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for Participant, SALTON SEA AUTHORITY

STATE WATER RESOURCES CONTROL BOARD

STATE OF CALIFORNIA

IMPERIAL IRRIGATION DISTRICT; AND SAN DIEGO COUNTY WATER AUTHORITY, Petitioners,	CLOSING BRIEF OF SALTON SEA AUTHORITY

I.

INTRODUCTION

The uncontroverted evidence presented in these proceedings established that the Salton Sea supports a vast, diverse ecosystem of regional, statewide and international importance. The goal of the Salton Sea Authority is to maintain and restore that ecosystem so that the people of the State of California can continue to enjoy the Sea's rich, biological, recreational and economic resources.

The primary issue presented by this Board in the Second Phase of these proceedings is whether the IID/SDCWA water transfer would unreasonably affect fish, wildlife or other instream beneficial uses of water. With respect to the Salton Sea, the evidence is clear; the transfer project, as originally proposed and presented at the hearings before this Board, would devastate the Sea and the ecosystem that it supports.

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The proposed project's reliance on on-farm conservation would result in large decreases of inflows to the Salton Sea, causing the sea to substantially shrink, become rapidly hyper saline, and die. The exposure of large areas of sediment may well lead to catastrophic air quality events.

During the hearing, it became increasingly clear that the primary wildlife mitigation proposed by IID (the "fish ponds" of HCP No. 1) would not preserve the ecosystem and that potential air quality impacts were unknown and unmitigable. By the end of the hearing, even the petitioners acknowledged that the proposed project's reliance on HCP No. 1 was untenable.

The final EIR that was made public subsequent to the hearing, which was certified by IID on June 28, 2002, and presented to this Board on July 9 and 10, proposes a different mitigation strategy: replacement water. Until 2030, transfer-induced losses of inflows to the Sea would be mitigated by the provision of replacement water from as yet undefined sources.

The revised approach to the habitat conservation plan is an improvement to mitigation. However, significant concerns remain:

- The apparent change from providing mitigation replacement water through the term of the project (75 years) to providing mitigation replacement water up to 2030;
- Potential elevation-related impacts post-2030, the year replacement water is cut off.
- The reliance on a hydrological baseline which may not fairly represent the ecologically viability of the Sea under a "no-action" scenario and certainly does not account for the Sea's long term viability under a restoration scenario.
- The undefined mechanisms for determining the amount of replacement water and verifying its provision.

These and other issues may be further explored in a supplementary brief devoted to changes between the Draft EIR and Final EIR. The following discussion focuses on the proposed water transfer's unreasonable impacts on fish and wildlife resources at the Salton Sea.

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II.

THE SALTON SEA IS A RICH BIOLOGICAL RESOURCE THAT DESERVES PROTECTION

II.A. The Salton Sea Supports an Ecosystem of Critical Regional and Intentional Importance

The Salton Sea supports one of the richest, most diverse ecosystems in California. Given the extensive loss of California wetlands, the Sea has become a critical link in the Pacific flyway. (Hearing Transcript ("HT") 1865, Lns. 15-16, 2419-2421; SSA Ex. 6, p. 3). The Sea is considered one of the most productive fisheries of the world. (HT 1495, Lns. 8-11.)

The Sea has been described as the "crown jewel of California avian biodiversity". (HT 2427, Lns.5-20.) Over 400 species of birds visit the Sea. (PCL Ex. 1, p. 5.) The Sea provides critical habitat for 80 percent of American white pelicans, 90 percent of the North American population of eared grebes, and 45 percent of the Yuma clapper rail, which is a federally and state listed endangered species. (HT 1496, Ins 7-21.)

The Sea is also an important recreational resource. (SSA Ex. 6, p. 6-7.) An estimated 2 million people visit the Sea annually. (IID Ex. 55, p. 3.14-24.) Many consider it to have the best fishing in the state. (HT 1686, Lns. 2-11.) It is considered one of the most popular bird-watching spots on the continent. (HT 1554, Lns. 14-17.)

There was no testimony provided which questioned the biological importance of the Sea. In fact, witness after witness testified to the importance, and growing importance, of the Sea to wildlife resources. (HT May 15, p. 1876, 1496, 1506, 1865-66, 1505-1506, p. 1660.) That importance, in part, comes from the productivity of the lake and its fishery. (HT 1527, p. 1681-1686, p. 1952.)

Dr. Milt Friend noted that the Sea is a crown jewel of avian biodiversity (HT p. 2427, Lns. 5-20) and that its importance has grown because of the loss of other habitat (HT May 29, p. 2420). Dr. Stuart Hulbert described the Sea as a "biological gold mine" (HT 1598, Lns. 13-15) that provides new information to science (HT 1533, Inc. 1-6). He testified that the Sea's biological diversity is much greater than one of the State's famous alpine lakes (Lake Tahoe) (HT 1535, Lns. 5-13) and the Sea is of national importance (HT 1554, Inc. 12-25).

The only evidence provided designed to diminish the importance of the Sea was related to wildlife disease. IID apparently introduced Exhibit 74, Salton Sea National Wildlife Refuge Summary

of 1996 Avian Botulism Event, U.S. Fish & Wildlife Service, to demonstrate the hazardous aspects of the Sea for wildlife. No expert was offered by IID to explain the exhibit. The nation's leading expert in wildlife disease, Dr. Milt Friend, and Charlie Pelizza with the U.S. Fish and Wildlife Service testified that IID's exhibit was provided out of context. (HT 2406, 2007-2408 and p. 2511-2512.) Dr. Friend put wildlife disease at the Sea in context with worldwide wildlife occurrences. (HT 2415, p. 2477-2478.) Wildlife disease typically effects less than 1% of the birds at the Salton Sea in any given year. Dr. Friend noted that further degradation of the Sea could actually aggravate wildlife disease problems. (HT May 29, p. 2481-2482.)

