ALLEN MATKINS LECK GAMBLE & MALLORY LLP
DAVID L. OSIAS (BAR NO. 091287)
MARK J. HATTAM (BAR NO. 173667)
501 West Broadway, Ninth Floor
San Diego, California 92101-3577
Phone: (619) 233-1155
Fax: (619) 233-1158

HORTON, KNOX, CARTER & FOOTE
JOHN PENN CARTER
895 Broadway, Suite 101
El Centro, CA 92243
Telephone (760) 352-2821

Attorneys for Petitioner
Imperial Irrigation District

STATE WATER RESOURCES CONTROL BOARD

STATE OF CALIFORNIA

IMPERIAL IRRIGATION DISTRICT and SAN DIEGO COUNTY WATER AUTHORITY, Petitioners.	**CLOSING BRIEF BY PETITIONER IMPERIAL IRRIGATION DISTRICT IN SUPPORT OF FURTHER FINDINGS UNDER THE SWRCB'S RETAINED JURISDICTION PURSUANT TO DECISION 1600 AND ORDER 88-20, AND IN SUPPORT OF FINDINGS AND APPROVAL OF CHANGE PETITION AND LONG-TERM TRANSFER OF CONSERVED WATER**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Page(s)

SWRCB Orders & Decisions

Page(s)

Other

Page(s)

Publications

I. INTRODUCTION

The Imperial Irrigation District ("IID") comes before the State Water Resources Control Board ("SWRCB") for approval of a conserved-water transfer to other urban water districts in Southern California that will be hugely beneficial to the entire state. The IID holds one of the oldest and largest Colorado River water rights in California, established under state law before the start of the 20th Century, and modified by a contract with the Secretary of the Interior in the early 1930's. With such water right, IID has supported the development of an agricultural-based economy in rural Imperial County that produces agricultural products of approximately $1 billion per year. IID's irrigation water-use efficiency is among the highest in California, but it can become even more efficient with further costly improvements that can be funded by the transferees of the conserved water.

In 1988, per instructions from the SWRCB in Order 88-20 to seek conservation funding from urban areas, IID and the Metropolitan Water District of Southern California ("MWD") entered into a conservation agreement by which approximately 108,000 acre-feet per year ("AFY") of water has been conserved in IID and transferred to MWD.

Consistent with recommendations to consider additional conservation and "ag-to-urban" water transfers contained in previous decisions and orders from the SWRCB, such as in Decision 1600 and Orders 84-12 and 88-20, IID negotiated the proposed conserved-water transfer of 130,000 to 200,000 AFY (the "Transfer") to the San Diego County Water Authority ("SDCWA").

In association therewith, IID has also settled major disputes with the Coachella Valley Water District ("CVWD") and MWD by agreeing, among other things, to further conserve and transfer 100,000 AFY of additional conserved water (the "Settlement").

The entire state will benefit from the Transfer and associated Settlement. California is under immense pressure from the federal government and the other Colorado River basin states to limit its Colorado River water use to 4.4 million AFY, its basic apportionment under federal law and the Supreme Court decree. Historically, California Colorado River right holders junior in priority to IID have caused California to divert and use 600,000 to 800,000 AFY more than the 4.4 million AFY limit. The Transfer and associated Settlement is a primary vehicle for California to accomplish a substantial portion of the necessary reduction.

The proposed Transfer and Settlement will not cause any injury or impact sufficient to deny approval of this Petition. All proposed transferees of the conserved water (SDCWA, MWD and CVWD) already use Colorado River water. All junior right holders in California have consented, and no significant injury will occur to any legal user of water possessing a Colorado River water right. To the extent that negative environmental impacts might occur, the benefits of the Transfer and Settlement far outweigh any environmental detriment such that there is no resulting unreasonable environmental impact.

This closing brief sets forth the law and evidence regarding: (a) what IID requests by the Petition; (b) why the SWRCB may and should issue the Findings and Order of approval

requested; and (c) why the objections made by various parties are either not merited, or concern irrelevant environmental issues or environmental impacts outweighed by the benefits of the Transfer and Settlement. IID also responds to the specific inquiries posed by the SWRCB in its letter of June 14, 2002, and certain CEQA issues raised by some parties. Proposed Findings are included in the section preceding the Conclusion.

In reviewing this closing brief, and in making a decision and issuing Findings and an Order, IID respectfully requests the SWRCB to keep the following matters in mind:

- IID's Petition is predicated on a plan to deliver water and irrigate more efficiently and then transfer the conserved water saved -- just as previously recommended by the SWRCB. These actions require third-party funding, and the transferees and settling parties are the source of such funding.

- The lower-priority water right holders, CVWD (which takes its water at Imperial Dam) and MWD (which takes its water at Parker Dam), consent to the Transfer. The Transfer and Settlement water is going to MWD-member SDCWA and CVWD (or MWD). Thus, the Transfer and Settlement will have no more impact on anything (Salton Sea, Colorado River, San Diego "growth," etc.) than would any lesser use by IID in the same amount and the corresponding higher use by the same junior right holders MWD and CVWD -- which, by the way, could happen any time IID's water use

drops for any reason. Thus, the protestants are really claiming that IID cannot contract with junior right holders to lessen its use and allow their corresponding increased use.

- To the extent a balancing of competing interests is performed, or a consideration of the overall public interest is material, the Transfer and Settlement provide a substantial additional water supply for urban Southern California and a corresponding reduction in export pressure on Northern California water resources, including a benefit to the San Francisco Bay Delta. These environmental and public considerations overwhelm any short-term detriments to an already salt-poisoned Salton Sea. Salton Sea impacts are not unreasonable when judged in the light of the overall benefits (the statutory standard), and considering the fact that IID's conservation and transfer activities will remain subject to compliance with state and federal endangered species laws.

- Not a single environmental group, the state, nor the federal government has yet offered any money to save, restore or preserve the Salton Sea. No one has yet even determined how to do so and whether it would be economically feasible. In contrast, California is facing imminent Colorado River water reductions that are as certain as the increasing

salinity of the Salton Sea. The parties opposing this Transfer and Settlement are fundamentally arguing that the benefit of the conserved-water transfer to assist a critical California water-supply problem is outweighed by the ability of someone (as of yet unidentified) to save the Salton Sea with a solution (as of now undiscovered) utilizing an (unknown) funding source to pay costs in an (unknown) amount. The objections ignore the Congressional recognition in the Salton Sea Restoration Act that transfers which reduced flows into the Sea were expected to occur before such restoration, and the **transfers were to be supported**.

- This hearing is not, as the Chair noted, the proper forum to litigate the legal sufficiency of the EIR/EIS documentation. Many parties have unfairly and improperly attempted to turn this water-rights hearing into a CEQA or NEPA challenge. Although it may be proper to raise environmental concerns and whether EIR/EIS status permits the SWRCB to issue a decision, it is not appropriate to waste the parties' and the SWRCB's time with alleged technical arguments regarding CEQA and NEPA compliance.

- The IID has sought SWRCB approval to transfer conserved water created by efficiency-improving conservation only -- not by fallowing valuable farmland. The Petition before the SWRCB is for a

conserved-water transfer in which fallowing is expressly prohibited by the contract with SDCWA and also violative of long-standing IID policies. Thus, there is no request to approve a fallowing-based transfer before the SWRCB at this time.

- Imperial County is one of the poorest counties in this state, with high unemployment and low per-capita income. Fallowing would cause a substantial economic burden on Imperial Valley residents by partially dismantling the agricultural "engine" that provides the majority of jobs and economic activity in the Imperial Valley. Fallowing was identified as an alternative in the Draft EIR/EIS, and thus many parties submitted arguments and testimony to the SWRCB seeking an order or conditional approval related to fallowing. Solely because of such argument and testimony, IID presented rebuttal testimony and evidence on the negative impacts of fallowing.

Because there was (and may still be) additional evidence on the changes between the Draft EIR/EIS and the Final EIR/EIS, IID will address those changes in its supplemental closing brief.

IID does not go into detail in this brief as to how IID's water rights arose under and are governed by both state and federal law, and how they encompass differing categories of rights. Such was detailed extensively in IID's Petition.

II. PROCEDURAL AND FACTUAL SUMMARY

The following is a short summary of the history leading up to this proceeding, what is now sought from the SWRCB, and an overview of the evidence presented.

A. The History Behind This Proceeding

The matters in this proceeding are not the first time the SWRCB has considered them. The IID has specifically requested in the Petition that the SWRCB revisit IID's reasonable and beneficial use of water, drainage to the Salton Sea, and ability to conserve and transfer additional amounts pursuant to the express retention of jurisdiction on such matters by the SWRCB in earlier decisions and orders. The SWRCB previously determined that IID could generate approximately 400,000 AFY of water for transfer through additional conservation measures. The SWRCB also specifically held that tailwater and tile-water runoff into the Salton Sea should be reduced, and ordered IID to become more efficient. The following SWRCB rulings and statements put the current proceeding into context:

> In summary, water conserved by IID will be needed for consumptive use within California in the very near future.

SWRCB Order 84-12 (SWRCB Exh. 2a, p. 16).

> The need for substantial additional water supplies in California and the prospects of substantial water conservation in IID have been well established. . . . Based on presently available information, the Board finds that conservation of 367,900 acre-feet per annum . . . is a reasonable long-term goal which will assist in meeting future water demands.

SWRCB Order WR 88-20 (SWRCB Exh. 2b, p. 44).

> Approximately one million acre-feet per year of Colorado River water enter [sic] the Salton Sea as irrigation return flow from Imperial Irrigation District. This large quantity of freshwater is lost to further beneficial consumptive use and has contributed to the flooding of property adjoining the Salton Sea. Following diversion of major quantities of water by the Central Arizona Project . . . there will be insufficient water available from the Colorado River to satisfy the existing level of demand of California water users. . . . [IID's failure to reduce runoff] is unreasonable and constitutes a misuse of water . . .

SWRCB Decision 1600 (SWRCB Exh. 2, p. 66).

> The State Water Resources Control Board supports AB 2542 for the following reasons: . . . . There is a potential 438,000 acre-feet of water which could be conserved annually by IID if they have economic incentive for doing so. This bill helps provide that incentive.

SWRCB Bill Analysis on AB 2542 (IID Exh. 44, first page).

To achieve these goals, in Order 88-20 the SWRCB required that the IID complete "an executed agreement with a separate entity willing to finance water conservation measures in Imperial Irrigation District," 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," and required SWRCB reporting by IID. at p. 44 (emphasis added).

Since the 1988 IID/MWD water conservation agreement accounts for about 108,000 AFY of the potential conserved water to be generated and transferred by the IID (IID Exh. 15), the additional 300,000 AFY at issue in this proceeding would bring the total IID conservation under these programs to a little over

400,000 AFY -- just what the SWRCB and the Department of Water Resources identified (see IID Exh. 44, DWR Bill Analysis).

The foregoing history is important to the current evaluation of the instant Petition. IID has sought opportunities consistent with SWRCB recommendations to further improve its delivery system and improve its irrigation efficiency through urban-funded conservation and transfers. IID should not be forced to turn its back on such opportunities to preserve a very uncertain and unstable status quo at the Salton Sea. IID is faced with massive potential liability from the continuing risk of Salton Sea flooding should a dike fail and/or a tropical storm arrive before the elevation of the Salton Sea declines. IID will reduce this risk by efficiency conservation reducing inflows to the Salton Sea. Such conservation has been supported over decades by the SWRCB, DWR, the Legislature and the courts. The "let's keep the Salton Sea at its current elevation" refrain from many protestants ignores IID's risk and ignores the historical concerns of the SWRCB. It also asks IID to bear the risk of flooding with no compensation or economic safety net. None of the protestants have offered to indemnify IID or offered to pay for dike maintenance or expansion.

The backdrop to the transfer Petition is thus all-important. A Salton Sea status quo at elevations which leave IID at risk for dike failure or future additional flooding is not an acceptable outcome, especially when California needs additional water for Southern California urban needs, and when IID has the opportunity to provide such water with conservation transfers funded by the transferees.

B. IID's Request To The SWRCB

1. Reasonable And Beneficial Use Finding And Conclusion

IID presented extensive evidence that its irrigation efficiency is higher than state standards and is, in fact, reasonable and beneficial (addressed below in some detail). Since this matter is before the SWRCB as part of its continuing jurisdiction over IID's water use, it is appropriate for the SWRCB to find IID's use reasonable and beneficial.

2. Statutory Findings

For purpose of the widest notice possible, this Petition was noticed as a possible change of place of diversion, place of use, and/or purpose of use, and such change considerations are appropriate for determining whether any injury results. However, IID cannot stress enough that Water Code §§ 1011, 1012, 1014, and 1017 (in the context of this Transfer and Settlement) provide that as a matter of law the place and purpose of use are **not changing**. As IID stated in its Petition, when IID conserves water, IID is **itself** deemed to be using the water according to state law. This occurs irrespective of whether IID transfers the conserved water.

Water Code § 1011(a) clearly articulates this principle:

> When any person entitled to the use of water under an appropriative right fails to use all or any part of the water because of water conservation efforts, any cessation or reduction in the use of the appropriated water shall be deemed equivalent to a reasonable beneficial use of water to the extent of the cessation or reduction in use . . .

(Emphasis added.)

Thus, if IID were to simply conserve water, without even making any kind of transfer, this by statutory definition is a reasonable and beneficial use by IID. It is not a use by anyone else or a use by IID anywhere else.

If IID then chooses to transfer the water, this does not modify IID's water right or deemed water use. Water Code § 1014 states that the subsequent transfer of any such conserved water "shall not cause, or be the basis for, . . . modification of any water right, contract right, or other right to the use of that water." (Emphasis added.) Similarly, Water Code § 1017 says that the transfer of the water "shall constitute a beneficial use of water by the holder of the permit . . . ." (Emphasis added.)

Therefore, the Legislature has provided that conservation is itself a reasonable beneficial use by the water right holder, and that if the water right holder then transfers the conserved water, this does not result in a modification of the water right or change the legal user. Such being the case, the Transfer and Settlement involve a change in diversion point, but as a matter of law, water use by IID for the transferred water continues.

3. Necessary Findings To Preserve Settlement

As the SWRCB is aware, IID and SDCWA have entered into a set of settlement documents with MWD and CVWD, including the Protest Dismissal Agreement ("PDA") (IID Exh. 23) and the pending Quantification Settlement Agreement ("QSA") (IID Exh. 22) (collectively, the "Settlement Documents"), all related to the Transfer and Settlement and this hearing. Thus, the SWRCB findings that were conditions precedent, as initially stated in the IID/SDCWA transfer agreement and detailed in the Petition,

have been supplemented and substituted by the explicit requested findings in the PDA.

This proceeding was not contested by MWD and CVWD because of the PDA. For the Settlement to remain in place, and thus for the Transfer and Settlement to be implemented, a number of SWRCB findings are required. IID believes that all of these findings are consistent with the SWRCB's authority and the law. They are listed on pages 4-5 of the PDA (IID Exh. 23), and they are repeated here, along with reasons why the findings are justified.

The PDA requires the IID and SDCWA to urge the SWRCB to base the requested findings on the following preamble and to include such verbatim in its decision:

> Based on the substantial evidence regarding the proposed conservation activities; the substantial evidence of the terms and benefits of the Quantification Settlement Agreement and Acquisition Agreements; the continuing effectiveness of the Quantification Settlement Agreement, with an automatic lapse causing all findings of fact and conclusions of law to be of no force or effect upon the termination date (as defined therein) of the Quantification Settlement Agreement; the terms and provisions of and the consent of CVWD and MWD under this Protest Dismissal Agreement; the SWRCB authority granted under the California Constitution Article X, § 2, Water Code sections 100, 109, 1011, 1012, 1700 et seq. and 1735 et seq.; and on the SWRCB retained jurisdiction under Decision 1600 and Water Rights Order 88-20 . . . .

IID Exh. 23, p. 4.

Additionally, the following are the sought PDA findings and their rationale:

Sought SWRCB Finding	Reason Finding Is Justified
1. The decision, order and all findings of fact and conclusions of law, with the exception of any decision, order, finding of fact or conclusion of law made with respect to standing or the right to appear or object, shall have no precedental effect (as defined in the California Administrative Procedures Act) in any other proceeding brought before the SWRCB and, specifically but without limitation, shall not establish the applicability or nonapplicability of California law or federal law to any of the matters raised by the Petition or to any other Colorado River transfer or acquisition.	1. There is no requirement that any SWRCB decision be precedental. According to the California Administrative Procedure Act, a decision made by the SWRCB may not be relied on as precedent unless the SWRCB explicitly "designates and indexes the decision as precedent as provided in Section 11425.60." Government Code § 11425.10(a)(7). The SWRCB has issued non-precedental decisions in the past. (See, for example, Orders WQ 2001-07 and WQ 2001-05-CWP.) The SWRCB must state that its decision in this matter is non-precedental because it has earlier ruled that its decisions are precedental unless specified to the contrary. Order WR 96-1, fn.11.
2. There is no substantial injury to any legal user of water.	2. This is simply a restatement of what the SWRCB must find per Water Code § 1736 in any event, and as noted herein, it is true.

Sought SWRCB Finding	Reason Finding Is Justified
3. There is no unreasonable impact on fish, wildlife or other instream beneficial uses.	3. This is simply a restatement of what the SWRCB must find per Water Code § 1736 in any event. Based upon the evidence and the law (discussed in detail below), it is justified here.
4. The SWRCB concerns, if any, with respect to IID's reasonable and beneficial use, are satisfied.	4. IID's water use has been reviewed by the SWRCB a number of times, such as in Decision 1600 and Order WR 88-20. The SWRCB has received periodic reports from the IID about its conservation project, and this proceeding has been noticed as a continuation of such jurisdiction. IID presented extensive (and uncontroverted) evidence about its reasonable and beneficial water use and its high efficiencies.
5. The SWRCB does not anticipate the need, absent any substantial material adverse change in IID's irrigation practices or advances in economically feasible technology associated with irrigation efficiency, to reassess the reasonable and beneficial use of water by the IID before the end of calendar year 2023.	5. This is simply a reasonable statement of current intent on the part of the SWRCB. It in no way abrogates the SWRCB's authority to review IID's water use if there are changed circumstances, but rather gives IID some assurance that it is now operating reasonably and that barring changed circumstances, the SWRCB is unlikely to undertake further IID use review in the near future given the 23-year ramp-up schedule for the Transfer and Settlement.
6. Water Code sections 1011, 1012 and 1013 apply to and govern the transfer and acquisitions and IID's water rights are unaffected by the transfer and acquisitions.	6. These statutes are part of California's overall water transfer legislation ensuring that transferors retain their water rights, and the SWRCB is simply being asked to

Sought SWRCB Finding	Reason Finding Is Justified
	specifically find what the law provides: that IID's water rights are unaffected by the transfer.
7. The conserved water transferred or acquired retains the same priority as if it were diverted and used by the IID.	7. This is simply a corollary to number 6 above. If IID's water rights are unaffected, then the conserved water retains its Priority 3 status.
8. The transfer and acquisitions are in furtherance of earlier SWRCB decisions and orders concerning the IID's reasonable and beneficial use of water, California Constitution article X, § 2, and sections 100 and 109 of the Water Code.	8. Again, this is simply a finding of applicable law and the need to resolve and conclude the SWRCB's earlier decisions in Decision 1600 and Order WR 88-20.
9. IID shall report annually on conservation of water pursuant to its Petition, and such annual reports shall satisfy reporting obligations of IID under Decision 1600 and Water Rights Order 88-20. The quantity of conserved water transferred or acquired will be verified by the IID reporting that (i) the IID's diversions at Imperial Dam (less return flows) have been reduced below 3.1 million AFY in an amount equal to the quantity of conserved water transferred or acquired, subject to variation permitted by the Inadvertent Overrun Program adopted by the DOI; and (ii) the IID has enforced its contracts with the participating farmers to produce conserved water and has identified the amount of reduced deliveries to participating farmers and has	9. As per number 8 above, this is to resolve IID's reporting obligations under previous SWRCB decisions and orders, and to provide a mechanism for reporting annually on performance of this Transfer and Settlement. The verification will ensure actual "wet water" conservation.

