciding this matter. Thus, the Indian Water Authority respectfully requests permission to file its Brief submitted in support of the Appellants urging reversal of the judgment invalidating the Allocation Agreement.

Date: February 24, 2011

Respectfully submitted,



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AMICUS CURIAE BRIEF OF
SAN LUIS REY INDIAN WATER AUTHORITY
IN SUPPORT OF APPELLANTS

BACKGROUND

On February 11, 2010, the Trial Court issued its decision invaliding the Joint Powers Authority Agreement for the Quantification Settlement Agreements ("QSA JPA") on the ground that it violates the appropriation clause in Article XVI, section 7 of the California Constitution.[1] The Trial Court also invalidated eleven other separate agreements based on its determination that they were all "interrelated and interdependent" with the QSA JPA.[2]

The San Luis Rey Indian Water Authority ("Indian Water Authority") and the La Jolla, Pala, Pauma, Rincon and San Pasqual Bands of Mission Indians ("Bands") are signatories to one of the agreements

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[1] Unless otherwise indicated, this amicus brief uses defined terms from SDCWA's Table of Defined Terms.

[2] Because the Indian Water Authority, the Bands, and the United States are parties to the Allocation Agreement, but all enjoy sovereign immunity and were not parties in the proceedings below, there is at a minimum a substantial question as to whether the Trial Court's rulings actually invalided the Allocation Agreement in general, and in particular whether those rulings actually invalidated the portions of that agreement directly affecting the Indian Water Authority and the Bands.

For ease of presentation only, however, and without waiving any of its rights to assert that the Trial Court's rulings did not invalidate either the Allocation Agreement or those portions impacting the Bands and the Indian Water Authority, the Indian Water Authority and the Bands use the terms "invalidated," "invalidating," and similar terms in this amicus brief.

invalidated by the Trial Court – the October 10, 2003 "Allocation Agreement Among the United States of America, The Metropolitan Water District of Southern California, Coachella Valley Water District, Imperial Irrigation District, San Diego County Water Authority, the La Jolla, Pala, Pauma, Rincon and San Pasqual Bands of Mission Indians, the San Luis Rey River Indian Water Authority, the City of Escondido and Vista Irrigation District" ("Allocation Agreement").

The Indian Water Authority and the Bands are not parties to the validation action because they have not waived tribal sovereign immunity. (*See* "Notice of Tribal Sovereign Immunity" filed in the Trial Court on January 20, 2004. (AA:5:4:1101-103.); Declaration of Stephanie Zehren-Thomas on Behalf of the San Luis Rey Indian Water Authority and the La Jolla, Pala, Pauma, Rincon and San Pasqual Bands of Mission Indians in Support of Joint Petition for Writ of Supersedeas ("Declaration") at ¶ 3 (Included as Exhibit 8 to Volume 1 of the Declarations in Support of the Petition for Writ of Supersedeas.) As signatories to one of the agreements invalidated in the February 11, 2010 decision, however, the Indian Water Authority and the Bands have a strong interest in the outcome of this appeal. The Trial Court's invalidation of the Allocation Agreement potentially creates confusion and uncertainty regarding the availability of the 16,000 acre-feet per year of water conserved by the lining of the All-American Canal and its Coachella Branch for the Bands and the other San

Luis Rey Settlement Parties and may significantly burden the implementation of a near-final settlement of the four decade long San Luis Rey water rights dispute. For this reason, the Indian Water Authority now submits this amicus brief to focus this Court's attention on the unique interests of the Indian Water Authority and the Bands with respect to the Allocation Agreement.

As set forth below, the Indian Water Authority contends that the Trial Court should not have invalidated the Allocation Agreement, certainly not that portion of the Allocation Agreement that carries out the Congressional directive to provide 16,000 acre-feet of conserved water per year for the benefit of the San Luis Rey Settlement Parties to resolve the San Luis Rey water rights dispute and fulfill the United States' trust obligations to the Bands. The Indian Water Authority therefore urges this Court to reverse the Trial Court's decision to invalidate the Allocation Agreement.

By participating in this appeal as an amicus curiae, the Indian Water Authority does not waive its sovereign immunity or that of the Bands, nor should the Indian Water Authority's participation as an amicus curiae be construed in any way as a consent to the jurisdiction of this Court or the Trial Court.

A. The Origins Of The San Luis Rey River Water Rights Dispute.[3]

The water rights dispute between the Bands on the one hand and the Vista Irrigation District ("Vista") and the City of Escondido ("Escondido") on the other originated 116 years ago as a result of the United States granting the rights to the same flows of the San Luis Rey River twice – first to the Bands, and then to Vista and Escondido. To settle this dispute, in 1988 Congress enacted legislation requiring, among other things, that the United States provide annually and in perpetuity 16,000 acre-feet of supplemental water (*i.e.* water from a source other than the San Luis Rey River) for use by the Bands, the Indian Water Authority, Vista and Escondido.[4] The Allocation Agreement implements that Congressional mandate by allocating to the San Luis Rey Settlement Parties 16,000 acre-feet of supplemental water annually from water conserved by the lining of

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[3] This history of the San Luis Rey River dispute is largely set forth in published decisions, as well as in the VID AOB, pp. 2–14. (See *Escondido Mut. Water Co. v. Fed. Energy Regulatory Comm'n* (9th Cir. 1982) 692 F.2d 1223, *modified on rehearing*, (9th Cir. 1983) 701 F.2d 826, *aff'd in part and rev'd in part sub nom., Escondido Mut. Water Co. v. La Jolla Band of Mission Indians* (1984) 466 U.S. 765, 104 S.Ct. 3562, *on remand, Escondido Mut. Water Co. v. Fed. Energy Regulatory Comm'n* (9th Cir. 1984) 743 F.2d 1321; see also *Rincon Band of Mission Indians v. Escondido Mut. Water Co.* (9th Cir. 1972) 459 F.2d 1082; FERC Opinions, *infra*, fn. 4.)

[4] The Bands, Vista and Escondido, together with the Indian Water Authority, are collectively referred to in this Application for Permission to File Amicus Curiae Brief as the "San Luis Rey Settlement Parties," as they are identified in the Allocation Agreement, or, for short the "Settlement Parties."

portions of two very large earthen water canals. The Settlement Parties' share of the funding for these lining projects came from a $200,000,000 special appropriation of the California Legislature in 1998. The two lining projects were completed in 2006 and 2009.

The San Luis Rey River originates in northern San Diego County, and flows westward terminating at the Pacific Ocean in the City of Oceanside. Beginning in the late 1800s, the United States established reservations for the Bands in or near the San Luis Rey River watershed. In doing so, the United States impliedly reserved for the Bands a quantity of San Luis Rey River water sufficient to satisfy the purposes of the reservations. (*See, e.g., Winters v. United States* (1908) 207 U.S. 564, 28 S. Ct. 207.)

Shortly after these Indian Reservations were established, Escondido's predecessors, relying upon a series of water appropriations, permits and contracts, began diverting San Luis Rey River water for use in the Escondido community. In 1922, relying upon different water appropriations, permits and contracts, Vista's predecessors began storing flood waters in Henshaw Dam (located upstream of the Bands' reservations) for subsequent release into the San Luis Rey River, from which the water was diverted for use in the Escondido and Vista communities. In 1924, the Federal Power Commission, the predecessor of the Federal Energy Regulatory Commission ("FERC"), issued Escondido's

predecessor a license for "Project 176," which authorized Escondido's use of various federal and Indian lands for facilities through which San Luis Rey River flows could be diverted across portions of the La Jolla, Rincon and San Pasqual Indian Reservations for use in the Escondido and Vista service areas.