Finally, the Salton Sea, as naturally reoccurring California water body, is entitled to protection under the public trust doctrine. (See discussions of public trust doctrine in "Closing Argument/Legal Brief of National Audubon Society - California", which is incorporated herein by reference.) This Board has an affirmative duty to protect the people's common heritage in the Sea's unique biological and aesthetic values. (National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419 441, 446; Water Code Section 1736.)

II.B. In Absence of Transfer-Induced Inflow Reductions, the Sea Could Remain Robust and Vital for a Number of Years.

While the Sea faces a number of challenges, the most critical is salinity. At the Sea's current salinity level of 45 ppt, the Sea's rich diversity of fish species seems to thrive. The best current evidence is that the Sea's biological bounty will become less robust as the Sea becomes more saline. (HT 1539, Lns. 1-20; Audubon Ex. 18, p.17.)

IID is using a 60 ppt salinity threshold for assumed loss of the fishery. The Authority concurs with Audubon's closing brief and Dr. Stuart Hulbert's concerns that rigid salinity thresholds are an inappropriate and unsubstantiated standard. (AUD Ex. 18, p. 17; HT 1539, line 21 to p. 1542, line 15.)

The current average inflow to the Sea (1.34MAF) has remained remarkably stable for 30 years (IID Ex. 55, Appendix F, Table 2.2.) At that level of inflows, the Sea will not reach the 60 ppt threshold until approximately 2060. (Dr. Brownlie, SSA Ex. 3, p. 3.) And, according to data provided by petitioners and verified by IID's hydrological expert, the lake surface elevation has also

remained stable for twenty years. (IID Ex. 55, Appendix F, Fig. 7.1, p. 41; HT 944, Lns. 3-9.)

In addressing the reasonableness of the current (and past) transfer projects, petitioners have not attempted to refute the Sea's existing richness and value. Instead, transfer proponents diminish the measure of the Sea's value by arguing the inevitability of the Sea's eminent demise. Impacts on the Sea's ecological resources need not be fully appreciated or mitigated, so the argument goes, because those resources will shortly disappear of their own accord.

This "inevitability of demise" argument persuaded this Board to discount impacts to the Sea in its 1984 decision regarding water conservation by IID:

> "It is impossible to predict when the salinity will adversely affect the fish either with or without a planned reduction in IID inflow. However, the rapid rise in salinity between 1980 and 1982 shows that salinity could exceed 40,000 ppm, the danger level for fish reproduction, in less than 5 years whether or not a planned reduction in inflow takes place. Therefore, it is apparent that a prolonged delay in water conservation measures would not save the fishery for an appreciable length of time.". (SWRCB Decision 1600, p. 61.)

Decision 1600's prediction of the eminent demise of the Salton Sea proved premature. Currently, nearly 18 years later, salinity has increased to 45,000 ppm and the fishery is vital.

If the Board had had available at that time more accurate information regarding the biology and hydrology of the Sea, it would have had considerable more difficulty finding that IID's use of water was nonbeneficial. (Id. at 66.) In fact, the overwhelming evidence presented to the Board further a claim that IID's return flows to the Sea constitute a beneficial use of water. The Board retains jurisdiction to reconsider that conclusion in light of current evidence of the rich ecosystem supported by flows to the Salton Sea. (See, e.g. SWRCB Decision 1631.)

The Draft EIR incorporates a more nuanced approach to the "inevitability of demise" argument to diminish the Sea's value and petitioner's responsibility to mitigate: it constructs a "baseline" that predicts reduced inflows and a diminished Sea, due to factors unrelated to the proposed project. Under IID's "baseline", inflows would be reduced over time by approximately 110,000 acre-feet per year, a reduction that would cause the Sea to reach the 60 ppt threshold in 2023

(IID Ex. 55, Appendix F). Petitioner maintains that its responsibility to mitigate impacts to the Sea should be reduced accordingly. In Section IV. below, the flaws of EIR's baseline analysis are discussed at length.

Given the tremendous value of the biological resource at stake, the lack of a clear understanding of the interactions of the complex ecosystem elements, and previous premature predictions of the Sea's demise, this Board should consider with substantial skepticism any prediction of the Sea's untimely demise under no-project conditions.

III.

THE PROPOSED PROJECT REMAINS TOO ILL-DEFINED TO FULLY GAUGE ITS IMPACTS ON FISH AND WILDLIFE RESOURCES

The Authority joins with the County of Imperial in maintaining that the IID/SDCWA proposal is not ripe for decision by this Board at this time. Quite simply, the "project" has not been defined. Conservation and mitigation measures remain unspecified. Petitioner's CEQA process is not complete.

Unfortunately, the ill-defined nature of how the project would be accomplished compounds the difficulty of gauging the transfer's impact on wildlife resources. After two months of testimony, the definition of the transfer project is still, seemingly, ambiguous. The State Board chairman cross-examined IID's witnesses on the first day of the hearing and asked "why are we even here talking about transferring water when there seems to be so many details missing" . (HT 245-246, Lns. 3-6.) Unfortunately, many days later the same is true today.

While the proposed project in the Draft IE (IID Ex. 55) allowed for a variety of conservation methods, including fallowing, IID repeatedly stated that the transfer would not include fallowing (see, for example, Jesse Silva's testimony, HT 239, Lns. 5-7). Much of the testimony, impact assessment and cross-examination assumed that the project would be implemented with efficiency improvements and system improvements and that these conservation measures would have a direct, one-to-one, impact on the inflows sustaining the Salton Sea.

These efficiency improvements were proposed to be combined with "Habitat Conservation Plan #1" or HCP1. HCP1 involved the construction of fish ponds on 5,000 or more acres. The fish

ponds would provide a food base for some pisciverous birds.