Sought SWRCB Finding	Reason Finding Is Justified
identified the amount of conserved water created by projects developed by the IID.	

In sum, per the settlement agreements between the parties, the above findings need to be made for the Transfer and Settlement to occur.

C. The On-Farm Conservation Agreements With Farmers Will Follow SWRCB Approval

A question asked by Chairman Baggett early in the proceeding was whether or not this proceeding was premature since no on-farm conservation agreements with farmers had yet been executed. IID Hearing Transcript ("Transcript") April 23, 2002, p. 246(3)-(5); p. 251(20)-(22). The question was a good one and quite understandable. The answer was provided by Dr. Rodney Smith, who was a participant on the IID side of the negotiation of the Transfer: (a) the on-farm program is designed to be flexible, to allow each farmer to tailor his own conservation methods to his own unique crops (which change over time) and differing soil conditions; and (b) IID needs to know what conditions (if any) are to be placed on the Transfer and Settlement (by the SWRCB and the resource agencies with respect to endangered species) before attempting to craft agreements with farmers. Transcript, April 24, 2002, pp. 292(6)-296(5).

As is evident from the participation in the hearings by farmers Mr. Larry Gilbert, Mr. William DuBois, and the California Farm Bureau, farmers in IID are very interested in all such matters. It would be impractical to expect a diverse group of

farmers to contract for a voluntary on-farm conservation program unless they had a clear idea of what they were getting into. Thus, the practical choice was to seek SWRCB approval first, after full environmental review, thus allowing potential participants and the IID to better craft the on-farm contracts.

D. Summary Of Evidence

The following is a general overview of the major areas of evidence. As to certain particular matters, further detail is provided later in this brief in topical sections.

1. IID's State And Federal Water Right Was Uncontested

IID presented the SWRCB with evidence of its water right, both under state and federal law. See, for example, IID Exhs. 26, 27, 28, and 29. No one contested such evidence.

2. IID Is Reasonably And Beneficially Using Its Water

Similarly, IID presented extensive evidence that it is currently reasonably and beneficially using its water. See, for example, the very detailed reports of Natural Resources Consulting Engineers, Inc. ("NRCE"), and testimony from its principal, Dr. Woldezion Mesghinna. IID Exhs. 2 and 3.

All water rights in California are subject to a constitutional (article X, section 2) and statutory (Water Code § 100) requirement of both beneficial and reasonable use. California law is clear that the reasonableness requirement is a question of fact to be determined after taking into account all facts and circumstances. Analyses of beneficial use typically look to the type of the use or the purpose of the use. A

determination of what is a beneficial and reasonable use typically involves consideration of the hydrological, economic, social, environmental, and energy circumstances of the subject use of the water, and its relationship to other existing or potential beneficial consumptive or nonconsumptive uses. In addition, the issue of reasonableness must respond to increasing demands for a finite quantity of water. Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist. (1935) 3 Cal.2d 489.

Conformity with local custom for use, method of use, or method of diversion is not solely determinative of reasonableness, but it is a factor to be considered and weighed in the determination of reasonableness. Water Code § 100.5. Courts often refer to local custom as a factor in determining whether a particular practice is reasonable. Tulare at 547. In reviewing the reasonableness of local customs, the SWRCB has taken into consideration the extent to which local users have adopted and are complying with widely accepted standards for efficient water management practices in the region and throughout California. SWRCB Decision 1638, September 18, 1997.

Using factors such as those stated above, NRCE's conclusion was that IID is reasonably and beneficially using its water, based upon the following core facts (summarized here from IID Exhibit 2, pp. 5-7):

a) During the study period (1988-1997), IID's on-farm irrigation efficiency averaged 83%, while its combined on-farm and distribution efficiency was about 74%. DWR assumes that California's statewide on-farm irrigation efficiency will be 73% by the

year 2020 and could reach 80% by that date through better irrigation management and improved facilities. The irrigation efficiency of IID has thus already surpassed the state's future efficiency estimate, 20 years ahead of time;

b) Even other irrigation projects that are served by some of the most technologically advanced irrigation systems, including drip irrigation, exhibit only about the same level of irrigation efficiency. To the extent that water loss occurs in IID, it is a corollary to a huge volume of water being delivered by a gravity system to farms irrigating in a hot climate with salty water and on heavy cracking soils;

c) IID's average conveyance and distribution efficiency from 1988 to 1997 was determined to be approximately 89%. The 89% conveyance efficiency is high, especially given the size of IID's irrigation project and the complexities of its ordering and delivering water;

d) Tailwater and leach water are vital and necessary components of Imperial Valley irrigation. Due to the low permeability of the heavy cracking soils in IID, it is difficult to adequately leach salts from the soil during regular irrigation applications. The nature of most of IID's soils requires more leaching water than stated in traditional leaching formulae;

e) The salinity of IID tailwater is about 30% higher than the water delivered at the head of the field, which indicates significant horizontal leaching is taking place in IID; and

f) Though many previous studies of IID had concluded that horizontal leaching in IID was significant, the Jensen Reports, commissioned by the Bureau of Reclamation erroneously, ignored such data and attempted to apply invalid leaching formulae for lighter soils, resulting in flawed conclusions as to IID's efficiency.

NRCE's study and conclusions were unrebutted by any evidence from any party.

3. The Benefits Of The Transfer And Settlement

The SWRCB heard testimony by numerous witnesses regarding the extensive benefits of the Transfer and Settlement, including facilitating a "soft landing" for California reductions from 5.2 to 4.4 million AFY over 15 years by preserving the availability of Interim Surplus water. For example, Professor Barton Thompson, Jr., of Stanford University, testified about current water concerns in California and why this Transfer and Settlement are so important. Transcript, April 24, 2002, pp. 363(19)-368(23). Similarly, the general managers of IID, SDCWA, MWD, and CVWD stated similar conclusions, as did Department of Water Resources representative Steven MaCaulay. See Transcript, April 23, 2002, p. 112(22)-(24); pp. 116(24)-117(3).

In short, absent the Transfer and Settlement and the Interim Surplus Guidelines promulgated by the Bureau of Reclamation ("BOR"), California must immediately limit its Colorado River water use to 4.4 million AFY. The proposed transfer, which makes available up to 300,000 AFY from IID to the other agencies, will significantly further such compliance while also assisting urban Southern California with meeting its water needs. Here are some important highlights of the testimony on this issue by parties other than IID and SDCWA:

- Steve MaCaulay, Chief Deputy Director at DWR, testified that the IID-SDCWA Transfer is a key component of the California Water Plan. Transcript, April 23, 2002, p. 112(22)-(24). He also testified that if the QSA is not signed and going forward by the end of this year, California will be limited to 4.4 million AFY, "resulting in a very significant drop of [water] in [sic] almost overnight in the amount of water that California can take from the river." Id. at p. 114(18)-(20). Additionally, Mr. MaCaulay noted that such a reduction would "immediately put more pressure on the [San Francisco Bay] Delta, [requiring] more deliveries from the State Water Project." Id. at pp. 115(23)-116(1). Mr. MaCaulay also testified that failure to implement the California Plan, which includes the Transfer and Settlement, would have catastrophic consequences for California and for the CalFed

process involving habitat enhancement in the San Francisco Bay delta. Id. at p. 116(14)-(23);

- Dennis Underwood, an MWD Vice President, testified in a similar vein, pointing out that the implementation of the QSA was a key component of the California Plan (Transcript, April 23, 2002, p. 121(11)-(17), and that the Transfer and Settlement are absolutely critical for California. Id. at pp. 130(9)-131(6);

- Tom Levy, General Manager of CVWD, reiterated the same points made by Mr. Underwood and Mr. MaCaulay: the QSA is essential for California (Transcript, April 23, 2002, p. 141(17)-(21) and pp. 142(20)-143(1). He also noted that SWRCB approval of the Transfer and Settlement was a condition precedent to implementation of the QSA. Id. at p. 143(10)-(18). Mr. Levy also pointed out another reason the Transfer and Settlement were vital for CVWD: CVWD has a serious groundwater overdraft problem which is alleviated by the Transfer and Settlement. Id. at pp. 140(23)-141(10);

- Dr. Barton Thompson, a professor at Stanford University and an expert on water resource matters, testified that the Transfer and Settlement were vital for California for three reasons: (a) they help Southern California meet its water needs and

thus remove pressure on the San Francisco Bay Delta; (b) they resolve numerous longstanding divisive water disputes; and (c) they are important models for further long-term water transfers in California. Transcript, April 24, 2002, pp. 363(19)-366(24).

Others testified on these matters as well, such as Maureen Stapleton and Jesse Silva (General Managers of SDCWA and IID, respectively), as well as Dr. Rodney Smith.

In sum, extensive evidence was presented to the SWRCB that it is in the best interests of California for the Transfer and Settlement to go forward. Without the Transfer and accompanying Settlement, California will suffer an imminent major water shortfall.

4. Environmental Impacts

A number of environmental concerns were voiced by many objecting parties; some concerns were about alleged impacts, while others were about technical compliance of the Final EIR/EIS with CEQA. In this section, IID summarizes the main substantive objections that were raised, provides its basic overall response, and then some issues are addressed in more detail (with both factual and legal citations) later in this brief.

A. Salton Sea

Objection	**IID Response**
1. If the Transfer and Settlement go through, the Sea will become hyper-saline faster, harming fish, wildlife, and recreation.	1. It is true that the Sea will become hyper-saline faster with the Transfer and Settlement than without them. However, the evidence clearly shows such hyper-salinity occurring within about 21 years anyway, and the

Objection	IID Response
	Transfer and Settlement accelerate it by only about 11 years. Page 3.2-149 of IID Exh. 55 and incorporated in IID Exh. 93 Final EIR/EIS at p. 1-1. The speeding up of this inherent process is not a sufficient negative impact that the State's water supply needs should be held hostage to it. Further, the status quo at the Salton Sea involves massive bird and fish die-offs and the killing of endangered species, accompanied by a substantial reduction in recreational values.
2. The Transfer and Settlement will cause a reduction in Sea elevation, exposing shoreline and creating possible air emission issues.	2. The Sea has had extensive shoreline exposed in the long-term and short-term past with no notable dust problems. Elevation will fluctuate in the future, as it has in the past, even without the Transfer and Settlement. IID faces continuing risk for flooding at the current elevation that must be reduced. The Final EIR/EIS identifies a mitigation program that adequately addresses air emission concerns.
B. Lower Colorado River	
1. The only alleged impacts raised at the hearing by any protestants as to the Lower Colorado River was made by the Colorado River Indian Tribes ("CRIT"). They alleged that because the flow of the Colorado River might reduce by up to four inches, it could affect their habitat areas.	1. IID has no duty to order any set amount of water from the BOR. If IID orders less because crop markets are down, less water flows past the CRIT lands. This is just the state of the River, as determined by human taming of the River and prioritizing its use. The effect CRIT complains of is minimal, and occurs regularly in any event by virtue of the huge volume swings on the River from year to year.

C. San Diego Growth

1. The Transfer and Settlement involve "new water" or greater reliability that will cause growth in San Diego County.	1. No evidence that growth actually changes with water supply or reliability was presented. SDCWA is not adding any new volume of water, but simply firming up the reliability of the water it historically received from MWD. This Transfer alleviates a pending reduction in supply, not creation of a new supply.

III. WHY THE REQUESTED FINDINGS AND APPROVAL ARE WARRANTED

The SWRCB should make the requested Findings and approve the Transfer and Settlement for three reasons: (a) all statutory requirements are satisfied; (b) the benefits far outweigh any alleged environmental impacts; and (c) the action is consistent with prior SWRCB findings and recommendations.

A. All Statutory Requirements Are Met

Under Water Code § 1736, the SWRCB may approve a long-term transfer "where the change would not result in substantial injury to any legal user of water and would not unreasonably affect fish, wildlife, or other instream beneficial uses." These statutory criteria are satisfied.

1. No Substantial Injury To Other Legal Users Of Water

The critical words in the "injury" section of § 1736 are the word "substantial" and the phrase "legal user." In other words, the law permits some injury so long as it is not substantial. And, for purposes of the statute, the only persons protected are other "legal users of water."

The only objecting entity at this proceeding which conceivably might have had standing to raise a "legal injury" claim was CRIT. No other water right holder objected. Neither the pelicans, the tilapia, the Salton Sea croakers, the fishermen at the Salton Sea, nor their advocates, have a permit or a right to divert and use Colorado River water. Any environmental or recreational users of the Salton Sea are merely incidental beneficiaries of IID's diversions and are not "legal users of water" under the Code.[1]

NRCE provided extensive evidence (*Assessment of Imperial Irrigation District's Water Use*, IID Exh. 2) that the diversion of water at Parker Dam, as opposed to Imperial Dam (a change necessary for a water transfer to SDCWA), will not substantially affect the ability of any legal user of water between the two points from being able to pump its normal supplies of Colorado River water. The NRCE study indicates that even in the driest study-year period there would be sufficient flow on the Colorado

---

[1] The SWRCB has repeatedly held that the "no injury" rule in the Water Code limits standing to those who actually have a confirmed water right, not just "anyone who uses water," as some have argued. In Water Rights Order 98-01 (1998 Cal. ENV. LEXIS 1) the South Delta Water Agency ("SDWA") claimed to be a "legal user of water" and objected to a short-term water transfer. The SWRCB ruled that SDWA had no standing because to be a "legal user of water" one had to have a water right to the water being affected. Id. at pp. 6. (See also fn.2 of this decision, p. 7, which states: "We conclude, however, that the requirement that a transfer not injure any legal user of water does not extend protection to persons or interest[s] who have no legal right to use of the water." (Emphasis added.) In addition, in Water Rights Order 99-002 (1999 Cal. ENV. LEXIS 1), the SWRCB stated the same rule: "The 'no injury' rule codified in section 1702 of the Water Code is a common law rule designed to protect the rights of third party water-right holders when a water right is changed." Id. at p. 20. See also SWRCB Decision 1641, p. 91.

River for the other users. (*Assessment of Imperial Irrigation District's Water Use*, IID Exh. 2, pp. VII-1-VII-21.)

What of CRIT's objection? CRIT simply has no "water right" which will suffer any potential injury. Though IID does not dispute here that CRIT is a legal user of water, the alleged "injury" to CRIT's power generation is not related to its diversion water right; instead, CRIT's alleged injury relates to an implied assertion by CRIT that it should be able to mandate that other downstream water right holders must order the same (or higher) volumes of water so that CRIT can incidentally benefit. CRIT is asserting a right to IID's water, not its own. (CRIT's separate environmental objection is addressed in the environmental section below.)

This is made clear from the following factual evidentiary references cited in IID's earlier response to the CRIT interrogatory responses:

- CRIT diverts water at Headgate Rock Dam for use on tribal lands. (Transcript, April 24, 2002, p. 455(5)-(12).) It makes such diversion under rights confirmed in the Arizona v. California decrees by the Supreme Court;
- CRIT's diversion right will be unaffected by the proposed IID/San Diego water transfer. (Transcript, April 24, 2002, pp. 455(13)-456(7).);
- CRIT's power generation at Headgate Rock Dam does not emanate from the water that CRIT diverts as a matter of right, but rather from whatever water flows through the dam after CRIT diverts water under

its water right. (Transcript, April 24, 2002, p. 452(20)-(22); pp. 454(24)-455(4) and p. 458(8)-(18).);

- CRIT's power generation thus does not stem from its water right or ordered water, but from whatever water may naturally flow by, as well as whatever water is ordered by downstream right holders. (Transcript, April 24, 2002, p. 452(20)-(22); *see also* Id., p. 459(9)-(17).) If, for whatever reason, a downstream user orders less (or no) water from the BOR, then *ipso facto* there is less water flowing through Headgate Rock Dam. (*See generally,* Transcript, April 24, 2002, p. 457(8)-(25).);
- CRIT has no right to order water from the BOR for power generation at Headgate Rock Dam, but rather is dependent on others to order water so that CRIT may incidentally benefit. (Transcript, April 24, 2002, p. 456(8)-(16) and p. 459(9)-(17).);
- Even without the proposed transfer, the flow on the Colorado River fluctuates dramatically, in part because IID's orders fluctuate significantly. (IID Exh. 11); and
- The amount of power supposedly to be lost at Headgate Rock Dam is about 5.37%, requiring no mitigation, per the BOR. Transcript, April 24, 2002, p. 460(1)-(11); IID Exh. 53, p. 3.3-13; IID Exh. 93b Final IA EIS, p. 3.3-19.

CRIT suffers no "substantial injury" as a "legal user of water" under Water Code § 1736, because CRIT's water right must be affected (and it is not), and because the amount of any supposed injury is *de minimis* -- and thus not "substantial" as required by the statute.

2. No Unreasonable Effects On Fish, Wildlife, Or Other Instream Beneficial Uses

The key words in this portion of Water Code § 1736 are the words "unreasonable" and "other instream beneficial uses," which will be discussed in reverse order.

a. "Other Instream Beneficial Uses"

There does not appear to be any requirement under § 1736 that the SWRCB review effects on fish, wildlife, or other beneficial uses other than those which are "instream," i.e., on the Colorado River or its tributaries. The legislative intent here is obvious: the review of potential impacts to the body of water supporting the water right and from which the water is to be transferred. If the statute meant that the SWRCB were required to analyze if there were any impacts to wildlife "anywhere," the words "other instream" would be superfluous. A statute should be construed so as to give meaning to all its constituent parts. Mayer v. Workmen's Compensation Appeals Board (1973) 10 Cal.3d 222, 230. It is obvious that the Salton Sea and IID drainage flows are not "instream"-related.

This is not to say that the SWRCB is without jurisdiction to look at impacts elsewhere (for example, Water Code § 1701.3 states that the SWRCB may require information regarding compliance with the Fish and Game Code and/or the federal

Endangered Species Act), but simply to point out that under the language of the statute governing transfer approval, the SWRCB is not required to find lack of unreasonable impact except as to instream impacts. Impacts elsewhere are entitled to even less consideration.

b. "Unreasonable Effects"

Even assuming that one were to read the statute in such a manner that fish, wildlife, and instream water uses beyond the Colorado River were to be analyzed (such as at the Salton Sea), the fundamental questions implicit in the statute would be, "Are there any effects?", and if so, "Are they unreasonable?"

Obviously, there are potential effects on the Salton Sea by virtue of the Transfer and Settlement -- though these effects are basically an acceleration of what is occurring in any event. These effects, and the balancing test as to whether or not they are "unreasonable," are addressed in the environmental section below.

As to "instream" impacts on fish and wildlife on the Colorado River, which § 1736 requires the SWRCB to consider, no evidence of meaningful impacts was introduced, and the minor CRIT complaint is based on an inconsequential reduction in flow past their riparian habitat. The primary focus of the environmental objections during the proceedings was on the Salton Sea, with a tangential complaint about induced San Diego "growth."

