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

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ABSTRACT

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.[1] 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 Sea is on a

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1. *See generally Charting Our Water Future*, 2030 WATER RESOURCES GROUP 6 (2009), *available at* http://www.mckinsey.com/App_Media/Reports/Water/Charting_Our_Water_Future_Exec%20Summary_001.pdf.

> The ever-expanding water demand of the world's growing population and economy, combined with the impacts of climate change, are already making water scarcity a reality in many parts of the world—and with it we are witnessing severe damage to livelihoods, human health, and ecosystems. In just 20 years, this report shows, demand for water will be 40 percent higher than it is today, and more than 50 percent higher in the most rapidly developing countries. Historic rates of supply expansion and efficiency improvement will close only a fraction of this gap. Unless local, national and global communities come together and dramatically improve the way we envision and manage water, there will be many more hungry villages and degraded environments—and economic development itself will be put at risk in many countries.

Id.

2. MICHAEL J. COHEN & KAREN H. HYUN, HAZARD: THE FUTURE OF THE SALTON SEA WITH NO RESTORATION PROJECT 6 tbl.1 (2006), *available at* http://www.pacinst.org/wp-content/uploads/sites/21/2013/02/report15.pdf [hereinafter "HAZARD"].

trajectory that will create significant negative externalities. Likely impacts include increased health problems 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.[3] Each of these potential impact areas will be examined in this paper.

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

[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.

-Judge Ronald Boyd Robie[4]

I. INTRODUCTION

The reduction of Sea water is a deliberate result of an agreement known as the Quantitative Settlement Agreement ("QSA").[5] The QSA requires California agencies to transfer water from the Imperial Irrigation District to urban areas, primarily to San Diego County.[6] In addition to transferring water, the QSA also imposes an "unconditional contractual obligation of the State of California"[7] to pay for "environmental mitigation requirements"[8] 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

4. *In re* Quantification Settlement Agreement Cases, 134 Cal. Rptr. 3d 274, 287 (Cal. Ct. App. 2011).

5. 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 2 (2003), *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 Cnty. of Imperial v. Superior Court*, 61 Cal. Rptr. 3d 145, 153 (Cal. Ct. App. 2007) (discussing "the QSA . . . and the QSA-related agreements").

6. Over a period of 110 years, the QSA calls for a total transfer of 8.5 million acre-feet to San Diego County. *See* SAN DIEGO CNTY. WATER AUTH., QUANTIFICATION SETTLEMENT AGREEMENT FOR THE COLORADO RIVER (2013), *available at* http://www.sdcwa.org/sites/default/files/files/publications/qsa-fs.pdf.

7. QUANTIFICATION SETTLEMENT AGREEMENT JOINT POWERS AUTHORITY CREATION AND FUNDING AGREEMENT 1 (2003), *available at* http://www.sdcwa.org/sites/default/files/files/QSA_jpa-funding.pdf.

8. *Id.* at 11.

resulting from the water transfer agreement would be mitigated, and that the Sea's ecosystem would be restored where harm occurred.[9]

California's obligation to restore the Sea has not yet been met.[10] 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.[11] 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.[12] In December of 2011 a California Court of Appeals decided *In re Quantification Settlement Agreement Cases*,[13] ("*In re QSA*") holding that QSA water transfers may move forward despite the State's inability to comply with its mitigation obligations under the agreement.[14] The California Supreme Court declined to hear the case, in effect finalizing the judgment of the Court of Appeals.[15] The U.S. Supreme Court also denied review of any issues in the matter, ostensibly foreclosing the possibility of any further judicial review of the QSA's validity.[16]

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,

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9. *See* Bill Analysis SB 654, Senate Agricultural & Water Resources Committee, 2003, *available at* http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0651-0700/sb_654_cfa_20030910_120952_sen_comm.html ("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.").

10. The California Legislature "has not yet acted on the preferred alternative" plan for restoration, nor has it "provided a viable funding plan" to restore the Sea. SAN DIEGO CNTY. WATER AUTH., *supra* note 6.