B. The San Luis Rey River Water Rights Litigation.

In 1969, two of the Bands, Rincon and La Jolla, sued Escondido and Vista claiming that the two agencies' diversion of San Luis Rey River flows deprived the Bands of adequate water on their reservations that are located downstream of the Escondido and Vista point of diversion, and challenging the validity and implementation of the federal permits, contracts and licenses which made those diversions possible. The United States joined that fray in 1972.[5] In 1969, the La Jolla and Rincon Bands also separately raised objections to Escondido's continued operation of Project 176. The Bands, together with the Secretary of the Interior on their behalf, subsequently opposed the relicensing of Project 176 to Escondido, and filed other complaints against both Escondido and Vista.

[5] *Rincon Band v. Escondido Mut. Water Co.*, Civ. No 69-217-S (S.D. Cal. 1969); *United States v. Escondido Mutual Water Company, et al.*, Civ. No. 72-271-S (S.D. Cal. 1972); *Rincon Band v. Vista Irrigation Dist.*, Civ. No. 72-276-S (S.D. Cal. 1972).

After extensive hearings, FERC issued a new license for Project 176 to Escondido and Vista.[6] The Ninth Circuit overturned FERC's reissuance of the license, but the United States Supreme Court subsequently affirmed in part and reversed in part the Ninth Circuit decision, remanding the matter back to FERC for additional proceedings. (See *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians* (1984) 466 U.S. 765, 787-788, 104 S.Ct. 3562; *Escondido Mut. Water Co. v. Fed. Energy Regulatory Comm'n* (9th Cir. 1984) 743 F.2d 1321.)

C. Congressional Enactment Of The San Luis Rey Water Rights Settlement Act.

Following the Supreme Court's remand to FERC of the relicensing of Project 176, the San Luis Rey Settlement Parties and the United States entered into settlement negotiations to resolve the then fifteen-year long litigation. Their negotiations culminated in enactment of the Settlement Act in 1988.[7] The Settlement Act recognized the inadequacy of the San Luis Rey River to supply the needs of the Bands, Escondido and Vista. (§ 103.) To resolve those conflicting and unmet water needs, the Settlement

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[6] *Escondido Mut. Water Co., Project No. 176*, 6 FERC ¶ 61,189 (1979) (FERC Opinion No. 36). The 236-page FERC Opinion resulted from 53 days of hearings, and a record comprising over 50,000 pages, including over 11,000 pages of trial transcripts, and was followed by a 91-page decision on rehearing. (See *Escondido Mut. Water Co., Project No. 176*, 9 FERC ¶ 61,241 (1979) (FERC Opinion No. 36-A).)

[7] San Luis Rey Indian Water Rights Settlement Act, Title I of Public Law 100-675, 102 Stat. 4000, 4003, enacted on November 17, 1988 (the "Settlement Act") (See VID AOB, Exh. A to the RJN).

Act directed the Secretary of the Interior to provide 16,000 acre-feet of non-local water annually for the benefit of the Bands and Vista and Escondido ("Supplemental Water"), and approved the establishment of the Indian Water Authority to administer the Bands' share of the Supplemental Water. (§§ 106, 107.)

Title II of Public Law 100-675, 102 Stat. 4005, recognized that a significant quantity of the Colorado River water conveyed through the federally-owned All-American Canal and its Coachella Branch was being lost by seepage and that such losses could be reduced or eliminated by lining the canals. (*Id.* at § 201.) Title II authorized the Secretary of the Interior to provide for the lining of the All-American Canal and its Coachella Branch (the "Canal Lining Projects"), with funding for the project to be provided by parties other than the United States. (*Id.* at § 203.) The conserved water was to be provided to meet the growing needs of California consumers, as well as to settle the Bands' dispute with Vista and Escondido. (*Id.* at §§ 106, 202, 204.) The Canal Lining Projects lay dormant for many years owing in part to the requirement that the projects be funded by entities other than the United States. (*Id.* at § 203.)

D. The California Legislature Funds The Canal Lining Projects, Enabling Supplemental Water To Be Provided To The San Luis Rey Settlement Parties.

In 1998, as part of the California Plan, the California Legislature enacted the Colorado River Management Program, California Water Code

§§12560-12565 (the "CRMP"). The CRMP appropriated up to $200,000,000 to fund the Canal Lining Projects that had been authorized by Congress in Title II of Public Law 100-675.

The CRMP recognized that there were competing demands for the water conserved by the Canal Lining Projects. The CRMP therefore provided that the availability of the $200,000,000 appropriated by the California Legislature was contingent upon the potential users of the conserved water reaching agreement on how that water would be allocated. The CRMP also provided that the parties to the SLR Water Rights Litigation other than the United States (referred to in the CRMP as the "San Luis Rey settlement parties") were necessary parties to the agreement to allocate the conserved water among water users that was required to obtain the $200,000,000 to construct the Canal Lining Projects. Specifically, Section 12562 of the CRMP states:

> Allocation of water conserved from the canal lining projects to the Metropolitan Water District of Southern California [MWD], shall be consistent with federal law and shall be determined by an agreement among the Metropolitan Water District of Southern California, the Imperial Irrigation District, the Palo Verde Irrigation District, the Coachella Valley Water District, and the San Luis Rey settlement parties, reached after consultation with the [California] director [of Water Resources] and the United States Secretary of the Interior.

Thus, the CRMP designates the San Luis Rey settlement parties, including the Bands and the Indian Water Authority, as intended

beneficiaries of the $200,000,000 appropriated for the construction of the Canal Lining Projects. The San Luis Rey settlement parties, including the Bands and the Indian Water Authority, were therefore necessary parties to the Allocation Agreement that was mandated by the CRMP as a pre-condition to use of the $200,000,000 appropriated by the California Legislature for the Canal Lining Projects.

E. The Packard Amendment Prescribes The Source From Which The Supplemental Water Would Come.

Although the Settlement Act directed the Secretary of the Interior to provide 16,000 acre-feet of Supplemental Water annually to the San Luis Rey Settlement Parties, the source of such water was not definitively determined until 2000 when Congress enacted what is commonly referred to as the Packard Amendment. (The Act of October 27, 2000, Pub. L. 106-377, Appendix B, § 211, 114 Stat. 1441A-70 ("Packard Amendment").)[8] The Packard Amendment ensured as a matter of federal law that the Supplemental Water was to come from water conserved by the Canal Lining Projects, and directed that the Secretary of the Interior provide for the delivery of that water annually and permanently to the San Luis Rey Settlement Parties. The San Luis Rey Settlement Parties were therefore intended beneficiaries of the actions to be taken by the United States to

[8] A copy of the Packard Amendment was provided to this Court as Exhibit B to the Request for Judicial Notice filed by Vista and Escondido concurrently with those Appellants' Opening Brief.