Though IID later addresses in some detail the environmental matters raised, it is important to remember that the test is not whether there are any effects, but whether there are unreasonable effects.

B. The Proposed Transfer's Benefits Must Be Considered To Determine Unreasonableness

The reasonableness of any environmental impacts requires consideration of countervailing benefits. The Transfer and Settlement create new water through conservation and thus benefit all of California. They benefit each of the agencies involved and help prevent a looming water shortage in urban Southern California.

1. Benefits To California

It is important to note that a DWR senior executive appeared to testify in support of the Transfer and Settlement, and that the major Southern California urban (MWD and SDCWA) and agricultural (IID and CVWD) agencies did the same. Although there is a long history of disputes between agencies such as MWD, IID, and CVWD, on the need for the Transfer and Settlement they are unanimous: California will immediately lose a huge volume of Colorado River water if the Transfer and Settlement do not promptly go forward under a long-term arrangement.

The Colorado River water rights priority chart from the Seven-Party Agreement helps illustrate the problem[2]:

[2] See IID Exhibit 26, as well as IID Exhibit 28.

Priority	Description	Acre-feet Annual
1	Palo Verde Irrigation District--gross area of 104,500 acres	3,850,000
2	Yuma Project (Reservation District) - not exceeding a gross area of 25,000 acres	
3a	Imperial Irrigation District and lands in Imperial and Coachella Valleys to be served by AAC	
3b	Palo Verde Irrigation District--16,000 acres of mesa lands	
4	Metropolitan Water District and/or City of Los Angeles and/or others on coastal plain	550,000
5a	Metropolitan Water District and/or City of Los Angeles and/or others on coastal plain	550,000
5b	City and/or County of San Diego	112,000
6a	Imperial Irrigation District and lands in Imperial and Coachella Valleys	300,000
6b	Palo Verde Irrigation District--16,000 acres of mesa lands	
7	Agricultural use	all remaining water
	TOTAL	5,362,000

One can see from the chart that 4.4 million AFY is allocated through Priority 4. Thus, in years when California is limited to its 4.4 million AFY apportionment[3,4], MWD's Priority 5 right is completely unsatisfied.

The benefit to California of the Transfer and Settlement is not just the firming up of urban Southern California's water supply; it is also an environmental benefit to Northern California. The opponents of the Transfer and Settlement speak emphatically about the environmental virtues of the Salton Sea,

---

[3] Coming soon, per the testimony. See Transcript, April 30, 2002, p. 676(13)-(21).

[4] The allocations discussed here are without mention of miscellaneous present-perfected rights and federal reserved rights which, in times of shortage and normal flow, are also senior to MWD.

but say nothing about the looming environmental impact a loss of this Transfer and Settlement could have on the San Francisco Bay Delta and the State Water Project. As California politics have long shown, the dry and heavily populated southern part of the state will make demand on the wet northern half whenever need arises. If this Transfer and Settlement fail, that demand will come and the environmental outcome will be worse for this State. It is far preferable to allow the Salton Sea to go hyper-saline a bit faster than it otherwise would rather than increase the export of vast quantities of Northern California water to Southern California through the Bay-Delta to make up for lost Colorado River water. Mr. MaCaulay's testimony in this regard is very important: as a DWR representative, he testified, rightly, that if the Transfer and Settlement fail, there will be catastrophic consequences for California and for the CalFed process. Transcript, April 23, 2002, p. 116(14)-(23).

California should not imperil the whole state, its water supply and the environment to preserve merely an "opportunity" to save the Salton Sea.

2. Benefits To San Diego

SDCWA's witnesses, especially Maureen Stapleton, made clear that, because of MWD's internal water allocation methodology, SDCWA faces the risk of severe water shortages. See SDCWA Exh. 1, pp. 5-6. It is a substantial benefit for SDCWA to firm up the reliability of its current water supply. Although the amount of Colorado River water delivered to SDCWA won't change, its reliability will. For SDCWA, the Transfer and Settlement represents acquisition of Priority 3 Colorado River water senior

to MWD's existing Priority 4 and 5 water upon which SDCWA now depends. It thus is more reliable than current MWD supplies; almost half of MWD's Colorado River water supply (Priority 5) is subject to loss when California is held to 4.4 million AFY. Further, if a shortage is declared on the Colorado River, MWD's Priority 4 entitlement is also the first supply to be at risk. The Transfer and Settlement are thus meaningful benefits to SDCWA and the many residents of SDCWA's service area in the form of added reliability.

3. Benefits To IID

Because the proposed Transfer and Settlement are based on efficiency conservation, IID receives the benefit of such improvements, and the increased economic activity associated with constructing, maintaining and operating the efficiency projects. Improving IID's irrigation efficiency has many beneficial impacts: (a) improved efficiency helps IID reduce the risk of flooding by reducing inflow to the Salton Sea and the Sea's elevation; (b) system and on-farm conservation projects create increased economic activity for the Imperial Valley without a decline in agricultural output; (c) improved irrigation efficiency further reduces the potential for disputes with junior right holders seeking additional supplies; and (d) the IID will have proactively implemented the recommendations of the SWRCB to become more efficient.

a. **Reduced Flooding Risk**

Lost in all the talk about maintaining a "status quo" Salton Sea and the environmental groups' demands for fallowing is the fact that IID has historically paid approximately $20 million in

flooding-related claims, continues to pay for lost drainage from Sea-adjoining fields and dike maintenance, repairs and replacement, and runs the risk that further flooding will occur.[5] On the one hand, the courts and the SWRCB have told IID in the past that it should become more efficient to eliminate the risks of flooding, while on the other hand, IID is now told by some that it should take no steps to reduce the flooding risk by lowering Sea elevations.

IID urges the SWRCB and its staff to review the following cases prior to making a decision. Past litigation has resulted in liability on IID for Salton Sea flooding and evidences that IID needs to reduce the risk of further flooding:

- Elmore v. Imperial Irrigation Dist. (1984) 159 Cal.App.3d 185 -- The Fourth District Court of Appeals held that IID has a mandatory duty to stop flooding at the Salton Sea: "IID has a clear, mandatory duty to . . . prevent flooding and provide drainage." Id. at 193 (emphasis added). "Elmore . . . pleads facts showing as a direct result of IID's activities, many thousands of acres of prime agricultural land adjacent to the Salton Sea are flooded. . . . . The petition sufficiently states IID has failed to perform its mandated duty to avoid water waste [and] prevent flooding resulting from its irrigation practices . . . " Id. at 198.

- U.S. v. Imperial Irr. District (S.D.Cal. 1992) 799 F.Supp. 1052 -- In this case the Torres-Martinez band of Mission Indians was awarded $2,795,694 from IID (71.5% of the total award) for flooding of tribal lands at the Salton Sea. Id. at 1070. Salton Sea flooding caused IID to be found liable for trespass. Id. at 1059-1066. Further the Court found that for the "400 years prior to 1905, the Sea was essentially dry," and that "plaintiffs have

[5] Obviously, IID is not admitting any liability for flooding, but is simply pointing out its risks regarding such flooding. The court cases cited below are sufficient to illustrate this risk.

proven that the Sea would have receded to its pre-flood level by 1923 but for irrigation in the Imperial valley and the Coachella valley." Id. at 1057.

- Salton Bay Marina, Inc. v. Imperial Irrigation Dist. (1985) 172 Cal.App.3d 914 -- Imperial County had for many years allowed building in the Salton Sea area because IID had acquired flooding waivers from landowners. The Fourth District Court of Appeals held that such flooding waivers were void as a matter of public policy. Id. at 940. It based its holding on the fact that IID had a mandatory duty to prevent flooding: "Since the District has a duty to avoid wasting water and to prevent flooding, then it follows an agreement seeking to exempt the District from liability . . . [is] void." Id. at 940.

- In Imperial Irrigation Dist. v. State Wat. Resources Control Bd. (1990) 225 Cal.App.3d 548 and Imperial Irrigation Dist. v. State Wat. Resources Control Bd. (1990) 186 Cal.App.3d 1160, the courts of appeal upheld the SWRCB's findings that IID's return flows to the Salton Sea should be reduced.

IID's conservation of water is helpful to limit the risk of further flooding. Creating conserved water by fallowing land and mitigating Salton Sea impacts by allowing water to flow to the Salton Sea does nothing to alleviate this problem. Thus, the Transfer and Settlement are important to IID because they will allow IID to fund efficiency conservation that it needs to reduce the liability risk associated with flooding[6].

[6] With the San Andreas fault running right through the Salton Sea (Transcript, May 30, 2002, pp. 2766(21)-2767(18)), as long as the Salton Sea is held back by the dikes, this risk is quite serious.

b. Efficiency Conservation Is An Economic Benefit To The Imperial Valley

In addition to reducing flooding risks, the efficiency conservation contemplated by the Transfer and Settlement[7] provides a meaningful benefit to the Imperial Valley. Dr. Rodney Smith testified without meaningful rebuttal that a non-fallowing program based on system improvements and installation of tailwater recovery systems would increase annual personal income in Imperial County by about $20 to $25 million ('01$) per year over the term of the Transfer and Settlement. Smith Phase II Testimony, IID Exh. 65, p. 7. Of this gain, about 75% of the increase in income would be for employee compensation and 25% would be for the income earned by proprietors of businesses in Imperial County. Id. He also noted that since a program based on methods of conservation other than land fallowing requires investments in on-farm conservation and system improvements, a non-fallowing program generates an immediate economic stimulus to the local economy. Smith Phase II Testimony, IID Exh. 65, p. 15.

Dr. Smith summarized the economic value of efficiency conservation as follows:

> The economic value of income generated by a non-fallowing program is worth hundreds of millions of dollars . . . . If there were no risk of early termination, the economic value of local income generated by a non-fallowing program would exceed $700 million ('01$). At a moderate risk of early termination, the economic value exceeds $400 million ('01$). The economic value of the income generated by a non-fallowing program would still be almost

[7] For the Transfer and QSA conservation, about 100,000 AFY is contemplated to be conserved by system improvements, and about 200,000 AFY by on-farm conservation projects such as tailwater return systems, dead-level basin irrigation, or drip irrigation, etc. Transcript, April 23, 2002, p. 182(1)-(11).

> $300 million ('01$) if the risk of early termination were so high that the expected duration of the 75-year agreements were only 20 years.

Smith Phase II Testimony, IID Exh. 65, p. 14.

This significant beneficial impact for Imperial County from efficiency conservation is not achieved by fallowing (the negative effects of which are discussed in the environmental section below).

c. **Efficiency Conservation Reduces The Risk Of Litigation With Junior Water Right Holders**

As the SWRCB is aware from its own record in this matter, MWD and CVWD were objecting parties until the PDA was executed. Even though the Settlement requires that the ruling on this matter be non-precedental as to many legal matters, implementation of the Transfer and Settlement significantly reduces the risk of future litigation with such junior right holders by further increasing the water delivery and irrigation efficiency of the IID. Even though IID's overall and irrigation efficiencies are extremely high -- and even better than CVWD's -- MWD and CVWD as junior right holders have historically sought to increase their own supplies by challenging the reasonableness of IID's use. Because efficiency conservation will improve IID's efficiency to an unprecedented level, it will help insulate IID from future challenges.

d. **Efficiency Conservation Reduces The Need For Further SWRCB Supervision**

The Transfer and Settlement enable the IID to improve its delivery and irrigation efficiencies through conservation --

actions consistent with past SWRCB recommendations related to reasonable use. Thus, the SWRCB will be less likely to need to engage in future time-consuming and expensive proceedings to examine IID's reasonable use.

C. The Petition Is Made In Compliance With Past SWRCB Recommendations

IID has previously described how this Petition is simply the logical consequence of IID following past SWRCB recommendations: find urban conservation partners to further reduce the risk of Salton Sea flooding and to create new supplies of conserved water to transfer to water-short urban areas. IID has earlier highlighted some of the key text in the previous SWRCB decisions; thus, it will not lengthen this brief by restating them here. However, IID urges the SWRCB and its staff to fully review those earlier decisions (particularly WR Order 84-12 [SWRCB Exh. 2a] and WR Order 88-20 [SWRCB Exh. 2b], which expand significantly upon the principles articulated in Decision 1600). Such a review will definitively show that this Transfer and Settlement are consistent with such earlier SWRCB decisions.

IV. THE ENVIRONMENTAL OBJECTIONS ARE EITHER NOT MERITED OR ARE MITIGABLE

The Transfer and Settlement do not create unreasonable effects on fish, wildlife, or other instream beneficial uses.

A. The Environmental Objections

The main environmental-related objections concerned impacts to the biological resources of the Salton Sea, air impacts related to Salton Sea elevation, and possible induced growth in the San Diego area. In this section IID addresses such issues in

the context of seeking SWRCB approval; the detailed technical responses to critical comments are contained in the Final EIR/EIS.

1. Impacts On The Salton Sea

Some have argued that the Salton Sea has the equivalent of a "right" to continued irrigation drainage inflow from IID at a constant volume equaling the 40 or 50-year historical average. There is no legal basis for such argument. The Salton Sea holds no Colorado River water right to receive water in any volume. There has never been any entitlement by the Salton Sea to Colorado River water.

What Salton Sea environmental advocates basically seek to impose on the IID is some sort of efficiency-conservation prohibition. IID has no such duty to forego conservation and, in fact as noted earlier, has a duty mandated by the courts to stop flooding. Further, under California law, IID has the absolute right to recapture and reuse its irrigation runoff. Stevens v. Oakdale Irr. Dist. (1934) 13 Cal.2d 343; cf. Lindsay v. King (1956) 138 Cal.App.2d 333.

IID diverts Colorado River water based on its anticipated agricultural and domestic needs. When farmers reduce their water orders (for example in 1992, when there was a whitefly infestation; see drop off in water use in 1992 in IID Exh. 11), then IID's diversions reduce accordingly. In such instances, less water is applied to Imperial Valley fields, and there is reduced drainage inflow to the Salton Sea. The historical use of water by the IID has varied dramatically over the years, with increases and decreases in the hundreds of thousands of acre-

feet. IID Exh. 11 Such changes result from changes in weather, salinity, cropping patterns, and crop market conditions primarily. In response to such changes, Salton Sea inflow and elevation have also varied substantially over time. Historical inflow "averages" do not support the environmentalists' goal of constant future inflows. IID has no duty to divert any set amount of water from the Colorado River. IID Exh. 28.

The evidence demonstrates that the Transfer and Settlement would probably hasten the transition of the Salton Sea into a hyper-saline body of water. However, those who oppose the proposed Transfer and Settlement on this basis miss a number of critical points:

- The proposed Transfer and Settlement merely accelerate a process that is already and inevitably occurring. The Salton Sea has no meaningful natural inflow or right to inflow, and its deteriorating condition has been slowed only by the accident of irrigated agriculture in the Imperial Valley. Any continued artificial inflow will fluctuate significantly based on IID, CVWD, and Mexican actual water use.

- Preserving the Salton Sea status quo requires a prohibition on IID conserving water. Yet, the SWRCB has repeatedly stated that IID and other agricultural agencies must seek to become more efficient through conservation, and to seek transfers such as that proposed with SDCWA to fund

the conservation. Decision 1600 (SWRCB Exh. 2); WR Order 84-12 (SWRCB Exh. 2a); and WR Order 88-20 (SWRCB Exh. 2b).

- The proposed Transfer and Settlement benefits are ignored. Instead, opponents act as if the Salton Sea issues should be considered in isolation. But, the benefits of an increased water supply to urban Southern California, moving forward to comply with California's 4.4 million AFY Colorado River limitation, reducing demand on Northern California water, and resolution of decades-long water disputes between IID, CVWD, and MWD outweigh inevitable Salton Sea hyper-salinity.

- There will be habitat around the deltas of the freshwater inflows even when the rest of the Sea becomes hyper-saline.

- Any potential money spent for reclamation of the Sea might be better spent reestablishing wetlands in other parts of Southern California, where the climate is not so harsh, inflows not so variable, and salinity not so relentlessly increasing.

IID shares all parties' concerns about the Salton Sea. The Salton Sea provides benefits and opportunities to certain areas of the Imperial Valley. However, IID's proposed water Transfer and Settlement are neither the source of the Sea's problems nor the vehicle for the Sea's solution. The Salton Sea, a man-made

drainage repository, is becoming hyper-saline on its own, and no one has yet determined how, when, or who will pay for any solution. IID wholeheartedly supports federal and state-financed restoration efforts for the Salton Sea. But postponing beneficial conservation now because of a hope that the federal or state governments might eventually choose to save the Sea and pay for a restoration plan is a very improvident path.

a. **Congress Intended That The Salton Sea Restoration Act Not Hold Conservation Transfers Hostage**

The Salton Sea Restoration Act of 1998 included an express Congressional assumption that conserved water transfers, such as the Transfer and Settlement, would occur and should be allowed. In fact, the Restoration Act mandated that the Secretary promote such conservation-based transfers. The pertinent text of the statute reads:

> ASSUMPTIONS. -- In evaluating options, the Secretary shall apply assumptions regarding water inflows into the Salton Sea Basin that **encourage** water conservation, account for transfers of water out of the Salton Sea Basin, and are based on a maximum likely reduction in inflows into the Salton Sea Basin which could be 800,000 acre-feet or less per year.

Section 101(b)(3), PL 105-372 (HR 3267) (Salton Sea Restoration Act of 1998). (Emphasis added.)

Thus, despite several parties' implication that the Transfer and Settlement would frustrate potential federal restoration activities, in fact Congress specifically considered and sanctioned potential conservation-based transfers which would reduce Salton Sea inflows. Congress authorized funds for

reviewing potential restoration of the Sea only if such review assumed a significant decline in inflow because of conservation-based water transfers. It would therefore actually thwart federal intent were conservation-based transfers disallowed because of a nonexistent goal to preserve the status quo to assist Salton Sea restoration.

b. **California Should Not Wait To See If Some Day Someone Will Pay For Salton Sea Restoration**

Despite the enthusiastic advocacy on the part of many who hope for eventual Salton Sea restoration, to date no environmental group, governmental entity or charitable foundation has stepped forward with any significant funding to "restore" the Salton Sea. The only funding to date, in amounts which are a tiny fraction of potential restoration costs, has been to study the "mystery" of the Salton Sea.

Despite what has assuredly been zealous lobbying by Mr. Kirk and the Salton Sea Authority, nothing has happened other than basic research. And what is the fruit of that research? A Salton Sea Restoration EIR/EIS that its authors (Tetra Tech and Dr. Brownlie) state is fundamentally in error and has been withdrawn without replacement for two years, and a recommendation by fish and bird specialists that many years more of research are needed. Transcript, May 13, 2002, p. 1403(5)-(25); p. 1431(8)-(11); Transcript, May 15, 2002, p. 1917(3)-(11).

The simple fact is that Salton Sea restoration is still in the "concept" stage. More than a decade of further study may be needed. Transcript, May 15, 2002, p. 1917(3)-(11). And then,

after many years of further study, a recommended solution may take many more years to design, implement, and fund.

Congress was obviously well aware of this potential restoration timeline. That is why the authorization legislation basically says, "Let's assume needed water transfers go through first, how much will it **then** take to restore the Salton Sea?"

