State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
P.O. Box 2000, Sacramento, CA 95812-2000
Info: (916) 341-5300, FAX: (916) 341-5400, Web: http://www.waterboards.ca.gov/waterrights

PETITION FOR CHANGE

(WATER CODE 1700)

X* Point of Diversion, _____ Point of Rediversion, X* Place of Use, X* Purpose of Use, ____Split
Application 7482 Permit 7643 License _____

If the change petition is being submitted for the purpose of requesting to split the water right between two or more owners, see page 2.

I (we) hereby petition for change(s) noted above and shown on the accompanying map and described as follows:

Point of Diversion or Rediversion: (Give coordinate distances in California Coordinates, NAD 83, or other ties as allowed by CCR, tit. 23, section 715. Also provide the 40-acre subdivision in which the present and proposed points of diversion lie.)
Present: The changes made in Revised Order WRO 2002-0013
Proposed: Mitigation changes as stated in attached Summary and Petition

Place of use (If irrigation, then state number of acres to be irrigated within each 40-acre tract.)
Present: The changes made in Revised Order WRO 2002-0013
Proposed: Mitigation changes as stated in attached Summary and Petition

Purpose of Use
Present: The changes made in Revised Order WRO 2002-0013
Proposed: Mitigation changes as stated in attached Summary and Petition

GIVE REASON FOR PROPOSED CHANGE:
See attached Petition re mitigation issues

WILL THE OLD POINT OF DIVERSION OR PLACE OF USE BE ABANDONED: (yes or no) No

WATER WILL BE USED FOR All purposes allowed under Permit 7643 as amended PURPOSES.

I(we) have access to the proposed point of diversion or control the proposed place of use by virtue of?
Ownership _____, lease _____, verbal or written agreement _____. If by lease or agreement, state the name and address of party(s) from whom access has been obtained.

Not applicable

Are there any persons taking water from the stream between the old point of return flow and the new point of return flow? (yes or no) Yes. Give name and address of any person(s) taking water from the stream between the present point of diversion or rediversion and the proposed point of diversion or rediversion, as well as any other person(s) known to you who may be affected by the proposed change.

See Revised Order WRO 2002-0013

A copy of the petition must be provided to the California Department of Fish and Game (DFG). Indicate the date that the petition was provided to DFG and provide a copy of the transmittal letter to DFG: October 11, 2011

All petitioners must sign at the bottom of page 2.

* These were the changes allowed by Revised WRO 2002-0013. See attached Petition Summary for changes sought to that Order.

Fill out this section only if you are requesting to split a water right among multiple owners.

REQUEST FOR DIVISION OF LICENSE/PERMIT

Request to divide License/Permit _____issued on Application _____ into _____ licenses/permits. Fill out and attach a separate sheet of paper if the water right will be divided among more than two owners, or you need additional space.

ITEM:	First Owner	Second Owners
Name:		
Address:		
Phone Number:		
Source:		
Direct Diversion Quantity Assigned in Gallons Per Day (gpd) or Cubic Feet Per Second (cfs):		
Storage Quantity Assigned (in Acre-Feet):		
Maximum Rate of Diversion to Offstream Storage (cfs)		
Maximum Amount (afa)		
Diversion Season:		
Point(s) of Diversion in CA Coordinates (NAD 83)		
Place of Use (APN Number)		
Purpose(s) of Use		
Note: A map showing the place of use boundaries must be submitted.		

All Petitioners Must Sign Below:

THIS CHANGE DOES NOT INVOLVE AN INCREASE IN THE AMOUNT OF THE APPROPRIATION OR SEASON OF USE.
I (we) declare under penalty of perjury that the above is true and correct to the best of my (our) knowledge and belief.

Dated October 11, 2011 at San Diego and Santa Barbara, California

First Owner's Signature and Telephone Number: Mark J. Hattam (619) 233-1155

Second Owner's Signature and Telephone Number: Bradley J. Herrema (805) 963-7000

NOTE: All petitions must be accompanied by the **filing fee (see fee schedule at www.waterrights.ca.gov)** made payable to the State Water Resources Control Board and an **$850 fee** made payable to the Department of Fish and Game must accompany a change petition. Separate petitions are required for each water right.

SUMMARY OF PETITION

The attached Joint Petition by the Imperial Irrigation District and the San Diego County Water Authority ("Petitioners") requests the following changes to the State Water Resources Control Board's (the "Board") Revised Order WRO 2002-0013:

1. Eliminate all obligation of Petitioners to provide mitigation water to the Salton Sea between 2014-2017, unless by that time a Salton Sea restoration project has been validly adopted by the California Legislature, the adopted alternative is supported by fully appropriated financing that will fund all anticipated costs of such restoration project by the State of California, and implementation of the restoration project has commenced, while honoring the limitations on contributions to Salton Sea restoration under existing law as to parties other than the State of California (an "Actual Restoration Plan")[1]. The Board is also asked to concurrently approve accelerated alternative mitigation by IID and SDCWA that would create better and more durable habitat for Salton Sea wildlife, in accord with and after completion of additional environmental review to be undertaken by Petitioners ("Additional Environmental Review") if the Actual Restoration Plan is not in effect by January 1, 2014. As will be shown by Petitioners, using money for accelerated alternative habitat is more beneficial to the environment and neighboring communities than putting water into the deteriorating Salton Sea.

2. Approve a modestly accelerated schedule of conserved water transfers from IID to SDCWA or MWD that is within the Board's previous overall water volume approval for water transfers, but which might have effects on inflows to the Salton Sea, and thus will be studied in the Additional Environmental Review. The ramp-up acceleration alternatives being considered, and for which Board approval may be sought, include a range from zero changes in the current schedule for water transferred to SDCWA or MWD, up to a transfer of the entirety of the water which otherwise would have gone to the Salton Sea in 2014-2017 as mitigation, to be created by efficiency conservation.

3. Eliminate the requirement under the previously approved mitigation plan for roosting structures to be constructed in the Pacific Ocean for the brown pelican. The brown pelican is no longer listed as an endangered or threatened species by the United States or by California, and the alternative habitat can supplant the need for additional roosting structures.

4. Provide conforming approvals to the Additional Environmental Review as a Responsible Agency under the California Environmental Quality Act ("CEQA").

For further detail, please see the attached full Petition.

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[1] Or a similarly concrete federal action plan, with approved federal funding.

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
MARK J. HATTAM (BAR NO. 173667)
HEATHER S. RILEY (BAR NO. 214482)
501 West Broadway, 15th Floor
San Diego, California 92101-3541
Telephone: (619) 233-1155
Facsimile: (619) 233-1158
E-Mail: mhattam@allenmatkins.com
hriley@allenmatkins.com

Attorneys for Petitioner
IMPERIAL IRRIGATION DISTRICT

BROWNSTEIN HYATT FARBER SCHRECK, LLP
SCOTT S. SLATER (BAR NO. 117317)
BRADLEY J. HERREMA (BAR NO. 228976)
21 East Carrillo Street
Santa Barbara, California 93101
PO Drawer 720
Santa Barbara, California 93102-0720
Telephone: (805) 963-7000
Facsimile: (805) 965-4333
E-Mail: sslater@bhfs.com.
bherrema@bhfs.com

Attorneys for Petitioner
SAN DIEGO COUNTY WATER AUTHORITY

STATE WATER RESOURCES CONTROL BOARD

STATE OF CALIFORNIA

In the Matter of IMPERIAL IRRIGATION DISTRICT'S (IID) AND SAN DIEGO COUNTY WATER AUTHORITY'S (SDCWA) AMENDED JOINT PETITION FOR APPROVAL OF A LONG-TERM TRANSFER OF CONSERVED WATER FROM IID TO SDCWA AND TO CHANGE THE POINT OF DIVERSION, PLACE OF USE AND PURPOSE OF USE UNDER Permit 7643 issued on Application 7482 of Imperial Irrigation District	**JOINT PETITION FOR MODIFICATION OF REVISED ORDER WRO 2002-0013 BY THE IMPERIAL IRRIGATION DISTRICT AND THE SAN DIEGO COUNTY WATER AUTHORITY**

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JOINT PETITION

I. INTRODUCTION AND EXECUTIVE SUMMARY

The Imperial Irrigation District ("IID") and the San Diego County Water Authority ("SDCWA") hereby jointly petition the State Water Resources Control Board ("SWRCB" or the "Board") to modify its Revised Order WRO 2002-0013 (the "2002 Order").[1]

In 2002, IID and SDCWA acquired approval from this Board for conserved water transfers from IID to SDCWA, the Metropolitan Water District of Southern California ("MWD"), and the Coachella Valley Water District ("CVWD"). Such water transfers, which were designed to assist California to live within its 4.4 million acre-feet per year entitlement of Colorado River water, alleviate significant urban water needs in Southern California, and reduce that region's reliance on water from the fragile Bay-Delta, ultimately came to fruition after this Board's 2002 Order as part of the Quantification Settlement Agreement and its Related Agreements ("QSA and Related Agreements").[2]

As a condition for approval of those water transfers, this Board required that the Salton Sea receive replacement water for the first 15 years of the transfers as mitigation of the transfers' impacts. After 15 years, other habitat and air pollution mitigation activities would be substituted. This Board's rationale was that the Salton Sea restoration process was (at that time) still being evaluated by the state and federal governments, and that during this 15-year period there would either be implementation of a definitive restoration program, or it would become clear that no such program was feasible. Under either scenario, sending mitigation water to the Salton Sea would be unnecessary.