The Salton Sea Authority and the other participants prepared cases that focused on this proposed project. Then, on May 29, Ms. Stapleton, of the San Diego County Water Authority, testified that the proposed project combined with HCP1 would not receive the necessary permits from the US Fish and Wildlife Service and the California Department of Fish and Game. (HT 2525-2526, 2882, 28888, Lns. 1-13.) The proposed project would be changed for the Final EIS/EIR. The proposed project would involve fallowing, either as a part of the project or as part of HCP2 or some other water source would "make up" water loss through on-farm conservation. (HT 2949, Lns. 2-6.)

Details would be provided in the Final EIS/EIR. While the Final EIS/EIR does eliminate HCP1, it does not provide much more detail as to the nature of the project, nor the nature of HCP2. The impact assessment is similarly muddled.1

The most direct statement that the modified project will include fallowing appears in a *footnote* in the Master Responses to Comments:

> "Implementation of Salton Habitat Conservation Strategy in concert with only on-farm and system based conservation measures is not currently considered practicable."2 (Master Response to Comments, p. 3-15, fn 1.)

It is still not clear whether the modified project will include fallowing. The State Board chairman's question is as appropriate in the last minutes of the hearing as it was on the first day.

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1 Errata page 4-49 of the Final EIS/EIR indicates that the proposed project would result in a decrease in the Sea's elevation from the "baseline level of -235 feet msl to -250 by the year 2077. Additionally, the figures in the hydrology chapter, such as Errata Figure 3.1-30 seem to demonstrate a 300,000+ acre foot per year (AFY) Reduction impact on the Sea. However, most of the errata pages and response to comments take another twist. Errata Page 4-67: "Under the a Proposed Project...reduced inflow would cause the Sea to decline to about elevation -240 feet msl by the year 2077." and, errata page 4-107: "Under the Proposed Project, the Sea's elevation is projection to decline from an existing level of -228 to -224".

Such incongruity might suggest that the proposed project, involving efficiently improvements, would reduce the Sea's elevation to -250 msl by 2077 and that implementation of the habitat conservation plan (HCP2) would increase the elevation to -240 msl by 2077 through make-up water. This does not make any hydrological sense. If flows to the Sea from the habitat conservation plan are cut off in 2030, then the Sea will achieve the same equilibrium by 2077 that it otherwise would have (presumably -250msl).

2 Mr. Levy, Coachella Valley Water District concurred with this statement (HT 2599).

Given the absence of details of the project, it is unreasonable to ask hearing participants to argue, and this Board to decide, the magnitude of the project's impacts and the efficacy of mitigation of those impacts.

Nevertheless, the issue of unreasonable fish and wildlife impacts under the proposed project, which relied on HCP 1 and was the subject of all of Phase 1 and much of Phase 2 of this hearing, is examined in the following paragraphs. The issue of unreasonable fish and wildlife impacts under the presumed modified project, which relies on HCP 2 and is included in the Final EIS/EIR, will be examined in the supplement brief. Lack of detail continued to frustrate efforts to fully examine and assess impacts.

IV.

ENVIRONMENTAL ANALYSIS IS BASED ON FLAWED HYDROLOGICAL ASSUMPTIONS THAT MASK THE PROJECT'S IMPACTS

In a variation of the "inevitability of demise" argument, petitioner's attempt to mask the transfer's impacts and limit their responsibility to mitigate by advocating a "baseline" that posits 110 KAFY reductions in inflows that are unrelated to the current proposed transfer. Based on this assertion, the Draft EIR predicts that the project's "temporal impact" (and petitioners' responsibility to mitigate) is significantly less than it would otherwise be.

Consequently, the DRAFT EIR's hydrological assumptions were the subject of much testimony and cross-examination during the hearing. Dr. Eckhart acknowledge that the assumptions underlying the hydrological analysis had not been made public. (HT 866, Lns. 14.) Unfortunately, no substantive changes to the Draft EIR/EIS were made in the hydrological assumptions and modeling for the Final EIR/EIS. Therefore, the concerns described below apply to the proposed project in the Draft EIR/EIS as well as the proposed project in the Final EIR/EIS.

IV.A. Entitlement Enforcement

Over the years 1950-1999, historic inflows to the Salton Sea from all sources averaged 1.34 million acre feet (maf). (IID Ex. 55, Appendix F., Table 2.2.) However, for the life of the project, the

DEIR/DEIS projects that inflows to the Sea from all sources will average approximately 1.23 maf in the absence of the project. (IID Ex. 55, Appendix F, Table 4.1.)

A substantial portion of this predicted reduction in inflows from 1.34 maf to 1.23 maf -- 56,800 acre feet -- is accounted for by "entitlement enforcement." (See IID Ex. 55 , Appendix F, Table 4.1.) "Entitlement enforcement" refers to a 59,000 af reduction in water diverted to IID and CVWD in the event the Secretary of the Interior forces California to reduce its use of Colorado River water. (HT 886 - 868.) This 59,000 AFY reduction is assumed to lead to a 56,800 acre foot reduction in inflows to the Sea, with system loss accounting for the difference between 59,000 acre feet and 56,800 acre feet. (HT 867, Lns., 23-25, 868, Lns. 1-4.)3

There is no basis for the assumption that a 59,000 AFY reduction in agricultural diversions to IID and CVWD would result in a 56,800 AFY loss to the Sea. First, the reduction would be imposed on CVWD as a junior water rights holder, at least in the absence of contrary arrangements among CVWD and other water agencies. (HT 872, Lns. 1-6.)