The Salton Sea Authority's purpose is to advocate on behalf of the Salton Sea. However, what is best for the Salton Sea is not necessarily what is best for California. In fact, as biologist Dr. Milt Friend stated, it would be best for the birds if there were even more flooded land in the Imperial Valley. Transcript, May 29, 2002, p. 2456(1)-(14). However, California -- faced with a looming, substantial water shortage -- should not wait for years or decades while experts ponder the fate and restoration potential of the Salton Sea. If Congress were currently debating the funding of a feasible restoration plan for the Sea, it might make sense to wait and see what Congress does. But, there is no evidence of any imminent decision, solution or funding. In fact, the evidence proved that further study was necessary and ongoing, and that no restoration funding commitment, even in part, was available from any government source or environmental group. Transcript, May 15, 2002, p. 1917(3)-(11).

c. **The Salton Sea Will Become Hyper-Saline Irrespective Of The Proposed Transfer**

While no one knows exactly what to do about the Salton Sea or how to pay for it, one thing all the experts agreed on is that the Salton Sea will become hyper-saline, Transfer or no Transfer.

One of the more interesting attempts to rewrite history occurred when certain parties, who had been lobbying Congress and others for immediate Salton Sea funding to stave off the imminent impending death of the Sea, suddenly changed their tune and "discovered" that under the "no transfer" status quo the Sea would remain a suitable habitat for more than 50 years. In fact, many parties roundly criticized the Final EIR/EIS prediction that the Salton Sea would reach 60 g/L between 2018 and 2030, with a median at 2023 under the status quo. (Page 3.2-150 of IID Exh. 55 and incorporated in IID Exh. 93 Final EIR/EIS at p. 1-1.) However, the Final EIR/EIS Salton Sea model predictions are in almost complete accord with the protesting parties' own published predictions. The following is a short table summarizing the Final EIR/EIS and the statements of the parties outside the SWRCB proceeding:

The EIR/EIS Model Prediction	**What The Environmentalists Said Prior To These Hearings**
1. "Available evidence indicates that Corvina reproduction could fail at any time, and, at a salinity level of 50 g/L, it will fail along with that of the croaker and sargo, leaving tilapia as the only sport-fish species. . . By 60 g/L, the salinity tolerance of tilapia reproduction will have been exceeded:" (Page 3.2-147 of IID Exh. 55 and incorporated in IID Final EIR/EIS at p. 1-1.) With no 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**,	1. Fishery collapse under current trends is predicted **between 2015 and 2035**. Salton Sea Authority Exhibit 18, p.6, "Current Salinity" slide from January 2002. See Transcript, May 14, 2002, p. 1623(13)-(22) (emphasis added).

The EIR/EIS Model Prediction	**What The Environmentalists Said Prior To These Hearings**
respectively. Under the Proposed Project, the thresholds for sargo, gulf croaker, and tilapia would be exceeded **1**, **5**, and **11 years earlier** than under the Baseline (in 2007, 2010, and 2012, respectively)." (Page 3.2-149 of IID Exh. 55 and incorporated in IID Exh. 93 Final EIR/EIS at p. 1-1.)	
	"Proposed water transfers may reduce the time needed for implementing salinity controls from 15-30 years to 5-7 years." PCL Exh. 1, p. 22, from March 2002. (Emphasis added.)
	"[A]t current rates of salt loading of 4 million tons of salts per year, the Salton Sea will be unsuitable for fish and other wildlife in 15 years." IID Exh. 72, p. 1, written by Dr. Timothy Krantz in 1999 (Transcript, May 14, 2002, p. 1640(14)-(22). (Emphasis added.)

The EIR/EIS Model Prediction	**What The Environmentalists Said Prior To These Hearings**
	"In general, the Sea's sport fishery will likely fail by the year **2025** with the loss of corvina, sargo, croaker and tilapia." Salton Sea Authority EIR/EIS (January 2000), IID Exh. 69, p. 4-105.
	"Much attention has been given to controlling rising salinity in the sea -- which will indeed be a problem in the next 15 years or so if nothing is done about it . . . ." IID Exh. 73, p. 2, article by Dr. Timothy Krantz (September 9, 2000). (Emphasis added.)
	"There have been numerous studies done on the Salton Sea by many different agencies, institutions and experts. . . . The overall consensus with these studies is that something needs to be done **soon**." Defenders of Wildlife Salton Sea Position Statement, IID Exh. 79, p. 2 (emphasis added).

Thus, the overwhelming evidence is that outside the confines of this proceeding, everyone agrees that the Salton Sea is on the verge of becoming too saline for the fish species relied on by the birds who pass through. The Transfer and Settlement accelerate this inevitable occurrence by about 11 years for tilapia, the most durable bird prey species.

In the Final EIR/EIS, IID presents a sensitivity study that shows the variation on the Sea Baseline for changes in certain assumptions. Because testimony was elicited on this at the

hearing on the Final EIR/EIS, these assumptions will be addressed in IID's supplemental brief, but it is worth pointing out now that there is comparably little variation in the results using differing assumptions.

It is also important to note that the environmental literature is full of references to the present Salton Sea as a very dangerous place for wildlife. The Audubon Society has called it an "environmental Chernobyl." IID Exh. 76, p. 1. In fact, massive numbers of endangered species have died at the Salton Sea in the recent past from botulism and other diseases. For example, in 1996 Salton Sea botulism killed about 10% of the entire population of western white pelicans. IID Exh. 76, p. 2. Thus, the Salton Sea is quite deadly already. Slowing the progress of its hyper-salinity (which will certainly occur without very expensive restoration) may prove more harmful to migratory endangered species such as the pelicans than a rapid demise.

Additionally, concerning the Salton Sea as a "sportfishery," there is no doubt that despite health warnings against consumption, people still fish at the Salton Sea. But what was once -- a long time ago -- a popular vacation and resort spot, has deteriorated markedly over the years to a less than significant sportfishing destination. Transcript, May 14, 2002, pp. 1707(19)-1708(5). There is no evidence of any commercial fishery, or even of a sportfishing fleet (Transcript, May 14, 2002, pp. 1713(20)-1714(9)), and the financial impact of the fishing "industry" there is almost nil, per the Salton Sea Authority's own analysis: an average of $.47 per visitor per

day, or $130,000 total for all visitors to the State Recreation Area in 1998-1999. IID Exh. 69, Table 3.12-1 on p. 3-136. Attempting to analogize from saltwater fishing in the Pacific near wealthy urban coastal areas to the potential for a sportfishing industry at the Salton Sea is completely inappropriate.

The simple fact is that, despite such hardy (foolhardy?) souls as Dr. Hurlburt who still swim in the coffee-colored, opaque waters of the Salton Sea, the status quo of the Salton Sea is that of a sick and dying habitat:

> The Salton Sea, California's largest body of water, is in trouble. . . . The Salton Sea has become a fatal attraction as a result of its polluted and saline water.
>
> . . .
>
> [D]ue to its deteriorating water quality, the number of visitors to the Sea over the past 30 years has understandably declined.
>
> . . .
>
> [T]he Salton Sea may never be swimmable again due to the reality that significant amounts of wastewater continue to flow into it.

Defenders of Wildlife Salton Sea Position Statement, IID Exh. 79, pp. 1 and 4.

> "[I]t might be a safer place all around if they just let the fish disappear and the lake become salty," says Ed Glenn, a University of Arizona, Tuscon, environmental biologist . . . .

IID Exh. 76, p. 2.

d. **The Public Trust Doctrine Does Not Support Preserving The Salton Sea**

Some have argued that the "Public Trust Doctrine" requires the IID to 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 (1984 Cal.Env. LEXIS 31), the SWRCB ruled that IID cannot be compelled by the Public Trust Doctrine to drain irrigation water into the Salton Sea:

> 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. 12, 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.

e. **The Fallowing Non-Alternative**

As the SWRCB is almost certainly aware, since newspaper editorials keep trumpeting it, IID is under intense political pressure to create "conserved" water by fallowing land instead of doing efficiency conservation, and to mitigate Salton Sea impacts

by fallowing even more land for the Sea's benefit. As was evident at the hearing, even co-petitioner SDCWA and PDA-signatories MWD and CVWD seemed intent on pushing IID in this direction. None of this is surprising -- ***since no one but the Imperial Valley would suffer by the substitution of fallowing for efficiency conservation.*** Fallowing is thus an easy "compromise" for MWD, CVWD, and SDCWA, and the environmental organizations, since it is not their ox being gored.

The negative impacts of fallowing would be significant in the Imperial Valley. Not only would IID lose all the efficiency conservation benefits discussed earlier (which is the reason it voluntarily stepped forward to help solve urban Southern California's water supply problem in the first place), but it would also add insult to injury by causing additional significant detriment. The Transfer and Settlement would go from a "win-win" scenario, to a "win SDCWA/MWD/CVWD, but lose IID" result. SDCWA, MWD, and CVWD would get what they bargained for, while IID, on the other hand, would lose the benefit of its bargain.

The economic results of fallowing were detailed at the hearings. The switch to fallowing for the Transfer and Settlement would result in a loss of anywhere from 1,000 to 2,000 jobs. Testimony of Dr. Smith, Transcript, May 1, 2002, p. 952(12)-(21). Dr. Smith testified that the financial losses from fallowing would be large indeed:

> During the first six years when the quantity of water conserved is relatively low, **annual** personal income losses would be **$5.0 million** ('01$). Thereafter, the **annual** income losses would steadily grow until they reach **$30.0 million** ('01$) as land fallowing expands with the magnitude of IID's delivery

> obligations under its proposed agreements with the SDCWA and Coachella/MWD. Of these losses, about 60% represents reduced employee compensation and 40% reduced income earned by proprietors of businesses in Imperial County.

Dr. Rodney Smith Testimony, Phase II, IID Exh. 65, p. 8 (emphasis added).

Steven E. Spickard, AICP, Senior Vice President of Economics Research Associates (ERA), an international consulting company specializing in land-use economics, echoed Dr. Smith. He testified that fallowing would reduce property values, and the community at large would suffer through a reduction in property tax revenue. Imperial County Exh. 3A, p. 2, ll. 11-28. School districts, municipalities, and Imperial County will be the hardest hit by declining revenues. Id. at ll. 17-18 Shrinkage of the economy, including employment reductions due to fallowing, will further reduce sales tax collections and other revenues to local governments in Imperial County. Id. at ll. 25-27

To "mitigate" such huge losses, Mr. Levy of CVWD posited a "phantom farming" scenario whereby land would be fallowed, but water would still be distributed to it to flow into the Sea. Every one would act "just like" there was a crop there (i.e., farmers would buy non-needed seed, laborers would be paid to harvest invisible crops, pesticides and crop-dusting would be purchased to deal with mythical insects, trucks would arrive to load intangible foodstuffs, etc.). Transcript, May 29, 2002, pp. 2555(4)-2556(14). Mr. Levy's theory was that in this way all of fallowing's financial impacts on the community would be non-existent, and one could avoid imaginary legal constraints to boot. (The issue of farmer storage for non-consumed seed,

pesticides, etc. was conveniently ignored, as was the extent that farmer vendors had to continue the phantom theme.)

IID is not willing to risk economic impacts and its water rights on such a proposal for the following reasons:

- It would appear to violate Water Code § 1004, which bars such practices;
- The cost of policing every farmer, worker, supplier, trucking company, etc., to make sure they are doing what they "would have done" had there been an actual crop would be astronomical and would create an agricultural "Big Brother" police department that IID has no interest in administering, even if feasible, which it is not; and
- There would be no basis to compel a court or the SWRCB to consider the water delivered to phantom farms to be reasonably and beneficially used.

As discussed in IID's responses below to the SWRCB's questions, IID believes that "phantom farming" is not necessary to provide a reasonable volume of mitigation water to avoid environmental impacts from voluntary conservation activities connected with a voluntary transfer in order to not violate the "Law of the River." One need not go through the contortions suggested by Mr. Levy (who, we note, has not suggested fallowing the verdant links in CVWD and then attempting to "phantom golf" on the sand where the lush grass used to be).

In short, there was no competent testimony presented to the SWRCB that fallowing was good, or even neutral, for Imperial County. In fact, the unanimous testimony from economists was

that fallowing would harm the local economy significantly, and that it imposed a serious loss as compared to the benefits of efficiency conservation.

Therefore, there is no factual basis for the SWRCB to order or condition approval on the use of fallowing as an on-farm conservation method. The IID has sought approval from the SWRCB for a Transfer that prohibits fallowing. (And, although fallowing is not prohibited in the QSA documents for the smaller amount of settlement water for MWD and CVWD, it nonetheless violates IID policy and has not been requested for approval.) This is not to say that if somehow all the lost benefits and detriment caused by fallowing were assured of being mitigated, and necessary contractual and statutory protections provided, that some fallowing might not be possible; but that would require amended Transfer and Settlement contracts, with different terms than exist today, and an amended request to the SWRCB.

2. Air Impacts Related To The Salton Sea

There is no certainty what will happen regarding air emissions when the Salton Sea level drops. IID's experts were frank with the SWRCB about this issue. Though the history that is known about the Salton Sea indicates that it has not acted like Owens or Mono Lakes to date when shoreline has been exposed, no guarantees can be made about future emissions.

The Final EIR/EIS addresses air quality concerns with the following general perspective and plan, found on pp. 3-47 to 3-53 of IID Exh. 93:

- No certainty as to predictions can exist, but reasonable analogies can be made;

- Wind and sand are major driving forces triggering emissivity in dry salt lakes, and they are both found in significantly smaller volumes at the Salton Sea than at Owens Lake;
- Additionally, the temperatures and salt content at the Salton Sea are quite distinct from Owens Lake, making it less likely to have emissivity problems; and
- Though portions of the inundated Salton Sea bed have been exposed at various times over the decades, no serious emissivity issues have been documented; quite distinct from Owens Lake, where emissivity occurred almost immediately.

A phased-mitigation approach in four steps will be implemented if the Transfer and Settlement go forward: (a) restrict access (vehicles and similar human traffic causing emissivity problems); (b) research and monitor PM10 emissions; (c) create or purchase offsetting emission reduction credits, if needed; and (d) if necessary, direct activity to reduce emissions at the Sea. IID Exh. 93, Secs. 3.9-3.13.

Given the fact that no one can predict exactly what will happen at the Salton Sea regarding PM10 emissions, the above-stated approach is reasonable. IID does not expect the SWRCB to ignore possible emission issues. However, denial of the Transfer and Settlement on the basis that something might happen would be improper. SWRCB approval conditioned on the mitigation approach specified in the certified Final EIR/EIS, as outlined above, is warranted.

3. The Colorado River

Only the reach of the Colorado River between Parker and Imperial Dams could possibly be affected by the Transfer and Settlement, since the only diversion differential is between the two (IID normally taking the water at Imperial Dam that now will be transferred, while MWD/SDCWA will divert at Parker). Nevertheless, CRIT complained that the reduced flow may harm their habitat.

What is the possible effect of the flow reduction? Miniscule. Fluctuations in surface elevation attributable to the Transfer and Settlement are inconsequential in comparison to the Colorado River's natural fluctuations. For example, the total potential Transfer and Settlement-related maximum variation (4.5 inches) is less than the 6.0 inch daily flow variation at Imperial Dam. IID Exh. 55, p. 3.2-103 to 105; IID Exh. 93 Final EIR/EIS p. 4-49 to 51. The 4.5 inch maximum Transfer and Settlement variation is also less than monthly variations at Parker Dam, which range from 60.0 inches in the peak summer irrigation season to 30.0 inches in the low-demand winter season. IID Exh. 55, p. 3.2-103; IID Exh. 53 Final EIR/EIS p. 4-49. Even the BOR's Draft Environmental Impact Statement for the Implementation Agreement, Inadvertent Overrun and Payback Policy, and Related Federal Actions (January 2002) notes that the Colorado River is highly variable in flow from year to year. IID Exh. 53, p. 3.1-1 and Figure 3.1-1; IID Exh. 93B, Final IA EIS, p. 3.1-1 and Figure 3.1-1. According to BOR, within a given month, daily releases at Parker Dam can vary by more than 11,000 cfs. IID Exh. 53, p. 3.1-10; Final IA EIS, p. 3.1-9. BOR

also states that since 1980, within any given non-flood year, flows through Parker Dam have ranged from approximately 1,500 cfs to approximately 19,500 cfs. IID Exh. 53, p. 3.1-10; IID Exh. 93B Final IA EIS, p. 3.1-9 to 10. Thus, potential fluctuations in water surface elevation resulting from the Transfer and Settlement would generally be well within the River's historic variation. IID Exh. 55, p. 3.9-5; IID Exh. 93 Final EIR/EIS p. 4-87.

Because the maximum total change in average water surface levels attributable to the Transfer and Settlement (4.5 inches) is substantially less than the normal water surface elevation changes (30.0 to 60.0 inches), Transfer and Settlement-induced variations would be less than 15% (maximum) of the baseline daily fluctuation levels in any one year. IID Exh. 55, p. 3.2-105; IID Exh. 93 Final EIR/EIS p. 4-51. Furthermore, the small water surface elevation fluctuations ensuing from the Transfer and Settlement would not occur all in one day, but would take place over a minimum period of 10 years, at a predicted rate of 0.05 to 0.45 inches per year. IID Exh. 55, p. 3.2-104; IID Exh. 93 Final EIR/EIS p. 4-49. The 10 to 20-year implementation time permits substantial adjustment to this change in average water levels as successional colonization of plants occurs naturally along the new wetted perimeter. Even in backwater and slough areas such as CRIT's habitat, plant root systems would be able to adjust to the very minor water level reductions occurring in minute increments over a prolonged period. IID Exh. 55, p. 3.2-104; IID Exh. 93 Final EIR/EIS p. 4-49.

Thus, the effect the Transfer and Settlement will have on the inter-dam stretch of the Colorado River is minimal.

4. The San Diego Area

As noted earlier, the "growth" inducement argument is factually flawed: SDCWA is increasing water reliability, not adding to a water supply. This issue is covered in IID Exh. 93A, the Final Program Environmental Impact Report for the Implementation of the Colorado River QSA (June 2002), Section 6.0, and IID believes that such document provides the applicable facts. Furthermore, the SWRCB is not the forum for litigating this alleged defect in the Final EIR/EIS.

B. The "Deal Point" Objections Should Be Ignored

In addition to the above objections, certain other objections were raised by parties such as Mr. Gilbert and Mr. DuBois which relate to the structure of the proposed Transfer and Settlement. These objections are basically protests that some IID farmers do not like the contractual agreement the IID made with SDCWA.

These objections do not fall within the statutory framework of the SWRCB's purview. The SWRCB has ruled in the recent past that if the water agency controlling the water right proposes a change, users under the agency are not "legal users of water" who have standing to protest. SWRCB Revised Decision 1641 (March 15, 2000), pp. 129-130.

Though their objections are well-meant, the farmers' objections are not appropriate in this forum. The exact parameters of how the on-farm program will work have yet to be finalized by IID. Transcript, April 13, 2002, pp. 250(14)-

252(15); Transcript, April 14, 2002, pp. 294(21)-297(7). To the extent that Mr. Gilbert and Mr. Dubois, or any other farmer, believe that such program (when determined) is unfair, they will have opportunity to exhaust their administrative remedies.

C. The Impacts On Fish, Wildlife, And Instream Beneficial Uses Are Not "Unreasonable"

By using the term "unreasonable" in the context of fish/wildlife/recreational impacts, the Legislature in Water Code § 1736 makes evident that long-term water transfers are allowed to cause impacts on such resources, so long as the impacts are not unreasonable.