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[1] Petition Lodgment, Exhibit "1." (Petitioners have separately lodged exhibits for the convenience of the Board and its staff.)

[2] The QSA and Related Agreements are over 30 contracts between the United States, California, and numerous public water agencies to settle longstanding disputes on the Colorado River, and to approve various long-term conserved water transfer from IID to other agencies. The Third District Court of Appeal in *County of Imperial v. Superior Court* (2007) 152 Cal.App.4th 13 has a useful summary of the QSA and Related Agreements and their history on pages 19-21 of the decision.

Now, near the end of the ninth year of the water transfers, and just six years from the end of the 15-year period, IID and SDCWA believe there is sufficient information for this Board to re-evaluate the wisdom of Salton Sea mitigation water. IID and SDCWA ("Petitioners") are asking this Board to modify the 2002 Order in the following respects, which Petitioners would anticipate the Board would duly notice:

1. Eliminate all obligation of Petitioners to provide mitigation water to the Salton Sea between 2014-2017, unless by that time a Salton Sea restoration project has been validly adopted by the California Legislature, the adopted alternative is supported by fully appropriated financing that will fund all anticipated costs of such restoration project by the State of California, and implementation of the restoration project has commenced, while honoring the limitations on contributions to Salton Sea restoration under existing law as to parties other than the State of California (an "Actual Restoration Plan").[3] The Board is also asked to concurrently approve accelerated alternative mitigation by IID and SDCWA that would create better and more durable habitat for Salton Sea wildlife, in accord with and after completion of additional environmental review to be undertaken by Petitioners ("Additional Environmental Review") if the Actual Restoration Plan is not in effect by January 1, 2014 . As will be shown by Petitioners, using money for accelerated alternative habitat is more beneficial to the environment and neighboring communities than putting water into the deteriorating Salton Sea.[4]

2. Approve a modestly accelerated schedule of conserved water transfers from IID to SDCWA or MWD that is within the Board's previous overall water volume approval for water transfers, but which might have effects on inflows to the Salton Sea, and thus will be studied in the Additional Environmental Review. The ramp-up acceleration alternatives being considered, and for which Board approval may be sought, include a range from zero changes in the current schedule for water transferred to SDCWA or MWD, up to a transfer of the entirety of the water

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[3] Or a similarly concrete federal action plan, with approved federal funding.

[4] As a corollary to this change that will reduce some water to the Sea, accelerated air quality mitigation methods other than the use of mitigation water will also be addressed in the Additional Environmental Review.

which otherwise would have gone to the Salton Sea in 2014-2017 as mitigation, to be created by efficiency conservation.

3. Eliminate the requirement under the previously approved mitigation plan for roosting structures to be constructed in the Pacific Ocean for the brown pelican. The brown pelican is no longer listed as an endangered or threatened species by the United States or by California, and the alternative habitat can supplant the need for additional roosting structures.

4. Provide conforming approvals to the Additional Environmental Review as a Responsible Agency under the California Environmental Quality Act ("CEQA").

The fundamental reason for this Petition is straightforward. Despite promises in the 2003 QSA legislation[5] to embark on some form of meaningful restoration of the Salton Sea, the State of California has not done anything of substance to actually implement that restoration. The Salton Sea Ecosystem Restoration Program Preferred Alternative Report and Funding Plan ("Preferred Alternative Report") was provided to the Legislature in May 2007. That Preferred Alternative Report found that:

- "Diminished inflows to the Salton Sea due to various factors and increased evaporation due to climate change effects will cause the total ecosystem collapse of the Salton Sea over the next decade or two with or without the QSA." Page ES-1.
- The Preferred Alternative Report considered eight restoration alternatives. Page ES-3. The preferred alternative combines some portions of different alternatives, but basically creates a drastically reduced Salton Sea. Page ES-5.
- The Preferred Alternative Report notes that for the preferred alternative there is a five-year "pre-construction" period for planning, permitting, and the like. Page ES-7. Actual construction of the preferred alternative would not begin until afterwards. *Id.* Thus, even with a hypothetical funding scenario of late

[5] There were a number of bills passed in 2003 related to the QSA, and to Salton Sea restoration. They include: Sen. Bill No. 277 (Stats. 2003, ch. 611); Sen. Bill No. 317 (Stats. 2003, ch. 612); Sen. Bill No. 654 (Stats. 2003, ch. 613).

2007, construction would not have started until 2014. *Id.* Since it is now 2011 and there is no funding, the five-year pre-construction period has not even started. *Id.* Per the Preferred Alternative Report, this would mean no actual construction could start until 2017, even if funding appeared today.

- The estimated cost for the preferred alternative is $8.9 billion. Page ES-9.

Thus, the State's Preferred Alternative Report clearly shows that the State has determined that the preferred restoration alternative is not to save the Salton Sea, but to instead create a much-reduced Sea for habitat protection. However, the price tag for the State is still high, and there has been no funding for such a project.

In 2008, the California Legislative Analyst's Office issued a report that recommended that air quality and wildlife habitat should be the highest priorities for Salton Sea restoration and that the California Legislature adopt a comprehensive restoration plan that includes a financing plan from the outset. Since the submittal of that report, the California Legislature has taken no action to adopt a comprehensive restoration plan that includes a financing plan or that focuses on the mitigation of air impacts and the preservation of habitat. The federal government has been inactive as well.

The result of this inaction is that if, by 2014, nothing substantive is done for restoration, no meaningful restoration project could be implemented by the time the mitigation water requirement ends in 2017. It would serve no purpose, and indeed be counter-productive, for this Board to require that mitigation water be sent to the Sea from 2014-2017, when those funds could be used instead to start much earlier on beneficial durable mitigation habitat projects.

That early mitigation habitat can have great value. In August 2011, the United States Army Corp of Engineers and the California Resources Agency by its Department of Fish & Game and Department of Water Resources, released a Draft Environmental Impact Statement/Environmental Impact Report to evaluate the impacts of alternative methods of implementing the Salton Sea Species Conservation Habitat Project ("SCH Project"). The SCH Project is modeled after the originally proposed Early Start Habitat, which was intended to provide functional habitat during the period prior to Salton Sea restoration. It is designed to provide long-

term high value habitat while acting as a refinement tool for additional shallow water habitat design and to evaluate various water management scenarios for the habitat, The shallow water habitat will support fish and wildlife that are dependent on the declining Salton Sea habitat that is being lost due to salinity increases and elevation declines not caused by the QSA conserved water transfers.

The SCH Project may be a feasible Salton Sea restoration approach, and similar SCH-focused projects developed and utilized as QSA transfer impact environmental mitigation can sooner provide greater quantities of, better, and more durable wildlife habitat, while protecting opportunities for renewable energy development on exposed Salton Sea shoreline and air mitigation of some of the emissive Salton Sea shoreline during the years 2014-2017, as compared to the delivery of 480,000 acre feet of environmental mitigation water to the Salton Sea in that same time period. If the SCH Project and similar SCH-focused projects developed and utilized as QSA transfer impact environmental mitigation are jointly designed, constructed and operated, the total costs to the State of California and the QSA transfer parties could both be reduced, and accelerate the schedule for durable habitat development and the extent of the developed habitat.

Further, as discussed below, preliminary modeling shows that the elimination of water to the Salton Sea for 2014-2017 is relatively minimal, especially when compared with the benefit of early alternative habitat creation.

Petitioners believe that the Bureau of Reclamation and the Metropolitan Water District of Southern California are supportive of Petitioners' attempt to review alternative mitigation measures as described herein, and they do not believe those entities will object to this Petition. Petitioners believe that the Coachella Valley Water District will submit a protest so that it has a placeholder, which protest will either go forward or not depending on the results of the Additional Environmental Review.

Petitioners address below the history of this Board's 2002 Order, the status of the overall QSA process, and why this Board should approve the Petition for the benefit of the public, the environment, and the petitioning public agencies.

II. BACKGROUND OF KEY ISSUES

To understand the context of Petitioners' requests, it will be helpful if some background as to various key issues are summarized.

A. THE IID AND THE SALTON SEA

The IID (and CVWD to a lesser degree[6]) is inextricably tied to the Salton Sea because its agricultural drainage water flows "downhill" to the Salton Sea, the lowest point in the region. This geographical truth has long been recognized by the federal government, which has through various laws made clear that IID has a right to use the area of the Salton Sea for agricultural drainage. The Salton Sea was designated an agricultural drainage sump for IID by President Coolidge in 1924 and again in 1928. (Public Water Reserve No. 90, signed by President Coolidge on March 10, 1924, and Public Water Reserve No. 114, signed by President Coolidge on February 23, 1928.) The background of the 1924 and 1928 public water reserves is described in *U.S. v. Imperial Irr. District* (S.D. Cal. 1992) 799 F.Supp. 1052, 1061:

> ... Congress delegated to the executive branch the power to withdraw any of the public lands of the United States. Act of June 25, 1910, ch. 421, 36 Stat. 847 (1910).
>
> To assure that the drainage sink was preserved and protected, in the early 1920's IID began acquiring the private lands and railroad lands under and around the Salton Sea below an elevation of -220'. For the same reason, IID also petitioned the United States to withdraw public lands roughly below the -220' contour.
>
> ... [R]ather than grant to IID an easement in land below the -220' contour, [the Secretary of the Interior] recommended to the President, and the President approved, two public water reserves, PWR 90 of 1924, and PWR 114 of 1928. The clearly stated purpose of these PWR's was to provide an "evaporation pan for surplus and waste water from Imperial Valley irrigation development." .... The irrigation reserve created by the PWR's was roughly along the -220' line, although the perimeter created by them was irregular.