Under the 1989 Approval Agreement (IID Exhibits 16, Sections 3.1 and 3.2) MWD is required to provide up to 50,000 acre feet of make up water CVWD in the event CVWD's use is cut

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3 *What's Good for the Metropolitan Goose Is Not Apparently Good for the Salton Sea Gander*. The EIR utilized two contradictory approaches to accessing impacts of entitlement enforcement in different subregions. In the Salton Sea Basin, it was assumed that the 59 KAF of entitlement enforcement would result in reductions at the Sea (see above). In the coastal subregion, the story is just the opposite. Entitlement enforcement by the Secretary is generally assumed to have the biggest hit on MWD and SDCWA; after all, they have been exceeding their "entitlement" by over 700,000 AFY. Yet, the EIR assumes that there is no such loss of water provided to the metropolitan areas, that somehow the water will be made up in the baseline scenario (HT 111, Lns. 5 to p. 1112 line 3; p. 1167 line 21 to p. 1168 line 11). If the baseline for the metropolitan areas hand incorporated "entitlement enforcement" reductions of 700 KAFY, the growth inducing impacts of the transfer would have been much more apparent.

In the Imperial subregion, there will be a 59 KAF reduction of water that will significantly impact the Salton Sea even though there are provisions for making up that water by supplying replacement water to the junior water right holder. In the metropolitan subregion, there may be hundreds of thousands of acre-feet of water held back annually from metropolitan users with no defined provisions for make-up, yet there is no description of such a baseline condition in the EIR (HT, April 30, p. 868, line18 to p. 860 line 21.)

back by entitlement enforcement. The most reasonable assumption appears to be that if the agricultural agencies are forced to reduce their diversions by 59,000 AFY, that reduction will be imposed on CVWD; MWD and provide CVWD with up to 50,000 AFY to make up for the reduction; and the average reduction of inflows to the Sea will be reduced.

Second, even if the full reduction were imposed on IID or CVWD, there is no reason to think that it would necessarily result in a 1 to 1 impact on the Sea. If the districts accommodated the reduced diversion in accordance with their current use of water, then inflow reduction should be proportional to the reductions in inflow for every 6 acre feet applied per acre. (See IID Exh. 55, p. 2-30). In that event, a 59,000 acre foot reduction in diversion would lead to approximately 19,000 acre feet reduced inflows to the Sea even if for some reason it were imposed on IID alone. Such a change is admitted to extend the time period that the sea would reach 60 ppt by about 50%, from 2023 to 2033. (IID's Master Responses to Comments on the Draft EIR-Hydrology Section, page 3-28.)4

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4 The IIDclaims that IID's farmers could easily accommodate this 59,000 AFU reduction by:

"increasing efficiency using temporary non-structural operations improvements rather than yield to accommodate this relatively small reduction." (Master Responses to Comments , page 3-24).

This "relatively small reduction" (Master Response to Comments, page 3-24) of 59,210AFY represents over 50% of the 1988 IID-MWD agreement. IID's Mr. Silva testified that in order to conserve water for that agreement, IID needed an urban partner that can bear the costs of the efficiency improvements (HT, April 23, p. 179). IID has testified that it is extremely efficient; in fact the total efficiency was claimed to be 89% (HT, April 23, p. 207). The Board Chairman probably teasingly, noted after his testimony that IID might be the "most efficient district anywhere". (HT 246.) Noting this efficiency, Board Chairman asked IID's expert Dr. Mesghinna how much water is available to work with from this efficient system:

"It all depends how much money someone is going to spend to improve the efficiency over and above 83 percent to save 17 percent." (HT April 23, p. 246-247).

For one purpose, funding for water transfers, IID claims that it needs money to afford efficiency improvements. For another purpose, modifying the CEQA baseline, which minimizes project impacts, it claims that farmers can squeeze out 59,210 AFY without doing anything that costs money or involves structural improvements. (Master Responses to Comments, p. 3-24).

Notably, this "relatively small reduction" also represents nearly 50% of the minimum amount that could be transferred to SCCWA (130,000 AFY). IID and its partners have spent tens of millions of dollars and plan on spending tens of millions of more dollars to increase efficiency in the IID through structural and other improvements. Now the

If the reduction were imposed on CVWD, and MWD provided CVWD with 50,000 acre feet of makeup water, the loss to the Sea could be as little as 3,000 acre feet in any given year (one-third of the 9,000 acre foot reduction to CVWD).

IV.B. IOP vs. Entitlement Enforcement

Another issue related to entitlement enforcement that continues to be puzzling is the application of the inadvertent overrun policy (IOP). The discussion of entitlement enforcement on pages 3-23 and 3-24 of "IID's Master Responses, Section 3.3" appears to further cloud this issue. The last line in the next to last paragraph of this discussion (middle of page 3-24) indicates that IOP is a component of the project, and **not** a component of the baseline. Yet the very first line of the next paragraph states that 59,210 AFY would be used to payback inadvertent overruns. Are we to believe that it is just a coincidence that this is the exact same amount that is used to reduce the baseline diversion for entitlement enforcement? By reducing the baseline inflow to the Sea by 56,800 KAF the impacts of the IOP have been completely masked.5

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transfer environmental document is claiming that 59,210 AFY could be accommodated without any real, definable project and simply included in the baseline.

5 spending tens of millions of more dollars to increase efficiency in the IID through structural and other improvements. Now the transfer environmental document is claiming that 59,210 AFY could be accommodated without any real, definable project and simply included in the baseline. See the following table.