All "reasonableness" tests require, by their very nature, a balancing of competing interests. Impacts may be outweighed by benefits. Such is the case here.

There will be impacts on the Salton Sea. The Transfer and Settlement will almost certainly accelerate the salinity increase, therefore shortening the "lifespan" of this accidental body of water. Further, there conceivably could be air emission impacts, as noted. There are also minor incidental impacts on the Colorado River between the two diversion points (Parker and Imperial Dams).

However, none of these impacts make the Transfer and Settlement "unreasonable." The SWRCB itself has clearly articulated how adverse impacts can still be reasonable, given that the SWRCB must take into account the benefits of a transfer and the conditions it will require:

> A finding under section 1727(a)(2) regarding the reasonableness of effects on fish and wildlife requires consideration not only of the effects on fish and wildlife but also of

> the relative need for water outside the stream, the prevailing hydrologic conditions, and other factors specific to the proposed transfer. The shortage of water for consumptive uses this year and the need for water help make the effects on fish, wildlife and instream beneficial uses reasonable, even though there is a potential for significant adverse effects on these resources.

Order No. 94-4, p.3 of 1994 WL 732841 (1994). (Emphasis added.)

> The State Board's obligation in the present proceeding, however, is much more limited. With respect to fish and wildlife, Water Code Section 1727 provides that upon receipt of notification of a proposed temporary change, the State Board shall make an evaluation sufficient to determine that the proposed "temporary change will not unreasonably affect fish, wildlife or other beneficial instream beneficial uses." The State Board is not required to determine that no species of fish are being adversely impacted by water diversions. Rather, the focus is on whether the proposed temporary change and transfer will unreasonably affect fish and wildlife.

Order No. 91-05, 1991 WL 170936, p.3 (1991). (Emphasis added.)

IID is willing to have this Transfer and Settlement conditioned upon compliance with state and federal endangered species acts through the receipt of "take" permits, or the use of other appropriate waivers or exemptions. IID is also willing to have the Transfer and Settlement conditioned upon the air emission mitigation specified in the Final EIR/EIS. Given those conditions, and given the desperate need in California for this Transfer and Settlement, the remaining impacts on other species are not "unreasonable." This is particularly true since the Salton Sea is becoming hyper-saline in any event, and because Congress itself assumed the existence of conservation transfers before any planned restoration.

V. ALLEGED TECHNICAL CEQA OBJECTIONS DO NOT WARRANT DISAPPROVAL OF THE TRANSFER AND SETTLEMENT

Certain of the environmental groups and Imperial County have repeatedly sought to delay and postpone action by the SWRCB on the basis of alleged defects in CEQA compliance. However, none of the supposed CEQA issues have merit, and must be seen for what they are: stalling tactics crafted by experienced environmental lawyers who know that a project delayed is a project denied.

In this section, IID addresses the main issues raised regarding CEQA, and refers the SWRCB and the parties to the Final EIR/EIS (IID Exh 93)[8] and the Responses therein for other related matters.

A. CEQA Does Not Mandate A Delay Or Denial Of The Petition.

The claim that somehow the SWRCB cannot act or it will be in violation of CEQA is incorrect. IID has provided a Final EIR for the Transfer and Settlement and the related Habitat Conservation Plan ("HCP"). The Final EIR has been certified by IID (the CEQA Lead Agency) as complete and in compliance with CEQA. The BOR, as the federal lead agency, is in the process of taking similar steps under NEPA with respect to the EIS portion. The proposed project assessed in the Final EIR includes the actions which the SWRCB has been requested to take pursuant to the Petition. The Final EIR was prepared with notice to, and consultation with, the

[8] The IID and the SWRCB, as a CEQA lead and responsible agency, respectively, need to comply with CEQA. Exhibit 93 is a joint Final EIR/EIS so that NEPA can be complied with as well. However, because the SWRCB need be concerned with CEQA compliance only, and because IID certified the Final EIR/EIS under CEQA only, the Final EIR/EIS is referred to hereafter as the "Final EIR."

SWRCB as a Responsible Agency, in conformance with the process established under CEQA for assessment of a project which requires permits or approvals from both a Lead and a Responsible Agency. Thus, the Final EIR was intended to, and does, provide the environmental assessment required to support the SWRCB's action on the Petition.

The County of Imperial ("County") asserts, without authority cited, however, that a certified Final EIR is not enough. The County claims that the SWRCB cannot legally approve the Transfer and Settlement because (1) the proposed project is not sufficiently defined and may be subsequently changed, and/or (2) the SWRCB, as a Responsible Agency, cannot legally take action after the certification of the EIR but before final project approval by IID. The County further claims that the SWRCB must either disapprove the Transfer and Settlement or delay action until a final project has been approved by IID. These arguments are meritless.

1. IID's Certification Of The Final EIR In Advance Of Project Approval Is Legal And Appropriate.

The County argues that IID has failed to "fully perform" its obligations as a Lead Agency because it has not approved the proposed project, or any alternative project. IID agrees that it has both the right and the obligation under CEQA to approve the project before it can be implemented. However, CEQA does not require that project approval occur concurrently with certification of the Final EIR or within any specific time period thereafter. CEQA requires, first and foremost, that

certification of a final EIR occur prior to project approval so that the environmental assessment can be considered in deciding whether approval should be granted and in structuring the final terms and conditions of the project. See CEQA Guidelines §§ 15090(a), 15092(a), and 15004(a). CEQA Guidelines also require that the Lead Agency make certain findings prior to project approval. Public Resources Code 21081; CEQA Guidelines § 15091. However, these findings are not required to be made at the time of Final EIR certification or prior to action on the project by a Responsible Agency.

The principal purpose of CEQA is to provide decision makers with environmental information for their use in evaluating a proposed project. In this case, it is recognized that the proposed project is a significant undertaking, in terms of both its scope and its impacts; the project features and the HCP and other mitigation measures are complex; the project term is quite lengthy; and the affected resources include areas in the midst of transition, such as the Salton Sea. For these reasons, IID has made every effort to facilitate the broadest possible review of the project's benefits and impacts by state and federal regulatory and resource agencies prior to taking any final action on the project. The County's argument that the project must be approved by IID before any discretionary action on the project by any other agency undermines this effort and does not advance any CEQA policy. CEQA encourages a Lead Agency to respond to Responsible Agencies' concerns and take their recommendations into account in approving or disapproving a project.

In addition, it is reasonable and practical for IID to delay project approval until resource and regulatory agencies have identified their requirements for issuance of necessary permits and approvals. IID is seeking the SWRCB's approval of the Transfer and Settlement portions of the project. At the same time, IID is seeking issuance of Incidental Take Permits by CDFG and USFWS under the state and federal endangered species act. A lengthy permit process is required for these ESA permits, and both USFWS and CDFG were reluctant to even commence the permit process prior to completion of the Final EIR. It is understood that the requirements for issuance of ESA permits will be very substantial and costly and may affect IID's ability and willingness to proceed with the project. The County's position undermines IID's effort to ensure that the final project, if approved, will be consistent with all regulatory and permitting requirements as well as IID's objectives and financial limitations.

2. CEQA Allows A Responsible Agency To Issue A Project-Related Approval Prior To The Lead Agency's Project Approval.

CEQA does not require the SWRCB to delay issuing a decision until the project has been finally approved by IID as the Lead Agency. The County's references to the CEQA Guidelines to support its position are misleading. CEQA Guidelines § 15096(a), which is cited by the County as authority for its position, states:

> A responsible agency complies with CEQA by considering the EIR or negative declaration prepared by the lead agency and by reaching its

> own conclusions on whether and how to approve the project involved.

Most importantly, the Responsible Agency is not expected to consider the project as approved by the Lead Agency; rather, the CEQA Guidelines describe the Responsible Agency's consideration of the Project as proposed by the Lead Agency. CEQA Guidelines § 15096(g)(2). CEQA requires a Responsible Agency's decision to be based on the Lead Agency's EIR and the Lead Agency's proposed project, and CEQA requires a Responsible Agency to come to its own decision regarding the project-related action before it. As a result, CEQA cannot be construed to preclude Responsible Agency action prior to the Lead Agency's project approval.

In prior water orders and decisions, the SWRCB has indicated that a Final EIR is needed, but it has not required Lead Agency project approval before acting on a project. For example, in Decision 1632, 1995 Cal. Env. Lexis 7, 96 (1995), the Board stated that an "EIR must be prepared and considered at the time a responsible agency considers approval of a proposed project. (Title 14, Section 15096.)" (Emphasis added.) In Order No. WR 88-12, 1988 Cal. Env. Lexis 33, 11 (1988), the SWRCB explained:

> Pursuant to 14 Cal. Code of Regulations Section 15096 (State CEQA Guidelines), the Board is a Responsible Agency for the project. In this capacity, the Board is required to consider the Negative Declaration and Initial Study adopted by DWR, along with other relevant information, and make its own conclusions whether and how to approve the project.

(See also, Order No. WQ 2002 – 0008, 2002 Cal. Env. Lexis 814 (2002).)

Thus, according to both CEQA Guidelines and the SWRCB's prior decisions, the SWRCB must review the Lead Agency's Final EIR, but there is no basis for claiming the SWRCB must await or rely upon the Lead Agency's project approval before taking a Project-related action.

The CEQA Guidelines also permit a Responsible Agency, if it finds the Lead Agency's Final EIR deficient, to prepare a subsequent or supplemental environmental assessment, subject to the limitations on subsequent assessment set forth in CEQA Guidelines § 15162. Thus, affirmative action, rather than delay and deferral, is the appropriate response of a Responsible Agency.

3. The Project Description Satisfies CEQA And Is Sufficient For SWRCB Action.

The County argues that SWRCB action is improper unless and until the "ultimate" project to be implemented by IID has been somehow defined more specifically. This assertion is not supported by CEQA. In fact, it undermines the purpose of CEQA suggesting a requirement to define a project prematurely and in such detail so as to preclude necessary and prudent flexibility to respond to environmental information or to comments from resource and regulatory agencies.

IID has provided a description of the proposed project in the Final EIR (IID Exh. 93), consisting of more than 50 pages. This description is sufficient for purposes of analyzing the environmental impacts of the proposed project and for certifying the Final EIR. IID Exh. 55, Sec. 2.0; incorporated in IID Exh. 93 Final EIR/EIS at p. 1-1. A description of the QSA

settlement agreement is included in the Final Program EIR for the QSA (IID Exh. 93A, Sec. 2.0), and this description was also considered acceptable and sufficient, by all four co-lead agencies, for purposes of analyzing the impacts and certifying the Final Program EIR for the QSA. The Final EIR also describes the aspects of the water Transfer and associated Settlement for which SWRCB approval is sought.

The Final EIR explains that the conserved water may vary in amount, but the potential impacts of the maximum proposed transfer volume are disclosed and assessed. It is appropriate to focus on environmental analysis of the "worst-case scenario" in order to satisfy CEQA's objective of disclosing all potential adverse project impacts. The Final EIR explains that the conservation methods used to create water for transfer may vary over the substantial project term, as a result of the complexity of the irrigation system, changes in the participants in the on-farm portion of the program, variations in soil and water needs and uses, weather and hydrological conditions, agricultural market conditions, and other factors; however, the aggregate impacts of the various conservation programs are disclosed and assessed in the Final EIR. Furthermore, the potential impacts on IID drain habitat, the New and Alamo Rivers, and the Salton Sea from reduced inflows do not primarily depend on the reason for the reduced inflow. The variability and flexibility allowed within the project do not render the project description inadequate or legally defective. The impacts of any conservation program adopted by IID will fall within the range of impacts

identified in the Final EIR, or further assessment will be conducted.

The County argues that a project description which includes variation and flexibility is inadequate. This argument is merely a cover for the County and other protestants' objection to the project, desire for changes in the project, or predictions that the IID Board might not approve the project. However, nothing in CEQA or the CEQA Guidelines makes the legitimacy or adequacy of a Final EIR dependent upon whether the project is ultimately approved or even likely to be approved at the time of EIR certification.

The purpose of an EIR is "to inform other governmental agencies and the public generally of the environmental impact of a proposed project." CEQA Guidelines § 15003(c) (emphasis added). CEQA requires only a "general description" of the project's technical, economic and environmental characteristics. CEQA Guidelines § 15124; Dry Creek Citizens Coalition v. County of Tulare (1999) 70 Cal.App.4th 20, 29. In Dry Creek, the appellants contended that the final EIR inadequately described the project by deferring the actual design of the diversion structures until after project approval. The appellants claimed the final EIR did not provide enough detail for adequate CEQA review. Id. at 27. The Court, however, found that CEQA requires only a general description of the project's technical characteristics:

> CEQA Guidelines § 15124 provides: "The description of the project shall contain the following information but *should not supply extensive detail* beyond that needed for evaluation and review of the environmental

> impact. . . . A *general description* of the project's technical, economic, and environmental characteristics, considering the principal engineering proposals if any and supporting public service facilities."

Id. at 28-29 (emphasis in original and added).

Because CEQA requires only a general description, the Court in Dry Creek Citizens Coalition found meritless the appellants' claim that the project description lacked sufficient detail:

> "General" means involving only the main features of something rather than details or particulars. . . . The general description requirement also fosters the principle that EIRs should be prepared early enough in the planning stages of a project to enable environmental concerns to influence the project's design. (Guidelines, § 15004; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 738 . . . . A general description of a project element can be provided earlier in the process than a detailed engineering plan and is more amenable to modification to reflect environmental concerns. (Cf. *San Joaquin Raptor*, supra, 27 Cal. App. 4th at p. 742; and see *County of Inyo v. City of Los Angeles* (1977) 71 Cal. App. 3d 185, 199 [139 Cal. Rptr. 396] [CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project; new and unforeseen insights may emerge during investigation, evoking revision of the original proposal].)

Id. at 28.

Rather than requiring an EIR to contain a detailed description of the economic and technical characteristics of a project, the court explained that CEQA merely requires a general description of the economic and technical aspects sufficient to enable reasoned decision-making. Id. at 36. Because none of the appellants' contentions demonstrate that the description of the

project is insufficient to understand the environmental impacts of the proposed project or that the description narrowed the scope of environmental review, the Court found the project description satisfied CEQA. Id.

Similarly, in Riverwatch v. County of San Diego (1999) 76 Cal.App.4th 1428, the Court upheld a final EIR which deferred, until a later time, a more detailed analysis of the highway realignment aspect of the project. The court noted that CEQA did not prevent the deferral of such decisions, and stated the parties were quite practical in deferring financial decisions until they determined whether the project would be approved:

> CEQA did not prevent Palomar and the county from deferring resolution of their financial dispute until they could determine that the quarry project, including the highway realignment, would not have an impermissible impact on the environment. . . . Indeed there was a great deal of practicality in the approach adopted by Palomar and the county. If the project could not go forward for environmental reasons, there was no need to resolve the financial issues.

Id. at 1449.

CEQA simply requires that the project description contain sufficient detail to enable decision makers to understand the environmental impacts of the proposed project. It does not require the level of precise detail which the County and other protestants have demanded, such as the exact location where mitigation water might be discharged into the Salton Sea. Courts have also upheld EIR's which defer both decisions and environmental analyses until some post-approval time. Therefore, IID's project description in the Final EIR satisfies CEQA

requirements and is sufficient to support SWRCB approval of the Transfer and Settlement.

4. CEQA Accommodates Post-Certification Project Changes.

The protestants claim that the possibility of changes in the project will render the Final EIR deficient, and they advance this theory as a basis for deferring SWRCB action. First, the SWRCB has been requested to take specific action as described in the Petition and PDA. It is not necessary or appropriate for the SWRCB to speculate on the possibility of future changes to the Transfer and Settlement, including the methods of conservation, the proposed mitigation measures, or any other aspect of the project. Second, the CEQA process fully anticipates and accommodates potential project changes. As noted above, it does not further the purposes of CEQA to require a project to remain fixed throughout, and even after, the environmental review process. Changes to reflect new conditions, information, laws, or changing technologies are acceptable and appropriate, especially in the case of a project as complex as the proposed Transfer and Settlement.

If IID later determined to change the project to accommodate Responsible Agency requirements, changed conditions, or for any other reason, the CEQA Guidelines provide a detailed process for evaluating those changes and determining whether the assessment in the Final EIR must be supplemented. CEQA Guidelines § 15162 states the criteria for subsequent assessment if changes are proposed after an EIR has been certified, allowing an agency to prepare: (1) a subsequent EIR to account for substantial changes

in the project, the circumstances, or in the information available (CEQA Guidelines § 15162); (2) a supplement to make minor changes or additions to the original EIR (CEQA Guidelines § 15163); or (3) an addendum to address minor technical changes to the project, the circumstances, or the information available (CEQA Guidelines § 15164). See also CEQA Guidelines § 15096(f) and Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal. (1993) 6 Cal.4th 1112, 1125-26. The Lead Agency also retains the flexibility to change the project and mitigation measures even after project approval in accordance with the same CEQA process.

Thus, project changes, if made by IID, may result in subsequent environmental assessment, but they do not, by themselves, impair the legal sufficiency of the certified Final EIR. IID acknowledges and is fully prepared to comply with the CEQA process applicable to any changes subsequently needed. The existence of a recognized legal process refutes the protestants' concerns about possible future project changes, and does not require any deferral or delay by the SWRCB.

5. The SWRCB Is Not Required To Resolve All Allegations Regarding EIR Deficiencies.

As the SWRCB has already noted, this hearing is not the appropriate forum to adjudicate the legal sufficiency of the Final EIR. Rather, the SWRCB is entitled to rely upon the Final EIR certified by IID if it finds that it adequately assesses the actions the SWRCB is requested to take. The SWRCB's responsibility under CEQA is limited to the scope of its action on the project and its area of jurisdiction and expertise.

For example, CEQA Guidelines § 15096(d) states that a Responsible Agency should limit its comments on a Draft EIR to "those project activities which are within the agency's area of expertise or which are required to be carried out or approved by the agency or which will be subject to the exercise of powers by the agency". CEQA Guidelines § 15096(g)(1) states:

> When considering alternatives and mitigation measures, a responsible agency . . . has responsibility for mitigating or avoiding only the direct or indirect environmental effects of those parts of the project which it decides to carry out, finance, or approve.

The County seeks to dissuade the SWRCB from acting on the Petition by improperly suggesting that the SWRCB will "assume" Lead Agency duties by doing so. This is incorrect. CEQA Guidelines § 15052 specifies that a Responsible Agency assumes the role of the Lead Agency only in the following limited circumstances: (1) the Lead Agency did not prepare any environmental documents for the project and the statute of limitations has expired for challenging the Lead Agency's action; (2) the Lead Agency prepared environmental documents but a subsequent EIR is required, the Lead Agency has granted a final approval for the project, *and* the statute of limitations for challenging the Lead Agency's action has expired; or (3) the Lead Agency prepared inadequate environmental documents without consulting with the Responsible Agency and the statute of limitations has expired for a challenge to the Lead Agency's action. Clearly, none of the circumstances described in § 15052 apply here.

The County acknowledges, in a footnote, that the CEQA Guidelines do not provide for a shift of the Lead Agency role in our circumstances, but blithely asserts that SWRCB action on the Petition is nevertheless unlawful. Nothing in the carefully crafted language of § 15092, or any other provision of the CEQA Guidelines, suggests that the critical responsibilities of the Lead Agency could be shifted inadvertently or by implication.