Id.

In February 1982, the Secretary of Interior allegedly revoked Public Water Reserve Nos. 90 and 114 in their entirety through Public Land Order 6105, 47 Fed. Reg. 5417 (Feb. 5, 1982).

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[6] Because CVWD's Colorado River water use is less than IID's.

However, Congress then designated the Salton Sea as a permanent flowage easement for IID and CVWD on December 27, 2000 as part of the Torres-Martinez Desert Cahuilla Indians Claims Settlement Act. Pub.L. 106-568, 114 Stat. 2906. *See* 25 U.S.C. §§ 1778a(6); 1778e(a), (b).

This interconnectivity between IID and the Salton Sea has historically created certain problems. Because virtually all the Colorado River water IID orders from the Bureau of Reclamation (the "Bureau") is for IID's delivery to farmers in its service area, the varying needs for water by those farmers causes the volume of water used in IID to fluctuate significantly. If farm markets are weak, or low-water-use crops are in demand, water orders may be reduced. Conversely, if markets are strong, or high-water-use crops are popular, water orders increase. Further, if salinity is running high on the Colorado River, then IID's farmers need more water to leach salt from their lands, increasing water usage. When water use is high in IID, the Salton Sea receives more drainage water; when low, it receives less. This farming volumetric fluctuation means that when the volume of farming water use is high, land surrounding the shallow Salton Sea can be flooded, resulting in complaints and lawsuits against IID. Indeed, this Board's decisions in the 1980's -- Decision 1600[7] and Water Rights Order 88-20[8] -- were products of this phenomenon. In contrast, when farming water use is low, then the Salton Sea recedes, leading to environmental complaints that habitat is suffering. Further, water that goes to the Salton Sea from agricultural drainage contains high volumes of salts, thus adding salinity to the Salton Sea.

The Salton Sea has no water right to the Colorado River.[9] Some have argued that the "Public Trust Doctrine" requires that IID preserve the Salton Sea. However, the SWRCB has already and correctly ruled that the Public Trust Doctrine does *not* require continued flow of IID irrigation drain water into the Salton Sea. In its Order WR 84-12[10], the SWRCB ruled that IID cannot be compelled by the Public Trust Doctrine to drain irrigation water into the Salton Sea:

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[7] Petition Lodgment, Exhibit "2."

[8] Petition Lodgment, Exhibit "3."

[9] *See* this Board's 2002 Order, p.15 Colorado River entitlement chart, which does not list the Salton Sea as an entitlement holder. Petition Lodgment, Exhibit "1."

[10] Petition Lodgment, Exhibit "4."

> Upon its admission to the Union in 1850, California acquired title as trustee to navigable waterways and underlying lands . . . . No such title or public trust easement was acquired to the property underlying the present Salton Sea since the Sea was not created until 1905 [by accidental diversion of the Colorado River]. Therefore, regardless of the extent to which the public trust doctrine may or may not apply to an artificial body of water, it is apparent that the doctrine does not justify continued inundation of property to which no public trust easement attaches.

Order WR 84-12, p. 10, fn.1.

This prior ruling of the SWRCB is in accord with the overall law in California on the Public Trust Doctrine. *See Colberg, Inc. v. State of California* (1967) 67 Cal.2d 408, 416; *National Audubon Society v. Superior Court of Alpine County* (1983) 33 Cal.3d 419, 433. [11]

When the QSA and Related Agreements were being negotiated, and not as a cause of those agreements, the Salton Sea was already an unhealthy habitat. The Audubon Society labeled it an "environmental Chernobyl" in 1999. Massive numbers of endangered species were dying from disease. For example, in 1996 botulism at the Salton Sea killed about 10% of the entire population of western white pelicans. The EIR/EIS for the IID Transfer Project confirmed that the Salton Sea was an irreversibly declining habitat that ultimately will not support viable wildlife populations without a restoration project:

> [With no restoration project] the salinity of the Salton Sea would exceed the level at which sargo, gulf croaker, and tilapia could complete their life cycles . . . in 2008, 2015, and 2023, respectively.

Draft EIR/EIS, p. 3.2-147 (IID Exh. 55 in 2002 proceedings).

The Salton Sea's accidental creation early in the 20th Century[12] has been sustained only through the happenstance that farmers in the IID and CVWD service areas cannot be 100% efficient in their water use. However, as explained below, this Board's prior orders, leading up to the 2002 Order, have made very clear that increased irrigation efficiency, and the resulting transfers of the conserved water as usable water for urban Southern California, is preferable to delaying for a short time the inevitable demise of the Salton Sea through irrigation drainage not reduced by water conservation.

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[11] The Board chose not to address public trust claims in its 2002 Order. *Id* at p.19, fn. 5.

[12] *See* the 2002 Order, p. 7. Petition Lodgment, Exhibit "1."

B. THIS BOARD'S 2002 ORDER AND THE SALTON SEA

This Board's 2002 Order addressed various Salton Sea issues, and did so in the context of its earlier orders to IID in the 1980's.

1. Decision 1600, WRO 88-20, And The Salton Sea

Decision 1600 was adopted by the SWRCB on June 21, 1984. At the conclusion of a six-day evidentiary hearing, the SWRCB found that, "the Imperial Irrigation District must take several actions to improve its water conservation program, as specified in this decision." Decision 1600, p. 2.

In Decision 1600 the SWRCB noted that California is limited to 4.4 million acre-feet per annum ("mafa") of water from the Colorado River when surplus is not available. *Id.* p. 12. Under such circumstances, Metropolitan Water District of Southern California ("MWD") would be limited to 550,000 af, less than one-half of its historical diversions. *Id.* at p. 12. Thus, "A transfer of conserved water could partially satisfy future Southern California needs." *Id.* at p. 56. In light of the potential benefits from the transfer of IID conserved water, and after reviewing applicable provisions of the California Constitution and Water Code, the SWRCB chose to exercise and retain its jurisdiction over IID conservation programs.

In 1988, four years after Decision 1600, the SWRCB conducted further hearings to review the status of the IID's water conservation program and plans. The SWRCB then issued Order WR 88-20. A central element of Order 88-20 is the prospect for conserved water transfers by IID. *See* pp. 11-13. Evidence was presented by the State Water Contractors showing that a transfer of water from the IID "could increase the supplies available to other State Water Project (SWP) water users . . . ." *Id.* at p. 12. The SWRCB found that California would benefit from a conserved water transfer by the IID:

> The evidence presented clearly establishes that California water users have a need for substantial additional water supplies and that additional water conservation in IID presents a feasible means of meeting a portion of that demand. . . . The evidence presented at the Board hearing confirms that a transfer of this quantity of water [250,000 acre feet per year] would assist in meeting the identified future demands of California water users.

Id. at p. 14.

However, the SWRCB also found that one of the main problems for IID was funding conservation that would allow such transfers. *Id.* at p. 18. One of the likely sources of funding for IID conservation measures identified by the SWRCB was urban areas in need of water, such as the Southern California region. *Id.* at p. 21. The SWRCB further recognized that the California Legislature had gone "on record" in "favor of promoting voluntary transfers of water or water rights as a means of meeting the State's growing water needs." *Id.* at p. 39. The SWRCB found that the "need for substantial additional water supplies in California and the prospects for substantial water conservation in the IID have been well established." *Id.* at p. 44. The SWRCB also found that "conservation of 367,900 acre feet per annum . . . is a reasonable long-term goal which will assist in meeting future water demands." *Id.*

As a result of the above determinations, IID was required to complete "an executed agreement with a separate entity willing to finance water conservation measures in Imperial Irrigation District," totaling 100,000 afa, or take other measures which would achieve equally beneficial results. *Id.* at p. 45. The SWRCB retained "jurisdiction to review implementation of the initial plan and future water conservation measures." *Id.* at p. 44.

Pursuant to such guidance, IID entered into a 1988 conserved water transfer with MWD for about 105,000 afa, and then in 1998 negotiated a long-term transfer with SDCWA. IID and SDCWA petitioned this Board for approval of that conserved water transfer, which led to the 2002 Order.

2. The 2002 Order

In 1998, IID and SDCWA jointly petitioned the Board for approval of their long-term conserved water transfer. IID and SDCWA proposed a water transfer for up to 75 years, where SDCWA would pay IID to conserve water, and IID would then transfer the conserved water to SDCWA. The initial petition sought approval for a transfer of up to 300,000 afa to SDCWA. It was expressly brought pursuant to State Board Decision 1600; State Board Water Rights Order 88-20; Article X, § 2 of the California Constitution; and §§ 100, 109, 1011, 1012, 1700 *et seq.* and 1735 *et seq.* of the Water Code. The petition noted that the agreement between IID and SDCWA

was ineffective until environmental review was completed, when the agencies would then make a decision whether to even go forward with the transfer project.

During the course of the Board process and before the hearings commenced, the former IID-SDCWA petition was twice amended, first to add a change in purpose of use to include "municipal," and the second to seek approval for MWD and CVWD to receive 100,000 afa of the original 300,000 afa that had been proposed for SDCWA. SDCWA's transfer was reduced to 200,000 afa.

Fourteen protests were filed to the second amended petition. IID and SDCWA attempted to resolve the protests and were successful in doing so with MWD and CVWD. That resolution was memorialized in the Protest Dismissal Agreement ("PDA").

