

1 IN THE SAN BERNARDINO COUNTY TRIAL COURT DISTRICT
2 SAN BERNARDINO DIVISION, COUNTY OF SAN BERNARDINO
3 STATE OF CALIFORNIA

4 CENTER FOR BIOLOGICAL
5 DIVERSITY,)

6 PETITIONER,)

7 - vs -)

No. BCVBS 09950

8 COUNTY OF SAN BERNARDINO,)

9 _____
RESPONDENT.)

10
11 REPORTER'S TRANSCRIPT OF ORAL PROCEEDINGS

12 BEFORE THE HON. JOHN P. VANDER FEER, JUDGE

13 DEPARTMENT S-37

14 SAN BERNARDINO, CALIFORNIA

15 APRIL 29, 2011

16
17 APPEARANCES:

18 FOR THE PETITIONER:

19 INGRID BROSTROM
BRENT NEWELL
Attorneys at Law

20
21 FOR THE RESPONDENT:

22 BART BRIZZEE
Attorney at Law

23 FOR REAL PARTY IN INTEREST: JENNIFER GUENTHER
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25 Reported by:

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Official Reporter
CSR No. 4420

KATHY E. SELLERS, CSR

1 SAN BERNARDINO, CALIFORNIA; FRIDAY, APRIL 29, 2011
2 DEPARTMENT NO. S-37 HON. JOHN P. VANDER FEER, JUDGE
3 P.M. SESSION
4

5 THE COURT: Biological Diversity versus County of San
6 Bernardino, et al; BCVBS 09950.

7 Appearances.

8 MR. NEWELL: Brent Newell for the Petitioners, your
9 Honor.

10 MS. BROSTROM: Ingrid Brostrom for Petitioners.

11 MS. GUENTHER: Good morning. Jennifer Guenther
12 appearing on behalf of Real Parties in Interest from Gresham,
13 Savage, Nolan & Tilden.

14 MS. OWENS: Good morning, your Honor. Tracy Owens on
15 behalf of Real Party in Interest Nursery Products.

16 MR. BRIZZEE: Bart Brizzee from County Counsel's
17 Office representing County of San Bernardino.

18 THE COURT: Who has joined in the Real Party in
19 Interest, correct?

20 MR. BRIZZEE: Correct, your Honor.

21 THE COURT: You can be seated, you can stand, it is
22 up to you.

23 All right. This matter is here before the Court for
24 a motion by Petitioner Center for Biological Diversity and
25 HelpHinkley.org, their motion to deny the return to writ by
26 the San Bernardino County, Real Party in Interest being

1 Nursery Products LLC.

2 This matter is staying in front of me. Even though I
3 have changed assignments and are no longer the CEQA judge for
4 the desert, I am the judge that issued the writ and did the
5 other ruling so I will be hearing the return on the writ since
6 it is my writ and the orders that were made.

7 Whether or not there is enforcement, just to clarify
8 where we are procedurally, the issue before the Court is
9 whether the Respondent County has complied with the Court's
10 order and not whether the County has complied with CEQA's like
11 some overall CEQA matter. This is not a petition for Writ of
12 Mandate challenging the adoption of the supplemental EIR or
13 environmental impact report because if it were it would be
14 untimely; this is because of a violation of CEQA that did not
15 violate the Court's order. When I say Court order, I am
16 referring to my Writ of Mandate would be outside the
17 jurisdiction of the Court to adjudicate and conversely a
18 violation of the Writ of Mandate or my order would require
19 objection on return of the writ regardless of whether that
20 violation was also a violation of CEQA.

21 So that is what we are here on, my Writ of Mandate or
22 the Court's Writ of Mandate, the order of the Court.

23 I want to address some of the procedural issues first
24 before we go to the substantive issues. The procedural issue,
25 I will give a tentative decision on that and allow the parties
26 to be heard and go through the substantive issues secondarily.

1 The issue that is being argued procedurally by the
2 Petitioners is whether it was proper for the County to receive
3 by way of adoption of a supplemental EIR. Public Resource
4 Code section 21166 provides that when an EIR has been
5 prepared, a supplemental EIR is not required unless there are
6 substantial changes in the project or circumstances or if new
7 information is available.

8 Also, CEQA guidelines 14 CCR section 15162 provides
9 further guidance as to when a supplemental EIR is required
10 after an EIR has been certified.

11 It is the contention of the Petitioners that the
12 preparation of a supplemental EIR was improper and they cited
13 primarily to Galante Vineyards versus Monterey Peninsula Water
14 Management District (1997) 60 Cal.App.4th 1109 where an EIR
15 was found to be deficient and the trial court ordered the
16 public entity to prepare a supplemental EIR.

17 I am just going to read this into the record. I am
18 going to read the Court of Appeals analysis and this is at
19 pages 1124 to 1125.

20 *"The District contends it should not have been*
21 *directed to prepare a supplemental EIR as a method by which it*
22 *makes its return to writ of mandate. It objects to having its*
23 *discretion restricted to this single method of complying with*
24 *a writ. Citing Guidelines sections 15162 through 15164, it*
25 *maintains it should have the choice preparing the subsequent*
26 *or supplemental EIR, or an addendum to the EIR. There is no*

1 merit to the contention.

2 All three cited guidelines refer to preparation of
3 documents after the certification of an EIR. These documents
4 are prepared only when, subsequent to certification, changed
5 circumstances occur or when new information, which was not
6 known and could not have been known when the original EIR was
7 certified, becomes available. Moreover, an addendum is proper
8 if only minor technical changes or additions are needed to
9 address changes which have occurred subsequent to preparation
10 of a previously certified EIR."

11 I am skipping citations.

12 "In this case, petitioners are challenging the
13 certification of the original EIR. Consequently, since the
14 original EIR is inadequate, procedures for addressing
15 postcertification changed circumstances or new information are
16 inappropriate.

17 The District has no discretion to cure the inadequate
18 EIR by means of a subsequent EIR addendum. The judgment
19 ordering the District to void its certification of the EIR to
20 prepare a supplemental EIR was correct."

21 The reply papers, the Petitioners contend that the
22 reference in Galante Vineyards to a supplemental EIR being
23 correct is not intended to refer to a true supplemental EIR as
24 that term of art is defined in CEQA, but I am not sure they
25 have authority for their position.