11. 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 its salinity." HAZARD, *supra* note 2, at ii, 6.

12. There is currently only one bill, AB 939, being considered by the California Legislature that 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. *See* Assemb. B. 939, Reg. Sess. (Ca. 2013–14), *available at* http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0901-0950/ab_939_bill_20130708_amended_sen_v94.pdf.

13. 134 Cal. Rptr. 3d 274 (Cal. Ct. App. 2011).

14. *See id.* at 309 (holding that "the Joint Powers Agreement can be read so as not to violate the [California Constitution.]").

15. *See Quantification Settlement Agreement Cases*, No. S199424, 2012 Cal. LEXIS 2522 (Cal. Mar. 14, 2012).

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

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 of California ("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 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 ninety miles to the northeast of San Diego.[17] The Basin sits below sea level and stretches over 8,000 square miles.[18] Before 1905, the Basin intermittently filled when the Colorado River ("the River") changed course,[19] creating an inland body of water known as the Salton Lake.[20] Some scholars believe that the Basin was actually empty the majority of the time,[21] although debate remains about how often the depression was filled.[22] With the intervention of

17. HAZARD, *supra* note 2, at i.

18. *A Brief Description of Its Current Conditions, and Potential Remediation Projects*, SALTON SEA AUTH. (Oct. 3, 1997), http://www.sci.sdsu.edu/salton/Salton%20Sea%20Description.html.

19. *Restoring the Salton Sea*, LEGISLATIVE ANALYST'S OFFICE (Jan. 24, 2008), http://www.lao.ca.gov/2008/rsrc/salton_sea/salton_sea_01-24-08.aspx ("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 generally Salton Sea Geography*, SALTON SEA AUTH. (2003), http://saltonsea.ca.gov/about/geography.htm.

20. GEOLOGY OF THE SALTON TROUGH 7 (David L. Alles ed., 2011), *available at* http://fire.biol.wwu.edu/trent/alles/GeologySaltonTrough.pdf.

21. VICTOR M. PONCE, THE SALTON SEA: AN ASSESSMENT (2005), *available at* 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.").

22. *See* P. Laflin, *The Salton Sea: California's Overlooked Treasure*, PERISCOPE (Coachella Valley Historical Soc'y), 1995, (reprt. 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.").

humans, the desert landscape of the Salton Basin was transformed into what is now California's largest lake.[23]

A. The Sea's Origin

In the 1890s, the city of Imperial, California, sat within the "middle of an enormous desert"[24] known at the time as the Salton Sink or Colorado Desert.[25] 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."[26] Indeed, the "area was a below sea level bed of an ancient lake" laden with "exceedingly rich silt deposited there by the Colorado River."[27] Under 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.[28] 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.[29]

In 1896, a "shrewd and clever" engineer named Charles Rockwood formed the California Development Company ("the Company") in order to begin irrigating what would become the Imperial Valley in Southern California.[30] Lacking capital, Rockwood partnered with George Chaffey, an experienced civil engineer and irrigation expert, who provided $150,000 in start-up capital in exchange for a position as president and chief engineer of the California Development Company.[31] The Company constructed a head gate to divert the Colorado at a point called Pilot Knob near Yuma, Arizona.[32] 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

23. HAZARD, *supra* note 2, at i.

24. Hugo de Vries, *The Imperial Valley in 1904*, 22 J. SAN DIEGO HIST. 1 (1976), *available at* http://www.sandiegohistory.org/journal/76winter/imperial.htm.

25. William O. Hendricks, *Developing San Diego's Desert Empire*, 17 J. SAN DIEGO HIST. 3 (1971), *available at* http://www.sandiegohistory.org/journal/71summer/desert.htm.

26. de Vries, *supra* note 24.

27. Hendricks, *supra* note 25.

28. de Vries, *supra* note 24.

29. *Id.*

30. Laflin, *supra* note 22.

31. *Id. See also* Hendricks, *supra* note 25.