The Board conducted a 15-day evidentiary hearing on the second amended State Board petition. To approve, the Board needed to make a number of findings under Water Code § 1736, including whether any legal users of water would be injured, and whether unreasonable effects on fish, wildlife, or instream uses would result. The Board hearing was split into two phases: Phase I of the proceeding dealt with water rights matters and injury to legal users of water; and Phase II dealt with environmental effects. Phase II commenced after IID's public release of its Draft Environmental Impact Report ("Transfer Project Draft EIR"). Many witnesses testified before the State Board, and over 200 exhibits were submitted by all parties.

The Board issued a draft decision on September 26, 2002, which it circulated for comment. After written comments were submitted by the parties, another hearing was held to review the draft order, and then the Board issued its final 2002 Order on October 28, 2002. It subsequently issued Revised Order WRO 2002-0013 on December 20, 2002.

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The 2002 Order required extensive environmental mitigation, including: (a) 15 years of Salton Sea salinity mitigation[13]; (b) implementation of a detailed monitoring and mitigation plan for air quality impacts; (c) mitigation reporting as to effects on the Colorado River; (d) implementation of the Tamarisk Scrub Habitat Conservation Strategy, the Drain Habitat Conservation Strategy, the Desert Pupfish Conservation Strategy, and the Razorback Sucker Conservation Strategy; (e) compliance with all state and federal law and permit requirements; and (f) relocation or construction of Salton Sea recreational facilities. The Board also reserved jurisdiction to address socio-economic impacts after the Resources Agency and the Technology, Trade and Commerce Agency issued reports related to Salton Sea restoration.

Of primary importance to the instant Petition is what the Board said about the Salton Sea and its possible restoration. First, the Board acknowledged that the delivery of mitigation water would not save the Salton Sea:

> Also relevant in this case is the fact that, while maintaining baseline salinity levels will keep the habitat values of the Sea intact for some period of time, *it will not solve the basic problem* of increasing salinity in the long term. Without some sort of reclamation project to reduce salinity, the Salton Sea will become too saline to support the variety of fish and wildlife species that presently use the Salton Sea.

2002 Order at p.44. (Emphasis added.)

Next, the Board clearly understood that there might not be a feasible restoration plan for the Salton Sea, and that if there were not one soon, then it would not be beneficial to keep sending water to the Salton Sea as mitigation water:

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[13] On October 23, 2003, IID requested the Chief of the Division of Water Rights to modify Condition Nos. 5 and 6 of the 2002 Order to be consistent with an alternate Salton Sea Habitat Conservation Strategy utilizing a specific fallowing-for-transfer schedule and a fallowing-for-mitigation schedule as reflected in the QSA and Related Agreements and the September 2003 Amended and Restated Addendum to the Final EIR/EIS. After allowing for comment on IID's request and consideration of all submitted material, on January 7, 2004, the Chief of the Division of Water Rights approved IID's use of the alternate Salton Sea Habitat Conservation Strategy. In essence, under this alternate strategy, IID creates conserved water by fallowing in addition to the conserved water transferred to SDCWA, on an annual schedule, and causes the delivery of mitigation water to the Salton Sea. This strategy mitigates salinity and elevation impacts of IID's water transfers for up to 15 years by causing replacement inflow to the Salton Sea to offset the reduced inflow caused by such transfers.

> It would be unreasonable to require the continued mitigation of the impact of the transfer on the Salton Sea if the decline of the Sea continues to the point where restoration is no longer feasible, or if it becomes clear that no implementation plan will ever be developed. At the point when it becomes unreasonable to require continued mitigation of impacts on the Salton Sea, because there is no longer any hope for saving the Sea, the public interest in avoiding inappropriate burdens on this important transfer outweighs any harm to instream beneficial uses of the Sea.

2002 Order at p.44.

Finally, the Board ensured it could change the mitigation plan, depending on how (then) future events played out, since the 2002 Order specifically provides for modification of Petitioners' mitigation obligations regarding impacts of the IID-SDCWA transfer on the Salton Sea:

> The SWRCB reserves continuing authority to consider whether it would be appropriate to add, delete, or modify the mitigation measures required by Conditions 5 and 6, above, in light of the results of the study on the feasibility of restoration to be prepared by the Secretary of Interior, in cooperation with the Resources Agency, the Salton Sea Authority, and the Governor of California, in accordance with the Salton Sea Reclamation Act of 199 (Pub.L. No. 105-372 (Nov. 12, 1998) 112 Stat. 3377) and Senate Bill 482 (Stats. 2002, ch. 617, § 2).

2002 Order at p.87.

> Permittee may petition the Chief of the Division of Water Rights to modify any of the mitigation measures required by this order if alternate mitigation measures are found to be equally protective, or more protective, of any species addressed in the Salton Sea Habitat Conservation Strategy, Tamarisk Scrub Habitat Conservation Strategy, Drain Habitat Conservation Strategy, Desert Pupfish Conservation Strategy, or Razorback Sucker Conservation Strategy, as described in the Final Environmental Impact Report and Habitat Conservation Plan (SCH # 1999091142), as certified by permittee on June 28, 2002.

2002 Order at p.89.

As explained below, what has occurred with subsequent restoration-related events shows that the Board's guarded forecast was merited: virtually nothing of substance as to restoration has occurred, leaving IID and SDCWA with unnecessary water going to the Salton Sea in 2014-2017.

C. SUBSEQUENT HISTORY OF SALTON SEA RESTORATION

When this Board issued its 2002 Order, the various laws related to Salton Sea restoration were in process and not complete. Naturally, what the State would do in response to those laws

was also not determined. For purposes of this Petition it is important for the Board to understand the subsequent history of those laws and their implementation.

1. Setting For State Restoration Action

Despite the sad environmental state of the Salton Sea, the state and federal governments nonetheless had hoped they could save the Sea as a habitat for migratory birds whose marsh habitat on the California coast was already lost to urban development. A migratory bird habitat required the Sea to sustain a fishery of some kind to provide food. That, in turn, required controlling the ever-increasing salinity.

Restoration of the Salton Sea was studied for decades prior to the approval of the QSA and Related Agreements. Dozens of studies addressed the increasing salinity and lowering elevation in an effort to stabilize a habitat for fish and wildlife.

Congress passed the Salton Sea Reclamation Act of 1998, which instructed the Secretary to perform certain "feasibility studies and cost analyses" for stabilizing the elevation and salinity of the Salton Sea. Salton Sea Reclamation Act (Public Law 105-372, Sec. 101.) The Secretary was to establish "options he deems economically feasible and cost effective," based on a set of operating assumptions. *Id.* Among those assumptions was to "account for transfers of water out of the Salton Sea Basin . . . which could be 800,000 acre-feet or less per year." *Id.*

2. State Restoration Legislation

The State Legislature in 2003 wanted to "revive" Salton Sea restoration prospects, given federal neglect. This was articulated in SB 654, Chapter 613, Section 2(g):

> Restoration of the Salton Sea is in the state and national interest. Congress recognized in the Salton Sea Reclamation Act of 1998, Public Law 105-372, that appropriate federal agencies should offer alternative restoration options . . . . The failure to issue that report in a timely fashion has unnecessarily constrained the Legislature's ability to timely consider fully the costs and benefits of various options to restoration that should be undertaken at the Salton Sea.

To start making progress toward restoration, Fish and Game Code section 2931 was enacted and expressed the Legislature's clear restoration intent:

> (a) It is the intent of the Legislature that the State of California undertake the restoration of the Salton Sea ecosystem and the permanent protection of the wildlife dependent on that ecosystem.

Section 2931 stated that restoration would be based on a "preferred alternative" to be determined by future study over the next *three years*. Fish & G. Code, § 2931(b).[14]

A review of the Salton Sea legislation shows that the State guaranteed to IID, CVWD, and SDCWA that they would have no responsibility for restoration in exchange for the payment by those agencies of $30 million to the Salton Sea Restoration Fund, and it established several additional sources of money for the State to study restoration options, make determinations about what the State would do, and then implement restoration. The Legislature created the Salton Sea Restoration Fund with initial funding from anticipated bond proceeds and from IID, CVWD and SDCWA, and created mechanisms for substantial additional funding within the control of the State. Fish & G. Code, § 2081.7(c)(1), (2), (4), (5), (6), and (d)(4); and SB 654 section 2(b).

Fish and Game Code section 2932 directed that the Salton Sea Restoration Fund was to pay the following Salton Sea restoration expenses:

> (a) Environmental and engineering studies related to the restoration of the Salton Sea and the protection of fish and wildlife dependent on the sea. . . .
>
> (b) Implementation of conservation measures necessary to protect the fish and wildlife species dependent on the Salton Sea, including adaptive management measures pursuant to Section 2081.7 . . . .
>
> (c) Implementation of the preferred Salton Sea restoration alternative.
>
> (d) Administrative, technical, and public outreach costs related to the development and selection of the preferred Salton Sea restoration alternative.

Fish and Game Code section 2081.7 as it existed in 2003, stated that the contributions of IID, SDCWA and CVWD to Salton Sea restoration were limited to $30 million, and that the State would perform some form of restoration.[15] Here is that statute, with ellipses used only to eliminate some of the detail in a lengthy statute:

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[14] Fish & G. Code § 2931 was amended in 2004 to add subdivision d. *See* Stats 2004, Ch. 614 (SB No. 1214), § 3.