	Existing Setting (KAF)	Baseline (KAF)	Proposed Project (KAF)
Flows to Sea from IID/Mexico	1149	1100	793

The "baseline", above, has been reduced by 49 KAF, in part because of a reduction of 56.8 KAF reduction associated with entitlement enforcement. The project's impacts are determined by comparing this baseline to the "proposed project", in this case about 300 KAF. If, in fact, the IOP were to be fully analyzed and its impacts considered, we would see a difference between the baseline and the proposed project of 356 KAF. Actually, the impact is exactly 356 KAF acre-feet between the proposed project and the existing setting, not the baseline. The impacts of the IOP are masked, 1:1 by the use of "entitlement

IV.C Impacts of the Existing IID/MWD Transfer are Improperly "Grandfathered"

The Final EIR states that the previously approved IID/MWD transfer has, and will, result in an approximately 110,000 acre-foot per year reduction in inflows to the Sea. (Master Responses to Comments, 3-22.) In the absence of that transfer, "entitlement enforcement" would not be necessary, there would be sufficient water available to IID under the agricultural entitlement.

IID has not been required to mitigate that projected Salton Sea impact of its prior transfer project. While the responsibility of a project proponent to mitigate impacts of its prior projects under CEQA is not clear, the Water Board certainly retains jurisdiction to modify prior water projects if it finds that those projects threaten sensitive resources. (See Decision 1631.) Furthermore, under both the ESA and CESA, a prior project can be enjoined if found to be damaging to endangered species, notwithstanding that mitigation was not required at the time of project approval. (*United States v. Glenn-Colusa Irrigation Dist.* (1992) 788 F.Supp. 1126 (ESA); *Dept. of Fish and Game v. Anderson - Cottonwood Irr. Dist.* (1992) 8 Cal. App. 4th 1554 (CESA).)

Consequently, to the extent that the MWD/IID transfer does in fact cause significant reductions in inflows,6 (reductions which the Draft EIR incorporates into its baseline), petitioners should not be allowed to use their prior failure to mitigate those impacts as an excuse to diminish their mitigation with respect to the current transfer project. Current proposed reductions when

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enforcement" in the baseline.

6 Notably, the Sea surface elevation prediction under Decision 1600 was -227.55 below sea level: "If other factors remain relatively constant, a long term reduction in the average rate of IID inflow by about 100,000 afa would stabilize the water level at or near the -227.55 level existing in December 1982. (p.60)

added to past transfer-related reductions constitute a cumulative impact that must be acknowledged and addressed. As the amount of reductions and inflows attributed to the prior transfer (approximately 110,000 acre-feet per year) are essentially equivalent to petitioners' claimed baseline reductions (110,000 acre-feet per year), petitioners should not be allowed to grandfather in any of the claimed baseline impacts. Instead, petitioners' mitigation obligation should be measured against historical inflows, unless petitioners can definitively show that reduced inflows are not caused by its current or past projects.

IV.D. The Detrimental effect of the Extension of 1988 MWD-IID Agreement is not considered.

The Master Response claims that there is no impact on reaching the 60 ppt level from the extension of the 1988 IID/MWD agreement for 110 KAF. (IID Master Responses to Comments on Draft EIR, p. 3-28.) This of course, is predicated on the flawed baseline that predicts the fishery will collapse in 2023. If the IID/MWD agreement ends in 2028 or thereabouts, the implied assumption is the Sea no longer needs the water (after all, the Sea "died" in 2023). Again, the flawed hydrological assumptions have reverberations throughout the EIR. The 1988 project agreement projected a forty-year term. If an extension is contemplated as a part of the project, the impacts of the extension should be evaluated and mitigation considered. The impacts of the extension could negatively affect air quality, restoration efforts, the fishery, shoreline habitat, recreation, and any other resource area impacted by increasing salinity and/or decreasing elevation.

IV.E. The Failure to Address even Obvious Deficiencies of the Hydrological Model Undercuts its Credibility.

Even the most modest, straightforward critiques of the hydrological assumptions have been ignored. The "projection" in the model has "entitlement enforcement" beginning in the year 2000, even though the project would not begin until 2003 (IID Exhibit 55, Appendix F, Table 4.1, page 14). Dr. Eckhardt admitted that "entitlement enforcement" is a projection and that the Secretary of Interior has not yet reduced IID or CVWD's water use (Hearing Transcript, April 30, page 835, line 24 to page 836 line 12). Mr. Krantz, the director of the Salton Sea database program concurred

(Hearing Transcript, May 14, pp. 1576-1577). Dr. Eckhardt also agreed that that assumption reduces inflow to the Sea by 168,000 acre feet over three years (Hearing Transcript, April 30, page 880, Lns. 10-22).

IV.F. Summary of Baseline Concerns

If the assumed reductions for "entitlement enforcement" are removed from the project baseline, or adjusted to reflect a more reasonable range of possibilities, the baseline inflows to the Salton Sea for the project term would be as close or closer to the historic 1.34 million acre feet annual inflow than to the 1.23 inflow assumed under the baseline.

If a baseline of 1.34 million acre feet annual future inflows is used, salinity at the Salton Sea would not exceed 60 ppt until after 2060, as compared to the years 2023 under the transfer DEIR/DEIS baseline projection and 2012 if the proposed project is implemented. (Salton Sea Authority Exhibit 11, page 3, Testimony of Dr. John Eckhardt, Hearing Transcript, April 30, 2002, p. 858, Lns. 8-20; IID Exh. 55, p. 3.1-123.) In other words, the threshold for tilapia reproduction would be accelerated by the project by only 11 years if the DEIR/DEIS baseline is used, as compared to nearly 50 years if a current inflows baseline is used. There are similar effects on surface area and elevation.

As discussed below, even when the baseline is used to lessen the measure of the impacts on the Sea, the Draft EIR acknowledges that the proposed project will have significant impacts on fish and wildlife resources. Without the masking effect of the baseline, those impacts become much more severe and unreasonable.

V.