32. Hendricks, *supra* note 25.

> 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.[33]

By 1902, the Company had succeeded in building the Imperial Canal, which diverted massive amounts of water to new farmlands in the Imperial Valley.[34] Between 1902 and 1904, the number of settlers in the Imperial Valley skyrocketed from 2,000 to 10,000.[35] 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.[36] 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.[37] The canal was quickly overloaded, and massive amounts of River water began pouring out onto the farmland and building up in the deepest part of the Salton Basin.[38]

In December of 1906 the River flooded again, destroying homes and farms in the Imperial Valley.[39] The River also washed away the Southern Pacific Railroad's main line from Los Angeles to Yuma.[40] 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 water to its normal course.[41] Although the Railroad eventually stopped the flood of River water, a vast quantity of water remained behind, forming the basis of the modern Salton Sea.

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33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. Robert L. Sperry, *See when the Imperial Valley Fought for its Life*¸ 21 J. SAN DIEGO HIST. 1 (1975), *available at* http://www.sandiegohistory.org/journal/75winter/imperial.htm ("On December 5, the men patrolling the river were surprised and shocked when a great flood came."). *See also* Laflin, *supra* note 22.
40. Laflin, *supra* note 22.
41. *Id. See also* Sperry, *supra* note 39.

B. The Modern Salton Sea

After the Colorado had been returned to its original course, the Sea continued to receive large amounts of the River's water through canals, fields, and drainage ditches.[42] The incoming drainage water has sustained the Sea since its accidental creation over a century ago.[43] Without incoming water, the Sea would completely evaporate within "about a dozen years."[44]

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, endangered species locations and population growth."[45] The driving factors behind this change are "climate change and water allocation for ecosystems."[46] The Sea, along with much of the Imperial Valley and San Diego County, lie in an area that the U.S Army Corps of Engineers has classified as having a substantial potential for a water supply crisis by 2025.[47]

California is the largest user of Colorado River water, and enjoys a base allotment of 4.4 million acre-feet of water per year ("maf/yr").[48] However, "[b]etween 1983 and 1996, California used from 4.2 to 5.2 maf/yr, taking advantage of unused apportionments."[49] 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."[50]

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

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42. HAZARD, *supra* note 2, at 3.

43. *Id.*

44. *Id.*

45. *U.S. Water Demand, Supply, and Allocation: Trends and Outlook*, WATER RES. OUTLOOK (Dec. 22, 2007), *available at* http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/2007-R-03.pdf.

46. *Id.* at ix.

47. *Id.* at 9 fig.2.

48. The 4.4 million acre-feet allotment is based on the Boulder Canyon Project Act of 1928, as well as the related Colorado River Compact of 1922. *See* U.S. Dep't of the Interior Bureau of Reclamation, *The Law of the River*, RECLAMATION, http://www.usbr.gov/lc/region/g1000/lawofrvr.html (last updated Jan. 22, 2014).

49. DALE PONTIUS, COLORADO RIVER BASIN STUDY 27 (1997), *available at* http://repository.unm.edu/bitstream/handle/1928/2782/COLORADO.pdf?sequence=1.

50. *Restoring the Salton Sea*, *supra* note 19; *see also* CAL. DEP'T OF WATER RES., THE CALIFORNIA WATER PLAN UPDATE BULLETIN 160-98 ch. 7, at 56 (1998), *available at* http://www.waterplan.water.ca.gov/docs/previous/b160-98/v2ch7.pdf ("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.").

legal "4.4 million acre-foot entitlement or face an immediate reduction to that level."[51] The Colorado River Board of California quickly set about developing the "4.4 Plan" to reduce water usage in the state to the 4.4 maf/yr entitlement while acknowledging that "Californian's long-standing use of Arizona and Nevada's apportioned, but unused apportionments, as authorized by the Secretary of the Interior, is nearing an end."[52]

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[53]—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."[54] The All-American Canal is an 80-mile long man-made channel that carries water from the Colorado River near Yuma, Arizona, into the Imperial Valley.[55] The Coachella Canal carries water from the All-American Canal into Coachella Valley in southern California.[56] 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.[57]

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51. *Restoring the Salton Sea*, *supra* note 19; *see also Colorado River: California's 4.4 Plan* (Mar. 7, 2000), http://www.slcdocs.com/utilities/NewsEvents/news2000/news03072000.htm ("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 of his term as Secretary.").