[15] *See also* SB 654, Ch. 613, Section 3, where the State grants to itself the exclusive obligation for restoration, over and above the $30 million agency commitment.

§ 2081.7. The take of species resulting from impacts attributable to implementation of Quantification Settlement Agreement

a) . . .

b) . . .

c) . . .

6) Coachella Valley Water District, Imperial Irrigation District, and San Diego County Water Authority to pay a total of thirty million dollars ($30,000,000) to the Salton Sea Restoration Fund as provided in paragraph (2) of subdivision (b) of Section 3 of Senate Bill 654 of the 2003-04 Regular Session.

d) . . . .

e) (1) The Secretary of the Resources Agency . . . 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. . . . The secretary shall use all available authority to enter into a memorandum of understanding (MOU) with the Secretary of the Interior, as provided in Section 101(b)(1)(B)(i) of the Salton Sea Reclamation Act of 1998 (P.L. 105-372) for the purpose of obtaining federal participation in the restoration of the Salton Sea.

(2) The restoration study shall establish all of the following:

(A) An evaluation of and suggested criteria for the selection of alternatives that will allow for consideration of a range of alternatives including, . . . and a most cost-effective technical alternative.

(B) An evaluation of the magnitude and practicability of costs of construction, operation, and maintenance of each alternative evaluated.

(C) . . . .

(D) The selection of a preferred alternative consistent with Section 2931, including a proposed funding plan to implement the preferred alternative.

(3) The study identifying the preferred alternative shall be submitted to the Legislature on or before December 31, 2006.

Later, in November 2004, federal legislation, the Water Supply Reliability and Environmental Improvement Act, was passed (Public Law 108-361), requiring that:

> Not later than December 31, 2006, the Secretary of the Interior, in coordination with the State of California and the Salton Sea Authority, shall complete a feasibility study on a preferred alternative for Salton Sea restoration.

In addition, Public Law 108-361 also required Reclamation to provide Congress a report on a preferred alternative for Salton Sea restoration.

3. Restoration's "Limbo" Status Post-QSA Legislation

After the QSA was signed, the Salton Sea restoration plan was functionally not implemented by the State of California, no doubt due to budget concerns.

The State has not timely selected or funded a preferred alternative for Salton Sea restoration as set forth in SB 317. The Preferred Alternative Report was provided to the Legislature in May *2007*, well after it was initially required *and without any funding plan*. Petition Lodgment, Exhibit "5." To date, no action has been taken on the preferred alternative due to high costs and uncertainties. In 2008, state legislation named the Resources Agency as the lead to implement this alternative. This was followed in 2010 by SB 51, which created a governing structure for restoration. In the Preferred Alternative Report, the State addressed funding requirements, but no information was provided on the mechanism through which restoration might actually be funded.

In December 2007, one year after the deadline mandated under the Water Supply Reliability and Environmental Improvement Act, the Bureau released its final report on a preferred alternative for Salton Sea. This report, which describes and evaluates the physical, biological and engineering aspects of, and performs risk assessments of, five potential project alternatives, only partially fulfilled PL 108-361's requirement. According to the Bureau, "lack of data and the time and funding required to analyze these data did not allow a full feasibility level study." (Bureau of Reclamation Feasibility Report for Restoration of the Sea, December 2007 (Feasibility Report), p. xvi.) The report provides information on the study results for: a Mid-Sea Dam with a North Marine Lake (proposed by the Salton Sea Authority); a Mid-Sea Barrier with South Marine Lake; Concentric Lakes (proposed by the Imperial Group); North-Sea Dam with Marine Lake; and Habitat Enhancement without Marine Lake. A no-project alternative was also evaluated. Due to "hydrologic and biologic uncertainties," the Bureau did not recommend implementation of any of the action alternatives evaluated in this report. (Feasibility Report, p. xvi.) Instead, the Bureau noted that "a focused and progressive adaptive management study initiative of saline habitat

complexes could be undertaken to determine if such complexes are a feasible approach to replacing historic wildlife use values at the Sea." (Feasibility Report, p. xvii.)

In its 2007 study, the Bureau estimated that all of the action alternatives considered in its 2007 report would cost between $3.5 and $14 billion. It also stated that annual costs associated with the alternatives will be very high. Since release of the Feasibility Report almost four years ago, the Federal Government has not taken any steps to recommend or fund a preferred alternative to restore the Sea.

IID and SDCWA both recently passed resolutions urging the State to approve a realistic funding plan and to appropriate funds. However, despite such requests, there has been no funding action.

Thus, despite state and federal articulated *desires* to embark on some sort of a restoration project, they have simply refused to commit to any plan or to fund anything (other than studies). From a political standpoint this may make sense in a deficit-focused Washington, D.C., and in a cash-strapped Sacramento. However, this inactivity means that the habitat provided by the Salton Sea continues to deteriorate significantly. Petitioners contend that unless the state and/or federal governments actually choose, fund, and begin physical work on implementing a restoration plan by the start of 2014, Petitioners' water transfer mitigation funds for 2014-2017 are better spent on early habitat mitigation for various species, rather than more water to the Sea.

D. THE QSA

The critical nature of the QSA and its status is important information for the Board on this Petition.[16]

The QSA and the water transfers involved therein reflect California's policy of encouraging conservation, reasonable and beneficial use, and water transfers, while discouraging waste. (Wat. Code, §§ 1701 *et seq.*, 1011-13.) The conserved water transfers further the

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[16] Though Petitioners here detail some of the history of the QSA, and where litigation stands over the QSA and Related Agreements, it must be noted that in the 2002 Order this Board did not approve the QSA and Related Agreements, but rather certain transfers of conserved water. Similarly, by the instant Petition the Petitioners are not asking this Board to approve the QSA and Related Agreements, but rather to simply make modifications to the 2002 Order.

Legislature's mandate to encourage agriculture-to-urban water transfers, in conformity with previous orders of the Board, and does so without harming other legal users of water.

The Board, in the 2002 Order, acknowledged the critical importance of the water transfers under the proposed QSA:

> The proposed transfer is a critical part of California's commitment to reduce its use of water from the Colorado River. The State's water supply could be severely impacted if the transfer is not implemented and the Secretary of Interior limits California's diversions from the Colorado River.

2002 Order, p.2.

> The SWRCB finds that the benefit of a reliable Colorado River water supply under the USBR's Interim Surplus Criteria are critically important to the people of the State. The California Water Plan identifies the Colorado River as a source of supply for Southern California. In the absence of the proposed transfer, the State may be required to immediately reduce its diversions from the Colorado River by approximately 800,000 acre-feet of water per year. The only infrastructure currently in place that could provide an alternative source of water is the State Water Project, which diverts water from the Sacramento-San Joaquin Delta Estuary. Increased diversion from the Bay-Delta could have negative impacts on fish and wildlife resources that rely on the Bay-Delta, and the resulting measures to protect threatened and endangered species under the CESA and the federal ESA could result in severe and unpredictable water shortages throughout the State.

2002 Order, p.73.

The Board found the implementation of the water transfers under the QSA to be so important to California that the benefits justified the environmental impacts that might arise from them:

> This order incorporates requirements that avoid or mitigate the adverse environmental impacts of the transfer to the extent feasible. To the extent that environmental impacts are not fully mitigated, and to the extent that fallowing may result in adverse socio-economic impacts, the public interest in the transfer outweighs those adverse impacts. The transfer is a critical part of California's efforts to reduce its use of Colorado River water in accordance with California's Colorado River Water Use Plan, the Interim Surplus Guidelines, and the draft QSA. Implementation of the transfer as approved by this order will benefit not just the parties to the transfer, but the State as a whole.

2002 Order, p.84.

1. The QSA And Related Agreements

The QSA and Related Agreements are a complex series of agreements that, taken together, settled protracted, acrimonious disputes among IID, SDCWA, CVWD, MWD, several Indian Tribes, the State of California, and the United States regarding the allocation and distribution of water from the Colorado River throughout Southern California. The QSA allowed California to reduce its Colorado River use from its recent historical high of over 5.2 mafa to its agreed amount of 4.4 mafa in non-surplus years.

For decades, California lawfully used more than 4.4 mafa because Arizona and Nevada were not utilizing their full apportionments. The then-existing priority system -- while not perfect -- provided a tenable method of managing California's rights on the Colorado River. However, this system proved unsustainable in the face of mounting pressure from the other Colorado River basin states and the United States' mandate that California develop a plan to reduce its Colorado River water use. Many factors were aligning, resulting in the call on California to reduce its use: (1) Arizona was ramping up its use of the Colorado River to meet its full Colorado River entitlement set forth in *Arizona v. California* (1963) 373 U.S. 546; (2) Colorado River flows were becoming more variable and the probability of surplus flows appeared increasingly slim; and (3) Nevada's water demand was growing.

As surplus water dwindled, lower priority California water users such as MWD and CVWD began to look to IID's large water right as a potential solution to future water shortages. MWD and CVWD alleged that IID was wasting water through inefficient irrigation practices, and sought to compel IID to improve water use and thereby make more water available to MWD and CVWD.