implement the Canal Lining Projects. The provision of such water by the federal government to the San Luis Rey Settlement Parties was directed to occur "[n]otwithstanding any other provision of law." (*Ibid.*)

F. The Allocation Agreement And The Lining Of The All-American Canal.

In October 2003, the United States, the Bands, the Indian Water Authority, Escondido and Vista, along with Imperial Irrigation District ("IID"), Coachella Valley Water District ("CVWD"), Metropolitan Water District ("MWD"), and the San Diego County Water Authority ("SDCWA"), entered into the Allocation Agreement to provide fro the allocation of the Supplemental Water. In accordance with the Settlement Act, as amended by the Packard Amendment, the Allocation Agreement provides that 17% of the water conserved by the lining project (up to a maximum of 16,000 acre-feet annually) will be furnished for the benefit of the San Luis Rey Settlement Parties. (AA:1:1:00045, 00062-00068.) Although the Allocation Agreement was entered into at the same time that various parties (not including the United States, the Bands, the Indian Water Authority, Escondido or Vista) executed the QSA JPA and other agreements, as further detailed below, the language of the Allocation Agreement makes clear that it is ***not*** dependent upon the QSA JPA or any other QSA-related agreement which relied upon the QSA JPA for funding. Indeed, Article 28 of the Allocation Agreement expressly states that the

rights and responsibilities of the United States and the San Luis Rey Settlement Parties "are as set forth in the Allocation Agreement and ***are not affected by the Quantification Settlement Agreement.***" (AA:1:1:00103, emphasis added.)

Final designs for the Canal Lining Projects were initiated in 2004. Financing and construction agreements were executed in 2006. Supplemental Water first became available for delivery in December 2006 following completion of the lining project for the Coachella Branch of the All-American Canal.

Shortly after the Canal Lining Projects commenced, a Mexican community group and two American environmental groups sued to enjoin construction of the All-American Canal Lining Project, claiming that it would prevent seepage of canal water to a groundwater basin in Mexico and that it violated the federal Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, and other laws. (*Consejo De Desarrollo Economico De Mexicali, A.C. v. United States* (9th Cir. 2007) 482 F.3d 1157, 1165-1166 ("*Consejo*").) The district court dismissed the action, and the *Consejo* plaintiffs appealed. After the Ninth Circuit heard oral argument on the merits of the appeal,

Congress enacted Section 395 of the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922 ("Section 395").[9]

Section 395 supplemented Title II with regard to the All-American Canal Lining Project, specifically referencing the Allocation Agreement. It states (with emphasis added):

> (a) . . . ***Notwithstanding any other provision of law, upon the date of enactment of this Act, the Secretary shall, without delay, carry out the All American Canal Lining Project identified*** – (1) as the preferred alternative in the record of decision for that project, dated July 29, 1994; and (2) ***in the allocation agreement allocating water from the All American Canal Lining Project***, entered into as of October 10, 2003.

After Section 395 was enacted, the Ninth Circuit held a second oral argument in *Consejo* and then issued its decision. In holding that the express language of Section 395 evidenced Congress's to exempt the All-American Canal Lining Project from "any other provision of law," the Court stated:

> ... [W]e must conclude as a matter of statutory construction that [Section 395] renders the challenges to commencement of the [Canal] Lining Project based on NEPA, the Endangered Species Act, the Migratory Bird Treaty Act, and the Settlement Act (contained in Counts Five through Eight of the amended complaint) moot. Each of those claims, if relief were to be granted, would delay commencement of the [All-American Canal] Lining Project.

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[9] A copy of Section 395 was provided to this Court as Exhibit C to the Request for Judicial Notice filed by VID and Escondido concurrently with those Appellants' Opening Brief.

> Congress has instructed otherwise, "notwithstanding any other provision of law." Therefore, we must construe [Section 395] as exempting the [All-American Canal] Lining Project from the identified statutory claims.

(*Consejo*, *supra*, 482 F.3d at 1167-1169.)[10]

Starting in December 2006, the United States delivered to MWD for the benefit of the Indian Water Authority all available Supplemental Water dedicated to the San Luis Rey Indian water rights settlement.[11] The initial annual deliveries were 4,500 acre-feet annually; the deliveries ultimately reached the entire 16,000 acre-feet annually in 2010.

While the Canal Lining Projects were under construction, the San Luis Rey Settlement Parties moved forward with drafting a comprehensive

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[10] At approximately the same time that the *Consejo* lawsuit was filed, Category 2 party and Respondent in this Validation Action, Protect Our Water and Environmental Rights ("POWER") filed a state court action seeking to block the All-American Canal Lining Project. The trial court dismissed POWER's suit because it found that the United States was an indispensable party to the action that was not and could not be joined owing to its sovereign immunity. The First District California Court of Appeal affirmed in an unpublished opinion, *Protect Our Water & Envtl. Rights v. Imperial Irrigation Dist.* (Nov. 28, 2008, A116205 and A119689) [nonpub. opn.], reasoning that the United States' ownership of the All-American Canal, its role as a signatory to the agreements governing construction and allocation of the conserved water, its interest in carrying out the project without delay and its special trust responsibility to the Bands to deliver the 16,000 acre-feet of Supplemental Water annually rendered the United States indispensable to POWER's challenge to the All-American Canal Lining Project and its associated agreements. (Supp.AA:197:1884:49160-49167.)

[11] Article 7 of the Allocation Agreement provides that the portion of the Supplemental Water that is dedicated to the San Luis Rey settlement would be delivered to MWD until the San Luis Rey settlement takes effect.

agreement that would resolve their longstanding water rights dispute. As of the date of the filing of this Application for Permission to file Amicus Curiae Brief, significant progress has been made toward reaching a settlement among the negotiators. Upon finalization and execution of that comprehensive settlement agreement and dismissal of the remaining water rights litigation, the Supplemental Water that the Bands, Escondido and Vista desperately need will be delivered to them pursuant to the Settlement Act and in accordance with the terms of the Allocation Agreement.

If upheld, the Trial Court's invalidation of the Allocation Agreement could potentially create confusion and uncertainty regarding the availability of the 16,000 acre-feet of Supplemental Water to the San Luis Rey Settlement Parties. It may also significantly burden the implementation of a near-final settlement of the four-decade long water rights dispute over San Luis Rey River water pursuant to the directives of Congress as manifested in the Settlement Act, as amended by the Packard Amendment, and Section 395.

STATEMENT OF THE CASE

On November 12, 2003, IID filed its Validation Complaint seeking to validate thirteen contracts, including the Allocation Agreement, designated in the Validation Complaint as "Exhibit B." (AA:1:1:00001-01079). IID filed its Second Amended Validation Complaint on November 23, 2004. (AA:5:19:01256-01290.)

The Indian Water Authority and the Bands are parties to only one of the thirteen contracts sought to be validated by IID's Validation Complaint—the Allocation Agreement. Because their interests in the proceeding were limited and no specific claims in the Validation Complaint challenged the validity of the Allocation Agreement itself, and also owing to their tribal sovereign immunity, the Indian Water Authority and the Bands did not participate in the litigation before the Trial Court.

On January 20, 2004, the Bands and the Indian Water Authority filed a "Notice of Tribal Sovereign Immunity," in which the Bands and the Indian Water Authority stated that they "have not waived and retain their sovereign immunity from suit in this validation action," and that they "do not in any way consent to the jurisdiction of this court." (AA:5:4:1101-103.)