6. By Approving the Transfer and Settlement The SWRCB Will Not Become The Principal Defendant In A CEQA Action.

Contrary to the County's suggestion, IID does not maintain that the statutory period for challenging the adequacy of the Final EIR commences upon its certification. IID acknowledges that, pursuant to Public Resources Code § 21167(c), an action alleging that the Final EIR does not comply with CEQA must be commenced within 30 days after the filing of a Notice of Determination by the Lead Agency. See Deltakeeper v. Oakdale Irrigation Dist. (2001) 94 Cal.App.4th 1092, 1099.

IID also disagrees with the County's attempt to scare the SWRCB into delay by alleging that the SWRCB would be the principal defendant in a CEQA lawsuit if the SWRCB approves the Transfer and Settlement before IID approves the proposed project. IID, as the Lead Agency responsible for the preparation of the EIR, must be named as the respondent in any CEQA action challenging the legal adequacy of the Final EIR. If IID is not named as a respondent or joined as an indispensable party, the plaintiff's CEQA challenge will be dismissed. Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation and Park District

(1994) 28 Cal.App.4th 419, 429; CEB, Practice Under CEQA, § 23.15.

In Cuyamaca, the plaintiffs brought an action against a Park District for failure to perform an environmental assessment pursuant to CEQA. After allowing CDFG to intervene in the case (Id. at 424), the court held that because CDFG was the Lead Agency, the plaintiff's claim against the Park District did not support a CEQA violation and was properly denied. Id. at 429. Similarly, in Citizens Task Force on Sohio v. Board of Harbor Commissioners of the Port of Long Beach (1979) 23 Cal.3d 812, 814, the court found not only that the Lead Agency was an indispensable party, but also that the lower court should have permitted the action to proceed against the Lead Agency alone--without the Responsible Agency. Id. Since a challenge to an EIR is limited to the issue whether substantial evidence supports the Lead Agency's determination that the EIR is adequate, it is logical for the courts to require that the Lead Agency be joined as an indispensable party. Deltakeeper v. Oakdale Irrigation Dist., 94 Cal.App.4th 1092, 1107 (2001).

The indispensable party principle extends beyond requiring the joinder of the Lead Agency. Code of Civil Procedure § 389(a) requires that any entity whose interest will be directly affected by the lawsuit and whose ability to protect that interest may be impaired or impeded by the disposition of the proceeding, must be joined as a party. *See* Save Our Bay, Inc. v. San Diego Unified Port Dist. (1996) 42 Cal.App.4th 686 (holding that a property owner whose property sale was contingent on the Port District's approval of a city project was an indispensable party and

dismissing the action for failure to join the property owner); Beresford Neighborhood Assn. v. City of San Mateo (1989) 207 Cal.App.3d 1180 (holding that a developer was an indispensable party because the developer's interest was not adequately represented by the city and dismissing the claim for failure to join the developer).

B. CEQA Does Not Require Recirculation Of The Final EIR.

Those who have improperly sought to convert the proceedings before the SWRCB into a CEQA challenge process have argued that the Final EIR should have been recirculated before certification. In fact, review of the CEQA Guidelines shows that the Final EIR does not contain "significant new information" as defined in those CEQA Guidelines, and therefore was not subject to recirculation.

Section 15088.5 of the CEQA Guidelines governs recirculation of a draft EIR prior to certification. Recirculation is only required when "significant new information" is included in the Final EIR, such as information showing that:

(1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.

(2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted to reduce the impact to a level of insignificance.

(3) A feasible project alternative or mitigation measure considerably different from others previously analyzed

would clearly lessen the significant environmental impacts of the project, but the project's proponents decline to adopt it.

(4) The Draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.

None of the criteria described above as grounds for recirculation exist. The Final EIR does not identify new significant environmental impacts from a new mitigation measure as compared to the Draft EIR. The Final EIR does not identify a substantial increase in the severity of any environmental impact over that described in the Draft EIR.

The Lead Agencies gave thoughtful consideration to all 1700 comments received. A number of issues raised by commenters were either re-analyzed or the original analysis was augmented. All information relevant to the work done in response to comments was disclosed in the responses to comments. Despite the intensity and breadth of the review, no new significant impacts were identified and no substantial increase in severity of a previously identified impact was found. If anything, the opportunity to review the Draft EIR through the eyes of commenters only served to underscore that the Final EIR was extremely conservative in its approach, always analyzing the maximum potential impact, even under scenarios that are highly unlikely to occur. For example, CVWD has repeatedly asserted that it will be the transferee of all the water made available to it under the terms of the QSA, thereby making it highly unlikely that MWD will ever receive water not taken by CVWD. The impact

of conserved water being transferred to CVWD is less severe than if it is transferred to MWD, yet all analyses assumed the worst case scenario of 100,000 AFY going to MWD instead of CVWD.

Section 3.0 of IID Exh. 93 Final EIR/EIS, Master Responses to Comments, discusses in detail the substantive issues that were further examined in response to comments and illustrates how none of them identified a new significant environmental impact or a substantial increase in the severity of a previously identified impact.

Simply put, the Final EIR does not fall within the framework for recirculation under CEQA.

C. Use Of A Modeled Baseline To Assess Potential Project Impacts On The Salton Sea Is Appropriate Under CEQA.

There was some criticism by the parties of the use by IID of a Baseline for the Salton Sea, purportedly grounded in allegations of CEQA noncompliance. However, when a resource is in the midst of significant change, as is the case with the Salton Sea here, CEQA does in fact allow an agency to use the changing circumstance in the Baseline.

The CEQA Guidelines require an EIR to describe the environmental setting, defined as the physical environmental conditions in the vicinity of the project as they exist at the time the NOP is published. There appears to be no dispute that the Final EIR describes the existing setting (set forth for each resource in Section 3 of the Draft EIR, which is incorporated into the Final EIR at p. 1-1 at IID Exh. 93). However, the protestants have objected to the projection of this existing

setting over the proposed project term, in the case of hydrologic conditions at the Salton Sea, and the use of this projected Baseline to assess project impacts. Section 15125(a) of the Guidelines provides:

> This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.

[Emphasis added.]

In a simple project, such as construction of a commercial building, the Baseline normally equals the existing conditions as of a fixed date (the date of publication of the NOP) on a "snapshot" basis. However, the proposed project at issue is complex, with built-in flexibility, and will be implemented for up to 75 years. The actual physical conditions at the Salton Sea that may be affected by the Transfer and Settlement require a more refined and complex approach to identify impacts over the 75-year term. In particular, existing conditions at the Salton Sea include identifiable trends which will affect Sea salinity and elevation over the 75-year period. A projected Baseline allows future changes caused by existing conditions to be distinguished from project effects. This distinction is important because CEQA does not require IID to mitigate effects which are not caused by the project. Section 15125(a) of the Guidelines does not mandate that a frozen snapshot of existing conditions be used. As noted in an authoritative text on CEQA compliance:

> Both the Guidelines and following Discussion provide that physical conditions at the time of the [NOP] normally constitute the baseline for

> determining impacts, but a lead agency may determine that another baseline is more appropriate, either for overall evaluation of a project's impacts or for evaluation of a particular project impact. For example, if it is known that a certain surrounding environmental condition will either improve or degrade by the time the project is implemented, the lead agency may have a basis for selecting a different baseline for evaluating environmental impacts related to that condition. If the lead agency does elect a different baseline, the lead agency should be careful to explain in the EIR why a different baseline has been selected and to summarize the evidence or determination surrounding the selection of a different baseline.[9]

The Salton Sea is a unique, complicated, and evolving water body that is directly affected by reductions in irrigation drainage, constituents in the inflows, and other factors affecting inflow. The existing conditions of the Salton Sea reflect a historical trend of increasing salinity that will continue into the future, absent a major intervention aimed at restoration. The trend evidences both declining water quality and habitat values. This significant trend was recognized in the 2001 Draft EIS/EIR for the Salton Sea Restoration Project (SS Restoration Draft EIR/EIS, IID Exh. 69), which also utilized an earlier version of the same Salton Sea Accounting Model used for the Draft and Final EIR/EIS. As noted in that SS Restoration Draft EIS/EIR (IID Exh. 69):

> The Salton Sea ecosystem is under stress from increasing salinity, nutrient loading, oxygen depletion, and temperature fluctuations that may

[9] Kostka, Stephen L. and Michael H. Zischke, 2002, California Environmental Quality Act (CEQA), § 12.16, updated January 2002, p. 489. See also, Remy, Michael H. et al., Guide to the California Environmental Quality Act (CEQA), 10th ed., 1999, p. 165.

> be threatening the reproductive ability of some biota, particularly sportfish species, and also causing additional ecosystem health problems. There are indications that the deteriorating environmental conditions may be contributing to the prominence of avian disease at the Sea. Without restoration, the ecosystem at the Sea will continue to deteriorate.

Executive Summary, page ES-1.

It is appropriate to reflect this trend in the Baseline because it is an element of existing conditions, and it is appropriate to differentiate adverse changes in conditions at the Sea resulting from the ongoing trend from changes caused by the Transfer and Settlement. The Final EIR utilizes a reasonable method of presenting the Baseline and identifying the project impacts, and is the result of substantial time, effort and expense. It is well within the discretion of the IID as the CEQA Lead Agency to adopt this analytical method.

A recent case, Save Our Peninsula Committee v. Monterey County Board of Supervisors (2001) 87 Cal.App.4th 99, recognized a lead agency's discretion to establish an appropriate baseline:

> Because the chief purpose of the EIR is to provide detailed information regarding the significant environmental effects of the proposed project on the "physical conditions which exist within the area," it follows that the existing conditions must be determined, to the extent possible, in the EIR itself. . . . [Citations] . . . On the other hand, the agency has the discretion to resolve factual issues and to make policy decisions. If the determination of a baseline condition requires choosing between conflicting expert opinions or differing methodologies, it is the function of the agency to make those choices based on all of the evidence.

Id. at 120.

The Court in Save Our Peninsula also rejected the theory that the baseline must be rigidly determined as of a specific date, the date when the NOP is filed:

> . . . [T]he date for establishing baseline cannot be a rigid one. Environmental conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods. In some cases, conditions closer to the date the project is approved are more relevant to a determination whether the project's impacts will be significant.

Id. at 125.

Citing County of Amador v. El Dorado County Water Agency (1999), 76 Cal.App.4th 931, 955, and CEQA Guidelines Section 15151, the Save Our Peninsula Court cautioned that an adequate baseline description requires more than raw data; it also requires sufficient information and analysis to enable the decision-makers to make intelligent choices.[10] The Save Our Peninsula case was followed in Fat v. County of Sacramento (2002), 2002 Cal.App. LEXIS 3679, where the appellate court upheld an EIR in the face of a challenge to the baseline used by the lead agency. The Court held that CEQA Guidelines § 15125 gives the lead agency the discretion to deviate from the time-of-review baseline.

In light of the inherent variability in the hydrological conditions at the Salton Sea, which is verified by historical records, using a "snapshot" Baseline which focuses on the physical conditions on a specific date (or other limited point in

[10] Ibid. 124.

time) is not an accurate or reasonable method of reflecting existing conditions. In addition, a "snapshot" approach does not reflect predictable future changes caused by existing trends over the project term. Following the direction provided by the above cases, the Final EIR provides a reasoned methodology and analysis to allow the Lead Agencies to adopt the described Baseline and to identify and assess project impacts in a meaningful way.

VI. THE SWRCB'S SPECIFIC INQUIRIES

The SWRCB asked a number of questions in Chairman Baggett's letter to the parties of June 14, 2002. Though some of these questions may already have been answered elsewhere in this brief, in this section IID specifies the question, answers it, and then explains the rationale for each answer.

Before addressing the particular questions, however, IID needs to address the context from which they apparently arose. CVWD General Manager Tom Levy and MWD Vice President Dennis Underwood attempted to present their "legal" opinions about what the "Law of the River" might mean as to using water for Salton Sea or other environmental mitigation for conservation and transfer impacts. They basically said that they did not think that Colorado River water could be voluntarily used to mitigate environmental impacts caused by a voluntary conservation and transfer. Transcript, May 29, 2002, pp. 2734(12)-2737(15). IID fundamentally disagrees with Mr. Levy and Mr. Underwood.

However, Mr. Levy and Mr. Underwood's remarks are in accord with the consistent position that both CVWD and MWD have taken over the past few years, i.e. that state law of any type has no role with respect to the use of Colorado River water within

California. Both agencies basically feel, as they made plain in their protests here before such were dismissed via the PDA, that federal law has totally preempted state law regarding Colorado River water use, and state entities such as the SWRCB really have no meaningful role.

IID disagrees, since it contends that federal law makes clear that state law governs where not specifically inconsistent with federal law. IID suggests that the SWRCB needs to read everyone's responses to its questions and the Levy/Underwood testimony with this "state law versus federal law" tension in mind. The PDA was intended to make it unnecessary for the SWRCB to rule on these questions. The testimony prompting the SWRCB's questions, however, now warrants answers being provided. Nonetheless, IID reiterates its request that any and all rulings, findings, and the decision remain non-precedental so that the Settlement may go forward.

***Question 1 of the SWRCB**: Does the Law of the River (including the 1922 Colorado River Compact, the Boulder Canyon Project Act of December 21, 1928, and case law interpreting the Compact and the Act), allow the use of water by IID for purposes of fish, wildlife, and other instream beneficial uses?*

Answer of IID to Question 1:

In responding to all parts of Question 1, it is very important to emphasize that this SWRCB proceeding does not in any way involve any "instream" uses of water from the Colorado River, either through conservation and transfer, mitigation, or any other means. Accordingly, nothing set forth in these answers

should be construed in any way to apply to "instream flow" water uses or other such applications that may be in any way be connected to the mainstream of the Colorado River or its tributaries.

The question is also posed as to whether a fish and wildlife use may be "allowed" versus "compelled." The IID believes it cannot be compelled under any law to make water available to its drains, the New or Alamo Rivers, or the Salton Sea. The question inquires about the legal foundation to voluntarily use water for mitigation in connection with a voluntary irrigation-conservation program. The mitigation water used would maintain certain values at the Salton Sea (an artificial water body). In terms of answering the question in this context, the answer is "yes." IID's water right authorizes irrigation and domestic use. IID believes that the Law of the River does in fact permit IID to voluntarily use Colorado River water for incidental environmental mitigation connected with other uses authorized under IID's water right. IID provides a detailed analysis in response to this question, and then amplifies as necessary for the subparts of Question 1.

IID does not believe it has a right to order water from the BOR just to aid fish, wildlife, or for other instream or non-instream similar uses. However, IID does have a right to voluntarily engage in a large irrigation conservation effort and to use some of its water to mitigate environmental impacts caused by that activity. Under state law, which governs intra-state use if not inconsistent with federal law, IID's act of conservation is itself a reasonable and beneficial irrigation use by IID.

Also, acts incident to the authorized use are themselves also treated as an authorized use.

(a) State Law Is Determinative In Evaluating IID's Conserved Irrigation Water Use

As stated earlier, under the plain text of Water Code § 1011, along with similar legislative intent expressed in §§ 1012, 1014 and 1017, when IID conserves water, such conservation is deemed by these sections of the Water Code to be a reasonable and beneficial use of the water by IID itself. The conservation is irrigation conservation, so it is an irrigation use.

However, does state law determine intra-state use issues? Yes, based upon the history of the Law of the River and the required federal deference to state law for determinations on intra-state water use. A short summary of this deference to state law follows:

- **U.S. Supreme Court:** California v. United States (1978) 438 U.S. 645, 675. "Congress intended to defer to the substance, as well as the form, of state water law."; and at 664: "But the [Reclamation] Act clearly provided that state water law would control in the appropriation and later distribution of the water."
- **Ninth Circuit Court of Appeals:** U.S. v. SWRCB (9th Cir. 1982) 694 F.2d 1171, 1177: "[A] state limitation or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purpose with an important

federal interest served by the Congressional scheme." U.S. v. Alpine Land and Reservoir Co. (9th Cir. 1989) 878 F.2d 1217, 1223: "[S]tate law governs the validity of transfers of water rights."

- **California Supreme Court:** Environmental Defense Fund v. East Bay Mun. Utility Dist. (1980) 26 Cal.3d 183, 192: "California may impose any condition not inconsistent with Congressional directive. . . . Absent conflict with congressional directive, state law must be complied with in the 'control, appropriation, use, or distribution of water'."

As the SWRCB is aware, Arizona diverts Colorado River water for the Central Arizona Project ("CAP"). Recently-adopted Arizona state laws made "nonuse" through storage of diverted CAP water in groundwater basins for later future use an allowed present use under state law. In the case Central Arizona Irr. and Drainage Dist. v. Lujan (D.Ariz. 1991) 764 F.Supp. 582, the Court noted:

> The allocation and preferences given to CAP water seems [sic] to be within the exclusive province of the Secretary of the Interior; ***once the preferences are already established, the possible uses of that water are governed by state law***. . . . M&I users may use their water for any use authorized by Arizona law, including recharge.

Id. at 591. (Emphasis in original and added.)

Would a California state law determination that IID's conservation of irrigation water is an irrigation use conflict with federal law? No. The "Law of the River" as applied to

these facts shows that the state law determination would be valid.

For this analysis, it is helpful to start with the actual state permit at issue in this Petition. Permit number 7643 (SWRCB Exh. 1) states that the water must be "beneficially used" (¶ 1). It then states that it "supplements and is without prejudice to" the applicable federal contracts and laws, and then quotes the Seven-Party Agreement and IID's federal contract (¶ 3). Thus, we start off with the principle that there is nothing in Permit number 7643 that precludes conservation (or mitigation for conservation) as a beneficial irrigation use.

But what of the federal law the Permit references? It does not preclude such a determination either. The Seven-Party Agreement (SWRCB Exh. 4) specifies that IID's Priority 3 entitlement is limited only by the 3.85 million AFY agricultural cap and is for "beneficial consumptive use." Id. Sec. 3, p. 558. However, as noted above, state law determines what constitutes such beneficial consumptive use. Under Water Code § 1011, IID is beneficially consuming such water as a matter of law, just as under the CAP in Arizona that state is "using" its water, though it is simply storing it underground.

IID's contract with the Secretary of the Interior states the same Seven-Party Agreement language, and also adds that the water delivered to IID shall be used "as reasonably required for potable and irrigation purposes." IID Exh. 28, p. 335. It also notes that Article VIII of the Colorado River Compact states that Colorado River water shall be used for "irrigation and domestic uses and satisfaction of perfected rights . . . ." (Id.), and it

incorporates the Compact and applicable reclamation law (Id. at 339-340).

Thus, in sum, the IID contract with the Secretary mirrors the rights in the Colorado River Compact, the Boulder Canyon Project Act, and general reclamation law, with the additional gloss of IID's present perfected rights. Is there anything related to such matters precluding application of state law to determine use? No.

First, as to IID's present perfected rights, those are not even restricted by the Colorado River Compact and the Boulder Canyon Project Act:

> Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this Compact.

Compact, Article VIII.

> One of the most significant limitations in the Act is that the Secretary is required to satisfy present perfected rights, a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective.

Arizona v. California (1963) 373 U.S. 546, 584 (emphasis added). See also 43 U.S.C. 617e.