In response to the potential looming crisis of severe cutbacks in MWD's Colorado River supply in the 1990's, SDCWA desired to reduce its nearly exclusive reliance on MWD and sought alternative water supply sources to diversify its supplies and improve water supply reliability. SDCWA turned to IID, which was seeking additional ways to comply with Board-recommended conservation requirements. IID and SDCWA negotiated a 1998 Agreement for Transfer of Conserved Water (the "Transfer Agreement"), which met SDCWA's and IID's complementary

needs. As originally negotiated, pursuant to the Transfer Agreement, IID would transfer up to 300,000 acre-feet per year to SDCWA derived from IID-conserved water developed through SDCWA-funded conservation improvements within IID's service area.

The Transfer Agreement contained conditions precedent to final implementation of the IID/SDCWA Transfer, including compliance with environmental laws, obtaining approvals from the Board and the Bureau, IID's maintenance of its water rights, and SDCWA obtaining a conveyance arrangement.

After entering into the initial 1998 Transfer Agreement, IID and SDCWA submitted a joint petition to the Board for approval of the IID/SDCWA Transfer. CVWD and MWD protested the Board Petition based on their position that federal law controls IID's water rights and any water unused by IID is available to them based on the Colorado River priority system.

While IID and SDCWA's earlier Petition, and CVWD's and MWD's protests, were pending, broad negotiations were under way to reduce California's use of Colorado River water. A key element of achieving this goal was the transfer of water from agricultural to urban uses, with the IID/SDCWA Transfer representing the largest such transfer. After the IID/SDCWA Transfer Agreement was signed, the State and the United States Secretary of the Interior ("Secretary") expressed concern that the existing Colorado River water rights scheme presented an obstacle to conserved water transfers, and water rights must be more clearly defined before water was transferred.

In 1999, negotiators for IID, CVWD, MWD, SDCWA, and federal and state agencies reached agreement on several "Key Terms" for settling the longstanding disputes over allocation of California's apportionment of Colorado River water: (1) settle disputes regarding the priority, use and transferability of Colorado River water; (2) agree on a plan to allocate specific quantities of Colorado River water among the agencies; (3) reach agreements to ensure continued reliability of Colorado River water supplies; (4) assist the agencies in meeting their water demands; (5) identify terms and conditions for the transfer and conservation of specific amounts of water; and (6) provide incentives to the agencies to conserve water.

Representatives from the numerous California agencies, California's Departments of Water Resources (DWR) and Fish and Game (DFG), the California Legislature, United States Department of Agriculture, the Department of the Interior, the Bureau, the United States Fish and Wildlife Service, and each of the other six Colorado River Basin states proceeded with negotiation for the various QSA Agreements. Public interest groups, environmental groups, farmers, the County of Imperial, local farm bureaus, and other farming representatives also participated at various stages of the negotiations.

In 2000, the Colorado River Board of California published a draft Colorado River Water Use Plan providing a framework to satisfy California's water needs within its annual apportionment of 4.4 mafa, which included the draft QSA and some of the related agreements. In response, the Secretary adopted the Interim Surplus Guidelines (ISG) to provide California with a soft landing to reduce its water usage and to provide the Water Agencies 15 years to implement various components of the Plan. The soft landing consisted of a 15-year phase-out period for surplus water that could be used by California when its demand exceeded its 4.4 mafa apportionment. 66 Fed.Reg. 7772.

To implement the QSA settlement concepts, IID, SDCWA, CVWD and MWD entered into the Protest Dismissal Agreement dated February 11, 2002, to resolve MWD and CVWD's protests to the IID/SDCWA earlier Petition by agreeing to disagree over applicability of state or federal law to the water transfers at issue, and agreeing that IID would decrease its water transfer to SDCWA from a maximum of 300,000 afa to a maximum of 200,000 afa, and make the 100,000 afa difference available to CVWD or MWD, who would withdraw their protests.

The IID/SDCWA Transfer was analyzed in a joint state/federal document, an Environmental Impact Report/Environmental Impact Statement (EIR/EIS), with IID as lead agency under CEQA and Reclamation as lead agency under NEPA. The draft EIR (DEIR), released for public comment on January 17, 2002, analyzed the long-term transfer of conserved water from IID to SDCWA and the transfer of water to CVWD and MWD. The Project objectives reflected the important policy and historic considerations that led to the Transfer Agreement: IID's objectives focused on its needs to conserve and transfer water without impairing its historic

senior-priority water rights on the Colorado River under state and federal law, and SDCWA's objectives focused on acquiring a reliable, independent, long-term water supply to help meet existing needs independent from MWD.

On June 28, 2002, IID certified the Final Environmental Impact Report (FEIR) as complying with CEQA and submitted the certified FEIR to the Board for its consideration as a responsible agency. The FEIR served as the State Water Board's basis for finding, in the Revised Order, that the IID/SDCWA Transfer complied with CEQA.

Over the course of further QSA negotiations after the Board's adoption of the 2002 Order, the IID/SDCWA Transfer underwent slight modifications. In September 2003, IID prepared an Amended and Restated Addendum ("Amended Addendum") to the EIR to address potential environmental impacts associated with slight changes in the transfer schedule of the Transfer Project, refinements to mitigation measures for the Salton Sea, and any new significant information contained in the Revised Fourth Amendment.

2. Legal Challenges To The QSA And Related Agreements

The QSA Cases are a series of coordinated cases involving actions for validation of, or legal challenges to, certain approvals of the Board, the water agencies, and other agencies, related to environmental reviews and approvals of the QSA and associated agreements and actions. Shortly after the execution of the QSA and Related Agreements, IID filed a validation action in Imperial County to validate 13 of the QSA-related contracts it had signed. (Imperial County Case No. ECU01649/Sacramento County Case No. 04CS00875). Case 1649 was ultimately coordinated with other QSA-related litigation, and transferred to the Sacramento Superior Court.

In addition to IID's validation action, various lawsuits were filed challenging certain of the QSA and Related Agreements and the Board's approval of the Transfer Project. The coordinated

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proceedings originally included eleven cases.[17] The six QSA cases that survived are: (1) Case 1649, the validation action; (2) *Protect Our Water and Environmental Rights [POWER] v. Imperial Irrigation District* (Imperial County Case No. ECU01653/Sacramento County Case No. 04CS00877) (Case 1653), a CEQA challenge to the IID-SDCWA transfer approvals and the related Environmental Impact Report/Environmental Impact Statement (EIR/EIS), brought against IID as the lead agency for preparing the EIR/EIS and responsible agencies MWD, CVWD and SDCWA; (3) *County of Imperial vs. Metropolitan Water District of Southern California* (Imperial County Case No. ECU01656/Sacramento County Case No. 04CS00878) (Case 1656), a CEQA challenge brought against IID, CVWD, MWD and SDCWA as co-lead agencies for the Programmatic Environmental Impact Report (PEIR), which provided program-level environmental review for the QSA itself and certain related agreements; (4) *Morgan v. Imperial Irrigation District* (Imperial County Case No. ECU01658/Sacramento County Case No. 04CS00879) (Case 1658), another CEQA challenge to the IID-SDCWA Transfer and related EIR/EIS, which was also brought against IID as the lead agency for preparing the EIR/EIS and responsible agencies MWD, CVWD, and SDCWA; (5) Imperial County Case No. ECU01834 (Case 1834), a challenge to IID's acquisition of certain Western Farms land; and (6) Imperial County Case No. ECU01886 (Case 1886), another challenge to IID's acquisition of certain Western Farms land.

The trial court ordered the trial to proceed in phases, with Phase 1A limited to Case 1649 (the "Validation Case"), and with any environmental challenges to validity to be handled subsequently in Phases 1B and 1C. Phase 1A consisted of an 11-day bench trial conducted over

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[17] Five of the eleven QSA cases were dismissed before trial, including two CEQA mandamus petitions and one reverse validation/class action complaint. Cases 82 and 83 -- the two CEQA cases challenging the Board's approval of the transfer of water from IID to SDCWA -- were dismissed in 2005 and 2008, respectively, because the petitioners failed to timely name MWD and CVWD as necessary and indispensable parties. (*County of Imperial v. Superior Court* (2007) 152 Cal.App.4th 13, 24-25 (*County of Imperial*); *Imperial County Air Pollution Control District v. State Water Resources Control Board*, Third Appellate District Case No. C059264 (Case 83) (pending on appeal).)

four weeks. The trial court invalidated the QSA-JPA Agreement,[18] which was authorized by the Legislature to facilitate the implementation of the mitigation measures required by the Transfer Project EIR and its addenda, the 2002 Order, and endangered species and fully-protected species incidental-take permits issued by the wildlife agencies. The trial court concluded that the State's obligation, although contingent, to pay for mitigation costs in excess of the legislatively imposed cap, if any, violated section 7 of article XVI of the State Constitution.[19] Based on this asserted infirmity in the QSA-JPA Agreement, the court then found eleven other contracts before it,[20] including the IID/SDCWA Transfer Agreement, invalid and void.

Numerous parties, including Petitioners and the State, appealed. On March 1, 2010, Appellants IID, SDCWA, MWD, CVWD, Vista Irrigation District and the City of Escondido jointly filed a Petition for a Writ of Supersedeas (or Related Relief) Seeking Stay of Judgment Invalidating Certain QSA Agreements Pending Appeal ("Petition for Writ of Supersedeas"). On March 9, 2010, the Third District Court of Appeals issued an Order granting a temporary stay of the judgment pending its review of the Petition for Writ of Supersedeas. The Court granted the Writ of Supersedeas on May 7, 2010, staying enforcement of the trial court judgment pending resolution of the appeal.