The Trial Court issued its Tentative Decision on December 10, 2009. (AA:46:267:12339-12365.) Therein, after declaring the QSA JPA invalid, the Trial Judge proceeded to find "the remaining 11 contracts [(including the Allocation Agreement)] to be interdependent with the QSA JPA to the point of requiring that all 11 remaining contracts must also be invalidated." (AA:46:267:12358-12359.)[12] Escondido and Vista filed Written

[12] The Trial Court ruled that the thirteenth contract, an Agreement to Resolve Salton Sea Flooding Damage Issues Between IID and CVWD, designated as Contract M, was not subject to being validated in the proceeding. (AA:47:292:12720-12721.)

Comments on the Trial Court's Tentative Ruling on December 16, 2009 with respect to the Trial Court's Tentative Decision as to the Allocation Agreement, pointing out that:

1. In its Tentative Decision the Trial Court did not identify any specific issue that would prevent it from upholding the validity of the Allocation Agreement;
2. The Trial Court did not mention or discuss Article 28 or any other provisions of the Allocation Agreement that stand on their own without regard to the QSA JPA;
3. The Trial Court did not mention or discuss the Settlement Act, as amended by the Packard Amendment, which directs the Secretary of the Interior to furnish the 16,000 acre-feet per year of water conserved by the Canal Lining Projects for the San Luis Rey settlement;
4. The Trial Court did not mention or discuss the statute enacted by Congress in 2006, Section 395, which directed the Secretary of the Interior to carry out the All-American Canal Lining Project without delay, notwithstanding any other provision of law and in accordance with the Allocation Agreement, or the holding of the Ninth Circuit Court of Appeals in *Consejo*, *supra*, 482 F.3d 1157, which gave effect to Section 395; and

5. The Trial Court did not mention that the United States – a principal party to the Allocation Agreement – has sovereign immunity and has not consented to the suit or the absence of the Bands, who are also parties to the Allocation Agreement and are immune from suit by virtue of their sovereignty.

(AA:46:271:12385-12398.) At the hearing on the Trial Court's Tentative Decision held on December 17, 2009, Escondido's and Vista's arguments were presented, and SDCWA joined those arguments. (Reporter's Transcript re Hearing on the Trial Court's Tentative Ruling, at AA:46:277:12463-12526.)

In its Final Statement of Decision, issued January 13, 2010 (AA:47:292:12706-12757), the Trial Court quoted Article 28 of the Allocation Agreement, which states that the rights and obligations of the parties regarding the subject matter of the Allocation Agreement are governed by it and ***not*** the Quantification Settlement Agreement. The Trial Court did not discuss or analyze Article 28 or any other provision of the Allocation Agreement, except in a footnote stating that "The Secretary and the San Luis Rey Settlement Parties are not the only parties to the Allocation Agreement. MWD, CVWD, IID, SDCWA, the City of Escondido and Vista Irrigation District are also parties to the Allocation

Agreement." (AA:47:292:12750.)[13] The Trial Court also rejected Escondido's and Vista's argument that the court lacks jurisdiction to invalidate the Allocation Agreement because of Section 395 and *Consejo*. (*Id.*) On February 11, 2010, the Trial Court issued its final Judgment concluding that Contracts A through L (including the Allocation Agreement, designated as Contract B) were "void and invalid." (AA:48:312:13071-13077.)

On February 19, 2010, Escondido and Vista joined SDCWA, MWD and CVWD in filing a Joint Notice of Appeal of the Judgment. (AA:48:314:13093-13112.) Those parties jointly filed a Joint Petition on March 1, 2010, for a Writ of Supersedeas (or Related Relief) Seeking Stay of Judgment Invalidating Certain QSA Agreements Pending Appeal ("Petition for Writ of Supersedeas"). Attached to the Writ of Supersedeas Petition were numerous declarations, including the Declaration on behalf of the Indian Water Authority and the Bands, as well as a declaration from Escondido's Special Counsel and from Vista's General Manager. Those declarations describe the crucial role that the Allocation Agreement plays in the near-final settlement of the San Luis Rey River water rights dispute, and the deleterious effect that the Allocation Agreement's invalidation could potentially have on that near-final settlement, and on Escondido,

[13] As noted by Vista and Escondido, the Trial Court apparently failed to recognize that Escondido and Vista are included among the "San Luis Rey

Vista and the Bands. (See Declarations of Donald R. Lincoln, Roy Coox and Stephanie Zehren-Thomas, included as Exhibits 6, 7 and 8, respectively, to Volume 1 of the Declarations in Support of the Petition for Writ of Supersedeas, filed herein.)

On March 9, 2010, this Court issued an Order granting a temporary stay of the judgment pending its review of the Petition for Writ of Supersedeas. On March 30, 2010, the State of California, acting through the California Department of Fish and Game and the California Department of Water Resources, filed its own Petition for Writ of Supersedeas. This Court granted the Writ of Supersedeas on May 7, 2010, staying enforcement of the Trial Court Judgment pending resolution of this appeal.

ARGUMENT

I. THE TRIAL COURT ERRED IN INVALIDATING THE ALLOCATION AGREEMENT, CERTAINLY AND AT A MINIMUM WITH RESPECT TO THE PORTION OF THE ALLOCATION AGREEMENT THAT CARRIES OUT THE CONGRESSIONAL DIRECTIVE TO PROVIDE 16,000 ACRE-FEET PER YEAR OF CONSERVED WATER TO THE SAN LUIS REY SETTLEMENT PARTIES TO RESOLVE THE SAN LUIS REY WATER RIGHTS DISPUTE.

Escondido and Vista have filed briefs seeking reversal of the Trial Court's invalidation of the Allocation Agreement. The Indian Water Authority supports the arguments advanced by Vista and Escondido in those briefs. In addition, the Indian Water Authority supports the

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Settlement Parties." (VID AOB, p. 28.)

arguments made by the SDCWA, MWD, and CVWD against the Trial Court's invalidation of the Allocation Agreement and the arguments that the United States, the Indian Water Authority and the Bands are necessary and indispensable parties that cannot be joined owing to their sovereign immunity. (SDCWA AOB, pp. 4, 84–85, 88–118, 127–142; SDCWA ARB, pp. 50, 53–55, 88–126, 135–144.).

Amicus Curiae Indian Water Authority wishes to focus attention on the specific provisions of the Allocation Agreement that carry out the Congressional directive to provide 16,000 acre-feet per year of conserved water to the San Luis Rey Settlement Parties to resolve the San Luis Rey water rights dispute and to explain why these provisions should not be invalidated.[14]

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[14] This is a highly unusual, if not totally unique, situation. A California court is being asked to validate (or invalidate) a contract to which the United States and six Indian sovereigns are parties. But neither the United States nor any of the other six sovereigns are parties to the validation action and all are immune from suit. Further, there are no defects in the contract at issue, which carries out Congressional directives to provide desperately needed water for a Congressionally authorized Indian water rights settlement.

Under these circumstances, the Indian Water Authority suggests several possible outcomes. The Allocation Agreement could be validated on the grounds that it has no defects and is not interrelated or interdependent with the QSA JPA. The validity of the Allocation Agreement also could be dismissed from the action due to the absence of indispensable parties or pursuant to the obligation of state judges under the United States Constitution to carry out "the supreme law of the land." (U.S. Const., art. VI, cl. 2.)