THE PROPOSED PROJECT HAS UNREASONABLE ENVIRONMENTAL IMPACTS

V.A. "HCP 1" is inadequate mitigation for the unreasonable biological impacts.[7]

It is undisputed that substantial reductions in inflows will significantly accelerate the demise

7 While the fish ponds mitigation, HCP1, has been jettisoned for a more defensible HCP2, make-up water, recent public statements by IID representatives expressed interest in resurrecting the concept of HCP1. Additionally, Congressman Duncan Hunter testified at a recent Congressional Hearing that his preference was to reconsider HCP1. Given the uncertainty of petitioner's ultimate mitigation strategy, the Board should definitively find that HCP1 is unacceptable to mitigate impacts.

of the Sea and consequent destruction of fish and wildlife resources. The ultimate effect of the project on fish and wildlife resources therefore depends then on the efficacy of petitioner's proposed mitigation measures in mitigating the impacts of transfer-induced reductions of inflows. It is undisputed that the originally proposed mitigation, HCP 1, fails to successfully mitigate those impacts.

In Phase 1 of the hearing IID represented that Phase 2 testimony would offer details on the nature of the proposed project and HCP1 (HT April 23, pp 265 - 268). Unfortunately, many of the details of the project were not provided in the EIR and were not provided in that Phase 2 testimony. IID's experts indicated that they did not personally prepare the HCP or that the HCP was still under consultation with the wildlife agencies, so the plan was in flux. (HT April 30, p 773, p 777, p 781.)

While little detailed testimony was provided by the petitioners on the design and operation of the fish ponds, HCP1, their similarity to the Pacific Institute proposal was the subject of much testimony. Generally, the evaluation of the Pacific Institute proposal raised significant issues about the efficacy of creating impoundments to provide a fishery for birds (SSA Exhibit 12; Hearing Transcript, Dr. Barnum's Testimony on May 5/29 p. 2435). The similarities and concerns between the peer reviewed Pacific Institute Proposal and the ill-defined HCP1 concept were also the subject of much testimony (Hearing Transcript, 5/29, p. 2438). The concerns included habitat viability, eutrophic conditions, selenium contamination, high costs, wildlife disease, vector-borne disease and impacts on the remaining Salton Sea (SSA Exhibit 12; HT p. 1586-1590; HT p. 1591-1596; HT, May 15, pp. 1945-1946). While the HCP was seeking coverage for 16 species of fish-eating birds, the HCP was only designed to meet the needs of four species of fish-eating birds (Hearing Testimony, April 30, pp 776-779). Ironically, the endangered Brown Pelican, one of the key species that would was designed to be "covered" by this HCP would not use ponds designed under HCP1 (Hearing Transcript, May 15, p. 1899). Even one of the petitioners acknowledged the significant issues associated with HCP1 (Hearing Transcript, Ms. Stapleton, 5/29 p. 2604, Lns. 20-21).

What is known is that the HCP1 would involve construction of fish ponds on 5000 or more acres of land and that the ponds would provide a food base for four piscervous birds (Hearing Transcript, April 30, pp 776-779). At the time that direct testimony was being offered, HCP1 was assumed to be permittable by the USFWS and Department of Fish and Game. The fact that it would be permittable was used by IID's Mr. Osias to claim that:

"This Board can rely on those permits in determining whether there is an unreasonable effect." (Hearing Transcript, April 30, p. 653)

It is questionable whether planned granting of a "take" permit is the only bar which this Board can use to determine if there are unreasonable fish and wildlife impacts. However, the reverse may be true. If the wildlife agencies have determined that a proposed mitigation plan is not permittable because the plan does not sufficiently address impacts, the Board can, and in this case, should determine that a project that relies on such mitigation be denied because of unreasonable impacts on fish and wildlife.

V.B. Proposed Project would have unacceptable air quality, socioeconomic and environmental justice impacts.

In this brief, the Authority has focused on impacts to fish and wildlife, which was the subject of the Board's original Phase 2 question. However, as it became apparent during the course of the hearing, the scope of this Board's review of water projects is considerably broader: the full range of environmental impacts that bear on the reasonableness of water use as required by Article X, Section 2 of the California Constitution. (National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419, 435; SWRCB Decision 1631, 196-197.) The testimony was clear: the proposed project would have a number of additional impacts, for example environmental justice, air quality and recreation, that reinforce the conclusion that the proposal constitutes an unreasonable use of water. (See discussion in Imperial County and Defenders of Wildlife briefs).

VI.

THE TRANSFER CANNOT BE APPROVED IF IT FORECLOSES OPPORTUNITY TO SUSTAIN FISH AND WILDLIFE RESOURCE THROUGH RESTORATION

VI.A. Restoration is designed, in large part, to sustain fish and wildlife resources

One of the fundamental purposes of the restoration project is to sustain fish and wildlife

resources. This is a purpose that has been codified in federal law (SSA Ex. 9). It is also a fundamental purpose that has driven activities by the restoration lead agencies (see SSA Ex. 6, pp 2-5; IID Exhibit 63 pp 1-5; IID Ex. 62, pp. 2-3 to 2-4).

In addition to considering the negative environmental effects of the proposed project, discussed above, the Board must consider the potential environmental effects of foreclosing on restoration opportunities.

VI.B. There is significant momentum to restore the Salton Sea.

There is significant momentum to restore the Salton Sea. Five years ago, the Salton Sea Authority had assembled less than $100,000 to support restoration. Today, over twenty million dollars has been authorized, appropriated and/or expended to support restoration (see SSA Exhibit 16, Newsletters, for a description of projects and programs underway). Ten or fifteen years ago, how many national and statewide environmental groups would have participated in a hearing like this? Today nearly every major environmental group in the state is weighing in on the importance of the Sea, as evidenced in the parties participating in the petition process. The work of late Congressmen Sonny Bono and George Brown began much of the restoration initiatives now underway.