26 So I am not sure it is appropriate for this Court to

1 assume that the Court of Appeal in Galante did not mean what
2 it says when it stated that a supplemental EIR was
3 appropriate. As to what was inappropriate, the Court of
4 Appeal only stated that the public entity has no discretion to
5 cure an inadequate EIR by means of a subsequent EIR and
6 addendum. The Court did not state that the preparation of a
7 supplemental EIR was not within the public entity's
8 discretion. Further, the language of Public Resource Code
9 section 21166 and of CEQA guideline 15162 state when a
10 supplemental EIR is not required, but they do not preclude a
11 supplemental EIR, and although it is not directly addressed,
12 in the sense it could be considered dicta.

13 And *San Franciscans for Reasonable Growth Versus City*
14 *and County of San Francisco (1989) 209 Cal.App.3d 1502*, in
15 that case the trial court issued a peremptory writ of mandate
16 directing the public entity to vacate certification of the EIR
17 and to prepare a supplemental EIR.

18 In this case I didn't actually tell people exactly
19 how to do it, I left it to the discretion of the County. In
20 that court, the Court actually did instruct them specifically
21 what to do. In that case the judgment was affirmed without
22 discussion whether the supplemental EIR was the appropriate
23 remedy so the Court just affirmed the judgment without even
24 addressing that.

25 So in this case there is nothing, no authority to
26 indicate that the manner and method the County took in their

1 supplemental EIR is procedurally appropriate under CEQA, the
2 Public Resource Code sections, and under the case law that I
3 have cited.

4 And in other respects it may not even be that much in
5 issue because in this case the County decertified the EIR and
6 approved the EIR and the supplemental EIR simultaneously. If
7 the combined EIR and supplemental EIR were called the EIR,
8 there would be no question but that the County had proceeded
9 properly assuming proper notice of circulation.

10 On that argument the County only circulated the
11 supplemental EIR which Real Party contends was sufficient
12 pursuant to CEQA guidelines and specifically 14 CCR, 15088.5
13 requires regulation -- strike that -- recirculation of an EIR
14 if significant new information is added to the EIR and the
15 subdivision (c) provides that if the revision is limited to a
16 few chapters or portions of the EIR the lead agency need only
17 recirculate the chapters or portions that have been modified.
18 That appears to be what has occurred in this case.

19 The original EIR was properly circulated, defective
20 portions were then revised and recirculated, and the entire
21 EIR, including the material in the supplemental EIR that had
22 been recirculated, was then adopted.

23 The contention of the Petitioners is that the
24 original EIR would had to have been circulated, which is true,
25 but ignores the fact that the original EIR was circulated
26 prior to the initial action.

1 So in the Court's view all portions of the EIR had
2 been properly circulated because all portions of the EIR were
3 adopted by the public entity following the Court's writs. I
4 see no procedural errors in the method by which the County has
5 attempted to comply or indicates it has complied with the
6 Court's order procedurally.

7 So on a procedural ground the Court would deny the
8 motion of the Petitioners to deny the return on the writ on
9 procedural grounds. I will address the substantive grounds
10 subsequently.

11 So I will allow either side to be heard to the
12 procedural grounds for denying the motion to deny the writ.

13 MS. BROSTROM: Thank you, your Honor.

14 The County violated the writ by relying on the
15 supplemental EIR instead of conducting a new analysis not
16 based just solely on case authority.

17 As a preliminary matter, your Honor, this very issue
18 was already considered and decided by the Court when signing
19 the preemptory writ. When we received the decision in May of
20 2008 we were a Party in Interest and Petitioners had
21 fundamental agreement on its interpretation. Again, the
22 decision ordered that the EIR be decertified in whole.

23 So both parties submitted proposed preemptory writs.
24 Petitioners argue that a new analysis was required and
25 included language in its preemptory writ that not only vacated
26 the EIR in whole, but also all of the County's findings and

1 approvals. It also included language that no part of the
2 project was severable.

3 Real Party submitted its own proposed preemptory writ
4 taking out much of that language and only included that the
5 EIR would be vacated. We also included briefing, Petitioners
6 again argued extensively that the decision required a new
7 analysis to be conducted, and Real Party argued that it could
8 retain the old EIR.

9 Your Honor ultimately signed Petitioner's version to
10 have the writ set aside, not only the entire EIR, and ordering
11 it to be immediately vacated upon receipt of the preemptory
12 writ; it also vacated all of the projects County's finding.

13 So the plain language of the writ does not allow the
14 County to just ignore that order and retain the original EIR
15 through the entire time that it processed the supplemental
16 EIR, which is in fact what occurred.

17 Basically, the County simply ignores an order with
18 which it disagreed and followed its own version of the
19 peremptory which was not adopted by this Court.

20 In terms of the Galante Vineyards case, the document
21 that was invalidated by the Court was a supplemental EIR. In
22 fact, the case had been -- I mean the environmental review of
23 the particular project there had been ongoing and so the
24 document that was ordered invalidated was a supplemental EIR.
25 Therefore, when the Court ordered that a supplemental EIR be
26 prepared, it was ordering that a new EIR be prepared.

1 In looking at the Court's analysis it directly
2 supports Petitioner's position. It states that the CEQA
3 guidelines that allow supplemental and subsequent EIRs to be
4 used do not apply where an EIR has been declared invalidated,
5 which is the case here.

6 The difference between a subsequent EIR and a
7 supplemental EIR is very minor. In fact, the two sections are
8 section 15162 and 15163. 15163 which is irrelevant to the
9 supplement to an EIR states that a lead agency may choose to
10 prepare a supplemental EIR if only minor addition or changes
11 would be necessary. This Court already declared that minor
12 addition would not be sufficient invalidating the entire
13 previous EIR. Therefore, there is no logic that would say a
14 supplement to an EIR would be treated differently than a
15 subsequent EIR in the analysis in Galante.

16 The authority that I cited in our brief was CEQA
17 treatise which I understand is not controlling, but the CEQA
18 treatise acknowledged that there was some confusion created by
19 the Court's use of the term supplemental EIR. But it reasoned
20 that looking at the Court's analysis, the only reason that
21 analysis would make sense is if the Court meant to require a
22 supplemental EIR as the new EIR, so Petitioners believe that
23 Galante is directly on point and directly supports Petitioners
24 here. In fact, if Galante, if a subsequent EIR and
25 supplemental EIR are to be treated differently, the Court's
26 analysis just wouldn't hold up.

1 The other procedural matter which I don't believe
2 your Honor addressed -- well, I am sorry, you did address it,
3 but it was the County's vacation of the EIR and then the
4 immediate recertification of the EIR in the same vote.