As suggested in the text, partial validation (or invalidation) is also at

A. The Provisions Of The Allocation Agreement Pertaining To The Allocation Of Water To The San Luis Rey Settlement Parties Are Entirely Independent Of And Separate From The QSA JPA.

As noted by Vista and Escondido (VID AOB, p. 20), the Trial Court's sole basis for invalidating the Allocation Agreement was its statement that it is "interrelated and interdependent" with the QSA JPA, an agreement which the Trial Court held violated the appropriation clause in Article XVI, section 7 of the California Constitution. The Trial Court did not describe the nature of any such interrelationship or interdependence with the QSA JPA, or identify any defect in the substance of the Allocation Agreement itself, or in the procedures surrounding its approval by any of the parties to it. As more fully described by Vista and Escondido (VID AOB, pp. 20–30), however, the Allocation Agreement is entirely independent of and separate from the QSA JPA. The purpose, terms and funding mechanisms of the Allocation Agreement demonstrate that the Allocation Agreement is neither interrelated nor interdependent with the QSA JPA. This is particularly true with respect the provisions of the

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leaset theoretically possible. Attorneys for the Indian Water Authority are not aware of any case law on the question of whether a contract can be partially validated or invalidated. If this Court concludes that the only outcomes of a validation action are complete validations or invalidations, the Indian Water Authority supports either complete validation or dismissal of the action to validate the Allocation Agreement. Put another way, the Indian Water Authority supports any outcome that would not impose a burden on the implementation of the near-final San Luis Rey settlement.

Allocation Agreement that allocate conserved water for the benefit of the San Luis Rey Settlement Parties.

Article 28 of the Allocation Agreement expressly and unequivocally states that the provisions of the Allocation Agreement that provide for the Settlement Parties' use and benefit of the 16,000 acre-feet per year of the conserved water are not affected by the QSA Agreements, including the QSA JPA:

> Article 28
> Interrelationship With Existing Agreements
> Existing contracts and agreements entered into by the Secretary [of the Interior] for the delivery of Colorado River water shall remain in full force and effect in accordance with their terms and, with this Allocation Agreement, shall govern the delivery and use of Colorado River water allocated as a result of the Projects. Neither the Secretary nor the San Luis Rey Settlement Parties are party to the Quantification Settlement Agreement, and ***the rights and responsibilities of the Secretary and the San Luis Rey Settlement Parties with respect to the allocation of water conserved by the All American Canal Lining Project and the Coachella Canal Lining Project are as set forth in this Allocation Agreement and are not affected by the Quantification Settlement Agreement.***

(AA:1:1:00102-00103, emphasis added.)

Article 28 therefore makes clear that United States, Escondido, Vista, the Bands and the Indian Water Authority are not parties, individually or collectively, to the QSA. Article 28 also evidences the understanding and intention of ***all*** the parties to the Allocation Agreement

that the rights and responsibilities of the United States, Escondido, Vista, the Bands, and the Indian Water Authority regarding the allocation of water to be conserved by the Canal Lining Projects for the benefit of the San Luis Rey Settlement Parties are as set forth in the Allocation Agreement, and are in ***no*** way governed or affected by the QSA. Article 28 is effectively a declaration of the independence of the San Luis Rey settlement provisions of the Allocation Agreement from the QSA JPA and the other QSA Agreements.

The funding mechanisms of the Allocation Agreement likewise demonstrate that the San Luis Rey settlement provisions of the Allocation Agreement are separate and distinct from the QSA JPA. The Canal Lining Projects, which provide the water that is the subject of the Allocation Agreement, were ***not*** funded by any mechanism in any of the QSA-related agreements reviewed by the Trial Court. (See VID AOB, p. 22.) Rather, they were primarily funded by separate and independent appropriations of the California Legislature of approximately $255,000,000 for the specific purpose of creating a source of "Supplemental Water" to be apportioned among the San Luis Rey Settlement Parties on the one hand and the SDCWA, MWD, CVWD and IID on the other. (See VID AOB, p. 22; Cal. Water Code §§ 12560, et seq., 79567; *Consejo*, *supra*, 482 F.3d at 1165, 1170; see also Allocation Agreement, ¶¶ 2.6, 2.7, at AA:1:1:00044-00045.) The primary portion, $200,000,000, of those appropriations from the

California Legislature, and its direction to allocate water conserved by the Canal Lining Projects, occurred five years prior to the approval of the QSA JPA. (See VID AOB, p. 22.)[15]

One of the primary bases for the Trial Court's Statement of Decision was that the QSA JPA violates Article XVI, Sections 1 and 7 by creating a debt in excess of the constitutional debt limit. (AA:47:292:12742-12743). Because the Canal Lining Projects, and the funds for necessary environmental mitigation for the Canal Lining Projects, were funded separately (and indeed all the money has already been spent and the Canal Lining Projects have been completed), this constitutional issue is not relevant to the validity of the Allocation Agreement.

Most importantly, the impacts of the Canal Lining Projects and the water transfers contemplated by the Allocation Agreement are mitigated through commitments made in environmental reviews specifically prepared for the project, not through any funding provided for in the QSA JPA. (See VID AOB, p. 22; see e.g., AR3/24/721931/722134 [§ 103(a)(3)]; AR3/35/48/7248, 7251–7258, 7288–7289, 7293–7294, 7296, 7316–7317, 7322–7326, 7341–7344, 7347–7349, 7384–7385; AR3/1/10457/10467, 10492–10493 [§ 1.2(11)(ii)].)

[15] The remaining $193,960,000 of construction costs for the Canal Lining Projects was provided by SDCWA. (See VID AOB, p. 22.)

Because the Allocation Agreement is not interrelated or interdependent with the QSA JPA or the other QSA related agreements (and indeed the Trial Court did not describe the nature of any interrelationship or interdependence with the QSA JPA), the Allocation Agreement – or at least those provisions that implement the Congressional directive to provide 16,000 acre-feet per year of conserved water to the San Luis Rey Settlement Parties –should remain in effect.

B. The Trial Court Did Not Identify Any Defect In The Substance Of The Allocation Agreement Itself, Or In The Specific Provisions That Carry Out The Congressional Directive To Provide 16,000 Acre-Feet Per Year To The San Luis Rey Settlement Parties, Or In The Procedures Surrounding The Approval Of The Allocation Agreement By Any Of Its Signatory Parties That Would Warrant Its Invalidation.

Significantly, the Trial Court did not identify any defect in the substance of the Allocation Agreement itself, or in the procedures surrounding its approval by any of the parties to it. (See VID AOB, pp. 20, 29–30.)

As relates to the interest of the Indian Water Authority and the Bands, the purpose of the Allocation Agreement was to implement the express Congressional directive for the Department of the Interior to furnish 16,000 acre-feet per year of water to the San Luis Rey Settlement Parties in order to carry out the San Luis Rey water rights settlement. The Allocation Agreement states that one of its purposes is "to provide for the

allocation of an amount of Colorado River water" to satisfy the requirements of the Settlement Act and the Packard Amendment and to facilitate a final settlement of the San Luis Rey water rights dispute." *See* Recitals 2.10 and 2.14 of the Allocation Agreement (AA:1:1:00045, 00046.).