On March 9, 2010, Imperial County and its Air District filed a notice of cross-appeal identifying as issues on appeal, inter alia, that the trial court erred in not hearing, deciding and issuing writs of mandate on the merits in CEQA Cases 1653 and 1656. On March 16, 2010, POWER also filed a notice of cross-appeal.

Therefore, the survival of the QSA contractual structure is now in the hands of the Court of Appeal. If it overturns the trial court's constitutional finding, then the QSA cases will be remanded for trial of all remaining matters. If it upholds the decision of the trial court, then the

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[18] The QSA-JPA Agreement is an agreement among IID, SDCWA, CVWD and DFG, creating the QSA Joint Powers Authority for the purpose of funding and implementing environmental mitigation of the QSA transfers.

[19] The trial court's Statement of Decision and Judgment are Exhibit "6" to the Petition Lodgment.

[20] With the exception of the Flooding Agreement between IID and CVWD, over which the trial court declined to exercise jurisdiction.

previously agreed QSA structure will be invalidated. However, the need for some form of QSA will not have changed, nor will the need for conserved water transfers into Southern California.

E. PRESENT MITIGATION OF THE QSA WATER TRANSFERS

Pursuant to this Board's 2002 Order and its environmental mitigation obligations, IID has been involved in extensive mitigation of the environmental effects of the water transfers. Petitioners highlight some aspects of the ongoing mitigation in this section.

1. Salton Sea Mitigation

The approved "bucket for bucket" Salton Sea mitigation for the QSA water transfers began in 2003-2004, and has continued to the present. It has been regularly reported to the SWRCB by IID in annual reports, and will not be re-detailed here.

2. Other Relevant Mitigation

Though there are many environmental mitigation activities ongoing for the QSA water transfers, some are worth noting in particular here, because they bear some relevance to the alternative mitigation measures this Board may be asked to approve.[21]

(a) Air Quality Mitigation

The 2002 Order Condition No. 8 requires IID to implement the monitoring and mitigation plan for Salton Sea shoreline as described on pp. 3-50 to 3-52 of the Final EIR/EIS; to implement best management practices ("BMPs") to mitigate PM10 emissions associated with fallowing, as described in the Final EIR/EIS; to comply with any relevant requirements of the State Implementation Plan for PM10 Emissions ("SIP") or PM10 rules of the Imperial County Air Pollution Control District ("ICAPCD") or the South Coast Air Quality Management District ("SCAQMD"); and to report annually on actions taken to comply. IID has been performing these activities.

The delivery of Salton Sea mitigation water under the approved Alternative Salton Sea Habitat Conservation Strategy has been ongoing. IID has continued the implementation of the IID Air Quality Mitigation Plan, which includes the four-step process for Salton Sea shoreline

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[21] Detail as to the actual measures will have to await further environmental review, which will be submitted to the Board during the petition process.

mitigation outlined in the Final EIR/EIS. IID continues to restrict access to the playa areas by gating access roads and providing signage in selected areas. IID is also evaluating soil stabilization processes that could be used on necessary playa access points to mitigate particulate matter emissions.

As part of Step 2 (Research and Monitoring) of the IID Air Quality Mitigation Plan, IID continues to oversee the six-station Salton Sea Regional Air Monitoring System. In late 2010, the QSA JPA voted to discontinue funding the IID/ICAPCD Memo of Understanding for the operation and maintenance of five of the six air quality monitoring stations, so IID assumed those responsibilities in July 2011. IID can provide the services in a more cost-effective manner. The stations are projected to operate through 2013. In 2010, IID coordinated with the California Air Resources Board ("CARB") to determine the applications for the data collected by the monitoring stations to develop wind and dispersal patterns, identify existing sources of particulate matter, and predict future sources of emissions.

Other research in 2010 included examining the potential for innovative dust control measures that may be secondary benefits of other projects, especially those that can be located on exposed playa and thereby reduce emissions. Projects being explored include alternative energy (solar and algae biomass) and aquaculture. IID is cooperating with USFWS Sonny Bono National Wildlife Refuge in developing a concept for a habitat project at Red Hill Bay that may demonstrate that habitat enhancement on exposed playa can provide the additional benefit of controlling emissions that affect air quality. Pilot projects in 2010 also include evaluating multiple types of surfactants as emission control measures on up to ten selected areas of the playa and evaluating the efficacy of wetting areas of playa with water from the New River channel to encourage vegetative growth that will stabilize the playa surface and serve as a wind screen. IID will also consider the possible recovery of playa lands for agricultural production.

IID completed the initial development of the playa exposure model in 2009, and is coordinating with USGS to finalize the bathometric data to refine the model. IID began compiling existing chemical and physical characteristics for the playa areas to document conditions at the various emission control pilot projects.

In addition to Salton Sea air quality mitigation compliance, the implementation of BMPs to minimize PM10 emissions from fallowed lands below the level otherwise caused by farming the land was implemented in 2003 and has continued every year since as to fallowed land.

(b) Habitat Creation

IID has been implementing various habitat creation measures for environmental mitigation. For example, IID was required to develop a Managed Marsh habitat to mitigate for impacts to vegetation within the IID managed agricultural drain system which will drain less water as a result of QSA conserved water transfers. The amount of vegetation within the drains was classified and quantified in a 2006 field study. The QSA Water Transfer Project impacts include those caused by reduced water flows in the drains and by IID's operation and maintenance activities (O&M).

The environmental permits require the Managed Marsh to be completed in three phases (total of 959 acres). Construction of the first phase of the facility was completed in October 2009, and suitable habitat for aquatic birds, including the targeted marsh birds, was established in early 2010. The first phase consists of approximately 365 acres of fresh-water emergent wetland habitat, bosque-like habitat and riparian corridor habitat. The first phase was planted and seeded in October 2009, and the Managed Marsh is currently being managed to more efficiently use irrigation water while continuing to enhance the habitat types established in the various cells. IID delivers Colorado River water to maintain the Managed Marsh.

The Managed Marsh operation is managed and coordinated by biologists and environmental specialists paid for by the QSA JPA, with assistance from outside consultants (also paid for by the QSA JPA) for specific tasks. As the vegetation matures the potential for erosion and invasive plant material growth will decrease, and the level of ongoing controls efforts is reduced, but not eliminated. Monitoring is also ongoing and will continue. Additionally, the IID team currently coordinates several area nurseries under contract to grow additional woody material to use for supplemental planting in Phase I. The approximate construction cost for Phase I of the Managed Marsh was $4.3 million (construction, infrastructure and planting), and was part of the QSA JPA 08-09 and 09-10 budgets. Land purchase costs for the entire facility (all three phases) is approximately $3.5 million. Maintenance, operations (including irrigation water), and monitoring

for the constantly ongoing work is budgeted at approximately $1 million per year. IID continues to work with CDFG to develop necessary documentation to transfer ownership of the Managed Marsh site to CDFG.

Additionally, IID is coordinating with CDFG and California Department of Water Resources in their planning for their Species Conservation Habitat ("SCH") project to be located at potential sites at the New River delta. Also, the desert pupfish refugium was completed in December 2010 and is located at the IID fish hatchery complex north of Villa Road in El Centro.

F. PRESENT STATUS OF THE SALTON SEA

Though the overall scope of the environmental conditions at the Salton Sea will be provided in detailed environmental review that will be furnished to the Board, the Board should be made aware that the Salton Sea is currently declining, and not due to the QSA water transfers, which are presently fully mitigated.

Even with the mitigation measures Petitioners have undertaken pursuant to the 2002 Order Revised Order, the Sea has continued to decline, with its water levels being lowered as a result of (1) lowered water use within IID over the past 10 years; (2) reduced inflows from the New and Alamo Rivers, and (3) lowered precipitation.

IID requests deliveries of water from the Bureau based on the orders from local farmers. During the period of 1994-2002, consumptive use within IID exceeded three million acre-feet per year. However, since 2002, consumptive use has dropped substantially, falling all the way to approximately 2,642,000 acre-feet[22] in 2009. Since the 2002 Order was adopted, for reasons independent of the QSA transfers, IID farmers have used less water than they previously had. As approximately one third of agricultural water used within IID drains to the Salton Sea, the Sea's elevation has correspondingly decreased.

Additionally, the New and Alamo Rivers provide a substantial portion of the inflows to the Salton Sea, both as drains for runoff within IID and carrying inflows from Mexico. In comparing cumulative cross-border flows within the last 20 years, average flows have declined over the past

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[22] These totals for annual consumptive use, for years in which IID transferred QSA conserved water (2003 to 2009), have the volume of transferred water included in the totals.

10 years, and flows within the past five-year period are the lowest they have been. This decline is the result of the development of additional water uses within Mexico, including recently developed sewage treatment and power plants, which combine to consume a large portion of the historical flow of the New River.

Finally, while precipitation provides only a small portion of the Sea's annual inflows, rainfall records since 1990 reflect a similar decline in precipitation. The 96-year average rainfall in the Imperial Valley is 2.83 inches. It was slightly higher for a period during the 1990s, but was significantly lower in the mid- to late 2000s. Accordingly, the Sea received less direct rainfall and less runoff resulting from rainfall.

III. THE PETITION REQUESTS ARE MERITED

The requests made in the Petition are merited. While the nature of this Petition is such that the Board is not being asked to act immediately and cannot be provided all environmental review detail until that work is complete, Petitioners desired to file this Petition to start the Board's processing of the Petition. The Board will not be asked to take any final action until Petitioners provide it with updated environmental review of the Salton Sea as required by CEQA, and detailed proposed alternative mitigation to be implemented in lieu of water to the Sea in 2014-2017. However, the overall merits of the Petition requests are clear even at this filing stage.