The separate nature of IID's present perfected rights is also supported by the language in the IID contract with the Secretary quoted above, which states (citing the Compact) that deliveries to IID are for "irrigation and domestic uses and satisfaction of perfected rights." (Emphasis added.) Further, the Supreme Court's present perfected rights determination as to

IID expressly stated that such rights could be for uses related to its irrigation:

> [IID's present perfected right is found to be] in annual quantities not to exceed (i) 2,600,000 acre-feet of diversions from the mainstream **or** (ii) the consumptive use required for irrigation of 424,145 acres and for the satisfaction of **related uses**, whichever of (i) or (ii) is less, with a priority date of 1901.

Arizona v. California (1979) 439 U.S. 419, 429. (Emphasis added.)

> In the first place, it bears emphasizing that the Section 6 perfected right is a water right originating under state law. . . . [Section 6] was an unavoidable limitation on the Secretary's power and that in providing for these rights the Secretary must take account of state law. In this respect, state law was not displaced by the Project Act and must be controlling in determining the content and characteristics of the water right that was adjudicated to the District by our decree.

Bryant v. Yellen (1980) 447 U.S. 352, 370-371.

However, even exclusive of present perfected rights, the Boulder Canyon Project Act clearly allows state law to cover usage determinations:

> Nothing herein shall be construed as interfering with such rights as the States had on December 21, 1928, either to the waters within their borders or to adopt such policies and enact such laws as they deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River Compact or other interstate agreement.

43 U.S.C. § 617q.

Additionally, as stated in the case law cited above, the federal courts have continued to grant to state law the deference Congress intended as to usage determinations. This is not to say that IID can do anything it wants with its water, but to say that state law determines whether IID is reasonably using its water for the beneficial uses specified, even if such water is not pursuant to a "present perfected right." The Supreme Court made this very clear in California v. United States (1978) 438 U.S. 645, 677-678:

> Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights. . . . [T]he Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law.

Id. at 674-675.

There is nothing in the Compact, the Boulder Canyon Project Act, or the IID federal contract that would negate the ability of IID to voluntarily conserve irrigation water for transfer and to incidentally use water to mitigate the environmental impact of such conservation (if desired). The allowed uses of water under applicable federal laws are broad. In the Compact it is stated that the water shall be for "domestic, agricultural, and power purposes" (Article IV(a)), and gives a very broad definition of "domestic" (Article II(h)), as including household, stock, municipal, mining, milling, and industrial within the meaning, and then saying that "domestic" also includes "other like purposes." Similarly, the Boulder Canyon Project Act cites "irrigation and domestic" purposes. (Act, Section 5). Neither

the Act nor the Compact set out to create a list of what would qualify as "irrigation," but certainly the fact that "domestic" was defined broadly would imply that "irrigation" should be as well. As stated by the federal case law above, since state law is used to determine actual use, it was certainly sufficient for Congress to specify usages in general terms because state law would be used in determining what was included in the use.

In summary, unless federal law has preempted state law, state law will govern. There is no federal law indicating that California's irrigation conservation laws (such as § 1011) are somehow preempted. Further, the reverse is true: Congress itself, in the Salton Sea Restoration Act, cited earlier, required the Secretary to assume that water transfers would be reducing the inflow to the Salton Sea. Given that this Transfer had already been assumed (it was in fact specifically addressed in the House Report on the bill; see IID Exh. 60), it would be a startling thing for Congress to mandate a transfer assumption, unless state-law transfers of conserved Colorado River water were thought by Congress to be allowed.

(b) Incidental Use To An Authorized Use Is Permissible

In addition to the fact that state law (§ 1011) deems that IID's irrigation conservation is a reasonable and beneficial use, mitigating such conservation would merely be an incidental or related use to the conservation use, and thus also be allowable. If mitigation water were a condition to additional conservation and transfer to protect certain species (for example, to obtain permits from resource agencies in respect to endangered species),

this mitigation use would simply be a voluntary incidental use to an authorized water use.

The concept of incidental water use being authorized if ancillary to the water's main use is long established. The Supreme Court in 1852 stated in Rundle v. The Delaware and Raritan Canal Co. (1852) 55 U.S. 80:

> It is true . . . that the waters diverted by defendants' dam and canal are used for the purpose of mills, and for private emolument. But as it is not alleged, or pretended, that defendants have not taken more water than was necessary for the canal, or have constructed a canal of greater dimensions than they were authorized and obliged by the charter to make, this secondary use must be considered as merely incidental to the main object of their charter.

Id. at 93.

The California Supreme Court came to the same conclusion in reviewing water conservation greater than mandated by the Los Angeles County Flood Control District:

> The control and conservation of such tributary waters is but an incident necessarily appurtenant to the main purpose of the project applicable to the San Gabriel River area. . . . What is necessarily incidental to the main purpose of the project is authorized to be done.

Peacock v. Payne (1934) 1 Cal.2d 104, 109.

Similarly, the SWRCB has held that incidental uses to an appropriator's permitted use can be recognized, especially when to the public's benefit:

> The SWRCB received evidence that establishes that the water in Deer Creek occasionally is used in an emergency to fight fires. This is a beneficial use of the water. IID correctly

> argues that an appropriative right is needed to store water for fire protection. None of the petitioners for reconsideration are claiming a storage right for this purpose. It is in the public interest to allow the incidental use of water for fire protection during an emergency . . . .

Order WR 95-9, 1995 WL 418673, at p. 21.

If for any reason IID is willing to mitigate impacts on endangered species arising from voluntary conservation and transfers, such use is purely incidental to the authorized conservation and transfer activity allowed under the previously-referenced sections of the Water Code.

***Question 1a of the SWRCB**: Does the Act, which authorizes the Secretary of the Interior to enter into contracts for the storage and delivery of Colorado River water "for irrigation and domestic uses," limit the purposes for which IID may use water under contract with the Secretary? If so, do these limitations apply to the use of water that is delivered in satisfaction of present perfected rights within the meaning of article VIII of the Compact?*

Answer of IID to Question 1a:

Pursuant to the detailed analysis above, the answer is, "Yes, but only as to non-present perfected rights." The contracts limit IID's use to irrigation/agriculture and domestic/potable uses. However, also per the detail provided earlier, the use of the terms "irrigation and domestic" include within their terms irrigation conservation under state law, and acts incidental thereto. In other words, the practical answer to

this question is that because state law governs unless in conflict with federal law, and no federal law bars conservation and transfer, then there is no bar to ancillary mitigation either.

To use a pertinent example, the SWRCB is aware that a major lining of the All-American Canal is to ensue if all these Settlement Agreements are finalized. There may be some environmental mitigation involved in the loss of "habitat" from a currently porous canal. If replacement mitigation habitat has to be established near the Canal, it is ludicrous to believe that the water from the Canal ten feet away cannot be used to water the replacement bushes or trees, but instead non-Colorado River water must be shipped in at great expense.

***Question 1b of the SWRCB**: Does article III, paragraph (e) of the Compact, which provides that Lower Division States, including California, may not "require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses," limit the purposes for which water may be used within the Lower Division States? Or does article III, paragraph (e) simply establish the measure of how much water the Lower Division States are entitled to receive? If the Compact limits the purposes for which water may be used, does this limitation apply to present perfected rights?*

Answer of IID to Question 1b:

IID answers this question in the same manner as Questions 1 and 1a. Though the language in the Compact effectively provides

a use and volume limitation for non-present perfected rights, the distinction between IID's present perfected and non-present perfected rights in this context is irrelevant: voluntary conservation and voluntary mitigation of such conservation as an incidental use remains an irrigation use under state law, and (because of no conflict) thus under federal law as well.[11]

***Question 1c of the SWRCB**: Does the Law of the River allow the holder of present perfected rights to change the place and purpose of use of water in accordance with state law, provided that the amount used does not exceed that which would be used in the absence of the change?*

Answer of IID to Question 1c:

Yes. As stated earlier, IID's present perfected rights and its rights over and above its perfected rights may be used intra-state pursuant to state law if not inconsistent with federal restrictions. In the present context, there is no difference between the two categories of rights.

***Question 1d of the SWRCB**: Does the Law of the River allow the use of water for the protection of fish, wildlife, or other instream beneficial uses where such*

[11] IID has a concern that because of the questions over present perfected rights, the SWRCB may be thinking of specifying that the water rights addressed in the Petition are present perfected rights only. This would be in error. The Transfer and Settlement involve both present perfected rights and non-present perfected rights, and the Transfer and Settlement may not be restricted to only present perfected rights. As to the Settlement water, CVWD does not receive any if a shortage reduces available water to IID to only its present perfected right. Also, as noted earlier, IID's state and federal law water rights are detailed in the Petition and are thus not repeated here.

use is required under state law in order to mitigate the adverse impacts of delivering water for irrigation or domestic uses?

Answer of IID to Question 1d:

IID's voluntary conservation and transfer, and the voluntary mitigation of impacts created by the conservation and transfer, is allowed. Voluntary mitigation here also would include mitigation that is "required" as a condition to the voluntary conservation and transfer. But, the IID's contract right to receive Colorado River water is not subject to the compelled use of that water for instream or non-instream fish or wildlife protection, since that would be tantamount to the IID ordering water for that purpose, which falls outside of permissible uses under federal law.

Question 2 of the SWRCB: *Will the Interim Surplus Guidelines (66 Fed.Reg. 7772) remain in effect if IID, Metropolitan Water District of Southern California, and Coachella Valley Water District do not execute the Quantification Settlement Agreement (QSA) by December 31, 2002, but California reduces its water use to meet the benchmark quantities set forth in the Guidelines?*

Answer of IID to Question 2:

The BOR has recently answered the questions raised about the Colorado River Interim Surplus Guidelines ("Guidelines") in the BOR's recent Notice ("Notice") in the Federal Register of June 19, 2002. Federal Register/Vol. 67, No. 118, June 19, 2002/Notices, pp. 41733-41735. A courtesy copy of the Notice is

attached hereto as Exhibit "A," and request for judicial/administrative notice is made.

In the Notice, the BOR makes the following points very clear:

1) Sections 5(B) and 5(C) of the Guidelines "established independent conditions for performance of certain actions by entities in California . . . ." Id. at 41733 (emphasis added);

2) Section 5(B) addresses the QSA, and states the requirement that it be signed by December 31, 2002. The Notice says that the "QSA is a critical agreement among the California parties to reduce California's reliance on surplus water from the Colorado River." Id. at 41734. It then points out that some commentators have asserted that failure to sign the QSA by the deadline specified will not affect surplus determinations for 2003 and/or that the Guidelines would be terminated if the QSA were not signed by the end of this year. However, the BOR make clear in the Notice that such contentions are incorrect: "Such suggestions are inconsistent with the plain language of the Guidelines as adopted." Id. at 41734. In fact, the BOR states that the effect of the QSA not being finalized by the end of this year will in fact be the suspension of the "soft landing" created by the special surplus water currently being made available by the Interim

Surplus Guidelines, though the Guidelines as a whole will not be. Id. at 41734.

3) Section 5(C) of the Guidelines is an independent requirement that certain "Benchmark Quantities" for California agricultural use must be reached in specified three-year intervals. Id. at 41734. Just as with Section 5(B), if this independent condition is not met, the "soft landing" for California is at risk: "As with the requirements in section 5(B), section 5(C) also establishes the implications for surplus determinations in the event that the Benchmark quantity conditions for performance are not met." Id. at 41734.

Based upon the foregoing, the answer to Question 2 as worded is, "The Guidelines will remain partially in effect, but the portion of the Guidelines that provide California a 'soft landing' will be suspended," and California will lose the benefit of the Interim Surplus Guidelines. As stated in the Notice, the "soft landing" provisions in Sections 2(B)(1) and 2(B)(2) of the Guidelines will be suspended if either 5(B) (QSA signing) or 5(C) (Benchmark Quantities) are not met. The BOR states that the QSA signing and the Benchmark Quantities are each independent requirements, and thus a failure of either negates the efficacy of Sections 2(B)(1) and 2(B)(2) of the Guidelines.

***Question 2a of the SWRCB**: The Guidelines provide that if the QSA is not executed by December 31, 2002, the Interim Surplus Guidelines will be suspended "until such time as California completes all required actions*

and complies with reductions in water use reflected in section 5(C) of these Guidelines . . . ." Is execution of the QSA a "required action" within the meaning of this section, or does the phrase "all required actions" refer to those actions necessary to meet the benchmark quantities?

Answer of IID to Question 2a:

Based upon the Notice, and a reading of the text of the Guidelines, the signing of the QSA is a separate and independent condition and it is part of the "all required actions." If all California had to do was meet the Benchmark Quantities in 5(C), then there would be no reason to have a separate requirement in 5(B). The BOR has clearly stated in the Notice that if the QSA is not signed, the "soft landing" provisions are suspended.

***Question 2b of the SWRCB**: If the proposed transfer is not implemented beginning in 2003, will California nonetheless meet the 2003 benchmark quantity for agricultural usage of 3.74 million acre-feet set forth in the Guidelines, and, if so, how?*

Answer of IID to Question 2b:

IID will not be capped at 3.1 million AFY. Last year it used more than this amount. The 1988 IID/MWD Agreement, with the corresponding Approval Agreement and the loss of All-American Canal Lining funding will probably result in the failure to achieve the required reduction. The Approval Agreement puts transferred water to MWD into Priority 4, not Priority 3. IID Exhs. 15 and 16. Plus, CVWD can recapture up to 50,000 AFY of the transferred water depending on the cutback required from

Priority 3, thus reducing the volume transferred. The state funding of the lining of the All-American Canal and IID's forbearance of use of the conserved water will be lost without timely implementation of the QSA.

***Question 2c of the SWRCB**: If the proposed transfer cannot be mitigated satisfactorily, is an alternative solution available?*

Answer of IID to Question 2c:

IID is unsure of what is being asked, but answers what it believes is meant here as follows:

a. If the SWRCB is inquiring, "If there is no feasible mitigation for the Salton Sea-related effects, what alternatives do we have?", then IID responds, as stated earlier: that the SWRCB should find that there are impacts, but they are not unreasonable. The SWRCB should then defer to the resource agencies for endangered species compliance.

b. If, on the other hand, the SWRCB is inquiring, "Can IID and/or the other QSA participants do something else other than efficiency conservation to make this Transfer and Settlement work?" the answer is "probably not by December 31, 2002." As stated in detail above, Imperial County will suffer serious financial harm if fallowing is employed on any meaningful scale. Though socioeconomic mitigation in theory may be possible, no agreements about scope, extent, funding, and mitigation activity have been negotiated, nor any offers received. Thus, entirely

new terms would have to be negotiated. For purposes of this hearing, there is no reasonable alternative.

***Question 2d of the SWRCB**: If the proposed transfer is not implemented, is there any other action that the SWRCB can and should take in order to ensure that California reduces its use of Colorado River water in accordance with the Guidelines?*

Answer of IID to Question 2d:

No. If the Transfer and Settlement fail, IID believes that the SWRCB need not be the body seeking to accomplish the 4.4 million AFY requirement for California; the Secretary of the Interior will either choose to enforce such requirement or not, as the case may be, and the Colorado River priorities will be honored.

VII. PROPOSED FINDINGS

Based upon the foregoing discussion, the following is a proposed set of findings for the SWRCB, along with appropriate evidentiary references. These findings incorporate, as required, the necessary findings in the PDA, as well as additional appropriate findings. The requested preamble and findings are italicized:

Based on the substantial evidence regarding the proposed conservation activities; the substantial evidence of the terms and benefits of the Quantification Settlement Agreement and Acquisition Agreements; the continuing effectiveness of the Quantification Settlement Agreement, with an automatic lapse causing all findings of fact and conclusions of law to be of no force or effect upon the termination date (as defined therein) of

the Quantification Settlement Agreement; the terms and provisions of and the consent of CVWD and MWD under the Protest Dismissal Agreement; the SWRCB authority granted under the California Constitution Article X, § 2, Water Code sections 100, 109, 1011, 1012, 1700 et seq. and 1735 et seq.; and on the SWRCB retained jurisdiction under Decision 1600 and Water Rights Order 88-20:

1. This decision, order and all findings of fact and conclusions of law, with the exception of any decision, order, finding of fact or conclusion of law made with respect to standing or the right to appear or object, shall have no precedental effect (as defined in the California Administrative Procedures Act) in any other proceeding brought before the SWRCB and, specifically but without limitation, shall not establish the applicability or nonapplicability of California law or federal law to any of the matters raised by the Petition or to any other Colorado River transfer or acquisition.

*2. There is no substantial injury to any legal user of water. The objection by the Colorado River Indian Tribes ("CRIT") is not a basis to deny the Petition, since: (a) the CRIT diversion water right is unaffected by the proposed Transfer and Settlement (*Transcript, April 24, 2002, pp. 452-460*); (b) IID has no duty to order any specific amount of water from the federal government (*IID Exh. 28*); (c) CRIT's Headgate Rock Dam generates power from whatever water happens to pass by, and such water flow varies significantly from year to year, irrespective of the Transfer (*Transcript, April 29, 2002, pp. 452-460*); and the power loss is minimal (potentially about*

*6%) (*Id.; IID Exh. 53; Final IA EIS, IID Exh. 93B, p. 3.3-19), *thus not rising to the level of "substantial injury."*

3. There is no unreasonable impact on fish, wildlife or other instream beneficial uses. While the Transfer and Settlement will have impacts on such resources, the SWRCB finds that they are not unreasonable in light of: (a) California's immediate need to retain the interim surplus water deliveries from the Bureau of Reclamation per the Colorado River Interim Surplus Guidelines (Federal Register/Vol. 66, No. 17/Thursday, January 25, 2001/Notices, pp. 7772 et seq.) *and per the testimony provided at the hearing by the California Department of Water Resources* (Transcript, April 23, 2002, pp. 112-117), *Metropolitan Water District* (Transcript, April 23, 2002, pp. 121-131), *Coachella Valley Water District* (Transcript, April 23, 2002, pp. 141-143), *and the petitioning parties* (Transcript, April 24, 2002, p. 399; Transcript, April 30, 2002, p. 676; *(b) the fact that the SWRCB is conditioning the granting of this Petition on the implementation of the air mitigation strategy outlined in the Final EIR (*IID Exh. 93*) for the Project; and (c) the fact that the SWRCB is conditioning the granting of this Petition on the compliance by the petitioning parties with state and federal endangered species laws, or appropriate waivers or exemptions.*

4. The SWRCB concerns, if any, with respect to IID's reasonable and beneficial use, are satisfied. (IID Exhs. 1 and 2.)

5. The SWRCB does not anticipate the need, absent any substantial material adverse change in IID's irrigation practices or advances in economically feasible technology associated with

irrigation efficiency, to reassess the reasonable and beneficial use of water by the IID before the end of calendar year 2023.

6. Water Code sections 1011, 1012 and 1013 apply to and govern the transfer and acquisitions and IID's water rights are unaffected by the transfer and acquisitions.

7. The conserved water transferred or acquired retains the same priority as if it were diverted and used by the IID.

8. The transfer and acquisitions are in furtherance of earlier SWRCB decisions and orders concerning the IID's reasonable and beneficial use of water, California Constitution Article X, § 2, and sections 100 and 109 of the Water Code.

9. IID shall report annually on conservation of water pursuant to its Petition, and such annual reports shall satisfy reporting obligations of IID under Decision 1600 and Water Rights Order 88-20. The quantity of conserved water transferred or acquired will be verified by the IID reporting that (i) the IID's diversions at Imperial Dam (less return flows) have been reduced below 3.1 million AFY in an amount equal to the quantity of conserved water transferred or acquired, subject to variation permitted by the Inadvertent Overrun Program adopted by the DOI; and (ii) the IID has enforced its contracts with the participating farmers to produce conserved water and has identified the amount of reduced deliveries to participating farmers and has identified the amount of conserved water created by projects developed by the IID.