After the untimely death of Sonny Bono, the Salton Sea Reclamation Act was passed (see Ex. 9, Salton Sea Reclamation Act of 1998). The Act, for the first time, put the federal government on record to proactively plan for restoration. The Act and the Secretary of Interior kicked off an intensive scientific process that has provided a wealth of information and insight about this valuable and complex ecosystem (see SSA Ex. 17: EPA 98 2001 Annual Progress Report).

Congresswoman Mary Bono and other members of the Congressional Salton Sea Task Force have continued their support for restoration. Support for addressing Salton Sea related issues has increased by the State of California as well with Secretary of Resources Mary Nichols supporting a budget change proposal that ultimately provides additional resources to the Department of Fish and Game, Department of Water Resources and Regional Water Quality Control Board to address Salton Sea issues. Restoration of the Sea and preserving the Sea's beneficial uses drives much of the work of the Regional Water Quality Control Board (HT 1240 Lns. 21 to 24).

VI.C. Restoration is feasible under historic, or near-historic, inflows

Salinity control is the key to maintaining the Sea's viability. (HT 1286). If the Sea's salinity

is maintained near marine levels, the fishery will remain intact, and continue to provide the basis for the Sea's rich and diverse ecosystem. (HT 1282.)

The Salton Sea Authority has conducted extensive research and testing of salinity control methodologies. (HT 1278-1279.) At this stage, solar evaporation ponds appear to be the most cost-effective methodology. (HT 1286-1288.)

At current inflows (1.34 MAFY), an on-land solar pond system could be constructed to maintain salinity near marine levels, at a net present cost, including operation and maintenance, of approximately $250 million. (Testimony of Dr. Brownlie, SSA Ex.3 p. 5; HT 1288.) This amount is well within the estimated amount of federal and state funds that would likely be available for a restoration project. (HT 1290.)

The Salton Sea Restoration Project has demonstrated that the Sea's challenges are not inevitably fatal. If inflows remain close to historical levels, low-tech, tried and true solar ponds are capable of removing sufficient salt to maintain the Sea's viability indefinitely. Consequently, in evaluating the transfer project's impact on the Sea's rich biological resources, its impacts on the feasibility of a restoration project must be taken into account. The Sea's natural resources need to be evaluated for what they are and can be: a rich ecosystem that is sustainable in the long run at an acceptable cost.8

VI.D. Projects, such as the proposed project, which significantly reduce inflows render restoration projects infeasible.

As discussed above, the project as proposed would result in a one-to-one loss of inflows to the Sea. A three hundred thousand acre foot reduction of inflows to the Sea would greatly accelerate salinity increases in the Sea (HT, p. 1542 line 21 to p. 1543 line 9). As the Sea becomes smaller, it becomes more concentrated with salt and any "restoration" plan would not only have to withdraw the amount of salt coming into the Sea, about 4,000,000 tons, but all of the salt that was left behind from the reduced elevation (HT, April 30, Lns. 4-10). This makes a restoration project much larger (HT, p. 886 line to p. 887 line 8).

Under such a scenario the cost of a restoration project would increase by a factor of ten, to

8 IID itself expressed restoration expectations in earlier proceedings when it proposed "evaporation ponds to maintain the salinity of the Salton Sea at a viable level for survival of the fishery." (SWRCB Order No. WR 88-20,32.)

approximately $3 billion. (HT 1289; SSA Ex. 11, Table 2 and Figure 9). That amount is well beyond the amount of restoration funding likely to be available. (HT 1290, p. 1212 line 5 to line 8). Furthermore, the shear magnitude of a solar-pond or any other restoration project sized to accommodate inflow reduction of 300 KAFY would render the project technically infeasible. (SSA Exhibit 3, p. 7.)

Whether restoration costs start at $250 million or $500 million or some other amount, reduced inflows have a dramatic effect on restoration costs; a Sea that is made smaller and saltier is very difficult to "restore". That delta, or difference, between restoring the Sea under current inflows and restoring the Sea under reduced inflows is staggering. Put another way, the impact of reducing inflows on restoration costs range between $200 and $300 per acre-foot of water reduced per year. This, of course, is the approximate value, identified in the agreement between the IID-SDCWA, of the water in the first place.

The Proposed Project makes no allowance for accounting for this incremental impact. There is some discussion about applying the estimated costs for the Proposed Project's habitat conservation plan, quoted in the one hundred to two hundred million dollars (HT, p. 941, line 25 to p. 942 line 3), to the restoration project. Federal legislation has been introduced to fund the environment costs associated with the Proposed Project; the legislation caps those costs at $60 million (see SSA Exhibit 8: H.R. 2764, Colorado River Quantification Settlement Facilitation Act) and provides a mechanism to apply that funding to restoration of the Sea, if restoration is authorized. Whether the Proposed Project's and/or legislative financial contributions to restoration are $60 million or $160 million, if the Proposed Project's impact on the Sea is well over $2 billion, who will fund the difference? Let's assume that federal and state government comes to the rescue under this scenario.

The next question is can restoration even be viable under a significantly reduced inflow scenario? The answer is unlikely. In large part, the answer is no because of the large parts. To marshal the necessary massive authorizations and appropriations from government will take time. To design and permit an enormous project, as Mr. Brownlie (SSA Exhibit 3, Written Testimony of William Brownlie) and the Draft Assessment of Salinity and Elevation Control for Varied Inflow report (SSA Exhibit 11) describe, to address a Sea that is becoming much smaller and saltier requires ever-larger restoration responses, will take time. And to build a large, complicated project and

probably to do so in the deepest, most expensive and most seismically risky areas of the Sea will take time.

Even if all of the political and financial support were available within a few years, it is unlikely that restoration could occur in time to preserve a fishery at the Sea and the values that the fishery supports.