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

53. 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. *See generally* Matt Williams, *Judge Upholds 2003 Colorado River Quantification Settlement Agreement*, ASSOCIATION OF CALIFORNIA WATER AGENCIES (June 5, 2013), http://www.acwa.com/news/water-supply-challenges/judge-upholds-2003-colorado-river-quantification-settlement-agreement.

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

55. *All-American Canal History*, IMPERIAL IRRIGATION DIST., http://www.iid.com/index.aspx?page=177 (last visited Jan. 23, 2014).

56. *Coachella Canal Rehabilitation and Betterment*, U.S. DEP'T. OF THE INTERIOR BUREAU OF RECLAMATION, http://www.usbr.gov/projects/Project.jsp?proj_Name=BCP+-+Coachella+Canal+Rehabilitation+and+Betterment (last updated Jan. 30, 2012).

57. HAZARD, *supra* note 2, at 6 tbl.1.

C. The Quantitative Settlement Agreement

By December of 2000, the major water users in southern California came together and created a draft agreement to re-distribute the reduced allocation of River water amongst themselves.[58] These users included the Imperial Irrigation District, The Metropolitan Water District of Southern California, and the Coachella Valley Water District.[59] A complicated series of negotiations took place to determine how the re-allocation would take place:

> [t]he quantification settlement agreement (QSA) 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.[60]

The stated goal of the QSA is 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."[61] After protracted negotiations among the stakeholders, the water districts signed the QSA on October 10, 2003.[62]

On the same day, the State of California[63] entered the Quantification Settlement Agreement Joint Powers Authority Creation and Funding Agreement, also known as "the Joint Powers Agreement" ("JPA").[64] The JPA is one of the agreements related to, and executed in conjunction with,

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58. QUANTIFICATION SETTLEMENT AGREEMENT, DRAFT 12-12-00 1 (2000), *available at* http://www.cvwd.org/news/publicinfo/Quantification_Settlement_Agreement.pdf.

59. *Id.*

60. Cnty. of Imperial v. Superior Court, 61 Cal. Rptr. 3d 145, 151 (Cal. Ct. App. 2007).

61. QUANTIFICATION SETTLEMENT AGREEMENT, *supra* note 58, at 2.

62. *See Cnty. of Imperial*, 61 Cal. Rptr. 3d at 23 ("On October 10, 2003, Imperial, Metropolitan, and Coachella signed the QSA and finalized the QSA-related agreements.").

63. 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 FUNDING AGREEMENT (2003), *available at* http://www.sdcwa.org/sites/default/files/files/QSA_jpa-funding.pdf.

64. *Id.*; *see also In re* Quantification Settlement Agreement Cases, 134 Cal. Rptr. 3d 274, 288 (Cal. Ct. App. 2011).

the QSA.[65] The JPA is an agreement between the State of California and the Coachella Valley Water District, the Imperial Irrigation District and the San Diego County Water Authority.[66]

The JPA includes two key provisions about funding for environmental mitigation costs. In the first provision, the State of California assumes 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.[67]

Next, the State agrees 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.[68]

The JPA also affirmed the parties' understanding that the California legislature had already passed legislation committing the State to pay for environmental mitigation costs.[69] The JPA specifies California Senate Bill 654, commonly referred to as the "Machado" bill[70] as a "mechanism to implement and allocate environmental cost mitigation among" the parties as well as "the State."[71]

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65. *See In re* Quantification Settlement Agreement Cases, 134 Cal. Rptr. 3d 274, 288 (Cal. Ct. App. 2011) (referring to "12 agreements related to the Quantification Settlement Agreement").