10. The transfers and acquisitions addressed in the Petition will provide urban Southern California with a reliable source of water in the face of looming cutbacks. Without such

transfers and acquisitions California faces a serious and imminent water shortage (Transcript, April 23, 2002, p. 114; 66 Fed. Reg. 7712). *Further, the transfers and acquisitions will assist San Diego County Water Authority in acquiring a reliable source of water in the face of possible cutbacks* (Transcript, April 24, 2002, p. 399), *assist Coachella Valley Water District in solving a serious groundwater overdraft problem* (Transcript, April 23, 2002, pp. 140-141), *and provide economic benefit to Imperial County.* (IID Exh. 65.)

11. Though fallowing of agricultural land is a possible conservation option for Imperial Irrigation District (and perhaps other involved agencies), the evidence showed that fallowing would have substantial negative socio-economic impacts on the Imperial Valley. (IID Exh. 65; Transcript, May 1, 2002, pp. 2797-2798.) *Therefore, the SWRCB does not require its inclusion in any of the transfers or acquisitions involved in the Petition, though it is not prohibited either.*

IID believes all the above findings are in accord with the law, and the testimony and evidence presented at the hearing. IID also requests that the SWRCB make all necessary findings under CEQA and/or other applicable environmental laws (if any) when appropriate. IID requests that it be given an opportunity to review such before they are made final.

VIII. CONCLUSION

The road to this hearing has been lengthy, and all the parties and the SWRCB have expended large amounts of time and money reaching the "finish line." Yet, it will all have been

worth it if Southern California's water supply is enhanced and if almost a century of "water wars" can be resolved.

The SWRCB is being asked by the petitioners, and the other agencies involved, to approve a water transfer that is in accord with everything the SWRCB has said before, benefits urban Southern California, provides environmental protection to Northern California, and generates economic advances for the impoverished Imperial Valley. Against those benefits, the SWRCB must weigh some impacts to the Salton Sea, and some small incidental impact to the stretch of the Colorado River between Parker and Imperial Dams. Frankly, IID believes that such a weighing clearly mandates approval of the Transfer and Settlement. IID thus respectfully requests that the SWRCB adopt the Findings and approve the long-term transfer.

Dated: July 11, 2002

IMPERIAL IRRIGATION DISTRICT

By: /s/
David L. Osias
Attorneys for the Imperial Irrigation District

Strengthen Community Conservation Advocacy, Partnerships, and Stewardship

(1) Help establish sustainable conservation organizations.

(2) Assist the communities of which National Parks are a part.

(3) Support conservation partnerships in obtaining funding and other resources.

Enhance Conservation and Recreation Opportunities for All Americans

(1) Engage in projects which reflect the nation's cultural diversity.

(2) Undertake partnership projects in urban and underserved areas.

(3) Establish a strong presence in every State.

(4) Build a staff that represents America's cultural diversity.

Dated: May 9, 2002.

Samuel N. Stokes,

Chief, Rivers, Trails and Conservation Assistance Program.

[FR Doc. 02–15360 Filed 6–18–02; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Colorado River Interim Surplus Guidelines, Notice Regarding Implementation of Guidelines

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice and correction.

SUMMARY: The Colorado River Interim Surplus Guidelines (Guidelines) were adopted as a result of a Record of Decision signed by the Secretary of the Interior (Secretary) and published in the **Federal Register** on January 25, 2001 (66 FR 7772–7782). The Department of the Interior (Department) has received a number of informal comments and has identified issues regarding implementation of the Guidelines. This notice identifies and addresses these issues in order to facilitate a common understanding regarding the implementation of the Guidelines for calendar year 2003. This notice also corrects a typographical/computational error in the Guidelines as published in the **Federal Register** on January 25, 2001.

DATES: The Secretary is not proposing to take any specific action as a result of this **Federal Register** notice. Accordingly, the Department is not establishing a specific date by which comments must be submitted. The Secretary will also accept input on the issues addressed by this **Federal Register** notice through the process under which the Annual Operating Plan for the Colorado River System Reservoirs (AOP) is developed. This process includes consultation with the Colorado River Management Work Group, a group that the Secretary consults with in order to carry out the provisions of section 602(b) of the Colorado River Basin Project Act of 1968 and section 1804(c)(3) of the Grand Canyon Protection Act of 1992.

ADDRESSES: You may submit written comments to the Regional Director, Lower Colorado Region, Attention: Jayne Harkins, Bureau of Reclamation, P.O. Box 61470, Boulder City, Nevada 89006–1470.

SUPPLEMENTARY INFORMATION: The Secretary, pursuant to applicable law including particularly the Boulder Canyon Project Act of December 28, 1928 (BCPA), and the Supreme Court opinion rendered June 3, 1963, and decree entered March 9, 1964 (Decree) in the case of Arizona v. California, et al., is vested with the responsibility to manage the mainstream waters of the Colorado River in the Lower Basin. In furtherance of this responsibility, the Department, through a notice published in the **Federal Register** on May 18, 1999 (64 FR 27008–09), initiated a process to develop specific criteria to identify those circumstances under which the Secretary would make Colorado River water available for delivery to the States of Arizona, California, and Nevada (Lower Division States or Lower Basin) in excess of the 7,500,000 acre-foot Lower Basin basic apportionment. The Department noted in that notice that "[i]n recent years, demand for Colorado River water in Arizona, California, and Nevada has exceeded the Lower Basin's 7,500,000 basic apportionment. As a result, criteria for determining the availability of surplus [water] has become a matter of increased importance." (64 FR 27009). In particular, California has been using water in excess of its 4.4 million acre-foot mainstream basic apportionment established in the BCPA for decades.

The Department, through a notice published in the **Federal Register** on January 25, 2001 (66 FR 7772–7782) notified the public that the Secretary signed a Record of Decision (ROD), regarding the preferred alternative for Colorado River Interim Surplus Guidelines on January 16, 2001. The Guidelines "implement Article III(3)(B) of the [Long Range Operating Criteria]" adopted pursuant to the Colorado River Basin Project Act of 1968 (as published in the **Federal Register** on June 10, 1970). (65 FR 78511).

Pursuant to section 3 of the Guidelines, the Secretary utilizes the "Guidelines to make determinations regarding Normal and Surplus conditions for the operation of Lake Mead * * *" during "development of the Annual Operating Plan for the Colorado River System Reservoirs (AOP)." (66 FR 7781). The Secretary applied these Guidelines for the first time during the development of the 2002 AOP, signed by the Secretary on January 14, 2002.

In the period since adoption of the 2002 AOP, increasing attention has been focused on the provisions of the Guidelines and their application to AOP determinations that are upcoming for 2003. In particular, numerous entities have contacted the Department to discuss their views and concerns regarding the provisions of Section 5 of the Guidelines, entitled "California's Colorado River Water Use Plan Implementation Progress." (66 FR 7782).

This provision of the Guidelines was included in order to assist the Secretary in the execution of the Secretary's watermaster duties on the lower Colorado River, which include facilitating adherence to the Lower Basin's allocation regime. The relationship between efforts to reduce California's reliance on surplus deliveries and the adoption of specific criteria to guide surplus determinations was established in the initial **Federal Register** notice announcing the potential development of surplus guidelines: "Reclamation recognizes that efforts are currently underway to reduce California's reliance on surplus deliveries. Reclamation will take account of progress in that effort, or lack thereof, in the decision-making process regarding specific surplus criteria." (64 FR 27009). This concept was embodied in the purpose of and need for the Federal action as analyzed in Reclamation's Environmental Impact Statement regarding adoption of the Guidelines: "Adoption of the [Guidelines] is intended to recognize California's plan to reduce reliance on surplus deliveries, to assist California in moving toward its allocated share of Colorado River water, and to avoid hindering such efforts. Implementation of [the Guidelines] would take into account progress, or lack thereof, in California's efforts to achieve these objectives." Final Environmental Impact Statement at 1–3 to 1–4.

Sections 5(B) and 5(C) of the Guidelines established independent conditions for performance of certain actions by entities in California, and the

implications for surplus determinations in the event that the conditions for performance are not met.

Section 5(B) of the Guidelines specifically addresses California's Quantification Settlement Agreement (QSA), a proposed agreement among the Imperial Irrigation District, the Coachella Valley Water District, the San Diego County Water Authority and The Metropolitan Water District of Southern California. The QSA is a critical agreement among the California parties to reduce California's reliance on surplus water from the Colorado River. The QSA addresses the use and transfer of Colorado River water for a period of up to seventy-five years.

With respect to execution of the QSA, section 5(B) of the Guidelines states: "It is expected that the California Colorado River contractors will execute the Quantification Settlement Agreement (and its related documents) * * * by December 31, 2001." (66 FR 7782). The parties were unable to execute the QSA by this date, and over the past year, there has been increasing concern regarding the ability of the California Colorado River contractors to execute the QSA by the end of this year. Failure to execute the QSA by the end of 2002 is specifically addressed by section 5(B) of the Guidelines: "In the event that the California contractors and the Secretary have not executed [the Quantification Settlement Agreement (and its related documents)] by December 31, 2002, the interim surplus determinations under Sections 2(B)(1) and 2(B)(2) of these Guidelines will be suspended and will instead be based upon the 70R Strategy, for either the remainder of the period identified in Section 4(A) or until such time as California completes all required actions and complies with reductions in water use reflected in Section 5(C) of these Guidelines, whichever occurs first." (66 FR 7782).

In light of the concern regarding the ability of the California Colorado River contractors to execute the QSA by the end of 2002, increasing attention has focused on the specific requirements of this section of the Guidelines. Some informal commentors have suggested that failure to execute the QSA would have no consequence for surplus determinations for 2003 under the Guidelines. Other commentors have observed that the Guidelines would be terminated if the QSA and its related documents were not executed by December 31, 2002. Such suggestions are inconsistent with the plain language of the Guidelines as adopted.

The Department observes that the Guidelines specifically provide that "In the event that the California contractors and the Secretary have not executed such agreements by December 31, 2002, the interim surplus determinations under sections 2(B)(1) and 2(B)(2) of these Guidelines will be suspended and will instead be based upon the 70R Strategy * * *" (66 FR 7782) (emphasis added). Therefore, in the event that the QSA and its related documents are not executed by December 31, 2002, as provided above, the "determinations under sections 2(B)(1) and 2(B)(2) of these Guidelines will be suspended." (66 FR 7782). This suspension, under section 5(B) of the Guidelines does not suspend or terminate the Guidelines as a whole; rather, in the event of a suspension, surplus determinations are limited to sections 2(A)(1), 2(B)(3) and 2(B)(4).

Nothing in this notice is intended to address or limit the appropriate circumstances for reinstatement of sections 2(B)(1) and 2(B)(2) as the bases for annual surplus determinations. Reinstatement of these sections of the Guidelines will be made in accordance with the provisions of section 5(B), which provides that in the event of a suspension, the 70R Strategy will be the basis for surplus determinations "for either the remainder of the period identified in Section 4(A) [i.e., until December 31, 2015] or until California completes all required actions and complies with reductions in water use reflected in section 5(C) of the[] Guidelines, whichever occurs first." (66 FR 7782) (emphasis added).

Section 5(C) addresses the other conditions for performance of certain actions by entities in California, *i.e.*, the specific Benchmark Quantities that California agricultural "use would need to be at or below" at the end of the specified calendar years. The Benchmark dates are established in three year intervals beginning in 2003.

As with the requirements in section 5(B), section 5(C) also establishes the implications for surplus determinations in the event that the Benchmark quantity conditions for performance are not met.

One of the benefits of adoption of the Guidelines was to provide "more predictability to States and water users" with respect to "the Secretary's annual decision regarding the quantity of water available for delivery to the Lower Basin States." (64 FR 27009).

In light of the above identified concern with respect to the likelihood regarding execution of the QSA by the date established in section 5(B) of the Guidelines, one of the issues that the Secretary will be analyzing in the period between this notice and January 1, 2003 (the statutory date for transmittal of the 2003 AOP, pursuant to 43 U.S.C. § 1552(b)), will be the impact on Lower Basin users, particularly in Nevada, in the event that the Guidelines are suspended pursuant to the provisions of section 5(B).

The relevant considerations with respect to this issue include the following: (1) The ability of lower basin entities outside of California, to affect compliance with the section 5(B) requirements, (2) the need of other lower basin entities outside of California, to utilize surplus quantities in 2003 (and the relative amounts of such surplus quantities), (3) impacts on storage of water in the Colorado River reservoirs, and the impact on future deliveries to users of the waters of the Colorado River under applicable provisions of federal law and international treaty, (4) impacts on California's ability to meet applicable conditions for reinstatement of the determinations under sections 2(B)(1) and 2(B)(2).

The Department corrects a typographical/computational error in the Guidelines as published in the **Federal Register** on January 25, 2001. Specifically, the correction would replace the value of 100,000 acre-feet that appears in section 2(B)(1)(a) with the value of 120,000 acre-feet.

The basis for this correction is as follows. The **Federal Register** notice published on January 25, 2001 states that the decision made by the Secretary is "adoption of specific interim surplus guidelines identified in the Preferred Alternative (Basin States Alternative) as analyzed in the FEIS." (66 FR 7773). Reclamation had earlier published information that Reclamation had received from the Colorado River Basin states of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming during the public comment period" on the proposed adoption of the Guidelines. (65 FR 48531–48538). Reclamation crafted an alternative based on this information, which was ultimately identified as the preferred alternative.

As submitted to the Department, and published in the **Federal Register**, the information from the basin states provided in section IV(B)(1)(a) with respect to Direct Delivery Domestic Use by MWD, that offsets "shall not be less than 400,000 af in 2001 and will be reduced by 20,000 af/yr over the Interim Period so as to equal 100,000 af in 2016." (65 FR 48536). When the ROD was prepared, the Department modified this provision of the proposed alternative to take into account that the Guidelines would not be in effect for 2001 AOP determinations, and would

first be applied for 2002 determinations. Accordingly, the year was modified in this provision from 2001 to 2002. (66 FR 7780). However, when this change was incorporated into the ROD, the Department did not modify the corresponding value for the end date (*i.e.*, in year 2016). The computation of a reduction of 20,000 af/year during the interim period yields a final value of 120,000 rather than the published value of 100,000.

Dated: June 13, 2002.

Bennett W. Raley,

Assistant Secretary—Water and Science.

[FR Doc. 02–15470 Filed 6–18–02; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP(OJP)–1357]

Supplemental Notice of Intent To Prepare an Environmental Impact Statement (EIS) and Environmental Impact Report (EIR) for a New Juvenile Justice Facility in Alameda County, CA

AGENCY: Office of Justice Programs, Justice.

ACTION: Notice of intent (NOI).

SUMMARY: This NOI is being published to provide additional information regarding alternatives that will be evaluated for the Alameda County (California) Juvenile Justice Facility project. The County proposes to develop a new Juvenile Justice Facility with an initial capacity for 420 beds, five juvenile courts, offices for courts administration, probation, public defender, and district attorney, plus associated support facilities (approximately 425,000 square feet of floor area). Future expansion of the facility could accommodate 450 to 540 beds and an additional juvenile court (up to 460,000 square feet total). The Juvenile Justice Facility is proposed in response to serious shortcomings in the capability of the existing facilities located in San Leandro and Oakland, California, to serve the existing and future needs of children in the County. Existing buildings in San Leandro would be demolished and building space in Oakland would be vacated following completion of the new facility.

DATES: Two public scoping meetings will be held on Wednesday, July 10, 2002, at the Oakland Asian Cultural Center, 388th Ninth Street at Webster, in Oakland, California.

An afternoon meeting will be held from 2 p.m. to 4 p.m. for interested and affected federal, state, and local agencies to identify major and less important issues, coordinate the schedule, and determine respective roles and responsibilities in preparation of the EIS/EIR. The public is also welcome to attend.

The evening meeting will be held from 6 p.m. to 9 p.m. The meeting will be conducted in an open house format which offers interested persons an opportunity to drop in at any time during the meeting to learn more about the project and the environmental review process. The intent of the meeting is to solicit comments from the public to identify those environmental issues that are most relevant or of most concern with respect to the implementation of the project and alternatives so that these issues can be analyzed in depth in the Draft EIS/EIR. Representatives of the independent environmental consulting firms preparing the environmental documents will be in attendance along with representatives of the Federal, State, and county governments.

Comments may also be submitted in writing, identifying relevant environmental and socioeconomic issues to be addressed in this environmental analysis. Comments and information should be mailed to Mr. Michael Houghtby of the California Board of Corrections at the address listed below. Requests to be placed on the mailing list for announcements and the Draft EIS/EIR should also be sent to Mr. Michael Houghtby. The deadline for submitting written comments is July 19, 2002.

FOR FURTHER INFORMATION CONTACT: Ms. Jill Young, Environmental Coordinator, Department of Justice, Office of Justice Programs, Corrections Programs Office, 810 7th Street, NW., Washington DC 20531, Telephone (202) 353–7302, Fax (202) 307–2019.

Written comments should be directed to Mr. Michael Houghtby, Field Representative, State of California Board of Corrections, Corrections Planning and Programs Division, 600 Bercut Dr, Sacramento, CA 95814, Telephone (916) 322–7085; Fax (916) 445–5796. Each of the participating agencies will receive copies of the letters sent to Mr. Houghtby.

SUPPLEMENTARY INFORMATION: The proposed Juvenile Justice Facility is intended to replace the existing Alameda County Juvenile Hall, which is located in the hills of San Leandro, Alameda County, California. The existing facility was constructed in various phases with most structures dating from the 1950s to 1970s. It includes secure detention at the Juvenile Hall facility for 299 detainees, camps for low security detention, and the Chabot Community Day Center. The detention facility is constructed on a steep hillside in close proximity to the Hayward fault, an active earthquake fault with a potential for causing severe ground shaking with an estimated 32% chance of a major seismic event during the next 30 years. In addition, these facilities, which have been overcrowded, have or will soon exceed their useful, economic life and are in need of replacement, based on operational and architectural/engineering evaluations. Therefore, the facility does not meet the present or future needs of the residents, staff or community and must be replaced.

A juvenile justice system master plan completed in 1998 determined that the County needed to construct a new juvenile detention facility that would house up to 540 children at any given time. The facility would respond to the approximately 10,000 annual referrals for intake, of which 6,000 are admitted for detention in a given year. The estimated total number of beds required for a new detention facility was based on historical trends and projections, multiplied by a factor of 1.2 to account for peaking, classification and operational needs, so that the County could house youth in a facility that reflects the detainees' gender, age, and security risk, to avoid crowding, and to provide for long-term planning. The County Board of Supervisors has since revised the project to include 420 beds, with possible expansion to 450 beds.

The Juvenile Justice Facility is funded in part by Federal grant monies disbursed by the California Board of Corrections. These funds total $33,165,000, and are part of the State's allocation from the Violent Offender Incarceration and Truth-in-Sentencing (VOI/TIS) Incentive Grant Program. The County would provide additional funding from bonds, certificates of participation, and the general fund. The total cost for the Juvenile Justice Facility is estimated to be approximately $177,000,000.

The U.S. Department of Justice, the California Board of Corrections and the County of Alameda are preparing a joint Environmental Impact Statement and Environmental Impact Report (EIS/EIR) in order to satisfy the requirements of the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA) concurrently. The U.S. Department of Justice is the lead federal agency under