5 The County, once the County vacated the EIR and
6 wanted to basically use that document to approve the project,
7 all of the notice and comment provisions of CEQA were
8 triggered. The different sections cited by Real Party in
9 their briefs basically stand for the proposition that a
10 supplemental EIR need not comply with all of the notice --
11 sorry, the original EIR does not have to be circulated with
12 the supplemental EIR for the supplement to comply with the
13 CEQA notice and comment requirements. It does not stand for
14 the proposition that the original EIR could be vacated and
15 then recertified without complying with those provisions.

16 What essentially happened was the public was not
17 provided with any opportunity to assess the adequacy of the
18 combined EIR and SEIR to determine the adequacy of the EIR to
19 support the project approval.

20 So for these reasons Petitioners first object to the
21 use of a supplemental EIR instead of redoing the analysis as
22 we believe was required by the peremptory writ. And we also
23 believe that the County violated the very basic CEQA procedure
24 requirements by not allowing the public to comment on the
25 combined adequacy of the two documents.

26 So we would ask that on the procedural grounds that

1 you grant Petitioner's request to reject the preemptory writ
2 until these provisions can be complied with.

3 THE COURT: I am not inclined to change my tentative,
4 but if you wish to put some things on the record you feel are
5 pertinent you may do so now.

6 MR. BRIZZEE: I will submit on the tentative. Thank
7 you, your Honor.

8 MS. GUENTHER: Your Honor, I think you have hit each
9 of the points adequately and I don't believe that Petitioner
10 has raised anything additional in their brief so I will also
11 submit on the tentative.

12 THE COURT: All right. Then the tentative decision
13 on the procedural issue stands and becomes a final decision of
14 the Court on the procedural grounds.

15 Going then to the substantive grounds, the two issues
16 that the Court directed the County to address was to conduct
17 as stated in administrative record volume five page 1406, the
18 Court directed the County to provide additional evidence in
19 the administrative record -- well, this is the assertion.

20 The Court directed the County to provide
21 administrative evidence in the administrative record that an
22 enclosed composting facility was not economically feasible and
23 identify a single water source and conduct a water supply
24 assessment.

25 I am not sure it was the Court's directive to prove
26 to it that the composting facility was not economically

1 infeasible. I believe the directive was to do a proper
2 analysis, economic analysis of the enclosed facility, not to
3 provide evidence that the enclosed facility was infeasible;
4 proper CEQA analysis is supposed to consider the possibility
5 that a project alternative is superior and should be adopted.

6 So in as much as the administrative record is just
7 spent on bolstering the idea that an enclosed facility is not
8 economically feasible, then we have complied with the Court's
9 writ.

10 It should also be noted it also required that part of
11 the writ, preemptory writ of mandate which is listed in the
12 Court file but also in MP 1390, which is volume five of 11 of
13 the administrative record that is included therein includes
14 pursuant to Public Resource Code section 21168.9 (b), this
15 Court retained jurisdiction on this matter by way of return of
16 this preemptory writ of mandate until the Court has determined
17 that the County has complied with the provisions of CEQA.

18 Also line 22 is also to comply with CEQA regarding
19 this project; lines 27 comply with CEQA; and it does state
20 that earlier that found that the enclosed composting facility
21 was not economically feasible is not supported by substantial
22 evidence in the administrative record and it failed to address
23 the water project.

24 And then I say what has to be -- well, I say what has
25 to be done. I didn't actually order a supplemental EIR, but I
26 did decertify or set aside the certification and address that,

1 the compliance with CEQA.

2 One of the CEQA provisions that would have to be
3 complied with, and although there is, which is the key purpose
4 for the process of review and comment on the draft EIR, is to
5 identify ways a project's significant effects might be reduced
6 or avoided. As result, the CEQA guidelines explicitly
7 recognize that comments on a EIR are particularly helpful if
8 they suggest alternatives or mitigating measures that provide
9 better ways to void or mitigate the significant environmental
10 effects.

11 I am quoting from Kostka & Zischke, which is *Practice*
12 *Under the Environmental Quality Act* section 15.41 and so the
13 suggestion is that this should be looked at. I tend to agree
14 with their positions.

15 I cannot say, tell the County how they are supposed
16 to do their job so when I made my writ I said this is the
17 reason why but I did not limit it to finding, show me some,
18 bring me some evidence or substantial materials to show me
19 that it is economically infeasible.

20 So that is part of the basis for the Court's
21 decision, but in this process that has gone on other
22 feasibility methods have been presented to the County
23 regarding this and those are never addressed. So economic
24 feasibility enclosed facility some issues with whether that
25 has been done adequately because it seems like there is just a
26 limitation by the County that well, all they do is address

1 this and not that. So there is a big concern I have whether
2 or not there is any projected alternative process in
3 compliance with CEQA in addition to compliance with the
4 Court's preemptory writ which includes compliance with CEQA.
5 So that is an issue for the Court.

6 A secondary issue is the water supply analysis. I
7 have before me the comments by the Mojave Water Agency
8 commenting that they had looked at two wells within 1.7 miles
9 and 2.2 miles from the location and the time frames indicated
10 and the water levels thereto and I am not going to -- it will
11 take too much time to read this into the record, but some of
12 the highlights are primarily that there is no consultation,
13 there is a declaration submitted afterwards and attached to
14 the opposition papers that while there is some informal
15 contacts over time, different people from Mojave Water Agency,
16 that somehow qualifies as the contact under the water use
17 laws. There is the subsequent issue with the amount of water
18 being used and the amount of water available, Mojave Water
19 Agency's statement about the facility could produce up to
20 three million gallons per year under the applicable superior
21 court order. MWA states this is misleading although not
22 entirely wrong as the Court did not confer a right to pump a
23 minimal producer and direct the Mojave Water Agency to
24 determine the cost of the physical solution attributable to
25 minimal producers.

26 The MWA comments also stated -- and this is all in

1 volume six of the administrative record -- that the Mojave
2 Basin Watermaster has determined the volume, quality of
3 sustainability of the aquifer -- well, has stated that neither
4 it nor the Mojave Basin Watermaster has determined the volume,
5 quality of sustainability of the aquifer or basin in the area
6 of the Hawes Composting Facility. It is showing a decline in
7 the monitoring wells.