Because the Trial Court did not identify any defect in the substance of the Allocation Agreement itself, or in the specific provisions that carry out the congressional directive to provide 16,000 acre-feet per year to the San Luis Rey Settlement Parties, or in the procedures surrounding the approval of the Allocation Agreement by any of the parties to it, the Allocation Agreement – or at least those provisions that implement the Congressional directive to provide 16,000 acre-feet per year of conserved water to the San Luis Rey Settlement Parties – should remain in effect.

C. The Trial Court Erroneously Invalidated The Allocation Agreement In The Absence Of Necessary And Indispensable Parties Who Cannot Be Joined Owing To Their Sovereign Immunity.

1. The Indian Water Authority And The Bands Are Immune From Suit By Virtue Of Their Sovereignty.

The United States, the Bands and the Indian Water Authority cannot be joined in this suit because they each have sovereign immunity. (See SDCWA ARB, pp. 92–95 (Sovereign Immunity Applies to In Rem Proceedings and Cannot Be Waived Under State Law.) Indian tribes have long been recognized as possessing the immunity from suit traditionally

enjoyed by sovereign powers. As with all other aspects of tribal sovereignty, tribal sovereign immunity is subject to the superior and plenary control of Congress. (See *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58, 98 S. Ct. 1670].) Thus, absent a clear and unequivocally expressed waiver by Congress or the tribe, Indian tribes are immune from suit. (*Ibid.*; *Okla. Tax Comm'n v. Potawatomi Tribe* (1991) 498 U.S. 505, 509, 111 S. Ct. 905. *See also Imperial Granite Co. v. Pala Band of Mission Indians* (9th Cir. 1991) 940 F.2d 1269 (Indian tribes possess immunity from suit for declaratory and injunctive relief as well as for damages.)) "[T]ribal immunity is a matter of federal law and is not subject to diminution by the States." (*Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 756, 118 S.Ct. 1700.)

The United States Supreme Court has held that tribal sovereign immunity extends to off-reservation conduct. (*Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 756, 118 S.Ct. 1700.) The courts of California have likewise recognized that tribal immunity applies on and off-reservation and to tribal governmental and commercial activities. (*Redding Rancheria v. Superior Court* (Hansard) (3d Dist. 2001) 88 Cal. App. 4th 384, 387–88; *see also Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (2d Dist. 1999) 74 Cal. App. 4th 1407, 1419–1420; *Long v. Chemehuevi Indian Reservation* (4th Dist. 1981) 115 Cal. App. 3d 853, 856; see also SDCWA ARB, pp. 92–95)

Like the Bands, the Indian Water Authority is not amenable to the jurisdiction of this court because it has sovereign immunity by virtue of its status as an Indian organization pursuant to Section 107(b) of the Settlement Act.

Congress has not authorized suit against the Indian Water Authority or the Bands in this proceeding, and the Indian Water Authority and the Bands have not consented to suit. Quite the opposite, the Indian Water Authority and the Bands made a Special Appearance during the course of the litigation contesting the Trial Court's jurisdiction over them by asserting their sovereign immunity. (AA:5:4:01101-01109).

2. The Indian Water Authority And The Bands Have Not Waived Their Sovereign Immunity.

Imperial County ("County") asserts that the Bands waived their sovereign immunity by the filing the Notice of Tribal Sovereign Immunity and the filing of the Declaration in support of Appellants' Petition for Writ of Supersedeas by the attorney for the Indian Water Authority. (County's R/XAOB, at pp. 45-47.) This argument has no merit. The County erroneously contends that the Bands "argue[d] the merits in the Superior Court[,]" thereby waiving their sovereign immunity. (County's R/XAOB, at p. 45). The County also mistakenly argues that the Bands should have contested jurisdiction by "filing a motion to quash along with a demurrer or motion to dismiss for lack of jurisdiction." (*Ibid.*)

The cases upon which the County relies for its argument that the Bands made a general appearance and waived their sovereign immunity by "argu[ing] the merits" do not support its position. The County cites three cases for this proposition. Two of those cases do not involve waivers of tribal sovereign immunity, which are governed not by state law but by principles of federal law. Moreover, all three decisions support the Bands' position that their sovereign immunity has not been waived.

In *Sanchez v. Superior Court* (1988) 203 Cal.App.3d 1391, 1397, the court held that the defendant had not made a general appearance by allowing the plaintiff to take his deposition. After the deposition was taken, the defendant argued that the court lacked personal jurisdiction because he had not been served within three years, as required by Cal. Code Civ. Proc. § 583.250. The *Sanchez* court began by looking to the definition of "Appearance" in Cal. Code Civ. Proc. § 1014, which states: "A defendant appears in an action when he answers, demurs, files a notice of motion to strike, files a notice of motion to transfer pursuant to Section 396b, gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." Although the court acknowledged that "this definition is not exclusive," *id.* at 1397, it is clear from the court's description of the types of conduct deemed to confer personal jurisdiction

that the very limited activities of the Indian Water Authority and the Bands in this case do not come close to constituting a general appearance.[16]

In *California Overseas Bank v. French American Banking Corp.* (1984) 154 Cal.App.3d 179, 184, the court found that the defendant had made a general appearance by appearing at a hearing, represented by counsel, and arguing the merits. Nothing like that happened here.

In the only case cited by the County that involved an issue of tribal sovereign immunity, the court held that an Indian tribe had not waived its sovereign immunity by filing a motion to quash based on federal preemption arguments, and its sovereign immunity. (*Great W. Casinos v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407.)

The single statement in the Notice of Tribal Sovereign Immunity of the Bands' support for validating the agreements is purely and simply a description of their position. It is clearly not an argument on the merits. Nor was there an "appearance" at a hearing or otherwise. Likewise, the Declaration filed by the Indian Water Authority's attorney provides factual statements, i.e., evidence, in support of arguments made by the parties seeking the Writ of Supersedeas. No authority cited by the County remotely suggests that the submission of evidence through a declaration by

[16] See also *Creed v. Schultz* (1983) 148 Cal.App.3d 733 (use of court processes to initiate discovery proceedings constituted a general appearance); *Borsford v. Pascoe* (1979) 94 Cal.App.3d 62 (participation in cross-action did not amount to general appearance in the main action).

an attorney, agent or employee of any non-party, no less a sovereign non-party, to an action constitutes a general appearance or subjects that non-party to the court's jurisdiction.

Most importantly, the Indian Water Authority and the Bands have not appeared as parties in this action, and have never compromised their sovereign immunity. Indeed, if the caption was not clear enough, the very first sentence of the "Notice of Tribal Sovereign Immunity" states (with emphasis added):

> PLEASE TAKE NOTICE THAT the La Jolla, Pala, Pauma, Rincon and San Pasqual Bands of Mission Indians ("Tribes") and the San Luis Rey River Indian Water Authority ("Indian Water Authority") ***have not waived and retain their sovereign immunity from suit in this validation action.***

(AA:5:4:1101-103.) In the Notice, the Indian Water Authority and the Bands also expressly denied the trial court's jurisdiction over them:

> The Tribes and the Water Authority make a special appearance to file this notice of tribal sovereign immunity, ***but do not in any way consent to the jurisdiction of this court.***

(Emphasis added). (AA:5:4:1101-103.) Likewise, paragraph 3 of the Declaration states (with emphasis added):

> Neither the Indian Water Authority nor the Bands are parties to this litigation and they ***have not waived their tribal sovereign immunity or consented to be sued.***

Moreover, the County's brief seeks to circumvent the well-established federal law governing waivers of tribal sovereign immunity.