66. QUANTIFICATION SETTLEMENT AGREEMENT JOINT POWERS AUTHORITY CREATION AND FUNDING AGREEMENT 1 (2003), *available at* http://www.sdcwa.org/sites/default/files/files/QSA_jpa-funding.pdf.

67. *Id.* § 9.1.

68. *Id.* § 9.2.

69. *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).

70. *See Restoring the Salton Sea*, *supra* note 19 (referring to "SB 654: Chapter 613, Statutes of 2003 (Machado)").

71. *See* S.B. 654, 2003 Leg. (Cal. 2003), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0651-0700/sb_654_cfa_20030910_120952_sen_comm.html.

D. QSA Related Legislation

The QSA integrates four different bills passed by the California Legislature in 2003 and 2004.[72] The four bills are SB 277 ("Ducheny"), SB 317 ("Kuehl I"), SB 1214 ("Kuehl II") and the Machado bill.[73] The four bills are designed as a package to facilitate implementation of various aspects of the QSA.[74]

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,"[75] and it provided for implementation of various QSA water transfers.[76] Provisions of the Ducheny bill outlined restoration objectives of the preferred alternative plan.[77] 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.[78] 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."[79] 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

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72. *See generally Salton Sea Ecosystem Restoration Program*, CAL. DEP'T OF WATER RES., http://www.water.ca.gov/saltonsea/ (last modified Mar. 2, 2014) (referring to "State legislation enacted in 2003 and 2004 (SB 277, SB 317, SB 654 and SB 1214)").

73. *See Restoring the Salton Sea*, *supra* note 19 (discussing "Quantification Settlement Agreement Statutes").

74. *See id.*

75. S.B. 317, 2003 Leg. (Cal. 2003), *available at* http://legix.info/us-ca/statutes;2003;chp0612.

76. *Id.* ("Imperial Irrigation District to transfer up to 800,000 additional acre-feet of conserved water . . . .").

77. *See* S.B. 277, 2003 Leg. (Cal. 2003), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0251-0300/sb_277_bill_20030929_chaptered.html.

78. *See* S.B. 1214, 2003 Leg. (Cal. 2003), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1201-1250/sb_1214_bill_20040921_chaptered.pdf.

79. S.B. 654, 2003 Leg. (Cal. 2003), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0651-0700/sb_654_cfa_20030910_120952_sen_comm.html.

District, the San Diego County Water Authority and the Department of Fish and Game."[80]

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.

E. 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.[81] This "mitigation water" is apportioned to the Sea to help offset the impacts to the Sea's ecology until 2017, with the original rationale that by 2017 "other habitat and air pollution mitigation activities would be substituted."[82]

The 2003 Kuell I bill requires the Secretary of the California Resources Agency to develop a "preferred alternative" plan for restoration of the Sea.[83] In 2007, the Secretary submitted the Salton Sea Ecosystem Restoration Program's Final Programmatic Environmental Impact Report ("Preferred Alternative") to the California Legislature.[84] The Preferred Alternative was

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80. S.B. 654, 2003 Leg. (Cal. 2003), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0651-0700/sb_654_cfa_20030910_120952_sen_comm.html.

81. *Salton Sea Restoration Frequently Asked Questions*, IMPERIAL IRRIGATION DIST., http://www.iid.com/Modules/ShowDocument.aspx?documentid=5155 (last visited Jan. 23, 2014) (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).

82. Joint Petition for Modification of Revised Order WRO 2002-0013 By The Imperial Irrigation District and The San Diego County Water Authority at 1 (2011), *available at* http://www.iid.com/Modules/ShowDocument.aspx?documentid=5071.

83. *See* S.B. 317, 2003 Leg. (Cal. 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.").