8 The MWA also specifically stated there has been no
9 determination of Real Party's right to produce water in the
10 applicable order and asserts that there is no analysis in the
11 water supply assessment to substantiate the claim that the
12 project would only use 1,000 gallons a day and that there is
13 no document or analysis that demonstrates there is over one
14 million anchor feet -- they put AF -- but anchor feet of water
15 capable of production for beneficial use.

16 The analysis that there is sufficient groundwater has
17 been accomplished. It has not been shown to be sustainable by
18 substantial evidence. In fact, it is the opposite. The MWA,
19 who is the Mojave Water Agency, is in charge of that basin,
20 its own analysis is the system is currently in a state of
21 overdraft, and also states the physical solution, which is the
22 part of the judgment, I think it is Judge Kaiser out of
23 Riverside, I believe it is Judge Kaiser or may have been
24 different judges over time, is designed to provide a mechanism
25 to fund the purchase of supplemental water and that there is
26 no document or analysis that demonstrates that there is over

1 one million AF, which are feet of water, capable of production
2 for benefit of use.

3 So I am not sure what the justification is to rely on
4 such conclusion as support for lack of impact by the proposed
5 project.

6 It is the Court's view the proper analysis of the
7 water supply would require the analysis of the actual water
8 conditions and not just arguing the legal rights and
9 entitlement to water that may not even exist. In *Planning &*
10 *Conservation League versus the Department of Water Resources*
11 *(2000) 83 CalApp 4th 892, 914 (footnote 7) the Court stated,*
12 *"Contractors surely cannot be entitled to water nature refuses*
13 *to provide or the body politic refuses to harvest, store, and*
14 *deliver."*

15 The County's assumption that -- when I say judgment I
16 am referring to the judgment over the water rights brought by
17 the Barstow -- assuming all upstream users in the Mojave Water
18 Basin for a judicial determination and adjudication of water
19 rights, but that judgment would actually result in a
20 sustainable ground water supply. It is an assumption that it
21 would be sufficient to support the needs of the project and
22 any other uses in the Centro Sub-Basin and Mojave Basin Area
23 without an analysis of the actual water supply and usage,
24 especially in light of the evidence provided by the Mojave
25 Water Agency that the groundwater is depleting and in
26 overdraft, so that conclusion by the County is not supported

1 in the Court's view by substantial evidence.

2 In reference to the greenhouse gases, I am not, that
3 wasn't part of -- I did not make a finding that that was
4 deficient in the original EIR and whether the supplemental EIR
5 addressed that. I guess that would be a supplement on their
6 part, but whether a defective analysis to the greenhouse gases
7 is an issue for -- well, let me state it this way.

8 The greenhouse gas analysis and the supplemental EIR
9 is irrelevant to my issue because I am dealing with this
10 peremptory writ. I have already indicated the CEQA like a new
11 writ of mandate is not before me. I did not require an
12 additional analysis of greenhouse gases to satisfy the
13 peremptory writ, that was not part of the peremptory writ. I
14 did say it would satisfy the CEQA and whether that additional
15 analysis is sufficient is not relevant for me in determining
16 whether the writ has been satisfied.

17 So basically to summarize I am not sure if the County
18 has conducted an adequate analysis to project alternatives
19 through the CEQA process required by the Court, but I am open
20 to argument on that.

21 What is for me the primary issue is in light of the
22 Mojave Water Agency's comments and the administrative record
23 there is no evidence supporting the finding in the
24 supplemental environmental impact report that there is
25 sustainable groundwater, in referring to administrative record
26 volume seven page 1957, in light of the evidence that the

1 aquifer is in overdraft; that is AR volume six pages 1782 to
2 1784.

3 So I am open to argument on the project alternative
4 issue and then I will hear argument on the water issue. But
5 for me it is significant. That is the easier decision to
6 make; the other one is more argumentative in certain regards
7 because I do see the County's point is your writ says this:
8 There is only two things we have to address in our writ the
9 Court asked us to do. We did what you asked us to do so I do
10 have some concerns that if I ask them to do something I really
11 didn't require them to do under the writ to go through a
12 number of other filter mechanisms and things of that when I
13 said look at enclosed facilities.

14 So I am not really tied to my tentative decision on
15 this issue, but the water issue is really going to have to
16 convince me on that one as far as the Real Party in Interest
17 because I read the entirety of the Mojave Water Agency's
18 comments and it is pretty clear to me their position on that
19 issue.

20 So that being said, the tentative decision then for
21 those reasons would ultimately be to deny the writ or deny the
22 motion for return on the writ by the County and they will have
23 to continue to work on complying with the Court's original
24 writ of mandate.

25 So I will allow the parties to be heard. Who wants
26 to go first? You brought the motion so technically you have

1 the right to go first.

2 MS. BROSTROM: Sure.

3 I'd like to address the alternatives issue primarily.

4 You covered many of the points, but let me summarize
5 the CEQA guidelines section 15088 requires that a County
6 consider and respond to any mitigation or alternatives
7 suggested in public comment unless those measures are facially
8 infeasible.

9 During the public comment period where the public
10 suggested numerous mitigation measures and alternatives,
11 including the use of negative area and static piles which are
12 now required in the San Joaquin Air District, compost covers,
13 which is a type of facility as well as vessel facilities,
14 which is also a type of enclosed compost facility.

15 The County in its responsive comments did not find
16 any of the suggestions to be economically infeasible, instead
17 it refused to analyze them stating that they were not within
18 the scope of the SEIR and the County quoted that the Court
19 merely directed the County to provide additional evidence
20 supporting draft EIRs' conclusion that an enclosed facility is
21 economically infeasible. However, this interpretation has no
22 basis in the writ. In fact as you stated, your Honor, that
23 was the reason why the analysis was rejected but was not a
24 direction from the Court.

25 That interpretation of the preemptory writ moreover
26 is in violation of CEQA. A County may not tailor its analysis

1 to support a predetermined outcome; that was the finding of
2 *City of Santee versus County of San Diego at 214 Cal.App.3d at*
3 *1438*. That type of reasoning also renders the analysis to
4 nothing more than a post hoc rationalization of its previous
5 action; that is also a violation of CEQA.

6 The writ did not merely order the County to shore up
7 its previous findings, it invalidated the entire EIR.
8 Recognizing that the County was required to make some sort of
9 infeasibility finding on the comments, the Real Party in its
10 briefing attempted to make those infeasibility findings.
11 However, the County as lead agency was required to make those
12 findings during the CEQA review process and the Real Party is
13 unable to cure the County's findings in post litigation
14 briefing. Your Honor should reject the post hoc
15 rationalization of the Real Party's Counsel.