Such waivers cannot be implied, but must be clear and unequivocal. (See *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58, 98 S. Ct. 1670; *Okla. Tax Comm'n v. Potawatomi Tribe* (1991) 498 U.S. 505, 509, 111 S. Ct. 905; and Part I.E., *supra*.). California courts have cited, relied upon and followed federal law in analyzing and applying tribal sovereign immunity.

It is well-settled that a sovereign does not waive its inherent immunity by making a special appearance or by the filing a declaration by an agent or attorney. (*Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 754; *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58–59 [waivers of sovereign immunity "must be unequivocally expressed"]; *see also C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma* (2001) 532 U.S. 411, 421 [waivers of sovereign immunity must be unequivocal and must be construed narrowly]; *Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044, 1047 [waivers of tribal sovereign immunity may not be implied]; *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 1196 *citing People of State of Cal. ex rel. California Dept. of Fish and Game v. Quechan Tribe of Indians* (9th Cir. 1979) 595 F.2d 1153, 1155 [sovereign immunity cannot be waived by implication]; *Krystal Energy Co. v. Navajo Nation* (9th Cir. 2004) 357 F.3d 1055, 1056; *accord Long v. Chemehuevi Indian Reservation* (1981) 115 Cal.App.3d 853, 856; *Great Western Casinos, Inc. v. Morongo Band of Mission Indians*

(1999) 74 Cal.App.4th 1407, 1419, fn. 2 [special appearance to object to jurisdiction and request stay of action did not constitute general appearance and waive claim of sovereign immunity].)

In *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council* (1985) 170 Cal.App.3d 489, 498, the court found that a tribe did not waive sovereign immunity when the tribe's attorney appeared in arbitration proceedings to argue that the tribe had not waived sovereign immunity and that the contracts at issue were unenforceable under federal law. The Ninth Circuit has also emphasized that a waiver must be express; submission of an amicus brief does not constitute an implied waiver of sovereign immunity. (*In re Estate of Ferdinand Marcos Human Rights Litigation* (9th Cir. 1996) 94 F.3d 539, 547.)

In sum, the Notice of Tribal Sovereign Immunity and the filing of a factual declaration by the Indian Water Authority's attorney are far cries from an express waiver of sovereign immunity. Indeed, as quoted above, both documents clearly state that the Indian Water Authority and the Bands were not waiving their sovereign immunity or submitting to the court's jurisdiction.

The County also suggests that the Bands were required to file a motion to quash/dismiss in order to contest jurisdiction. (County's R/XAOB, at p. 45–46.) However, there is simply no support for the idea that the Bands somehow waived their sovereign immunity by not doing so.

Indeed, in *Morongo*, *supra,* 74 Cal.App.4th at 1417, the court expressly acknowledged "the general rule that subject matter jurisdiction can be challenged at any time during the course of an action" and found that "[i]f the lack of subject matter jurisdiction can be raised at any time, it seems to follow [that] no specified procedural vehicle should be required to bring the matter to the court's attention."

Moreover, waivers of tribal sovereign immunity are governed by federal law, not procedural requirements imposed by state law. Accordingly, the Bands were not required to file a motion to quash/dismiss. The Notice of Tribal Sovereign Immunity was an appropriate procedural vehicle to bring the sovereign immunity of the Indian Water Authority and the Bands to the Trial Court's attention.

3. As Signatories To The Allocation Agreement, The Bands And The Indian Water Authority Are Necessary Parties.

The Trial Court invalidated the Allocation Agreement even though seven of its thirteen signatories are not parties to the validation action. It reasoned that because one party in the Validation Action had indicated that the Trial Court ***could validate*** the Allocation Agreement, the Trial Court necessarily had the power to ***invalidate*** it, and should exercise that power. (See VID AOB, 47; AA:47:292:12718, 12750.) But the seven absent signatories to the Allocation Agreement are necessary and indispensable parties that cannot be joined owing to their sovereign immunity. The Trial

Court therefore erred, and this Court should reverse the judgment, at least insofar as it invalidates the provisions of the Allocation Agreement that implement the Congressional mandate to provide 16,000 acre-feet of conserved water for the benefit of the San Luis Rey Settlement Parties.

The Trial Court's ruling invalidating the Allocation Agreement impairs the ability of the United States to implement the Congressional mandate in the Settlement Act, the Packard Amendment and Section 395 to furnish 16,000 acre-feet per year to the San Luis Rey Settlement Parties from water conserved by the Canal Lining Projects. It also impairs the ability of the Indian Water Authority and the Bands to complete the Congressionally authorized settlement of the four-decade long San Luis Rey water rights dispute. Accordingly, the Bands and the Indian Water Authority are "necessary" parties to any litigation challenging the validity of the Allocation Agreement. (See also VID AOB, pp. 42–56; VID ARB, pp. 26–31.)

4. The Invalidation Of The Allocation Agreement Should Not Be Considered In The Absence Of The Indian Water Authority And The Bands.

If necessary parties cannot be joined, a court must determine whether in equity and good conscience, the action should proceed among the parties before it, or should be dismissed. If a court determines the action must be dismissed, the absent party is deemed "indispensable." (See *Tracy Press, Inc. v. Superior Court* (2008) 164 Cal.App.4th 1290, 1297-

1298; *Save Our Bay, Inc. v. San Diego Unified Port Dist.* (1996) 42 Cal.App.4th 686, 692-693.)

Code of Civil Procedure section 389(b) sets forth the factors that must be considered when determining whether a case should be dismissed because a necessary party not joined in the litigation is found to be "indispensable." That provision, and the case law applying it, are fully described in the Vista and Escondido briefs (VID AOB, pp. 43–47; VID ARB, pp. 36–39.) The general rule in litigation challenging a contract is that all parties to the contract are indispensable and, if a party to the contract is not joined in the litigation, the challenge must be dismissed. (*Id.*)

The indispensability of the Indian Water Authority and the Bands is also supported by applying the four factors set forth in Section 389(b). First, a judgment invalidating the Allocation Agreement in its entirety would be prejudicial to the Indian Water Authority and the Bands because it would potentially create confusion and uncertainty regarding the availability of the 16,000 acre-feet per year of conserved water for the San Luis Rey Settlement Parties and would threaten to disrupt completion and implementation of the settlement to resolve the four decade long San Luis Rey water rights dispute. Second, the only way to lessen or avoid that prejudice would be shaping relief, or including protective provisions in the judgment, that would enable the 16,000 acre-feet per year of conserved

water to be allocated, furnished and provided for the benefit of the Indian Water Authority, the Bands and the other San Luis Rey Settlement Parties. In other words, avoiding prejudice necessitates an outcome under which the 16,000 acre-feet per year of the conserved water would continue to be made available for the use and benefit of the Settlement Parties. Third, a judgment rendered in the absence of the Indian Water Authority and the Bands, or the United States, would not be adequate because any judgment invalidating the Allocation Agreement would not be binding on the absent parties. Fourth, excluding the Allocation Agreement from the action to validate the twelve QSA contracts due to the absence of the indispensable parties would not deprive the parties seeking to enforce the appropriation clause in Article XVI, Section 7 of the California Constitution of an adequate remedy because the appropriation clause could be enforced by invalidating the QSA JPA.