84. *Restoring the Salton Sea*, *supra* note 19 ("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

expected to cost a total of approximately 9.2 billion dollars, with the majority of funds to be expended within several decades, and final operations and maintenance taking place until the year 2078.[85] Startup costs for the Preferred Alternative were to be approximately 508 million dollars by 2013, with a much more substantial cost of 5.9 billion dollars for construction to take place between 2014 and 2020.[86]

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 . . . 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.[87]

The Preferred Alternative combined elements from a number of different restoration plans.[88] 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 suffered from a 14.4 billion dollar budget deficit.[89] The Preferred Alternative's hefty price proved prohibitive in light of California's ongoing fiscal crisis, and the legislature has "demonstrated little interest in funding Salton Sea restoration."[90] The Preferred Alternative

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efforts and not abandon the Sea, or the hopes and hard work of the 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* PAC. INST., SALTON SEA COALITION URGES IMMEDIATE ACTION TO SAVE SALTON SEA (2007), *available at* http://www.pacinst.org/press_center/press_releases/20070525.html.

85. CAL. DEP'T OF WATER RES., SALTON SEA ECOSYSTEM RESTORATION FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT REPORT ch. 3, at 27 (2007), *available at* http://www.water.ca.gov/saltonsea/docs/final_eir_05_chapter_3.pdf.

86. *Id.*

87. *Id.* ch. 3, at 10.

88. *Id.* ch. 3, at 2.

89. Michael J. Cohen, *Past and Future of the Saltan Sea*, *in* THE WORLD'S WATER 2008–2009, at 137 (Pac. Inst. for Studies in Dev., Env't, & Sec. ed., 2009), *available at* http://www.worldwater.org/data20082009/WB02.pdf.

90. *Id.*

proved to be a non-starter in the legislature, and the State has yet to take any action to fund or otherwise implement the Preferred Alternative.[91]

Despite the apparent failure of the Preferred Alternative, there is currently one bill in the California state senate, AB 939, dealing with restoration of the Sea.[92] 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.[93] This would transfer restoration responsibility from a state agency to a more local political unit.[94] The bill would also require that the Salton Sea Authority develop a new restoration plan. [95] The bill does not appropriate any additional funding for restoration efforts.[96] California assembly member Manuel Pérez introduced the Bill in 2011, which has stalled in the Senate after failing to pass in the Appropriations Committee.[97]

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.[98] 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.[99] The SCHP is intended to

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91. *See* Joint Petition for Modification of Revised Order WRO 2002-0013 By The Imperial Irrigation District and The San Diego County Water Authority 4 (2011) ("[T]he 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.").

92. *See* S.B. AB-939, 2011 Leg. (Cal. 2011), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB939&search_keywords=.

93. *Id.*

94. *See* S.B. AB-939, 2011 Leg. (Cal. 2011), Bill Analysis, Senate Appropriations Committee (Aug. 16, 2012), *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.").

95. *See* S.B. AB-939, 2011 Leg. (Cal. 2011), *available at* http://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml.

96. *See id.*

97. *See* S.B. AB-939, 2011 Leg. (Cal. 2011), History, *available at* http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml.

98. In addition to efforts by California State agencies, the Torres-Martinez Indian Tribe is pursuing a small-scale habitat project. *See Water Resources - Desert Cahuila Wetland*, TORRES MARTINEZ DESERT CAHUILA INDIANS, http://www.torresmartinez.org/Departments/Wetlands.aspx (last visited Feb. 2, 2014).

99. *Salton Sea Species Conservation Habitat Project*, CAL. DEP'T OF WATER RES., http://www.water.ca.gov/saltonsea/# (last modified Mar. 2, 2014) ("Ponds encompassing about

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.[100]

III. ANALYSIS

In *In re Quantification Settlement Agreement Cases*, 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.[101] The court reviewed decisions stemming from three separate suits, which were coordinated for trial as *In re QSA*.[102] The first action was brought by the Imperial Irrigation District, seeking a judicial determination that the QSA and its related agreements were valid.[103] The second and third actions also challenged the validity of the QSA, and were brought respectively by the County of Imperial and an environmental group, Protect Our Water and Environmental Rights.[104]

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.[105] Article XVI, section 7 of the California Constitution requires that "[m]oney may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn warrant."[106]

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

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100 acres have been constructed as a pilot project near the southern shoreline of the sea to evaluate the feasibility of developing shallow saline habitat to compensate for habitat that is becoming lost at the Salton Sea.").