16 Since the County failed to consider potential
17 feasible alternatives in mitigation, some of which were
18 actually enclosed facility options that are required in other
19 air districts now, it violated CEQA and the peremptory writ.

20 Thank you.

21 THE COURT: Whose turn?

22 MS. GUENTHER: Thank you, your Honor.

23 There is a reason that the CEQA statutes specifically
24 limit recirculation of a particular item to only that item.
25 It is because Petitioners don't get multiple bites at the
26 apple; that has been determined under both California

1 Environmental Quality Act status but also under case law.

2 In the case of *Pollack versus State Personnel Board*
3 *88 CalApp 4th 1394, 1405 and at 1408*, the Court specifically
4 found that a petitioner cannot readjudicate factual issues
5 that were brought and decided or should have been brought in
6 the original petition.

7 In this particular case we have a facility that has
8 been proposed. The development of 80 acres on 160-acre site
9 for the purposes of composting biosalts, that project has not
10 changed. We went through our original EIR process and during
11 that process petitioner submitted multiple lengthy letters and
12 in those letters they provided specific recommendations for
13 alternatives; in particular, the enclosed facility.

14 When the Court looked at the matter the first time,
15 the Court agreed with Petitioner that the enclosed facility
16 should have been looked at, and in particular it found that
17 the County's reliance upon the final infeasibility of that
18 enclosed facility was not adequately supported. Now
19 petitioners want to come back and they want to not only argue
20 that they should be allowed to present again the enclosed
21 facility, but also multiple other alternatives to the project.
22 They had that opportunity already and they didn't do it then;
23 they don't get to do it now. Otherwise, we are here and we
24 are continuing and continuing and continuing to move forward
25 on this case without ever coming to a resolution.

26 This is further supported in *Federation of Hillside*

1 *and Canyon Associations versus City of Los Angeles* --

2 THE COURT: Let me ask you the question. The Pollack
3 case you cited, it is not cited in your opposition papers, is
4 that correct?

5 MS. GUENTHER: That's correct because I am basing it
6 upon the reply.

7 THE COURT: Can you give me the cite again?

8 MS. GUENTHER: Yes, absolutely.

9 It is 88 CalApp 4 1394 and pages 1405 and 1408.

10 THE COURT: And the case you are citing now?

11 MS. GUENTHER: Is *Federation of Hillside and Canyon*
12 *Associations versus City of Los Angeles* 126 CalApp 41180, page
13 1202.

14 THE COURT: All right. Proceed.

15 MS. GUENTHER: That particular case says res judicata
16 bars the litigation not only of issues that were actually
17 litigated, but actually issues that could have been litigated.

18 They had the opportunity, they did not take advantage
19 of that opportunity, they don't get to continue to try to
20 challenge and bring new issues in this lawsuit.

21 Now, when we do get to the alternatives that were
22 analyzed, the enclosed facility alternative, which is the one
23 alternative that we were required to look at under the
24 judgment, they do do a substantial financial analysis.

25 THE COURT: Just to make sure we are clear, it is the
26 writ, not judgment.

1 MS. GUENTHER: I am sorry, the writ; thank you.

2 They do do a substantial analysis of the financial
3 ability to create such a facility. Now, when you think about
4 who the customers of this facility are, these customers are
5 public agencies. The public agencies dictate the ability of
6 the site to function. What can the public agencies afford to
7 pay for the processing of the waste that is created within
8 their municipalities?

9 Now, that was looked at in the context of what would
10 it cost to develop a covered facility? But that is not the
11 only thing that was looked at by any means and it was found
12 that the cost was absolutely prohibitive for a facility of
13 this size. If you think about it, I believe you are from the
14 High Desert, your Honor, and if you drive down the 15 you can
15 envision the huge Wal-Mart distribution facility that you see
16 from the 15 freeway. That facility covers 30 acres, it is a
17 million square foot facility. What is being proposed here
18 with a covered facility with 80 acres of a fully utilized site
19 within that 80 acres is essentially a 2.7 million square foot
20 facility and all of the impacts that go with that in the
21 construction of that.

22 I mean, just I want to present that visual picture of
23 the size of the facility we are actually talking about: Three
24 times the size of the Apple Valley facility.

25 Now, what they looked at for that is they looked at
26 okay, ignoring just the sheer impacts from construction

1 because you think of construction the paving, the cement, the
2 VOCs from the coatings that would be applied, that alone is
3 astronomical for a 2.5 million square foot building. But you
4 think about the electricity that it would be required to run
5 that facility because we know from the EIR that compost emits
6 VOCs and if it is done correctly those are fairly low, but
7 they are not below what the standard is.

8 Well, these composting facilities to keep those from
9 essentially building up with inside the building itself from
10 creating a situation where you no longer have the anaerobic
11 composting taking place but still enter a state of decay where
12 you have bacteria issues all of which are raised in the EIR at
13 PP 0153, the sheer energy that is required to run the fans and
14 the ventilation systems and the filtering systems if you did
15 it purely on solar would require 216 acres of solar
16 facilities; that is almost 50 some acres larger than the
17 project site itself of which we can only develop 80 acres of.

18 THE COURT: Well, we are really on the economic
19 feasibility issue. Their position is you didn't consider the
20 other cost savings mechanisms, other feasibility issues that
21 they are asserting, you should have also looked at this, not
22 just how extensive the enclosed facility is going to be, look
23 at these as alternatives to what we originally talked about
24 back years ago, a large facility with electricity and
25 purifying the air and capturing all the volatile organic
26 compounds that were being released from the things.

1 MS. GUENTHER: But, your Honor, enclosing the facility
2 in its entirety doesn't lessen the overall VOCs to a level of
3 less than significant and they had the opportunity to raise
4 these other potential alternatives and they didn't; they are
5 now barred under res judicata from continuing to say well, you
6 know what, there is another alternative I forgot to mention
7 earlier so I think you should consider it now. They had that
8 opportunity and they don't point to anywhere in their briefing
9 where they raised it because when I read through their letters
10 I couldn't find it. Now they want to argue these other
11 options because they realize the one option that they did
12 argue that was litigated that was decided by the Court has
13 been addressed and it has been fully addressed.

14 And it has been analyzed for more than simply a
15 financial feasibility mechanism. They looked at it from the
16 VOCs that would be omitted. They found if you didn't put a
17 solar field in, which is technically impossible to do because
18 the acreage simply isn't there on site, but if you did put a
19 solar field in the greenhouse gas emissions actually become a
20 significant and unavoidable impact.