Accordingly, the action to invalidate the Allocation Agreement should not proceed due to the absence of the seven indispensable and immune sovereigns.

D. The Practical Implications Of Invalidating The Allocation Agreement Militate Strongly In Favor Of Reversing The Trial Court.

For all of the reasons previously described, the Allocation Agreement is entirely independent, separate and distinct from the QSA JPA and should not have been invalidated by the Trial Court. In addition to

these reasons, invalidating the Allocation Agreement would not serve any useful purposes and would pose immense practical problems.

Title II, § 201 of the Settlement Act acknowledged that a significant quantity of water being delivered into the federally-owned All-American Canal and its Coachella Branch was being lost by seepage from the canals and that such losses could be reduced or eliminated by lining the canals. Section 203 therefore authorized the Canal Lining Projects. The Packard Amendment ensured as a matter of law that the Supplemental Water required under the Settlement Act was to come from the water conserved by the Canal Lining Projects, and that such water would be delivered annually and permanently to the San Luis Rey Settlement Parties. In accord with the Settlement Act and the Packard Amendment, the Allocation Agreement provides that 17% of the water conserved by the Canal Lining Projects (up to a maximum of 16,000 acre-feet per year) will be furnished for the benefit of the San Luis Rey Settlement Parties upon a final settlement of their water rights dispute.

Conserved water, including the component dedicated to the San Luis Rey settlement, first became available for delivery in December 2006 following completion of the lining project for the Coachella Branch of the All-American Canal. The All-American Canal Lining Project was completed in 2009. The money appropriated by the State of California has been spent. All of the conserved water is available.

Invalidating the Allocation Agreement would pose immense practical questions. No one has seriously suggested that the canals should be unlined, that the State of California and/or SDCWA should be reimbursed for their investments in the Canal Lining Projects or that the environmental mitigation should be forsaken.[17] The conserved water will continue to be available and is desperately needed. The Settlement Parties will continue to be entitled to 16,000 acre-feet of Supplemental Water under federal law. Now that the bell has been rung, it cannot be unrung. Invalidating (or partially invalidating) the Allocation Agreement would not serve any useful purpose or achieve any constitutional objective. It would simply create immense practical problems, the unraveling of which could consume enormous additional amounts of time and money. Particularly in the absence of any direct conflict between the Allocation Agreement and the appropriation clause of the California Constitution, the Allocation Agreement should remain in full force and effect.

Moreover, the Canal Lining Projects are consistent with the State of California's policy that waste and the unreasonable use of water should be prevented. Article X, Section 2 of the California Constitution provides:

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[17] It is also extremely important to note that that the conserved water created by the Canal Lining Projects fulfills the vital public policy of the State of California to maximize the beneficial use of water, which is manifested in both Article X, Section 2 of the California Constitution, the Colorado River Management Program (California Water Code §§12560-12565), and Section 100 and 275 of the California Water Code.

"It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

A similar limitation is repeated in Section 100 of the Water Code. *See also* Section 275 of the Water Code (charging the Department of Water Resources and the State Water Resources Control Board with the responsibility of preventing the misuse of water).

E. The Supremacy Clause Of The United States Constitution Requires That State Courts Carry Out The Laws Enacted By Congress.

Under the Supremacy Clause of the United States Constitution, federal laws made in pursuance of the Constitution "shall be the supreme

law of the land." (U.S. Const., art. VI, cl. 2.) Critical to this appeal, the clause goes on to state that "the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." (*Id.*) As the Supreme Court states in *Second Employers' Liability Cases* (1912) 223 U.S. 1, 57, and reiterated in *Testa v. Katt* (1947), 330 U.S. 386, 392:

> The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.

(See also *Smith v. Alum Rock Elementary School Dist.* (1992) 6 Cal.App.4th 1651, 1657–1658, quoting *M'Culloch v. State of Maryland* (1819) 17 U.S. (4 Wheat.) 316, 427, 4 L.Ed. 579, 606–607 ("It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments ....")) [18]

No consideration was given to the Supremacy Clause in the Trial Court's invalidation of the Allocation Agreement which of course includes

[18] It is also worth noting that Article 26 of the Allocation Agreement states that in the case of conflict between Federal and State law, Federal law controls.

provisions that carry out Congress's directive to furnish 16,000 acre-feet per year of conserved water for the San Luis Rey settlement. Whatever interrelationship or interdependence may or may not exist between the QSA JPA and the Allocation Agreement, there is surely nothing in the Allocation Agreement itself that conflicts or is inconsistent with the appropriation clause of the California Constitution.[19] Under these circumstances, the judges of California's courts are obligated under the United States Constitution to honor and give full force and effect to the federal laws directing the Secretary of the Interior to furnish 16,000 acre-feet of water conserved by the Canal Lining Projects for the use and benefit of the San Luis Rey Settlement Parties.

CONCLUSION

The plain language of the Allocation Agreement and its separate funding establish that it is not interrelated or interdependent with the QSA JPA, and therefore should remain in effect, even if the invalidity of the QSA JPA is upheld. In addition, because the Allocation Agreement implements express Congressional policy mandates that must be carried out "notwithstanding any other provision of law" and "without delay," and because seven parties to that agreement that are certainly necessary and

[19] Since there is no claimed conflict or inconsistency between the Allocation Agreement and California law, the Supremacy Clause point raised by the Indian Water Authority does not raise an issue of preemption of state law but rather the obligation of state judges to fulfill their judicial

indispensable but were absent from the litigation owing to their sovereign immunity, the portions of the Allocation Agreement pertaining to the furnishing of conserved water for the benefit of the San Luis Rey Settlement Parties should remain in effect.

For all of the foregoing reasons, Amicus Indian Water Authority respectfully requests that this Court reverse the Judgment of the Trial Court invalidating the Allocation Agreement.

Dated: February 24, 2011

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responsibilities in ways that are consistent with and carry out federal laws.

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief, including footnotes, but not including the caption page, signature block, tables of content and authorities, and this certificate, consists of 10,474 words, as counted by the Microsoft Word word-processing program used to generate the brief.

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PROOF OF SERVICE

[The Mail Service List below includes parties and their addresses as instructed by the Court of Appeal.]

I am employed in the County of Boulder, State of Colorado. I am over the age of 18 and not a party to the within action. My business address is 1335 Marshall Street, Boulder, Colorado 80302.

On February 24, 2011, I served the following document on all parties listed on the Mail Service List:

1. **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF SAN LUIS REY INDIAN WATER AUTHORITY IN SUPPORT OF APPELLANTS AND AMICUS CURIAE BRIEF OF SAN LUIS REY INDIAN WATER AUTHORITY IN SUPPORT OF APPELLANTS.**

by placing true copies thereof enclosed in sealed envelopes as stated on the attached Mail Service List.

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I declare under penalty of perjury under the laws of the State of Colorado that the above is true and correct.

Executed on February 24, 2011.

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