100. *Salton Sea Species Conservation Habitat Project, Frequently Asked Questions*, CAL. NAT. RES. AGENCY (Aug. 17, 2011), http://www.water.ca.gov/saltonsea/docs/faqs_schproject.pdf.

101. *See In re* Quantification Settlement Agreement Cases, 134 Cal. Rtpr. 3d 274, 288 (Cal. Ct. App. 2011) ("[t]he . . . 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.").

102. *Id.* at 288.

103. *Id.* ("[T]he Irrigation District sought a court determination that the Quantification Settlement Agreement and 12 related agreements were valid.").

104. *Id.*

105. *Id.* at 288.

106. CAL. CONST. art. XVI, § 7.

the agreement were unenforceable: "nothing 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."[107]

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."[108] 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.[109]

The QSA-JPA required that the State would "seek . . . to obtain Legislative appropriation of funds sufficient to satisfy the State obligation"[110] if the environmental mitigation costs exceeded the approximately 30 million dollars in mitigation costs that the water districts were required to pay.[111] 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 a defense."[112] 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 that creates real obligations; the obligations however, will not be enforced by the judiciary.

According to the Restatement of Contracts, "[a]n unenforceable contract is one for the breach of which neither the remedy of damages nor the remedy of specific performance is available."[113] Unenforceable contracts are defined as "those which have some legal consequences but which may not

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107. *Quantification Settlement Agreement Cases*, 134 Cal. Rtpr. 3d at 289.

108. *Id.* at 306.

109. At the time the opinion was authored, the legislature had already been intransigent on the issue of funding mitigation costs for five years since a Preferred Alternative restoration plan was submitted to the legislature in 2006. *See* CAL. DEP'T OF WATER RES., SALTON SEA ECOSYSTEM RESTORATION FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT REPORT 3–19 (2007), *available at* http://www.water.ca.gov/saltonsea/peir/.

110. QUANTIFICATION SETTLEMENT AGREEMENT JOINT POWERS AUTHORITY CREATION AND FUNDING AGREEMENT § 14.2 (2003), *available at* http://www.sdcwa.org/sites/default/files/files/QSA_jpa-funding.pdf.

111. *See id.* § 14.3.

112. *Id.* § 9.2.

113. RESTATEMENT (SECOND) OF CONTRACTS § 8 (1981).

be enforced in an action for damages or specific performance in the face of certain defenses."[114] 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."[115] 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."[116]

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 pay for mitigation and restoration was a real, non-illusory obligation, however, that obligation was not enforceable.[117] Since the court has determined that the QSA is legally effective and binding in imposing non-illusory 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."[118] 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."[119]

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114. CALAMARI AND PERILLO ON CONTRACTS §1.8(b) (6th ed. 2009).

115. *Id.*

116. QUANTIFICATION SETTLEMENT AGREEMENT JOINT POWERS AUTHORITY CREATION AND FUNDING AGREEMENT, *supra* note 110, Recitals G.

117. *In re* Quantification Settlement Agreement Cases, 134 Cal. Rptr. 3d 274, 306 (Cal. Ct. App. 2011).

118. QUANTIFICATION SETTLEMENT AGREEMENT JOINT POWERS AUTHORITY CREATION AND FUNDING AGREEMENT, *supra* note 110, § 15.15.

119. *Id.* § 14.3.

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.

A. Environmental Impacts

The Salton Sea is facing an environmental crisis that is likely to have serious consequences well beyond its receding shores. There are three major areas of concern: wildlife, air quality, and water quality. These risks present serious hazards to both endangered species as well as to human health.[120] Ongoing and potential ecological impacts to the Sea have been well documented.[121]

Wildlife were the first casualties of the Sea's decline. By the time the QSA was signed, increased levels of salt in the Sea's water had already caused most fish within the Sea to die off.[122] Tilapia fish have proved more resilient than most other species due to their natural tolerance of very salty water.[123] 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.[124]

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

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120. *See Particulate Matter (PM) Health Effects*, U.S, ENVTL. PROT. AGENCY, http://www.epa.gov/pm/health.html (last updated Mar. 18, 2013).