21 That can be found at 1442 of the administrative
22 record, MP 1442.

23 They looked at the alternative they were required to
24 look at; they looked at the alternative that was raised below
25 that is not a second bite of the apple; and they found that it
26 was yes, financially infeasible, but also infeasible for

1 multiple other reasons.

2 THE COURT: I will let you address the water.

3 MS. GUENTHER: Yes, absolutely.

4 Now, your Honor you referenced a letter, a comment
5 letter from the Mojave Water Agency that was issued on
6 September 1st of 2009, it is found at tab 14 -- that is not
7 the right tab, sorry; I gave the citation earlier.

8 THE COURT: It is MP 781.

9 MS. GUENTHER: But, your Honor, that letter wasn't
10 ignored. But before I go specifically to that letter, I do
11 want to address the consultation because petitioners make a
12 very big deal that there was not a formal consultation that
13 they think was required under the statute.

14 Under Water Code section 10910, if you read the
15 section in its entirety, section 10910(b) which states that
16 the City or County shall prepare the water assessment required
17 by this after consulting with any entity serving the domestic
18 water supplies whose service area includes the project site.

19 If you look at what is written before that, it talks
20 very specifically about consultation is only required when a
21 public water system as defined by 10912 does not supply the
22 project.

23 The purpose of the consultation is to ensure that the
24 agency that is involved with the supply of the water is the
25 actual agency supplying the water. It is to ensure that they
26 have the opportunity to comment and they did have the

1 opportunity to comment.

2 Not only do we have a declaration of the consultant
3 and his conversations with the head engineer who would be the
4 person they would need to consult with at the Mojave Water
5 Agency, but we also have the letters from Mojave Water Agency
6 itself. There has been no effort to show that one, a formal
7 consultation such as required under the Fish and Wildlife Code
8 for a section seven permit was necessary here. There is no
9 requirement for notice. There is no requirement here that it
10 even be in writing.

11 We have demonstrated to you that that consultation,
12 those discussions which is what consultations is defined as by
13 Black Dictionary is a discussion on the same subject between
14 two parties occurred.

15 Now, what petitioner hasn't made any effort to show
16 is that there was any item or issue that could not have been
17 raised if that consultation actually didn't take place. We
18 know it took place, we have the declaration saying it took
19 place. The fact that it wasn't a large, normal, written
20 notice consultation isn't required by the code.

21 Now, they haven't mentioned a single issue that the
22 Mojave Water District could not have raised or could not have
23 had addressed because of that alleged omission, which from
24 everything I have seen in the declaration that we provided is
25 not an actual omission.

26 Now, the second thing I would like to point out is

1 the fact that the Mojave Water District did submit a letter
2 and that letter wasn't ignored. That letter was submitted on
3 September 1st of 2009 and it was taken very seriously and on
4 November 3rd, 2009, prior to the planning commission's
5 consideration of any of the environmental documents or the
6 project, it was fully addressed.

7 F you look at M P 1955, 1955 of the administrative
8 record --

9 THE COURT: What page?

10 MS. GUENTHER: MP 1955; I think that is volume 14 A.

11 THE COURT: The page number again?

12 MS. GUENTHER: 1955, it is the first page of section
13 14 A, tab 14 A.

14 THE COURT: I have a yellow sticker on it. Go ahead.
15 That is the same thing that is attached to your identical what
16 you attached to your opposition, correct?

17 MS. GUENTHER: Correct, but what we didn't attach to
18 the opposition in an effort to save you from hundreds of
19 additional pages is all the attachments.

20 This is an addendum that was prepared to the water
21 supply assessment very specifically to address each of the
22 comments raised by the Mojave Water Agency.

23 After receiving the letter if you look on 1956, the
24 next page, it states that they actually went out and -- sorry,
25 let me make sure I have my pages correct. Sorry, 1956 and
26 1957, it describes the condition of the Mojave Water Basin.

1 It references the multiple sources that were cited in
2 determining what the current status of that basin is and it
3 also states that one of the things they did between March 17,
4 2009 and March 20th, 2009, was do on-site boring for the
5 project to determine the depth of the groundwater and the flow
6 of the groundwater. And what they found is that there was
7 sufficient water to meet the requirements of the project.

8 Now, there has been questions raised as to well, how
9 did you come up with a thousand gallons per day? And there
10 has been some assumptions that that number was simply pulled
11 out of thin air, but if you look at page 1956, it says the
12 project was used primarily for dust control, the project will
13 use water primarily for dust control by periodically watering
14 soil and vehicles. The volume of water used is based on the
15 site average and area of disturbance on any particular day
16 with a rate of water application varying with the level of
17 on-site activity. At full operation, about 30 acres will be
18 subject to active equipment usage usually daily. Of the
19 1,000 gallons per day planned usage, about 900 gallons or
20 90 percent will be used for dust suppression. This figure is
21 a cap, it is a cap and the amount used daily will vary.

22 What that means is for dust suppression they are not
23 going to take more than 900 gallons per day, but because it
24 will vary, it will vary depending upon the time of year,
25 depending whether there is rainfall and other things. They go
26 on further to talk about storage of excess water that is not

1 used on any given day. There is a storage tank on-site, the
2 30,000 gal storage tank on-site will contain additional water
3 if any unforeseen circumstances related to dust suppression
4 and unusual conditions.

5 Reading further finally, rain water will be collected
6 in two on-site detention basins and when available collected
7 rain water will be used in lieu of additional water
8 withdrawal.

9 They go in detail by detail how that water is going
10 to be used, how they are going to use additional water, how
11 they will account for any fluctuations in water. It is not a
12 figure taken out of in the air, it is done by very specific
13 calculations based on the square footage and based upon the
14 fact this is not, windrows, composting and windrows is not an
15 unknown factor. In fact, there are only two covered
16 composting facilities in the western United States. Windrows
17 is the most common form of composting bio solids.

18 So they have taken those numbers, they have done the
19 calculations, they have determined water usage that they would
20 need, they have done the drilling, they have done analysis
21 from the various sources of information. In essence, they met
22 each and every one of the requirements that was requested of
23 them in the letter for the Mojave Water Agency and it is very,
24 very notable that the Mojave Water Agency did not submit a
25 follow-up letter saying no, you need to do more. They were
26 silent from that point on, they were a noticed body, but they

1 were silent because they felt that they had been adequately
2 addressed by this addendum. This addendum doesn't stand by
3 its own, it is not a simple four page document, it is multiple
4 additional documents and attachments.