A. Mitigation Water To The Sea For 2014-2017, Without An In-Place Funded Restoration Plan, Is Not Prudent

While the required provision of flows to the Salton Sea may have been reasonable at the time of the 2002 Order, given the information available today as to the Sea's accelerating decline, the impact of the restrictions on transmission of water supplies through the Bay-Delta on California's water supplies, and the mitigation alternatives available to address the remaining small impact of the approved IID water transfers on the Salton Sea, it would be unreasonable to require the continued flows. (*See Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489 ["What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time."]; *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132 ["...what is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be

resolved in a vacuum isolated from state-wide considerations of transcendent importance. Paramount among these we see the ever-increasing need for the conservation of water in this state, an inescapable reality of life quite apart from its express recognition in the 1928 amendment [now Article X, Section 2 of the California Constitution]."].

As the Board has previously indicated, one of the most important factors to be considered in evaluating the reasonableness of water use is the identification of other beneficial uses that may be made of water. (*See* Decision 1600 at 24, *citing Joslin*, in which the court weighed the competing demands for water of a water district and the people it served against the demands of a riparian landowner who depended upon an unobstructed flow of water to replenish the rock and gravel which the landowner excavated from the streambed and sold, concluding that the riparian's insistence on the full unobstructed flow was unreasonable; *see also Antioch v. Williams Irrigation Dist.* (1922) 188 Cal. 451.)

The 2002 Order makes clear that it is unreasonable to require continued mitigation of transfer impacts on the Sea at the point it is clear that a Sea restoration plan will never be implemented:

> At the point when it becomes unreasonable to require continued mitigation of impacts on the Salton Sea, because there is no longer any hope for saving the Sea, the public interest in avoiding inappropriate burdens on this important transfer outweighs any harm to instream beneficial uses of the Sea.

2002 Order at p. 44.

The Board's concern as to the lack of benefit of providing flows to the Sea has been confirmed. The state and federal governments have failed to approve and fund a Salton Sea Restoration plan that will be implemented in time to materially alter the trajectory of the Sea's decline.

As will be shown in the updated environmental review that Petitioners will provide to the Board, mitigation alternatives may exist that can minimize and feasibly mitigate any impacts to the Sea without the waste of water. For example, alternate mitigation may include measures that would provide direct environmental benefits to the Salton Sea region instead of requiring the QSA-JPA to pay $60 million for water to the Sea in 2014-2017. These alternate mitigation

measures would provide immediate benefits to wildlife, such as the endangered desert pupfish, and nearby landowners, in contrast to the lack of any meaningful benefit in providing mitigation water to the Sea, which is rapidly declining independent of any impacts.

Though at this early petition-filing stage the Petitioners cannot provide the extensive scientific studies and data that will be present for the Board after environmental review is complete, there are some early rough modeling results which indicate that losses to the Salton Sea will likely be minimal in comparison to the benefits to be derived by using funding for early mitigation habitat creation. If the Board approves the alternate mitigation approach that may be requested (depending on environmental review), then opportunities arise for the conserved water that was otherwise going to be created and paid for as mitigation water to be transferred to fund early mitigation. For example, perhaps 40 kaf per year from 2014 to 2017 (160 kaf total of the 480 kaf of mitigation water) could be conserved and transferred to the urban coast in order to create additional funds for habitat expansion and air mitigation projects. IID has done a rough model of one such opportunity utilizing these assumptions to identify the magnitude of potential environmental impacts. Here are the modeling results of the estimated average impact of the change from the status quo with such assumptions:

Year	Salinity (PPT)	Elevation Of Sea (Feet Above/Below MSL)	Exposed Playa (Acres)
2018	+5.7	-2.2	+6,100
2024	+7.6	-1.7	+6,700
2030	+4.0	-0.7	+2,400
2036	+0.8	-0.1	+380
2044	-1.5	+0.2	-620

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These results are not inconsequential, but also do not appear exceptional. Coupled with the fact that alternative habitat creation will be accelerated, Petitioners believe that the benefits of this kind of approach are likely to outweigh the impacts at the Salton Sea -- though such will have to await final environmental review.

B. Roosts For Brown Pelicans Are No Longer Necessary

The brown pelican is no longer listed as an endangered species under federal or state law. As stated by Audubon California on its website[23]:

> In 2009, in recognition of the birds remarkable comeback, the Brown Pelican was removed from both the California and Federal Endangered Species Lists. Audubon California supported this delisting, but has insisted that the population continue to be closely monitored, as it still faces a number of environmental challenges.

Due to the delisting of the brown pelican from the endangered species lists, Petitioners do not believe that it is necessary any longer to provide roosting habitat, as had been required by the initial environmental mitigation plan.

IV. PROCESSING OF THIS PETITION

Petitioners will gladly meet with Board staff to work out suitable notice procedures, likely timelines, and other necessary procedural matters. All persons who were parties to the 2002 Order process are being served with a courtesy copy of this Petition.

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[23] http://ca.audubon.org/birds/pelican.php

V. CONCLUSION

Petitioners believe that this Board should approve their request to end unnecessary mitigation, and to accelerate needed mitigation. The modifications sought in this Petition to the 2002 Order are for the benefit of the environment and the public. The Board is respectfully requested to approve the sought changes.

Dated: October 11, 2011

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP

By: _____

MARK J. HATTAM
Attorneys for Petitioner
IMPERIAL IRRIGATION DISTRICT

Dated: October 11, 2011

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: _____

BRADLEY J. HERREMA
Attorneys for Petitioner
SAN DIEGO COUNTY WATER AUTHORITY

COURTESY SERVICE LIST
Re Joint Petition for Modification of Revised Order WRO 2002-0013
by the IID and the SDCWA

Steven B. Abbott
Redwine and Sherrill
1950 Market Street
Riverside, CA 92501-1720

Marcia Scully,
Interim General Counsel
The Metropolitan Water District of Southern California
P. O. Box 54153
(700 North Alameda Street, 90012-2944)
Los Angeles, CA 90054-0153

Kim Delfino
Defenders of Wildlife
926 J Street, Suite 522
Sacramento, CA 95816

Executive Director
California Farm Bureau Federation
2300 River Plaza Drive
Sacramento, CA 95833

Executive Director
Planning and Conservation League
926 J Street, Suite 612
Sacramento, CA 95814

Executive Director
Sierra Club California
1414 K Street, Suite 500
Sacramento, CA 95814

City of Los Angeles
Department of Water & Power
Water Resources Business Unit
111 North Hope Street, Room 1460
Los Angeles, CA 90012

Executive Director
Salton Sea Authority
78-401 Highway 111, Suite "T"
La Quinta, CA 92253

Alene M. Taber
Jackson, DeMarco, Tidus & Peckenpaugh
2030 Main Street, Suite 1200
Irvine, CA 92614

Regional Director:
Lorri Gray
U.S. Bureau of Reclamation
Lower Colorado Regional Office
P. O. Box 61470
Boulder City, NV 89006

Thomas S. Virsik, Esq.
Law Office of Patrick J. Maloney
2425 Webb Avenue, Suite 100
Alameda, CA 94501-2922

California Environmental Protection Agency
Secretary for Environmental Protection
1001 I Street, 25th Floor
Sacramento, CA 95814

Executive Officer
South Coast Air Quality
Management District
21865 Copley Dr.
Diamond Bar, CA 91765

Eric Shepard, Esq.
Colorado River Indian Tribes
Office of the Attorney General
Route 1, Box 23-B
Parker, AZ 85344

Antonio Rossmann
Rossmann and Moore, LLP
380 Hayes Street, Suite 1
San Francisco, CA 94102

California Fisheries Restoration Foundation
1146 Pulora Court
Sunnyvale, CA 94087-2331

William I. DuBois
3939 Walnut Avenue, No. 144
Carmichael, CA 95608

Executive Officer
Regional Water Quality Control Board
Colorado River Basin Region
73-720 Fred Waring Drive, Suite 100
Palm Desert, CA 92260

J. William Yeates, Esq.
Kenyon Yeates LLP
2001 N Street, Suite 100
Sacramento, CA 95811

Executive Director
California Regional Water Quality
Control Board
73-720 Fred Waring Drive, Suite 100
Palm Desert, CA 92260

U.S. Fish & Wildlife Service
Ecological Division
2800 Cottage Way, Room E1803
Sacramento, CA 95825

Executive Officer
RWQCB, San Diego Region (9)
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Executive Director
Pacific Institute
948 North Street, Suite 7
Boulder, CO 80304

Larry A. Gilbert
945 E. Worthington Road
Imperial, CA 92251-9764

Kevin M. Doyle
David Younkman
National Wildlife Federation
3500 5th Avenue, Suite 101
San Diego, CA 92103

Executive Director
Association of California Water Agencies
910 K Street, Suite 100
Sacramento, CA 95814-3577

California Department of Fish and Game
Eastern Sierra & Inland Deserts
Region 6
3602 Inland Empire Blvd., Suite C-220
Ontario, CA 91764

U.S. Fish & Wildlife Service
Ventura Fish & Wildlife Office
2493 Portola Road, Suite B
Ventura, CA 93003

Bartkiewicz, Kronick & Shanahan
c/o Alan B. Lilly
1011 Twenty-Second Street
Sacramento, CA 95816-4907

Robert M. Trimm
P. O. Box 119
Brawley, CA 92227