121. *See* Marie F. Moreau et al., *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*, 23 LAKE & RESERVOIR MGMT. 536 (2007); Michael J. Cohen, *Past and Future of the Saltan Sea*, *in* THE WORLD'S WATER 2008–2009, at 137 (Pac. Inst. for Studies in Dev., Env't, & Sec. ed., 2009), *available at* http://www.worldwater.org/data20082009/WB02.pdf.

122. Moreau et al., *supra* note 121, at 537 ("Rising salinity caused all these fish species except for tilapia to become extinct in the lake by 2003.").

123. HAZARD, *supra* note 2, at 26.

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

using the Sea, often as a critical stop in their migratory routes.[125] Since many of the birds that visit the Sea rely on fish as their primary food source, the declining numbers of fish will pose a serious threat to these birds' 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."[126] Other species of birds that 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 thirty to forty years after mitigation water stops.[127]

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 twenty feet within a decade.[128] The Sea will recede enough to expose approximately 134 square miles of land that is currently underwater.[129] The QSA will directly cause about half of this reduction, with the remaining reduction due to ongoing hydrological patterns that have reduced naturally occurring inflows to the Sea.[130] As more land is exposed, increasing amounts of airborne particulate matter will be produced. Some estimates have shown that the Sea could begin producing forty-three tons *per day* of "fugitive windblown dust," with as many as 215 tons per day being produced by 2036.[131] According to the EPA, particulate matter 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."[132] The lands that are likely to be exposed belong predominately to the Imperial Irrigation District as well as the federal government.[133]

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125. *Id.* at 26 (citing W. David Shuford et. al., *The Salton Sea as Critical Habitat to Migratory and Resident Waterbirds*, 473 HYDROBIOLOGIA 255, 255–74).

126. HAZARD, *supra* note 2, at 29.

127. *Id.* at 30.

128. *Id.* at 8.

129. *Id.* at 33.

130. *Id.*

131. *Id.* at 34.

132. *Particulate Matter (PM) Health Effects*, *supra* note 120.

133. HAZARD, *supra* note 2, at 36.

B. 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.[134] The mitigation requirements were finalized in the final Environmental Impact Report/Environmental Impact Statement.[135] The liabilities assumed by the 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, in-kind contributions, adaptive management requirements, and cost-sharing requirements."[136] The QSA-JPA also provided that "[t]he State shall have the power to sue and be sued in any court of competent jurisdiction."[137] 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 non-appropriation be a defense."[138]

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."[139] The QSA and its related agreements purport

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134. QUANTIFICATION SETTLEMENT AGREEMENT JOINT POWERS AUTHORITY CREATION AND FUNDING AGREEMENT § 9.2 (2003), *available at* http://www.sdcwa.org/sites/default/files/files/QSA_jpa-funding.pdf.

135. 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 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; and (2) associated with the All American Canal and the Coachella Canal Lining Projects, and measures to address socioeconomic impacts." S.B. 654, 2003 Leg. (Cal. 2003).

136. QUANTIFICATION SETTLEMENT AGREEMENT JOINT POWERS AUTHORITY CREATION AND FUNDING AGREEMENT § 1.1(b) (2003), *available at* http://www.sdcwa.org/sites/default/files/files/QSA_jpa-funding.pdf.

137. *Id.* § 15.13.

138. *Id.* § 9.2.

139. *Id.* § 15.15.

to impose obligations on the State of California; however, in light of *In re QSA*, it is unclear if the State has any obligations that 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 preserves 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 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, is 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 that 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 that 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 the 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 allowed the State's 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 that 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 its commitments to its constituencies. Without extraordinary human intervention, the Salton Sea will likely become a serious ecological catastrophe.