5 Now, in addition to that, other information is also
6 included in the environmental or excuse me in the
7 administrative record and was before the decision making
8 bodies.

9 Now, when you look at the EIR and at the water
10 assessment that is included within the section of the EIR, it
11 very specifically references as a source of much of its
12 information the 2004 regional water management plan. That
13 2004 regional water management plan can be found at MP 3063,
14 and I believe there are two or three volumes that continue
15 thereon. It goes into great detail about the availability of
16 water within the basin, the usage of water within the basin,
17 they planned for the water within these basins, too. Those
18 are not factors that were ignored, those are not factors taken
19 out of a vacuum, these are all statements, they are all
20 information, this is all facts that was gathered from the
21 appropriate sources and included within the document and
22 within the ultimate analysis.

23 There was substantial evidence for the County to make
24 its determination that there is adequate water supply for this
25 project.

26 THE COURT: Anything further?

1 MS. GUENTHER: No, your Honor.

2 THE COURT: All right. I will give my staff a short
3 break, we have been going for an hour, my court reporter is
4 probably going to need to ice her fingers for a few minutes,
5 and then I want to look at a couple cases and I will rule,
6 give a final ruling when we are done after our break. Take
7 ten minutes.

8 (Recess.)

9 THE COURT: Back on the record in BCVBS 09950.
10 Record will reflect the same parties and counsel are present.
11 The Court will rule on the issue before it.

12 I have reviewed my original statement of decision
13 which I saved on my computer from our first hearing back years
14 ago. I went to Barstow to Joshua Tree and now here.

15 So in going over that statement of decision when we
16 were discussing -- and I will read part of it into the record,
17 page two of the original statement of decision.

18 It is undisputed that volatile organic compounds will
19 be emitted from the proposed composting facility project,
20 brackets, contributing to a significant cumulative impact on
21 the air quality. And then I cite the Public Resource Code
22 section.

23 Then I state, the potential mitigation measure
24 evaluated by the County was an enclosed composting operation.
25 The gases would be captured and thermally destroyed. The
26 County found this litigation measure not to be feasible on an

1 economic and technical basis. The capital and operating costs
2 would make it infeasible and there is no electricity to the
3 site, and I cite to the administrative record.

4 Then I go to the analyzing the financial and
5 feasibility of the project, the comparison to cost of the
6 composting facility in Rancho Cucamonga and some of the
7 references from the five page memorandum from Jeffrey Sweat to
8 Jeff Memmer (phonetic spelling).

9 I found that the County's finding of economic and
10 technical infeasibility is not supported by the record, that
11 only one indoor facility was evaluated, and I noted that there
12 were other in the response to comment section of the final
13 environmental impact report the California Department of
14 Health Services enclosed facility such as those operating in
15 Los Angeles, Riverside counties, and throughout the country
16 have been shown to be effective in controlling emissions. I
17 state the analysis regarding economic feasibility of enclosed
18 facility should have looked at the capital and operating cost
19 of other facilities.

20 The conclusion that private financing for such a
21 risky proposition would not be available is not sufficient and
22 I go through some of the things, the plausible scenarios that
23 could have been done.

24 And then finally conclude, there is insufficient
25 documentation in the administrative record to justify the
26 conclusion that an enclosed facility at the Hawes site is not

1 economically feasible, then I discuss electricity. The only
2 technological feasible aspect would be how long, not that
3 there is no electricity, just how to get it there and how much
4 it will actually cost.

5 So I conclude that the County failed to properly
6 evaluate a technological feasible mitigation measure in its
7 finding that enclosed composting facility is not economically
8 feasible and not supported by substantial evidence or the
9 administrative record and on that ground I granted the
10 Petitioner's prayer for preemptory relief directing a
11 preemptory writ saying the preemptory writ will issue setting
12 aside the environmental impact report, setting aside the
13 approvals, and vacating the approvals including the issuance
14 of judicial use permit directing the County to comply with
15 CEQA regarding this project, specifically directing the County
16 to conduct an appropriate economic feasibility analysis of an
17 enclosed facility at the Hawes site for the project as
18 proposed. Part of the project is severable.

19 I am going to change my tentative decision on that
20 issue because I think it would contradict my earlier
21 statements about what the purpose of the Court's decision is.
22 The purpose of the Court's decision is to determine whether or
23 not there is a compliance with the Court order, not whether
24 the County has complied with CEQA.

25 As I stated earlier, and my order is based on my
26 statement of decision, what did I ask the County to do? And I

1 think it is clear from and reminder upon reviewing my
2 statement of decision the County did what I asked it to do.
3 Petitioner says well, have them do some more and I think there
4 is a due process argument in whether or not even CEQA requires
5 that and I originally cited to the practice guide, they are
6 referring to environmental impact report, but we are not at
7 that here with environmental impact report, we are in a
8 different area, we in the return of the writ which at this
9 point I doubt that there -- it is a different issue and you
10 are not going to get to reargue. Don't look at me like you
11 want to say something. I am sure you do, but we are past that
12 point, so I have to agree that the County did what I asked
13 them to do. They may have looked at it in a way that the
14 petitioners may not have agreed with, but they did comply with
15 the writ of the Court so I will not -- that tentative decision
16 is now no longer my tentative decision of the Court. That
17 will not be a basis for denying the motion for return on the
18 writ of mandate.

19 I have still -- Counsel, you convinced me on that one
20 but not on the water issue. I looked at that and I
21 considered -- you attached it to your opposition so there was
22 something that I reviewed, but in looking at that analysis
23 that which was the supplemental environmental impact report
24 which is modified by the addendum, I probably didn't state
25 this previously in my intended decision, concludes that there
26 is sufficient groundwater and you are referring as you have

1 directed the Court to volume seven, page 1957 and it talks
2 about the groundwater, how much groundwater is available,
3 etcetera.

4 However, in the Court's view there still is no
5 evidence to support the conclusion that groundwater is
6 sustainable. MWA may not have commented subsequently, but
7 they didn't say, send anything in saying oh, you are correct,
8 we misspoke when we said the system is currently in a state of
9 overdraft; that has never changed.