Unfortunately, the Transfer DEIR (IID Exhibit 55, page 1-42) and FEIR indicate that the proposed project is "not inconsistent" with subsequent implementation of a restoration project. The mantra that the 1998 Salton Sea Reclamation Act somehow obviates this obvious relationship between restoration and inflows is unsubstantiated.9

VII.

CONCLUSIONS/RECOMMENDATIONS

The Salton Sea Authority respectfully requests:

A. That the Board find that the Salton Sea is of preeminent ecological importance. The evidence of the Sea's importance is uncontroverted. Further, the Board should find that the Sea is a public trust resource. (See Audubon's Closing Brief.)

B. That the Board find that restoration of the Sea is fundamental to preserving the Sea's fish and wildlife values; and that water transfers which significantly reduce the Sea's inflows substantially jeopardize restoration, thus unreasonably affect fish and wildlife resources. The

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9 It has been suggested that the 1998 Salton Sea Reclamation Act was designed, in part, to fix the Sea under reduced inflow conditions (HT, p. 888 Lns. 14-17). The Act actually says that 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." (see SSA Exhibit 9, Salton Sea Reclamation Act of 1998)*

The Secretary was to develop a report, with the Salton Sea Authority, that evaluated restoration options under reduced inflow conditions. Such a report is still forthcoming. In a recent letter to the Secretary of Interior, even the Sea's greatest legislative supporters acknowledge that the report should evaluate multiple inflow conditions (see SSA Exhibit 10, Letter to Secretary Norton from Congressional Salton Sea Task Force).

While the Act did direct the Secretary to evaluate options that include inflow reduction assumptions, evaluating those options, unfortunately, does not imply taking responsibility for those conditions (HT May 13, p. 1291 line 21 to p. 1293, line 9). Legislative direction related to a feasibility study does not change the laws of physics. By transferring water that would have flowed to the Sea on a 1:1 ratio, the proposed project is the most inconsistent with restoration of all of the alternatives presented.

The EIR should acknowledge that alternatives that reduce inflows negatively impact the ability to restore the Sea in proportion to the reduction. The true implications, impacts and costs of such alternatives must be shown to the decision-makers.

petitioners should be required to provide full analysis of the impact of reduced inflows on restoration efforts.

C. Given the continued ambiguity of the petitioners' project description, that the Board find that the County of Imperial's recommendation to deny the joint petition based on lack of ripeness is sound. The proposed project should be defined and its environmental impacts should be fully considered. A revised Draft EIR/EIS should be prepared and circulated.

D. That the Board reconsider Decision 1600's conclusion that flows to the Salton Sea are a nonbeneficial use of water. Despite contrary projections in that order, the Sea continues to support a robust fishery and tremendous avian biodiversity. The Board retains the right to alter previously issued permits in light of evolving public interest, which includes environmental considerations. The long-term positive environmental implications of IID's agricultural runoff should be acknowledged. Any extension of the 1998 MWD-IID agreement should be subject to Board consideration and environmental review. The Board should be wary of hydrological projections which, without substantial foundation, accelerate the demise of the Sea.

E. If the Board proceeds with a decision, that the Board deny the petitioners the option of proceeding with on-farm conservation and system improvements paired with DEIR Habitat Conservation Plan 1 (HCP1), the fish ponds. The evidence of unreasonable fish and wildlife impacts of HCP1 is overwhelming. While HCP1 has been eliminated from consideration in the FEIR, it is still the subject of potential rekindling by transfer proponents. A Board finding that HCP1 is an unreasonable strategy will prevent further waste of efforts in that fruitless controversy.

F. That the Board grant its decision precedential effect, at least with respect to the findings regarding the value of the Salton Sea's ecosystem and necessity of protecting it from transfer-related harm. Given the extraordinary amount of time and effort expended in these proceeding on those issues, future proceedings should be able to benefit from any decision that this Board makes in that regard. (See Imperial County's closing brief.)

G. That the Board find that State and Federal law allows the use of water by IID for purposes of fish, wildlife, and other instream beneficial uses. (See Defenders of Wildlife's closing brief and Imperial County's closing brief.)

H. That the Board adopt Imperial County's suggestion that all parties enter structured

discussions to produce a California consensus. One of the petitioners admitted that the transfer agreement between IID and San Diego was a two party arrangement and environmental interests were not at the table (HT, p. 2603-2604). This "win-win" arrangement produced a loss for the environment. Certainly one benefit of these proceedings has been to bring parties together, albeit in an adversarial setting. A mediated process involving all major stakeholders could produce a consensus solution to Southern California's water supply needs while protecting the environment and economy of southeastern California.

In its subsequent brief, the Salton Sea Authority will discuss recommendations considering changes between the DEIR and FEIR, specifically the HCP and changes in the air quality resource section. However, given the degree of ambiguity about the source of replacement water for the HCP, the nature of the project, the reliance of the HCP on an unsubstantiated baseline, the Board could expect significant concerns to be raised in the supplemental brief.

In evaluating the threat to the Sea posed by the proposed transfer, the wildlife community and the pubic at large have rediscovered the Sea as ecological, recreational and aesthetic gem in the heart of the California desert, home to a rich and diverse wildlife community, a critical stopover in the Pacific flyaway, and perhaps the world's richest fishery. The public trust, and common sense, dictate that all reasonable efforts to protect and to restore the Sea be exhausted before projects are approved that condemn the Sea to a rapid and untimely death.

The Salton Sea Authority respectfully requests that the Water Board become a partner in that effort.

Dated: July 11, 2002 SALTON SEA AUTHORITY

By_____
TOM KIRK, Executive Director

Dated: July 11, 2002 BEST BEST & KRIEGER LLP

By_____
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