10 And the physical solution that I have referred to
11 earlier, the judgment, there is just, and you can point it out
12 to me if I am incorrect. I don't know that there is a
13 document or analysis that demonstrates there is over one
14 million anchor feet of water available for production of
15 beneficial use and the response to comment letter asserted
16 that the MWA is continually drafting policies and programs
17 that it supplementally funded recharge to which the project
18 may be subject.

19 In the addendum to the SEIR that I referenced assumes
20 that the imposition of a Court judgment would automatically
21 bring about desired consequence of no further overdraft and we
22 go right back where we started from.

23 How much actual water, not what the Court says who
24 gets what and how much everybody gets because it really
25 doesn't make any difference if the Court says oh, you get that
26 much water and you get that much water, and you are limited to

1 that much water when the water is not there.

2 So in my view it is still proper analysis for the
3 water supply to require the analysis of the actual water
4 conditions, not the legal rights and entitlements to water
5 that may not exist, and I don't find that that position that
6 there is adequate groundwater that supported the conclusion in
7 my view is not supported by substantial evidence.

8 So the ruling of the Court is as follows --

9 MS. GUENTHER: Your Honor, I apologize for
10 interrupting you, but you did say that I could refer you to a
11 page number that may change that?

12 THE COURT: Yes.

13 MS. GUENTHER: If you look at MP 3328 which is part of
14 the 2005 Urban Water Management Plan Update, it specifically
15 addresses efforts to eliminate ground water overdraft. The
16 Mojave Basin Area Anwar Valley Adjudication Plan state that
17 ground water extractions from each basin do no exceed the
18 estimated annual supplies and empower the watermasters of each
19 basin to enforce pumping limits as mandated by the Court.

20 One of the fundamental objectives of the RWMP is to
21 balance future water demands with available supplies
22 recognizing the need to stabilize the groundwater basin
23 storage balance over long-term hydrologic cycles.

24 As part of the preparation of this 2004 RWMP, and
25 remember there is the update, projects and management actions
26 were identified that would allow MWA to meet this objective by

1 2012 while also meeting a second objective to maximize the
2 overall beneficial use of water throughout MWA by supplying
3 water of quantity and quality suitable to the various
4 beneficial uses.

5 This water management plan updates specifically
6 states --

7 THE COURT: Counsel, you can read something but you
8 are not going to argue it. You can just refer me to it.

9 MS. GUENTHER: Okay. That is the page I would like to
10 refer you to.

11 THE COURT: What was that again?

12 MS. GUENTHER: Page number 3328.

13 (Pause in proceedings.)

14 THE COURT: And then that is again going back to the
15 legal responsibilities and abilities of the Mojave Water
16 Agency to take certain legal action or directive
17 administrative functions to protect its basin, but it still
18 doesn't answer the physical question in the Court's view.

19 So the County's return on the writ is denied as the
20 supplemental environmental impact report, SEIR, fails to
21 satisfy the Court's preemptory writ as there is no evidence
22 supporting finding in the SEIR that there is sustainable
23 groundwater in light of the evidence that the aquifer is in
24 overdraft and it will be denied on that basis only and no
25 other basis.

26 So you will need to prepare the order.

1 MR. NEWELL: Your Honor, should I clarify the motion
2 to reflect the writ is granted in part?

3 THE COURT: Yeah. Well, a number of grounds so you
4 would have to put all the different grounds. The procedural
5 grounds I specified is not a basis, it is denied in your
6 request -- well, the way it is worded, your motion to deny the
7 writ almost creates a double negative in some ways.

8 The motion to deny the writ, it is going to get
9 complicated, but yes, you will need to clarify so there is an
10 adequate record on appeal that your procedural basis -- I did
11 not grant your procedural basis for the motion to deny the
12 return on the writ; I did not grant it on the greenhouse gas
13 project, greenhouse gas issue; I did not grant it on the
14 failure to analyze project alternatives; and the only basis it
15 was granted in part was the groundwater issue that I
16 identified in the record.

17 MR. NEWELL: And the reason that it was granted was
18 because the SEIR fails to satisfy the writ because there was
19 no finding that --

20 THE COURT: There is no evidence supporting finding
21 in the SEIR that there is sustainable groundwater in light of
22 the evidence aquifer is in overdraft, referring to
23 administrative record volume seven page 1957 and
24 administrative record volume six pages 1782 to 1784.

25 That is the sole basis for the Court's ruling in your
26 favor. So you will need to prepare an order and the order

1 will need to comply with California Rule of Court 3.1312
2 regarding preparation of orders and submission to the Court
3 which means they get an opportunity to review it and make any
4 objections.

5 MR. NEWELL: Correct.

6 Your Honor, that Rule of Court requires that we
7 submit it within five days.

8 THE COURT: I don't have a problem going beyond that
9 if that is agreeable with the parties because I know it will
10 take some time to get a transcript and everything of that
11 nature so if you agree to a date other than five days that is
12 fine.

13 Is that agreeable?

14 MS. GUENTHER: That is agreeable.

15 THE COURT: I am not going to impose the five days;
16 within a reasonable amount of time as agreed to by the
17 parties.

18 MR. NEWELL: Excellent. Thank you, your Honor.

19 THE COURT: Anything further?

20 MR. NEWELL: No, your Honor.

21 MS. GUENTHER: No, your Honor.

22 THE COURT: Thank you.

23 MR. BRIZZEE: Thank you, your Honor.

24 (At which time, the evening recess was taken.)
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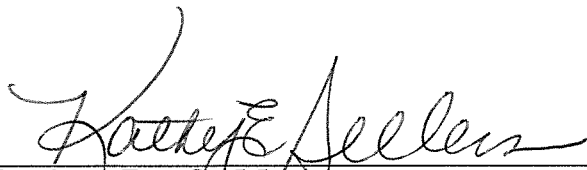
REPORTER'S CERTIFICATE

STATE OF CALIFORNIA }
COUNTY OF SAN BERNARDINO } SS

I, KATHY E. SELLERS, CSR, Official Court Reporter of the above-entitled court, do hereby certify:

That I am a Certified Shorthand Reporter of the State of California, duly licensed to practice; that I did report in Stenotype oral proceedings had upon hearing of the aforementioned cause at the time and place herein before set forth; that the foregoing pages numbered 1 to 42, inclusive, constitute, to the best of my knowledge and belief, a full, true, and correct transcription from my said shorthand notes so taken for the date of April 29, 2011.

Dated at San Bernardino, California, this 5th day of May, 2011.



Kathy E. Sellers
Official Reporter, C.S.R. No. 4420

KATHY E. SELLERS, CSR